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Containing the text of the acts of the 1929, 1931, 1933, 1935, and 1937 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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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.

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, 227NW391.

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., §§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 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, 262NW 681. 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' Ass'n., 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., 274NW165. See Dun. Dig. 5756.

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., 273NW603. See Dun. Dig. 5781.

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., 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.

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. 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.

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).

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.

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.

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, 215NW883.

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 oppressively, 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, 246NW 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.*

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 foreclosure, 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.

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.