

MASON'S MINNESOTA STATUTES

1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-
UTES CONTAINED IN THE GENERAL STATUTES OF 1923, EXCEPT
THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED
BY THE SUBSEQUENT LEGISLATION OF 1925
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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9718. Corporation, when dissolved—If the court shall determine that a corporation, by neglect, abuse, or surrender, has forfeited its corporate rights, privileges, and franchises, it shall adjudge that it be excluded therefrom and be dissolved. (4552) [8262]

9719. Costs—If judgment be rendered in such action against a corporation, or against persons claiming to be such, the court may cause the costs therein to be collected by execution against such persons, or by process against the directors or other officers of such corporation. (4553) [8263]

9720. Judgment against corporation—Receiver, etc.—When such judgment is rendered against a corporation, the court may restrain it, appoint a receiver of its property, and make distribution thereof among its creditors, for which purpose the attorney general shall forthwith institute proceedings. (4554) [8264]

9721. Judgment roll—Copy filed—Upon rendition of such judgment against a corporation, or for the vacating or annulling of letters patent, the attorney general shall forthwith cause a copy of the judgment roll to be filed with the secretary of state. (4555) [8265]

CHAPTER 87.

SPECIAL PROCEEDINGS

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MANDAMUS

9722. To whom issued, etc.—The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting

from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion. (4556) [8266]

1. When writ lie—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 (92-397, 100+105). It will not lie to control the action of the governor or other executive officers of the state even as to ministerial duties (4-309, 228; 19-103, 74; 20-363, 314; 24-517; 27-1, 6+341; 28-50, 8+902; 29-555, 12+519; 40-174, 41+817. See 3-190). It will not lie to test the right to a public office (2-180, 148; 15-221, 172; 15-455, 369; 17-113, 90; 25-340; 51-355, 53+716); or to enforce rights which are doubtful (9-139, 130; 17-113, 90; 17-429, 406; 18-40, 21; 27-458, 8+768; 32-501, 21+722; 58-514, 60+338; 95-442, 104+556); or to control discretion (32-324, 20+238; 38-397, 374-949; 44-549, 47+163; 60-510, 62+1135; 69-429, 72+705; 72-37, 74+1024; 74-371, 77+221. See as to compelling the exercise of discretion (58-275, 59+1015; 66-266, 68+1081; 77-302, 79+966; 86-350, 90+781); or to compel an officer to do an unauthorized act (2-346, 298; 26-521, 6+337; 27-90, 6+421; 32-275, 20+196; 33-381, 23+545; 92-397, 100+105); or where it would prove unavailing (33-381, 23+545; 43-328, 45+606); or to control internal affairs of foreign corporation (109-168, 123+417). Not a writ of right (95-442, 104+556). It will lie to compel calling of meeting of stockholders of domestic corporation (109-168, 123+417). It will not lie to regulate the affairs of unincorporated societies or associations (119-407, 138+432). Is exclusive remedy of parent county seeking to collect from new county its share of former's indebtedness (109-479, 124+372). Board of regents of university is an inferior tribunal, corporation, or board (104-359, 116+650).
164-49, 204+632.

Mandamus cannot be resorted to for the purpose of reviewing an order of the district court, determining the manner of trial of a civil action. If a jury trial is denied, where a litigant is entitled to it and asserts his right, the error can be reviewed only on appeal. 159-193, 198+453.

The writ may issue to require a court in which an action is pending to hear and determine it, although the clerk may have transmitted the records and files to another court. 159-282, 198+667.

Although mandamus was not intended as a reviewing writ, the practice of using it to settle disputes as to the proper place of trial has become firmly established. 159-282, 198+667.

An application for a writ of mandamus to compel a city council 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. 163-100, 203+514.

Determination of fitness of soldier for public employment. 164-14, 204+572.

Where, in their answer, defendants attack the resolution, adopted by the voters of a common school district, for the building of a new schoolhouse, and deny authority of the electors in such matter, and make no effort to carry out the mandate of the voters, mandamus is proper to compel action. 164-134, 204+925.

Mandamus to compel the board of public welfare to issue a permit to inter a body in relator's cemetery, where there had been no interments and to the use for burials the city council had not consented, the court

rightly directed the entry of a judgment of dismissal. 167-410, 209+6.

2. **Necessity of demand before suit**—17-429, 406; 28-358, 10+22; 39-426, 40+561; 55-118, 56+585.

3. **Successive applications**—25-460.

See also: 121-182, 141+97; 126-265, 148+67; 126-367, 148+306; 126-501, 148+463; 128-225, 150+924; 132-36, 155+1048; 133-160, 157+1092; 134-355, 159+792; 135-479, 160+486; 150-499, 185+1020.

9723. **On whose information, and when**—The writ shall issue on the information of the party beneficially interested, but it shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law. (4557) [8267]

213+545, note under § 9468.

1. **On whose information**—25-340; 39-426, 40+561; 43-328, 45+606.

2. **Other adequate relief**—15-177, 136; 15-221, 172; 15-455, 369; 17-215, 188, 18+277; 25-340; 31-440; 41-25, 42+548; 77-302, 79+960; 80-108, 83+32; 82-88, 84+654; 92-397, 100+105; 95-442, 104+556; 128-530, 149+1070.

9724. **Alternative and peremptory writs—Contents**—The writ of mandamus is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission so to do, and command him that immediately after the receipt of a copy of the writ, or at some other specified time, he do the required act, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so, and that he then and there make his return to the writ, with his certificate thereon of having done as commanded. The peremptory writ shall be in similar form, except that the words requiring defendant to show cause shall be omitted. (4558) [8268]

15-221, 172; 39-219, 39+153; 39-426, 40+561; 75-473, 78+87. Requisites of alternative writ to which petition is attached (116-40, 133+67). Cited (119-407, 138+432).

135-277, 160+773.

9725. **Peremptory writ**—When the right to require the performance of the act is clear, and it is apparent that no valid excuse for non-performance can be given, a peremptory writ may be allowed in the first instance. In all other cases the alternative writ shall first issue. (4559) [8269]

12-382, 261; 42-284, 44+64. See 2-342, 294; 2-345, 297; 2-346, 298.

9726. **Writ, how issued—Order—Service**—Writs of mandamus shall be issued upon the order of the court or judge, which shall designate the return day, and direct the manner of service thereof, and service of the same shall be by copies of the writ, order allowing same, and petition upon which the writ is granted. (R. L. § 4560, amended '09 c. 408 § 1) [8270]

Constitutional (66-271, 68+1085). Order that writ be served "in the manner provided for by law" held sufficient (111-39 126+404). G. S. 1394 § 5979 cited (98-104, 107+1048).

9727. **Answer—When and how made**—On the return day of the alternative writ, or such further day as the court shall allow, the party upon whom the writ is served may show cause by answer made in the same manner as an answer to a complaint in a civil action. (4561) [8271]

Cited (119-407, 138+432).

122-163, 142+136.

9728. **Default—New matter—Demurrer**—If no answer is made, a peremptory mandamus shall be allowed against the defendant. If an answer is made, containing new matter, the plaintiff may demur thereto, or, on the trial or other proceedings, may avail himself of any valid objection to its sufficiency, or may rebut

it by evidence either in direct denial or by way of avoidance. (4562) [8272]

Respondent may demur to petition and alternative writ (119-407, 138+432).

9729. **Pleadings—Issues, trial, etc.**—No pleading or written allegation other than the writ, answer, and demurrer, shall be allowed. They shall be construed and amended, and the issues tried, and further proceedings had, in the same manner as in a civil action. The demurrer need not be noticed for argument, but the issues raised thereby may be disposed of as are other objections to the pleadings. (4563) [8273]

Denials on information and belief and affirmative allegations in same form permissible (58-514, 60+338). Denials in answer of any knowledge or information sufficient to form belief not stricken out as sham (15-221, 172). Amendment of writ—proceeding elastic—relief allowable (39-219, 39+153; 39-426, 40+561; 75-473, 78+87). See also 115-6, 131+792). Sufficiency of pleadings considered (2-346, 298; 15-221, 172; 25-404; 29-440, 13+671; 31-440, 18+277; 55-118, 56+585). Judgment must be entered before writ issues (74-371, 77+221; 92-242, 99+807). Cited (119-407, 138+432). See 129-184, 151+971.

Court is not limited to a consideration of facts and conditions as they existed at the time the proceeding was initiated, but should take into consideration the facts and conditions existing at the time it determines whether a peremptory writ should issue. 156-475, 195+452.

When mandamus is used to review the order of the court on a motion to change the place of trial to promote the convenience of witnesses and the ends of justice, only the matters presented to the trial court can be considered by the Supreme Court. It sits in review and does not try the facts. 161-176, 201+298.

9730. **Effect of judgment for plaintiff—Appeal**—If judgment is given for the plaintiff, he shall recover the damage which he has sustained, together with costs and disbursements, and a peremptory mandamus shall be awarded without delay. An appeal from the district court shall lie to the supreme court in mandamus as in civil actions. (4564) [8274]

Appeal (92-242, 99+807). Judgment directing issuance cannot be collaterally impeached in proceedings to punish disobedience. If facts arise subsequently rendering modification proper, remedy is by motion in original action (98-102, 107+1048).

9731. **Fines for neglect of duty**—Whenever a peremptory mandamus is directed to a 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, without just excuse, has refused or neglected to perform the duty so enjoined, it may impose upon him a fine of not more than two hundred and fifty dollars, which fine, when collected, shall be paid into the state treasury; and the payment thereof shall be a bar to an action for any penalty incurred by such officer or member, by reason of his refusal or neglect. (4565) [8275]

9732. **Jurisdiction of district and supreme courts**—The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction. In such case the supreme court, or a judge thereof, shall first make an order, returnable in term, that such district court or judge show cause before the court why a peremptory writ of mandamus should not issue, and upon the return day of such order the district court or judge may show cause by affidavit or record evidence; and, upon the hearing, the supreme court shall award a peremptory writ or dismiss the order. In case of emerg-

ency, a special term of the supreme court may be appointed for the hearing. (4566) [8276]

2-342, 294; 28-40, 8+899; 28-50, 8+902; 30-98, 14+459; 38-281, 37+782; 77-302, 79+960; 104-359, 116+650; 125-522, 146+480; 129-535, 152+654.

9733. Trial of issues of fact—Issues of fact in proceedings commenced in a district court shall be tried in the county in which the defendant resides, or in which the material facts stated in the writ are alleged to have taken place; and either party shall be entitled to have any issue of fact tried by a jury, as in a civil action. In any case commenced in the supreme court, where there is an issue of fact, upon request of either party that court shall transmit the record to the proper district court, which shall try the issue in the same manner as if the proceeding had been there commenced. A change of venue may be granted as in other cases. (4567) [8277]

Jury trial (25-404; 28-40, 8+899). Removal from supreme to district court (28-362, 10+17).

PROHIBITION

9734. Issuance and contents—Writs of prohibition shall be issued only by the supreme court, and shall be applied for upon affidavit, by motion to the court, or to a judge thereof in vacation. If the cause shown appears to the court or judge to be sufficient, a writ shall be issued, commanding the court and party or officer to whom it is directed to refrain from any further proceeding in the action or matter specified until the next term of the supreme court, or its further order therein, and to show cause at the next term thereof, or on some designated day in the same term, if issued in term time, why they should not be absolutely restrained from any further proceedings therein. (4568) [8278]

A writ of prohibition is an extraordinary writ issuing out of the supreme court for the purpose of keeping inferior courts or tribunals, corporations, officers and individuals invested by law with judicial or quasi judicial authority from going beyond their jurisdiction (13-244, 228; 13-493, 454; 15-369, 302; 19-117, 85; 42-30, 43+572; 70-58, 72+825). It is directed to the court or other tribunal and to the prosecuting party commanding the former not to entertain and the latter not to prosecute the action or proceeding (13-244, 228; 13-493, 454). The office of the writ is not to correct errors or reverse illegal proceedings, but to prevent or restrain the usurpation of inferior tribunals or judicial officers and to compel them to observe the limits of their jurisdiction (13-493, 454). The danger of usurpation must be real and imminent (4-366, 275; 13-493, 454). It is not a writ of right, but issues in the discretion of the court, and only in extreme cases where the law affords no other adequate remedy by motion, trial, appeal, certiorari, or otherwise (19-117, 85; 24-143; 26-162, 2+166; 26-233, 2+698; 35-178, 28+217; 44-76, 46+204; 70-58, 72+825; 77-302, 79+960). It is a preventive not a corrective remedy (92-176, 99+636). It is to be used with great caution and forbearance for the furtherance of justice and for securing order and regularity in the subordinate tribunals of the state (4-366, 275; 70-58, 72+825). The exercise of unauthorized judicial or quasi judicial power is regarded as a contempt of the sovereign which should be promptly checked (29-474, 523, 9+737; 42-30, 43+572). Three things are essential to justify the writ: first, that the court, officer or person is about to exercise judicial or quasi judicial power; second, that the exercise of such power by such court, officer or person is unauthorized by law; third, that it will result in injury for which there is no other adequate remedy (29-474, 523, 9+737; 70-58, 72+825; 77-302, 79+960). It is issued only to restrain the exercise of judicial powers. It will not issue to restrain the exercise by individuals or non-judicial parties of political, legislative or administrative functions (13-244, 228; 13-493, 454; 30-29, 14-58; 33-81, 21+860; 35-480, 29+585). It may issue to an officer or municipal body to prevent the unlawful exercise of judicial or quasi judicial power (29-474, 523, 9+737; 35-480, 29+585; 70-58, 72+825); and, in rare cases, it may issue to a person or body of persons not being in law a court, nor strictly officers (29-474, 523, 9+737; 42-30, 43+572). It will only lie where there is a want of jurisdiction of the subject matter (77-405, 80+355; 89-440, 95+211; 92-176, 99+636). But jurisdiction of the subject matter means in this connection jurisdiction of the general class of cases to which

the particular case belongs. It does not mean jurisdiction of the subject matter of the particular case. If the court has jurisdiction of the general class of cases to which the particular case belongs and could properly proceed on any possible state of facts prohibition will not lie (see 70-58, 72+825; 89-440, 95+211). In an action proceeding in the ordinary way by summons, pleadings, trial, judgment, etc., where the cause of action is within the jurisdiction of the court, and in the course of the action any matter arises or is presented to the court which requires it to decide upon its jurisdiction, an error in such decision is to be corrected by appeal and not by prohibition (26-162, 2+166; 26-233, 2+698; 35-178, 28+217). A court does not lose jurisdiction of the subject matter by making an erroneous ruling or unauthorized order (77-405, 80+355; 89-440, 95+211). Prohibition does not lie for an excess of jurisdiction committed during the course of trial (24-143, 147). Some cases, however, suggest that prohibition will lie where an inferior tribunal assumes to entertain a cause over which it has jurisdiction but goes beyond its legitimate power and transgresses the bounds prescribed by law (70-58, 72+825; 92-176, 99+636). But see 26-162, 2+166; 26-233, 2+698; 35-178, 28+217; 77-405, 80+355). A court may lose its jurisdiction during the course of an action by reason of the subject matter passing beyond its control (19-117, 85; 44-76, 46+204). Prohibition will not lie to question the jurisdiction of the court over the person of the defendant (26-233, 2+698). See 135-99, 160+198; 136-455, 161+164.

The writ of prohibition is one of discretion and not of right. 210+40

9735. Service and return of writ—Such writ shall be served upon the court and party or officer to whom it is directed in the same manner as a writ of mandamus; and a return to such writ shall be made by such court or officer, the making of which may be enforced by attachment. (4569) [8279]

13-493, 454.

9736. Adoption by party of return—If the party to whom such writ is directed, by an instrument in writing signed by him and attached to such return, shall adopt the same, and rely upon the matters therein contained as sufficient cause why such court should not be restrained as demanded in the writ, such party shall thereafter be deemed the defendant in the proceeding, and the person prosecuting such writ may take issue or demur to the matters so relied upon by such defendant. (4570) [8280]

9737. When return not so adopted—If the party to whom the writ is directed shall not adopt such return, the party prosecuting the writ shall bring on the argument of such return as upon an order to show cause; and he may, by his own affidavit and other proofs, controvert the matters set forth in such return. (4571) [8281]

9738. Judgment—Writ of consultation abolished—If upon final hearing an order is made in favor of the relator, it shall award a writ of prohibition absolute, and it may also direct that all or any of the proceedings theretofore taken in the matter as to which such writ issues be annulled. The writ of consultation is hereby abolished, and the final order, if it be against the relator, shall authorize further proceedings as if the first or alternative writ had not issued. The court may make and enforce such order concerning costs and disbursements, and the amount thereof, as justice shall require. (4572) [8282]

HABEAS CORPUS

9739. Who may prosecute writ—Every person imprisoned or otherwise restrained of his liberty, except persons committed or detained by virtue of the final judgment of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment, may prosecute a writ of habeas corpus to obtain relief from such imprisonment or restraint, if it proves to be unlawful; but no order of commitment for any alleged contempt, or upon pro-

ceedings as for contempt to enforce the rights or remedies of any party, shall be deemed a judgment, nor shall any attachment or other process issued upon any such order be deemed an execution, within the meaning of this section. (4573) [8283]

1. Unconstitutional law—If the law under which a person is held is unconstitutional he may be discharged although held under a "final judgment" (43-250, 48+232; 48-236, 51+112, 31 Am. St. Rep. 650; 55-467, 57+206, 57+794).

2. Want of jurisdiction—If the court is without jurisdiction, either of the person or subject matter, it is not a "competent tribunal" within this section (42-147, 43+845; 54-135, 55+830; 74-518, 77+424; 85-114, 88+415).

3. Not a substitute for appeal—Where a person is confined under the final judgment of a court he can be released on habeas corpus only for jurisdictional defects. Habeas corpus cannot be allowed to perform the function of a writ of error or appeal. If a court has jurisdiction of the person and subject matter and could have rendered the judgment on any state of facts, the judgment, however erroneous or irregular or unsupported by the evidence, is not void, but merely voidable, and habeas corpus is not the proper remedy to correct the error (24-87; 39-172, 39+65; 54-135, 55+830; 55-467, 57+206, 794; 68-320, 71+396; 68-465, 71+681; 69-265, 72+79; 69-451, 72+703; 73-77, 75+1029; 74-518, 77+424; 78-377, 81+9; 109-434, 124+11; 112-121, 127+465; 112-428, 128+454; 116-1, 133+86; 117-173, 134+509).

A writ of habeas corpus does not take the place of an appeal or writ of error. 213+56.

3a. Office of writ.

The evidence is sufficient to sustain the action of the examining magistrate in holding the relator to answer in the district court to the charge of furnishing intoxicating liquor portable as a beverage to a minor. Writ of habeas corpus discharged. 213+556.

3b. Custody of children.

161-532, 201+631.

The findings to the effect that relator, the mother, was fit and suitable and situated financially and in other respects to afford her child proper care, therefore entitled to its custody and control, held sustained by the evidence. 156-178, 194+326.

The evidence warrants the conclusion that relator and his wife, the parents of the child, Irene, temporarily placed in the custody of respondents, are morally and financially fit and able to properly rear and educate their child, and should be awarded custody of the same. 164-573, 205+267.

3c. Insane persons.

Whether the relationship of the petitioner to the alleged defective as relative or guardian, and his residence in the county, are jurisdictional facts, quaere 210+14.

Jurisdiction of the probate court was not negatived, and no relief could be given on habeas corpus. 210+14.

3d. Conviction pending appeal.

A judgment of conviction of the relator in a state court held not void under R. S. U. S. § 766 (Mason's Code 28:65), because at the time of the trial of the indictment resulting in the conviction there was pending in the United States Circuit Court of Appeals an appeal from an order of the United States District Court discharging a writ of habeas corpus issued upon the petition of the relator. 158-473, 198+309.

Section 766 of the Revised Statutes of the United States (Mason's Code, 28:365) provides in effect that a judgment in a state court, convicting a person of a criminal offense, cannot be enforced during the pendency of an appeal from an order of a federal court discharging a writ of habeas corpus by which the validity of the judgment was brought into question. The pendency of such an appeal does not stay the enforcement of another judgment of conviction rendered by the state court in another prosecution for a similar offense, separate and distinct from the offense involved in the proceeding in the federal court. 167-343, 209+24.

3e. Denial of change of judge.

Where a court having jurisdiction of the subject-matter and of the defendant erroneously denies an application for change of judge, the remedy is by appeal. The defendant is not entitled to be discharged on a writ of habeas corpus. 159-403, 199+103.

3f. Sentence invalid in part.

A sentence imposing imprisonment as a punishment, and imprisonment to coerce the payment of costs, the two exceeding 3 months, is not void altogether; and one imprisoned is not entitled to his liberty until he has served the valid portion of his sentence. 164-289, 204+955.

4. Review of evidence—When a person is restrained

under a final judgment the sufficiency of the evidence to sustain the judgment cannot be reviewed on habeas corpus (69-451, 72+703, and cases cited), but the evidence on which a committing magistrate has committed a person may be reviewed for the purpose of determining whether it fairly and reasonably tends to show the commission of the offense charged and whether it fairly and reasonably tends to make a probable cause for charging the prisoner with its commission (31-110, 16+692; 35-283, 28+659; 85-114, 88+415).

5. How far discretionary—Although the writ of habeas corpus is a constitutional and imperative writ of right it does not issue as a matter of course to every applicant. The petition for the writ must show probable cause for issuing it and where the petition on its face shows no sufficient prima facie ground for the discharge of the applicant, the writ may be legally refused (64-226, 66+969; 73-126, 75+1132).

6. Successive applications—A decision of one court or officer on a writ of habeas corpus refusing to discharge a prisoner is not a bar to the issuance of another writ based on the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereon (31-110, 16+692; 37-360, 34+334); otherwise in proceedings for the possession of a child (37-360, 34+334; 61-539, 63+1113).

7. Restraint by guardian—86-310, 90+763.

8. Restraint in insane hospital—Where person, tried for crime and committed on ground of insanity, recovers sanity, habeas corpus is proper remedy (116-62, 133+82).

9. Scope of review in extradition cases—38-243, 36+462; 84-237, 87+770; 111-132, 126+482. See 128-84, 142+1051; 123-508, 144+157; 126-38, 147+708; 132-295, 156+127; 136-332, 162+353.

9740. Petition—To whom and how made—Application for such writ shall be by petition, signed and verified by the petitioner, or by some person in his behalf, to the supreme court, or to the district court of the county within which the petitioner is detained. Any judge of the court to which the petition is addressed, being within the county, or, if addressed to the district court, the court commissioner of the county, may grant the writ. If there be no such officer within the county capable of acting and willing to grant such writ, it may be granted by some officer having such authority in any adjoining county. (4574) [8284]

Application to court commissioners (10-63, 45; 17-340, 315; 38-278, 37+338; 64-226, 66+969; 83-252, 86+89; 91-5, 97+371); to judges of the district court (10-63, 45; 64-226, 66+969); to judges of the supreme court (10-39, 22; 31-110, 16+692; 47-518, 50+607); to judge of adjoining county (47-518, 50+607). See 124-456, 145+167; 127-102, 148+896.

9741. Proof in certain cases—Whenever application for such writ is made to an officer not within the county where the prisoner is detained, he shall require proof, by the oath of the applicant or other evidence, that there is no officer in such county authorized to grant the writ, or that all so authorized are absent, or for reasons specified are incapable of acting, or have refused to grant such writ; and, if such proof is not produced, the application shall be denied. (4575) [8285]

On habeas corpus, where evidence did not establish conclusively that relator was of fugitive from justice of another state, writ was properly discharged. 162-52, 203+226.

9742. Statements in petition—The petition shall state, in substance:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so imprisoned or restrained, and the place where; naming both parties if their names are known, or describing them if they are not.

2. That such person is not committed or detained by virtue of any process, judgment, decree, or execution as hereinbefore specified.

3. The cause or pretense of such confinement or restraint, according to the knowledge or belief of the party verifying the petition.

4. If the confinement or restraint be by virtue of

any warrant, order, or process, a copy thereof shall be annexed, or it shall be averred that, by reason of such prisoner being removed or concealed before application, a demand of such copy could not be made, or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused.

5. If the imprisonment is alleged to be illegal, the petition shall state in what the illegality consists. (4576) [8286]

The petition should state in what the illegality of the imprisonment consists and this should be done by stating facts as distinguished from mere conclusions of law. If the confinement is by virtue of a warrant a copy thereof must be annexed or a reason averred for not doing so (23-1; 73-126, 75+1132). The petition must show probable cause for issuing the writ (64-226, 66+969).

167-343, 209+24, note under § 9739.

9743. Form of writ—Every writ of habeas corpus shall be under the seal of the court, and substantially in the following form:

The State of Minnesota, to the Sheriff of, etc. (or to A. B.):

You are hereby commanded to have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. shall be called or charged, before E. F., judge of the court, at, on (or immediately after the receipt of this writ), to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

Witness, etc.

(4577) [8287]

Seal of court essential (17-340, 315).

9744. When sufficient—Such writ shall not be disobeyed for any defect of form. It shall be sufficient if the petitioner, and the person having him in custody, be designated therein with reasonable certainty, by name, description, or otherwise. Either may be designated by an assumed name if his true name be unknown or uncertain, and any person served with the writ shall be deemed the person to whom it is directed, although the name or description be wrong, or be that of another person. (4578) [8288]

124-457, 145+167.

9745. Refusal to grant—Penalty—If any officer authorized to grant writs of habeas corpus wilfully refuses to grant such writ when legally applied for, he shall forfeit to the party aggrieved one thousand dollars for every such offence. (4579) [8289]

64-226, 66+969.

9746. Return to writ—The person upon whom any such writ is duly served shall state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody or under his control or restraint, and, if he has not, whether he has had him in his custody or under his control or restraint at any and what time prior or subsequent to the date of the writ.

2. If he has the party in his custody or under his control or restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited, on the return of the writ, to the officer before whom the same is returnable.

4. If the person upon whom such writ is served has had the party in his custody or under his control or restraint at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority, such transfer took place.

The return shall be signed by the person making the same, and, except where such person is a sworn public officer, and makes his return in his official capacity, it shall be verified by oath. (4580) [8290]

9747. Body produced—Exception—The person or officer on whom the writ is served shall bring the body of the person in his custody, according to the command of such writ, except in the case of the sickness of such person, as hereinafter provided. (4581) [8291]

9748. Compelling obedience—If the person upon whom such writ is served refuses or neglects to produce the person named therein and make a full return thereto at the time and place required, and no sufficient excuse is shown, the officer before whom such writ is returnable, upon proof of service thereof, shall forthwith issue an attachment against such person, directed to the sheriff or coroner of any county, and commanding him forthwith to apprehend such person and bring him before such officer; and, on such person being so brought, he shall be committed to the county jail until he shall make return to such writ and comply with all orders made by such officer in the premises. (4582) [8292]

9749. Prisoner held in custody by sheriff—The officer by whom any such attachment is issued may also, at the same time or afterward, issue a precept to the sheriff or other person to whom the attachment was directed, commanding him to bring forthwith before such officer the party for whose benefit such writ was allowed, who shall thereafter remain in the custody of such sheriff or person until he is discharged, bailed, or remanded, as such officer shall direct. (4583) [8293]

9750. Proceedings on return of writ—The officer before whom the person is brought on such writ, immediately after the return thereof, shall examine into the facts set forth in such return, and into the cause of the imprisonment or restraint, whether the same was upon commitment for a criminal charge or not. (4584) [8294]

Cited (101-303, 112+260).

210-110.

9751. Prisoner discharged, when—If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such officer shall discharge the petitioner therefrom. (4585) [8295]

9752. Prisoner remanded, when—The officer shall forthwith remand such person, if it appears that he is detained in custody:

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction;

2. By virtue of the final judgment of a competent court of civil or criminal jurisdiction, or of an execution issued upon such judgment;

3. For any contempt, specially and plainly charged in the commitment, by some court, officer, or body having authority to commit for the contempt so charged; or

4. That the time during which such person may be legally detained has not expired. (4586) [8296]

106-138, 118+676.

149-301, 183+670; 153-161, 189+711.

167-343, 209+24, note under § 9739.

9753. Held under process, when discharged—If it appears on the return that the prisoner is in custody by virtue of civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner can be discharged only in the following cases:

1. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

2. Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the person is entitled to be discharged;

3. Where the process is defective in some matter of substance required by law, rendering it void;

4. Where the process, though in proper form, has been issued in a case not allowed by law;

5. Where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; or

6. Where the process is not authorized by any judgment or order of any court, or by any provision of law. (4587) [8297]

Legal existence of court organized under color of law cannot be questioned in habeas corpus sued out by person convicted and sentenced (106-133, 118+676). Cited (116-62, 133+82).

9754. Bailed, remanded, etc., when—If it appear that the petitioner has been legally committed for a criminal offense, or if upon hearing it appears by the testimony offered with the return that he is guilty of such offense, although the commitment is irregular, the officer before whom he is brought shall admit him to bail, if the case is bailable and good bail be offered, or, if not, he shall forthwith remand him. In other cases he shall be placed in the custody of the person legally entitled thereto, or, if no one is so entitled, he shall be discharged. (4588) [8298]

156-506, 194+460.

9755. Custody until judgment—Until judgment is given upon the return, the officer before whom such person is brought may either commit him to the custody of the sheriff of the county, or place him in such other custody as his age and other circumstances require. (4589) [8299]

9756. Notice of proceeding—In criminal cases, if the prisoner is confined in a town, village, city or county jail, notice of the time and place at which the writ is returnable shall be given to the county attorney of the county from which the prisoner was committed, if such county attorney is within his county; if the prisoner is confined in a state institution, said notice shall be given to the attorney general, whose duty it shall be to appear for the person named as respondent in said writ; in other cases, like notice shall be given to any person interested in continuing the custody or restraint of the party seeking the aid of such writ. (R. L. '05 § 4590, G. S. '13 § 8300, amended '15 c. 227 § 1)

9757. Traverse of return—New matter—The petitioner, on the return of any writ, may, on oath, deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge; and thereupon such officer shall proceed, in a summary way, to hear such allegations and proofs as are legally produced in support of such imprisonment or detention, or against the same, and so dispose of such person as justice requires. (4591) [8301]

Traverse of return (24-87). If the petitioner does not plead, the petition must be disposed of forthwith on the return alone without the introduction of evidence (55-467, 57+206, 794). See 149-437, 183+957.

9758. Proceedings in case of sickness of prisoner—Whenever, by reason of sickness or infirmity, the petitioner cannot, without danger, be brought before the officer before whom the writ is returnable, the person in whose custody he is may state that fact in his return; and if the officer is satisfied of the truth of such statement, and the return is otherwise sufficient, he shall decide upon such return and dispose of the matter. The petitioner in such case may appear by attorney and plead to the return as if he were present, and, if it appear that the petitioner is illegally imprisoned or restrained of his liberty, the officer shall order those having him in custody to discharge him forthwith; but if it appear that he is legally imprisoned or restrained, and is not entitled to be admitted to bail, said officer shall dismiss the proceedings. (4592) [8302]

9759. Order of discharge, how enforced—Obedience to any order for the discharge of a prisoner may be enforced by the officer issuing the writ or granting the order, by attachment, in the same manner as provided for neglect to make return to a writ of habeas corpus; and the person guilty of such disobedience shall forfeit to the person aggrieved one thousand dollars in addition to any special damages sustained by him. (4593) [8303]

9760. Re-arrest of person discharged—No person who has been discharged upon a habeas corpus shall be again imprisoned or restrained for the same cause, unless indicted therefor, convicted thereof, or committed, for want of bail, by some court of record having jurisdiction of the cause, or unless, after a discharge for defect of proof, or for some material defect in the commitment in a criminal case, he shall be again arrested on sufficient proof, and committed by legal process. (4594) [8304]

31-110, 16+692; 37-405, 34+748.

9761. Transfer or concealment of person—Forfeiture—If any one who has in his custody or under his control a person entitled to a writ of habeas corpus, whether a writ has been issued or not, transfers such prisoner to the custody, or places him under the power or control of another person, conceals him, or changes his place of confinement, with intent to elude the service of such writ or to avoid the effect thereof, he shall forfeit four hundred dollars to the party aggrieved thereby, to be recovered in a civil action. (4595) [8305]

9762. Refusal to furnish copy, etc.—Any officer or other person refusing to deliver a copy of any order, warrant, process, or other authority by which he detains any person, to any one who shall demand the same and tender the fees therefor, shall forfeit two hundred dollars to the person so detained. (4596) [8306]

68-509, 71+687.

9763. Service of writ—Bond—The writ can be served only by a legal voter of the state. The officer granting it may require a bond to the state in a sum not exceeding one thousand dollars, conditioned for the payment of all costs and expenses of the proceeding, and the reasonable charges of restoring the prisoner to the person from whose custody he was taken, if he shall be remanded. Such bond shall be approved by the officer issuing the writ, and be filed with the clerk. (4597) [8307]

9764. Service of writ—The writ of habeas corpus may be served by delivering the same to the person to whom it is directed, or, if he cannot be found, by leaving it at the jail or other place in which the prisoner is confined, with any underofficer or other person of

proper age having charge for the time of such prisoner. If the person upon whom the writ ought to be served conceals himself, or refuses admittance to the party attempting to serve the writ, it may be served by affixing the same in some conspicuous place on the outside either of his dwelling house, or of the place where the party is confined. (4598) [8308]

9765. Return to be made, when—If the writ is returnable on a certain day, return shall be made and the prisoner produced at the time and place specified therein. If it is returnable forthwith, and the place is within twenty miles of the place of service, such return shall be made and the prisoner produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles. (4599) [8309]

9766. Power of court not restrained—Nothing herein shall prevent any court from issuing a writ of habeas corpus necessary or proper to bring before it any prisoner for trial, or to be examined as a witness in any action or proceeding, civil or criminal, pending in such court. (4600) [8310]

9767. Appeal to supreme court—Any party aggrieved by the final order in proceedings upon a writ of habeas corpus may appeal therefrom to the supreme court in the same manner as other appeals are taken from the district court, except that no bond shall be required of the appellant. Upon filing notice of appeal with the clerk of the district court, and payment or tender of his fees therefor, such clerk shall forthwith make, certify, and return to the clerk of the supreme court copies of the petition, writ, return of respondent, answer, if any, of the relator thereto, and the order appealed from. (4601) [8311]

61-539, 63-1113; 65-453, 68-77; 66-291, 68-1089; 69-104, 72-53; 77-483, 502, 80-633, 778; 78-166, 80-877; 83-252, 86-89; 84-203, 87-489; 84-237, 87-770; 86-310, 90-769; 91-277, 97-972; 93-294, 101-303; 99-49, 108-880; 123-85, 142-1057; 135-321, 160-858; 143-149, 173-414; 148-486, 181-640.

9768. Hearing on appeal—The appeal may be heard before the supreme court whenever it is in session, upon application of either party to said court or a justice thereof. The order fixing the time of hearing, which shall not be less than six nor more than fifteen days from the date of application, shall be served on the adverse party at least five days before the date so fixed. The appeal shall be tried and judgment rendered in the same manner as if the writ had originally issued out of the supreme court, and, if the person in whose behalf the writ is applied for is a child of tender years, the court, as a part of its judgment, shall determine who is entitled to control his education and training. No costs or disbursements shall be allowed any party to such appeal, nor shall any of the papers used on such hearing be required to be printed. (4602) [8312]

Trial de novo (110-103, 124-634). Errors and irregularities occurring on trial below need not be considered (119-368, 133-315). Rules as to service of briefs and assignments of error have no application (116-1, 133-86). Cited (98-533, 107-1134; 99-49, 108-880).

123-509, 144-157; 149-437, 183-956.

After an extended examination and consideration of the evidence as shown by the record in this case, we are satisfied that, for the present, the welfare and best interests of the child demand that she be left with the respondent, and that, for such reason, the writ should be dismissed. 166-423, 208-131.

CERTIORARI

9769. Within what time writ issued—No writ of certiorari shall be issued, to correct any proceeding, unless such writ shall be issued within sixty days after the party applying for such writ shall have re-

ceived due notice of the proceeding sought to be reviewed thereby. ('09 c. 410 § 1) [8313]

127-519, 143-1082; 129-300, 152-541; 134-191, 158-826; 136-461, 161-714; 137-267, 161-1056; 148-336, 181-858; 194-403.

165-50, 205-691; 167-307, 209-3.

In general.

A writ of certiorari will not lie to a special tribunal which has gone out of existence. 162-251, 202-444.

The determination of the rightfulness of the actions of county official in assessing omitted moneys and credits will not be determined on certiorari. There is an adequate legal remedy by way of defense. 166-414, 208-181.

Time for issuance.

After the period allowed for an appeal from an order or judgment of the probate court, there can be no review on the merits by certiorari. 161-83, 200-848.

Writ of certiorari properly quashed because not issued within 60 days after applicant therefore had admitted due service of notice of order sought to be reviewed. 212-29.

Notice.

Actual notice does not take place of written notice. 163-383, 202-52.

Service of writ. 165-493, 206-718.

Findings of fact. 158-532, 197-257.

Compensation proceedings.

Certiorari to review a judgment awarding compensation to the relator under the Workmen's Compensation Law. The only questions presented are questions of fact not within the province of this court to determine. 131-153, 201-141.

Drainage proceedings.

The order so made on that hearing, finding the facts stated and establishing the proposed ditch, is final as to such questions, reviewable only by certiorari directed to that particular order. 156-95, 194-402.

It cannot be reviewed on certiorari sued out in review of the final order confirming the proceedings had in laying the ditch in compliance with the first order. 156-95, 194-402.

The drainage law does not give the petitioners the right to appeal from an order of the district court dismissing proceedings to establish a ditch. The order may be reviewed by certiorari. 159-140, 198-455.

An order of the district court merging six public drainage systems and several private tile drains, held to be such a final order as may be reviewed by certiorari. 153-428, 199-853.

9770. When served—Such writ must also be served upon the adverse party within said period of sixty days. ('09 c. 410 § 2) [8314]

137-265, 161-714.

165-493, 206-718; 212-29, note under § 9769.

Informal service of the writ of certiorari on the adverse party was made within 60 days from notice of the decision. The conduct of respondents thereafter was such as to lead relator to believe that no advantage would be sought by them because of lack of service. 166-339, 208-18.

9771. Surety for costs in civil case—Each writ of certiorari in a civil case shall be indorsed by some responsible person as surety for costs. ('09 c. 410 § 3) [8315]

149-116, 182-986.

9772. Costs—The party prevailing on a writ of certiorari in any proceeding of a civil nature shall be entitled to his costs against the adverse party; and in case such writ shall appear to have been brought for the purpose of delay or vexation, the court may award double costs to the prevailing party. ('09 c. 410 § 4) [8316]

9773. When dismissed—Costs—If any writ of certiorari shall hereafter be issued contrary to any provision of this act, or shall not be served upon the adverse party within said period of sixty days, the party against which the same is so issued may have the same dismissed on motion and affidavit showing the facts and shall be entitled to his costs and disbursements the same as in other civil actions. ('09 c. 410 § 5) [8317]

129-301, 152-541.

1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions,
and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and
amendatory, and notes showing repeals, together with annotations from the
various courts, state and federal, and the opinions of the Attorney
General, construing the constitution, statutes, charters
and court rules of Minnesota together with digest
of all common law decisions.



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9706. Actions for fines, forfeitures, and penalties, etc.

Actions with respect to money found in forfeited gambling devices. Op. Atty. Gen., June 19, 1931.

9707. Fines, how disposed of.

Amount of forfeited bail bond paid into municipal court must be paid into county treasury. Op. Atty. Gen., Oct. 5, 1929.

Fine of one under complaint of inspector in department of agriculture, dairy and food, was properly remitted to county of conviction. Op. Atty. Gen., July 9, 1932.

Fines provided for in Laws 1933, c. 170 (§5015-40), are "not specially granted or appropriated by law," and in absence of any agreement, by charter or otherwise, between city of South St. Paul and County of Dakota, they shall be paid into the treasury of the county. Op. Atty. Gen., Dec. 18, 1933.

Fines and costs in state cases in municipal courts, such as misdemeanors, are to be paid to county treasurer. Op. Atty. Gen. (306b-6), Apr. 6, 1934.

Fines collected under §835-3 should be paid into the county treasury and not into the state treasury. Op. Atty. Gen. (135a-4), Aug. 3, 1934.

Justice of the peace is personally responsible for check taken in payment of fine. Op. Atty. Gen. (266b-9), Sept. 5, 1934.

Fines collected under §5015-40 are to be paid to county treasurer and not credited to railroad and warehouse commission fund. Op. Atty. Gen. (306h-6), Dec. 15, 1936.

Fine voluntarily paid and transmitted to state treasurer cannot be refunded. Op. Atty. Gen. (199b-7), Aug. 13, 1937.

Fines collected for violations of Veterinarians' Act. Op. Atty. Gen. (465a), May 15, 1939.

Fines collected for violation of ordinances or by-laws of a town regulating traffic on town roads must be paid into county treasury. Op. Atty. Gen. (989B-4), May 20, 1939.

Subject to Laws 1939, c. 359, amending Mason's Stat., §202-158, town of Minnetonka in Hennepin County through its board may enact and enforce ordinances or by-laws relating to streets and highways, vehicles thereon, parking, and traffic, and fines for violation should be paid into town treasury, and not into county treasury. Op. Atty. Gen. (989B-4), July 13, 1939.

9708 1/2. * * * * *

DECISIONS RELATING TO CHAPTER IN GENERAL

1. Liability in general.

Official bond covering term of officer and "until successor is elected and qualified" extends only for a reasonable time after expiration of term. American Surety Co. v. Independent School Dist. (CCA8), 53F(2d)173. Cert. den., 284US683, 52SCR200. See Dun. Dig. 8021.

CHAPTER 86

Actions to Vacate Charters, Etc., and to Prevent Usurpations

9709. To annul act of incorporation—Fraud.

179M373, 229NW353.

9710. To vacate charter, etc.

179M373, 229NW353.

9711. For Usurpation of office, etc.

Action by quo warranto to test title to office in private corporation may be brought in the district court by other officers and stockholders of the corporation without application to, or action by, the attorney general. 179M373, 229NW353.

On respondents' motion, court properly vacated an ex parte order issuing a writ of quo warranto directing respondents to show by what warrant they claimed right to act as trustees of a named religious corporation, organized under laws of this state, it conclusively appearing from petition, writ and affidavits filed that respondents were in fact and law such trustees, and hence that writ had been improvidently issued. Dollenmayer v. R., 286NW297. See Dun. Dig. 8065.

Attorney General will not institute quo warranto proceedings against one in possession of a public office and discharging the duties thereof unless there exists very

substantial ground for believing his possession to be unlawful. Op. Atty. Gen. (63b-3), Jan. 17, 1939.

Statutory provisions for quo warranto are not exclusive, since common law proceedings for same writ may be brought by any taxpayer in either district court or supreme court. Op. Atty. Gen. (361e-2), Jan. 24, 1939.

9713. Relator to be joined.

Title of proceeding in quo warranto. Dollenmayer v. R., 286NW297. See Dun. Dig. 8070.

9717. Judgment for usurpation—Fine.

Where a county commissioner accepts an incompatible office and enters upon the performance of the duties of such office, a vacancy as county commissioner exists, and he may not reassume the duties of the office of county commissioner after having resigned the incompatible office before the board of appointment had acted. Op. Atty. Gen., Feb. 8, 1932.

Where office of county commissioner is rendered vacant by officer's acceptance of an incompatible office, such officer may not be reappointed even after he has resigned the incompatible office. Op. Atty. Gen., Feb. 8, 1932.

CHAPTER 87

Special Proceedings

MANDAMUS

9722. To whom issued.

1. When will lie.

Where commerce commission suspends sale of registered securities pending a hearing to show cause why registration should not be cancelled, and before the hearing the corporation requests a cancellation of the registration, the commission has no right to compel the production of its records and papers, in the absence of some specific allegation of a violation of the Blue Sky Law. 172M328, 215NW186.

A writ will not be granted where, if issued, it would prove unavailing or where lapse of time has rendered the relief sought nugatory. 173M350, 217NW371.

Petitioner must show he is entitled to relief sought but where he seeks to compel public officials to form a governmental duty they are presumed able to perform and the burden is upon them to show the contrary. 173M350, 217NW371.

Where discretion of town supervisors with respect to the opening of a road has been exercised in an arbitrary and capricious manner, the court may exercise control, but it must be made to appear that there are not only available funds but also sufficient available funds to do whatever else may, in the reasonable judgment of the board, be needful on the other town roads. 175M34, 220NW166.

When an executive or administrative body determines a matter involving the exercise of its discretionary power the courts do not interfere. 175M583, 222NW286.

Mandamus is not the proper remedy to correct an error in fixing the time of trial, but if the trial court refuses to proceed with trial, mandamus is the remedy. State ex rel. Collins v. Dist. Ct. of Ramsey County, 176M636, 222NW931.

Power given by §2609 to town board to determine necessity of cutting down hedges and trees in highway is discretionary and cannot be controlled by mandamus. 177M372, 225NW296.

Mandamus does not issue from this court to review a judgment of the district court entered upon the hearing of a motion to dismiss an action brought by the relator, a resident and citizen of another state, under the Federal Employers' Liability Act to recover damages sustained while in the employ of a railroad engaged in interstate commerce in such other state. State ex rel. Boright v. Dist. Ct. Steele County. 178M236, 226NW569.

The writ will not lie to compel the attorney general to try a civil action brought by the state at the "next term" of court. 178M442, 227NW891.

Will not be granted to compel county to publish annual statement in newspaper unlawfully entering into agreement with other papers to obtain contract. 178M484, 227NW499.

The duties imposed on the governor by Mason's Minn. St., §56954, 6955, relating to the removal of officers, is discretionary and not ministerial, and mandamus will not lie. 179M337, 229NW313.

Where town board was without funds, and agreement between towns as to allotment of town road for repairs

was uncertain, mandamus to compel compliance with contract would not issue. 179M392, 229NW577.

Mandamus may be used to enforce right of a member of an incorporated relief association to be placed on pension roll under its by-laws. 181M444, 232NW797. See Dun. Dig. 5752, 5767.

The granting or withholding the remedy of mandamus rested in the discretion of the trial court, and the granting of the writ was not error. *State v. Magie*, 183M60, 235NW526. See Dun. Dig. 5762a.

The legal remedy of mandamus is granted on equitable principles, and the relator may be rejected if he has not "clean hands." *State v. Magie*, 183M60, 235NW526. See Dun. Dig. 5758, 5752(81).

Title to a public office cannot be determined in mandamus proceeding, but temporary possession of the office pending litigation to try title thereto may be controlled thereby. *State v. Magie*, 183M60, 235NW526. See Dun. Dig. 5763.

Mandamus will lie to direct the district court to finish a trial commenced therein, where upon appeal from probate court it erroneously declines jurisdiction. *State v. O'Brien*, 186M432, 243NW434. See Dun. Dig. 5766.

Denial of a motion to change place of trial of an action for divorce, brought in proper county, upon ground that convenience of witnesses and ends of justice will be promoted, may be reviewed on mandamus. *State v. District Court*, 186M513, 243NW692. See Dun. Dig. 5764a.

Mandamus is not proper remedy to review order of court denying a motion to amend a pleading. *De Jardins v. E.*, 189M356, 249NW576. See Dun. Dig. 5754.

Mandamus did not lie to compel trial judge to change place of trial for convenience of witnesses. *Fauler v. C.*, 191M637, 253NW884. See Dun. Dig. 5764a.

Court cannot by mandamus control exercise of discretion vested in a civil service commission, but may determine whether, on a given state of facts and under law and rule applicable thereto, commission has any discretion. *State v. Ritchel*, 192M63, 255NW627. See Dun. Dig. 5753.

Determination by district court on application for examination of writings within reach of court cannot be controlled by mandamus, but is left to be reviewed on appeal or certiorari after trial. *State v. District Court*, 192M620, 257NW340. See Dun. Dig. 5754a.

Mandamus may not issue to enforce a moral obligation. *State v. Bauman*, 194M439, 260NW523. See Dun. Dig. 5756.

Mandamus is an extraordinary remedy and is not to be resorted to where redress may be had in ordinary suit at law, as for enforcement of a promise or contract to pay money. *Id.* See Dun. Dig. 5754.

Where contracts of employment of public school teachers in special school district of city of Minneapolis stipulate a monthly salary, but provide that board of education, employer, may reduce same whenever it deems necessary, no certain or definite rights spring from such contracts so that mandamus will lie to enforce same, and fact that, when so reducing said stipulated salary, board promised that if more money came from tax collections than estimated when reduction was made, such excess would be distributed pro rata to teachers, and that there is such excess, do not legally obligate board to distribute same. *Id.* See Dun. Dig. 5756.

Order denying motion of attorney general to strike out return made by the state auditor to the alternative writ of mandamus and to strike names of attorneys appearing for him from record is not appealable; but by certiorari, court may review order on its merits. *State v. District Court*, 195M169, 264NW227. See Dun. Dig. 5770.

Where employee within civil service provisions of charter of city is wrongfully separated from his employment by discharge or suspension for more than thirty days, mandamus affords a proper remedy. *State v. Warren*, 195M180, 261NW857. See Dun. Dig. 5763.

Where things to be done are ministerial acts of public officials and right to have them done clearly appears, mandamus is a proper remedy. *State v. City of Waseca*, 195M266, 262NW633. See Dun. Dig. 5756.

Mandamus does not lie unless, without reference to any writ or order of court, it be plain duty of officer or officers in question to do act sought to be compelled. *State ex rel. Evans v. City of Duluth*, 195M563, 262NW681. See Dun. Dig. 5756.

Mandamus will not lie unless it is plain duty of defendant to do acts sought to be compelled. *State v. City of Duluth*, 195M563, 263NW912. See Dun. Dig. 5756.

Writ is issued only where there already exists a legal right so clear that it does not admit of any reasonable controversy. *International Harvester Co. v. E.*, 197M360, 268NW421. See Dun. Dig. 5756.

Before state commissioner of highways may legally pay amounts appropriated by Laws 1935, c. 309, to persons therein named, there must be a judicial determination in usual way that highway department is liable therefor, and that determination cannot be made in a proceeding for a writ of mandamus. *Id.*

Where city police civil service commission classified all police employees of city, and classification made is alleged to be erroneous, and in violation of soldiers' preference act, proper remedy is certiorari to review the classification made and not mandamus to compel a reclassification. *State v. Ernest*, 197M599, 268NW208. See Dun. Dig. 5752.

In mandamus to compel issuance of building permit, court is bound to consider situation as it exists as of time of hearing on question whether peremptory writ should issue, and where a city ordinance has been passed since issuance of alternative writ, its effect and validity are necessary and proper issues for determination. *State v. Clousing*, 198M35, 268NW844. See Dun. Dig. 5752b.

Court cannot inquire into motives of city council except as they may be disclosed on the face of particular act in question or by reference to general existing conditions or other legislative acts. *Id.* See Dun. Dig. 5753.

In absence of absolute duty upon officer, mandamus does not lie. *State v. Strom*, 198M173, 269NW371. See Dun. Dig. 5756.

Where before May 1 of an odd-numbered year a dwelling formerly not a homestead becomes one, owner, not having made timely demand upon assessor, local board of review, or county board of equalization for a reclassification of property for assessment as a homestead, is not entitled to mandamus to compel county auditor to reclassify property. *Id.*

Mandamus will be denied when sought for improper purposes and not in good faith. *State v. St. Cloud Milk Producers' Assn.*, 200M1, 273NW603. See Dun. Dig. 5758.

Members of cooperative are not entitled to mandamus to compel corporation to permit inspection and examination of records where purpose is to benefit other companies who have interfered with contractual relations existing between association and its members. *Id.* See Dun. Dig. 5766(78).

Mandamus to compel performance of official duty lies only where officer is under plain and mandatory duty, imposed by law, to perform very action wanted, a ministerial duty being one in which nothing is left to discretion. *Cook v. T.*, 200M221, 274NW165. See Dun. Dig. 5756.

Mandamus will lie to change place of trial for convenience of witnesses and in interest of justice. *State v. District Court of Hennepin County*, 200M633, 274NW673. See Dun. Dig. 5764a.

An action for personal injuries should be tried in the county in which the defendant resided when the action was begun, and mandamus should be granted to remand actions to such county after change of venue to another county. *Newborg v. M.*, 200M596, 274NW875. See Dun. Dig. 5764a, 10122(84).

Mandamus will be denied where it is shown that petitioner has not complied with provisions of a statute or ordinance which are conditions to his right to action demanded. *Yoselowitz v. P.*, 201M600, 277NW221. See Dun. Dig. 5756.

Where an employer is entitled to a designation of an insurance carrier, he can compel designation by the compensation insurance bureau by mandamus. *Id.* See Dun. Dig. 5766.

If court in a criminal contempt proceeding refuses to issue an order to show cause upon a proper showing, mandamus will lie. *Spannaus v. L.*, 202M497, 279NW216. See Dun. Dig. 5753.

Mandamus is an extraordinary remedy, not to be used where there is a plain, speedy and adequate remedy in ordinary course of law. *Farmers & Merchants Bank v. B.*, 204M224, 283NW138. See Dun. Dig. 5754.

Where service of notices to terminate right of redemption were invalid, mandamus was proper remedy by landowner to secure from county auditor official certificate of amount required to be paid to redeem. *Id.* See Dun. Dig. 5762.

Mandamus will not be granted to control discretion by directing its exercise in a particular way. *State v. School Dist. No. 70*, 204M274, 283NW397. See Dun. Dig. 5753.

State confers on school officers discretionary power to furnish free transportation of pupils, and this discretion cannot be controlled by mandamus. *Id.* See Dun. Dig. 5672.

County agricultural society having fair on strength of levy of tax has no remedy against county board thereafter rescinding levy, it being too late to bring mandamus proceedings. *Op. Atty. Gen.*, June 10, 1933.

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

Mandamus will lie to compel mayor to sign orders audited and allowed by city council. *Op. Atty. Gen.* (361f), Jan. 2, 1936.

9723. On whose information, and when.

Where there was an order of court confirming an award of damages in proceeding to establish a judicial road, court had jurisdiction, in a subsequent proceeding by a county to deposit part of damages in court pending settlement of conflicting claim thereto, to enter judgment against county ordering it to pay remainder of award to certain landowner, as against objection that landowner's remedy should have been by mandamus. *Blue Earth County v. W.*, 196M501, 265NW329. See Dun. Dig. 5754.

Mandamus is an extraordinary remedy and is not to be used where there is a plain, speedy and adequate remedy in ordinary course of law. *Id.*

9724. Alternative and peremptory writs—Contents.

State v. Bauman, 194M439, 260NW523; note under §9722.

9728. Default—New matter—Demurrer.

A demurrer searches all preceding pleadings. 172M 328, 215NW186.

9729. Pleadings—Issues, trial, etc.

Petition for examination of corporation books held not sufficient to support mandamus. 173M198, 217NW119.

Appearance in response to writ of mandamus and asking for an adjournment to enable answer does not waive defective pleading. 173M198, 217NW119.

Reply to answer is not necessary. 178M442, 227NW 891.

Relator's motion for judgment presumes truthfulness of answer, and such a motion by respondent rests on allegations of writ alone. 178M442, 227NW891.

Judgment on the pleadings. State v. Magie, 183M60, 235NW526. See Dun. Dig. 5778(28).

Where mandamus is used to review an order of trial court on motion to change place of trial to promote convenience of witnesses and ends of justice, only matters presented to trial court can be considered. State v. District Court of Brown County, 194M595, 261NW701. See Dun. Dig. 5764a, 10126, 10127, 10129.

Questions arising out of disputes on filing of nomination petitions must be presented to court promptly so they may be considered properly. Johnson v. H., 198M 192, 269NW405. See Dun. Dig. 5763.

Parties who submit a mandamus case on 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 statute. State v. St. Cloud Milk Producers' Ass'n., 200M1, 273NW603. See Dun. Dig. 5781.

Upon mandamus to change place of trial for convenience of witnesses, merits of case cannot be considered. State v. District Court of Hennepin County, 200M633, 274 NW673. See Dun. Dig. 5764a.

On appeal from judgment quashing writ of mandamus allegations of petition must be accepted as true. Farmers & Merchants Bank v. B., 204M224, 283NW138. See Dun. Dig. 5776.

9730. Effect of judgment for plaintiff—Appeal.

No costs or disbursements should be taxed against secretary of state unsuccessfully defending mandamus proceeding. State v. Holm, 186M331, 243NW133. See Dun. Dig. 2207.

A direction that a peremptory writ of mandamus issue is an irregular judgment from which an appeal will lie as from a judgment. State v. St. Cloud Milk Producers' Ass'n., 200M1, 273NW603. See Dun. Dig. 5778, 5781(41).

9732. Jurisdiction of district and supreme courts.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by supreme court after full hearing, case so settled cannot be stricken from record on ground that it was not properly settled, remedy being in mandamus proceeding, within time permitted for petitions for rehearing, for a modification of writ. Krom v. F., 192M520, 257NW812. See Dun. Dig. 5768.

PROHIBITION**9734. Issuance and contents.**

Writ may issue where court is exceeding its legitimate powers in any matter over which it has jurisdiction if no other speedy and adequate remedy is available. 173 M271, 217NW351.

Writ issued to lower court only when that court is exceeding its jurisdiction. 173M623, 217NW494.

A writ of prohibition will not be granted where the petitioner had an adequate remedy by writ of certiorari. Martin's Estate, 182M576, 235NW279. See Dun. Dig. 7842.

Where an appeal will give an adequate remedy, prohibition does not lie. State v. District Court, 195M169, 262 NW155. See Dun. Dig. 7842.

Rule that an absolute writ of prohibition will not issue unless petitioner has first raised question of its jurisdiction in subordinate tribunal, is one of practice and not of jurisdiction, and will not prevent issue of writ in a clear case where interests of justice require it. Id. See Dun. Dig. 7845.

Prohibition is properly used to restrain a judge from hearing a matter in which he is disqualified to sit by reason of filing of affidavit of prejudice. State v. Schultz, 200M363, 274NW401. See Dun. Dig. 7841.

Writ of prohibition will not be granted upon contention that criminal complaint does not charge a public offense for reason that alleged contemptuous publication related to matters which had been finally determined by court, since court had jurisdiction of person and of offense attempted to be charged and of determination of whether or not complaint stated a public offense. State v. Laughlin, 204M291, 283NW395. See Dun. Dig. 7840.

If county attorney is not proper party to maintain action for the state, it constitutes only a defect of parties, and objection must be taken by demurrer and not by prohibition out of supreme court. State v. District Court, 204M415, 283NW738. See Dun. Dig. 7323.

While in ordinary case writ of prohibition will not issue out of supreme court until application has been made to district court, such requirement is a matter of practice and is not to be insisted upon where it appears to be useless. Id. See Dun. Dig. 7842.

Prohibition will lie from supreme court where district court appoints a receiver ex parte in absence of extreme emergency. Id. See Dun. Dig. 7845.

Writ of prohibition to court christian. 20 MinnLawRev 272.

9735. Service and return of writ.

Though return to an alternative writ of prohibition is required to be made by court or officer to whom it is directed, it is duty of counsel for party litigant to see that it is made. State v. District Court, 195M169, 262 NW155. See Dun. Dig. 7848.

HABEAS CORPUS**9739. Who may prosecute writ.****1. Unconstitutional law.**

On habeas corpus constitutionality of law under which court proceeded and jurisdiction of court may be challenged. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4132(76).

Constitutionality of law under which court proceeded and jurisdiction of court may be challenged in habeas corpus proceeding. Id.

2. Want of jurisdiction.

A defendant's constitutional right to plead former jeopardy may be waived and if such a plea is not entered at proper time, it is waived by defendant and jurisdiction of trial court is not affected by fact that such a plea might have been interposed. State v. Utrecht, 287NW229. See Dun. Dig. 2442.

3. Not a substitute for appeal.

A writ of habeas corpus cannot be used as substitute for writ of error or appeal for review of a judgment of conviction, nor serve as cover for a collateral attack on such a judgment. State v. Wall, 189M265, 249NW37. See Dun. Dig. 4129(56).

Habeas corpus is not to be used as substitute for an appeal or writ of error, and therefore cannot be used to determine whether or not there was an erroneous decision of issue whether relator was or was not able to pay alimony supporting order of imprisonment for contempt. State v. Gibbons, 199M445, 271NW873. See Dun. Dig. 4129.

An application for a writ of habeas corpus may not be used as a substitute for a writ of error or appeal, as a cover for a collateral attack upon a judgment of a competent tribunal having jurisdiction of subject matter of offense and of person of defendant, nor does fact that petitioner has permitted time to elapse within which a review by appeal might be obtained, and has thereby lost opportunity for such a review, give him a right to resort to habeas corpus as a substitute. State v. Utrecht, 287NW229. See Dun. Dig. 4129.

3a. Office of writ.

Where a summary court-martial has convicted a member of the National Guard, the only questions reviewable by habeas corpus are whether the military court had jurisdiction over him and power to impose the penalty inflicted. 174M82, 218NW542.

On habeas corpus, where respondent justifies detention of relator under a warrant of commitment fair on its face issued upon an adjudication of a competent court having jurisdiction, errors in proceeding prior to commitment are of no avail. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4132(74).

An application for a writ of habeas corpus is an independent proceeding to enforce a civil right and is a collateral attack upon a criminal judgment. State v. Utrecht, 287NW229. See Dun. Dig. 4127.

In a habeas corpus proceeding involving a contention of former jeopardy in connection with a conviction of a state offense state court is bound to follow decisions of United States Supreme Court only so far as due process under 14th amendment is involved. Id. See Dun. Dig. 4127.

3b. Custody of children.

Habeas corpus lies to determine right to possession of child but court will give effect to divorce judgment. 173M177, 216NW937.

If child was awarded to third party who has never had nor sought possession of him, on controversy between parents, court will make such provision for his custody as it deems for the best interest of the child. 173M177, 216NW937.

Custody of children given to maternal grandmother as against father. 175M18, 221NW868.

Custody of child given to aunt and uncle as against father and stepmother. 176M193, 222NW927.

Fact that adjudication of delinquency by probate court committed delinquent to guardianship until 21 years of age instead of until 19 years of age, as prescribed by §8637, does not release her, before she has not yet attained the age of 19 years. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4431.

3c. Insane persons.

Statute directing district court not to try a person for a crime while he is in a state of insanity, imposes a duty on, but does not go to jurisdiction of, the court, and failure to comply with statute is no ground for collateral

attack, as by habeas corpus, on judgment of conviction. State v. Utrecht, 203M448, 281NW775. See Dun. Dig. 4132.

4. Review of evidence.

Governor's rendition warrant creates a presumption that accused is a fugitive from justice, and to entitle a prisoner held under such a warrant to discharge on habeas corpus evidence must be clear and satisfactory that he was not in demanding state at time alleged crime was committed. State v. Owens, 187M244, 244NW 820. See Dun. Dig. 3713(30).

9740. Petition—To whom and how made.

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ, real party in interest, or his attorney. State v. Hemenway, 194M124, 259NW687. See Dun. Dig. 2331.

9742. Statements in petition.

An allegation in a petition for a writ of habeas corpus that two criminal informations were based upon exactly same facts is not an allegation of a conclusion of law but one of fact, admission of which by state concedes truth of statement except in so far as statement is contradicted by copies of informations attached to petition. State v. Utrecht, 287NW229. See Dun. Dig. 4137.

9746. Return to writ.

Where original warrant of governor was not produced at hearing on habeas corpus but no objection was made thereto and relator did not traverse return of sheriff which contained an alleged copy of original warrant, and in verified petition for writ it was alleged that warrant had been issued, held, that relator was not entitled to discharge because of absence of original warrant. 172M401, 215NW863.

9752. Prisoner remanded, when.

(3).

A commitment which embodies judgment of conviction of criminal contempt, which is unmistakably charged in commitment, is adequate to entitle sheriff to custody of defendant until service imposed has been served. State v. Syck, 202M252, 277NW926. Cert. den., 59SCR64. See Dun. Dig. 4132.

If trial court had jurisdiction of offense and of defendant it is only where extraordinary circumstances surrounding trial make it a sham and a pretense rather than a real judicial proceeding that habeas corpus will lie on ground that judgment is a nullity for want of due process, and this is true even though there is a claim of denial of constitutional rights. State v. Utrecht, 287 NW229. See Dun. Dig. 4132.

9753. Held under process, when discharged.

Scope of review by court in extradition proceeding. 178M368, 227NW176.

9754. Bailed, remanded, etc., when.

Where a person is held as a fugitive from justice under a rendition warrant issued by the Governor of this state, he ordinarily should not be released on bail pending a decision in a habeas corpus proceeding to test the legality of his arrest. State v. Moeller, 182M369, 234 NW649. See Dun. Dig. 3713.

9760. Re-arrest of persons discharged.

A justice of the peace has no power to amend, suspend or set aside a sentence once imposed; but when he has issued a commitment which is found to be erroneous, he may issue a new one, correctly setting forth the sentence. Op. Atty. Gen., Feb. 28, 1931.

9763. Service of writ—Bond.

Where there has been no attempt to create a corporation de jure there can be no corporation de facto. 172 M471, 215NW845.

9767. Appeal to supreme court.

The trial on habeas corpus in the above court is a trial de novo. 172M401, 215NW863.

9768. Hearing on appeal.

179M472, 229NW582.
172M401, 215NW863; note under §9767.

Maternal grandmother awarded custody of female child in preference to father. 179M472, 229NW582.

Trial de novo. 179M532, 229NW787.

On appeal in habeas corpus proceeding, supreme court will not disturb action of trial court awarding custody of child, where all contesting persons are of excellent character and well-fitted for responsibilities of guardianship. State v. Hedberg, 192M193, 256NW91. See Dun. Dig. 4142.

On appeal in a habeas corpus proceeding to determine custody of a child, hearing is de novo. State v. Sivertson, 194M380, 260NW522. See Dun. Dig. 4142(13).

CERTIORARI

9769. Within what time writ issued.

1. In general.

171M519, 214NW795; note under §9770.

In certiorari to review a holding of department of commerce, Supreme Court makes but a limited review and disturbs its holding only where it has gone beyond its jurisdiction or acts arbitrarily or oppressive, or without foundation in the evidence. 174M200, 219NW81.

The record certified by the tribunal, whose proceedings are under review is conclusive. 175M222, 220NW 611.

On the record involved, certiorari would not give plaintiff an adequate remedy. National Cab Co. v. K., 182M 152, 233NW838. See Dun. Dig. 1391.

An order of the probate court, directing an executor to turn over to decedent's aunt certain funds which he claimed to hold as an individual was a final order, and reviewable by certiorari. Martin's Estate, 182M576, 235NW279. See Dun. Dig. 1394, 7842.

In our practice, writ of certiorari is used as a substitute for a writ of error. Mark v. K., 188M1, 143NW 472. See Dun. Dig. 1391, 1402.

Extension of time to redeem from a mortgage foreclosure sale is granted by an order and not by judgment, and review of such order is by certiorari. Swanson v. C., 192M81, 255NW812. See Dun. Dig. 1400.

Entry of judgment instead of order extending time for redemption from mortgage foreclosure sale under the moratorium statute did not prevent a review by certiorari. Id.

Supreme court has a certain discretion in matter of reviewing nonappealable orders by certiorari. State v. District Court, 196M56, 264NW227. See Dun. Dig. 1393.

Order denying motion of attorney general to strike out return made by state auditor to alternative writ of mandamus and to strike names of attorneys appearing for him from record is not appealable; but by certiorari, court may review order on its merits. Id. See Dun. Dig. 1394.

Certiorari will not lie to review an intermediate order of lower court, such as an order granting a new trial. Salters v. U., 196M541, 265NW333. See Dun. Dig. 1395.

Where city police civil service commission classified all police employees of city, and classification made is alleged to be erroneous, and in violation of soldiers' preference act, proper remedy is certiorari to review the classification made and not mandamus to compel a reclassification. State v. Ernest, 197M597, 268NW208. See Dun. Dig. 1391.

Judgment in action by mortgagor under moratorium statute denying relief asked and granting foreclosure is appealable, and is therefore not subject to review on certiorari. Flakne v. M., 198M465, 270NW566. See Dun. Dig. 1395.

Writ of certiorari is a writ of review in nature of a writ of error or an appeal to review and correct decisions and determinations already made. State v. Probate Court of Hennepin County, 199M297, 273NW636. See Dun. Dig. 1391.

Questions not raised by the record will not be decided. Id.

An attorney at law does not have a right, by reason of appearance in litigation for a client, to have a review of a judgment or decision rendered in such litigation. Id.

In certiorari to review conviction for contempt in violating a temporary injunction, latter is under collateral attack which must fail unless injunction is shown to be a nullity. Reid v. I., 200M599, 275NW300. See Dun. Dig. 1391.

An order discharging an order to show cause and dismissing a criminal contempt proceeding can only be reviewed by certiorari, and fact that trial court may have based its order on mistaken belief that it lacked jurisdiction does not affect mode of review. Spannaus v. L., 202M497, 279NW216. See Dun. Dig. 1391.

Premature motion to bring in additional parties was not reviewable by certiorari. Levstek v. N., 203M324, 281 NW260. See Dun. Dig. 1395.

An order for inspection of books and papers is an intermediate order and so not reviewable by certiorari. Asplund v. B., 203M571, 282NW473. See Dun. Dig. 1396.

In reviewing the determination of administrative boards such as the optometry board court will inquire no further than to determine whether board kept within its jurisdiction, whether it proceeded upon a proper theory of law, whether its action was arbitrary or oppressive and unreasonable, and whether evidence affords a reasonable and substantial basis for order sought to be reviewed. State v. Jensen, 286NW305. See Dun. Dig. 1402.

2. Time for issuance.

Certiorari to review an order granting or refusing a petition for an extension of time within which to redeem mortgaged premises sold at foreclosure sale must be had within 15 days after notice of such order. Hjeltness v. J., 195M175, 262NW158. See Dun. Dig. 1408.

6. Compensation proceedings.

Jurisdiction of industrial commission to vacate a decision rendered pursuant to §4295 was adequately raised so as to be reviewed on certiorari. Hawkinson v. M., 196 M120, 264NW438. See Dun. Dig. 1402.

8. Supersedeas.

Certiorari operates as a supersedeas. *Aylmer v. N.*, 195M661, 262NW257. See Dun. Dig. 1414.

During pendency of certiorari proceedings to review proceedings to extend time for redemption under mortgage foreclosure, plaintiff was required to either file a supersedeas bond or pay to clerk of district court monthly sums required by order as condition for extension. *Id.*

Certiorari stops further proceedings in municipal court, but does not preclude judge of that court from making return to show what actually occurred in his court, prior to time writ issued. *State v. Municipal Court*, 197M141, 266NW433. See Dun. Dig. 1414.

9. Remand of case.

Pending certiorari by mortgagors from order denying second extension of time to redeem from mortgage fore-

closure, supreme court remanded case on motion by mortgagee on showing that condition had changed since hearing in district court and that mortgagors were in position to take care of the mortgage and redemption. *Sjodin v. O.*, 195M507, 263NW543. See Dun. Dig. 1404.

In habeas corpus proceedings judgment of conviction for criminal contempt must be taken as a finality as to all questions presented and decided by supreme court on certiorari. *State v. Syck*, 202M252, 277NW926. Cert. den., 59SCR64. See Dun. Dig. 4132.

9770. When served.

Certiorari to review decision of Industrial Commission was quashed because not served upon the adverse party or his attorney within 60 days. 171M519, 214NW795.

CHAPTER 88

Actions against Boats and Vessels

9774. For what liable.

Defendant having executed a charter party in which it purported to contract as principal, is liable for breach of the contract, whether in fact contracting as principal or as agent for an undisclosed principal. 171M507, 214NW510.

Evidence held to sustain finding that contract was breached by the failure of the vessel to report for loading within the time required by the contract; also that the delay was caused by the voluntary act of the owner; also that plaintiff had not waived its claim for damages. 171M507, 214NW510.

CHAPTER 89

Assignments for Benefit of Creditors

9782. Requisites.**1. Nature of proceeding.**

Transfer of property by managing officer or bank to certain directors to secure payment of his debts to the bank, held a mortgage and not an assignment for benefit of creditors, though it rendered him insolvent. 172M148, 214NW787.

3. To what applicable.

Not applicable to state banks in liquidation. 181M1, 231NW407.

11. Releases.

An assignment in favor of only those creditors who will file releases is void. *Kobler v. H.*, 189M213, 248NW698. See Dun. Dig. 614.

9783. Assignment of real estate—Record.

Certified copy of assignment for benefit of creditors does not require certificate of auditor that taxes have been paid. Op. Atty. Gen. (363B-7), Sept. 15, 1939.

9789. Proof of claims—Order of payment.

Money received by bankrupt representing proceeds of hunting and fishing license fees, held preferred claim in favor of the state in bankruptcy proceeding. 47F(2d) 1073. See Dun. Dig. 612(93).

Subd. 1.

State is a preferred creditor entitled to all assets if not sufficient to pay claim in full. Op. Atty. Gen., Aug. 1, 1933.

CHAPTER 90

Insolvency

Certified copies of petitions, decrees and orders in bankruptcy under §21g, may be recorded in register of deeds office. Laws 1939, c. 117.

The persons and property of farmers are excluded from the operation of the state insolvency law so long as the national act is in force. *Adrian State Bk. of Adrian v. K.*, 182M57, 233NW588. See Dun. Dig. 4542(96).

COMMON LAW

DECISIONS RELATING TO BANKRUPTCY
IN GENERAL**1. In general.**

An insane person may not file petition in bankruptcy but may become involuntary bankrupt. *Tobin*, (DC-Minn), 24FSupp325.

Construction of bankruptcy act by United States Supreme Court prevails over any contrary interpretation by state courts. *Landy v. M.*, 193M252, 258NW573. See Dun. Dig. 738.

Lien of a judgment procured less than four months preceding filing of petition in bankruptcy is annulled thereby, even as to homestead set aside as exempt. *Id.* See Dun. Dig. 741.

Mortgagors' bankruptcy did not suspend court's order extending time for redemption from mortgage sale, order having fixed terms and conditions, compliance with which was wholly lacking. *Butts v. T.*, 194M243, 260NW308. See Dun. Dig. 740.

A trustee in bankruptcy, who brings suit in state court alleging conversion of property of bankrupt estate by reason of an invalid foreclosure of chattel mortgage, is bound by measure of damages in state jurisdiction and is entitled to recover only difference between value of property and amount of lien, and where property converted was worth less than amounts of chattel mort-

gage liens, judgments were rightly entered for defendants. *Ingalls v. E.*, 194M332, 260NW302. See Dun. Dig. 746.

Reason why interest is generally disallowed in bankruptcy and other similar proceedings is that equality among general creditors as of date of insolvency is thereby attained, but where ideal of equality is served, interest is properly allowed. *Equitable Holding Co. v. E.*, 202M529, 279NW736. See Dun. Dig. 4883a.

A claim for damages for pure tort arising out of negligence of debtor, not reduced to judgment at time of adjudication in 1936, was not provable as a debt under §63(a) (6½) of the 1898 Act, and could not be liquidated and allowed under §63(b) of such act, and amendment of the act of 1938 permitting proof of claim in pending negligence case did not render such a claim provable in proceeding wherein there was a previous adjudication. *Jones v. F.*, 204M333, 283NW535. See Dun. Dig. 743a.

Contracts from which provable debts may arise are express contracts or contracts implied in fact or in law. They do not include obligations imposed by law where the remedy is other than by action on contract, express or implied. Wholly contingent claims are not provable as debts in bankruptcy. So long as a claim remains uncertain as to whether a contract or liability will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt. *Peterson v. J.*, 204M300, 283NW561. See Dun. Dig. 743a.

Primary purpose of bankruptcy legislation is to effect an equitable distribution of bankrupt's property among his creditors, and so far as may be, to preserve existing business relations and not to upset them or interfere with fundamental incidents thereof. *Id.* See Dun. Dig. 745.

Fact that contract containing mutual covenant not to compete in business was not entered in bankrupt's