292.35 History: R. S. 1849 c. 124 s. 38; R. S. 1858 c. 158 s. 38; R. S. 1878 s. 3440; Stats. 1898 s. 3440; 1925 c. 4; Stats. 1925 s. 292.35.

292.36 History: R. S. 1849 c. 124 s. 39; R. S. 1858 c. 158 s. 39; R. S. 1878 s. 3441; Stats. 1898 s. 3441; 1925 c. 4; Stats. 1925 s. 292.36.

292.37 History: R. S. 1849 c. 124 s. 40; R. S. 1858 c. 158 s. 40; R. S. 1878 s. 3442; Stats. 1898 s. 3442; 1925 c. 4; Stats. 1925 s. 292.37.

292.38 History: R. S. 1849 c. 124 s. 31; R. S. 1858 c. 158 s. 31; R. S. 1878 s. 3443; Stats. 1898 s. 3443; 1925 c. 4; Stats. 1925 s. 292.38; 1935 c. 483 s. 158.

Sec. 3443, R. S. 1878, does not apply to the case of a child taken by habeas corpus from the custody of one parent on petition of the other, to whom its custody has been awarded, and afterwards again detained in custody of the parent in whose care it first was. Beyer v. Vanderkuhlen, 48 W 320, 4 NW 354.

292.39 History: R. S. 1849 c. 124 s. 32; R. S. 1858 c. 158 s. 32; R. S. 1878 s. 3444; Stats. 1898 s. 3444; 1925 c. 4; Stats. 1925 s. 292.39; 1935 c. 483 s. 159.

Revisor's Note, 1935: 292.39 is amended to include the substance of 292.40, 292.41 and 292.42 and those sections are repealed. [Bill 75-S, s. 159]

292.44 History: R. S. 1849 c. 124 s. 50; R. S. 1858 c. 158 s. 50; R. S. 1878 s. 3449; Stats. 1898 s. 3449; 1925 c. 4; Stats. 1925 s. 292.44; 1935 c. 483 s. 164; 1951 c. 247 s. 54.

Revisor's Note, 1951: Restores words inadvertently omitted in printing ch. 483 (Bill 75-S), Laws 1935. These words were not stricken in the bill or by any amendment. [Bill 198-S]

It is the duty of the warden of the prison to respond to a writ of habeas corpus ad testificandum and produce the convict in court. The warden is entitled to be reimbursed necessary traveling expenses incurred in taking the convict into court on such writ. The state is not entitled to collect witness fees from the county on account of the convict's testifying in response to such writ. 10 Atty. Gen. 1168.

The only process authorized by which to bring a person in legal confinement into court to testify is that of a writ of habeas corpus ad testificandum. 22 Atty. Gen. 939.

See note to 885.01, citing 48 Atty. Gen. 260.

292.45 History: 1927 c. 233; Stats. 1927 s. 292.45; 1929 c. 391 s. 1; 1935 c. 483 s. 165; 1957 c. 94; 1961 c. 310; 1969 c. 366 s. 117 (2) (b).

The state prison may be reimbursed for traveling expenses incurred by an officer who necessarily accompanies a prisoner to court in response to a writ of habeas corpus ad testificandum. 16 Atty. Gen. 703.

292.46 History: 1933 c. 40 s. 3; Stats. 1933 s. 292.46.

CHAPTER 293.

Mandamus and Prohibition.

293.01 History: R. S. 1849 c. 125 s. 1; R. S. 1858 c. 159 s. 1; R. S. 1878 s. 3450; Stats. 1898 s. 3450; 1925 c. 4; Stats. 1925 s. 293.01; 1935 c. 483 s. 167.

Revisor's Note, 1935: Mandamus is a civil action, 206 W 651. 293.02. Therefore it is proper to call the parties "plaintiff" and "defendant" as in common actions. By so doing the ambiguity of "respondent" in Supreme Court is avoided; and terminology standardized. The right to move to quash is well established by the decisions, State ex rel. Illinois v. Giljohann, 111 W 377, State ex rel. Cothren v. Lean, 9 W 279, is treated as a demurrer and it often determines the issues with little expense. Some returns are long and expensive. [Bill 75-S, s. 167]

On jurisdiction of the supreme court (general superintending control over inferior courts and control over corporations and non-judicial officers) see notes to sec. 3, art. VII; and on jurisdiction of circuit courts (appellate jurisdiction and supervisory control and extraordinary writs to non-judicial agencies and officers) see notes to sec. 8, art. VII.

The application must show affirmatively that relator is entitled to the right claimed. State ex rel. Spaulding v. Elwood, 11 W 17.

Where there is no return to an alternative writ the relator is not therefor entitled to a peremptory writ. He must enforce a return. State ex rel. Holmes v. Baird, 11 W 260.

The writ must express the precise duty to be performed. State ex rel. Hasbrouck v. Milwaukee, 22 W 397.

A circuit judge has authority to allow an alternative writ at chambers; and it seems that any officer having the general power of such judge at chambers has. State ex rel. Bement v. Rice, 35 W 178.

In circuit court the rule to show cause should supersede the alternative writ only in cases where, after hearing, no issue of fact appears to be involved. Schend v. St. George's Aid Society, 49 W 237, 5 NW 355.

On the hearing of an order to show cause why a peremptory writ should not issue questions of material fact were raised, it was error to grant the writ before relator had established his right in an action. State ex rel. Pfister v. Manitowoc, 52 W 423, 9 NW 607.

A peremptory writ must be sealed and made returnable at some certain day. State ex rel. Taylor v. Delafield, 64 W 218, 24 NW 905.

An alternative writ may be served in the same manner as a summons. State ex rel. Drury v. Lincoln, 67 W 274, 30 NW 360.

The judgment in an action to compel a county to aid in building a bridge directed the issuance of a mandamus commanding its supervisors to meet and levy the necessary tax upon the taxable property of the county. It did not fix a time for such meeting nor except from liability to the tax the property within certain cities which was not subject thereto. It would be a compliance if the tax was levied upon the property in the county subject thereto at the first meeting of the board after the writ was served. State ex rel. Spring Lake v. Pierce County, 71 W 321, 37 NW 231.

Where defendant moved to quash the writ after demurrer to the return, and submitted the case on the alternative writ, return, demurrer and motion to quash, he had conceded the truth of the relation, and consented to

have the case decided on the questions of law so presented. State ex rel. Wunderlich v. Kalkofen, 134 W 74, 113 NW 1091.

In mandamus against municipal officers who defended as such, they could not waive constitutional objections to the statute on which such proceeding was based, and the court should raise them where necessary to a disposition of the case. State ex rel. Joint School Dist. v. Becker, 194 W 464, 215 NW 902.

Denying a writ of mandamus to compel issuance of a dance hall license, where the application failed to comply with an ordinance requiring signing and approval by certain persons, was not an abuse of discretion. Issuing or denying mandamus directed to public officer is within court's discretion and reversible only for abuse. State ex rel. New Strand T. Co. v. Common Council of Racine, 201 W 423, 230 NW 60.

See note to 269.56, (relief) citing McCarthy v. Hoan, 221 W 344, 266 NW 916.

On mandamus to compel the relator's release from the house of correction, the court will not inquire into the motives of the governor in refusing to approve an order of the board of control paroling the relator. State ex rel. Kay v. La Follette, 222 W 245, 267 NW 907.

See note to 263.17, on demurrer to answer, citing State ex rel. Lathers v. Smith, 238 W 291, 299 NW 43.

Mandamus is a civil action and the proceedings therein are the same as those in other civil actions. It therefore follows that in the absence of a bill of exceptions the supreme court is limited to a determination of whether the order is sustained by the pleadings and the findings. State ex rel. Ferebee v. Dillett, 240 W 465, 3 NW (2d) 699.

On the defendant's motion in the trial court to quash an alternative writ of mandamus, and likewise on appeal from an order quashing such writ, the crucial issue is whether the facts alleged in the petition constitute a cause of action, and the determination of that issue is dependent on the facts alleged in the petition. State ex rel. Koch v. Retirement Board, 244 W 580, 13 NW (2d) 56.

Mandamus is a civil action, so that Title XXV, entitled "Procedure in Civil Actions," and ch. 263, dealing with the pleadings in civil actions, and 263.01, specifying that the rules for determining the sufficiency of pleadings in civil actions are prescribed by chs. 260 to 297 are applicable to a mandamus action, and 263.07, prescribing the rule for determining the sufficiency of a complaint as against a general demurrer, is applicable in determining the sufficiency of pleadings in a mandamus action. State ex rel. Dame v. LeFevre, 251 W 146, 28 NW (2d) 349.

A motion to quash an alternative writ of mandamus ordinarily is dependent for its effectiveness on grounds stated in the motion; it cannot be aided by allegations of fact, it admits all facts well pleaded for the purpose of the motion, and it raises the issue whether any ground for relief is stated. State ex rel. Leuch v. Hilgen, 258 W 430, 46 NW (2d) 229.

A motion to quash an alternative writ of mandamus is tantamount to a general demurrer. State ex rel. James L. Callan, Inc. v. Barg, 3 W (2d) 488, 89 NW (2d) 267.

The writ of mandamus in Wisconsin. Hurley, 1961 WLR 636.

293.02 History: R. S. 1849 c. 125 s. 2; R. S. 1858 c. 159 s. 2; R. S. 1878 s. 3451; Stats. 1898 s. 3451; 1925 c. 4; Stats. 1925 s. 293.02; 1935 c. 483 s. 168.

A motion to quash is a demurrer and on being overruled the respondent may answer. Allegations in a petition incorporated in a writ, perform office of a declaration and the respondent must negative them by his return. A demurrer tests sufficiency of the return. State ex rel. Cothren v. Lean, 9 W 279.

Where a right depends upon an election the result thereof must be shown. State ex rel. Spaulding v. Elwood, 11 W 17.

An objection that the wrong party applied for the writ, first raised on appeal, is too late. State ex rel. Ordway v. Smith, 11 W 65.

Failure of the relator, in application for a writ to compel supervisors to direct the town clerk to insert a judgment in the tax roll, to state that written notice of the judgment was served as required, is fatal. State ex rel. Burns v. Elba, 34 W 169.

If the return to an alternative writ denies material allegations in the relation, no answer is necessary to raise the issues. State ex rel. Spring Lake v. Pierce County, 71 W 321, 37 NW 231.

The function of the return is to show a right to refuse obedience in view of the allegations it contains, and if it does not do this it is demurrable. State ex rel. Hawley v. Polk County, 88 W 355, 60 NW 266.

The rules as to the form and sufficiency of pleadings in other civil actions apply to the return to a mandamus; the admissions therein are as conclusive as those in an answer in any such action. State ex rel. Buchanan v. Kellogg, 95 W 672, 70 NW 300.

Relator can demur to a portion of the return where it sets up separate and distinct grounds for not obeying the alternative writ. State ex rel. Rice v. Chittenden, 107 W 354, 83 NW 635.

A motion to quash may be made to the writ but not to the return, and where a motion to quash the return is made it is a demurrer. State ex rel. Illinois v. Giljohann, 111 W 377, 87 NW 245.

After the alternative writ all matters going to the merits by way of denial or new matter should be tried on due and proper pleadings consisting of a return and an answer or demurrer thereto, and not on affidavits. State ex rel. Holz v. Wolski, 116 W 71, 92 NW 360.

A demurrer to the return reaches back to the petition and judgment should not be awarded on a defective return, where it appears that the petition did not state a cause of action. State ex rel. Leiser v. Koch, 138 W 27, 119 NW 839.

A demurrer to the return makes the allegations therein verities. State ex rel. Potrykus v. Schinz, 176 W 646, 187 NW 743.

Mandamus proceedings are governed by the rules applicable to pleadings in civil actions; the petition constitutes the complaint, and the return the answer thereto. That relator

neither answered nor demurred to the return did not entitle defendants to judgment on the pleadings, where the alleged facts did not show them entitled thereto. State ex rel. Thompson v. Eggen, 206 W 651, 238 NW 404, 240 NW 839.

On appeal from an order denying a motion to quash a petition for mandamus, the motion treated as a demurrer. State ex rel. Tracy v. Henry, 217 W 46, 258 NW 180.

The recitals of a petition for a writ of mandamus are admitted by a motion to quash the alternative writ. State ex rel. Dame v. LeFevre, 251 W 146, 28 NW (2d) 349.

293.03 History: R. S. 1849 c. 125 s. 3; R. S. 1858 c. 159 s. 3; R. S. 1858 c. 160 s. 2; R. S. 1878 s. 3452; 1880 c. 231; Ann. Stats. 1889 s. 3452; Stats. 1898 s. 3452; 1917 c. 566 s. 46; 1925 c. 4; Stats. 1925 s. 293.03; 1935 c. 483 s. 169.

Editor's Note: On the status of electors of the President and Vice-President of the United States see In re Green, 134 US 377.

The supreme court cannot assume upon allegations in pleadings that a cause cannot be fairly tried in the county where the material facts occurred and send it to another county for trial. State ex rel. Field v. Saxton, 14 W 123.

The place of trial of a cause sent to a circuit court cannot be changed by compulsory order. State ex rel. Williams v. Gratiot, 17 W 245.

Under sec. 3452, R. S. 1878, and circuit court rules, where at a hearing upon the rule to show cause material issues of fact are shown and affidavits presented, the court may permit affidavits on which the rule was granted to stand for the relation or direct that a new relation be filed. Schend v. St. George's Aid Society, 49 W 237, 5 NW 355.

The power conferred by sec. 3452, Stats. 1898, will not be exercised in a case of an election of a representative in congress where the certificate of one candidate has already been sent to congress and where his term will begin before an inquiry can be had. State ex rel. Kustermann v. Board of State Canvassers, 145 W 294, 130 NW 489.

62.25 (2) (a), Stats. 1919, did not justify a public officer in disobeying a writ of mandamus issued pending an appeal from the order allowing the writ, where no stay of proceedings has been obtained. State ex rel. Pabst B. Co. v. Kotecki, 164 W 69, 159 NW 583.

See note to 274.35, citing State ex rel. Hathaway v. Mirlach, 174 W 11, 182 NW 331.

Although an alternative writ of mandamus was conceded not the proper procedure to review the action of the county board of canvassers in counting and certifying the returns of a primary election, the supreme court if it had concluded to take jurisdiction would have been at liberty to issue the proper writ. Petition of Price, 191 W 17, 210 NW 844.

293.04 History: R. S. 1849 c. 125 s. 4; R. S. 1858 c. 159 s. 4; R. S. 1878 s. 3453; Stats. 1898 s. 3453; 1925 c. 4; Stats. 1925 s. 293.04; 1935 c. 483 s. 170.

On mandamus to control the form of the election ballot the fact that the election has taken place before decision by the appellate court does not deprive that court of jurisdiction to determine all the questions presented; and although in such case the writ will be denied, yet if the lower court should have granted the relief sought, the relator will be entitled to a reversal with costs of the order denying such relief and to recover his costs in the lower court with nominal damages. State ex rel. Runge v. Anderson, 100 W 523, 76 NW 482.

Sec. 3453, Stats. 1921, does not authorize the allowance of attorney's fees as an item of damages in mandamus for that purpose. State ex rel. Thompson v. School Directors, 179 W 284, 191 NW 746.

293.04 is procedural and not substantive in character, and it does not create a right to damages which were not recoverable by separate action prior to the enactment of the statute. The purpose of the revision of 293.04, in 1935, was merely to eliminate the former requirement that the successful plaintiff's right to damages was limited to the situation where a cause of action existed for a false return. (Interpretation in State ex rel. Lathers v. Smith, 242 W 512, repudiated.) Corrao v. Mortier, 7 W (2d) 494, 96 NW (2d) 851.

293.05 History: R. S. 1849 c. 125 s. 5; R. S. 1858 c. 159 s. 5; R. S. 1878 s. 3454; Stats. 1898 s. 3454; 1925 c. 4; Stats. 1925 s. 293.05.

293.07 History: R. S. 1849 c. 125 s. 7; R. S. 1858 c. 159 s. 7; R. S. 1878 s. 3456; Ann. Stats. 1889 s. 3456; Stats. 1898 s. 3456; 1925 c. 4; Stats. 1925 s. 293.07; 1935 c. 483 s. 172.

293.08 History: R. S. 1849 c. 125 s. 8; R. S. 1858 c. 159 s. 8; R. S. 1878 s. 3457; Stats. 1898 s. 3457; 1925 c. 4; Stats. 1925 s. 293.08; 1931 c. 79 s. 29.

On jurisdiction of the supreme court (general superintending control over inferior courts) see notes to sec. 3, art. VII; and on jurisdiction of circuit courts (appellate jurisdiction and supervisory control) see notes to sec. 8, art. VII.

So much of 293.08 (applicable to both the supreme court and circuit courts) as states that the writ of prohibition should be addressed to the "court and party" by tradition and usage has become to mean a court and judge or person exercising judicial or quasi-judicial powers. State ex rel. Freemon v. Cannon, 40 W (2d) 489, 162 NW (2d) 32.

293.09 History: R. S. 1849 c. 125 s. 9; R. S. 1858 c. 159 s. 9; R. S. 1878 s. 3458; Stats. 1898 s. 3458; 1925 c. 4; Stats. 1925 s. 293.09.

293.10 History: R. S. 1849 c. 125 s. 10; R. S. 1858 c. 159 s. 10; R. S. 1878 s. 3459; Stats. 1898 s. 3459; 1925 c. 4; Stats. 1925 s. 293.10.

293.11 History: R. S. 1849 c. 125 s. 11; R. S. 1858 c. 159 s. 11; R. S. 1878 s. 3460; Stats. 1898 s. 3460; 1925 c. 4; Stats. 1925 s. 293.11.

293.12 History: R. S. 1849 c. 125 s. 12; R. S. 1858 c. 159 s. 12; R. S. 1878 s. 3461; Stats. 1898 s. 3461; 1925 c. 4; Stats. 1925 s. 293.12.

293.13 History: R. S. 1849 c. 125 s. 13; R. S. 1858 c. 159 s. 13; R. S. 1878 s. 3462; Stats. 1898 s. 3462; 1925 c. 4; Stats. 1925 s. 293.13.