CHAPTER XLV.

OF SPECIAL PROCEEDINGS.

(*This Chapter is Chapter LXXX. of the Statutes of* 1866.)

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TITLE I.

WRIT OF MANDAMUS.

SECTION 1. *Mandamus, how regulated.*—The writ of mandamus is regulated as in this chapter prescribed.

SEC. 2. *Writ may issue, how.*—It may be issued to any inferior tribunal, corporation, board, 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 it

may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control judicial discretion.

Mandamus will issue.—To compel an incumbent to surrender insignia of office, Crowell *v.* Lambert, 10 Minn. 369; Atherton *v.* Sherwood, 15 Minn. 221. Against registers of deeds to compel him to deliver books, etc., Board of Supervisors Ramsey Co. *v.* Heenan, 2 Minn. 341. To governor as well as other officer, Chamberlain *v.* Sibley, 4 Minn. 309.

Will not issue.—To compel an unlawful act, Clark *v.* Buchanan *et al.*, 2 Minn. 347. To a public officer commanding him to perform an official duty in the absence of a previous demand, State *ex rel. v.* Davis, 17 Minn. 429. Pending appeal to restore officer to possession of office from which he has been ousted by force, Allen *v.* Robinson, *ib.* 113. Where charter of corporation imposes specific duty, and there is no other specific or adequate remedy, mandamus may issue, etc., State *ex rel. v.* So. Minn. R. Co., 18 Minn. 40.

SEC. 3. *Shall not issue if there is adequate remedy at law.*—The writ shall not issue in any case where there is a plain, speedy, and adequate remedy, in the ordinary course of law. It shall issue on the information of the party beneficially interested.

Will not lie if there is adequate remedy at law, Baker *v.* Marshall *et al.*, 15 Minn. 177.

SEC. 4. *Writ is alternative or peremptory—alternative writ shall state, what—peremptory writ shall state, what.*—The writ is either alternative or peremptory. The alternative writ shall state concisely the facts, 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 out of which the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ, with his certificate of having done as he is commanded. The peremptory writ shall be in a similar form, except that the words requiring the defendant to show cause why he has not done as commanded, shall be ommitted.

Motion for peremptory writ.—Whole subject discussed, O'Ferrall *v.* Colby *et al.*, 2 Minn. 180. Papers must be explicit, etc., Harkins *v.* Sencerbox, *ib.* 344. Peremptory writ should rarely issue in first instance, Home Ins. Co. *v.* Scheffer, 12 Minn. 382.

Supreme court has no power to issue an alternative writ, Harkins *v.* Supervisors of Scott Co., 2 Minn. 343.

SEC. 5. *Peremptory writ allowed, when.*—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 may be allowed in the first instance; in all other cases the alternative writ shall be first issued.

SEC. 6. *Allowance to be indorsed.*—The court or judge, by an indorsement on the writ, shall allow the same, designate the return day thereof, and direct the manner of service.

SEC. 7. *Answer, when and how made.*—On the return day of the alternative writ, or such further day as the court allows, the party on whom the writ is served may show cause by answer, made in the same manner as an answer to a complaint in a civil action.

SEC. 8. *On default, peremptory writ shall be allowed—issue, how tried.*—If no answer is made, a peremptory mandamus shall be allowed against the defendant; if an answer is made containing new matter, the plaintiff may, on the trial or other proceedings, avail himself of any valid objection to its sufficiency; or may countervail it by evidence either in direct denial, or by way of avoidance.

SEC. 9. *Writ and answer the only pleadings—proceedings, how governed.*—No

other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried, and further proceedings had, in the same manner as in a civil action.

SEC. 10. *Damages recoverable, when.*—If judgment is given for the plaintiff, he shall recover the damages which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay.

SEC. 11. *Court may impose fine for neglect of duty.*—Whenever a peremptory mandamus is directed to a public officer, body, or board, commanding the performance of any public duty specially enjoined by law, if it appears to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court may impose a fine, not exceeding two hundred and fifty dollars, upon every such officer or member of such body or board; such fine, when collected, shall be paid into the state treasury, and the payment of such fine is a bar to an action for any penalty incurred by such officer, or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined.

SEC. 12. *Jurisdiction of district court in cases of mandamus—jurisdiction of supreme court in certain cases.*—The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction, and in such case the supreme court or a judge thereof shall first make a rule, returnable in term, that such district court, or judge thereof, show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such rule such district court, or judge, may show cause against the rule by affidavit or record evidence, and upon the hearing thereof the supreme court shall award a peremptory writ or dismiss the rule. In case of emergency a judge of the supreme court at the time of making the rule to show cause, may also appoint a special term of the court for hearing the motion, and at which the rule shall be made returnable.

Vide following section, jurisdiction of supreme court in issuance of peremptory writ, Crowell *v.* Lambert, 10 Minn. 369.

SEC. 13 (ACT OF MARCH 5, 1869). *Supreme and district courts to have concurrent jurisdiction—may appoint referee.*—The supreme court of this state shall have original concurrent jurisdiction with the district courts in all cases of mandamus, and such writ may be allowed by the court or any judge thereof in term time or vacation, and may be made returnable and heard at a general or special term of said court, or at any time in vacation, as the judge or court allowing the same may determine. In case any substantial issue of fact is raised in a proceeding commenced in the supreme court, the said court or judge thereof may appoint a referee to take and report the testimony, and upon the coming in of the report, the court shall proceed to determine the matter so that speedy justice may be done in the premises.

S. L. 1869, 95.

SEC. 14 (13). *Appeal.*—An appeal lies to the supreme court from the district court in mandamus as in civil actions.

TITLE II.

WRITS OF PROHIBITION.

SEC. 15 (14). *Issuance and contents of writs of prohibition.*—Writs of prohibition shall only be issued out of the supreme court, and shall be applied for upon affidavit, by motion to the court, or a judge thereof in vacation, and if the cause shown appears to the court or judge to be sufficient, a writ shall be thereupon issued, which shall command the court and party, or officer to whom it is directed, to desist and refrain from any further proceedings in the action or matter specified therein, until the next term of said supreme court, or the further order of the court thereon; and to show cause at the next term of said court, or some day to be named in the same term at the option of the court, if issued in term time, why they should not be absolutely restrained from any further proceedings in such action or matter.

Office of the writ will only arrest proceedings, Dayton *et al. v.* Paine *et al.*, 13 Minn. 493. Restrains judicial proceedings only, Home Ins. Co. *v.* Flint, 13 Minn. 244. Will only issue in the first instance as an order to show cause, etc. Prignitz, *v.* Fischer, 4 Minn. 366.

SEC. 16 (15). *How served and returned.*—Such writ shall be served upon the court and party or officer to whom it is directed, in the same manner as a writ of mandamus; and a return shall be made thereto by such court or officer, which may be enforced by attachment.

SEC. 17 (16). *Effect of adoption of return—issue, how determined.*—If the party to whom such writ is directed, shall, by an instrument in writing, to be signed by him and annexed to such return, adopt the same return, and rely upon the matters therein contained, as sufficient cause why such court should not be restrained, as mentioned in said writ, such party shall thenceforth be deemed the defendant in such proceeding, and the person prosecuting such writ may take issue, or demur to the matters so relied upon by such defendant.

SEC. 18 (17). *Proceedings when return is not adopted.*—If the party to whom such writ is directed shall not adopt such return, the party prosecuting such writ shall bring on the argument of such return, as upon a rule to show cause; and he may, by his own affidavit, and other proofs, controvert the matters set forth in such return.

SEC. 19 (18). *Judgment, how rendered.*—The court, after hearing the proofs and allegations of the parties, shall render judgment, either that a prohibition absolute, restraining the said court and party, or officer, from proceeding in such action or matter, do issue, or a writ of consultation authorizing the court and party, or officer, to proceed in the action or matter in question; and may make and enforce such order in relation to costs and charges, and the amount thereof, as may be deemed just.

SEC. 20 (19). *Prohibition absolute granted, when.*—If the party to whom such first writ of prohibition is directed, adopts the return of the court thereto, and judgment is rendered for the party prosecuting such writ, a prohibition absolute shall be issued, but if judgment is given against such party, a writ of consultation shall be issued as above provided.

TITLE III.

WRIT OF HABEAS CORPUS.

SEC. 21 (20). *Who may prosecute writ.*—Every person imprisoned or otherwise restrained of his liberty, except in the cases in the following section specified, may prosecute a writ of habeas corpus, according to the provisions of this title (chapter), to obtain relief from such imprisonment or restraint, if it proves to be unlawful.

SEC. 22 (21). *Who not entitled to prosecute.*—The following persons are not entitled to prosecute such writ: persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or decree; but no order of commitment for any alleged contempt, or upon proceedings as for contempt, to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section; nor shall any attachment or other process issued upon any such order, be deemed an execution within the meaning of this section.

SEC. 23 (22). *Application, how and where made.*—Application for such writ shall be made by petition, signed and verified either by the party for whose relief it is intended, or by some person in his behalf, as follows: to the supreme or district court, or to any judge thereof being within the county where the prisoner is detained; or if there is no such officer within such county, or if he is absent, or from any cause is incapable of acting, or has refused to grant such writ, then to some officer having such authority residing in any adjoining county.

Statute is not in conflict with constitution, State *v.* Grant, 10 Minn. 39. Court commissioner has power to grant writ returnable before himself, State *v.* Hill, *ib.* 63. A pretended writ under seal of court commissioner is unauthorized and void, State *ex rel. v.* Barnes, 17 Minn. 340.

SEC. 24 (23). *Proof required in certain cases.*—Whenever application for any such writ is made to any officer not residing within the county where the prisoner is detained, he shall require proof by the oath of the party applying, or by other sufficient evidence, that there is no officer in such county authorized to grant the writ; or if there is one, that he is absent, or has refused to grant such writ; or for some cause, to be specially set forth, is incapable of acting, and if such proof is not produced, the application shall be denied.

SEC. 25 (24). *Petition shall state, what.*—The petition shall state in substance:

First. That the person in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming both parties, if their names are known, or describing them if they are not.

Second. That such person is not committed or detained by virtue of any process, judgment, decree, or execution, specified in the twenty-second (twenty-first) section of this chapter.

Third. The cause or pretence of such confinement or restraint, according to the knowledge or belief of the party verifying the petition.

Fourth. If the confinement or restraint is by virtue of any warrant, order, or

process, a copy thereof shall be annexed, or it shall be averred that by reason of such prisoner being removed or concealed before application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused.

Fifth. If the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists.

SEC. 26 (25). *Form of writ.*—Every writ of habeas corpus, issued under the provisions of this title (chapter), shall be substantially in the following form:

The State of Minnesota, to the sheriff of, etc., (or to A. B.)

"You are hereby commanded to have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. shall be called or charged, before E. F., judge of the district court, as, etc. (or immediately after the receipt of this writ), to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

"Witness, etc."

SEC. 27 (26). *Writ sufficient, when.*—Such writ of habeas corpus shall not be disobeyed for any defect of form. It is sufficient:

First. If the person having the custody of the prisoner 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 any one who may be served with the writ, shall be deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

Second. 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.

SEC. 28 (27). *Refusal to grant writ—penalty.*—If any officer herein authorized to grant writs of habeas corpus, willfully refuses to grant such writ when legally applied for, he shall forfeit for every such offense, to the party aggrieved, one thousand dollars.

SEC. 29 (28). *Return to writ shall contain, what.*—The person upon whom any such writ is duly served, shall state in his return plainly and unequivocally:

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

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

Third. 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 officer before whom the same is returnable.

Fourth. If the person upon whom such writ is served, has had the party in his

control 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 such transfer took place.

The return shall be signed by the person making the same, and except where such person is a sworn public officer, and makes his return in his official capacity, it shall be verified by oath.

SEC. 30 (29). *Body of person in custody to be produced—exception.*—The person or officer, on whom the writ is served, shall bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person as hereinafter provided.

Sec. 31 (30). *Disobedience to writ—penalty.*—If the person upon whom such writ is duly served, refuses or neglects to obey the same, by producing the party named in such writ, and making a full and explicit return to every such writ within the time required by the provisions of this title (chapter), and no sufficient excuse is shown for such refusal or neglect, the officer before whom such writ is returnable, upon due proof of the service thereof, shall forthwith issue an attachment against such person, directed to the sheriff of any county in this state, and commanding him forthwith to apprehend such person, and to bring him immediately before such officer; and on such person being so brought, he shall be committed to close custody in the jail of the county in which such officer is, until he makes return to such writ, and complies with any order that may be made by such officer, in relation to the person for whose relief such writ was issued.

Sec. 32 (31). *Attachment directed to and executed by coroner, when.*—If a sheriff neglects to return such writ, the attachment may be directed to any coroner or other person 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.

SEC. 33 (32). *Precept to sheriff.*—The officer by whom any such attachment is issued, may also at the same time, or afterward, issue a precept to the sheriff, or other person to whom such attachment was directed, commanding him to bring forthwith before such officer the party for whose benefit such writ was allowed, who shall thereafter remain in the custody of such sheriff or person, until he is discharged, bailed, or remanded as such officer directs.

SEC. 34 (33). *Proceedings on return of writ.*—The officer before whom the party is brought on such writ shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement, or restraint of such party, whether the same was upon commitment for any criminal charge or not.

Vide State *v.* Hill, 10 Minn. 63, *supra.*

SEC. 35 (34). *Party discharged, when.*—If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such officer shall discharge such party from the custody or restraint under which he is held.

SEC. 36 (35). *Party remanded, when.*—The officer shall forthwith remand such party, if it appears that he is detained in custody, either:

First. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

Second. By virtue of the final judgment or decree of any competent court of

civil or criminal jurisdiction, or of any execution, issued upon such judgment or decree; or,

Third. 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,

Fourth. That the time during which such party may be legally detained has not expired.

SEC. 37 (36). *Prisoner held under process of court, discharged, when.*—If it appears on the return, that the prisoner is in custody by virtue of 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 can only be discharged in one of the following cases:

First. When the jurisdiction of such court or officer has been exceeded either as to matter, place, sum, or person;

Second. Where, though the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterward, the party is entitled to be discharged;

Third. Where the process is defective in some matter of substance required by law, rendering such process void;

Fourth. Where the process, though in proper form, has been issued in a case not allowed by law;

Fifth. Where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him; or,

Sixth. Where the process is not authorized by any judgment, order, or decree of any court, nor by any provision of law.

SEC. 38 (37). *Legality, etc., of judgment not to be inquired into.*—But no officer on the return of any habeas corpus, can inquire into the legality or justice of any judgment, decree, or execution, specified in the preceding twenty-first section.

SEC. 39 (38). *Prisoner held on commitment may be remanded or let to bail.*—If it appears that the party has been legally committed for any criminal offense, or if he appears, by the testimony offered with the return, upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the officer before whom such party is brought shall proceed to let such party to bail, if the case is bailable and good bail is offered, or if not, shall forthwith remand such party.

SEC. 40 (39). *Proceedings in other cases.*—In other cases the party shall be placed in custody of the person legally entitled thereto, or, if no one is so entitled, he shall be discharged.

SEC. 41 (40). *Custody of party before judgment.*—Until judgment is given upon the return, the officer before whom such party is brought, may either commit such party to the custody of the sheriff of the county in which such officer is, or place him in such care, or under such custody, as his age and other circumstances require.

SEC. 42 (41). *Notice to county attorney and party interested.*—In criminal cases notice of the time and place, at which the writ is made returnable, shall be given to the county attorney, if he is within the county; in other cases like notice shall be given to any person interested in continuing the custody or restraint of the party seeking the aid of said writ.

SEC. 43 (42). *Return to writ may be put in issue, or new matter alleged.*—The

party brought before any such officer, on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such officer shall proceed in a summary way to hear such allegations and proofs as are legally produced in support of such imprisonment or detention, or against the same, and to dispose of such party as justice requires.

SEC. 44 (43). *Proceedings in case of sickness of party directed to be produced.*—Whenever from the sickness or infirmity of the person directed to be produced by any writ of habeas corpus, such person cannot, without danger, be brought before the officer before whom the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ, verifying the same by his oath; and if such officer is satisfied of the truth of such allegation, and the return is otherwise sufficient, he shall proceed to decide upon such return, and to dispose of the matter; and if it appears that the person detained is illegally imprisoned, confined, or restrained of his liberty, the officer shall order those having such person in their custody, to discharge him forthwith; and if it appears that such person is legally detained, imprisoned, or confined, and is not entitled to be bailed, such officer shall dismiss the proceedings.

SEC. 45 (44). *Obedience to order of discharge, how enforced.*—Obedience to any order for the discharge of any prisoner, granted pursuant to the provisions of this title (chapter), may be enforced by the officer issuing such writ, or granting such order, by attachment, in the same manner as herein provided for a neglect to make a return to a writ of habeas corpus, and the person guilty of such disobedience shall forfeit to the party aggrieved one thousand dollars, in addition to any special damages such party may have sustained.

SEC. 46 (45). *Person discharged may be again arrested, when.*—No person who has been discharged upon a habeas corpus shall be again imprisoned or restrained for the same cause, unless indicted therefor, convicted thereof, or committed for want of bail, by some court of record having jurisdiction of the cause; or unless after a discharge for defect of proof, or for some material defect in the commitment in a criminal case, he is again arrested on sufficient proof and committed by legal process.

SEC. 47 (46). *Transfer or concealment of person entitled to writ—penalty.*—If any one who has in his custody, or under his control, a person entitled to a writ of habeas corpus, whether a writ has been issued or not, transfers such prisoner to the custody or places him under the power or control of another person, or conceals him, or changes the place of his confinement with intent to elude the service of such writ, or to avoid the effect thereof, the person so offending shall forfeit to the party aggrieved thereby the sum of four hundred dollars, to be recovered in a civil action.

SEC. 48 (47). *Forfeiture for refusing copy of order, etc.*—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 any one who demands such copy and tenders the fees thereof, shall forfeit two hundred dollars to the person so detained.

SEC. 49 (48). *Writ, when returnable.*—Every writ of habeas corpus may be made returnable at a day certain, or forthwith, as the case may require, and shall be under the seal of the court.

State *ex rel. v.* Barnes, 17 Minn. 340, *supra.*

SEC. 50 (49). *By whom served—service complete, when.*—It can only be served by an elector of this state, and the service thereof shall not be deemed complete unless the party serving the same tenders to the person in whose custody the prisoner is, if such person is a sheriff, coroner, constable, or marshal, the fees allowed by law for bringing up such prisoner. The officer granting the writ may in his discretion require a bond in a penalty not exceeding one thousand dollars, with sufficient sureties, conditioned that the obligors will pay all costs and expenses of the proceeding and the reasonable charges of restoring the prisoner to the person from whose custody he was taken, if he is remanded. Such bond shall run to the sheriff of the county and be filed in the office of the clerk of the court from which the writ issues.

SEC. 51 (50). *Writ, how served.*—Every writ of habeas corpus issued pursuant to this chapter, may be served by delivering the same to the person to whom it is directed; if he cannot be found it may be served by being left at the jail, or other place in which the prisoner is confined, with any under officer or other person of proper age having charge, for the time, of such prisoner.

SEC. 52 (51). *How served if person conceals himself.*—If the person on whom the writ ought to be served conceals himself, or refuses admittance to the party attempting to serve the same, it may be served by affixing the same in some conspicuous place on the outside, either of his dwelling-house or of the place where the party is confined.

SEC. 53 (52). *Return to be made, when.*—If the writ is returnable at a certain day, such return shall be made, and such prisoner produced at the time and place specified therein; if it is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made, and such prisoner produced within twenty-four hours; and the like time shall be allowed for every additional twenty miles.

SEC. 54 (53). *Court may issue writ to bring up prisoner to testify.*—Nothing contained in this title (chapter) shall be construed to restrain the power of any court to issue a writ of habeas corpus, when necessary to bring before them any prisoner for trial, in any criminal case lawfully pending in the same court, or to bring any prisoner to be examined as a witness in any action or proceeding, civil or criminal, pending in such court, when they think the personal attendance and examination of the witness necessary for the attainment of justice.