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.

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Presumption of due care of a pedestrian struck while standing close to edge of shoulder between two cars involved in a collision does not vanish in absence of evidence showing conduct of deceased when defendant's car approached at high speed in the night time and swung to the left when defective brakes prevented his stopping before passing through a lane of cars resulting from an accident. Lee v. Zaske, 213M 244, 6NW(2d)793. See Dun. Dig. 2616.

Evidence that a workman, who was electrocuted by taking hold of a metal brace and an uninsulated spot on a connection with high-voltage wires, while engaged in the performance of his work on the steeply sloping roof of a lean-to shed, was seen walking on the roof toward the crossarm brace and afterwards was seen holding onto the connection at the uninsulated spot and the metal brace, with his body doubled up, but did not show what the workman did when he got in close proximity to the brace, did not displace the presumption that decedent exercised due care for his own safety. Schroepfer v. City of Sleepy Eye, 215M525, 10NW(2d)398. 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., 207M500, 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., 208 M240, 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., 208M 240, 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., 209M72, 295NW508. See Dun. Dig. 2620.

Contributory negligence of driver of automobile killed at township highway crossing by car coming from his right held for jury. Ristow v. Von Berg, 211M150, 300NW 444. See Dun. Dig. 2616.

In action for wrongful death, testimony of only living witness to head-on collision need not be accepted as true where jury could not only find inconsistencies in his testimony, but there were circumstances of physical facts impeaching verity of witness's story. Malmgren v. Foldesi, 212M354, 3NW(2d)669. See Dun. Dig. 10344a.

In action for wrongful death in automobile collision, where sole evidence for plaintiff consisted of certain statements made by defendant's employee at scene of collision and his admissions later to a witness in presence of plaintiff's attorney, both of whom were investigating the accident, weight to be attached to such admissions was for jury, though contrary to testimony of such employee on the trial. Litman v. Peper, 214M 127, 7NW(2d)334. See Dun. Dig. 2616.

A certificate of death, being only prima facie evidence of the cause of death, may be contradicted and explained. Harris v. Wood, 214M492, 8NW(2d)818. 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., 208M487, 295NW57. See Dun. Dig. 2616.

Instruction that one attempting to rescue a person imperiled by negligence of another should recover unless his act was "clearly" one of rashness or recklessness was erroneous, but was without prejudice where it appeared from instructions as a whole that contributory negligence need be shown only by a fair preponderance of the evidence. Duff v. Bemidji Motor Service Co., 210M456, 299 NW196. 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, 208M 420, 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., 208M152, 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., 208M478, 294NW654. See Dun. Dig. 1056.

County may not purchase and pay for a public official fidelity bond issued by reciprocal company organized under either laws of Iowa or of Minnesota. Op. Atty. Gen. (249a-4), May 11, 1942.

A bond "during his continuance in office" remained in effect while appointee was holding over after expiration of term, but if there should be an appointment for a new term it would be advisable to obtain a new bond. Op. Atty. Gen. (401b-19), Aug. 4, 1942, Aug. 10, 1942.

9677-1. State may take fidelity insurance.—The public examiner from time to time shall make surveys of each department or other agency of the state government to determine the employes 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 employe, and shall submit a list thereof to the commissioner of administration for his action thereon. The commissioner may approve in whole or in part and shall certify his action thereon to the directing head of each such department or agency, who shall require each of the employes so listed to give bond to the state in the amount indicated in such certificate. The commissioner 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 commissioner shall direct, insuring the fidelity of such department employes in the respective amounts so required, upon a form to be prescribed by the public examiner. 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 commissioner shall require. The surety upon the bonds of all state officers and state employes 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 public examiner, 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. (As amended Apr. 23, 1943, c. 588, §1.)

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.

Certain schedule bonds are approved. Op. Atty. Gen. (980a-4), Nov. 4, 1941.

Director of game and fish is not authorized to pay premiums on bonds of agents for sale of licenses, including county auditors. Op. Atty. Gen. (209), Apr. 30, 1942.

Employees' schedule bond of Department of Conservation, filed in office of Secretary of State, does not properly include division of state parks, and could not include director. Op. Atty. Gen. (980a-4), July 10, 1942.

9679. Liberty loan bonds security.

United States bonds are not usable as security unless such as are immediately convertible into cash by an assignee or holder. Op. Atty. Gen. (218*l*), Apr. 19, 1943.

9686. Modes of justification.

In case of official bond of a school district treasurer under a later statute, where personal sureties execute, each need justify only in amount of penalty of bond, which is required to be double total sum which will probably come into hands of treasurer at any one time. Op. Atty. Gen. (451A-5), Oct. 17, 1941.

Bond in penal sum of $3,100, with two personal sureties, each of whom has justified in amount of $3,100 is a bond for $3,100 and not $6,200, notwithstanding that penal sum of bond should have been $6,200. Id.

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.

Certain schedule bonds are approved. Op. Atty. Gen. (980a-4), Nov. 4, 1941.

9693. Cost of surety bonds to be expense of receivers.

There is no authorization for payment of village funds for premiums on official bonds of village officers, except the village treasurer, and when a bonded village officer vacates his office, liability for any act after date of vacation terminates, and it does not lie within any village authority to sign cancellation of liability on bond. Op. Atty. Gen. (476b-4), June 16, 1941.

Village council is without authority to pay premium on surety bond of village justice of the peace in qualifying for office. Op. Atty. Gen. (266A-2), Feb. 9, 1942.

County board may designate surety. Op. Atty. Gen. (450b), Dec. 18, 1942.

9693-1. Premium on surety bonds to be paid by county in certain cases.—In counties now or hereafter having a population of more than 275,000, when a corporate surety bond has been furnished by any county officer or employee pursuant to statute or resolution of the County Board, the premium therefor shall be paid by the county. (Act Apr. 20, 1943, c. 537, §1.)

[382.153]

Laws 1943, c. 537, §2, provides: "All acts or parts of acts not consistent herewith are hereby repealed."

9694. Bonds, by whom approved.

One elected coroner and qualifying by taking oath and filing bond could not withdraw bond or oath on refusal of county board to pay bond premium, if bond was approved. Op. Atty. Gen. (104a), Jan. 19, 1943.

Where new sheriff was elected in 1942, filed his bond and oath before January 4, 1943, and commissioners approved his bond on January 5, 1943, he took office on the 5th of January. Op. Atty. Gen. (390a-20), Feb. 11, 1943.

9698. Official bonds, security to whom—Actions.

Surety on official bond of county auditor was liable to holder of county warrant issued by county auditor in payment of his own salary when no salary was due, even though warrant fails to state on its face time of service covered thereby, unless it be shown that it has been released by holder's participation in or connivance with auditor's wrongful acts, or there be proof that holder's negligence in acquiring warrant was proximate cause of loss. State Bank of Mora v. Billstrom, 210M497, 299NW 199. See Dun. Dig. 2309.

In action by bank holding warrants unlawfully issued by county auditor upon official bond of auditor, manner in which banks and county treasurer had handled auditor's salary warrants over a period of several years bore on issue of negligence of bank in purchasing warrant, and it was proper to receive in evidence all other warrants issued by and to auditor. Id.

Official bond of county auditor is for benefit of any one injured by his delinquency. Id.

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.

Purpose of statute is to protect laborers and materialmen 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., 208M367, 294NW210. See Dun. Dig. 9107c.

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

There is a clear distinction between cases requiring performance of a covenant before contractor shall be entitled to receive payment and in which contractor agrees, as a part of contract, to pay for labor and material before he is to receive payment from his employer, and those where nonperformance of an independent covenant merely raises a cause of action for its breach and does not constitute a bar to right of party making it to recover for the breach of the promise made to him. Farmers State Bank v. Burns, 212M455, 4NW(2d)330. Dissenting opinion 5NW(2d)589. See Dun. Dig. 9107c.

Under a contract between a municipality and a contractor and a performance bond executed pursuant to statute, rights and remedies between contractor and those third persons with whom he deals with respect to proceeds of contract should be left with them and city is under no duty and has no authority to determine rights. Id.

Generally, those who write surety bonds are regarded under our decisions as underwriters of contracts of insurance, and, being experts in business of appraising risks, they are not favored by the law. Id. See Dun. Dig. 9107a, 9107c.

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.

1½. Persons protected.

Where city purchased windows from local lumber company, some of materials for which were furnished to lumber company by an outside concern, and work of installation was done by city employees, city was not required to obtain a bond and was not liable to outside concern, which local company failed to pay. Op. Atty. Gen. (59a-15), June 25, 1943.

3. Bank advancing money.

Equity of a bank which finances a contractor in street improvement under an agreement whereby it is to make advances and contractor is to pay to it money received from the contract is superior, in respect to a balance remaining in hands of municipality upon completion of contract, to that of surety on contractor's performance bond, although contractor agreed in his application for the bond that upon default any sum remaining in hands of municipality, upon completion of the contract, should be considered as assigned to surety. Farmers State Bank v. Burns, 212M455, 4NW(2d)330. Dissenting opinion 5NW (2d)589. See Dun. Dig. 9107e.

The rule laid down in American Surety Co. v. Board of County Com'rs, 77M92, 79NW649, was not limited or abrogated by Barrett Bros. Co. v. County of St. Louis, 165M 158, 161, 206NW49, since the facts in the latter case clearly distinguish it from the former. Id.

9702. Approval and filing of bond.

Where city purchased windows from local lumber company, some of materials for which were furnished to lumber company by an outside concern, and work of installation was done by city employees, city was not required to obtain a bond and was not liable to outside concern, which local company failed to pay. Op. Atty. Gen. (59a-15), June 25, 1943.

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., 208M367, 294 NW210. 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., 209M219, 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.

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