latures have provided for a remedy in at least three different manners. The Ohio Code provides that a judgment or order obtained by false testimony may be vacated or modified by the court at any time within two years after the term where rendered.[44] In Minnesota it has been provided that a judgment may be set aside for perjury in an independent action brought for that purpose within three years after the discovery by the aggrieved party of such perjury.[45] In Maine it has been provided that an aggrieved party may maintain an independent action for damages sustained by him against the prevailing party or any perjuring witness.[46]

One possible solution for the problem is expansion of the common law to provide a suitable remedy. The common law is not a fixed but a growing body of law, as has been recognized by the many courts which in the last sixty-odd years have established the individual's right of privacy.[47] Justice calls for judicial re-examination and reconsideration of the remedies available to the aggrieved party who has lost his case because perjured testimony was used against him.

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[44] PAGE'S OHIO GENERAL CODE 1938 § 11631(10) (1952 Supp.). This statute requires the guilty party to be convicted of perjury before the remedy can be utilized.

[45] MINN. STATUTES § 548.14 (1949). *But see* In re Estate of Jordan, 199 Minn. 53, 271 N.W. 104 (1937); Murray v. Calkins, 186 Minn. 192, 242 N.W. 706 (1932). These cases hold that "intrinsic" fraud is not within the statute. If the parties are apprised of the issues and have an opportunity to defend they cannot utilize the statute.

[46] MAINE REV. STAT., c. 100, § 177 (1944).

[47] That such a right as the "right to privacy" existed had not been recognized in decisions until it was first described in the classic article by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). It now has substantial recognition in case law, which is described in HARPER, A TREATISE ON THE LAW OF TORTS § 277 (1933), and PROSSER, HANDBOOK OF THE LAW OF TORTS § 107 (1941).

HABEAS CORPUS IN IOWA

Traditionally the writ of habeas corpus has been regarded as one of the great bulwarks of individual liberty. Holdsworth enumerates various other writs designed to safeguard the liberty of the subject which eventually became ineffective and were superseded by the writ of habeas corpus at the end of the sixteenth and the beginning of the seventeenth century.¼ He points out, however, that from the time of Edward I various writs of habeas corpus were known to the law.½ Radin quotes Selden as saying it is " 'the highest remedy in law for any man that is imprisoned.' "¾ The writ *habeas corpus ad subjiciendum* was the basic writ relating to personal freedom; it initiated an immediate hearing to determine the legality of an existing actual confinement.[1] Availability of the writ is guaranteed by both state and federal constitutions.[2] It is the purpose of this article to discuss the procedure involved in applying the writ in Iowa and the various uses to which it may be put.

The modern statutory writ is initiated by a verified petition in the name of the person restrained.[3] Application may be made to the supreme, district or superior court or any judge of those courts,[4] and must be made to the court or judge most convenient in point of distance to the applicant.[5] The court has held that convenience rather than measurable distance controls,[6] though inmates of institutions must apply to the court or judge in the district in which they are confined.[7] Application to the supreme court may be made from any place in the state, since its jurisdiction is coextensive with the state.[8]

The petitioner must allege that he is restrained at a particular place, the cause or pretense under which he is held, and why the

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¼ IX HOLDSWORTH, A HISTORY OF ENGLISH LAW 104-108 (3rd ed. 1922-1932). For a list of readings on the history of habeas corpus, see PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 156, n. 5 (2nd ed. 1936).

½ IX HOLDSWORTH, *op. cit. supra*, note 1, at 108.

¾ RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 233 (1st ed. 1936).

[1] 3 BL. COMM. 131 (7th ed. 1775); see Wales v. Whitney, 114 U.S. 564, 571 (1885).

[2] U.S. CONST. ART. I, § 9; IOWA CONST. ART. I, § 13.

[3] IOWA CODE § 663.2 (1950); see State v. Collins, 54 Iowa 441, 442, 6 N.W. 692 (1880).

[4] IOWA CODE § 663.3 (1950). Municipal courts were not created until 1923 and no express authorization for habeas corpus jurisdiction is conferred upon them. Section 602.14 gives them jurisdiction in civil matters concurrent with the district courts, however.

[5] IOWA CODE § 663.4 (1950).

[6] Addis v. Applegate, 171 Iowa 150, 154 N.W. 168 (1915).

[7] State Institution for Feeble-Minded v. Stillman, 236 Iowa 1023, 20 N.W.2d 417 (1945).

[8] Ware v. Sanders, 146 Iowa 233, 124 N.W. 1081 (1910).

restraint is illegal. He must also allege that the legality of the imprisonment has not previously been adjudicated and, if a petition has been previously filed and refused, why it was refused.[9]

A penalty of one thousand dollars may be collected from a judge who refuses to issue a writ on a petition alleging sufficient grounds.[10] Refusal to comply with an order to produce the petitioner, or to show good cause for failure to produce, subjects the defendant to a one thousand dollar penalty and punishment for contempt;[11] disobedience of an order discharging the prisoner bears the same penalties plus actual damages sustained by the petitioner as a result thereof.[12]

No court may interfere by habeas corpus in a matter over which another court has obtained jurisdiction.[13] The proceedings are generally said to be legal in character and the findings of a trial court have the usual presumption of correctness on appeal.[14]

CHILD CUSTODY. Modern practice employs the writ to determine the legal custody of children. Proceedings are said to be governed by considerations of expediency and equity rather than by strictly legal rights.[15] The interests of the child are the paramount consideration,[16] and his wishes may control.[17] A presumption in favor of the natural parents may be overcome by evidence that the child will be better served by a contrary award.[18] A surviving parent has the benefit of the presumption unless custody has been relinquished voluntarily or a positive showing is made that the child will substantially benefit by other custody.[19] Habeas corpus has been used to determine custody under a contract to deliver a child to the putative father,[20] and to resolve disputed maternity.[21]

The full faith and credit status of foreign awards has been a perplexing problem. Iowa has permitted modification of such awards on the ground that the foreign state could itself have modified the decree upon a showing of changed conditions; since Iowa has done no more than the foreign state would do there has been no denial of full faith and credit.[22] An *ex parte* foreign divorce decree is void insofar as it purports to award custody of minor

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9 IOWA CODE § 663.1 (1950).
10 IOWA CODE § 663.10 (1950).
11 IOWA CODE § 663.29 (1950).
12 IOWA CODE § 663.42 (1950).
13 *See* Peff v. Doolittle, 235 Iowa 443, 447, 15 N.W.2d 913, 915 (1944).
14 Delashmutt v. McCoy, 188 Iowa 683, 176 N.W. 682 (1920).
15 See Allender v. Selders, 227 Iowa 1324, 1330, 291 N.W. 176, 179 (1940); Ellison v. Platts, 226 Iowa 1211, 286 N.W. 413 (1939).
16 *Ibid.*; Paulson v. Windelow, 236 Iowa 1011, 20 N.W.2d 470 (1945).
17 See Knochemus v. King, 193 Iowa 1282, 1286, 188 N.W. 957, 959 (1922).
18 *See* Risting v. Sparboe, 179 Iowa 1133, 1136, 162 N.W. 592, 594 (1917).
19 Allender v. Selders, 227 Iowa 1324, 1331, 291 N.W. 176, 180 (1940).
20 State v. Noble, 70 Iowa 174, 30 N.W. 396 (1886).
21 Tilton v. Tilton, 206 Iowa 998, 221 N.W. 552 (1928).
22 Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950); see *Custody of Children in the Conflict of Laws*, 1 DRAKE L. REV. 19 (1951).

residents or domiciliaries of Iowa and is subject to attack by habeas corpus.[23]

A good faith allegation that the child is at a certain place confers jurisdiction upon the court despite an answer or facts showing that the child has been removed.[24] Because the proceeding in custody cases is equitable in nature it is triable de novo on appeal, although the trial court's findings are given great weight.[25] A custody award is not res judicata if new allegations warrant an investigation of the current welfare of the child.[26]

The burden of proving unfitness of existing custody is on the one initiating the writ; the showing must be of positive rather than comparative unfitness.[27]

NON-PENAL INSTITUTION CASES. The writ is used to seek release from both private[28] and public[29] non-penal confinement. The court must determine whether or not the petitioner is a fit subject for treatment[30] and the likelihood of danger to the public from his discharge.[31] Jury trial is not available because the proceedings are said to be "special" and not of a criminal or civil nature,[32] but the findings of the court have the presumption of correctness accorded a jury verdict.[33] Application must be made to a court within the county where the institution is located;[34] no writ may issue when the same question is pending in another court.[35]

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[23] Boor v. Boor, 241 IOWA 973, 41 N.W.2d 155 (1950); Kline v. Kline, 57 Iowa 386, 10 N.W. 825 (1881); see Note, 4 A.L.R.2d 7 (1949). It should be noted that the recent decision of the United States Supreme Court in *May v. Anderson*, 345 U.S. 528 (1953), may require considerable revision in present concepts concerning the problem of determining child custody. A full consideration of the case is beyond the scope of this article. And in view of the fact that members of the Court were not in agreement as to what the exact holding was, it is difficult to say with any accuracy what the effect of the case will be. It would appear to hold that a court determining custody of children must have personal jurisdiction over the mother. At least this view of the Court's holding finds support in its statement of the issue under consideration: " . . . we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*." 345 U.S. 528, 533. A similar view of the holding is reached in 67 Harv. L. Rev. 91, 122-123.

[24] Rivers v. Mitchell, 57 Iowa 193, 10 N.W. 626 (1881).

[25] *E.g.*, Watters v. Watters, 53 N.W.2d 162 (Iowa 1952); Jensen v. Sorenson, 211 Iowa 354, 233 N.W. 717 (1930).

[26] Moravek v. Crock, 230 Iowa 241, 297 N.W. 319 (1941).

[27] See Watters v. Watters, 53 N.W.2d 162, 163 (Iowa 1952).

[28] Peff v. Doolittle, 235 Iowa 443, 15 N.W.2d 913 (1944).

[29] Madsen v. Obermann, 237 Iowa 461, 22 N.W.2d 350 (1946); Molesworth v. Baumel, 198 Iowa 1293, 201 N.W. 41 (1924).

[30] Madsen v. Obermann, *supra* note 29.

[31] *Id.* at 472, 22 N.W.2d at 357.

[32] See *In re* Bresee, 82 Iowa 573, 577, 48 N.W. 991, 992 (1891).

[33] Madsen v. Obermann, 237 Iowa 461, 22 N.W.2d 350 (1946); Adams v. Stewart, 197 Iowa 490, 197 N.W. 464 (1924).

[34] State Institution for Feeble-Minded v. Stillman, 236 Iowa 1023, 20 N.W.2d 417 (1945).

[35] Peff v. Doolittle, 235 Iowa 443, 15 N.W.2d 913 (1944).

Insanity once legally declared is presumed to continue and the petitioner bears the burden of proving a restoration to sanity.[36]

EXTRADITION CASES. Use of habeas corpus in extradition cases is authorized by statute.[37] Upon receiving a requisition, the Governor may call upon the Attorney General or any other prosecuting officer to investigate and report to him the situation of the person demanded and whether he ought to be surrendered.[38] The Governor's determination to surrender is subject to review upon habeas corpus,[39] and a court may order the discharge of the prisoner.

The scope of inquiry is limited to a determination of the legality of the process under which the demanded person is to be transferred; guilt or innocence of the accused is immaterial.[40] After prima facie determination of the sufficiency of the requisition by the Governor, some fatal defect must appear on the face of the record to entitle the demanded person to a discharge.[41] The court will entertain evidence relating to the identity of the petitioner, whether the alleged act was committed in the demanding state, whether the information or indictment charges a crime under the laws of that state, and whether necessary documents are properly authenticated.[42]

The requirement that the accused be a fugitive from justice was a major problem in the past. It was necessary to find that he had been in the demanding state at the time of the act charged, that he left and refused voluntarily to return, and that the act charged was a crime under the laws of the requesting state.[43] This requirement permitted fraud by mail[44] and abandonment of wives and children[45] to flourish and led to a provision in the Uniform Criminal Extradition Act that the accused need not have been in the demanding state at the time the crime was committed nor have fled therefrom.[46]

There is a presumption that the accused will be given a fair trial in the requesting state[47] and that it will give full faith and credit to any judgment of another state which would be a bar to the prosecution.[48] Since habeas corpus as here used is a proceed-

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[36] Bettenga v. Stewart, 214 Iowa 1284, 244 N.W. 279 (1932); Hazen v. Donahoe, 208 Iowa 582, 226 N.W. 33 (1929).
[37] IOWA CODE § 759.10 (1950).
[38] IOWA CODE § 759.4 (1950).
[39] Harris v. Magee, 150 Iowa 144, 129 N.W. 742 (1911); *accord*, Jones and Atkinson v. Leonard, 50 Iowa 106 (1878).
[40] Seely v. Beardsley, 194 Iowa 863, 190 N.W. 498 (1922).
[41] Taylor v. Wise, 172 Iowa 1, 126 N.W. 1126 (1910).
[42] See Seely v. Beardsley, 194 Iowa 863, 864, 190 N.W. 498, 499 (1922); cases cited note 39 *supra*.
[43] See Drumm v. Pederson, 219 Iowa 642, 259 N.W. 208 (1935); Seely v. Beardsley, 194 Iowa 863, 866, 190 N.W. 498, 500 (1922).
[44] Jones and Atkinson *v.* Leonard, 50 Iowa 106 (1878).
[45] See Drumm v. Pederson, 219 Iowa 642, 259 N.W. 208 (1935).
[46] IOWA CODE § 759.6 (1950).
[47] Leonard v. Zweifel, 171 Iowa 522, 151 N.W. 1054 (1915).
[48] Bruyneel v. Wies, 153 Iowa 565, 133 N.W. 1057 (1912).

ing at law, only matters presented for review in the assignments of error are decided upon appeal.[49]

CRIMINAL CASES. An important and fundamental use of habeas corpus is to test the legality of criminal process under which a person is confined. It lies primarily to challenge the jurisdiction of the committing court and may not ordinarily be used as a substitute for appeal[50] or to inquire into irregularity or error not affecting jurisdiction.[51]

Rules for determining jurisdiction are divided into those for pre-conviction use and post-conviction use. Usually the writ will not issue when proceedings are pending and trial and appeal are available to raise the issues presented. It may, however, be invoked before conviction to obtain a discharge if it can be shown that the statute under which the charge is made is invalid or that the charge wholly fails to state an offense.[52] Apparently the writ may be used to test the constitutionality of the statute or ordinance under which the charge is made.[53] Legality of restraint may be inquired into when it appears that the restraint is brought about by one acting without color of office, but the right of an officer *de facto* is not open to such collateral attack.[54] The validity of the process on its face and the jurisdiction of the court which issued it may be inquired into, but mere irregularities not rendering the process void afford no ground for relief.[55]

One at liberty *on bail* under a charge not sustained by sufficient evidence may be released and the charge quashed on habeas corpus.[56] If the indictment or information fails to charge a crime the petitioner may be released.[57]

After conviction the use of the writ is more narrow. It may not be employed to question the sufficiency of the indictment nor to attack collaterally a judgment not appealed from.[58] It cannot be used to raise irregularity in the impaneling of a grand[59] or trial[60] jury nor for bias on the part of the judge which is not sufficient to void the judgment.[61] Neither can it be made a means

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[49] Ross v. Alber, 227 Iowa 408, 288 N.W. 406 (1939).
[50] Reeves v. Lainson, 234 Iowa 1034, 14 N.W.2d 625 (1944).
[51] See Furey v. Hollowell, 203 Iowa 376, 377, 212 N.W. 698, 699 (1927).
[52] *See* McBain v. Hollowell, 202 Iowa 391, 394, 210 N.W. 461, 462 (1926).
[53] Bopp v. Clark, 165 Iowa 697, 147 N.W. 172 (1914).
[54] See *Ex parte* Strahl, 16 Iowa 369 (1864).
[55] Conkling v. Hollowell, 203 Iowa 1374, 214 N.W. 717 (1927); Furey v. Hollowell, 203 Iowa 376, 212 N.W. 698 (1927); see Note, 13 IOWA L. REV. 199 (1928).
[56] Balz v. Coquillette, 173 Iowa 432, 155 N.W. 801 (1916). The court did not discuss the fact that the man was not restrained.
[57] *See* McBain v. Hollowell 202 Iowa 391, 394, 210 N.W. 461, 462 (1926).
[58] Furey v. Hollowell, 203 Iowa 376, 212 N.W. 698 (1927).
[59] West v. Lainson, 235 Iowa 734, 17 N.W.2d 411 (1945).
[60] Foreman v. Hunter, 59 Iowa 550, 13 N.W. 659 (1882).
[61] *Ibid.*

of reviewing the sufficiency of evidence to support a conviction.[62] A person convicted on perjured evidence cannot attack the conviction by a later showing on habeas corpus that perjured testimony was admitted; he must rely on executive clemency.[63] An excessive sentence may not be attacked until the valid portion has been served, since the prisoner is not invalidly restrained until that time.[64]

Despite the rule that habeas corpus is not a means of reviewing a judgment of conviction by a court of competent jurisdiction, the Iowa court recently reversed a trial court for refusing to consider evidence that the petitioner had been denied his constitutional right to counsel and deprived of his right to appeal.[65] The court felt compelled to consider that contention on habeas corpus because of Supreme Court cases which, it said, either add deprivation of constitutional rights as a ground of habeas corpus or make denial of those rights a jurisdictional defect.[66] The court noted that the alleged irregularity had to be established by facts outside the record and that review of a transcript would not have disclosed their existence.

OTHER CONSIDERATIONS. The writ was used in early Iowa law to contest the legality of contempt commitment.[67] The split of authority as to whether this was a proper use was resolved by statutory provision for review by certiorari.[68]

An Iowa court may not free a prisoner detained under federal process.[69] The converse, however, is not true.[70] But the " . . . writ shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."[71] The petitioner must show a denial of some federal right and that he has exhausted his state remedies. The latter has presented a trap to the wary and unwary alike.[72] Venue lies in the district of confinement.[73]

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[62] Hallway v. Byers, 205 Iowa 936, 218 N.W. 905 (1928).
[63] Springstein v. Sanders, 182 Iowa 658, 164 N.W. 622 (1918); *but see* Mooney v. Holohan, 294 U.S. 103, 112 (1934).
[64] Smith v. Hollowell, 209 Iowa 781, 229 N.W. 191 (1930); Bailey v. Hollowell, 209 Iowa 729, 229 N.W. 189 (1930).
[65] Sewell v. Lainson, 57 N.W.2d 556 (Iowa 1953).
[66] *Id.* at 562. See Comment, 24 CORNELL L.Q. 270 (1939); 24 IOWA L. REV. 170 (1938).
[67] See, *e.g.*, Dudley v. McCord, 65 Iowa 671, 22 N.W. 920 (1885); State *ex rel.* Whitcomb v. Seaton, 61 Iowa 563, 16 N.W. 736 (1883).
[68] IOWA CODE § 665.11 (1950).
[69] *Ex parte* Holman, 28 Iowa 88 (1869).
[70] See Note, 61 HARV. L. REV. 657 (1948); Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483 (1953).
[71] 28 U.S.C. § 2254 (Supp. 1952).
[72] Darr v. Burford, 339 U.S. 200 (1950); *but cf.* Frisbie v. Collins, 342 U.S. 519 (1952); Note, 34 MINN. L. REV. 653 (1950).
[73] *Cf.* Ahrens v. Clark, 335 U.S. 188 (1948).

The writ *coram nobis* was a common law device to procure review of a judgment of conviction by the court which entered it. Though once a part of Iowa law, the court has held it no longer available because the section authorizing its use has been omitted from the Code.[74]

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[74] Boyd v. Smith, 200 Iowa 687, 205 N.W. 522 (1925).

THE IOWA TITLE STANDARDS II*

The first installment of this article discussed the theory and practice of the present system of title examination, including the part played therein by title standards such as those adopted in 1950 by the Iowa State Bar Association. That article considered at length two statutes of limitations which to some extent eliminate the necessity of examining the title from the date of its origin, and three of the ten chapters of the adopted title standards.[1]

This comment will consider chapters of the title standards dealing with abstracts, municipal corporations, and private corporations. The remaining chapters are to be reviewed in a subsequent issue of the Drake Law Review.

I. ABSTRACTS OF TITLE

The purpose of the abstract of title is to provide a summary of the official records affecting the title to land and to enable the purchaser to discover, by proper examination, the state of the title in the grantor. Defects in the form of an abstract do not detract from this purpose except as they may hinder examination, and objections should therefore be restricted to those defects in form which obstruct this purpose. For this reason Standards 1.1 and 1.2 provide that hand-written abstracts and properly certified reproductions or copies of abstracts are acceptable forms. The examiner may, however, reject any abstract that is so illegible or

* Students in the class in Conveyances who assisted in the preparation of this comment, under the supervision of Professor Robert W. Swenson, now on the faculty of the College of Law, University of Utah, include Terrence K. Hopkins, Joseph C. Piper, John D. Culbertson, Conrad A. Amend, and Harold J. Lincoln.

[1] *The Iowa Title Standards I*, 2 DRAKE L. REV. 76 (1953). This article dealt with chapters of the Iowa Title Standards on deeds (4.1-4.12), mortgages (7.1), and probate (9.1-9.23), and Iowa Code §§ 614.17 and 592.3 (1950).