

CHAPTER 586

MANDAMUS

586.01 TO WHOM ISSUED; JUDICIAL DISCRETION NOT CONTROLLED.

HISTORY. R.S. 1851 c. 83 ss. 3, 4; P.S. 1858 c. 73 ss. 3, 4; G.S. 1866 c. 80 ss. 1, 2; G.S. 1878 c. 80 ss. 1, 2; G.S. 1894 ss. 5974, 5975; R.L. 1905 s. 4556; G.S. 1913 s. 8266; G.S. 1923 s. 9722; M.S. 1927 s. 9722.

1. When issued
2. When denied
3. Demand before suit
4. Successive applications

1. When issued

While mandamus will not lie to test the right to a public office, the court may determine the right of a candidate for the state senate to a certificate of election, and will, by mandamus, compel its issuance to the party entitled to it. *O'Ferrall v Bryant*, 2 M 180 (148).

When a case is presented to an attorney of the state, making it reasonably probable that any of the acts or omissions enumerated in the statute can be proved against a corporation, it is not discretionary with him to apply for leave to bring an action; upon such a case, it is his duty to make such application, and the court will enforce such duty by mandamus. *Tullis v Brawley*, 3 M 190.

When some official act, not necessarily pertaining to the duties of the executive, and which might be performed as well by one officer as another, is directed by law to be done, any person who shows himself entitled to its performance, and has no other adequate remedy, may have a writ of mandamus against such officer even if the law has designated the chief executive of the state as a convenient officer to perform the duty. *Chamberlain v Sibley*, 4 M 309 (228).

The trustees of the Minnesota hospital for the insane are mere administrative agents of the state, and are not exempt from control of the judiciary. *St. Paul & Chgo. v Brown*, 24 M 517.

It is the duty of the district court to consider the application for the writ of quo warranto on its merits, and exercise its discretion in determining whether or not such writ should issue, and it is ordered (by the supreme court) that a writ of mandamus issue commanding the court to do so. *State ex rel v Otis*, 58 M 275, 50 NW 1015.

Where a board of county commissioners illegally strikes from a county seat petition, the names of electors, so that the number remaining is reduced below the minimum required for a valid petition, mandamus will lie to compel restoration of the names to the petition. *State ex rel v Geib*, 66 M 266, 68 NW 1081.

On the record in this case, and in like cases, the supreme court has original jurisdiction to issue to the trial court, and to the judges and clerk thereof, a writ of mandamus requiring a transfer of the action, and the papers and files therein to the court of the county of defendant's residence. *State ex rel v District Court*, 77 M 302, 79 NW 960.

The writ will only lie to compel the performance of acts which the law specially enjoins as a duty resulting from an office, trust or station. *State ex rel v Krahmer*, 92 M 397, 100 NW 105.

If the board of regents refuses to perform any duties imposed upon it by law, mandamus will lie to compel it to act. *Gleason v University of Minnesota*, 104 M 359, 116 NW 650.

MINNESOTA STATUTES 1945 ANNOTATIONS

3943

MANDAMUS 586.01

Mandamus will lie to compel a resident of the state, the secretary of a domestic corporation, to call a stockholders' meeting pursuant to a by-law of the corporation. State ex rel v DeGroat, 109 M 168, 123 NW 417.

Mandamus is the exclusive remedy of the parent county seeking to collect from a new county its share of former's indebtedness. County of Beltrami v County of Clearwater, 109 M 479, 124 NW 372.

Plaintiff who had brought suit and garnishment proceedings, not being a party to the mandamus proceedings, was not bound thereby, and might proceed to final determination of his case. Curtis v Hutchinson, 126 M 265, 148 NW 66.

It is the duty of the clerk of the school district to draw orders on the treasurer for a teachers wages. There is nothing that involves discretion, and consequently mandamus will lie to compel him to do his duty. State ex rel v Jack, 126 M 367, 148 NW 306.

Mandamus is the proper remedy to compel the district court to proceed with trial of a case brought by a citizen of Iowa upon a transitory cause of action for a tort committed there, against a railway company incorporated in Illinois, and doing business in all three states. State ex rel v District Court, 126 M 501, 148 NW 463.

All legal requirements having been complied with, mandamus will lie directing the county auditor to consider and pass upon certain bids submitted for the construction of a rural highway. State ex rel v Anding, 132 M 36, 155 NW 1048.

On application of an officer and stockholder accused of embezzling funds, mandamus will lie to compel the custodian of the books of the company to submit them to applicant for examination. State ex rel v Displayograph Co. 135 M 479, 160 NW 486.

A writ of mandamus has become a writ of review of orders made by the trial court granting or denying a motion for a change of the place of trial. It may be invoked when the change of the place of trial is a matter of right. State ex rel v District Court, 150 M 498, 185 NW 1019; State ex rel v District Court, 159 M 282, 198 NW 667.

An application for a writ of mandamus to compel the city council of Eveleth to submit a proposed ordinance to a vote of the people, pursuant to a charter provision, will not be denied because the ordinance binds the city only, it being assumed that the parties are acting in good faith. Oakman v City of Eveleth, 163 M 100, 203 NW 514.

Where in its answer the board attacks the validity of the vote by which the electors voted for the erection of the school building, and said board makes no effort to carry out the mandate of the voters, mandamus is proper to compel action. State ex rel v Anderson, 164 M 134, 204 NW 925.

A railway carrier has no right to a stay or denial of a speedy trial because of a foreign injunction. State ex rel v District Court, 176 M 636, 222 NW 931.

The granting or withholding of the remedy rested in the discretion of the trial court, and granting the writ did not indicate abuse. State ex rel v Magie, 183 M 60, 235 NW 526.

On trial of an appeal to the district court from the probate court, mandamus will issue to require the judge of the district court to make findings of fact, conclusions of law, and an order for judgment. State ex rel v District Court, 186 M 432, 243 NW 434.

The courts cannot by mandamus control the exercise of discretion vested in a public official or commission, but may determine whether, on a given state of facts and under the law, a commission or an official had any discretion. State ex rel v Ritchel, 192 M 63, 255 NW 627.

Under civil service rules mandamus is the proper remedy to which an employee should resort in obtaining relief from wrongful discharge. State ex rel v Warren, 195 M 180, 261 NW 857.

Where the things to be done are ministerial acts of public officials, and the right to have them done clearly appears, mandamus is a proper remedy. The officials are compelled to issue to relator a warrant for his salary. State ex rel v City of Waseca, 195 M 266, 262 NW 633.

Mandamus should be granted to remand the action to the proper county for trial. *Newborg v Martin*, 200 M 596, 274 NW 875; *Kulla v District Court*, 200 M 633, 274 NW 673.

The remedy of mandamus employed by the landowner to secure from the county auditor an official certificate of the amount required to be paid to the county treasurer in redemption of land sold for taxes, has not been supplanted by the uniform declaratory judgments act. *Farmers & Merchants v Billstein*, 204 M 224, 283 NW 138.

Section 125.06, Subdivision 14, confers on school officers discretionary power to furnish free transportation of pupils to and from school. Mandamus will not lie to control the discretion of the school officers. *State ex rel v School District*, 204 M 280, 283 NW 397.

Mandamus is the proper remedy to compel the auditor and treasurer to perform their statutory duties. *State ex rel v County of Pennington*, 211 M 569, 2 NW (2d) 41.

Mandamus is the proper remedy to compel a power company to connect its system with a private applicant's premises. OAG Aug. 20, 1934 (524c-11).

2. When denied

The writ of mandamus will not lie to require an act to be done which it would not be lawful for the person to do, except for the writ, so that when a board of canvassers has met, canvassed the votes and adjourned sine die, the board is functus officio. It has no power to reconvene, nor has the court power to compel it. *Clark v Buchanan*, 2 M 346 (298).

The supreme court will not undertake to compel the governor of the state to perform any duty devolving on him as the chief executive and properly pertaining to such office. The executive is, in such matters, independent of the judiciary. *Chamberlain v Sibley*, 4 M 309 (228).

Where there is no other specific and adequate remedy, mandamus may be awarded to, compel the performance of a duty; but the writ will not be awarded unless the right sought to be enforced is a complete and perfect legal right, and the reciprocal obligation a complete and perfect legal obligation. *Warner v Commissioners*, 9 M 139 (130); *Allen v Robinson*, 17 M 113 (90); *State ex rel v Davis*, 17 M 429 (406); *State ex rel v Southern Minnesota*, 18 M 40 (21); *State ex rel v Reed*, 27 M 458, 8 NW 768; *State ex rel v City of Mpls.* 32 M 501, 21 NW 722; *State ex rel v Cooley*, 58 M 514, 60 NW 338.

Upon mandamus the holder of the certificate of election is entitled to possession of the office and records, and the court will not try the question of his eligibility. The auditor's certificate, when regular, is conclusive of the right of the party to whom issued to the office except in a proceeding where the right is directly in issue. It cannot be questioned by mandamus. *State ex rel v Sherwood*, 15 M 221 (172); *State ex rel v Churchill*, 15 M 455 (369); *Allen v Robinson*, 17 M 113 (90); *State ex rel v Williams*, 25 M 340; *Burke v Leland*, 51 M 355, 53 NW 716.

The supreme court declines to comply with a request of the governor for its opinion upon the proper construction of an act of the legislature, following *Re Application of the Senate*, 10 M 78 (56), where the court held Public Statutes 1858, Chapter 4, that section to be unconstitutional. *Rice v Austin*, 19 M 103 (74); *State ex rel v Dike*, 20 M 363 (314).

The exemption of the governor of the state from actions or proceedings to enforce the performance of duties devolved on him as an executive, rests in the constitution, and cannot be waived by any legislative act. *St. Paul & Chgo. v Brown*, 24 M 517.

The courts cannot compel an officer to do an unauthorized act. *State ex rel v Register of Deeds*, 26 M 521, 6 NW 337; *State ex rel v Board*, 27 M 90, 6 NW 421; *State ex rel v Hill*, 32 M-275, 20 NW 196; *State ex rel v Secrest*, 33 M 381, 23 NW 545; *State ex rel v Krahmer*, 92 M 397, 100 NW 105; *State ex rel v Tauer*, 178 M 484, 227 NW 499.

Whether under the state constitution any officer of the executive department of the state government can be subjected to judicial control in the performance

MINNESOTA STATUTES 1945 ANNOTATIONS

3945

MANDAMUS 586.01

of an official duty has been before the state supreme court for consideration and decision in re Application of the Senate, 10 M 78 (56); Rice v Austin, 19 M 103 (74); State ex rel v Dike, 20 M 363 (314), and St. Paul & Chgo. v Brown, 24 M 517, and the holding has uniformly been against the existence of such jurisdiction or power in the courts. The reason rests upon the constitutional principles that each of these departments of government is independent of the other. Western Railroad v DeGraff, 27 M 1, 6 NW 341; State ex rel v Whitcomb, 28 M 50, 8 NW 902; Secombe v Kittelson, 29 M 555, 12 NW 519; State ex rel v Broden, 40 M 174, 41 NW 817.

The court cannot compel the discretion of a board to which the legislature has entrusted the administration of state policy. The relator is not entitled to a remedy by mandamus to secure a review of the correctness, or the reversal, of the determination of the board. State ex rel v State Medical Board, 32 M 324, 20 NW 238; State ex rel v Town of Somerset, 44 M 549, 47 NW 163; State ex rel v Board, 60 M 510, 62 NW 1135; State ex rel v Teal, 72 M 37, 74 NW 1024; State ex rel v Babcock, 175 M 583, 222 NW 285.

It is a fundamental principle of the law of mandamus that the writ will never be granted in cases when, if issued, it would prove unavailing. State ex rel v Secrest, 33 M 381, 23 NW 545; State ex rel v Archibald, 43 M 328, 45 NW 606; State ex rel v Neisen, 173 M 350, 217 NW 371.

Notwithstanding General Statutes 1878, Chapter 11, Section 80, mandamus will not lie to compel the trial court to certify its statement of facts and its decisions in tax cases to the supreme court. County of Brown v Winona & St. Peter, 38 M 397, 37 NW 949; State ex rel v Powers, 69 M 429, 72 NW 705.

The right to a public office and the right to exercise its functions cannot be determined in an action for an injunction to restrain the exercise of such functions, but in proceedings in the nature of quo warranto only. Burke v Leland, 51 M 355, 53 NW 716.

General Statutes 1894, Section 8041, providing that honorably discharged union soldiers and sailors who are properly qualified, shall be preferred for employment in all departments of public service, cannot be enforced by mandamus. State ex rel v Copland, 74 M 371, 77 NW 221.

Mandamus is not a mere writ of right. It is a legal remedy granted on equitable principles. Parties are entitled to mandamus only because of such conditions of exceptional circumstances as would result in failure of justice if the extraordinary relief were refused, and then only in exercise of sound judicial discretion. A court should not compel a compliance with the letter of the law where such compliance will violate the spirit of the law. The trial court in the instant case would have abused his discretion, if, at the instance of one operating a business tainted with gambling and not coming into court with clean hands, he had issued compulsory process compelling the carrier to accept the shipments. State ex rel v United States Express, 95 M 442, 104 NW 556.

The board of regents is by law exclusively vested with the management of all educational affairs of the institution, and the courts of the state have no jurisdiction to control its discretion. Gleason v University of Minnesota, 104 M 359, 116 NW 650.

Judgment for a peremptory mandamus should not be granted, upon the relation of a foreign holding corporation to compel the secretary of another holding and foreign corporation to call a meeting of its stockholders for the purpose of taking action necessary to bring about a change in the articles of incorporation of two other foreign corporations. State ex rel v DeGroat, 109 M 168, 123 NW 417.

Mandamus will not lie to regulate the affairs of unincorporated societies or associations. State ex rel v Cook, 119 M 407, 138 NW 432.

The city charter of Brainerd imposes no duty on the council to hear a petition of citizens for removal of officials, so an alternative writ of mandamus to fix a date of hearing was demurrable. State ex rel v City Council, 121 M 182, 141 NW 97.

Mandamus will not lie to change the venue of a transitory action from the municipal court of Hibbing to the municipal court of Duluth. State ex rel v Great Northern, 128 M 225, 150 NW 924.

While mandamus may be the proper remedy to compel members of a town board to repair a road when they refuse to use their discretion, or are arbitrary or capricious in their treatment of a demand, one who applies for relief must show a clear right to the relief, which in the instant case he did not do. *Olson v Honett*, 133 M 160, 157 NW 1092, 1103.

The city of Duluth under its charter may by referendum prohibit the granting of retail liquor licenses, and mandamus will not lie to compel the issuance of a license. *State ex rel v City of Duluth*, 134 M 355, 159 NW 792.

Mandamus cannot be resorted to for the purpose of controlling or reviewing the manner of trial of a civil action. If a jury trial is wrongfully denied, the error can be reviewed only on appeal. *Swanson v Alworth*, 159 M 193, 198 NW 453.

In construing the soldiers preference law, to obtain relief on mandamus, there must be a finding that there was no investigation as to ability and fitness, or that the action upon it was arbitrary. *State ex rel v Emple*, 164 M 14, 204 NW 572.

There is no estoppel against the city pleading and proving all reasons for refusal of food sale license. To bring himself within the provisions of the regulatory ordinance, the petitioner for mandamus must show compliance with the law and that the authorities acted arbitrarily. *State ex rel v City of Mpls.* 164 M 49, 204 NW 632.

There having been no consent by the city council, and no interments in so-called Oak Hill Cemetery, a writ of mandamus to compel the city officials to issue a permit for the interment was properly dismissed. *State ex rel v Harrington*, 167 M 410, 209 NW 6.

When pending a hearing before the commerce commission, defendant requests cancelation of its license to sell its corporate stock, it cannot thereafter be compelled by mandamus to produce its records before the commission, further investigation being only for the purpose of obtaining evidence on which to prosecute under the sale of securities law. *State ex rel v Hardstone Brick*, 172 M 328, 215 NW 186.

It is not enough that funds are available for the project. There must in addition be funds at the same time to do whatever else is necessary on other town roads, consequently the mandamus is limited to removing obstructions from the place of the proposed road. *Ramsdahl v Town of Long Lake*, 175 M 34, 220 NW 166.

Mandamus is not the remedy to correct an error in fixing time of trial, but it is the remedy if the trial court refuses to proceed with the trial. *State ex rel v District Court*, 176 M 636, 222 NW 931.

The power given to the town board under section 160.28 is discretionary. Such discretion cannot be controlled by mandamus. *Powell v Town of Carlos*, 177 M 372, 225 NW 296.

The Chicago Rock Island railway, a citizen of Illinois, being sued by a citizen of Kansas on account of an accident occurring in Kansas, the trial court on motion of the railway company refused to take jurisdiction. It is held that mandamus to compel jurisdiction is not the proper remedy. The writ of mandamus is not a substitute for appeal. (*Distinguishing Prall v District Court*, 126 M 501, 148 NW 463). *State ex rel v District Court*, 178 M 236, 226 NW 569.

Mandamus will not lie to compel the attorney general of the state to try a civil action, wherein the state is plaintiff, at the "next term" of court. *State ex rel v Youngquist*, 178 M 445, 227 NW 891.

The courts cannot by mandamus compel the governor to enforce a law not purely ministerial, but one in which action on his part requires the exercise of discretion. *State ex rel v Christianson*, 179 M 337, 229 NW 313.

Mandamus may be used to enforce the right of a member of an incorporated relief association to be placed on the pension roll under its by-laws. *McKenzie v Mpls. Police Assoc.* 181 M 444, 232 NW 797.

Upon the showing made, the trial court did not abuse its discretion in refusing to allow a change of venue in this proceeding. *State ex rel v District Court*, 186 M 513, 243 NW 692; *Fauler v Chgo. Burlington*, 191 M 637, 253 NW 884.

Mandamus is not the proper remedy to review an order of the trial court denying a motion to amend a pleading. *Desjardins v Emeralite Co.* 189 M 356, 249 NW 576.

An application for a writ of mandamus requiring the district court of Clay County to certify and return to the clerk of court all the testimony taken before respondent as committing magistrate, preliminary to hearing and issuance of a warrant, is quashed and applicant is left to his remedy of appeal or certiorari. *State ex rel v District Court*, 192 M 620, 257 NW 340.

Mandamus is an extraordinary remedy and is not to be resorted to where redress may be had in an ordinary suit at law. It may not issue to enforce a moral obligation. *State ex rel v Bauman*, 194 M 441, 260 NW 523.

Where appeal would be inadequate, prohibition will lie. In the instant case, the writ is made absolute compelling the district court of the fourth judicial district to stay its action for an injunction directed to the district court of St. Louis County. *State ex rel v District Court*, 195 M 170, 262 NW 155.

Mandamus does not lie unless, without reference to any writ or order of court, it be the plain duty of the officer or officials in question to do the act sought to be compelled. *State ex rel v City of Duluth*, 195 M 563, 262 NW 681, 263 NW 912, 266 NW 736.

The order denying the motion of the attorney general to strike out the return made by the state auditor to the alternative writ of mandamus and to strike from the record the names of attorneys appearing for him, is not appealable, but by certiorari the case on review affirmed the order of the trial court. *State ex rel v District Court*, 196 M 44, 264 NW 227.

In the instant case before the commissioner of highways may legally pay the amounts appropriated by Laws 1935, Chapter 309, there must be a judicial determination in the usual way that the highway department is liable. Such determination cannot be made in a proceeding for a writ of mandamus. *International v Elsberg*, 197 M 360, 268 NW 421.

When a classification by police civil service commission relating to soldiers' preference is claimed to be erroneous, review may be had by certiorari, and not mandamus to compel reclassification. *State v Ernest*, 197 M 599, 268 NW 208.

In proceedings for mandamus, the court is bound to consider the situation as it exists as of the time of the hearing whether peremptory writ should issue, and the effect and validity of a city ordinance passed since the issuance of the alternative writ are proper for determination. *State ex rel v Clansing*, 198 M 35, 268 NW 844.

The law not being clear on relator's petition for mandamus for reclassification of his property as a homestead, he must seek some other form of relief. Mandamus will not lie. *State ex rel v Strom*, 198 M 172, 269 NW 371.

Mandamus will be denied when sought for improper purposes and not in good faith. *State ex rel v St. Cloud Milk Producers*, 200 M 1, 273 NW 603.

Where an employer is entitled to a designation, he can compel same under the statute by mandamus; but mandamus will be denied where it is shown that the petitioner has not complied with the provisions of the statute or ordinance which are conditions to his right to the action demanded. *Yoselowitz v Peoples Bakery*, 201 M 608, 277 NW 221.

An order discharging an order to show cause and dismissing a criminal contempt proceeding can only be reviewed by certiorari. *Spannaus v Lueck*, 202 M 497, 279 NW 216.

3. Demand before suit

A mandamus will not lie to a public officer, commanding him to perform an official duty in the absence of a previous demand on him to perform such duty. *State ex rel v Davis*, 17 M 429 (406); *State ex rel v Schaack*, 28 M 358, 10 NW 22; *State ex rel v Olson*, 55 M 118, 56 NW 585.

It was not necessary for the relators to precede their application for a mandamus with a demand on respondents to move their office to the county-seat. The law pointed out their whole duty. The statute was a standing demand and the

MINNESOTA STATUTES 1945 ANNOTATIONS

586.02 MANDAMUS

3948

omission of the respondents was a refusal. State ex rel v Weld, 39 M 426, 40 NW 561.

4. Successive applications

Where the relator institutes proceedings in the district court by alternative mandamus, and that court dismisses the writ, not for any technical defect, but upon a ground which the district court holds shows the relator not entitled to relief, the decision is a bar to another proceeding by mandamus for the same cause. State ex rel v Hard, 25 M 460.

586.02 ON INFORMATION; REMEDY AT LAW.

HISTORY. R.S. 1851 c. 83 s. 5; P.S. 1858 c. 73 s. 5; G.S. 1866 c. 80 s. 3; G.S. 1878 c. 80 s. 3; G.S. 1894 s. 5976; R.L. 1905 s. 4557; G.S. 1913 s. 8267; G.S. 1923 s. 9723; M.S. 1927 s. 9723.

1. On whose information
2. Other adequate relief
3. Other remedies not adequate

1. On whose information

Where the county board declared the office of county treasurer vacant and appointed a successor, the appointee was the proper relator. State ex rel v Williams, 25 M 340.

In mandamus to enforce a purely public duty, not due the government as such, any private person may move as relator. State ex rel v Weld, 39 M 426, 40 NW 561; State ex rel v Archibald, 43 M 328, 45 NW 606; State ex rel v Renville Board, 171 M 180, 213 NW 545.

2. Other adequate relief

Mandamus will not lie where there is an adequate remedy by action. Baker v Marshall, 15 M 177 (136); State ex rel v Churchill, 15 M 455 (369); Harrington v St. Paul & Sioux City, 17 M 215 (188); State ex rel v Williams, 25 M 340; State ex rel v Nelson, 41 M 25, 42 NW 548; Lee v City of Thief River Falls, 82 M 88, 84 NW 654; State ex rel v Krahmer, 92 M 397, 100 NW 105; State ex rel v U.S. Express, 95 M 442, 104 NW 556; State ex rel v Dist. Ct. 128 M 530, 149 NW 1070; State ex rel v Renville Board, 171 M 181, 213 NW 545; Co. of Blue Earth v Williams, 196 M 508, 265 NW 329.

3. Other remedies not adequate

Mandamus will lie, quo warranto or other remedy not being speedy and adequate. State v Sherwood, 15 M 221 (172); State ex rel v Ames, 31 M 440, 18 NW 277; State ex rel v Dist. Ct. 77 M 302, 79 NW 960; State ex rel v Minn. Transfer, 80 M 108, 83 NW 32.

586.03 ALTERNATIVE OR PEREMPTORY; CONTENTS OF WRIT.

HISTORY. R.S. 1851 c. 83 s. 6; P.S. 1858 c. 73 s. 6; G.S. 1866 c. 80 s. 4; 1875 c. 68 s. 1; G.S. 1878 c. 80 s. 4; G.S. 1894 s. 5977; R.L. 1905 s. 4558; G.S. 1913 s. 8269; G.S. 1923 s. 9724; M.S. 1927 s. 9724.

The alternative writ requires respondent to perform or not to perform certain acts, or to show cause why he should not be so compelled. State ex rel v Sherwood, 15 M 221 (172).

It was not error to allow an amendment of the information and alternative writ bringing another party. The manner in which the restoring of the streets being uncertain, the mandate of the court may be specific. State ex rel v Mpls. & St. Louis, 39 M 219, 39 NW 153.

The peremptory writ need not precisely follow the alternative writ, in matters of detail. Upon the hearing, the court may grant the relief in any form consistent

with the case made in the complaint presented and embraced within the issues. State ex rel v Weld, 39 M 426, 40 NW 561.

The court upon hearing of a return on an alternative writ may determine what plan will accomplish the desired object, may disregard the plans made a part of the writ, and may order the bridge built by new plans and specifications, and to that end may have expert evidence on the subject. State ex rel v St. Paul & Duluth, 75 M 473, 78 NW 87.

The alternative writ did not state or recite the facts alleged in the petition, but by reference it stated that the facts stated in the petition attached were true. The writ was held valid. State ex rel v Common Council, 116 M 40, 133 NW 67.

Respondent may demur to the petition and alternative writ in a mandamus case. State ex rel v Cook, 119 M 407, 138 NW 432.

The city ordinance on which the petition was based was too limited to sustain mandamus. State ex rel v Chicago, Milwaukee, 135 M 277, 160 NW 773.

Mandamus may not issue to enforce a moral obligation. State ex rel v Bauman, 194 M 439, 260 NW 523.

586.04 PEREMPTORY WRIT.

HISTORY. R.S. 1851 c. 83 s. 7; P.S. 1858 c. 73 s. 7; G.S. 1866 c. 80 s. 5; G.S. 1878 c. 80 s. 5; G.S. 1894 s. 5978; R.L. 1905 s. 4559; G.S. 1913 s. 8269; G.S. 1923 s. 9725; M.S. 1927 s. 9725.

Since there can be no jury trial in the supreme court, and as the defendant in an alternative writ of mandamus is entitled to such trial, the supreme court cannot proceed with an alternative writ. The proper practice is to apply on notice for a peremptory writ. A peremptory writ will be issued without notice only in those cases where the moving papers preclude the possibility of an excuse for not doing the act sought to be enforced. Harkins v Board, 2 M 342 (294); Harkins v Spencerbox, 2 M 344 (297); Clark v Buchanan, 2 M 346 (298).

Where the facts upon which an application is made are of such nature that they may be controverted, the alternative writ should first issue. Home Insurance v Scheffer, 12 M 382 (261).

A peremptory mandamus, granted ex parte upon the petition of the relator, without previous opportunity afforded to the respondents to be heard, commanding the board of county commissioners to consider and determine the matters alleged in a petition for removal of a county-seat, irrespective of the matter of notice, is erroneous. State ex rel v Board, 42 M 284, 44 NW 64.

586.05 WRIT; COURT ORDER; SERVICE.

HISTORY. R.S. 1851 c. 83 s. 8; P.S. 1858 c. 73 s. 8; G.S. 1866 c. 80 s. 6; 1875 c. 68 s. 2; G.S. 1878 c. 80 s. 6; G.S. 1894 s. 5979; R.L. 1905 s. 4560; 1909 c. 408 s. 1; G.S. 1913 s. 8270; G.S. 1923 s. 9726; M.S. 1927 s. 9726.

That part of General Statutes 1894, Section 399, which provides that the courts may direct the manner in which notice may be given to the common carrier proceeded against, is not in violation of the constitutional provision which forbids delegation of legislative power to the judiciary; nor have legislative powers been delegated in General Statutes 1894, Section 5979, which provides that the court allowing a writ of mandamus shall direct the manner of service. State ex rel v Adams Express Co. 66 M 271, 68 NW 1085.

General Statutes 1894, Section 5979 (section 586.05), has reference only to the alternative writ and does not apply to the writ absolute. State ex rel v Giddings, 98 M 102, 107 NW 1048.

An order of the court granting an alternative writ of mandamus that it be served upon respondent as "by law provided" is a sufficient direction. State ex rel v Brotherhood, 111 M 39, 126 NW 404.

586.06 ANSWER.

HISTORY. R.S. 1851 c. 83 s. 9; P.S. 1858 c. 73 s. 9; G.S. 1866 c. 80 s. 7; G.S. 1878 c. 80 s. 7; G.S. 1894 s. 5980; R.L. 1905 s. 4561; G.S. 1913 s. 8271; G.S. 1923 s. 9727; M.S. 1927 s. 9727.

MINNESOTA STATUTES 1945 ANNOTATIONS

586.07 MANDAMUS

3950

The respondent may demur to the petition and alternative writ in a mandamus case. *State ex rel v Cook*, 119 M 407, 138 NW 432.

Defendant's answer by the facts pleaded therein presented an issue upon the question of reasonableness, and the demurrer of the city thereto should have been overruled. *State ex rel v St. Paul City Ry.* 122 M 163, 142 NW 136.

586.07 DEFAULT; NEW MATTER IN ANSWER; DEMURRER.

HISTORY. R.S. 1851 c. 83 s. 10; P.S. 1858 c. 73 s. 10; G.S. 1866 c. 80 s. 8; G.S. 1878 c. 80 s. 8; G.S. 1894 s. 5981; R.L. 1905 s. 4562; G.S. 1913 s. 8272; G.S. 1923 s. 9728; M.S. 1927 s. 9728.

Respondent may demur to the petition and alternative writ. *State v Cook*, 119 M 407, 138 NW 432.

A demurrer searches all preceding pleadings. *State ex rel v Hardstone Brick Co.* 172 M 330, 215 NW 186.

586.08 PLEADINGS, ISSUES, TRIAL.

HISTORY. R.S. 1851 c. 83 s. 11; P.S. 1858 c. 73 s. 11; G.S. 1866 c. 80 s. 9; G.S. 1878 c. 80 s. 9; G.S. 1894 s. 5982; R.L. 1905 s. 4563; G.S. 1913 s. 8273; G.S. 1923 s. 9729; M.S. 1927 s. 9729.

The complaint or demurrer could not have been held good, as there is no allegation that the board they seek to compel was in existence when the proceeding was instituted. *Clark v Buchanan*, 2 M 346 (298).

Denial in the answer to the writ of any knowledge or information sufficient to form a belief as to whether the relator had received the certificate of election will not be stricken out as sham. *State ex rel v Sherwood*, 15 M 221 (172).

Sufficiency of pleadings considered at length. *State v City of Lake City*, 25 M 404.

The alternative writ must be quashed because it does not contain sufficient information on which to base an order; and, second, there is a fatal variance between the statement which the writ requires respondent to insert and that which was struck out. *State ex rel v MacDonald*, 29 M 440, 13 NW 671.

When a claim against the city has been audited by the comptroller, accepted and ordered paid by the council, and a warrant for payment prepared and signed by the clerk, upon refusal of the mayor to sign, he may be compelled to sign by mandamus. *State ex rel v Ames*, 31 M 440, 18 NW 277.

Amendments to pleadings are liberally allowed, and the entire proceedings are elastic, and relief may be granted, though it differs greatly from the original prayer. *State ex rel v Minneapolis & St. Louis*, 39 M 219, 39 NW 153; *State v Weld*, 39 M 426, 40 NW 461; *State ex rel v St. Paul & Duluth*, 75 M 473, 78 NW 87.

The information on which the application is based fails to show a cause of action, and mandamus is denied. *State ex rel v Olson*, 55 M 118, 56 NW 585.

Pleading may be on information and belief. *State ex rel v Cooley*, 58 M 514, 60 NW 338.

Judgment must be entered before a writ issues. *State ex rel v Copeland*, 74 M 371, 77 NW 221; *State ex rel v McKellar*, 92 M 242, 99 NW 807.

A proceeding by mandamus is the appropriate method for enforcement of refundment of taxes. The preliminary application to the county auditor and refusal by him are sufficient under the statute. The statute, Revised Laws 1905, Section 4563, (section 586.08) makes the proceedings under the writ conform in substance to a civil suit. *State ex rel v County of Chisago*, 115 M 6, 131 NW 792.

The respondent may demur to the petition and alternate writ. *State ex rel v Cook*, 119 M 407, 138 NW 432.

In proceedings in mandamus to compel defendant to provide gates and gate-men at certain street crossings, it was error to strike from the answer averments to the effect that other less expensive devices were more effective, and that a viaduct in the course of construction would divert from these crossings more

MINNESOTA STATUTES 1945 ANNOTATIONS

3951

MANDAMUS 586.09

than nine-tenths of the present traffic. *City of Owatonna v Chgo. Rock Island*, 156 M 475, 195 NW 452.

When mandamus is used to review the order of the trial court on motion to change the place of trial, only matters presented to the trial court can be considered by the appellate court. The supreme court sits in review and does not try the facts. *State ex rel v Dist. Ct.* 161 M 176, 201 NW 298; *State ex rel v Dist. Ct.* 194 M 595, 261 NW 701.

The relator stockholders petitioned to compel an examination of the books of the corporation, but failed to state the purpose of the examination. *Gunther v Bullis*, 173 M 198, 217 NW 119.

The answer contains new matter in defense. In a proceeding of this character, there is no reply. The writ, not the petition, constitutes the complaint. *State ex rel v Youngquist*, 178 M 442, 227 NW 891.

Relator's motion for judgment on the pleadings was properly granted. *State ex rel v Magie*, 183 M 60, 235 NW 526.

Questions arising out of disputes on filings must be presented to the court promptly so they may be considered properly. *Johnson v Holm*, 198 M 192, 269 NW 405.

Parties who submit a mandamus case on the files, records, and affidavits are not in a position to complain that they were not accorded a trial as in an ordinary civil action under the statute. *State ex rel v St. Cloud Milk Producers*, 200 M 1, 273 NW 603.

In an application to compel the remand of the case to Freeborn county for convenience of witnesses, the merits of the case cannot be considered. *State ex rel v District Court*, 200 M 633, 274 NW 673.

Upon this appeal the allegations of the petition must be accepted as true. Mandamus is the proper remedy, and the procedure has not been supplanted by the uniform declaratory judgments act. *Farmers & Merchants v Billstein*, 204 M 224, 283 NW 138.

Defects in the title in mandamus proceedings were of no consequence. They substantially conform to the provisions of sections 544.33, 544.34, 586.08. Whereas here the party has a complete remedy by mandamus, prohibition will not lie. *Stenzel's Estate*, 210 M 512, 299 NW 2.

This is a transitory action, and the reasons why this defendant should have this action tried in the county of his residence are compelling, and a peremptory writ is issued compelling the transfer of the papers in the case to Hennepin county. *Yess v Ferch*, 213 M 593, 5 NW(2d) 641.

Removal from public office. 20 MLR 748.

586.09 JUDGMENT FOR PLAINTIFF; APPEAL.

HISTORY. R.S. 1851 c. 83 s. 15; P.S. 1858 c. 73 s. 15; G.S. 1866 c. 80 ss. 10, 13; G.S. 1878 c. 80 ss. 10, 14; G.S. 1894 ss. 5983, 5987; R.L. 1905 s. 4564; G.S. 1913 s. 8274; G.S. 1923 s. 9730; M.S. 1927 s. 9730.

The correct procedure to bring before the supreme court for review the decision of the district court is to appeal from the judgment or order denying a motion for a new trial. An appeal from an order directing peremptory writ of mandamus to issue can only be sustained by construing such order as an irregular judgment. *State ex rel v McKellar*, 92 M 242, 99 NW 807; *State ex rel v St. Cloud Milk Producers*, 200 M 1, 273 NW 603.

Judgment directing issuance cannot be collaterally impeached in proceedings to punish disobedience. If facts arise substantially rendering modification proper, the remedy is by motion in the original action. *State ex rel v Giddings*, 98 M 102, 107 NW 1048.

Costs and disbursements are not taxable in the supreme court against the secretary of state when his conduct, involved in the litigation, pertains to his governmental duties, in the interest of the state. *State ex rel v Holm*, 186 M 331, 243 NW 133.

Tort liability of administrative officers. 21 MLR 308.

586.10 FINES FOR NEGLECT OF DUTY.

HISTORY. R.S. 1851 c. 83 s. 16; P.S. 1858 c. 73 s. 16; G.S. 1866 c. 80 s. 11; G.S. 1878 c. 80 s. 11; G.S. 1894 s. 5984; R.L. 1905 s. 4565; G.S. 1913 s. 8275; G.S. 1923 s. 9731; M.S. 1927 s. 9731.

586.11 JURISDICTION OF DISTRICT AND SUPREME COURTS.

HISTORY. R.S. 1851 c. 83 s. 17; 1852 amend. p. 15; P.S. 1858 c. 73 s. 17; 1862 c. 18 s. 3; G.S. 1866 c. 80 s. 12; G.S. 1878 c. 80 s. 12; G.S. 1894 s. 5985; R.L. 1905 s. 4566; G.S. 1913 s. 8276; G.S. 1923 s. 9732; M.S. 1927 s. 9732.

The supreme court has no jurisdiction to issue an alternative writ. The proper practice is to apply for a peremptory writ. A peremptory writ will be issued without notice only where the moving papers preclude the possibility of an excuse. *Harkins v Board*, 2 M 342 (294).

General Statutes 1866, Chapter 80, Section 12, made the original jurisdiction of district courts, in all cases of mandamus, exclusive, except where the writ was directed to the district court or a judge thereof. Laws 1869, Chapter 79, gave the supreme court concurrent jurisdiction with the district court in all cases of mandamus. Laws 1876, Chapter 58, amended by including quo warranto in the list of writs issuable by the supreme court. Laws 1881, Chapter 80, Section 13, takes away the original jurisdiction of the supreme court except as stated in the act. *State ex rel v Burr*, 28 M 40, 8 NW 899.

The rule that the courts cannot control the executive officers of the state in their official acts, applied to the state auditor in his acts as commissioner of the land office. *State ex rel v Whitcomb*, 28 M 50, 8 NW 902.

A party complaining that a statement of the case or bill of exceptions is erroneously settled, should ordinarily in the first instance, make a regular application to the court for a resettlement. Thereafter, if necessary, mandamus will lie to compel a correct settlement. *State ex rel v Macdonald*, 30 M 98, 14 NW 459.

Laws 1887, Chapter 10, Section 8, vests in the supreme court (concurrently with a district court) with original jurisdiction of all proceedings by mandamus therein provided for to compel compliance with the provisions of the act. *State ex rel v Chicago, Milwaukee*, 38 M 281, 37 NW 782.

If a defendant complies with all the provisions of Laws 1895, Chapter 28, as to change of venue, the place of trial ipso facto changes. If plaintiff desires to traverse defendant's affidavits, it must be by motion to remand, made in the county to which the papers have been transferred. Should the court refuse compliance, the supreme court may issue a writ of peremptory mandamus requiring said court to show cause why the remand should not be made. *State ex rel v Dist. Ct.* 77 M 302, 79 NW 960.

Upon the face of the petition, a prima facie case is stated that the relator was entitled to registration as a student of the University and should the district court find that the board of regents refuses to perform any of the duties imposed upon it by law, mandamus will lie to compel it to act. *Gleason v University of Minnesota*, 104 M 359, 116 NW 650.

The refusal of the clerk of a district court to transmit the files when change of venue is asked, is in no sense the refusal of the court, and until the court has been first asked to act, relator is in no position to seek from the supreme court a writ to compel transmission of the files. *State ex rel v Dist. Ct.* 125 M 522, 146 NW 480.

A motion to dismiss the appeal is granted. Due to occurrences while the case was pending, it has become a moot case. *State ex rel v City Recorder*, 129 M 534, 152 NW 1102.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by the supreme court after full hearing, the case cannot be stricken from the record on the ground it was not properly settled; The remedy was in the mandamus proceeding within the time permitted for petitions for rehearing for a modification of the peremptory writ. *Krom v Friend-Crosby*, 192 M 522, 257 NW 812.

MINNESOTA STATUTES 1945 ANNOTATIONS

3953

MANDAMUS 586.12

Mandamus is the proper remedy to compel the auditor and treasurer of a county to perform their duties in conformance with the statute. State ex rel v County of Pennington, 211 M 575, 2 NW(2d) 41.

586.12 ISSUES OF FACT; TRIAL.

HISTORY. 1869 c. 79 s. 1; G.S. 1878 c. 80 s. 13; 7881 c. 40 s. 1; G.S. 1894 s. 5986; R.L. 1905 s. 4567; G.S. 1913 s. 8277; G.S. 1923 s. 9733; M.S. 1927 s. 9733.

The right of a jury trial in respect to issues of fact in a proceeding by mandamus instituted in the supreme court is not secured or allowed to either party under the constitution of the state. State v City of Lake City, 25 M 406; State v Burr, 28 M 40, 8 NW 899.

Where a proceeding in mandamus was pending in the supreme court on or before March 7, 1881, the defendant, under Laws 1881, Chapter 40, is entitled to have the record transmitted to the district court of the county of its residence. State ex rel v Town of Lake, 28 M 362, 10 NW 17.

Trial by jury as a matter of right under the code. 11 MLR 449, 452.

Removal from public office; veterans' preference. 20 MLR 748.