1941 Supplement

To

Mason's Minnesota Statutes, 1927

and

Mason's 1940 Supplement

Containing the text of the acts of the 1941 and 1943 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 Law Review Articles and digest of all common law decisions.

Edited by
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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.

When arrest for violation of traffic laws is made by sheriff money should be paid into county treasury. Op. Atty. Gen. (199B-4), Jan. 9, 1942.

CHAPTER 86

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

9709. To annul act of incorporation—Fraud.

For cases on quo warranto in general, see §§132, 156.

Cited pursuant to contention that notice of trial is necessary in quo warranto proceeding. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 8068.

As authorized by our constitution and statutes, quo warranto is not the old common-law writ, but rather the information in the nature of quo warranto as left by the changes brought about by St. 9 Anne., c. 20, and came into this country by adoption in that form as a part of our common law. Id. See Dun. Dig. 8074.

9711. For usurpation of office, etc.

Cited pursuant to contention that notice of trial is necessary in quo warranto proceeding. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 8068.

One claiming an office can succeed only on the strength of his own title. Id. See Dun. Dig. 8072(82, 83).

9714. Usurping office—Complaint—Judgment.

Cited pursuant to contention that notice of trial is necessary in quo warranto proceeding. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 8068.

9717. Judgment for usurpation—Fine.

Cited pursuant to contention that notice of trial is necessary in quo warranto proceeding. State v. Village of North Pole, 213M297, 6NW(2d)458. See Dun. Dig. 8068.

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, 206M63, 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., 206M437, 289NW 44. 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, 208M523, 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, 209M308, 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., 209M348, 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, 209M530, 296NW906. See Dun. Dig. 5763a.

Mandamus is appropriate remedy of one whose action is erroneously abated for duration of war on ground that he is an alien enemy. Ex parte Kumezo Kawato, 317US69, 63SCR115. See Dun. Dig. 5766.

Where performance of a duty is imposed upon a judge or court without any discretion in discharge thereof, performance may be compelled to mandamus. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 5762.

Mandamus lies to compel judge of probate by order to fix time and place of hearing on a petition for probate of a will that notice thereof might be given pursuant to statute. Id. See Dun. Dig. 5766.

Mandamus is proper remedy to compel a public officer to perform a positive statutory duty, such as duty of county auditor and treasurer to pay over to township taxes collected therefor. State v. County of Pennington, 211M569, 2NW(2d)41. See Dun. Dig. 5762.

Where duty does not permit exercise of any discretion with respect to its performance and only one course of action is open and where aggrieved party does not have an adequate remedy by appeal, as where the duty is to entertain jurisdiction of an action and the court refuses to do so, or where duty is to issue a proper process or notice and court refuses to issue the same, as, for example, the statutory notice of hearing on a petition for probate of a will, writ of mandamus will issue. State v. Delaney, 213M217, 6NW(2d)97. See Dun. Dig. 5752, 5753, 5754, 5766.

Mandamus will issue to compel judicial officers in the same manner and to the same extent as other public officers to perform duties with respect to which they plainly have no discretion as to the precise manner of performance and where only one course of action is open. Id. See Dun. Dig. 5752.

Mandamus is not a substitute for, and cannot be used as, an appeal or writ of error. Id. See Dun. Dig. 5752.

Mandamus may issue out of supreme court to compel judge of district court to comply with a mandate. Personal Loan Co. v. Personal Finance Co., 213M239, 6NW (2d)247. See Dun. Dig. 460, 5765.

Writ was denied to compel a change of venue denied for lack of diligence. Roper v. Interstate Power Co., 213M597, 6NW(2d)625. See Dun. Dig. 5764a.

Mandamus does not lie to interfere with the discretion of public officers but will be granted to compel performance of a public duty which law clearly imposes upon them. It sets in motion the exercise of discretion but does not attempt to control particular manner in which a duty is to be performed. State v. Pohl, 214M221, 8NW(2d)227. See Dun. Dig. 5753, 5762.

Mandamus does not lie to interfere with discretion of public officers, but it will be granted to compel the performance of a public duty which the law clearly imposes upon them, and it sets in motion the exercise of discretion, but does not attempt to control the particular manner in which a duty is to be performed. State v. Pennebaker, 215M79, 9NW(2d)259. See Dun. Dig. 5753, 5755.

Mandamus issued to compel court to allow a case to be proposed where there had been a stay of proceedings and there was a misapprehension as to the effect of the stay on the part of court and counsel, a rejection of the transcript by counsel for appellee being followed promptly by a motion to the court for leave to propose a case for allowance. Schmit v. Village of Cold Spring, 215M572, 10NW(2d)727. See Dun. Dig. 5766.

9723. On whose information and when.

Ordinarily, where a party has an adequate remedy by appeal, a writ of mandamus should be denied, and

denial of a trial by jury falls within this rule. State v. Delaney, 213M217, 6NW(2d)97. See Dun. Dig. 5754.

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, 208M195, 293NW243. See Dun. Dig. 5754.

Mason's St., §2162, did not provide an adequate and speedy remedy at law for owner of a specific part of land sold as a single parcel, seeking to redeem his part under §2158. State v. Erickson, 212M218, 3NW(2d)231. See Dun. Dig. 5754.

Where a justice of the peace denies a jury trial in a civil action to a party who is entitled to it, party has an adequate remedy by appeal and is not entitled to a writ of mandamus to compel inforcement of the right. State v. Delaney, 213M217, 6NW(2d)97. See Dun. Dig. 5754, 5767.

9727. Answer—When and how made.

On petition for an alternative writ of mandamus, a demurrer should be to the alternative writ as well as the petition. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 5776.

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., 209M348, 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., 206M437, 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, 209M91, 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, 209M308, 296NW 24. See Dun. Dig. 5776.

Defect as to names of parties in title of petition and alternative writ of mandamus should be diregarded where remedied by allegation in body of pleadings. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 7509.

Where a city was brought into case as an additional defendant and appeared specially and objected to jurisdiction of court elsewhere than in county where city was located, attention of counsel for city securing an alternative writ of mandamus from supreme court was called to Supreme Court Rule II, providing that all cases under review shall be entitled as in court below. Schaife Co. v. Dornack, 211M349, 1NW(2d)356. See Dun. Dig. 5769, 5770.

Power company under its theory that an ordinance adopted on a certain date was a nullity, because its franchise vested prior thereto, cannot contend that village officers should be mandamused to sign, attest or publish the ordinance. Union Public Service Co. v. Village of Minneota, 212M92, 2NW(2d)555. See Dun. Dig. 5762.

In mandamus against county auditor and others to compel defendants to permit plaintiff to redeem land and to enter a confession of judgment in respect to the land, plaintiff was not harmed because court ordered action dismissed with costs, instead of filing findings of fact and conclusions of law to the same effect, where upon the record plaintiff was not entitled to any relief. Adams v. Atkinson, 212M131, 2NW(2d)818. See Dun. Dig. 5778.

In mandamus by owner of a specific part of land sold for taxes as one parcel to compel county auditor to apportion tax judgment so that plaintiff could redeem part of parcel, opinion evidence as to whether value of a specific part as compared to value of whole parcel could be determined and as to how a division of taxes would affect value of remaining portion of parcel was irrelevant, immaterial and incompetent. State v. Erickson, 212 M218, 3NW(2d)231. See Dun. Dig. 5762.

Where defendant petitions the supreme court and alternative writ is issued to district judge directing him to show cause why a peremptory writ should not issue requiring transmission by the clerk of the files in a case to another county, a reply to the return is neither necessary nor proper. Yess v. Ferch, 213M593, 5NW(2d) 641. See Dun. Dig. 5776.

Order directing issuance of mandamus directing county commissioners to "proceed forthwith" to redistrict their county was proper where nearly three years elapsed since official census apprised commissioners of fact that population of commissioner district exceeded thirty per cent of population of county and facts indicated that the commissioners had no intent to comply with statute, as against contention that defendant had discretion to act at such time as they should deem proper. State v. Pohl, 214M221, 8NW (2d)227. See Dun. Dig. 5762, 5778.

Interested parties are joined and their rights adjudicated, although they are not necessary parties. Robinette v. Price, 214M521, 8NW(2d)800. See Dun. Dig. 5769.

An affidavit obviously founded upon mere hearsay is of no evidentiary worth. State v. Pennebaker, 215M75, 9NW(2d)257. See Dun. Dig. 3286, 5776.

In mandamus against director of civil service to compel a classification and allocation of relator as an employee of the state, orderly procedure requires the framing of issues, and, when these are framed, proof should be furnished as in the usual course of an orderly trial, and claim founded upon mere hearsay and assertions without proof cannot be accepted in lieu of competent evidence. Id. See Dun. Dig. 5776, 5777a.

When an appeal comes to the supreme court in a mandamus case, it should have before it all the essential facts upon which the trial court acted, thereby enabling it to render a final determination upon the merits. Id. See Dun Dig. 5781.

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, 206M63, 287NW625. See Dun. Dig. 2207.

An order granting respondent's motion for judgment on pleadings and denying relator's motion for judgment on pleadings and dismissing alternative writ of mandamus, is not appealable. State v. Delaney, 212M519, 4NW (2d)348. See Dun. Dig. 5781.

9732. Jurisdiction of district and supreme courts.

Where city, having been brought into case as an additional defendant, appeared specially and objected to jurisdiction of court on ground that city could not be compelled to defend itself elsewhere than in county where it is located, an alternative writ of mandamus secured from supreme court must be discharged where no motion was made below for change of venue. Scaife Co. v. Dornack, 211M349, 1NW(2d)356. See Dun. Dig. 5764a, 5768.

Supreme court should first make an order that district court or judge show cause before court why a peremptory writ of mandamus should not issue, but a writ including, in the alternative, an order to show cause complies with this statute. Lenhart v. Lenhart Wagon Co., 211M572, 2 NW(2d)421. See Dun. Dig. 5774.

PROHIBITION

9734. Issuance and contents.

Granting of a writ of prohibition is discretionary and ordinarily will be denied in exercise of court's discretion where party has a complete remedy by mandamus. Stenzel's Estate, 210M509, 299NW2. See Dun. Dig. 7842.

Where an appeal lies from an order based on a holding that court has jurisdiction, proper method of review is by appeal rather than by prohibition. State v. Funck, 211M27, 299NW684. See Dun. Dig. 7842.

Fact that an appeal may be less summary and more expensive than prohibition does not ipso facto render appeal inadequate. Id.

Prohibition will not lie to restrain probate court from entertaining petition for probate of a purported will by the proponent of another instrument who had already commenced proceedings for its probate in a different county, at least where probate court intends to stay proceedings pending a determination of the question of venue by the probate court in which proceedings were first commenced. State v. Probate Court of Olmsted County, 215M322, 9NW(2d)765. See Dun. Dig. 7843.

There is no occasion to prohibit that which is not threatened. Id.

9737. When return not so adopted.

In prohibition proceedings in supreme court it must be assumed that lower court will do exactly as the return states will be done. State v. Probate Court of Olmsted County, 215M322, 9NW(2d)765. See Dun. Dig. 7848.

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 be given to someone else. State v. Sorenson, 208M226, 293 NW241. See Dun. Dig. 7297.

Presumption is that parents are fit and suitable persons to be intrusted with care of their child and burden is upon him who asserts contrary to prove it by satisfactory evidence. Id.

When there is a contest between parents and courts are required to determine matter of a child's custody, whether in a divorce or a separation case, or a habeas corpus proceeding, best interest of child is paramount consideration. State v. Price, 211M565, 2NW(2d)39. See Dun. Dig. 4133.

Ordinarily, parents are entitled to custody of their children, but in exceptional cases this right may be denied, principal consideration being welfare of child. State v. Jensen, 214M193, 7NW(2d)393. See Dun. Dig. 4133.

In determining custody of a child court should not award custody to parents if serious emotional and psychological maladjustment would result, unless overpowering reasons require it. Id.

4. Review of evidence.

Defendant may challenge sufficiency of evidence before committing magistrate in a timely proceeding by a writ of habeas corpus. State v. Gottwalt, 209M4, 295NW67. See Dun. Dig. 4131.

9752. Prisoner remanded, when.

Judgment of conviction was not void because of denial of constitutional right to be represented by counsel where defendant was in fact represented by counsel of his own selection, and if counsel was drunk during the trial such condition was not apparent to the trial court nor court's attention called to such condition or request made for appointment of other counsel. Hudspeth v. McDonald, (CCA10), 120F(2d)962, rev'g (DC-Kan), 41F Supp182. Cert. den. 62SCR110. See Dun. Dig. 2419e, 4132.

9768. Hearing on appeal.

Constitutionality as to custody of child questioned in dissenting opinion. State v. Jensen, 214M193, 7NW(2d) 393. See Dun. Dig. 4142, 9070.

CERTIORARI

9769. Within what time writ issued.

1. In general.

A decision should stand, where it is sustained by the facts well found, even though there was error in other findings, which if changed or set aside would not affect the result. Cieluch v. E., 207M1, 290NW302. See Dun. Dig. 1402.

Certiorari is a writ of review in nature of a writ of error or an appeal, its office being to review and correct decisions and determinations already made. Johnson v. C., 209M67, 295NW406. See Dun. Dig. 1391 (60, 61, 64, 66, 67).

In mandamus and certiorari by a dischared war veteran, there being no showing to the contrary, assumption is that relator was honorably discharged from army. State v. City of Bemidji, 209M91, 295NW514. See Dun. Dig. 1397.

Where nonintoxicating liquor licensee appeared pursuant to notice before city council without objection and contested proceeding for revocation of license on its merits, he could not question sufficiency of notice or form of charges made against him. State v. City of Alexandria, 210M260, 297NW723. See Dun. Dig. 1402.

Since proceeding in certiorari is in nature an appeal, record to be considered is that made and certified by tribunal whose proceedings are under review, and that return, in so far as it is responsive to the writ, is conclusive upon the court. Id.

At common law the proper form of judgment in certiorari proceedings was either that the proceedings below be quashed or that they be affirmed, but under our practice, certiorari is not the common-law writ, but rather a writ in the nature of certiorari. State v. Board of Education of Duluth, 213M550, 7NW(2d)544. See Dun. Dig. 1391.

In reviewing determination of a school board that a statutory ground for discharging a tenure teacher exists, jurisdiction of courts is limited to questions affecting jurisdiction of school board, regularity of its proceedings, and, as to the merits, whether the determination was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it. Id. See Dun. Dig. 1402.

Discontinuance of position or lack of pupils having been judicially determined to exist as a ground for discharge of one or more tenure teachers, policy or rules to be followed by board in determining which teacher or teachers are to be discharged is an administrative question, upon which the decision of board is final, absent arbitrariness or capriciousness. Id. See Dun. Dig. 1402.

Where war veteran claiming to have been wrongfully discharged before effective date of civil service act applied to civil service board for determination as to his status, refusal of board to hear his claim, especially its failure to give him an opportunity to present his proof on the vital subject of his claimed wrongful discharge, amounted to a complete failure by the board to act upon the application, requiring reversal in certiorari proceedings, though board consulted printed record of a court case involving the applicant. State v. Elston, 214M205, 7NW(2d)750. See Dun. Dig. 1397.

Scope of review in certiorari proceedings is limited to and determined by record made by officers whose action is sought to be reviewed, and on appeal to supreme court from an order discharging the writ and affirming order below, supreme court cannot make findings of fact or determine questions of fact, but appealing relator has a right to have considered and determined all questions properly presented by the record. Id. See Dun. Dig. 1402.

6. Compensation proceedings.

Where claim is made that industrial commission did not consider certain evidence, which was part of transcript in case, and decision of commission recites that it considered transcript, all files, records and proceedings, recitals will be taken as affirmatively showing that evidence was considered. Cieluch v. E., 207M1, 290NW302. See Dun. Dig. 1402.

Where a party to a workmen's compensation proceeding obtains additional time in which to apply for certiorari, writ must be obtained and be served upon both industrial commission and employer and insurance carrier within time so limited, and actual notice does not take place of written notice. Haimila v. O., 208M605, 293 NW599. See Dun. Dig. 1408, 10426.

7. Drainage proceedings.

A landowner is not entitled to certiorari where he assails on the merits the validity of an assessment for repairs to a drainage ditch, because statutes afford him an adequate remedy, either by answer or petition. Saxhaug v. County of Jackson, 215M490, 10NW(2d)722. See Dun. Dig. 1397.

9. Remand of case.

Court on certiorari cannot modify or remand matter for rehearing where it cannot be said that board proceeded on other than a correct theory or that its action was arbitrary, fraudulent, oppressive or unreasonable. Walker v. Corwin, 210M337, 300NW800. See Dun. Dig. 1397.

If a district court, in reviewing administrative proceedings on certiorari, determines that administrative board has acted upon an erroneous theory of law, court should remand proceedings with directions to proceed under a correct theory, and should not itself attempt to decide the case on the merits. State v. Board of Education of Duluth, 213M550, 7NW(2d)544. See Dun. Dig. 1402.

Entry of a formal judgment of affirmance or reversal in certiorari proceedings is neither contemplated nor authorized under our statutes. Id. See Dun. Dig. 1405.

9770. When served.

Where a party to a workmen's compensation proceeding obtains additional time in which to apply for certiorari, writ must be obtained and be served upon both industrial commission and employer and insurance carrier within time so limited, and actual notice does not take place of written notice. Haimila v. O., 208M605, 293NW 599. See Dun. Dig. 1408, 10426.

CHAPTER 89

Assignments for Benefit of Creditors

9788. Fraudulent conveyances.

Fraudulent conveyances of chattels—chattel mortgages —sales—conditional sales. 24 MinnLawRev 832.

9789. Proof of claims—Order of payment.

Claim of state against a bankrupt's assets is not a preferred one unless it is for taxes. Op. Atty. Gen., (372B-5), Feb. 2, 1940.

CHAPTER 90

Insolvency

COMMON LAW DECISIONS RELATING TO BANKRUPTCY IN GENERAL

1. In general.

Peterson v. Johnson Nut Co., 204M300, 283NW561; 209M 470, 297NW178.

Creditors' attorneys were not entitled to fees out of bankrupt's estate for their services which benefited estate by reducing amount allowed to trustees' attorneys. Cox v. Elliott, (CCA8), 122F(2d)851.

Evidence held to show that receiver of corporation affiliated with railroads which participated in reorganization pursuant to Bankruptcy Act [11 Mason's U. S. C. A.