

## CHAPTER 293.

## MANDAMUS AND PROHIBITION.

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**293.01 Mandamus, return to first writ.** Mandamus is a civil action. The writ of mandamus shall specify the time within which the defendant shall make return thereto. Before such time expires the defendant may move to quash the writ and such motion shall be deemed a demurrer to the complaint. [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 No. 75 S. s. 167)

Where an inspection of articles reveals whether they can or cannot be lawfully owned, mandamus is not the proper remedy to obtain their return; replevin provides an adequate remedy. State ex rel. Mayer v. Keeler, 205 W 175, 236 NW 561.

Since the state treasurer had no discretion to remove for political reasons permanent officers protected by civil service under 16.24, a writ of mandamus would lie to compel reinstatement of a permanent deputy oil inspector discharged for political reasons. State ex rel. Nelson v. Henry, 216 W 80, 256 NW 714.

Mandamus is proper remedy to restore party to possession of office from which he has been illegally removed. State ex rel. Tracy v. Henry, 217 W 46, 258 NW 180.

The court cannot by mandamus compel an administrative board to take down testimony given before it by a stenographic reporter in the absence of a statute requiring the board to do so. State ex rel. Blank v. Gramling, 219 W 196, 262 NW 614.

The declaratory relief act (269.56) is not a substitute for mandamus or quo warranto. 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. If the approval of the governor were not necessary under the statutes to a valid order of parole, a writ running against the board of control alone would effect the prisoner's discharge. State ex rel. Kay v. La Follette, 222 W 245, 267 NW 907.

Mandamus is a proper remedy to compel the reinstatement of a wrongfully discharged teacher in a state teachers' college. State ex rel. Karnes v. Board of Regents, 222 W 542, 269 NW 284.

Mandamus would not lie against city and others to require payment of amounts by which policemen's and firemen's salaries were reduced where there was no allegation that there were funds in the treasury to pay the amount due. Silgen v. Fond du Lac, 225 W 335, 274 NW 256.

The fact that the year for which a license was sought had expired at the time of the appeal did not render the action moot since, if mandamus was improperly denied, the relator would be entitled to reversal of the judgment with costs and direction that he recover the costs in the court below. Man-

damus will not issue if it is too late to be available as a remedy to enforce the right alleged to have been violated. Bjordal v. Town Board of Delavan, 230 W 543, 284 NW 534.

The relator was not entitled to mandamus to compel the industrial commission to correct its return in an employer's suit to set aside its award, so as to show the circumstances attending the commission's review of the examiner's findings and order, since the relators could introduce proof of such circumstances in the action to review the award. State ex rel. Madison Airport Co. v. Wrabetz, 231 W 147, 285 NW 504.

Mandamus in the name of the state on the relation of the attorney general, acting on behalf of the people, will lie to compel the secretary of state to perform his statutory duty to publish an act of the legislature, the mere publication of the act, even if the act may be unconstitutional, not affecting the secretary either in his official capacity or in his personal capacity so as to entitle him to raise the constitutionality of the act at that time. State ex rel. Martin v. Zimmerman, 233 W 16, 288 NW 454.

Mandamus will not lie to compel performance of an official act when the officer's duty is not clear and requires the exercise of judgment and discretion. Mandamus to compel a county clerk to pay to the owner of a judgment, who had filed a copy thereof with the clerk pursuant to 304.21, money due allegedly to the judgment debtor from the county, was not proper where a question was involved as to whether the money due from the county was due to the judgment debtor or was due to another, since in such case the duty of the clerk to pay the money to the owner of the judgment was not clear and required the exercise of judgment and discretion; hence the defendants' motion to quash should have been granted. State ex rel. Adams County Bank v. Kurth, 233 W 60, 288 NW 810.

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

The landowner railroad company and the lessee fruit company, seeking relief against the city building inspector's refusal to issue a building permit, and relying on the unconstitutionality of the zoning ordinance on which the refusal was based, were entitled to bring mandamus to compel the building inspector to issue a building permit, the remedy by an action for a declaratory judgment, and the remedy by appeal to the board of appeals under 62.23 (8) (b) being inadequate in the circumstances. State ex rel. Scandrett v. Nelson, 240 W 438, 3 NW (2d) 765.

Mandamus being a civil action and the proceedings therein the same as those in other civil actions, the supreme court, in the absence of a bill of exceptions on an appeal from an order dismissing an alternative writ, is limited to determining whether the order is sustained by the pleadings and the findings. State ex rel. Ferebee v. Dillett, 240 W 465, 3 NW (2d) 699.

**293.02 Pleadings and proceedings.** Whenever a return shall be made to the writ the plaintiff may demur to the return. Otherwise the defenses alleged in the return shall be

deemed controverted and like proceedings shall be had as in other civil actions. [1935 c. 483 s. 168]

**Note:** It was the duty of the town board to open up a highway, and a peremptory writ of mandamus compelling the performance of that duty was properly awarded. 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 facts set forth in the pleadings did not show them entitled thereto. State ex rel. Thompson v. Eggen, 206 W 651, 238 NW 404, 240 NW 839.

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

**293.03 Issues of fact; election cases, trial of.** (1) Issues of fact in mandamus proceedings instituted in the supreme court shall be tried in the circuit court of the county within which the cause of action arose or in such other county as the supreme court, for cause shown, may order, and the circuit courts may try the issues of fact in mandamus proceedings at a special or a general term and may summon a jury for that purpose and prescribe the manner of summoning the same.

(2) In mandamus against a board of canvassers in the supreme court to compel the execution and delivery of a certificate of election to any person claiming to have been elected state senator or member of the assembly, or United States senator or congressman, or presidential elector, the court may if deemed necessary inquire into the facts of such election, irrespective of the election returns, and determine who received the greater number of legal votes cast, and the certificate issued in pursuance of such determination shall be the only lawful certificate of election to such office, and any other certificate of election to the same office shall be null and void. Such issue of fact may be tried as hereinbefore provided or according to such rules as the court may prescribe. [1935 c. 483 s. 169]

**293.04 Damages and costs.** If judgment be for the plaintiff, he shall recover his damages and costs. [1935 c. 483 s. 170]

**Note:** In a mandamus proceeding by a highway contractor to compel the state treasurer to honor an order of the state highway commission for the payment of certain work, wherein it was determined on appeal that the action of the treasurer in refusing to honor the order was not quasi judicial in

character, and was not within the scope of his authority, although he acted honestly, the treasurer was liable to the contractor for the latter's damages and costs. State ex rel. Lathers v. Smith, 242 W 512, 8 NW (2d) 345.

**293.05 Recovery to bar another action.** A recovery of damages by virtue of this chapter against any party who shall have made a return to a writ of mandamus shall be a bar to any other action against the same party for the making of such return.

**293.06** [Repealed by 1935 c. 483 s. 171]

**293.07 Fine or imprisonment.** Whenever a peremptory mandamus shall be directed to any public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it shall appear to the court that such officer or any member of such body or board has, without just excuse, refused or neglected to perform the duty so enjoined the court may impose a fine, not exceeding five thousand dollars, upon every such officer or member of such body or board, or sentence him to imprisonment for a term not exceeding five years. [1935 c. 483 s. 172]

**293.08 Writs of prohibition, how issued.** Writs of prohibition issued out of the supreme court shall be applied for upon relation or affidavits filed in the same manner as for writs of mandamus; and if the cause shown shall appear to the court to be sufficient a writ shall be thereupon issued, which shall command the court and party to whom it shall be directed to desist and refrain from any further proceedings in the action or matter specified therein until a day therein named to be fixed by the court and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such action or matter. [1931 c. 79 s. 29]

**Note:** The writ of prohibition is not to be used in place of appeal and review, but is the proper remedy where a court proposing to act refuses to proceed within the plain line of duty. State ex rel. Schwenker v. District Court, 206 W 600, 240 NW 406.

Prohibition held proper remedy to restrain circuit court from proceeding under ex parte order to stay and open habeas corpus proceedings after issues therein were fully litigated and petitioner vested with custody of his minor daughter, appeal being inadequate remedy. State ex rel. Wingenter v. Circuit Court, 211 W 561, 248 NW 413.

If the trial court was without jurisdiction to enter the order in question, its action can be reviewed by certiorari or by writ of prohibition. Lang v. State ex rel. Bunzel, 227 W 276, 278 NW 467.

A corporation upon which no valid service of process has been made was entitled to a writ of prohibition commanding the circuit court to refrain from proceeding further against the corporation. State v. Gehrz, 230 W 412, 283 NW 827.

**293.09 Service and return of.** Such writ shall be served upon the court and party to whom it shall be directed in the same manner as a writ of mandamus; and a return shall in like manner be made thereto by such court, which may be enforced by attachment.

**293.10 Proceedings on adoption of return.** If the party to whom such writ of prohibition shall have been 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 the said writ, said party shall thenceforth be deemed the defendant in such matter; and the person prosecuting such writ may take issue or demur to the matters so relied upon by such defendant; and the like proceedings shall be had for the trial of issues of law or fact joined between the parties and for the rendering of judgment thereupon as in personal actions.

**293.11 Proceedings if return not adopted.** If the party to whom such writ of prohibition shall be directed shall not adopt such return, as above provided, 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.

**293.12 Judgment.** 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 from proceeding in such action or matter, do issue, or a writ of consultation, authorizing the court and party to proceed in the action or matter in question.

**293.13 Judgment if return adopted.** If the party to whom such first writ of prohibition shall be directed shall adopt the return of the court thereto, as above provided, and judgment shall be rendered for the party prosecuting such writ, a prohibition absolute shall be issued; but if judgment be given against such party a writ of consultation shall be issued as above provided.