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Chapter 129.

Writs of Error, Certiorari, Mandamus and Quo Warranto.

Writs of Error.

Cross Reference.—See c. 165, § 6, re writs of error against administrator de bonis non.

Sec. 1. Writs of error.—Writs of error in civil cases may issue out of the supreme judicial court or the superior court in vacation or term time, returnable to the same court. (R. S. c. 116, § 1.)

Statute not applicable to divorce case.—The statute as to writs of error makes them applicable in civil cases, and, although there is found in Sullivan v. Sullivan, 92 Me. 84, 42 A. 230, a statement that: "A suit for a divorce is a civil suit", yet this had reference only to the distinction in evidential rules applicable to civil and criminal cases. Clarification is found in Simpson v. Simpson, 119 Me. 14, 109 A. 254, in the declaration that "while proceedings in divorce are civil in their nature as distinguished from criminal, yet they are ecclesiastical in their origin, are regulated entirely by statute, and cannot be classed as civil actions or cases." Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Where the issue is solely whether writ of error is maintainable to seek the annulment of a decree of divorce, the ruling must perforce be that a divorce action is not a civil case in the sense used in the statute regarding writs of error, that it is not according to the course of the common law as modified by any practice or usage in this state, and is not recognized by any rules of court. Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Applied in Morrill v. Buker, 92 Me. 389, 42 A. 796; Nissenbaum v. State, 135 Me. 393, 197 A. 915.

Sec. 2. Execution not stayed, unless bond given and approved.—No writ of error shall stay or supersede execution in any civil action unless the plaintiff in error, or some person in his behalf, gives bond to the defendant, conditioned that the plaintiff shall prosecute his suit with effect and satisfy the judgment rendered therein in such sum and with such sureties as a justice of the court, or the clerk from whose office the writ issued, approves according to the rules of court. (R. S. c. 116, § 2.)

The defendants are bound by the condition of their bond to satisfy the judgment rendered in error. Pierce v. Goodrich, 47 Me. 173.

The bond is to pay the judgment rendered in error, and the defendant not having done this, his bond is forfeited. Pierce v. Goodrich, 47 Me. 173.

Sec. 3. Filing of bond deemed delivery; effect.—When the bond provided for in section 2 is given, the filing of it in the clerk's office for the defendant's use is a delivery thereof. No execution shall be issued on the judgment complained of while such suit is pending; and if execution has already issued, the clerk shall make a certificate of the issue of the writ and filing of the bond; and after notice thereof to the officer holding the execution, further proceedings thereon shall be stayed. (R. S. c. 116, § 3.)

Sec. 4. Costs to prevailing party; damages and costs, if defendant prevails.—The prevailing party in such writ in a civil action shall be entitled to costs; and if the judgment is affirmed, the defendant in error shall be entitled to not less than 6% nor more than 12% a year on the amount of his former judg-

ment, as damages for his delay, and the court may allow him double costs. (R. S. c. 116, § 4.)

An action upon a bond, given upon suing out of a writ of error, will be considered prematurely commenced if there has been no adjudication of the court as to whether the costs upon the writ of error shall be double or single, and whether the former judgment shall or shall not be affirmed, and, if affirmed, what the damages for the delay shall be. Heath v. Hunter, 72 Me. 259.

Sec. 5. Reversal of judgment does not vitiate sale of real estate; levy void.—When a debtor's property has been sold on an execution and the judgment on which it was issued is afterwards reversed on writ of error, the title of the purchaser is not affected thereby; but the defendant in the original suit may maintain an action of assumpsit against the original plaintiff for so much of said judgment as is satisfied. The levy of an execution upon real estate is void when the original judgment upon which it issued is reversed by writ of error, brought within a year thereafter; and a copy of the final judgment duly certified by the clerk of courts in the county where such judgment is rendered shall be recorded within 30 days from the rendition thereof, in the registry of deeds where such levy is recorded. (R. S. c. 116, § 5.)

This section merely affirms what has long been the settled doctrine at common law. Bryant v. Fairfield, 51 Me. 149.

A sale of real or personal property on execution is not vacated by a reversal of the judgment on which it issued. Stinson v. Ross, 51 Me. 556.

Sec. 6. One codefendant may bring writ of error on giving security to others.—When there were several defendants in the original judgment, either may bring a writ of error in the name of all, on furnishing to each codefendant requiring it such security against all liabilities arising therefrom as the court deems reasonable; and at any stage of the proceedings, the court shall, on motion of any such codefendant, require such security. (R. S. c. 116, § 6.)

Sec. 7. Form.—The writ of error may be a scire facias issued substantially as follows, without any assignment of errors or other preliminary proceedings:

"STATE OF MAINE.

[L. S.] ....., ss. To the sheriff of our county of ..... or his deputy, Greeting:

We command you, that you make known unto ...., of ....., to appear, if he sees cause, before our supreme judicial" (or superior) "court, to be held at ....., within and for our said county of ....., on the ..... day of ..... next, to answer to ...., of ....., in a plea of error, whereas the said ...., alleges that in the process, proceedings and judgment had before ....., at ....., on the .... day of ....., A. D., 19...., wherein said .... was plaintiff, and said ...., defendant, there occurred the errors hereinafter specified, by which the present plaintiff was injured, and for which he therefor seeks that said judgment may be reversed, recalled or corrected, as law and justice require; that is to say, the following errors: ....

Hereof fail not, and have you there this writ with your doings thereon.

Witness, ..., Esq., our ....., at ....., the .... day of ....., A. D., 19.....

...., Clerk."

(R. S. c. 116, § 7.)

Quoted in part in Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Cited in Atkinson v. People's Nat. Bank of Waterville, 85 Me. 368, 27 A. 255.

Sec. 8. Scire facias to specify errors of fact and law.—The scire facias shall specify the errors of fact and law upon which the plaintiff relies; and a transcript of the record, process and proceedings, attested by the clerk of the court or trial justice rendering the judgment without further authentication or the

introduction of the record, is competent evidence in such trial; and in case of mistake in the transcript, the court may grant leave to amend. (R. S. c. 116, § 8.)

This section allows the joinder of errors of law and of fact in the same process. That was not allowed at common law. Starbird v. Eaton, 42 Me. 569.

A certified transcript of the record should be exhibited at the trial. Until that is done, it can not be known whether any error exists. Tyler v. Erskine, 78 Me. 91, 2 A. 845.

Which is introduced in evidence.—Under this section, instead of the writ of certiorari to the court to send up its record and proceedings, the parties procure transcripts of the record and proceedings, and introduce them as evidence before the court which is to examine them. Atkinson v. People's Nat. Bank of Waterville, 85 Me. 368, 27 A. 255.

And court can insist upon full transcript of complete record.—The court has unquestionably the same right under this section as at common law to insist upon a full transcript of the complete record and all the proceedings being produced, before hearing argument and rendering judgment. It may refuse to proceed until one party or the other produces such transcript. Atkinson v. People's Nat. Bank of Waterville, 85 Me. 368, 27 A. 255.

And a writ of error cannot be sustained when only fragments of a record are produced. In such case the writ may be dismissed, but the record below should not be affirmed. Morrill v. Buker, 92 Me. 389, 42 A. 796.

When the error is one of law, there is nothing upon which the court can act except the transcript of the record. Starbird v. Eaton, 42 Me. 569.

And such error must appear of record. Nothing will be error in law that does not appear of record, for matters not so appearing are not supposed to have entered into the consideration of the court. Evidence extraneous to the record is not received. Denison v. Portland Co., 60 Me. 519.

Writs of error, for errors in law, lie only for defects apparent upon the face of the record. Lewiston Steam Mill Co. v. Merrill, 78 Me. 107, 2 A. 882.

Under both the common law and a statutory writ of error, if errors in law are assigned, only the record in the former proceedings is admissible to determine such error. Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Hence, party should require clerk to make extended record where necessary.—If there is error in law that would appear from an extended, full record, which either party desires to avail himself of upon a writ of error, he should, before trial, require the clerk to make a full, extended record of the judgment sought to be reversed, and if he refuses so to do, procure an order from the court directing such record to be made, and then present a transcript of such extended, full record, that the court may know from inspection of it whether an error exists. Lewiston Steam Mill Co. v. Merrill, 78 Me. 107, 2 A. 882.

But error of fact may be shown by proof of fact not apparent on record.—The error for which a judgment may be reversed by writ of error may exist either in the foundation, proceedings, judgment or execution of the suit. It may be an error in law or in fact. If it be the former, it must always appear upon the record; if the latter, it may be shown by proof of some fact, not apparent upon the record, but affecting its validity, on the regularity of the proceeding itself. McArthur v. Starrett, 43 Me. 345.

Provided it does not contradict the record.—The plaintiff in error may assign errors of fact, though not disclosed by the record, and offer proof of the same, provided they do not contradict the record. Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Memorandum showing how judgment made up is no part of record.—See McArthur v. Starrett, 43 Me. 345.

Sec. 9. Proceedings.—The proceedings upon writs of error, not herein provided for, shall be according to the common law as modified by the practice and usage in the state and the general rules of court. (R. S. c. 116, § 9.)

The proceeding in this state upon writs of error are the same as at common law. Bryant v. Fairfield, 51 Me. 149.

The course of the common law as to writs of error does not appear to have been changed by any practice or usage in the state, or by any of the general rules of court. Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Sec. 10. Limitation; exceptions.—No writ of error shall be sustained un-

less brought within 6 years after the entering up of the judgment sought to be reversed or avoided; but if the person entitled to such writ is a minor, insane, imprisoned or not in the United States when becoming so entitled, then he, his heirs, executors or administrators may sue out the writ within 5 years after the removal of such disability. (R. S. c. 116, § 10.)

Cross references. — See § 16, re limitation of application for certiorari; c. 113, § 51, re no reversal of judgment.

Applied in Ayer v. Androscoggin & Kennebeck Ry., 131 Me. 381, 163 A. 270.

Writs of Error in Criminal Cases.

Sec. 11. Writ of error in criminal cases.—No writ of error upon a judgment for an offense punishable by imprisonment for life shall issue, unless allowed by a justice of the supreme judicial court or of the superior court after notice to the attorney general or other attorney for the state. (R. S. c. 116, § 11.)

Sec. 12. Effect; custody of plaintiff; release on bail; copies of judgment.—Writs of error shall issue of course upon all other judgments in criminal cases, and applications for the same shall be made to the supreme judicial court or to the superior court in the county where the restraint exists, if in session; if not in session, to a justice of either of said courts. Such court or such justice thereof in vacation may stay or delay execution of sentence or judgment, with an express order to stay all proceedings thereon; and in that case the court, or such justice thereof in vacation, may make such order as the case requires for the custody of the plaintiff in error or for letting him to bail; and when issued by the court, it shall be returnable thereto; but when issued by a justice thereof in vacation, it may be returnable before a justice of said court and be heard and determined by him, or returnable to said court; or upon a writ of habeas corpus, if entitled thereto, he may procure his discharge by giving bail.

The clerk of the court recording a judgment rendered upon a writ of error issued upon a judgment in a criminal case, if such judgment in the criminal case be recorded in a court or county other than that in which the judgment on the writ of error is recorded, shall forthwith transmit a certified copy of the record of the judgment rendered upon such writ of error to the clerk of the court in which and for the county where the judgment in the criminal case is recorded. The clerk receiving such copy of the record of a judgment upon a writ of error shall record the same with the record of the judgment in the criminal case upon which the writ of error issued. If the judgment in the criminal case was rendered by a judge of a municipal court or trial justice as aforesaid, the certified copy of the record of the judgment rendered upon the writ of error issued upon such judgment shall be transmitted to and recorded by the judge or recorder of such municipal court or trial justice in the manner aforesaid. (R. S. c. 116, § 12. 1951, c. 69.)

Cross reference. — See c. 148, § 32, re proceedings in case of error in sentence.

Writs of error issue as a matter of course in criminal cases which do not involve offenses punishable by imprisonment for life. Nissenbaum v. State, 135 Me. 393, 197 A. 915; Smith, Petitioner, 142 Me. 1, 45 A. (2d) 438; Smith v. State, 145 Me. 313, 75 A. (2d) 538; Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

It is the right of a person convicted to challenge his sentence by a writ of error. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

Despite plea of guilty.—One convicted of a crime in the state after a plea of guilty may have the process involved reviewed under a writ of error. Galeo v. State, 107 Me. 474, 78 A. 867; Welch v. State, 120 Me. 294, 113 A. 737; Nissenbaum v. State, 135 Me. 393, 197 A. 915; Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

Even after a plea of guilty the person convicted may have the record reviewed under a writ of error. Berger v. State, 147 Me. 111, 83 A. (2d) 571.

Or of nolo contendere.—A petitioner is not to be denied the remedy of a writ of error because of his virtual admission of

his guilt of the offense charged against him by a plea of nolo contendere. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

And the fact that a petitioner is under parole does not debar him from the remedy of a writ of error. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

One under the restraint of probation, as well as one confined under a sentence, has the right to test the sufficiency of the process under which he is restrained. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

But a fugitive from justice is not entitled to institute or prosecute error proceedings. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

However, this principle is no bar to a petitioner whose absence from the state is not in violation of the terms of his probation. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

One who has been convicted of a crime, not punishable by imprisonment for life, on a plea of nolo contendere and has had the sentence imposed on him therefor suspended, and has been placed in the custody and control of a probation officer, is entitled to a writ of error to have the process involved reviewed, if he leaves the state during the probation term, with the approval of his probation officer, and is not within its borders when his application for the writ is filed. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

And petitioner's presence before court is not necessary.—The presence of a petitioner before the court or justice to whom his application is addressed, pending issuance of the writ, or thereafter, is not requisite. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

Writs of error operate to delay the execution of sentence only in instances where allowed by a justice of the court, "with an express order to stay all proceedings thereon." Nissenbaum v. State, 135 Me. 393, 197 A. 915.

Writ of error is the appropriate process for attack against a sentence imposed without authority in law. Galeo v. State, 107 Me. 474, 78 A. 867; Smith, Petitioner, 142 Me. 1, 45 A. (2d) 438; Smith v. State, 145 Me. 313, 75 A. (2d) 538.

Whether sentence is excessive or imposed when record sets forth no crime.—If error lies to reverse a sentence imposed because it is in excess of that authorized by law, a fortiori it lies when the record does not set forth the commission of any crime by the respondent for which any sentence may be imposed. In either case he is attacking the validity of the sentence. Smith v. State, 145 Me. 313, 75 A. (2d) 538.

The issue raised by a writ of error must be determined on the record of the proceedings brought in question. Welch v. State, 120 Me. 294, 113 A. 737; Smith, Petitioner, 142 Me. 1, 45 A. (2d) 438; Smith v. State, 145 Me. 313, 75 A. (2d) 538.

Writs of error based on errors of law in the process sought to be reviewed are determined on the record of the process challenged, and nothing more. Ex parte Mullen, 146 Me. 191, 79 A. (2d) 173.

The writ is based upon the record facts alone; and facts outside the record are immaterial. Galeo v. State, 107 Me. 474, 78 A. 867; Welch v. State, 120 Me. 294, 113 A. 737; Berger v. State, 147 Me. 111, 83 A. (2d) 571.

Applied in Carson, Petitioner, 141 Me. 132, 39 A. (2d) 756.

Writs of Certiorari.

Sec. 13. Writs of certiorari.—All writs of certiorari, to correct errors in proceedings not according to the course of the common law, shall be issued from the supreme judicial court or the superior court according to the practice heretofore established, subject to such further regulations as are made, from time to time, by such court. (R. S. c. 116, § 13.)

Cross reference. — See c. 91, § 98 and note, re certiorari in zoning cases.

Certiorari is a common-law writ, but is provided for by this section. Chavarie v. Robie, 135 Me. 244, 194 A. 404.

Certiorari is a writ issued by a superior court to an inferior one commanding it to certify up its record of some proceeding, not according to the course of the common law, that it may be seen and determined whether there is any error therein for which the record should be quashed. Nobleboro v. Lincoln County Com'rs, 68 Me. 548.

Certiorari is a writ issued by a superior to an inferior court of record, or to some other tribunal or officer exercising a judicial function, requiring the certification and return of the record and proceedings, that the record may be revised and corrected in matters of law. Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A. (2d) 670.

And notice must be served upon the

tribunal to which the writ if granted will be addressed. Such tribunal is the only real party respondent; although other parties may appear to maintain or object to the proceedings and be subject to costs. Levant v. Penobscot County Com'rs, 67 Me. 429.

To petitions for the writ of certiorari, a copy of the record sought to be quashed should be annexed, and notice thereon ordered to the tribunal whose record is sought to be quashed, and in the discretion of the court, to such persons as may be interested in the result, who may appear and answer and be subject to costs. Hewett v. County Com'rs, 85 Me. 308, 27 A. 179.

Certiorari and error distinguished. — In some respects there is a difference between a writ of error and a writ of certiorari, and in some respects there is a strong resemblance. The former lies where the proceedings are according to the course of the common law; in other cases, a certiorari is the proper writ. A writ of error is a writ of right; a writ of certiorari is not; it is a matter of sound discretion to grant or refuse it. There are several other points of difference. They are alike in this, that no one but a party to the record, or one who has a direct and immediate interest in it, or is privy thereto, can maintain either of these writs. Bath Bridge & Turnpike Co. v. Magoun, 8 Me. 292.

Certiorari lies to correct proceedings not according to common law.—If the proceedings of the lower court were not according to the course of the common law, a writ of certiorari is the regular process from the appellate court, under which the errors are to be examined and corrected. Dow v. True, 19 Me. 46.

And it lies only to correct errors in law. Where the record contains no error, the writ cannot be issued. Lapan v. Cumberland County Com'rs, 65 Me. 160.

Certiorari differs from a writ of error in that it lies when the proceedings are not according to common law. It does not lie to enable the superior court to revise a decision upon matters of fact. Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A. (2d) 670.

Allegation must show that the record, a review of which is asked, is necessarily inaccurate. This is because, if the writ is granted, the court must determine, upon the record, whether or not the proceedings of the subordinate tribunal or officer, exercising judicial powers or functions, are legal and regular. Chavarie v. Robie, 135 Me. 244, 194 A. 404.

The error must appear in the record of the inferior court. Nobleboro v. Lincoln County Com'rs, 68 Me. 548.

Court hears whole case upon petition.— This section leaves the practice as heretofore established, and subject to such further regulations as may from time to time be made by the court. It has been the invariable practice to hear the whole case upon the petition. Levant v. Penobscot County Com'rs, 67 Me. 429.

And evidence extrinsic to record is admissible. — After the writ has issued, and the record is before the court on certiorari, evidence extrinsic to the record is inadmissible (see note to § 14). Its errors cannot be corrected nor its omissions supplied. The action of the court is upon the record as certified. But it is otherwise, when the question to be determined is whether, in accordance with the prayer of the petition, the writ shall issue or not, because, in this stage of the inquiry, the question is whether the party complaining has suffered any wrong or injustice from such a defect. Dresden v. Lincoln County Com'rs, 62 Me. 365.

All the authorities concur in excluding all evidence extrinsic to the record when it is before the court on a writ of certiorari. But it is otherwise in the hearing on the petition for the writ. As the petition for a writ to quash the record, in cases within the jurisdiction of the inferior tribunal, is addressed to the discretion of the court, in the hearing on the petition the court is not limited by the record with its infirmities in matters of form; but will enlighten its discretion by inquiring into so much of the proceedings under revision as will enable it to deal with the substantial justice of the case. Levant v. Penobscot County Com'rs, 67 Me. 429.

A writ of certiorari can be issued only for the relief of some injured party. Strong v. County Com'rs, 31 Me. 578.

Only parties who have an interest in the proceedings, other than the interest which the public has, are entitled to the writ of certiorari. Barter v. Rockland, 114 Me. 466, 96 A. 773.

A certiorari is not a writ of right and it lies where the proceedings sought to be revised are not according to the course of the common law. Levant v. Penobscot County Com'rs, 67 Me. 429.

But such a writ is grantable only at the discretion of the court. Cushing v. Gay, 23 Me. 9; Dyer v. Lowell, 33 Me. 260; Ox-

ford v. Oxford County Com'rs, 43 Me. 257.

The granting or the refusal to grant the writ of certiorari is a matter of judicial discretion. Hopkins v. Fogler, 60 Me. 266; Dresden v. Lincoln County Com'rs, 62 Me. 365; Andrews v. King, 77 Me. 224.

Generally a writ of certiorari is grantable only at the sound discretion of the court, when it appears that otherwise some injustice would be done. Levant v. Penobscot County Com'rs, 67 Me. 429.

Writ refused if error affects only matter of form.—Applications for a writ of certiorari being addressed to its discretion, the court has uniformly examined the records and proceedings, in which the errors are alleged, before granting the process. If the alleged errors are found to be such as affect the forms of the proceedings only, and not the substantial merits of the case, the writ will be refused. Lewiston v. Lincoln County Com'rs, 30 Me. 19.

If the error is merely in matter of form, and the exception purely technical, it would be no violation of the essential rights, if the court should refuse to grant certiorari. Cushing v. Gay, 23 Me. 9; North Berwick v. York County Com'rs, 25 Me. 69.

And a writ of certiorari is not grantable, except where it is shown that some injustice would be done. Rand v. Tobie, 32 Me. 450.

Petitions for writs of certiorari being addressed to the discretion of the court, it has been the uniform practice to refuse to grant such writs when sufficient appears to show that the tribunal has jurisdiction of the subject matter upon which it acted, and that substantial justice was done, though its records may not show that their proceedings were, in all respects, technically correct. In re Inhabitants of West Bath, 36 Me. 74.

A petition for a certiorari is always an application to the discretion of the court. And the court will not entertain such a petition for the correction of merely harmless errors which can in no event seriously prejudice the petitioner. Furbush v. Cunningham, 56 Me. 184.

The writ should never issue when proceedings are sought to be quashed for merely trivial or formal error, or when it is apparent no injustice will be done by not permitting it to issue. Hopkins v. Fogler, 60 Me. 266.

If the tribunal whose record is sought to be quashed had jurisdiction and the error assigned was mere matter of form and substantial justice was done, a denial of the writ is no violation of the party's essential rights. Levant v. Penobscot County Com'rs, 67 Me. 429.

Thus petitioner must allege and prove justice demands its issuance. — The petitioner in certiorari must allege and establish to the satisfaction of the court to which the application is made, that substantial justice demands that the writ should issue. Chavarie v. Robie, 135 Me. 244, 194 A. 404.

It is not necessary to insert in the writ an assignment of the errors. An assignment in the petition is sufficient. Dyer v. Lowell, 33 Me. 260.

Upon hearing of a petition for writ of certiorari, the question for the court to decide is whether it will issue the writ. If the writ is ordered to issue, the court at nisi prius has the jurisdiction to decide what should be done. Rogers v. Brown, 134 Me. 88, 181 A. 667; Brooks v. Clifford, 144 Me. 370, 69 A. (2d) 825; Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A. (2d) 670.

And the mere granting of a writ of certiorari is not tantamount to issuing the writ, and quashing the proceedings thereon. State v. Madison, 63 Me. 546; Rogers v. Brown, 134 Me. 88, 181 A. 667; Brooks v. Clifford, 144 Me. 370, 69 A. (2d) 825.

The granting of a writ of certiorari to quash the proceedings of county commissioners in locating a highway, does not, ipso facto, quash such proceedings, but their doings, where they have jurisdiction, remain valid until and unless the writ is issued. State v. Madison, 63 Me. 546.

Applied in Bethel v. Oxford County Com'rs, 60 Me. 535; Hebron v. Oxford County Com'rs, 63 Me. 314; Hodgon v. Lincoln County Com'rs, 68 Me. 226.

Sec. 14. Proceedings.—When the proceedings of any tribunal are brought up by a writ of certiorari, the court may quash or affirm such proceedings, or enter such judgment as the court below should have rendered, or may make such order, judgment or decree in the premises as law and justice may require. (R. S. c. 116, § 14.)

A record may be affirmed in whole or in part in certiorari proceedings. Hewett v. County Com'rs, 85 Me. 308, 27 A. 179.

If the writ is issued.—On denial of a petition for certiorari, it is improper to affirm the record sought to be quashed;

issuance of a writ being essential to any judgment affirming, modifying, or quashing the record. Ford v. Erskine, 109 Me. 164, 83 A. 455.

The writ of certiorari can present only the record and nothing dehors the record can be shown in order to obtain it. Ross v. Ellsworth, 49 Me. 417.

A writ of certiorari can present only a record of the proceedings. No testimony can be received from the petitioner to affect that record, or to prove other facts not appearing in it. Pike v. Herriman, 39 Me. 52; Emery v. Brann, 67 Me. 39.

On certiorari, the object of which is only to bring up the record, such errors or defects alone as appear on the face of the record can be considered. Chavarie v. Robie, 135 Me. 244, 194 A. 404.

When the case is before the court on a writ of certiorari, all evidence extrinsic to the record is excluded. State v. Madison, 63 Me. 546; Levant v. County Com'rs, 67 Me. 429; Toulouse v. Board of Zoning Adjustment, 147 Me. 387, 87 A. (2d) 670.

Erroneous record must be quashed.—When once the record has been permitted to be brought under examination, the court no longer has any discretionary power over it. If erroneous is must be quashed. Dyer v. Lowell, 33 Me. 260.

Sec. 15. Costs.—Upon every application for certiorari and on the final adjudication thereof, the court may award costs against any party who appears and undertakes to maintain or object to the proceedings. (R. S. c. 116, § 15.)

If the petition is refused, costs may be awarded to the respondent. But if allowed, costs may be awarded to the petitioner recoverable when the proceedings are closed. There should be but one judgment for a party for costs, as is ordinarily the practice in equity. Stetson v. Penobscot County Com'rs, 72 Me. 17.

But by this section a limit is imposed upon the discretion of the court. Costs cannot be awarded against a party who appears and does not defend against the proceeding. This is because a person who has acted in a judicial capacity ought not to be subjected to costs, in cases where his errors are corrected without any opposition on his part. He stands in the position of a respondent in equity, who puts in a disclaimer. Stetson v. Penobscot County Com'rs, 72 Me. 17.

Applied in Ford v. Erskine, 109 Me. 164, 83 A. 455.

Cited in Levant v. Penobscot County Com'rs, 67 Me. 429.

Sec. 16. Limitation of applications.—No application for a writ of certiorari shall be sustained unless made within 6 years next after the proceedings complained of, or within 5 years from the removal of such disabilities as are described in section 10. (R. S. c. 116, § 16.)

Writs of Mandamus.

Sec. 17. Presentation of petition; questions of law reserved; issue and return.—A petition for a writ of mandamus may be presented to a justice of the supreme judicial court or of the superior court in any county in term time or vacation, who may, upon notice to all parties, hear and determine the same, or may reserve questions of law arising thereon, upon exceptions or otherwise, for the determination of the law court, which may hear and determine the same as hereinafter provided; but in all cases where exceptions are alleged to any rulings, findings or decrees made upon such petition, the case shall be proceeded with as if no exceptions had been taken, until a decision shall be had and the peremptory writ shall have been ordered, so that the overruling of such exceptions would finally dispose of the case, which shall then be certified to the chief justice of the supreme judicial court as provided in the following section. If on such hearing such writ is ordered, it may be issued from the clerk's office in any county and be made returnable as the court directs. (R. S. c. 116, § 17.)

Mandamus is extraordinary writ.—The writ of mandamus is of ancient origin. It came into being as an extraordinary writ, to cover situations wherein justice could not be had by resort to the ordinary common-law actions. Steves v. Robie, 139 Me. 359, 31 A. (2d) 797.

The writ of mandamus is not an ordinary writ to be sued out as a matter of course. It is an extraordinary writ to be

issued only when it is made to appear clearly to the court that the writ is necessary to secure some substantial right, and also that it will be effective to secure that right. Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

Issuable in absence of other remedy.— In general, to induce the court to interfere there must be not only a specific legal right, but also the absence of any other specific legal remedy, in order to found an application for a mandamus. Steves v. Robie, 139 Me. 359, 31 A. (2d) 797.

Mandamus cannot be granted to give an easier or more expeditious remedy but only where there is no other remedy, being both legal and specific. Steves v. Robie, 139 Me. 359, 31 A. (2d) 797.

In this state the procedure for a writ of mandamus is regulated by statute. It is quite evident from the provisions of the statute that the purpose was to make the remedy by writ of mandamus readily and quickly available, with prompt, and even summary procedure. This was made necessary by the short tenure of those officials against whom the writ is most often invoked. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

Jurisdiction given justice individually.— By express statute the justice, not the court, is given jurisdiction although the petition may be presented to him at any time. The fact that he is holding a term of court at the time does not oust him of jurisdiction or limit his power as an individual justice. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

In any county in which he may be. — Each individual justice of the court is invested with the full judicial power to receive petitions and grant or deny the writ. He may receive and act upon the petition in any county in which he may then personally be and whether he is holding a term of court there or not. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

And he does not act as presiding justice of a court.—The justice is to act personally as an individual justice and not as the presiding justice of a court in term time. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

It is personally to an individual member of the court, distinguishable from him presiding as justice in term time, that a petition for mandamus should be addressed. Libby v. York Shore Water Co., 125 Me. 144, 131 A. 862.

Nor is he limited to terms or places. The time and place of hearing upon the petition are not fixed by the statute nor limited to any county or term of court. These are to be fixed by the justice receiving the petition, and for hearing in any county. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

The proceeding is not a matter of regular court record until the justice's final decision. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

Justice's signature is sufficient authentication.—The alternative writ in mandamus proceedings is neither an original writ nor a final writ of execution. It is practically a rule to show cause issued by a justice in vacation. It proceeds by way of interlocution from the justice who has received the petition and who alone has jurisdiction of the proceeding. There is no statute requiring that it bear the seal of the court, or be signed by the clerk. The signature of the justice himself is sufficient authentication. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

Length of notice within discretion of justice.—As to the length of the notice to the parties, that is entirely within the discretion of the justice, the exercise of which cannot be reviewed on exceptions, unless it has been plainly abused. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

The justice may reserve questions of law for the full court. Libby v. York Shore Water Co., 125 Me. 144, 131 A. 862.

Whether he rules for or against the petitioner. — This section places no restrictions upon the power of the single justice to reserve questions of law upon exceptions, whether he rules for or against the petitioner. Lawrence v. Richards, 111 Me. 95, 88 A. 92.

Case sent to law court in such shape that its decision will be final. — Questions of law may be reserved on exceptions or otherwise for consideration by the law court, but no appeal upon questions of fact is provided for, nor is there any provision for sending the case back to the justice for rehearing. It must be sent to the law court, if at all, in such shape that the decision of the law court will be the final disposition of the case. Hamlin v. Higgins, 102 Me. 510, 67 A. 625; Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

Writ issued and returned to such office as court directs. — There is no provision for the issuance of any precept out of the clerk's office in any county except the final or peremptory writ, and even that writ may be issued out of and returned to

such clerk's office as the court directs. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

Applied in Keefe v. Donnell, 92 Me. 151, 42 A. 345; Webster v. Ballou, 108 Me. 522, 81 A. 1009; Shea v. Sweetser, 119 Me. 400, 111 A. 579; Rogers v. Brown, 135 Me. 117, 190 A. 632; Chapman v. Snow, 135 Me. 134, 190 A. 636; Burkett v. Youngs, 135 Me. 459, 199 A. 619; Burkett v. Robie, 137 Me. 42, 15 A. (2d) 71; Ellsworth v. Portland, 142 Me. 200, 49 A. (2d) 169.

Quoted in part in Mitchell v. Emmons, 104 Me. 76, 71 A. 321.

Sec. 18. Return to writ; answer; judgment and peremptory writ; costs; no action for false return.—When a writ of mandamus issues, the person required to make return thereto shall make his return to the first writ, and the person suing the writ may by an answer traverse any material facts contained in such return or may demur. If the party suing the writ maintains the issue on his part, his damages shall be assessed and a judgment rendered that he recover the same with costs, and that a peremptory writ of mandamus be granted; otherwise the party making the return shall recover costs. No action shall be maintained for a false return to a writ of mandamus. After judgment and decree that the peremptory writ be granted, the justice of the court before which the proceedings are pending shall forthwith certify to the chief justice for decision all exceptions which may be filed and allowed to any rulings, findings or decrees made at any stage of the proceedings. The excepting party shall, within 15 days thereafter, forward to the chief justice his written argument upon such exceptions and shall, within said 15 days, furnish the adverse party or his attorney with a copy of such argument; the adverse party shall, within 15 days after receipt of such copy, forward to the chief justice his written argument in reply; and thereupon the justices of said court shall consider said cause immediately and decide thereon and transmit their decision to the clerk of the court where the petition is pending, and final judgment shall be entered accordingly. If the judgment is in favor of the petitioner, the peremptory writ of mandamus shall thereupon be issued. (R. S. c. 116, § 18.)

If the alternative writ of mandamus is granted on the petition, the respondent is to make his return upon that writ. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

And the petitioner may demur to or traverse the return. If he maintains on his part the issue thus formed he obtains an order for the peremptory writ of mandamus, otherwise he fails and pays costs. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

The person suing the writ, the petitioner as custom is to call him, may by his answer wholly or partially traverse the return and on the issue so formed introduce for trial and determining the further and deeper question of whether the peremptory writ is issuable. Or, in the stead of challenging some particular matter of fact alleged by the opposite party, the petitioner may demur to the return, and in this way advance an issue which, as if it were raised by traverse, he must maintain; or failing this, see his cause fall. Libby v. York Shore Water Co., 125 Me. 144, 131 A. 862.

And issue raised must be determined before proceeding further.—If the petitioner, in accordance with the procedure set forth in this section, traverses the respondent's allegation and, in turn, the respondent joins issue, this issue must be decided before the court passes to the consideration of other questions raised, inasmuch as the court, in this proceeding, has authority to pass upon such other questions only if mandamus is a proper remedy for the plaintiff to invoke. Steves v. Robie, 139 Me. 359, 31 A. (2d) 797.

Justice to fix time and place of return and hearing thereon.—The statute does not fix the time or place when and where the respondent shall make his return to the alternative writ, nor when or where shall be the hearing on the sufficiency or truth of the return if challenged. These are to be fixed by the justice and in any county. Hamlin v. Higgins, 102 Me. 510, 67 A. 625.

The return, if it does not show a compliance with the mandate or command of the alternative writ, must either deny the facts which the writ sets out, or state other facts sufficient in law to defeat the petitioner's claim. Libby v. York Shore Water Co., 125 Me. 144, 131 A. 862.

Either party may except.—This section gives no hint that either party may not be an "excepting party." Either party may except, in which case the other party

will be the "adverse party." Lawrence v. Richards, 111 Me. 95, 88 A. 92.

And exceptions lie, in matters of law, to the denial of a writ of peremptory mandamus. Lawrence v. Richards, 111 Me. 95, 88 A. 92.

It is true that the language is that the case shall proceed as if no exceptions had been taken until the peremptory writ is ordered, and that there is no literal provision for certifying exceptions to the chief justice until after the peremptory writ is granted. But in no other part of either this section or § 17 is there any restriction upon the right of exceptions, or any discrimination between the parties. And it was not the legislative intent that a petitioner should be bound by the decision of the single justice, in case it was against him, but that the respondents might take exceptions to the decision, in case it was against them. Lawrence v. Richards, 111 Me. 95, 88 A. 92.

Although the statute does not in express terms provide for the allowance and certification of exceptions if the peremptory writ is denied, it was the manifest intent of the legislature that the petitioner be entitled to prosecute exceptions in matters of law if the peremptory writ is refused. Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

The exceptions may be certified directly to the chief justice under the provisions of this section, although the peremptory writ was not issued. Lawrence v. Richards, 111 Me. 95, 88 A. 92; Nichols v. Dunton, 113 Me. 282, 93 A. 746; Burkett v. Robie, 137 Me. 42, 15 A. (2d) 71.

But the excepting party must show either an erroneous ruling in law or a clear abuse of judicial discretion. Day v. Booth, 122 Me. 91, 118 A. 899.

On exceptions, the excepter must show, not merely a granting or withholding of the writ, but an erroneous ruling in law, or patent misuse of discretionary control, else the decision below stands. Day v. Booth, 122 Me. 91, 118 A. 899; Libby v. York Shore Water Co., 125 Me. 144, 131 A. 862.

The writ of mandamus being a discretionary writ and not a writ of right, exceptions do not properly lie to either the granting or withholding of that writ unless the ruling is based upon a question of law or upon a clear abuse of discretion on the part of the sitting justice in passing upon facts. Day v. Booth, 122 Me. 91, 118 A. 899.

And if writ denied exceptions must show facts requiring its issuance as a matter of law.—As a peremptory writ of mandamus is issued only in the exercise of sound legal discretion by the court, the record accompanying the exceptions to the denial of the peremptory writ must disclose a state of facts which requires the issue of the peremptory writ as a matter of law. Unless such state of facts be disclosed by the record, any erroneous ruling by the single justice in denying the peremptory writ cannot be legally prejudicial to the petitioner and the exceptions must be overruled. Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

Applied in Webster v. Ballou, 108 Me. 522, 81 A. 1009; Nichols v. Dunton, 113 Me. 282, 93 A. 746; Old Tavern Farm v. Fickett, 125 Me. 123, 131 A. 305; Chapman v. Snow, 135 Me. 134, 190 A. 636; Farris v. Libby, 141 Me. 362, 44 A. (2d) 216; Ellsworth v. Portland, 142 Me. 200, 49 A. (2d) 169; Morris v. Goss, 147 Me. 89, 83 A. (2d) 556.

Sec. 19. Third person cited to show cause.—The court may make rules on a petition for the writ or upon and after the issuing of the first writ, calling upon any person having or claiming a right or interest in the subject matter, other than the party to whom the writ is prayed to be or has been directed, to show cause against the issuing thereof. If such person appears, he shall be heard in such manner as the court may direct, and in proper cases he may be allowed to frame and sign the return to the first writ, and to stand as the real party in the proceedings. (R. S. c. 116, § 19.)

Cited in Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

Sec. 20. Proceedings do not abate by death, resignation or removal.—If such third person is admitted, the proceedings shall not abate or be discontinued by the death, resignation or removal from office by lapse of time or

otherwise of the person to whom the writ was directed, and any peremptory writ shall be directed to his successor. (R. S. c. 116, § 20.)

Cited in Dorcourt Co. v. Great Northern Paper Co., 146 Me. 344, 81 A. (2d) 662.

Quo Warranto.

Sec. 21. Quo warranto. — Petitions, informations and other processes in quo warranto proceedings may be made returnable before the supreme judicial court or the superior court, in term time or in vacation, as and when the court or any justice thereof may order, and by like order the cause may be heard in vacation if the justice hearing the same shall determine that justice so requires. (R. S. c. 116, § 21.)

Proceedings may be begun by petition. —In this jurisdiction, although proceedings in quo warranto have usually been begun by filing an information, the ancient practice of making application for a writ of quo warranto by petition is recognized and, by implication, authorized by this section. This statutory provision has made no change in quo warranto as known to the common law. Ex parte Davis, 41 Me. 38; Leach v. Ulmer, 137 Me. 120, 15 A. (2d) 858.

Sec. 22. When attorney general need not be party. — When in quo warranto proceedings the title to office in a private corporation is involved, the petition or information may be brought in the name of the interested party and the attorney general need not be a party thereto. (R. S. c. 116, § 22.)

Section modifies common law. — At common law, private individuals without the intervention of the attorney general could not, either as of right or by leave of court, institute quo warranto proceedings. This rule has been modified in this state only to the extent that when in quo warranto proceedings the title to office in a private corporation is involved the attorney general need not be a party thereto. Leach v. Ulmer, 137 Me. 120, 15 A. (2d) 858.