

130278

# 1941 Supplement

To

# Mason's Minnesota Statutes

1927

1939 to 1941

(Supplementing Mason's 1940 Supplement)

Containing the text of the acts of the 1941 Session 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 Law Review Articles and digest of all common law decisions.

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## CHAPTER 84

## Actions by or against Personal Representatives and Heirs

**9656. What causes of actions survive.**—A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 9657. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against his personal representatives. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter. (As amended Act Apr. 25, 1941, c. 440, §1.)

**1. Held to survive.**

Cause of action against partnership having accrued. It did not abate with death of partner negligently driving partnership truck. *Kangas v. W.*, 291NW292. See Dun. Dig. 14.

**3. Cause of action arising in another state.**

Survivability of a cause of action relates to right and is governed by law of place where act occurred upon which right or liability rests, and law of Iowa that a cause of action for death against deceased tort-feasor survives governs in an action for death in the state of Minnesota, and the right of action based on the Iowa survival statute may be enforced in Minnesota as a matter of comity, although such state does not have a similar statute. *Daniel's Estate*, 294NW465. See Dun. Dig. 1543.

**9657. Action for death by wrongful act.****1. Right statutory.**

No action for wrongful death existed at common law. *Joel v. P.*, 289NW524. See Dun. Dig. 2600.

**3. Who may sue.**

Special administrator held entitled to maintain action for wrongful death under statute authorizing administrator to maintain such action. *Wilson v. P.*, 10SE(2d) (Ga.)407.

**5. Who is next of kin.**

Section 9657 is not amended or supplemented by §4272-5(2) so as to affect rights of next of kin, who are not dependents. *Joel v. P.*, 289NW524. See Dun. Dig. 2608.

**6. Jurisdiction—Actions under foreign statute.**

Suit for death of a seaman under Jones Act, Mason's U.S.C.A., 46:688, cannot be removed to federal court. *Fiolat v. M.*, (DC-Minn.), 31FSupp219.

Survivability of a cause of action relates to right and is governed by law of place where act occurred upon which right or liability rests, and law of Iowa that a cause of action for death against deceased tort-feasor survives governs in an action for death in the state of Minnesota, and the right of action based on the Iowa survival statute may be enforced in Minnesota as a matter of comity, although such state does not have a similar statute. *Daniel's Estate*, 294NW465. See Dun. Dig. 14.

Where an action is brought by a legal representative who has sole right to sue, his citizenship as a party is determined by his citizenship as an individual and not by that of beneficiaries of the action. *Id.* See Dun. Dig. 2614.

**16. Damages.**

Verdict for \$6575 for death of a 48 year old owner of a pool hall who supported his family of wife and 6 children well was not excessive. *Ost v. U.*, 292NW207. See Dun. Dig. 2617.

Verdict for \$7500 held not excessive for death of clerk 67 years of age. *Symons v. G.*, 293NW303. See Dun. Dig. 2617.

**16b. Negligence.**

In case involving electrocution of employee by defendant's uninsulated electric wire, where recovery is

sought by employer's insurer, as subrogee, for payments made to employee's dependents, questions of negligence, assumption of risk, and contributory negligence of both employee and employer were for jury. *Standard Acc. Ins. Co. v. M.*, 289NW782. See Dun. Dig. 2620.

In action for death, a workman putting out flares was guilty of contributory negligence as a matter of law in attempting after dark to pass across a pavement open for traffic in front of approaching car traveling with lights turned on, at a speed of not to exceed 30 miles an hour. *Hoelmer v. S.*, 290NW225. See Dun. Dig. 4171.

**16d. Presumptions.**

In death action against power company involving electrocution and wherein defendant had burden of proof on issue of contributory negligence, it is difficult to understand how presumption of due care in favor of a decedent would operate in favor of plaintiff. *Peterson v. M.*, 288NW588. See Dun. Dig. 2616.

Presumption of due care by a decedent cannot aid plaintiff on issue of contributory negligence, since burden of proof on that issue is upon defendant irrespective of any "presumption" of due care. *Ralston v. T.*, 292NW24. See Dun. Dig. 2616.

**17. Evidence.**

In action for wrongful death, whether deceased died as a result of the accident or from excessive use of hard liquor held for jury. *Ost v. U.*, 292NW207. See Dun. Dig. 2620.

Whether deceased employee was acting within scope of his authority in cleaning floor of oil room or was merely cleaning his coat with carbon tetrachloride, when fumes caused his death, held for jury. *Symons v. G.*, 293NW303. See Dun. Dig. 5858.

Whether employee was guilty of contributory negligence in using carbon tetrachloride to clean floors, resulting in his death, held for jury. *Symons v. G.*, 293NW303. See Dun. Dig. 2616.

In action for death of passenger in defendant's car based upon excessive speed, failure to keep a proper lookout, negligently driving upon shoulder of road, and failure to reduce speed on return to pavement, evidence held to support verdict for defendant. *Dahlstrom v. H.*, 295NW508. See Dun. Dig. 2620.

**17a. Instructions.**

An instruction that presumption of due care on part of a deceased is comparable to that of right conduct, every person is presumed to do what is right, but this presumption of due care on part of deceased may be overcome by ordinary proof by the greater weight of the evidence that due care was not exercised by deceased, was technically incorrect in that jury might understand that presumption is equivalent of evidence which defendant must meet and overcome, instead of charging that presumption vanishes when there is evidence of care deceased did take or omitted to take to avoid death. *Lang v. C.*, 295NW57. See Dun. Dig. 2616.

**18. Jurisdiction over fund for distribution.**

Amount recovered for one's death is no part of his estate, and probate court has no jurisdiction to control action in which recovery is had or to direct the distribution of fund after it is recovered. *Daniel's Estate*, 294NW465. See Dun. Dig. 2603.

**9664. Heirs and devisees—When liable.**

An action may now be maintained in district court against representatives and heirs of a deceased person to enforce a lien or charge for work and materials furnished for improvement of homestead at request of deceased, without presenting claim therefor to probate court for allowance, it appearing that deceased left no property other than homestead. *Anderson v. J.*, 293NW131. See Dun. Dig. 3592a.

## CHAPTER 85

## Official and Other Bonds—Fines and Forfeitures

**9677. Bonds, etc.—Sureties, qualifications.**

Statutory bonds must be construed in light of the statute creating obligations intended to be secured. *Graybar Electric Co. v. S.*, 294NW654. See Dun. Dig. 1056.

**9677-1. State may take fidelity insurance.**

Bonds must be approved as to form and execution by attorney general and generally by commissioner of administration, and need not be approved by department head, unless required by statute under which particular bond is given. *Op. Atty. Gen.*, (640), Oct. 5, 1939.

Surety companies need not file deviations from regular rates which they intend to charge on bonds covering state employees. *Op. Atty. Gen.*, (640), Oct. 30, 1949.

A state appraiser is a subordinate officer of the state department, which may require fidelity insurance in place of an official bond, but a fidelity policy must be conditioned as is a statutory bond. *Op. Atty. Gen.*, (640), Nov. 1, 1939.

Employees of state treasurer do not come within general rule laid down for writing of blanket bond, since state treasurer is personally accountable for all funds

deposited with him, and selection of surety should be subject to his approval. Op. Atty. Gen., (454), Jan. 29, 1940.

A mutual company may issue and department of administration may purchase a non-assessable fidelity bond which satisfies requirements of statutes and is licensed by commissioner of insurance and has a sufficient guaranty fund. Op. Atty. Gen., (980a-4), Jan. 31, 1940.

State may purchase surety bonds from mutual companies if they are non-assessable and otherwise comply with statute, and probable dividend may be taken into consideration in determining lowest bid. Op. Atty. Gen., (707a-13), Jan. 31, 1940.

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

A state appraiser is a subordinate officer of the state department, which may require fidelity insurance in place of an official bond, but a fidelity policy must be conditioned as is a statutory bond. Op. Atty. Gen., (640), Nov. 1, 1939.

**9689-1. Closed banks—Use of funds.**—Funds in the possession of the commissioner of banks set aside for the purpose of meeting unforeseen and contingent expenses incident to the liquidation of closed state banks, which funds have been established by withholding a portion of final liquidating dividends in such cases, may be used by the commissioner of banks for any expense incident to the administration of the affairs of the closed bank department of his division. (Act Mar. 28, 1941, c. 92, §1.)

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

Bond of judge of municipal court of Ortonville, also acting as clerk of that court, should run to the city and be filed with secretary of state. Op. Atty. Gen., (307a), Nov. 28, 1939.

#### 9700. Contractors' bonds.

##### 1. In general.

One contracting to do certain grading on a large number of highways for a township for certain specified sums per hour for different types of machinery used, and without fixed amount for entire job, must be required to furnish a bond for estimated cost of work. Op. Atty. Gen. (401B-6), July 6, 1940.

Purpose of statute is to protect laborers and material-men who perform labor or furnish material for execution of a public work to which mechanic's lien statute does not apply, and general rules and principles of law of suretyship apply and govern rights of parties. *Ceco Steel Products Corp. v. T.*, 294NW210. See Dun. Dig. 9107c.

Bond cannot be severed from statute and parties deemed to have contracted with reference thereto. Id.

#### 9703. Action on bond.

*U. S. v. National Surety Co.*, 60SCR458, aff'g 103F(2d) 450, which aff'd 23FSupp411.

#### 9705. Limit of time to bring action.

The provision of a bond of a contractor for a public improvement, and of the statute under which it was given, that suit on the bond must be brought within 60 days after accrual of cause of action, gave the surety on the bond a vested right in the limitation provided, and the repeal of the statute could not destroy such right and permit the claimant to bring the action within the time prescribed by the general limitation statute. *Nat'l Sur. Corp. v. W.*, (CCA8), 111F(2d)622, rev'g 24FSupp640.

Beneficiaries of bond must bear burden of showing statutory compliance on their part with respect to filing notice before they can avail themselves of the benefits thereof. *Ceco Steel Products Corp. v. T.*, 294NW210. See Dun. Dig. 9107c.

Evidence held not to sustain finding that surety waived statutory requirement respecting filing of notice with county auditor. Id.

Words "completion" and "acceptance" in this section, are not to be read into §2554 (17) so as to extend time for application for arbitration under that section. *State v. Wm. O'Neil Sons Co.*, 296NW7. See Dun. Dig. 9107c.

#### 9707. Fines, how disposed of.

Monies referred to in §53-47 and §5872, means license and examination fees collected by board, and not fines which are imposed by courts of competent jurisdiction for violations of act, which should be disposed of in accordance with §9707. Op. Atty. Gen., (188), April 9, 1940.

Fines for violation of acts relating to wholesale produce dealers should be paid to county treasurer, while fines collected under Laws 1921, c. 495, §21, should be paid to state treasurer. Op. Atty. Gen. (135a-4), Nov. 26, 1940.

## CHAPTER 87

### Special Proceedings

#### MANDAMUS

#### 9722. To whom issued.

##### 1. When will lie.

School board, having refused resident children of proper age admission to its school, is a proper party to mandamus proceedings to enforce rights of children to free education. *State v. School Board of Consol. School Dist. No. 3*, 287NW625. See Dun. Dig. 5769.

Where voters of school district voted to exclude children of orphan home from school, and school board acted thereon, board was proper party defendant in action in mandamus to compel admission of children to school. Id.

Mandamus will not control discretion although it will lie to compel its exercise. *Sinell v. T.*, 289NW44. See Dun. Dig. 5752, 5753.

Mandamus is neither law nor source of law, and as a remedy it is granted only on equitable principles. Id. See Dun. Dig. 5752, 5753.

Where a veteran was discharged prior to passage of civil service act, he could not maintain mandamus for reinstatement after passage of that act, mandamus being only available by statutory grant and such statutes being repealed by the civil service act so far as he was concerned. *State v. Stassen*, 294NW647. See Dun. Dig. 5763a.

Mandamus against an officer will not issue unless there is a clear and complete right shown by petitioner to receive that which court is asked to command official to give him. *State v. Hoffman*, 296NW24. See Dun. Dig. 5756.

If deputy oil inspector discharged before Civil Service Act went into effect had a civil service status under existing statute, such status was abolished by going into effect of such act and mandamus would not lie to enforce such right, though petition was filed and alternative writ was issued prior to effective date. *Reed v. T.*, 296NW535. See Dun. Dig. 5752b.

Repeal of veterans' preference act by civil service act took away statutory remedy of mandamus for a wrongfully discharged state employee, including a pending action in mandamus which was not perfected by final judgment, even though trial had been had before repeal, and a cause of action for damages, as long as it remained inchoate and not merged in final judgment, was equally destroyed by repeal of statute which created it. *State*

*v. Railroad and Warehouse Com'n*, 296NW906. See Dun. Dig. 5763a.

#### 9723. On whose information and when.

##### 2. Other adequate relief.

Where tax commission determined that there was an overpayment of income tax but rejected claim on ground of limitations, taxpayer was not "aggrieved" by the decision, and could proceed in mandamus to compel issuance of certificate for refundment. *State v. Minnesota Tax Commission*, 293NW243. See Dun. Dig. 5754.

#### 9728. Default—New matter—Demurrer.

Right to a writ of mandamus is determined as of time of hearing rather than that of application. *Reed v. T.*, 296NW535. See Dun. Dig. 5752b.

#### 9729. Pleadings—Issues, trial, etc.

Where facts pleaded fail to show any excuse for a delay of more than 62 years in bringing mandamus to open and grade a township road, laches appears as a matter of law, for equity aids the vigilant, and not the negligent. *Sinell v. T.*, 289NW44. See Dun. Dig. 5758a.

In mandamus and certiorari by a discharged war veteran, there being no showing to the contrary, assumption is that relator was honorably discharged from army. *State v. City of Bemidji*, 295NW514. See Dun. Dig. 5777a.

A motion for judgment on pleadings by respondent in mandamus proceeding must rest upon petition and alternative writ, since defensive averment in answer must be considered denied. *State v. Hoffman*, 296NW24. See Dun. Dig. 5776.

#### 9730. Effect of judgment for plaintiff—Appeal.

Board, having acted in behalf of school district in discharge of governmental functions, is not liable for costs or disbursements of mandamus action. *State v. School Board of Consol. School Dist. No. 3*, 287NW625. See Dun. Dig. 2207.

#### HABEAS CORPUS

#### 9739. Who may prosecute writ.

##### 3b. Custody of children.

Natural parents of a child have first right to its care and custody unless best interests of child require that it