# Chapter 34

## 1977 REPLACEMENT PART

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## WRIT OF REVIEW

**34.010 Former writ of certiorari as writ of review.** The writ heretofore known as the writ of certiorari is known in these statutes as the writ of review.

**34.020 Who may procure review; intermediate orders reviewable.** Any party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise. Upon a review, the court may review any intermediate order involving the merits and necessarily affecting the decision or determination sought to be reviewed.

**34.030 Jurisdiction to grant writ; petition for writ; time limit.** The writ shall be allowed by the circuit court or judge thereof, or, in counties where the county court has judicial functions, by the county court or judge of the county wherein the decision or determination sought to be reviewed was made, upon the petition of the plaintiff, describing the decision or determination with convenient certainty, and setting forth the errors alleged to have been committed therein. The petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney to the effect that he has examined the process or proceeding, and the decision or determination therein, and that it is erroneous as alleged in the petition. A writ shall not be allowed unless the petition therefor is made within 60 days from the date of the decision or determination sought to be reviewed.

**34.040 When allowed.** The writ shall be allowed in all cases where the inferior court, officer, or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or quasi-judicial functions appears to have:

(1) Exceeded its or his jurisdiction;

(2) Failed to follow the procedure applicable to the matter before it or him;

(3) Made a finding or order not supported by reliable, probative and substantial evidence; or

(4) Improperly construed the applicable law;

to the injury of some substantial right of the plaintiff, and not otherwise. The fact that the right of appeal exists is no bar to the issuance of the writ.

[Amended by 1965 c 292 §1, 1973 c 561 §1]

**34.050 Plaintiff's undertaking.** Except as provided in ORS 34.055, before allowing the writ, the court or judge shall require the plaintiff to give an undertaking to its approval, with one or more sureties, in the sum of $100, to the effect that he will pay all costs and disbursements that may be adjudged to the defendant on the review. The court or judge may allow the undertaking to be given in a sum not less than $50, when it is probable that such sum will be sufficient.

[Amended by 1977 c.515 §3]

**34.055 Land development project procedure; undertaking; damages and attorney fees.** (1) As used in this section:

(a) "Developer" means a person or persons proposing a land development project.

(b) "Land development project" or "project" means any proposed use of land for which approval or authority is required pursuant to ORS 215.010 to 215.190, 215.402 to 215.422, 227.010 to 227.310, or any ordinance or rule adopted pursuant thereto.

(2) Where a petition for a writ of review alleges that an inferior court, officer or tribunal has erred, based upon one or more of the grounds described in subsections (1) to (4) of ORS 34.040, in approving or authorizing a land development project, then before allowing the writ containing a stay of proceedings authorized by ORS 34.070, the court shall require the petitioner to give an undertaking with good and sufficient surety, to be approved by the court, in an amount not to exceed $1,000, to the effect that the petitioner will pay reasonable attorney fees and actual damages of the developer in an amount not to exceed the amount of the undertaking if the court affirms the decision approving or authorizing the project.

(3) The petitioner may request a hearing on the amount of the undertaking required by the court under subsection (2) of this section. At such hearing the developer shall offer proof as to the amount of his investment in the project and the amount of attorney fees and actual damages which may be caused by delaying the land development project.

(4) Based upon the length of time which it may take for the court to render a judgment on the matter being reviewed, the amount of the developer's investment in the project and

the amount of attorney fees and actual damages which may be caused by delaying the project, the court shall set the amount of the undertaking which the petitioner will be required to give.

(5) An undertaking required pursuant to this section shall be in lieu of any undertaking required under ORS 34.050.

(6) If upon a review, described in this section for which the court has granted a stay of proceedings under subsection (2) of ORS 34.070, the court affirms the decision approving or authorizing the project, the court may award reasonable attorney fees and actual damages to the developer in an amount not to exceed the amount of the undertaking required under subsection (2) of this section.
[1977 c 515 §2]

**34.060 The writ; to whom directed; return.** The writ shall be directed to the court, officer, or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having the custody of its records or proceedings, requiring it or him to return the writ to the circuit court, with a certified copy of the record or proceedings in question annexed thereto, so that the same may be reviewed by the circuit court. The court allowing the writ shall fix the date on which it is to be returned, and such date shall be specified in the writ.
[Amended by 1959 c 638 §9]

**34.070 Stay of proceedings.** (1) Except as otherwise provided in subsection (2) of this section, in the discretion of the court or judge issuing the writ, the writ may contain a requirement that the defendant desist from further proceedings in the matter to be reviewed, whereupon the proceedings shall be stayed accordingly.

(2) A court or judge issuing a writ involving a land development project as defined in ORS 34.055 may not require the defendant to desist from further proceedings regarding the project unless the undertaking required by ORS 34.055 has been given to the court or judge.
[Amended by 1977 c.515 §4]

**34.080 Issuance and service of writ.** Upon the filing of the order allowing the writ, and the petition and undertaking of the plaintiff, the clerk shall issue the writ, as ordered. The writ shall be served by delivering the original, according to the direction thereof, and may be served by any person authorized to serve a summons. A certified copy of the writ shall be served by delivery to the opposite party in the suit or proceeding sought to be reviewed, at least 10 days before the return of the original writ.

**34.090 Order for further return.** If the return to the writ is incomplete, the court may order a further return to be made.

**34.100 Power of court on review; appeal.** Upon the review, the court shall have power to affirm, modify, reverse or annul the decision or determination reviewed, and if necessary, to award restitution to the plaintiff, or by mandate direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision. From the judgment of the circuit court on review, an appeal may be taken in like manner and with like effect as from a judgment of a circuit court in an action.
[Amended by 1973 c 197 §2]

## WRIT OF MANDAMUS

**34.110 When and to whom writ issued.** A writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station; but though the writ may require such court, corporation, board, officer or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law.

**34.120 Courts having jurisdiction.** The circuit court or judge thereof of the county wherein the defendant, if a public officer or body, exercises his or its functions, or if a private person or corporation, wherein such person resides or may be found, or such private corporation might be sued in an action, shall have exclusive jurisdiction of mandamus proceedings, except that the Oregon Tax Court or judge thereof shall have jurisdiction in mandamus proceedings in all cases involving tax laws as defined in ORS 305.410, and except that the Supreme Court may take original jurisdiction in mandamus proceedings as provided in section 2 of amended Article VII of the Oregon Constitution.
[Amended by 1965 c 6 §10]

**34.130 Allowance and issuance of writ.** The writ shall be allowed by the court or judge thereof upon the petition, verified as a complaint in an action, of the party beneficial-

ly interested. It may be allowed with or without notice to the adverse party, as in the case of a writ of review. Upon the filing of the petition and order of allowance, the writ shall be issued by the clerk or court administrator in accordance therewith.
[Amended by 1971 c 193 §27]

**34.140 Direction and service of writ; proof of service; enforcing obedience to writ.** The writ shall be directed to the court, corporation, board, officer or person designated in the order of allowance, and may be served thereon, by any person authorized to serve a summons, by delivery of the original to such officer or person, or to any member of such court, or to any officer of such corporation upon whom a summons lawfully may be served. The proof of service shall be the same as in a writ of review, and obedience to the writ may be enforced in such manner as the court or judge thereof shall direct.

**34.150 Peremptory and alternative writs; form.** The writ shall be either alternative or peremptory; when in the alternative, it shall state concisely the facts, according to the petition, showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court or judge thereof, by whom the writ was allowed, at a time and place therein specified, why he has not done so; and that he then and there return the writ, with his certificate annexed, of having done as he is commanded, or the cause of his omission thereof. When peremptory, the writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, and to return the cause therefor, shall be omitted.

**34.160 Allowance of peremptory writ in first instance.** When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus shall be allowed in the first instance; in all other cases, the alternative writ shall be first issued.

**34.170 Answer or demurrer by defendant.** On the return day of the alternative writ, or such further day as the court or judge thereof may allow, the defendant on whom the writ was served may show cause by demurrer or answer to the writ, in the same manner as to a complaint in an action.

**34.180 Failure to answer or demur; additional pleadings.** If the defendant does not show cause by demurrer or answer, a peremptory mandamus shall be allowed against him. If the answer contains new matter, the same may be demurred or replied to by the plaintiff, within such time as the court or judge may prescribe. If the replication contains new matter, the same may be demurred to by the defendant within such time as the court or judge may prescribe, or he may countervail such matter on the trial or other proceedings by proof, either in direct denial or by way of avoidance.

**34.190 Other pleadings; construction and amendment of pleadings; motions; manner of trial.** The pleadings in the proceeding by mandamus are those mentioned in ORS 34.170 and 34.180, and none other are allowed. They are to have the same effect and construction, and may be amended in the same manner, as pleadings in an action. Either party may move to strike out, or be allowed to plead over after motion or demurrer allowed or disallowed; and the issues joined shall be tried, and the further proceedings thereon had in like manner and with like effect as in an action.

**34.200 Trial during term time or vacation; allowance and trial in Supreme Court.** In the circuit court or Oregon Tax Court the writ may be made returnable either in term time or vacation, and if the latter, may be tried and determined before the judge in like manner and with like effect as in term time. In the Supreme Court the writ may be allowed by the court or any judge thereof, but shall only be tried and determined by the court; and all issues therein shall be tried by the court.
[Amended by 1965 c 6 §11]

**34.210 Recovery of damages; costs and disbursements; issuance of peremptory writ.** If judgment is given for the plaintiff, he shall recover damages which he has sustained by reason of the premises, to be ascertained in the same manner as in an action, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay.

**34.220 Recovery as a bar.** A recovery of damages by virtue of ORS 34.210 against a party who has made a return to a writ of mandamus is a bar to any other action or suit against the same party for the same cause.

**34.230 Imposition of fine; payment as bar.** Whenever a peremptory mandamus is directed to a public officer or body commanding the performance of any public duty specially enjoined by law, if it appears to the court or judge thereof that the officer or any member of the body has without just excuse refused or neglected to perform the duty so enjoined, the court or judge may impose a fine, not exceeding $500, upon every such officer or member of such body; and the payment thereof is a bar to any action for any penalty incurred by the officer or member by reason of his refusal or neglect to perform the duty so enjoined.

**34.240 Appeal.** From the judgment of the circuit court or Oregon Tax Court, or judge thereof, refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken in like manner and with like effect as in an action.
[Amended by 1965 c 6 §12, 1973 c 197 §3]

## WRIT OF HABEAS CORPUS

**34.310 Purpose of writ; who may prosecute.** The writ of habeas corpus ad subjiciendum is the writ designated in ORS 34.310 to 34.730, and every other writ of habeas corpus is abolished. Every person imprisoned or otherwise restrained of his liberty, within this state, except in the cases specified in ORS 34.330, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.

**34.320 Courts having jurisdiction.** The circuit court of the judicial district wherein the party is imprisoned or restrained, and, if vested with power to exercise judicial functions, the county court and county judge of the county wherein the party is imprisoned or restrained, shall have concurrent jurisdiction of proceedings by habeas corpus, and said courts and judges may issue, hear and decide all questions arising upon habeas corpus.

**34.330 Who not entitled to prosecute writ.** The following persons shall not be allowed to prosecute the writ:

(1) Persons imprisoned or restrained by virtue of process issued by a court of the United States, or a judge, commissioner or other officer thereof, in cases where such courts, or judges or officers thereof, have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of actions, suits or other proceedings in such court, or before such commissioner or other officer.

(2) Persons imprisoned or restrained by virtue of the judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree.

(3) Except as provided in ORS 138.560, persons eligible to obtain post-conviction relief pursuant to ORS 138.510 to 138.680.
[Amended by 1959 c 636 §22]

**34.340 Petition; who may apply.** The writ shall be allowed by the court or judge thereof upon the petition of the party for whose relief it is intended, or of some other person in his behalf, signed and verified by the oath of the petitioner, to the effect that he believes it to be true.

**34.350 Application by district attorney.** Whenever a writ of habeas corpus is required in any action, suit or proceeding, civil or criminal, to which the state is a party, the application therefor may be made by the district attorney having charge thereof, and whenever so issued the court or judge shall state in the order of allowance that it was issued on such application.

**34.360 Contents of petition.** The petition shall state, in substance:

(1) That the party in whose behalf the writ is petitioned is imprisoned or restrained of his liberty, the place where, and officer or person by whom he is imprisoned or restrained, naming both parties if their names are known, or describing them if not known.

(2) That such person is not imprisoned or restrained by virtue of any order, judgment, decree or process specified in ORS 34.330.

(3) The cause or pretense of the imprisonment or restraint, according to the best knowledge or belief of the petitioner.

(4) If the imprisonment or restraint is by virtue of any order, warrant or process, a copy thereof shall be annexed to the petition, or it must be alleged that, by reason of the removal or concealment of the party before the application, a demand of such copy could not be made, or that the demand was made, and the legal fees therefor tendered to the person having the party in his custody, and that a copy was refused.

(5) If the imprisonment or restraint is alleged to be illegal, in what the alleged illegality consists.

(6) That the legality of the imprisonment or restraint has not already been adjudged

upon a prior writ of habeas corpus, to the knowledge or belief of the petitioner.

**34.365 Filing petition of prisoner without payment of filing fees.** Any court of the State of Oregon may authorize the filing of a petition for a writ of habeas corpus by or on behalf of any person imprisoned or otherwise restrained of his liberty by virtue of a charge or conviction of crime without payment of the filing fees therefor, if such person presents to the court or judge thereof satisfactory proof, by affidavit and as otherwise required by such judge, that he is unable to pay such fees.
[1955 c.493 §1]

**34.370 Allowance and issuance of writ.** The court or judge to whom the petition is presented must allow the writ without delay, unless it appears from the petition itself, or from the documents annexed thereto, that the person for whose relief it is intended is by the provisions of ORS 34.310 to 34.730 prohibited from prosecuting the writ. Upon the filing of the petition and the order of allowance with the clerk, the clerk shall issue the writ immediately in accordance therewith. If the clerk's office be closed, or if the clerk is otherwise unavailable, the court or judge to whom the petition is presented shall issue the writ. If the seal of the court or clerk thereof is unavailable, the writ shall be issued without the seal thereon.
[Amended by 1963 c.322 §1]

**34.380 Warrant in lieu of writ; when issued.** Whenever it appears by satisfactory evidence that any person is illegally imprisoned or restrained and there is good reason to believe that he will be carried out of the state or suffer irreparable injury before he can be relieved by the issuing of a habeas corpus, any court or judge authorized to issue such writ may issue a warrant reciting the facts, directed to any sheriff or other person therein designated, commanding him to take such illegally imprisoned or restrained person and forthwith bring him before such court or judge, to be dealt with according to law.

**34.390 Order for arrest of person having custody.** When the proof mentioned in ORS 34.380 is also sufficient to justify an arrest of the person having the party in his custody, as for a criminal offense committed in the taking or detaining of such party, the warrant may also contain an order for the arrest of such person for such offense.

**34.400 Execution of warrant; return and proceedings thereon.** Any officer or person to whom a warrant issued under ORS 34.380 is directed shall execute the same by bringing the party therein named and the person who detains him, if so commanded by the warrant, before the court or judge issuing the warrant; and thereupon the person detaining such party shall make a return in like manner, and the like proceedings shall be had thereon, as if a writ of habeas corpus had been issued in the first instance.

**34.410 Criminal offense by person having custody.** If the person having such party in his custody is brought before the court or judge as for a criminal offense, he shall be examined, committed, released or discharged by the court or judge in like manner as in other criminal cases of like nature.
[Amended by 1973 c 836 §324]

**34.420 Contents of writ.** The writ shall command the defendant to produce the person imprisoned or restrained, by whatsoever name he may be called or charged, and certify and return therewith the time and cause of his imprisonment or restraint, before the court or judge allowing the writ, at a time and place therein specified, or immediately after the receipt of the writ, to do and receive what shall then and there be considered concerning the person so imprisoned or restrained; or when it appears by the petition and documents thereto annexed that the cause or offense for which the person is imprisoned or restrained is not bailable, the production of the party may be dispensed with and the writ issued accordingly, though such production is prayed for in the petition.

**34.430 Defect of form; designation of persons.** The writ shall not be disobeyed for any defect of form. It is sufficient:

(1) If the officer or person having the custody of the person imprisoned or restrained is designated either by his name of office, if he has any, or by his own name, or if both such names are unknown or uncertain, he may be described by an assumed appellation; and anyone who may be served with the writ is to be deemed the officer or person to whom it was directed, although it may be directed to him by a wrong name or description, or to another person.

(2) If the person who is directed to be produced is designated by name, or if his name is uncertain or unknown, he may be described in any other way, so as to designate the person intended.

**34.440 Who may serve writ; tender of fees and undertaking when service is on sheriff or other officer.** A writ of habeas corpus may be served by any sheriff within his county, or by any other person therein designated in any county within the state. The service thereof shall not be deemed complete, so as to require the prisoner to be brought up before the court or judge issuing the writ, unless the party serving the writ tenders to the person in whose custody the prisoner may be, if such person is a sheriff or other officer, the fees allowed by law for bringing up such prisoner; nor unless he also enters into an undertaking to such sheriff or other officer, in a penalty double the sum for which the prisoner is detained, if he is detained for any specific sum of money, and if not, then in such a sum as the judge granting the writ directs, not exceeding $1,000, to the effect that such person shall pay the charges for carrying back the prisoner if he is remanded, and that the prisoner will not escape, either in going to or returning from the place to which he is to be taken. If such fees are not paid, or such security is not tendered, the officer to whom the writ is directed shall make return thereto, in the manner required by ORS 34.540, and shall state therein the reason why the prisoner is not produced, and thereupon the court or judge granting the writ may proceed as if the prisoner was produced. This section, except for the first sentence, does not apply to a case wherein the writ is issued on the application of the district attorney.

**34.450 Payment of charges when service is on person other than sheriff or officer.** Every court or judge allowing a writ of habeas corpus, directed to a person other than a sheriff or other officer, may require, in order to render the service effectual, that the charges of producing the party be paid by the applicant; and in such case the court or judge shall, in the order allowing the writ, specify the amount of such charges, which shall not exceed the fees allowed by law to sheriffs for similar services.

**34.460 Manner of service.** The writ of habeas corpus may be served by delivery of the original to the officer or person to whom it is directed, or if he cannot be found, by leaving it at the jail or other place in which the party is imprisoned or restrained, with any under officer or other person having charge for the time of such party.

**34.470 Service when party conceals himself or refuses admittance.** If the officer or person on whom the writ ought to be served conceals himself, or refuses admittance to the person attempting to make service, it may be served by affixing it in some conspicuous place on the outside, either of his dwelling house or the jail or other place where the party is confined.

**34.480 Proof of service.** The proof of service of the writ shall be the same as in the service of a summons, except that the same shall be indorsed upon a copy of the writ made by the officer or person serving it, and returned to the clerk who issued the writ.

**34.490 Duty to obey writ.** It is the duty of every sheriff or other officer upon whom a writ of habeas corpus is served, whether such writ is directed to him or not, upon payment or tender of the fees allowed by law, and the delivery or tender of the undertaking described in ORS 34.440, to obey and return the writ according to the exigency thereof; and it is the duty of every other person upon whom the writ is served, having the custody of the person for whose benefit it is issued, to obey and return it in like manner, without requiring the payment of any fees, unless the payment of such fees has been required by the court or judge allowing such writ.

**34.500 When return must be made.** If the writ is returnable at a certain time, the return shall be made at the time and place specified therein; if it is returnable forthwith, and the place of return is within 20 miles of the place of service, the return must be made within 24 hours, and the same time is allowed for every additional 20 miles.

**34.510 Production of person.** The person or officer on whom the writ is served shall also, at the time of making the return, bring the person in his custody, according to the command of the writ, except in the cases provided for in ORS 34.440 and 34.520.

**34.520 Sickness of person.** Whenever, from the sickness or infirmity of the party, he cannot, without danger, be produced, the officer or person in whose custody he is may state that fact in his return to the writ, and if satisfied of the truth of the allegation, and the return is otherwise sufficient, the court or judge shall proceed to decide on the return, and to dispose of the matter, the same as if the party had been produced.

**34.530 Requiring return and production of party by order.** At any time after the allowance of a writ of habeas corpus, the plaintiff therein, or the person applying

therefor on his behalf, may give notice to the judge issuing the writ, and thereupon, if necessary to avoid delay, the judge shall by order require that the return be made and the party produced before him at such time and place, within the county or district, as may be convenient.

**34.540 Contents of return.** (1) The officer or person upon whom the writ was duly served shall state in his return, plainly and unequivocally:

(a) Whether he has the party in his custody or power or under his restraint, and if he has not, whether he has had the party in his custody or under his power or restraint at any and what time prior or subsequent to the date of the writ.

(b) If he has the party in his custody or power or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large.

(2) If the party is detained by virtue of any writ, warrant or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced, and exhibited on the return of the writ, to the court or judge before whom the writ is returnable.

(3) If the person upon whom the writ was served has had the party in his power or custody or under his restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority the transfer took place.

(4) The return shall be signed by the person making the same, and except where he is a sworn public officer, and makes his return in his official capacity, it shall be verfied by oath.

**34.550 Warrant in case of refusal or neglect to obey writ.** If the person upon whom the writ was duly served refuses or neglects to obey the same by producing the party named in the writ and making a full and explicit return thereto within the time required, and no sufficient excuse is shown therefor, the court or judge before whom the writ was made returnable shall, upon due proof of the service thereof, forthwith issue a warrant against such person, directed to any sheriff in this state, commanding him forthwith to apprehend such person and bring him immediately before such court or judge; and on the person being so brought, he shall be committed to close custody in the jail of the county in which such judge shall be until he makes return to the writ and complies with any order made in relation to the party for whose relief the writ was issued.

**34.560 Failure of sheriff to return writ.** If a sheriff neglects to return the writ, the warrant may be directed to any other person to be designated therein, who shall have full power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

[Amended by 1965 c 221 §12]

**34.570 Precept commanding bringing of prisoner.** The court or judge issuing the warrant may also, at the same time or afterwards, issue a precept to the person to whom the warrant is directed, commanding him to bring forthwith before such court or judge the party for whose benefit the writ was allowed, who shall thereafter remain in the custody of such person until discharged or remanded.

**34.580 Inquiry into cause of imprisonment.** The court or judge before whom the party is brought on the writ shall, immediately after the return thereof, proceed to examine into the facts contained in the return, and into the cause of the imprisonment or restraint of such party.

**34.590 Discharge when no legal cause for restraint is shown.** If no legal cause is shown for the imprisonment or restraint, or for the continuation thereof, the court or judge shall discharge such party from the custody or restraint under which he is held.

**34.600 When party to be remanded.** It shall be the duty of the court or judge forthwith to remand such party if it appears that he is legally detained in custody, either:

(1) By virtue of process issued by any court, or judge or commissioner or any other officer thereof, of the United States, in a case where such court, or judge or officer thereof, has exclusive jurisdiction; or,

(2) By virtue of the judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or,

(3) For any contempt, specially and plainly charged in the commitment, by some court, officer or body having authority to commit for the contempt so charged; and,

(4) That the time during which such party may legally be detained has not expired.

**34.610 Grounds for discharge of prisoner in custody under order or civil process.** If it appears on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner shall be discharged only if one of the following cases exists:

(1) The jurisdiction of the court or officer has been exceeded, either as to matter, place, sum or person.

(2) The original imprisonment was lawful, yet by some act, omission or event which has taken place afterwards, the party has become entitled to be discharged.

(3) The order or process is defective in some matter of substance required by law, rendering the same void.

(4) The order or process, though in proper form, has been issued in a case not allowed by law.

(5) The person having the custody of the prisoner under such order or process is not the person empowered by law to detain him.

(6) The order or process is not authorized by any judgment or decree of any court, nor by any provision of law.

**34.620 Inquiry into legality of certain judgments and process not permitted.** No court or judge, on the return of a writ of habeas corpus, has power to inquire into the legality or justice of any order, judgment or process specified in ORS 34.330, nor into the justice, propriety or legality of any commitment for a contempt made by a court, officer or body, according to law, and charged in such commitment, as provided by law.

**34.630 Proceedings where commitment for criminal offense is legal, or party probably is guilty.** If it appears that the party has legally been committed for a criminal offense, or if he appears by the testimony offered with the return, or upon the hearing thereof, probably to be guilty of such offense, although the commitment is irregular, he shall forthwith be remanded to the custody or placed under the restraint from which he was taken, if the officer or person under whose custody or restraint he was, is legally entitled thereto; if not so entitled, he shall be committed to the custody of the officer or person so entitled.

**34.640 Custody of party pending proceedings.** Until judgment is given upon the return, the party may either be committed to the custody of the sheriff of the county, or placed in such care or custody as his age and other circumstances may require.

**34.650 Notice to third persons.** When it appears from the return that the party named therein is in custody on an order or process under which another person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it shall appear that the party so interested, or his attorney has had notice of the time and place at which the writ has been made returnable.

**34.660 Notice to district attorney.** When it appears from the return that the party is imprisoned or restrained on a criminal accusation, the court or judge shall make no order for his discharge until notice of the return is given to the district attorney of the county where the party is imprisoned or restrained.

**34.670 Replication following return; hearing.** The plaintiff in the proceeding, on the return of the writ, may, by replication, verified as in an action, controvert any of the material facts set forth in the return, or he may allege therein any fact to show, either that his imprisonment or restraint is unlawful, or that he is entitled to his discharge; and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of or against the imprisonment or restraint, and to dispose of the party as the law and justice of the case may require.

**34.680 Demurrer; controverting replication; time to plead; construction and effect of pleadings.** The plaintiff may demur to the return, or the defendant may demur to any new matter set forth in the replication of the plaintiff, or by proof controvert the same, as upon a direct denial or avoidance. The pleadings shall be made within such time as the court or judge shall direct, and they shall be construed and have the same effect as in an action.

**34.690 Requiring production of person after writ issued.** Notwithstanding the issuing of the writ without requiring the production of the person, the court or judge before whom the writ was returnable may, before final decision, issue a precept to the officer or other person to whom the writ was directed, requiring the production of the person.

**34.700 Judgment; liability for obedience to judgment.** If it appears that the party detained is imprisoned or restrained illegally, judgment shall be given that he be discharged forthwith; otherwise, judgment shall be given that the proceeding be dismissed and the party remanded. No officer or other person is liable to any action or proceeding for obeying such judgment of discharge.

**34.710 Appeal; conclusiveness of judgment.** Any party to a proceeding by habeas corpus, including the state when the district attorney appears therein, may appeal from the judgment of the court refusing to allow such writ or any final judgment therein, either in term time or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another proceeding of the same kind.

**34.720 Imprisonment after discharge.** No person who has been finally discharged upon a proceeding by habeas corpus shall again be imprisoned, restrained or kept in custody for the same cause; but it is not to be deemed the same cause if:

(1) He has been discharged from a commitment on a criminal charge, and afterwards is committed for the same offense by the legal order or process of the court wherein he is bound by a release agreement or has deposited security, or in which he is indicted or convicted for the same offense; or

(2) After a judgment of discharge for a defect of evidence or for a material defect in the commitment, in a criminal case, the party again is arrested on sufficient evidence, and committed by legal process for the same offense; or

(3) In a civil action or suit, the party has been discharged for illegality in the judgment, decree or process, and afterwards is imprisoned for the same cause of action or suit; or

(4) In a civil action or suit, he has been discharged from commitment on a writ of arrest, and afterwards is committed on execution, in the same action or suit, or on a writ of arrest in another action or suit, after the dismissal of the first one.

[Amended by 1973 c 836 §325]

**34.730 Forfeiture for refusing copy of order or process.** Any officer or other person refusing to deliver a copy of any order, warrant, process or other authority by which he detains any person, to anyone who demands a copy, and tenders the fees therefor, shall forfeit $200 to the person so detained.

## CERTAIN WRITS ABOLISHED

**34.810 Scire facias and quo warranto.** The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto are abolished, and the remedies heretofore obtainable under those forms may be obtained by action in the mode prescribed in ORS 30.510 to 30.640.

**34.820 Ne exeat.** The writ of ne exeat is abolished.

### CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173 170, I, Thomas G Clifford, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173 160 and other changes specifically authorized by law

Done at Salem, Oregon,
October 1, 1977

Thomas G Clifford
Legislative Counsel