

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.



Edited by  
**William H. Mason**  
*Assisted by*  
**The Publisher's Editorial Staff**

MASON PUBLISHING CO.  
SAINT PAUL, MINNESOTA  
1940

Plaintiff had affirmative on issue of proximate cause, and burden of proof rested upon him. *Paine v. G.*, 202M 462, 279NW257. See Dun. Dig. 2616.

Admission of mortality tables in evidence was not error, although deceased was not in normal health at time he was killed. *Id.* See Dun. Dig. 3353.

Circumstantial evidence was sufficient to sustain finding that missing rail was proximate cause of death of person using sidewalk and falling into pit. *Id.* See Dun. Dig. 2620.

Showing cash value of deceased's life, based upon his capacity, earnings, and life expectancy, in connection with argument as to pecuniary damage which beneficiaries of action sustained by his death, was proper. *McKeown v. A.*, 202M595, 279NW402. See Dun. Dig. 2619.

#### 17a. Instructions.

Electric company was not harmed by charge on presumption of due care by a deceased. *Ekdahl v. M.*, 203M 374, 281NW517. See Dun. Dig. 424.

#### 9660. Actions by foreign executor, etc.

A foreign executor or administrator is not authorized to maintain an action based upon possessory rights in real estate of decedent. *Bowen v. W.*, 203M289, 281NW 256. See Dun. Dig. 3678.

Effect of statutory right to sue on right to possession of realty by foreign administrator. 23MinnLawRev373.

#### 9661. Next of kin—Liability for debts.

*Gilbertson v. M.*, (CCA8), 32F(2d)665.

Moneys and credits which were omitted in assessment of any year or years during life of deceased owner may be assessed and taxed for such year or years after estate has been distributed and personal representative discharged, and heirs and legatees are liable on property passing to them, and personal representative is liable personally if he had knowledge of such omission during administration of estate, and personal representative is further personally liable if moneys and credits tax is not paid for years covered by administration. *Op. Atty. Gen.* (614f), Jan. 7, 1935.

## CHAPTER 85

### Official and Other Bonds—Fines and Forfeitures

#### 9677. Bonds, etc.

In counties having 55,000 to 70,000 population and 35 to 45 townships premiums on bonds of officers and deputies shall be paid by the county. *Laws 1939, c. 205.*

City officials should furnish new bond at beginning of each term of office, and a renewal certificate of bonding company is insufficient. *Op. Atty. Gen.*, Jan. 24, 1933.

Reelected township officials are required to furnish new bonds instead of renewal certificates. *Op. Atty. Gen.*, June 5, 1933.

A rider to a bond should be executed and properly acknowledged as provided by this section. *Op. Atty. Gen.* (645b-2), Aug. 20, 1934.

Provision in bond covering state employees that renewal thereof may be by certification or endorsement thereon is not renewed by instrument purporting to be a schedule continuous list. *Op. Atty. Gen.* (45G), Nov. 1, 1934.

Surety on official bond may not cancel bond during term of office without consent of all parties concerned, and consent may not lawfully be given by governing body until a satisfactory new bond is furnished. *Op. Atty. Gen.* (469b-5), Feb. 21, 1936.

Where one of joint sureties on bond of city treasurer dies, claim for full amount of defalcation should be filed against his estate, and city may not compromise claim or divide it as between sureties, estate of decedent being financially able to pay in full. *Op. Atty. Gen.* (59a-12), July 22, 1936.

Bonds should cover entire term of official, and annual continuation certificates should not be approved. *Op. Atty. Gen.* (59a-8), July 8, 1937.

Executive secretary of county welfare may not be required to execute a fidelity bond, but it would not be unlawful for board of control to pass a resolution providing that it is desirable that such secretary give a fidelity bond to be filed as other bonds and paid for by county, and a bond so voluntarily given would be enforceable. *Op. Atty. Gen.* (104a-2), Aug. 25, 1937.

There is no authority for the execution by secretary of state or any other state officer of a certificate of cancellation and release of a corporate surety on an official bond. *Op. Atty. Gen.* (45G), March 4, 1939.

Duty of approving generally fidelity and surety bond of state officers is upon commissioner of administration, but state officers need not be bonded except in cases where law so provides. *Op. Atty. Gen.* (640), June 24, 1939.

Commissioner of administration has authority to determine what employees are to be bonded and amount thereof. *Id.*

**9677-1. State may take fidelity insurance.**—The comptroller from time to time shall make surveys of each department or other agency of the state government to determine the employees in such department or agency whose fidelity should be assured by individual bond or fidelity insurance policy, and the amount of such bond or insurance necessary for each such employee, and shall submit a list thereof to the commission of administration and finance for its action thereon. The commission may approve in whole or in part and shall certify its action thereon to the directing head of each such department or agency, who shall require each of the employees so listed to give bond to the state in the amount indicated in such certificate. The commission in such certificate may direct that, in lieu of individual bonds so required,

the directing head of any such department or agency shall procure and keep in effect a schedule or position insurance policy, in such aggregate amount as the commission shall direct, insuring the fidelity of such department employees in the respective amounts so required, upon a form to be prescribed by the comptroller. Such policy may cover also the subordinate officers of such department required by law to give bond to the state, and in the amount which the Commission shall require. The surety upon the bonds of all state officers and state employees required under any law of the state shall be a corporation authorized to act as sole surety upon such official bonds, and all such bonds shall be approved by the attorney general as to form and generally by the comptroller, who shall keep an appropriate record of such approval and cause such bond or policy to be filed in the office of the secretary of state. (*Laws 1929, c. 263, §1; Apr. 20, 1931, c. 233, §1.*)

Legislature intended by §5327 to fix amount of fidelity assurance of deputy and twelve examiners, leaving amount of bond for assistant and second assistant examiners to determination of administration. *Op. Atty. Gen.* (980a-8), May 5, 1937.

Banking division of department of commerce created pursuant to *Laws 1909, c. 201*, as amended by *Laws 1925, c. 426, art. 8*, is a department of state government within meaning of §9677-1, and legislature contemplated administration of amount of fidelity bond for those for whom legislature has not fixed amount. *Id.*

Official bonds of secretary of department of health should be referred to commission of administration and finance for approval, and continuation certificates should not be approved, such bonds should be cumulative. *Op. Atty. Gen.* (45a), May 7, 1937.

Law does not permit commission of administration and finance to write a blanket fidelity insurance policy to cover employees in more than one department, but each department head shall procure and keep in effect such a policy, and commissioner of banks, commissioner of insurance and commissioner of securities are each directing heads of a department within such rule. *Op. Atty. Gen.* (980a-8), May 10, 1937.

Attorney-in-fact who executed insurance policy need not acknowledge his signature before a notary. *Op. Atty. Gen.* (45G), March 10, 1939.

Commission of administration and finance has same duty to perform with reference to bonds given by employees of unemployment compensation division it has with reference to bonds given by employees of other departments, except that penalties and positions to be bonded are not designated by it, such bonds to be filed with secretary of state as in other cases, but unemployment commission is to designate employees to be bonded, and amount thereof. *Op. Atty. Gen.* (885), April 13, 1939.

Commissioner of administration may provide by rule or regulation that two or more companies may join in writing of a single bond, be jointly and severally liable thereon. *Op. Atty. Gen.* (640), July 6, 1939.

Authority and responsibility of commissioner of administration with reference to requiring and procuring fidelity bonds or insurance for elective officers of state or appointive principal officers thereof, subordinate officers of the state, employees of the state, and directors of department of social security, determined and stated. *Id.*

Commissioner of administration has no authority to require a bond of directors of the several divisions comprising the department of social security. *Id.*

Commissioner may by rule or regulation prescribe maximum limits for liability which any one company may assume upon a single bond or upon different bonds in the aggregate, providing such limitation is reasonable, and is based upon considerations of financial responsibility. *Id.*

Fidelity blanket bonds procured under this section are "supplies, materials, and equipment" within meaning of reorganization act. *Id.*

**9677-2. Payment of premium.**—The premiums upon the bonds of all state officers and the premiums on all fidelity insurance placed under the provisions of this act shall be paid out of the appropriation for the maintenance of the department for which such bond or insurance is required, and such fidelity insurance, when placed in lieu of individual bond, shall be deemed full compliance with any provision of law requiring any such official or employe to give bond to the state for the faithful discharge of duty. If schedule or position insurance is provided covering the personnel of any department or agency all individual fidelity bonds covering such officers or employes theretofore bonded shall be canceled and a proportionate part of the premiums paid therefor refunded. (Laws 1929, c. 263, §2; Apr. 20, 1931, c. 233, §2.)

**9677-3. Inconsistent acts repealed.**—All acts or parts of acts inconsistent with the provisions of this act are hereby repealed. (Laws 1929, c. 263, §3; Apr. 20, 1931, c. 233, §3.)

**9679. Liberty loan bonds security.**

Liberty bonds may be accepted in lieu of statutory bonds. *Op. Atty. Gen.* (707c), Sept. 20, 1935.

**9687. State and county officers—Uniform bond.**

Village treasurer and surety on official bond were not relieved from liability for money of village deposited in a bank that failed, where there was no compliance with statute. *Village of Hallock v. P.*, 189M469, 250NW4. See *Dun. Dig.* 8022.

Interest cannot be recovered of the surety until notice of breach and demand to make good default of treasurer. *Id.* See *Dun. Dig.* 4384.

A city treasurer is guilty of malfeasance by depositing city funds in an undesignated bank of which he is stockholder, director, and assistant cashier, and a surety on his bond is liable for money lost through failure of the bank, notwithstanding stipulation in bond relieving surety from liability for loss caused by failure of any bank or other depository, and there is liability under a bond for funds wrongfully deposited during its term, though bank does not fail until afterwards. *City of Marshall v. G.*, 193M188, 259NW377. See *Dun. Dig.* 6712, 8000, 8004, 8022.

Sureties on bond of school district treasurer cannot withdraw therefrom until the expiration of the term or by consent of all parties concerned. *Op. Atty. Gen.*, Nov. 5, 1931.

Bond filed by treasurer of Soldiers' Home should be in form prescribed by this section. *Op. Atty. Gen.* (394b), Nov. 5, 1937.

**9689. Surety companies.**

Surety company held to have breached bond by failing to establish and maintain mortgage as lien prior to mechanic's liens. *Danielski v. P.*, 186M24, 242NW342. See *Dun. Dig.* 9107c.

In action on lien priority bond, evidence held to sustain finding that plaintiff suffered damages through failure of surety to establish and maintain mortgage as lien prior to mechanic's liens. *Danielski v. P.*, 186M24, 242NW342.

**9692. Undertaking in lieu of bond.**

174M56, 218NW444.

State is not required to furnish a bond in order to procure a temporary writ of injunction. *State v. Nelson*, 189M87, 248NW751. See *Dun. Dig.* 4499.

This section authorizes an appellant from probate court to post an undertaking in lieu of a bond. *Devenney's Estate*, 192M265, 256NW104. See *Dun. Dig.* 7791.

Inasmuch as a personal representative, in conduct of an action for wrongful death, acts for district court and not at all for probate court or estate of deceased, he is not acting in his capacity as executor or administrator, and therefore is not relieved by §9692, from necessity of furnishing an appeal bond or undertaking, or depositing cash in lieu thereof imposed by §9499. *Sworski v. C.*, 203M545, 282NW276. See *Dun. Dig.* 325a.

Where county issued auditor's warrant to Minnesota State Sanitarium and it was lost in the mail, the county auditor could issue a duplicate without a bond of the estate. *Op. Atty. Gen.*, Aug. 20, 1931.

**9693. Cost of surety bonds to be expense of receivers.**—Any receiver, assignee, trustee, committee, guardian, executor, administrator, or other fiduciary, required by law to give bond as such, may include as a part of his lawful expenses such actual sum paid for such suretyship, not exceeding ten dollars per annum when the amount of the bond is not more than one thousand dollars, and not more than one per cent per annum on the excess when over one thousand dollars, as the head of the department, court, judge, or officer by whom or the court or body by which he is appointed allows; and in all actions or proceedings the party entitled to recover costs may include therein the reasonable fees of such company for executing or guaranteeing any bond or undertaking therein. The several county and town boards, and the governing body of any city, village, or school district, may allow the treasurer of the municipality such reasonable sum, not exceeding the amount herein specified, as may have been paid by him for such suretyship, to be paid out of the general revenue fund of the municipality: Provided, that the officers required by law to approve such bill may first designate the surety company to be employed, if its charges be as low as those offered by any other responsible company. (R. L. '05, §4528; G. S. '13, §8238; Apr. 17, 1933, c. 311.)

Laws 1935, c. 180. Counties having area of 5,000 square miles and population in excess of 200,000, may pay annual premium of officers surety bond.

Probate judge must keep record of proceedings in insanity and juvenile matters. *Op. Atty. Gen.*, Mar. 27, 1933.

A village may not properly pay bond premium for officers of village, except the treasurer alone. *Op. Atty. Gen.* (469b), Oct. 16, 1934.

County board cannot require county attorney or judge of probate to furnish corporate surety bonds and cannot refuse to accept, arbitrarily, a proper personal bond when tendered, but such officers must pay their own premium. *Op. Atty. Gen.* (121a-3), Mar. 2, 1935.

County may not pay premium on bond of executive secretary of county welfare board, nor cost of notary public commission. *Op. Atty. Gen.*, (107b-3), Aug. 4, 1938.

**9694. Bonds, by whom approved.**

State board of control has authority to require bond by executive secretary of county welfare board, amount to be fixed by county board, and bond to run to state of Minnesota. *Op. Atty. Gen.* (125a-64), July 28, 1937.

Bond of executive secretary of child welfare board cannot be paid for out of general funds of county. *Id.*

A vacancy existed in office of treasurer in common school district where he filed his acceptance and oath, but failed to furnish a bond, claiming that clerk stated that she would apply for a surety bond for him. *Op. Atty. Gen.* (451a-23), August 10, 1939.

(3).

A supersedeas bond may be approved and filed in the Supreme Court after an appeal has been perfected and jurisdiction acquired. *Barrett v. S.*, 184M107, 237NW881. See *Dun. Dig.* 325(74).

**9695. Place of filing bonds.**

Village treasurer's bond need not be filed or recorded with register of deeds, and county is under no obligation to pay expense of recording. *Op. Atty. Gen.*, May 1, 1933.

Bond and oath of a village justice should be approved by village council and filed with clerk of district court. *Op. Atty. Gen.* (266a-2), Dec. 19, 1938.

**9695-1. Bonds and oaths of probate court officials to be filed with Secretary of State.**—Within 60 days after the passage of this act, all bonds and oaths of the judges, clerks, employees, and referees of the probate courts filed subsequent to June 30, 1935 in the offices of the county auditors shall be transmitted to the secretary of state to be filed and retained by him according to law. (Apr. 21, 1937, c. 321, §1.)

**9698. Official bonds, security to whom—Actions.**

Recourse cannot be had against surety on a bond of a public officer, conditioned for faithful performance of his official duties, because of negligence in acts done not within scope of his statutory duties, and furnishing of an abstract of chattel mortgages on hogs was not official duty of a register of deeds. *Federal Intermediate Credit Bank v. M.*, 194M150, 259NW793. See *Dun. Dig.* 8022.

Bond of city officer held sufficient to require its acceptance by city council though it contained no provision "for the use of all persons interested" and was executed for surety by "attorney" instead of "attorney-in-fact." *State v. City of Eveleth*, 196M307, 265NW30. See *Dun. Dig.* 8018.

**9700. Contractors' bonds.**—No contract with the State, or with any municipal corporation or other public board or body thereof, for the doing of any public work, shall be valid for any purpose, unless the contractor shall give bond to the state or other body contracted with, for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery or materials or insurance premiums or equipment or supplies for any camp maintained for the feeding or keeping of men and animals engaged under, or for the purpose of, such contract, conditioned for the payment, as they become due, of all just claims for such work, tools, machinery, skill, materials, insurance premiums, equipment and supplies, for the completion of the contract in accordance with its terms, for saving the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified, and for the enforcing of the terms of the bond if action is brought on the bond, including reasonable attorney's fees, in any case where such action is successfully maintained and for the compliance with the laws appertaining thereto. The penalty of such bond shall be not less than the contract price, and if after the giving of said bond the contract price should for any reason be increased, the obligee may require an additional bond, the penalty of which shall be not less than the amount of such increase, and if such additional bond be not furnished within ten days after such demand, the work on such contract shall cease until such additional bond shall have been furnished. Provided, that in contracts made by the state board of control or the Minnesota Highway Department on behalf of the state the penalty of the bond shall be in such amount as the state board of control or the Commissioner of Highways may fix, but not less than three-quarters of contract price. (R. L. '05, §4535; '09, c. 429, §1; G. S. '13, §8245; '23, c. 373, §1; Apr. 25, 1929, c. 369, §1; Apr. 20, 1931, c. 229, §1.)

**1. In general.**

Giving of receipt in full to general contractor by superintendent of ventilation installation given before his discharge by subcontractor held not waiver of right to recover in suit on general federal contractor's bond. U. S. v. S., (USDC-Minn), 21FSupp831.

When action has been brought under 40USC270, all other creditors must intervene within one year from date of final settlement. Id.

In suit on general federal contractor's bond for material furnished subcontractor under contract interest held recoverable from date of completion of contract. Id.

Where contract for supervising work on government building was entire and not severable and was substantially performed, recovery in action on general contractor's bond for the entire amount was allowable though the compensation was payable in weekly installments. Id.

Where principal is bound surety on general contractor's bond is bound. Id.

Where penalty of government contractor's bond is sufficient to pay all claims against the contractor the claimant is entitled to recover such interest as might have been recovered against the contractor. Id.

There could not be any recovery from. 172M259, 214NW888.

"Insurance premiums" includes insurance. 174M366, 219NW546.

Purpose to furnish bond under this section being established, it cannot be defeated by omission of one of its provisions, either voluntary or through inadvertence. 174M366, 219NW546.

The charter of Duluth gives the city council power to enact ordinances regulating the letting of contracts for public work and prescribing surety bonds. 174M579, 219NW943.

Particular language of contract controlled over general language in bond as respected work to be done and premium chargeable for bond. 175M14, 220NW543.

Construction of two additional bridges under "work order," held not a change or modification of the original contract, but an independent undertaking, and surety on original bond was not entitled to additional premium. 175M14, 220NW543.

In a suit by a creditor against surety on bond which guarantees payment for material furnished, the doctrine of substantial performance has no application. 175M256, 220NW958.

Contractor discovering mistake in bid for construction of school building three years after the transaction, could not obtain recovery of the deposit which had been

forfeited for failure to furnish a bond. 177M329, 225NW149.

Premiums for public liability, collision, and property damage insurance are not within the protection of the bond required of a public contractor. Kunz Ins. Agency v. P., 191M626, 255NW90. See Dun. Dig. 9107c.

By accepting order to pay another, contractor waived his right to retain money coming to subcontractor until he furnished evidence of full payment of claims for labor and material. Farmers State Bank v. A., 195M475, 263NW443. See Dun. Dig. 1847a.

Where road contractor hired equipment for \$1,200 per month, \$600 per month additional to be paid if equipment be used on double shift, second party guarantying rental for 60 days, and equipment was used on double shift for only part of 60 days and earned only \$2,180 for period used, contractor was only liable for \$2,400, and not for an additional amount by reason of double shift. Mead v. S., 198M476, 270NW563. See Dun. Dig. 731.

A contract for construction by plaintiff of exterior superstructure of a new courthouse cannot be construed as requiring county to secure a bond for plaintiff's protection from a third party who was to furnish stone, especially where evidence supports a finding that plaintiff waived giving of such bond. Zimmerman v. C., 202M54, 277NW360. See Dun. Dig. 9107c.

Commercial fisherman's license bond held intended to be limited to provisions of §§9700 to 9705 and governed by such sections rather than §9191 with respect to service of notice within 90 days and suit within one year. Op. Atty. Gen., Aug. 28, 1933.

Liberty bonds may be accepted in lieu of statutory bonds. Op. Atty. Gen. (707c), Sept. 20, 1935.

Owners of truck employed by county to haul gravel at a yardage rate need not furnish bonds to protect county against claims for gas and oil. Op. Atty. Gen. (125a-12), Dec. 18, 1935.

State form of bond approved. Op. Atty. Gen. (980a-3), Sept. 15, 1937.

Agreement between operator of grader and township construed as contract of employment and not within provisions of this section. Op. Atty. Gen. (707), Dec. 30, 1938.

Public contracts should require that contractor take out workmen's compensation insurance. Op. Atty. Gen. (523c), Feb. 2, 1939.

Respective equities and rights under building contractor's bond. 19MinnLawRev454.

Insurance premiums as an indebtedness for labor or material. 20MinnLawRev439.

Liability for loss of extras caused by defects in plans and specifications. 21MinnLawRev70.

**1½. Persons protected.**

Supervision of installation of ventilation in government building held "labor" justifying recovery in action on general contractor's bond. U. S. v. S., (USDC-Minn), 21FSupp831.

A mechanic, employed by a contractor to repair and keep in working condition a fleet of trucks used by such contractor in building a state highway, under contract with highway department, is employee on job protected by statutory bond. General Motors Truck Co. v. P., 191M467, 254NW580. See Dun. Dig. 6093, 6719a.

**2. "Materials."**

While under rule of Miller v. Am. Bonding Co., 133M336, 153NW432, there may be recovery for material and labor used in incidental repairs of contractor's machinery, there can be none for major repairs involving replacement of old with new parts in absence of proof that the new parts were consumed in the work. 178M288, 226NW940.

Repair parts, which are minor, comparatively inexpensive items of current repairs, such as frequently wear out or break and have to be replaced in operation of a fleet of trucks in road work are covered by bond. General Motors Truck Co. v. P., 191M467, 254NW580. See Dun. Dig. 6093.

Finding that two main items of repair of trucks, each exceeding in value \$400, are minor and not major replacements or repairs is not sustained. Mack International Motor Truck Corp. v. W., 194M484, 260NW869. See Dun. Dig. 9107c.

Under rule stated in *Chifton v. Norden*, 178Minn288, 226NW940, 67ALR1227, and applied in *General Motors Truck Co. v. Phillips*, 191Minn467, 254NW580, differential and transmission assemblies in motor trucks used in highway construction jobs are not covered by bonds given pursuant to section. Id. See Dun. Dig. 9107c.

Liability of surety on public contractor's bond to materialmen. 16MinnLawRev312.

**3. Bank advancing money.**

Bank held not entitled to recover from surety for advances made to contractor, following *First Nat. Bank v. O'Neil*, 176M258, 223NW298. *First Nat. Bank v. H.*, 177M194, 225NW11.

Condition in bond, that surety would be liable for payment of claims for labor and material on job, did not make surety liable to bank on assignment of particular fund, where surety had not consented or been a party to assignment and is not shown to have received any part of fund so assigned. *Farmers State Bank v. A.*, 195M475, 263NW443. See Dun. Dig. 6719b.

Where bank, by agreement with subcontractor, had furnished him money for payment of claims for labor and material in performance of contract and had paid such

claims, rights and equities of bank in fund assigned to it by order of subcontractor to contractor were superior to those of contractor and of surety on his bond. *Id.*

#### 7. Attorney fees.

Attorney's fees are not allowable where defendants pay plaintiff's full claim with taxable costs prior to trial. *Schutz v. I.*, 196M426, 265NW296. See *Dun. Dig.* 9107c.

#### 9701. Bidders to have right of action in certain cases.

Commission of Administration and Finance may return a bidder's check where he has made an honest mistake in his estimates without gross negligence on his part, provided the next lowest bidder accepts the job and the state suffers no loss. *Op. Atty. Gen.*, July 31, 1931.

County should refuse to return deposit made with bid until liabilities under the contract partially performed have been determined, the contractor having attempted to perform the work without giving the bond required by statute. *Op. Atty. Gen.*, Sept. 5, 1931.

Proposal deposit money may be returned following forfeiture for failure of contractor to execute contract due to clerical errors in compilation of bid. *Op. Atty. Gen.* (229d-4), Apr. 26, 1938.

**9702. Approval and filing of bond.**—Such bond shall be approved by, and filed with, the treasurer of the obligee named therein unless the contract be for work upon a state trunk highway, or erection, improvement, or repair of buildings for a state institution, in which case it shall be approved and filed with the board or officer having the financial management thereof (OF SUCH INSTITUTION). If such bond be not taken, the corporation or body for which work is done under the contract shall be liable to all persons furnishing labor, skill or material to the contractor thereunder for any loss resulting to them from such failure. No assignment, modification or change of the contract, or change in the work covered thereby, nor any extension of time for completion of the contract, shall release the sureties on said bond. (R. L. '05, §4536; '07, c. 379; G. S. '13, §8246; Apr. 13, 1931, c. 157.)

Construction of two additional bridges under "work order," held not a change or modification of the original contract but an independent undertaking, and surety on original bond was not entitled to additional premium. 175M14, 220NW543.

Construction of a more robust wall under work order, held a mere "change" or "modification" of the original contract. 175M14, 220NW543.

#### 9703. Action on bond.

175M8, 220NW958; notes under §§9700, 9705.

Release of lien on post office and of general contractor from claims for labor and material on such building, given without consideration, at a time when there was no claim against general contractor, subcontractor or surety, did not release claim against subcontractor for material subsequently furnished nor bar recovery on general contractor's bond. *U. S. v. S.*, (USDC-Minn.), 21F Supp831.

Automobile finance company, without consent of government, held not entitled to sue on postmaster's bond for loss resulting from misdelivery of mail. *U. S. v. N.*, (DC-Minn.), 23F Supp411. *Aff'd* (CCA8), 103F(2d)450.

A bank which advances money to pay checks for labor and material is not subrogated to the rights of the laborers and materialmen. *First Nat. Bk. of Chisholm v. O.*, 176M258, 223NW298.

Bank held not entitled to recover from surety for advances made to contractor, following *First Nat. Bank v. O'Neil*, 176M258, 223NW298. *First Nat. Bk. of Aitkin v. H.*, 177M194, 225NW11.

In action by surety against township to recover for completion of abandoned contract, burden of proof was upon plaintiff to show what work it performed and how much was still due. 177M408, 225NW291.

Liability on contractor's bond held properly determined by trial court by whom case was tried without a jury. 178M183, 226NW473.

A judgment recovered against a principal in a bond for a breach of its conditions, in an action in which surety is not a party, is not evidence against surety of any fact except its rendition. *Gilloley v. S.*, 203M233, 281 NW3. See *Dun. Dig.* 9107c.

**9705. Limit of time to bring action.**—No action shall be maintained on any such bond unless within ninety days after the completion of the contract and acceptance thereof by the proper public authorities, the claimant shall file a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, in the office of the commissioner of insurance in case the contract is for the performance of work for the state or any department

thereof, and in case the contract is let by any county, municipal corporation or other public board or body, then such notice shall be filed in the office of the county auditor of the county letting the contract or the county in which such municipal corporation, public board or body is situate, and if situate in two or more counties then such notice shall be filed in the office of the county auditor of each such counties; nor unless the action is begun within one year after the filing of such notice. The county auditor shall enter the time of filing every such notice in a book kept for that purpose which shall be properly indexed. (R. L. '05, §4539; '09, c. 413, §1; G. S. '13, §8249; Apr. 25, 1929, c. 369, §2.)

*Op. Atty. Gen.*, Aug. 28, 1933; note under §9700.

Notice mailed to the surety at its home office in another state, authorized action on bond. 171M305, 214 NW47.

In a suit on a contractor's bond for material furnished in the erection of a school building the notice prescribed by this section is sufficient though not specifying the date on which the last item was furnished; and the evidence held to show a proper service of the notice on the bonding company. 172M424, 215NW675.

Construed as referring to the "completion of the building" and not to the "completion of the contract." 174M366, 219NW546.

The doctrine of *Johnson v. Laurence*, 171M202, is not controlling as between the surety and creditors of a public contractor. 174M366, 219NW546.

As between the surety and creditors there must be strict performance of the contract, and the doctrine of substantial performance has no application. *Id.*

An acceptance of a building by a school board does not require the formal acceptance by motion or resolution passed by the board in session. It does require an act with intent to receive the building as its own as a compliance with the required duty of the contractor. 174M366, 219NW546.

Notice required by this section does not apply to bonds given by those who enter contracts with city of Duluth for public work. 174M579, 219NW943.

Required notices to surety held given within 90 days of completion of contract. 175M256, 220NW958.

Notice on surety held to sufficiently specify the "nature of the claim." Any deficiency in notice was waived 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.

Garnishees being liable on their bonds or not at all, there can be no recovery as against them where record fails to disclose compliance with this section. *Shandorf v. S.*, 198M92, 268NW841. See *Dun. Dig.* 9107c.

Action on bonds of contractors in state highway project held barred because not brought within one year after filing of notice with commissioner of insurance. *Shandorf v. S.*, 198M96, 268NW843. See *Dun. Dig.* 9107c.

A garnishment action is begun by the service of summons as of date thereof and a supplemental complaint in garnishment is a continuation of garnishment so begun and not commencement of a separate action. *Gilloley v. S.*, 203M233, 281NW3. See *Dun. Dig.* 9107c.

**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.

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