CHAPTER 294.

Quo Warranto.

294.01 History: 1856 c. 120 s. 331; R. S. 1858 c. 160 s. 1; R. S. 1878 s. 3463; Stats. 1898 s. 3463; 1925 c. 4; Stats. 1925 s. 294.01.

Revisers' Note, 1878: Section 1, chapter 160, R. S. 1858, verbally amended. The section is retained in substance as formally passed; but the writs and proceedings as formally used are retained in such cases in the supreme court. See State ex rel. Attorney General v. Messmore, 14 W 115; State ex rel. Wood v. Baker, 38 W 71.

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

The remedy by scire facias, and by action on the judgment to obtain a new one, are so different that a pending scire facias cannot be pleaded in abatement of an action on the judgment. Ingraham v. Champion, 84 W 235, 54 NW 398.

Proceedings by quo warranto at the common law were proper to reclaim a franchise, whether corporate or not, for abuse of it or nonperformance of a condition of the grant, and jurisdiction in that regard is complete regardless of sec. 3466, Stats. 1898, the remedy being under sec. 3463, the statutory substitute for the common-law remedy. State ex rel. Attorney General v. Portage C. W. Co. 107 W 441, 83 NW 697.

An action to try the title to the office of lumber inspector for a state district is a civil action under sec. 3463, Stats. 1898. State ex rel. Atkinson v. McDonald, 108 W 8, 84 NW 171.

The pleadings under sec. 3463 are to be liberally construed the same as in ordinary civil actions. State ex rel. Mengel v. Steber, 154 W 505, 143 NW 156.

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

294.02 History: 1856 c. 120 s. 332; R. S. 1858 c. 160 s. 2; R. S. 1878 s. 3464; Stats. 1898 s. 3464; 1925 c. 4; Stats. 1925 s. 294.02.

Sec. 3464, Stats. 1898, recognizes the absolute right to have issues of fact in actions of quo warranto tried by a jury. State ex rel. Atkinson v. McDonald, 108 W 8, 83 NW 1107.

294.03 History: 1856 c. 120 s. 338; R. S. 1858 c. 160 s. 8; R. S. 1878 s. 3465; Stats. 1898 s. 3465; 1925 c. 4; Stats. 1925 s. 294.03.

294.04 History: 1856 c. 120 s. 336; R. S. 1858 c. 160 s. 6; R. S. 1878 s. 3466; Stats. 1898 s. 3466; 1925 c. 4; Stats. 1925 s. 294.04.

1. Generally.
2. Right to office.
3. Exercise of corporate franchise.
4. Action by private person.

1. Generally.

Proceedings must be in the name of the attorney general; but the court may allow the relator, on his refusal, to file an information. The court may allow the relator to control the proceedings against the authority of the attorney general. Attorney General ex rel. Bashford v. Barstow, 4 W 567.

The summons should be subscribed by the attorney general and be directed to the defendant. A stipulation to extend the time for pleading is an appearance and waiver of defects in the summons. State ex rel. Attorney General v. Messmore, 14 W 115.

Where it appears upon overruling respondent's demurrer that he cannot be benefited by permission to answer judgment will go against him. State ex rel. Walsh v. Dousman, 28 W 541.

The word "complaint" seems to be used in a general sense as a substitute for relation. State ex rel. Wood v. Baker, 38 W 71.

The word "person" in sec. 3466, Stats. 1898, includes a corporation. State ex rel. Atkinson v. McDonald, 108 W 8, 83 NW 1107; State ex rel. Vilter M. Co. v. Milwaukee, B. & L. G. R. Co. 116 W 142, 92 NW 546.

A private individual as relator cannot maintain an action in the name of the state for quo warranto against jury commissioners without first applying to the attorney general. State ex rel. Gubbins v. Anson, 132 W 461, 112 NW 475.

A public service corporation is a private party within the meaning of sec. 3466, Stats. 1898. State ex rel. Green Bay G. & E. Co. v. Minahan B. Co. 141 W 400, 123 NW 258.

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

2. Right to Office.

An answer in quo warranto should either justify the holding or disclaim. State ex rel. Attorney General v. Foote, 11 W 14.

The answer should allege facts on which the denial of removal is founded. Where the answer of respondent does not state a defense the relator should demur. State ex rel. Kennedy v. McGarry, 21 W 496.

The question is whether defendant received a majority of all the votes which canvassers had a right to count. State ex rel. Holden v. Tierney, 23 W 430.

Where relator joins with the state as plaintiff and a good cause of action is stated in favor of the state a demurrer on the ground that relator is not shown to be entitled to the office is bad. State ex rel. Curran & Curran v. Palmer, 24 W 63.

On quo warranto to test an election between parties the court will rectify mistakes of canvassing boards and will go behind the certificate. State ex rel. Burnett v. Pierpoint, 29 W 608.

Right of a person to an office may be tried and the relator, if entitled to the office, may recover damages. State ex rel. Hawes v. Pierce, 35 W 93.

In an action to try the title to a county office it is sufficient to allege that at the time of the election relator was a legal and qualified elector and eligible. State ex rel. Kickbush v. Hoeflinger, 35 W 393.

In an action to try the title to office of chairman of town supervisors the result of the canvass made by the inspectors is prima

facie proof of the election; but where it appeared not only that 2 more votes were cast than were counted, but that a plurality was cast in favor of relator, such prima facie effect was overcome. Where the evidence tended to show that part of the votes cast for the relator were illegal, judgment that he was entitled to the office could be rendered only after verdict that he had received majority of legal votes. State ex rel. Swenson & Swenson v. Norton, 46 W 332, 1 NW 22.

The power conferred upon a common council by the charter of the city "to judge of the election and qualification of its own members" does not exclude the jurisdiction of the courts to determine the right to the office of alderman. State ex rel. Anderton v. Kempf, 69 W 470, 34 NW 226.

On appeal from a judgment in quo warranto in favor of an officer-elect, who has taken possession of the office and become an officer de facto, a stay of proceedings, pending the appeal, will not be granted by the supreme court. State ex rel. Warden v. Knight, 82 W 151, 50 NW 1012, 51 NW 1137.

Quo warranto is the proper proceeding to determine the right of one who claims, as against the holder of the certificate of election. State ex rel. Jones v. Oates, 86 W 634, 57 NW 296.

An action of quo warranto to oust defendant from the office of school commissioner of a city is properly brought in the name of the state on the relation of a private person. State ex rel. Nelson v. Mott, 111 W 19, 86 NW 569.

A private person cannot bring the action unless he is entitled to the office. State ex rel. Heim v. Williams, 114 W 402, 90 NW 452.

Although a candidate for the office of county judge promised free advice to litigants and in such a manner as to be guilty of bribery, he could not be ousted from the office unless it appeared that electors sufficient in number to change the result voted for him in consequence of such promise. State ex rel. Dithmar v. Bunnell, 131 W 198, 110 NW 177.

The office of supervisor of assessment is a county office and quo warranto may be brought to test it. State ex rel. Williams v. Samuelson, 131 W 499, 111 NW 712.

A complaint which fails to show the actual number of legal votes cast for each candidate, and the names of the persons whom the relator claims voted illegally at an election in the election district where such votes were cast, is fatally defective. State ex rel. Lochschmidt v. Raisler, 133 W 672, 114 NW 118.

Actual occupation and exercise of an office is an essential element to an action under sec. 3466, Stats. 1898. An allegation that the defendant has exhibited a certificate of election and will qualify and enter upon such office at some time in the future is insufficient. State ex rel. Lochschmidt v. Raisler, 133 W 672, 114 NW 118.

A de facto officer may hold as against an intruder; but if he surrenders possession to an intruder he cannot recover the possession. State ex rel. Schneider v. Darby, 179 W 147, 190 NW 994.

See note to 294.06, citing State ex rel. Symmonds v. Barnett, 182 W 114, 195 NW 707.

Members of a city board of education, even if subjecting themselves to the direction and control of a certain organization and failing to exercise their own individual judgment and discretion in the performance of their official duties, do not thereby unlawfully "exercise their offices," and cannot on that ground be proceeded against under 294.04. State ex rel. Brister v. Weston, 241 W 584, 6 NW (2d) 648.

Quo warranto is the appropriate remedy where ouster is claimed for a breach of official duty when the statute directs automatic removal from office, and may be said to be self-executing, and ipso facto works forfeiture of office, but, until title to the office, such as that of a member of a school committee, is divested by proper authority, the continuing official actions of such member are deemed valid. Joint School Dist. v. Waupaca, etc., County S. Committee, 271 W 100, 72 NW (2d) 909.

See note to 269.56 (scope), citing Boerschinger v. Elkay Enterprises, Inc. 26 W (2d) 102, 132 NW (2d) 258, 133 NW (2d) 333.

3. Exercise of Corporate Franchise.

The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by quo warranto or scire facias, at the suit of the state, and not at the suit of private parties. Stedman v. Berlin, 97 W 505, 73 NW 57.

Where a franchise is granted to a corporation and it accepts the same under seal as required by the ordinances granting the franchise, it holds such franchise within the meaning of sec. 3466, Stats. 1898, even though no further action had been taken under it; and such franchise could be inquired into by quo warranto. State ex rel. Vilter M. Co. v. Milwaukee, B. & L. G. R. Co. 116 W 142, 92 NW 546.

An allegation that the defendant was the owner of a dam and franchise rights appertaining thereto and is now maintaining the dam at a greater height than that allowed in the grant whereby the riparian owners were damaged, states a sufficient cause of action under sec. 3466, Stats. 1898. State ex rel. Attorney General v. Norcross, 132 W 534, 112 NW 40.

Where the attorney general refuses to act, a resident and taxpayer of a city may bring an action to test the validity of a franchise attempted to be granted by the council to a telephone company. State ex rel. Smythe v. Milwaukee I. T. Co. 133 W 588, 114 NW 108, 315.

Where a company assumes to act under a franchise granted by a city which has no power to grant such a franchise, the remedy of quo warranto is the appropriate one to oust the corporation from such franchise. State ex rel. Vilter M. Co. v. Milwaukee, B. & L. G. R. Co. 116 W 142, 92 NW 546; State ex rel. Smythe v. Milwaukee I. T. Co. 133 W 588, 114 NW 108, 315.

A quo warranto action is not the proper remedy against a corporation for allegedly engaging in the business of operating a collection agency without being licensed as required by 218.04, Stats. 1947, within the provision permitting such an action when any

person unlawfully exercises any "franchise" within the state, since a license issued to one to engage in the business of a collection agency does not constitute a "franchise"; nor is the case properly one for exercising equitable jurisdiction to grant injunctional relief. The terms "franchise" and "license" are not the same, a "franchise" being a special privilege conferred by government on individuals and which does not belong to citizens of the country generally by common right, and a "license" being authority to do some act or carry on some trade or business, in its nature lawful but prohibited by statute, except with permission of the civil authority or which would otherwise be unlawful. State ex rel. Fairchild v. Wisconsin Auto. Trades Asso. 254 W 398, 37 NW (2d) 98.

An action of quo warranto lies to exclude a banking corporation from unlawfully exercising its banking franchise beyond its terms, or from exercising its banking business beyond the limit imposed by law, and thus usurping the excess. The common-law distinction between quo warranto and scire facias is no longer important. State ex rel. City B. & T. Co. v. Marshall & Ilsley Bank, 4 W (2d) 315, 90 NW (2d) 556.

4. Action by Private Person.

The last clause of sec. 6, ch. 180, R. S. 1858, gives a new proceeding by private parties in the name of the state without use of the attorney general's name or office. This proceeding is in the nature of a civil action. The statute distinguishes between a criminal information by the attorney general and the quasi-civil remedy which it gives to a private person. State ex rel. Wood v. Baker, 38 W 71.

An action of quo warranto brought in the name of the state by a private person is a civil action, and change of venue can be had upon application of the relator. Fordyce v. State, 115 W 608, 92 NW 430.

Under sec. 3466, Stats. 1898, an action of quo warranto to oust persons from certain village offices may be brought in the name of the state by a property owner and taxpayer in the village, on his own complaint. State ex rel. Weinsheim v. Leischer, 117 W 475, 94 NW 299.

The fact that the attorney general appears for the respondent in an action of quo warranto sufficiently shows a refusal to act. State ex rel. Williams v. Samuelson, 131 W 499, 111 NW 712.

A citizen and resident of a city who is a property owner and taxpayer and who has children who are pupils in the public schools of the city may bring an action of quo warranto to test the title of members of the school board. State ex rel. Harley v. Lindemann, 132 W 47, 111 NW 214.

294.05 History: 1856 c. 120 s. 339; R. S. 1858 c. 160 s. 9; R. S. 1878 s. 3467; Stats. 1898 s. 3467; 1925 c. 4; Stats. 1925 s. 294.05.

294.06 History: 1869 c. 127 s. 1; R. S. 1878 s. 3468; Stats. 1898 s. 3468; 1925 c. 4; Stats. 1925 s. 294.06; Court Rule XXX; Sup. Ct. Order, 212 W xviii.

The complaint need not allege that the steps required by ch. 464, Laws 1885, relating to elections, were taken. State ex rel. Anderton v. Kempf, 69 W 470.

The averment as to the number of legal votes cast for the relator and defendant is essential to the cause of action. State ex rel. Leonard v. Rosenthal, 123 W 442, 102 NW 49.

See note to 294.04, on right to office, citing State ex rel. Lochschmidt v. Raisler, 133 W 672, 114 NW 118.

A complaint giving a list of names of voters, some of the names having an X after them, and alleging that the names so marked were the names of persons who voted illegally, is a sufficient compliance with the requirement that the illegal voters be named in the complaint. Such a complaint states a cause of action under sec. 3468, Stats. 1921, in favor of a defeated candidate to determine title to an office, and not a cause of action under sec. 3466 in favor of a relator as a private person to prevent a usurpation of office. State ex rel. Symmonds v. Barnett, 182 W 114, 195 NW 707.

294.07 History: 1872 c. 52 s. 1, 2; R. S. 1878 s. 3469; Stats. 1898 s. 3469; 1925 c. 4; Stats. 1925 s. 294.07.

294.08 History: 1856 c. 120 s. 340; R. S. 1858 c. 160 s. 10; 1872 c. 52 s. 3; R. S. 1878 s. 3470; Stats. 1898 s. 3470; 1925 c. 4; Stats. 1925 s. 294.08.

Where an action is commenced during a term it may be prosecuted to judgment after expiration of the term. State ex rel. Hawes v. Pierce, 35 W 93.

294.09 History: 1856 c. 120 s. 341; R. S. 1858 c. 160 s. 11; R. S. 1878 s. 3471; Stats. 1898 s. 3471; 1925 c. 4; Stats. 1925 s. 294.09.

If a person appointed to fill a vacancy in the office of county clerk, caused by the removal of the clerk, has failed to qualify within the time prescribed by sec. 701, R. S. 1878, sec. 3471 has no application. State ex rel. Prince v. McCarty, 65 W 163, 26 NW 609.

Sec. 3471, R. S. 1878, applies to cases where the failure of a person to file his bond within the time prescribed was due to no neglect or default upon his part, as where the officer whose duty it is to approve the bond refused to do so because the appointment was not valid. State ex rel. Ackerman v. Dahl, 65 W 510, 27 NW 343.

294.10 History: 1856 c. 120 s. 342; R. S. 1858 c. 160 s. 12; R. S. 1878 s. 3472; Stats. 1898 s. 3472; 1925 c. 4; Stats. 1925 s. 294.10.

294.11 History: 1856 c. 120 s. 343; R. S. 1858 c. 160 s. 13; R. S. 1878 s. 3473; Stats. 1898 s. 3473; 1925 c. 4; Stats. 1925 s. 294.11.

294.12 History: 1856 c. 120 s. 344; R. S. 1858 c. 160 s. 14; R. S. 1878 s. 3474; Stats. 1898 s. 3474; 1925 c. 4; Stats. 1925 s. 294.12.

294.13 History: 1856 c. 120 s. 345; R. S. 1858 c. 160 s. 15; R. S. 1878 s. 3475; Stats. 1898 s. 3475; 1925 c. 4; Stats. 1925 s. 294.13.

In case of a criminal information by the attorney general on relation of a private person no attorney's fees should be taxed. State ex rel. King v. Kromer, 38 W 547.

The statute is imperative that plaintiff must

recover his costs. State ex rel. Jones v. Jenkins, 46 W 616, 1 NW 241.

CHAPTER 295.

Contempts in Civil Actions.

295.01 History: R. S. 1849 c. 115 s. 1; R. S. 1858 c. 149 s. 1; 1866 c. 99 s. 1; R. S. 1878 s. 3477; 1885 c. 369 s. 2; Ann. Stats. 1889 s. 3477; Stats. 1898 s. 3477; 1925 c. 4; Stats. 1925 s. 295.01; 1947 c. 143; 1969 c. 255.

Attachment for contempt should be issued or withheld, sustained, modified or set aside by direct order of the court. Geisse v. Beall, 5 W 224.

Where the supreme court issues a writ of prohibition in aid of a writ of assistance from the circuit court it will issue an attachment for contempt against a party who disobeys or interferes with the requirement of the writ of prohibition. State ex rel. Cushing v. Hungerford, 8 W 345.

An order adjudging defendants guilty of contempt for violating an injunction can be reviewed only upon appeal. Shannon v. State, 18 W 604.

One in contempt is entitled to notice of adverse proceedings and may resist them. After judgment, in case of failure to appear and defend through mistake or excusable neglect and when there is reason to believe injustice may have been done, judgment may be vacated. Mead v. Norris, 21 W 310.

Strictly regular service of an injunctional order is not necessary to entitle plaintiff to proceed against defendant as for contempt. Ramstock v. Roth, 18 W 522; Mead v. Norris, 21 W 310.

See note to 292.01, citing In re Perry, 30 W 268.

Ch. 115, R. S. 1849, was a substantial transcript of the statute of New York on the subject. Poertner v. Russel, 33 W 193, 201.

The party against whom an injunctional order has been issued is bound to abstain from violating it from the time he knows of its issue without service, and is bound to use his best efforts to prevent its violation by his agents or servants. Poertner v. Russel, 33 W 193.

In general a party to a suit will not be adjudged in contempt therein for any act or omission which occurred before the suit was commenced, or before service of the process alleged to have been disregarded. Witter v. Lyon, 34 W 564.

Where the amount of a debt might have been made by levy at the time directed and a few days thereafter the judgment debtor was declared bankrupt, the sheriff, on being adjudged guilty of contempt, may be required to pay the judgment creditor's claim and be subrogated to his judgment rights. State ex rel. Mann v. Brophy, 38 W 413.

The circuit court may punish disobedience of a lawful order of a court commissioner. Nieuwankamp v. Ullman, 47 W 168, 2 NW 131.

Obedience to a void order of a court commissioner, in disobedience of a valid order of another court commissioner, though honestly made, is contempt. Nieuwankamp v. Ullman, 47 W 168, 2 NW 131.

The circuit court of any county may punish persons subpoenaed to testify in an action pending therein before a court commissioner in another county for disobeying a summons or refusing to be sworn or to answer. State ex rel. Lanning v. Lonsdale, 48 W 348, 4 NW 390.

A deputy sheriff who receives a process for service and fails to serve or to make due return is punishable and proceedings need not be against the sheriff. Where service has been made the officer is bound to make return showing the fact; and if the cause is triable in the court in which papers are entitled proceedings against him will be in that court even if the service was not such as gave it jurisdiction. Heymann v. Cunningham, 51 W 506, 8 NW 401.

The words "or triable therein" are intended to cover cases which are not covered by the words "pending in such court," and extend the statute. Heymann v. Cunningham, 51 W 506, 8 NW 401.

An attorney was not guilty of any contempt in obtaining an injunctional order which ran counter to a prior injunctional order issued by a court commissioner. Wisconsin C. R. Co. v. Smith, 52 W 140, 8 NW 613.

It is unjust to require one to indemnify a plaintiff for violating an injunction which never ought to have been granted and for obtaining which the plaintiff would be liable to defendant in damages. Kaehler v. Dobberpuhl, 56 W 497, 14 NW 631.

Under ch. 150, R. S. 1877, a court may punish its clerk for refusing to obey an order directing him to tax costs. State v. Reesa, 57 W 422, 15 NW 383.

The fact that an injunction issued by a court having jurisdiction was erroneous affords no justification or excuse for its violation; but such fact may properly be taken into consideration in awarding punishment for its breach. State ex rel. Fowler v. Circuit Court, 98 W 143, 73 NW 788.

"The punishment inflicted, even in civil contempts, where indemnity to another party is the dominant purpose, nevertheless rests upon the power of the court to vindicate its own authority, and to punish for defiance thereof, but to adjust that punishment so as to protect or enforce private rights." In re Meggett, 105 W 291, 298, 81 NW 419, 422.

Ch. 150, Stats. 1898, authorizes the court to punish by fine and imprisonment all acts of misconduct coming within it, though the misconduct may not pertain to the performance of a duty still within the powers of the contemnor to perform and although it may produce no actual loss or injury. The proceedings seek to accomplish a 2-fold purpose: To enforce obedience of the decrees of the court; and to indemnify parties to the action for their actual loss or injury and to compel the performance of duties still within the contemnor's power. Emerson v. Huss, 127 W 215, 106 NW 518.

A proceeding seeking to punish a party to an action, under sec. 3477 (3), Stats. 1898, for disobedience of a lawful order of the court, is brought for the primary purpose of protecting the rights of the opposite party, and is a civil proceeding. Vilter Mfg. Co. v. Humphrey, 132 W 587, 112 NW 1095.