CHAPTER 65.

HABEAS CORPUS.

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AN ACT to revise the law in relation to *habeas corpus*.
Approved March 2, 1874. In force July 1, 1874. R. S. 1874, p. 565.

Paragraph 1. Who may have writ.] SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That every person imprisoned or otherwise restrained of his liberty, except as herein otherwise provided, may prosecute a writ of *habeas corpus* in the manner provided in this Act, to obtain relief from such imprisonment or restraint, if it prove to be unlawful.

In lieu of part of R. S. 1845, p. 269, § 1.

For cases in which writ lies in favor of prisoner in custody under order of court, see ¶ 22, *infra*.

Our statute *held* adopted from St. 31 Car. II., ch. 2, and St. 56 Geo. III., ch. 100, and English constructions followed. Hammond *v.* P., 32 — 446.

Where party was sued civilly by his Christian name only, and arrested and held on *capias ad satisfaciendum* under such name, *held* that error in name was not ground for *habeas corpus*. Hammond *v.* P., 32 — 446.

Habeas corpus will lie to release child who is confined in reform school without fault on his part. P. *v.* Turner, 55 — 280. But see *In re* Ferrier, 103 — 367.

State court cannot issue *habeas corpus* to take prisoner out of custody of United States marshal, or out of custody of State officer, if prisoner is under sentence of United States court in prison of State. Ableman *v.* Booth, 62 U. S. (21 How.), 506.

¶ 2. Petition — Affidavit.] § 2. Application for the writ shall be made to the court or judge authorized to issue the same, by petition signed by the person for whose relief it is intended, or by some person in his behalf, and verified by affidavit.

In lieu of part of R. S. 1845, p. 269, § 1.

¶ 3. Petition — Contents.] § 3. The petition shall state in substance:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, and the place where — naming all the parties if they are known, or describing them if they are not known.

2. The cause or pretense of the restraint, according to the best knowledge and belief of the applicant, and that such person is not committed or detained by virtue of any process, judgment, decree or execution specified in the twenty-first section of this Act.

3. If the commitment or restraint is by virtue of any warrant or writ 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.

In lieu of part of R. S. 1845, p. 269, § 1.

See *Criminal Code*, ch. 38, *supra*, ¶ 431.

Petition should set out evidence on which commitment was made, or presumptions will be made in favor of officer's conduct. *Ex parte* Clepper, 26 — 532.

¶ 4. Copy of mittimus.] § 4. Any sheriff or other officer or person having custody of any prisoner committed on any civil or criminal process of any court or magistrate, who shall neglect to give such prisoner a copy of the process or order of commitment by which he is imprisoned within six hours after demand made by the prisoner, or any one on his behalf, shall forfeit to the prisoner or party aggrieved not exceeding $500.

Text is R. S. 1845, p. 273, § 15, rewritten.

¶ 5. Award of writ — Penalty for not issuing.] § 5. Unless it shall appear from the petition itself, or from the documents thereto annexed, that the party can neither be discharged, admitted to bail nor otherwise relieved, the court or judge shall forthwith award a writ of *habeas corpus*.* Any judge empowered to issue writs of *habeas corpus* who shall corruptly refuse to issue any such writ, when legally applied for in a case where it may lawfully issue, or who shall for the purpose of oppression unreasonably delay the issuing of such writ, shall, for every such offense, forfeit to the prisoner or party aggrieved a sum not exceeding $1,000.

Part preceding asterisk (*) is taken from R. S. 1845, p. 269, § 1. Part following asterisk (*) is *Id.*, p. 273, § 12, rewritten.

¶ 6. Writ — Form.] § 6. If the writ is allowed by a court it shall be issued by the clerk under the seal of the court; if by a judge, it shall be under his hand, and shall be directed to the person in whose custody or under whose restraint the prisoner is, and may be substantially in the following form, to wit:

The People of the State of Illinois, to the Sheriff of —— County (or, 'to A B.' as the case may be):

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 said C D shall be called or charged, before —— court of —— county, (or before E F, judge of, etc.), at, etc., immediately after being served with this writ, to be dealt with according to law; and have you then and there this writ, with a return thereon of your doings in the premises.

First part is taken from R. S. 1845, p. 269, § 1.

¶ 7. —— Indorsement.] § 7. To the intent that no officer or person to whom such writ is directed may pretend ignorance thereof, every such writ shall be indorsed with these words: "By the *habeas corpus* Act."

Taken from R. S. 1845, p. 269, § 1.

¶ 8. Subpœnas — Service.] § 8. When the party has been committed upon a criminal charge, unless the court or judge shall deem it unnecessary, a *subpœna* shall also be issued to summon the witnesses whose names have been indorsed upon the warrant of commitment, to appear before such court or judge at the time and place when and where such *habeas corpus* is returnable, and it shall be the duty of the sheriff, or other officer to whom the *subpœna* is issued, to serve the same, if it be possible, in time to enable such witnesses to attend.

Taken from R. S. 1845, p. 193, § 214, title "Criminal Jurisprudence."

Hearing on this writ is a criminal case. Witness entitled to fees as in such case, under ch. 53, ¶ 47. Angell *v.* Union County, 8 Ill. App. (8 Brad.), 244.

¶ 9. Habeas corpus — Who may serve — Penalty.] § 9. The *habeas corpus* may be served by the sheriff, coroner or any constable or other person appointed for that purpose by the court or judge by whom it is issued or allowed; if served by a person not an officer, he shall have the same power, and be liable to the same penalty for non-performance of his duty, as though he were sheriff.

¶ 10. —— On whom served — Manner of service.] § 10. Service shall be made by leaving a copy of the original writ with the person to whom it is directed, or with any of his under officers who may be at the place where the prisoner is detained; or if he cannot be found, or has not the person imprisoned or restrained in custody, the service may be made upon any person who has him in custody with the same effect as though he had been made a defendant therein.

¶ 11. Expense of bringing prisoner — Judge's certificate — Poor person.] § 11. When the person confined or restrained is in the custody of a civil officer, the court or judge granting the writ shall certify thereon the sum to be paid for the expense of bringing him from the place of imprisonment, not exceeding ten cents per mile, and the officer shall not be bound to obey it unless the sum so certified is paid or tendered to him, and security is given to pay the charges of carrying him back if he should be remanded: *Provided*, that if such court or judge shall be satisfied that the person so confined or restrained is a poor person and unable to pay such expense, then such court or judge shall so certify on such writ, and in such case no tender or payment of ex-

penses need be made or security given as aforesaid, but the officer shall be bound to obey such writ.

¶ 12. Return — Contents.] § 12. The officer or person upon whom such writ is served shall state in his return, plainly and unequivocally:

1. 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 control, or under his restraint, at any and what time prior or subsequent to the date of the writ.

2. 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.

3. 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 same is returnable.

4. If the person upon whom the writ is served has had the party in his custody or control, 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 the return in his official capacity, it shall be verified by oath.

¶ 13. Body must be brought — Exception.] § 13. The officer or person making the return, shall, at the same time, bring the body of the party, if in his custody or power, or under his restraint, according to the command of the writ, unless prevented by the sickness or infirmity of the party.

Taken from R. S. 1845, p. 269, § 1.

¶ 14. Sickness of prisoner — Examination.] § 14. When, from the sickness or infirmity of the party, he cannot, without danger, be brought to the place appointed for the return of the writ, that fact shall be stated in the return, and if it is proved to the satisfaction of the judge, he may proceed to the jail or other place where the party is confined, and there make his examination, or he may adjourn the same to such other time, or make such other order in the case as law and justice require.

¶ 15. Neglect to obey writ — Proof of service — Attachment.] § 15. If the officer or person upon whom such writ is 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 by this Act, and no sufficient excuse is shown for such refusal or neglect, the court or judge before whom the writ is returnable, upon proof of the service thereof, shall enforce obedience by attachment as for contempt, and the officer or person so refusing or neglecting shall forfeit to the party aforesaid a sum not exceeding $500, and be incapable of holding office.

In lieu of R. S. 1845, p. 273, § 13.

¶ 16. Writ to take body from delinquent officer.] § 16. The court or judge may also, at the same time or afterwards, issue a writ to the sheriff or other person to whom such attachment is directed, commanding him to bring forthwith before the court or judge the party for whose benefit the writ was allowed, who shall thereafter remain in the custody of such sheriff, or other person, until he is discharged, bailed or remanded, as the court or judge shall direct.

¶ 17. Emergency — Officer serving writ to take body — Arrest.] § 17. Whenever it shall appear by the complaint, or by affidavit, that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be taken out of the jurisdiction of the court or judge before whom the application for a *habeas corpus* is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause the writ to be directed to the sheriff or other proper officer, commanding him to take the prisoner thus held in custody or restraint, and forthwith bring him before the court or judge to be dealt with according to law. The court or judge may also, if the same is deemed necessary, insert in the writ a command for the apprehension of the person charged with causing the illegal restraint. The officer shall execute the writ by bringing the person therein named before the court or judge, and the like return and proceedings shall be required and had as in other writs of *habeas corpus*.

¶ 18. Examination — Adjournments.] § 18. Upon the return of a writ of *habeas corpus*, the court or judge shall, without delay, proceed to examine the cause of the imprisonment or restraint, but the examination may be adjourned from time to time as circumstances require.

In lieu of part of R. S. 1845, p. 270, § 3.

¶ 19. ——— Issue by sworn denial — Summary hearing.] § 19. The party imprisoned or restrained may deny any of the material facts set forth in the return, and may allege any other facts that may be material in the case, which denial or allegation shall be on oath; and the court or judge shall proceed in a summary way to examine the cause of the imprisonment or restraint, hear the evidence produced by any person interested or authorized to appear, both in support of such imprisonment or restraint and against it, and thereupon shall dispose of the party as the case may require.

Part of R. S. 1845, p. 270, § 3.

No distinction between order of court in session and by judge in vacation. Hammond *v.* P., 32 — 446.

¶ 20. Amendments.] § 20. The return, as well as any denial or allegation, may be amended at any time by leave of the court or judge.

R. S. 1845, p. 270, § 3, rewritten.

Writ of error does not lie on refusal to discharge on *habeas corpus*. *Ex parte* Thompson, 93 — 89.

Writ of error will not lie to judgment on *habeas corpus* discharging petitioner. Hammond *v.* P., 32 — 446; Wallace *v.* Cleary, 5 Ill. App. (5 Brad.), 384.

But lies to review judgment against sheriff for costs of *habeas corpus* proceedings on such release. Sheriff not liable therefor. Hammond *v.* P., *supra*.

¶ 21. No discharge, when.] § 21. No person shall be discharged under the provisions of this Act, if he is in custody either —

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

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, unless the time during which such party may be legally detained has expired; or,

3. For any treason, felony or other crime committed in any other State or Territory of the United States, for which such person ought, by the Constitu-

tion and laws of the United States, to be delivered up to the executive power of such State or Territory.

In lieu of part of R. S. 1845, p. 273, § 8.

¶ 22. Prisoner under process of court — Grounds for discharge.] § 22. If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person.

Habeas corpus lies to discharge prisoner confined under void judgment in criminal case. P. *v.* Whitson, 74 — 20.

2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

Habeas corpus lies to discharge person confined for contempt under order and *mittimus*, which do not specify time during which he is to be confined. P. *v.* Pirfenbrink, 96 — 68.

4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a *habeas corpus*, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted.

Taken from R. S. 1845, p. 270, § 3.

If applicant in custody under order of court does not bring himself within some of the above provisions, supreme court has no power to discharge him on *habeas corpus*. P. *v.* Foster, 104 — 156.

¶ 23. New commitment — Witnesses — Recognizances — Penalty.] § 23. In all cases where the imprisonment is for a criminal, or supposed criminal matter, if it appears to the court or judge that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court or judge shall make a new commitment in proper form, and direct it to the proper officer, or admit the party to bail if the case is bailable.* The court or judge shall also, when necessary, take the recognizance of all material witnesses against the prisoner, as in other cases. The recognizances shall be in the form provided by law, and returned as other recognizances. If any judge shall neglect or refuse to bind any such prisoner or witness by recognizance, or to return a recognizance when

taken as aforesaid, he shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

Part preceding asterisk (*) is taken from R. S. 1845, p. 270, § 3. Part following asterisk (*) is in lieu of part of *Id.*, § 4, p. 271.

¶ 24. Remanding order — Effect as evidence.] § 24. When any prisoner brought up on a *habeas corpus* shall be remanded to prison, it shall be the duty of the court or judge remanding him to make out and deliver to the sheriff, or other person to whose custody he shall be remanded, an order in writing, stating the cause of remanding him. If such prisoner shall obtain a second writ of *habeas corpus*, it shall be the duty of such sheriff, or other person to whom the same shall be directed, to return therewith the order aforesaid; and if it shall appear that the said prisoner was remanded for an offense adjudged not bailable, it shall be taken and received as conclusive, and the prisoner shall be remanded without further proceedings.

Text is R. S. 1845, p. 271, § 5, rewritten.

¶ 25. Second habeas corpus — Power of court.] § 25. It shall not be lawful for any court or judge, on a second writ of *habeas corpus* obtained by such prisoner, to discharge the said prisoner, if he is clearly and specifically charged in the warrant of commitment with a criminal offense; but the said court or judge shall, on the return of such second writ, have power only to admit such prisoner to bail where the offense is bailable by law, or remand him to prison where the offense is not bailable, or being bailable, where such prisoner shall fail to give the bail required.

Identical with R. S. 1845, p. 271, § 6.

¶ 26. Discharge bars future imprisonment for same cause — Exception.] § 26. No person who has been discharged by order of the court or judge, on a *habeas corpus*, shall be again imprisoned, restrained or kept in custody for the same cause, unless he be afterward indicted for the same offense, nor unless by the legal order or process of the court wherein he is bound by recognizance to appear. The following shall not be deemed to be the same cause:

1. If, after a discharge for a defect of proof, or any material defect in the commitment, in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offense.

2. If, in a civil suit, the party has been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same cause of action.

3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned if the cause be legal and the forms required by law observed.

Is R. S. 1845, p. 271, § 7.

Where person is wrongfully discharged on *habeas corpus*, supreme court cannot correct error of trial court, and person is not liable to second imprisonment except as herein provided. Hammond *v.* P., 32 — 446.

Release for defect in form of writ does not prevent subsequent arrest when defects are removed. Hammond *v.* P., 32 — 446.

¶ 27. Re-arrest of discharged person — Penalty.] § 27. Any person who, knowing that another has been discharged by order of a competent judge or tribunal on a *habeas corpus*, shall, contrary to the provisions of this Act,

arrest or detain him again for the same cause which was shown on the return of such writ, shall forfeit $500 for the first offense, and $1,000 for every subsequent offense.

Is R. S. 1845, p. 273, § 16.

¶ 28. Not to be removed from county, when — Exception.] § 28. To prevent any person from avoiding or delaying his trial, it shall not* be lawful to remove any prisoner on *habeas corpus* under this Act out of the county in which he is confined, within fifteen days next preceding the term of the court at which such person ought to be tried, except it be to convey him into the county where the offense with which he stands charged is properly cognizable.

Is R. S. 1845, p. 272, § 10. Word "not" at asterisk (*) does not appear in State edition of 1874, but is contained in official copy of laws in office of Secretary of State.

¶ 29. Changing custody — Penalty — Exceptions.] § 29. Any person being committed to any prison, or in the custody of any sheriff or other officer or person for any criminal or supposed criminal matter, shall not be removed therefrom into any other prison or custody, unless it be by *habeas corpus* or some other legal writ, or when it is expressly allowed by law. If any person shall remove, or cause to be removed any prisoner so committed, except as above provided, he shall forfeit to the party aggrieved a sum not exceeding $300.

Taken from R. S. 1845, p. 272, § 11.

¶ 30. Avoiding writ — Penalty.] § 30. Any one having a person in his custody, or under his restraint, power or control, for whose relief a writ of *habeas corpus* is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody or place him under the control of another, or shall conceal him, or change the place of his confinement, with intent to avoid the operation of such writ, or with intent to remove him out of the State, shall forfeit for every such offense $1,000, and may be imprisoned not less than one year nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of *habeas corpus* had issued at the time of the removal, transfer or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.

R. S. 1845, p. 273, § 14, rewritten.

¶ 31. Penalties — How recovered — Beneficiary.] § 31. All the pecuniary forfeitures incurred under this Act shall inure to the use of the party for whose benefit the writ of *habeas corpus* issued, and shall be sued for and recovered with costs, by the Attorney-General or State's attorney, in the name of the State, by information; and the amount, when recovered, shall, without any deduction, be paid to the party entitled thereto.

Is R. S. 1845, p. 274, § 17.

¶ 32. Pleading — Evidence.] § 32. In any action or suit for any offense against the provisions of this Act, the defendant may plead the general issue, and give the special matter in evidence.

Text is R. S. 1845, p. 274, § 18, rewritten.

¶ 33. Civil suit not barred by recovery of penalty.] § 33. The recovery of the said penalties shall be no bar to a civil suit for damages.

Identical with R. S. 1845, p. 274, § 19.

¶ 34. Habeas corpus for testimony, surrender or trial.] § 34. The several courts having authority to issue writs of *habeas corpus*, may issue the same when necessary to bring before them any prisoner to testify, or to be surrendered in discharge of bail, or for trial upon any criminal charge lawfully pending in the same court; and the writ may run into any county in the State, and there be executed and returned by any officer to whom it is directed.

Taken from R. S. 1845, p. 274, § 20.

¶ 35. ——— Object accomplished — Prisoner remanded or punished.] § 35. After any such prisoner shall have given his testimony, or been surrendered, or his bail discharged, or he has been tried for the crime with which he is charged, he shall be returned to the jail or other place of confinement whence he was taken for the purpose aforesaid: *Provided*, if such prisoner is convicted of a crime punishable with death or imprisonment in the penitentiary, he may be punished accordingly; but in any case where the prisoner shall have been taken from the penitentiary, and his punishment is by imprisonment, the time of such imprisonment shall not commence to run until the expiration of his time of service under any former sentence.

Part preceding *proviso* is taken from R. S. 1845, p. 274, § 20.

¶ 36. Prisoner under money decree, when discharged — Effect.] § 36. Any person imprisoned for any contempt of court for the non-performance of any order or decree for the payment of money, shall be entitled to a writ of *habeas corpus*, and if it shall appear, on full examination of such person and such witnesses, and other evidence as may be adduced, that he is unable to comply with such order or decree, or to endure the confinement, and that all persons interested in the order or decree have had reasonable notice of the time and place of trial, the court or judge may discharge him from imprisonment, but no such discharge shall operate to release the lien of such order or decree, but the same may be enforced against the property of such person by execution.

Text is L. 1852, p. 123, § 1, rewritten.

See *Justices and Constables*, ch. 79, ¶¶ 122, 123, *infra*.

WHAT IS CONTEMPT.

Disobedience of peremptory *mandamus* is contempt. P. *v.* Pearson, 4 — (3 Scam.), 270; P. *v.* Salomon, 54 — 39.

Supreme court will award attachment against circuit judge, who disregards peremptory *mandamus* and treats service of such writ upon him as contempt. P. *v.* Pearson, 4 — (3 Scam.), 270.

Publication of newspaper article, censuring judge and juror, is not contempt. Stuart *v.* P., 4 — (3 Scam.), 395.

Justice of peace disregarding mandate of *certiorari* liable to attachment for contempt. Gallimore *v.* Dazey, 12 — 143.

Taking property by defendant in replevin, after proper delivery to plaintiff by officer, is contempt. P. *v.* Neill, 74 — 68.

WHAT IS NOT CONTEMPT.

Clerk of court is not liable to be punished for contempt is not obeying order of court to turn over records to successor improperly appointed by court. *Ex parte* Thatcher, 7 — (2 Gil.), 167.

Newspaper article reflecting upon past action of grand jury is not contempt. Storey *v.* P., 79 — 45.

Refusal of constable, holding property under execution, to deliver it to sheriff acting under writ of replevin, is not contempt. Horr *v.* P., 95 — 169.

GENERALLY.

Prior statute (Gale, 173), providing that courts shall have power to punish for contempts offered to them while sitting as such, *held* to limit English doctrine of constructive contempts. Stuart *v.* P., 4 — (3 Scam.), 395.

Judge cannot discharge himself of contempt by resigning his office. P. *v.* Pearson, 4 — (3 Scam.), 270.

People are not allowed appeal or writ of error in contempt proceeding. P. *v.* Neill, 74 — 68.

Order committing person for contempt "until the further order of the court" is void. P. *v.* Pirfenbrink, 96 — 68.

FORMER ACTS.

For prior general Acts, see:

AN ACT regulating proceedings on writs of *habeas corpus*. R. L. 1827, p. 236, January 22, June 1; same, R. L. 1833, p. 322.

R. S. 1845, ch. 48, "*Habeas Corpus*," p. 269.

to amend law relating to contempts of court. 2 L. 1852, p. 123, June 22.