

1934 Supplement  
To  
**Mason's Minnesota Statutes**  
1927

(1927 to 1934)  
(Superseding Mason's 1931 Supplement)

Containing the text of the acts of the 1929, 1931, 1933 and 1933-34 Special Sessions of  
the Legislature, both new and amendatory, and notes showing repeals,  
together with annotations from the various courts, state, federal,  
and the opinions of the Attorney General, construing the  
constitution, statutes, charters and court  
rules of Minnesota



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CITER- DIGEST CO.  
SAINT PAUL, MINNESOTA.  
1934

by the surety retaining and acting on it without suggesting defect. 176M113, 222NW573.

The amendment by Laws 1929, c. 369, §2, does not apply to St. Paul, which has a home-rule charter. *Guaranteed Concrete Co. v. G.*, 185M454, 241NW588.

**9705-1. Notice.**—The commissioner of insurance or the county auditor in whose office the written notice above specified is filed shall upon receipt of said written notice mail one copy of the same by registered mail to the principal contractor, at his last known address, and to each of the sureties on his bond, at their last known addresses, and the claimant shall at the time he files said written notice furnish the commissioner of insurance or the county auditor in whose office the notice is filed at least two copies of said notice. The commissioner of insurance or county auditor with whom said notice is filed shall be entitled to charge a fee of \$1.00 for filing said notice and mailing the copies as herein provided; and provided further that the failure of the commissioner of insurance or the county auditor with whom said notice is filed to mail said copies as herein provided, shall in no way affect the validity of the claim or the right of the claimant to maintain an action thereon. (Act Apr. 25, 1929, c. 369, §3.)

**9705-2. Not to affect pending actions.**—This act shall not affect any action or proceedings now pending in any of the courts of this state. (Act Apr. 25, 1929, c. 369, §4.)

**9705-3. Effective May 1, 1929.**—This act shall take effect and be in force from and after May 1, 1929. (Act Apr. 25, 1929, c. 369, §5.)

**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.

**9708½. \* \* \* \* \***

#### 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)178. 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.

**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, 222NW285.

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.

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 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.

The duties imposed on the governor by Mason's Minn. St., §§6954, 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. 5752a.

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 con-

trolled 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.*, 249NW576. See Dun. Dig. 5754.

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.

#### 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).

#### 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.

### 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.

### 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*, 247NW573, 249NW187. See Dun. Dig. 4132(76).

Constitutionality of law under which court proceeded and jurisdiction of court may be challenged in habeas corpus proceeding. *State v. Patterson*, 249NW187. See Dun. Dig. 4132(76).

##### 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*, 249NW37. See Dun. Dig. 4129(56).

##### 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*, 247NW573, 249NW187. See Dun. Dig. 4132.

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*, 249NW187. See Dun. Dig. 4132(74).

##### 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*, 247NW 573, 249NW187. See Dun. Dig. 4431.

#### 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).

#### 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.

#### 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.

### CERTIORARI

#### 9769. Within what time writ issued.

##### 1. In general.

171M519, 214NW795; note under §9770.

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

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.

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.*, 246NW472. See Dun. Dig. 1391, 1402.

#### 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.