# GENERAL STATUTES

OF THE

# STATE OF MINNESOTA

IN FORCE

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# CHAPTER 79.

## ACTIONS TO VACATE CHARTERS AND LETTERS PATENT, AND TO PREVENT THE USURPATION OF AN OFFICE OR FRANCHISE.

### § 1. Action to annul act of incorporation.

Where a case is presented to the attorney general, making it reasonably probable that any of the acts or omissions enumerated in *c.* 80, Rev. St., can be proved against a corporation, it is his duty to apply for leave to bring the action contemplated by such chapter, and if he neglect or refuse so to do, *mandamus* will lie to compel him to apply for such leave. State v. Berry, 3 Minn. (Gil.) 190.

After application for leave to sue has been made, the discretion, as to whether suit will be brought, is for the court alone. Id.

See State v. Sharp, 27 Minn. 38, 6 N. W. Rep. 408; State v. St. Paul & S. C. R. Co., 35 Minn. 222, 28 N. W. Rep. 245.

### § 3. Action against intruders, etc., in office.

See State v. Sherwood, 15 Minn. 221, (Gil. 172, 177;) State v. Williams, 25 Minn. 340, 344; State v. Parker, Id. 215, 218.

### § 5. Joinder of complainants.

In an action in the nature of a *quo warranto* under this section, two dissimilar interests may be united—the one public, on the part of the territory, to prevent one not duly chosen from exercising official functions; and the other private, and on behalf of the claimant, to establish his right to the office, and to recover damages he may have sustained by the usurpation. Territory v. Smith, 3 Minn. 240, (Gil. 164.)

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# CHAPTER 80.

## SPECIAL PROCEEDINGS.

### TITLE 1.

#### WRIT OF MANDAMUS.

### § 2. To whom issued.

A writ of *mandamus* will not be granted unless it appears that there has been a clear violation of a legal right. Post v. Sparta, (Mich.) 29 N. W. Rep. 721.

The writ of *mandamus* will not lie to require an act to be done which it would not be lawful for the person to do without it. Clark v. Buchanan, 2 Minn. 346, (Gil. 298.)

The writ should not be granted after the expiration of the period which, under the statute of limitations, would be a bar to an action. People v. Chapin, (N. Y.) 10 N. E. Rep. 141.

While the court cannot determine the right of a party to hold a seat in the legislature, it can determine his right to a certificate of election to the legislature, and will, by *mandamus*, compel its issuance to the party entitled to it. O'Ferrall v. Colby, 2 Minn. 180, (Gil. 148.)

*Mandamus* will not lie to compel a public officer to perform an official duty till a demand on him to perform it. State v. Davis, 17 Minn. 429, (Gil. 406.) *Mandamus* will not lie to compel the treasurer of a school-district to demand and receive from the county treasurer the money in his hands due the district, where the only demand upon such treasurer of the school-district was to pay an order by the trustees on such treasurer. Id.

For the use of the writ to compel the payment of claims against municipal corporations, see State v. Ames, 31 Minn. 440, 18 N. W. Rep. 277.

*Mandamus* to a county auditor to compel him to draw his warrant on the county treasurer, see State v. Tarpen, (Ohio,) 1 N. E. Rep. 209; State v. Morris, (Ind.) 2 N. E. Rep. 355.

The decision of comptroller as to the person entitled to receive the money to be refunded in case of a void tax sale cannot be reviewed by *mandamus*. People v. Chapin, (N. Y.) 10 N. E. Rep. 142.

*Mandamus* to compel the levy of a tax to pay the costs of an appeal awarded against a municipality. People v. City of Kingston, (N. Y.) 4 N. E. Rep. 348.

A justice of the peace may be compelled by *mandamus* to correct entries in his docket to make them conform to the facts. State v. Whittet, (Wis.) 21 N. W. Rep. 245.

*Mandamus* to compel a police judge to issue a warrant. State v. McCutchan, (Neb.) 30 N. W. Rep. 58.

*Mandamus* to compel trial judge to take off nonsuit. Lindsay v. Judges of Wayne Cir. Ct. (Mich.) 30 N. W. Rep. 590.

As to *mandamus* to compel a judge of an inferior court to allow and sign a bill of exceptions, see State v. Hawes, (Ohio,) 1 N. E. Rep. 1. And see Churchill v. Circuit Judge, (Mich.) 23 N. W. Rep. 211.

See, further, as to *mandamus* to judges of inferior courts, Prosecuting Att'y v. Judge of Recorder's Court, (Mich.) 26 N. W. Rep. 694; Chilson v. Wayne Circuit Judge, Id. 859; Barnum Wire Works Co. v. Wayne Circuit Judge, Id. 802; Abbott v. Chambers, (Mich.) 21 N. W. Rep. 911; Nederlander v. Jennison, Id. 912; York v. Ingham, (Mich.) 24 N. W. Rep. 157; Locke v. Speed, (Mich.) 28 N. W. Rep. 917; Hawkins v. Newaygo Circuit Court, (Mich.) 29 N. W. Rep. 92; Shelley v. St. Charles Co., 30 Fed. Rep. 603.

*Mandamus* will lie against a corporation to compel it to perform a specific duty, imposed by its charter or the general law, when the right to have it performed is a complete and perfect legal right, and there is no other specific adequate remedy. State v. Southern Minnesota R. R. Co., 18 Minn. 40, (Gil. 21.)

Where there are two claimants to certain shares of stock in a corporation, and the certificates are issued to the wrongful claimant, the other has an adequate remedy by action, and *mandamus* to compel the issue of certificates to him will not lie. Baker v. Marshall, 15 Minn. 177, (Gil. 136.)

A writ of *mandamus* may be granted to compel a telephone company to furnish a telephone to one entitled to it in common with the public generally. State v. Telephone Co., (Neb.) 22 N. W. Rep. 237.

See Home Ins. Co. v. Scheffer, 12 Minn. 382, (Gil. 261, 265.)

## § 3. Restriction.

See State v. Williams, 25 Minn. 340, 343.

## § 4. Alternative and peremptory writs.

The peremptory writ of *mandamus* should be issued in the first instance only upon a state of unquestionable facts, leaving no room for doubt as to the right to the performance of the act sought to be compelled, and when it is apparent and manifest that no valid excuse can be given for nonperformance. Where such is not the case the alternative writ is, in the first instance, the proper writ, or the application should be upon notice. Home Ins. Co. v. Scheffer, 12 Minn. 382, (Gil. 261.)

The supreme court has no jurisdiction to issue an alternative writ of *mandamus*. The proper practice is to apply upon notice for a peremptory writ. Harkins v. Supervisors Scott Co., 2 Minn. 342, (Gil. 294.) But see Crowell v. Lambert, 10 Minn. 369, (Gil. 295.)

A peremptory writ will be issued without notice only where the moving papers preclude the possibility of an excuse for not doing the act sought to be enforced.—Id.

Notice must be given of an application for a peremptory writ, save where the duty sought to be enforced is very clear, and public or private rights would be jeopardized by delay, and where the moving papers preclude the possibility of any valid excuse for not performing the duty. Clark v. Buchanan, 2 Minn. 346, (Gil. 298.)

## § 9. Writ and answer—Trial.

Trial by jury in *mandamus* is not within § 4, art. 1, of the constitution. State v. Sherwood, 15 Minn. 221, (Gil. 172.)

A denial in the answer to the writ of any knowledge or information sufficient to form a belief as to whether the relator had received the certificate of election will not be struck out as sham.—Id.

## § 12. Jurisdiction of district court—Mandamus to that court.

Under this section the granting of *mandamus* is within the exclusive original jurisdiction of the district court, and an order of such court denying an application for the writ is appealable. State v. Churchill, 15 Minn. 455, (Gil. 369.)

A party complaining that a statement of the case or bill of exceptions is erroneously settled should, ordinarily, in the first instance, make a regular application to the court or judge for a resettlement. Thereafter, if necessary, *mandamus* will lie to compel a correct settlement. State v. Macdonald, 30 Minn. 98, 14 N. W. Rep. 459.

See note to § 2, *supra*.

### *§ 13. Supreme and district court—Jurisdiction.

Issues of fact in any such proceeding instituted in the supreme court or in any district court [shall be tried in the district court] of the county in which the defendant may reside, or in which the material facts contained in the relation for the *mandamus* shall be alleged to have taken place, and either party shall be entitled to have any issue of fact in such proceeding tried by a jury, as in an ordinary civil action. The provisions of this act shall govern and be applicable in any such action or proceeding heretofore commenced in the supreme court in which there has not been a final hearing: *provided, always*, that except as aforesaid nothing in this act contained shall be construed so as to divest the supreme court of jurisdiction to hear and finally determine any and all such suits or proceedings now pending in said court: *and provided, further*, that any such suit or proceeding now pending in the supreme court in which there is any issue of fact which has not been finally heard or determined, the said supreme court shall, on request of the attorney of either the plaintiff or defendant in such suit or proceeding, transmit the record to the district court of the proper county, which district court shall thereupon and thereafter have jurisdiction of the case, and shall proceed to try any issue or issues therein, in the same manner and with the same effect as if such suit or proceeding had been originally commenced in such district court: *and provided, further*, that the district court in which such suit or proceeding is pending may grant a change of venue as in ordinary civil actions. (1869, *c.* 79, § 1, *as amended* 1881, *c.* 40, § 1.)

See State v. Burr, cited in note to c. 63, § 1, *supra*. State v. Town of Lake, 28 Minn. 362, 10 N. W. Rep. 17; State v. Whitcomb, 28 Minn. 50, 8 N. W. Rep. 902.

### § 14. (Sec. 13.) Appeals.

An order denying a peremptory writ of *mandamus*, though the application be heard at chambers, is appealable. State v. Churchill, 15 Minn. 455, (Gil. 369.)

An order of the district court allowing a peremptory *mandamus* is appealable under the sixth subdivision of Gen. St. 1878, *c.* 86, § 8, as "a final order affecting a substantial right, made in a special proceeding;" and hence, to such an order, § 10 of that chapter applies, so that the execution of the bond there authorized "stays all proceedings" upon the order, and "saves all rights affected thereby." State v. Webber, 31 Minn. 211, 17 N. W. Rep. 339.

## TITLE 2.

### WRITS OF PROHIBITION.

### § 15. (Sec. 14.) Issuance and contents of writ.

The writ of prohibition is issued only to restrain the exercise of judicial powers. Home Ins. Co. of St. Paul v. Flint, 13 Minn. 244, (Gil. 228.)

This court will not issue a writ of prohibition, unless it clearly appears that the inferior court is about to proceed in some matter over which it has no jurisdiction. Prignitz v. Fischer, 4 Minn. 366, (Gil. 275.) The court will not issue the writ in the first instance, but will issue an order to show cause. Id.

The writ of prohibition issues to a court only to compel it to keep within its jurisdiction. It will not lie to correct errors, or reverse illegal proceedings already had. Dayton v. Paine, 13 Minn. 493, (Gil. 454.)

A writ of prohibition ought not to issue when the aggrieved party has an ample remedy by appeal. State v. Cory, 35 Minn. 178, 28 N. W. Rep. 217.

## TITLE 3.

### WRIT OF HABEAS CORPUS.

See State v. Buckham, 29 Minn. 462, 463, 13 N. W. Rep. 902; In re Snell, 31 Minn. 110, 16 N. W. Rep. 692.

### § 23. (Sec. 22.) Application—To whom made.

The statute conferring on judges of the supreme court power to allow writs of *habeas corpus* is constitutional. State v. Grant, 10 Minn. 39, (Gil. 22.)

The supreme court has original jurisdiction of the writ. A prisoner bound over and committed by a justice of the peace, who sues out a writ of *habeas corpus* from this court, may have a *certiorari* as ancillary thereto, to bring up the testimony received by the justice and by him returned to the district court and there filed. In re Snell, 31 Minn. 110, 16 N. W. Rep. 692.

A court commissioner may allow a writ of *habeas corpus*, returnable before himself, to issue to his own county, or to an adjoining county, where there is, in such adjoining county, no officer authorized to grant such writ. State v. Hill, 10 Minn. 63, (Gil. 45.)

A decision of one court or officer upon a writ of *habeas corpus*, refusing to discharge a prisoner, is not a bar to the issue of another writ, based upon the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereupon. In re Snell, 31 Minn. 110, 16 N. W. Rep. 692. Distinguished, State v. Bechdel, 34 N. W. Rep. 334.

As to power of district judge to reverse the decision of a court commissioner in proceedings on *habeas corpus*, see State v. Bechdel, (Minn.) 37 N. W. Rep. 338.

### § 24. (Sec. 23.) Application in another county.

A court commissioner may allow a writ of *habeas corpus*, returnable before himself, to issue to his own county, or to an adjoining county, if there be no officer therein authorized to allow such writ. State v. Hill, 10 Minn. 63, (Gil. 45.)

### § 34. (Sec. 33.) Return of writ—Proceedings.

A judge of a district court has power to allow a writ of *habeas corpus* returnable before himself at chambers. Savage v. Hill, 10 Minn. 63, (Gil. 45.)

See note to § 23, *supra*.

The title of the justice issuing the commitment to hold his office cannot be questioned on *habeas corpus*. Ex parte Johnson, (Neb.) 19 N. W. Rep. 594.

Where a prisoner waives his right to a jury trial under a statute permitting such waiver, and is afterwards convicted, the validity of such statute and waiver may be tested on *habeas corpus*. In re Staff, (Wis.) 23 N. W. Rep. 587.

See In re Finlen, (Nev.) 18 Pac. Rep. 827.

### § 35. (Sec. 34.) Discharge—When granted.

A person charged with crime and held to bail by the magistrate after examination, ought not to be discharged, if the magistrate had jurisdiction, and there is evidence reasonably tending to support his determination. State v. Hayden, 35 Minn. 283, 28 N. W. Rep. 659.

It is only when the judgment is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that it can be said to be void, so as to justify the discharge of the defendant in custody thereunder. State v. Sloan, (Wis.) 27 N. W. Rep. 616. And see State v. Orton, (Iowa,) 25 N. W. Rep. 775; Willis v. Bayles, (Ind.) 5 N. E. Rep. 8; Holderman v. Thompson, (Ind.) Id. 175; U. S. v. Patterson, 29 Fed. Rep. 775.

### § 43. (Sec. 42.) Traverse of return—Allegation of new matter.

See State v. Sheriff, 24 Minn. 87, 90.

### § 46. (Sec. 45.) Re-arrest.

A discharge for defect of proof merely terminates the proceeding, so that he cannot be prosecuted except by a new proceeding instituted on sufficient evidence given therein. State v. Holm, 34 N. W. Rep. 748. The complaint and warrant for re-arrest need not be any different from what they would be if there had been no prior arrest and discharge. Id.

See In re Snell, 31 Minn. 110, 113, 16 N. W. Rep. 692.

### § 49. (Sec. 48.) Writ—When returnable—Seal.

A writ of *habeas corpus* issued by a court commissioner under his own hand and seal, but without the seal of the court, is void. State v. Barnes, 17 Minn. 340, (Gil. 315.)

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# CHAPTER 81.

## FORECLOSURE OF MORTGAGES.

### TITLE 1.

FORECLOSURE BY ADVERTISEMENT.*

### *§ 1. Foreclosure by advertisement—Limitation.

Every mortgage of real estate, heretofore or hereafter executed, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified. (1878, c. 53, § 1, *as amended* 1879, c. 21, § 1.)

Chapter 121, Gen. Laws 1877, was unconstitutional so far as it assumed to abolish foreclosures under powers of sale in mortgages executed before its passage. O'Brien v. Krenz, 36 Minn. 136, 30 N. W. Rep. 458.

Where a mortgagee, foreclosing under the power, complies with the requirements of the statute, it is sufficient, although there may be additional requirements contained in the mortgage. Butterfield v. Farnham, 19 Minn. 85, (Gil. 58.)

Where an instrument is in effect several separate and distinct mortgages upon several separate lots to secure several separate and distinct sums, although, for convenience, all are consolidated in one writing, a sale of all the lots together as one tract, for a gross sum, is unauthorized and void. Hull v. King, (Minn.) 37 N. W. Rep. 792.

### *§ 2. Prerequisites to such foreclosure.

SUBD. 3. A mortgage on lands in two counties, but recorded in only one, may be foreclosed under the power as to the lands in that county. Balme v. Wambaugh, 16 Minn. 116, (Gil. 106.)

A mortgage with but one witness, which has been legalized by a curative act, but the registration of which has not been legalized, cannot be foreclosed by advertisement. Ross v. Worthington, 11 Minn. 438, (Gil. 323.) After the registration of such a mortgage is legalized by a curative act, it may be foreclosed by advertisement. Id.

A false and impossible particular, added to the description, by mistake of the register, in recording a deed, does not vitiate the record. Thorwarth v. Armstrong, 20 Minn. 464, (Gil. 419.)

What error in the record will defeat the foreclosure, see Thorp v. Merrill, 21 Minn. 336.

Under the provisions of this section, sub. 3, it was necessary that an assignment of a mortgage, to enable the assignee to foreclose by advertisement, should be in writing. Morrison v. Mendenhall, 18 Minn. 232, (Gil. 212.)

A guardian of a minor heir cannot, without an assignment of record, foreclose by advertisement a mortgage owned by the deceased ancestor of the minor. Miller v. Clark, (Mich.) 23 N. W. Rep. 35.

See, also, Bolles v. Carli, 12 Minn. 113, (Gil. 62.)

### *§ 3. Foreclosure for installments.

This section only authorized a separate foreclosure for installments falling due subsequent to the first installment of indebtedness secured by a mortgage, and the foreclosure under such chapter, for the first installment of mortgage indebtedness, is void. Shorts v. Cheadle, 8 Minn. 67, (Gil. 44.) Where a mortgage, payable in installments, was foreclosed for the first installment, and the owner of the land redeemed from that

* See curative acts, *infra*, c. 123.