

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.

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. In proceedings on a motion to quash an alternative writ of mandamus issued on a taxpayer's petition seeking to compel the city clerk to place on the tax roll for 1949 a special assessment against property of 2 taxpayers for installation of sewers, wherein it appeared that such tax roll had passed out of the control of the city clerk but the petition otherwise stated a cause of action and the question whether a tax should be levied rested on controverted facts, the trial court, instead of granting the motion to quash, should allow an amendment of the petition to seek placement of the tax on the next tax roll, and proceed with the litigation. *State ex rel. Leuch v. Hilgen*, 253 W 430, 46 NW (2d) 229.

An order commanding the mayor of the city to execute a deed of the property in question to the State Historical Society was not improper as to an accounting factor provided therein in respect to the city's previous operation of the property as an

historical museum, there being no reason, under the liberal rules of pleading in mandamus, for refusing to one entitled to consideration the relief to which he is entitled. *State ex rel. State Historical Society v. Carroll*, 261 W 6, 51 NW (2d) 723.

A valid and binding contract to convey property having been made by the city, by its common council and mayor, a successor mayor had no discretionary power in the matter but only the purely ministerial duty of executing and delivering the necessary deed, the performance of which duty could be compelled by mandamus. *State ex rel. State Historical Society v. Carroll*, 261 W 6, 51 NW (2d) 723.

Whether a proceeding in mandamus was proper to compel the county board to rescind its improper acceptance of a combination bid, or whether an action for injunction should have been brought instead, need not be determined on the bidder's appeal from the peremptory writ, where the appealing bidder was not commanded by the writ to do anything, the board complied with the writ and did not appeal therefrom, and a determination on the merits has been made. *State ex rel. Grosvold v. Board of Supervisors*, 263 W 513, 58 NW (2d) 70.

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.

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.

293.04 Damages and costs. If judgment be for the plaintiff, he shall recover his damages and costs.

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.

293.07 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 5 years.

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.

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.