

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.



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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

was uncertain, mandamus to compel compliance with contract would not issue. 179M392, 229NW577.

Mandamus may be used to enforce right of a member of an incorporated relief association to be placed on pension roll under its by-laws. 181M444, 232NW797. See Dun. Dig. 5752, 5767.

The granting or withholding the remedy of mandamus rested in the discretion of the trial court, and the granting of the writ was not error. State v. Magie, 183M60, 235NW526. See Dun. Dig. 5762a.

The legal remedy of mandamus is granted on equitable principles, and the relator may be rejected if he has not "clean hands." State v. Magie, 183M60, 235NW526. See Dun. Dig. 5758, 5752(81).

Title to a public office cannot be determined in mandamus proceeding, but temporary possession of the office pending litigation to try title thereto may be controlled thereby. State v. Magie, 183M60, 235NW526. See Dun. Dig. 5763.

Mandamus will lie to direct the district court to finish a trial commenced therein, where upon appeal from probate court it erroneously declines jurisdiction. State v. O'Brien, 186M432, 243NW434. See Dun. Dig. 5766.

Denial of a motion to change place of trial of an action for divorce, brought in proper county, upon ground that convenience of witnesses and ends of justice will be promoted, may be reviewed on mandamus. State v. District Court, 186M513, 243NW692. See Dun. Dig. 5764a.

Mandamus is not proper remedy to review order of court denying a motion to amend a pleading. De Jardins v. E., 189M356, 249NW576. See Dun. Dig. 5754.

Mandamus did not lie to compel trial judge to change place of trial for convenience of witnesses. Fauler v. C., 191M637, 253NW884. See Dun. Dig. 5764a.

Court cannot by mandamus control exercise of discretion vested in a civil service commission, but may determine whether, on a given state of facts and under law and rule applicable thereto, commission has any discretion. State v. Ritchel, 192M63, 255NW627. See Dun. Dig. 5753.

Determination by district court on application for examination of writings within reach of court cannot be controlled by mandamus, but is left to be reviewed on appeal or certiorari after trial. State v. District Court, 192M620, 257NW340. See Dun. Dig. 5754a.

Mandamus may not issue to enforce a moral obligation. State v. Bauman, 194M439, 260NW523. See Dun. Dig. 5756.

Mandamus is an extraordinary remedy and is not to be resorted to where redress may be had in ordinary suit at law, as for enforcement of a promise or contract to pay money. Id. See Dun. Dig. 5754.

Where contracts of employment of public school teachers in special school district of city of Minneapolis stipulate a monthly salary, but provide that board of education, employer, may reduce same whenever it deems necessary, no certain or definite rights spring from such contracts so that mandamus will lie to enforce same, and fact that, when so reducing said stipulated salary, board promised that if more money came from tax collections than estimated when reduction was made, such excess would be distributed pro rata to teachers, and that there is such excess, do not legally obligate board to distribute same. Id. See Dun. Dig. 5756.

Order denying motion of attorney general to strike out return made by the state auditor to the alternative writ of mandamus and to strike names of attorneys appearing for him from record is not appealable; but by certiorari, court may review order on its merits. State v. District Court, 195M169, 264NW227. See Dun. Dig. 5770.

Where employee within civil service provisions of charter of city is wrongfully separated from his employment by discharge or suspension for more than thirty days, mandamus affords a proper remedy. State v. Warren, 195M180, 261NW857. See Dun. Dig. 5763.

Where things to be done are ministerial acts of public officials and right to have them done clearly appears, mandamus is a proper remedy. State v. City of Waseca, 195M266, 262NW633. See Dun. Dig. 5756.

Mandamus does not lie unless, without reference to any writ or order of court, it be plain duty of officer or officers in question to do act sought to be compelled. State ex rel. Evans v. City of Duluth, 195M563, 262NW681. See Dun. Dig. 5756.

Mandamus will not lie unless it is plain duty of defendant to do acts sought to be compelled. State v. City of Duluth, 195M563, 263NW912. See Dun. Dig. 5756.

Writ is issued only where there already exists a legal right so clear that it does not admit of any reasonable controversy. International Harvester Co. v. E., 197M360, 268NW421. See Dun. Dig. 5756.

Before state commissioner of highways may legally pay amounts appropriated by Laws 1935, c. 309, to persons therein named, there must be a judicial determination in usual way that highway department is liable therefor, and that determination cannot be made in a proceeding for a writ of mandamus. Id.

Where city police civil service commission classified all police employees of city, and classification made is alleged to be erroneous, and in violation of soldiers' preference act, proper remedy is certiorari to review the classification made and not mandamus to compel a reclassification. State v. Ernest, 197M599, 268NW208. See Dun. Dig. 5752.

In mandamus to compel issuance of building permit, court is bound to consider situation as it exists as of time of hearing on question whether peremptory writ should issue, and where a city ordinance has been passed since issuance of alternative writ, its effect and validity are necessary and proper issues for determination. State v. Clousing, 198M35, 268NW844. See Dun. Dig. 5752b.

Court cannot inquire into motives of city council except as they may be disclosed on the face of particular act in question or by reference to general existing conditions or other legislative acts. Id. See Dun. Dig. 5753.

In absence of absolute duty upon officer, mandamus does not lie. State v. Strom, 198M173, 269NW371. See Dun. Dig. 5756.

Where before May 1 of an odd-numbered year a dwelling formerly not a homestead becomes one, owner, not having made timely demand upon assessor, local board of review, or county board of equalization for a reclassification of property for assessment as a homestead, is not entitled to mandamus to compel county auditor to reclassify property. Id.

Mandamus will be denied when sought for improper purposes and not in good faith. State v. St. Cloud Milk Producers' Assn., 200M1, 273NW603. See Dun. Dig. 5758.

Members of cooperative are not entitled to mandamus to compel corporation to permit inspection and examination of records where purpose is to benefit other companies who have interfered with contractual relations existing between association and its members. Id. See Dun. Dig. 5766(78).

Mandamus to compel performance of official duty lies only where officer is under plain and mandatory duty, imposed by law, to perform very action wanted, a ministerial duty being one in which nothing is left to discretion. Cook v. T., 200M221, 274NW165. See Dun. Dig. 5756.

Mandamus will lie to change place of trial for convenience of witnesses and in interest of justice. State v. District Court of Hennepin County, 200M633, 274NW673. See Dun. Dig. 5764a.

An action for personal injuries should be tried in the county in which the defendant resided when the action was begun, and mandamus should be granted to remand actions to such county after change of venue to another county. Newborg v. M., 200M596, 274NW875. See Dun. Dig. 5764a, 10122(84).

Mandamus will be denied where it is shown that petitioner has not complied with provisions of a statute or ordinance which are conditions to his right to action demanded. Yoselowitz v. P., 201M600, 277NW221. See Dun. Dig. 5756.

Where an employer is entitled to a designation of an insurance carrier, he can compel designation by the compensation insurance bureau by mandamus. Id. See Dun. Dig. 5766.

If court in a criminal contempt proceeding refuses to issue an order to show cause upon a proper showing, mandamus will lie. Spannaus v. L., 202M497, 279NW216. See Dun. Dig. 5753.

Mandamus is an extraordinary remedy, not to be used where there is a plain, speedy and adequate remedy in ordinary course of law. Farmers & Merchants Bank v. B., 204M224, 283NW138. See Dun. Dig. 5754.

Where service of notices to terminate right of redemption were invalid, mandamus was proper remedy by landowner to secure from county auditor official certificate of amount required to be paid to redeem. Id. See Dun. Dig. 5762.

Mandamus will not be granted to control discretion by directing its exercise in a particular way. State v. School Dist. No. 70, 204M274, 283NW397. See Dun. Dig. 5753.

State confers on school officers discretionary power to furnish free transportation of pupils, and this discretion cannot be controlled by mandamus. Id. See Dun. Dig. 5672.

County agricultural society having fair on strength of levy of tax has no remedy against county board thereafter rescinding levy, it being too late to bring mandamus proceedings. Op. Atty. Gen., June 10, 1933.

Mandamus is the appropriate remedy to compel a power company to connect its system with a private applicant's premises. Op. Atty. Gen. (524c-11), Aug. 20, 1934.

Mandamus will lie to compel mayor to sign orders audited and allowed by city council. Op. Atty. Gen. (361f), Jan. 2, 1936.

9723. On whose information, and when.

Where there was an order of court confirming an award of damages in proceeding to establish a judicial road, court had jurisdiction, in a subsequent proceeding by a county to deposit part of damages in court pending settlement of conflicting claim thereto, to enter judgment against county ordering it to pay remainder of award to certain landowner, as against objection that landowner's remedy should have been by mandamus. Blue Earth County v. W., 196M501, 265NW329. See Dun. Dig. 5754.

Mandamus is an extraordinary remedy and is not to be used where there is a plain, speedy and adequate remedy in ordinary course of law. Id.

9724. Alternative and peremptory writs—Contents.

State v. Bauman, 194M439, 260NW523; note under §9722.

9728. Default—New matter—Demurrer.

A demurrer searches all preceding pleadings. 172M 328, 215NW186.

9729. Pleadings—Issues, trial, etc.

Petition for examination of corporation books held not sufficient to support mandamus. 173M198, 217NW119.

Appearance in response to writ of mandamus and asking for an adjournment to enable answer does not waive defective pleading. 173M198, 217NW119.

Reply to answer is not necessary. 178M442, 227NW 891.

Relator's motion for judgment presumes truthfulness of answer, and such a motion by respondent rests on allegations of writ alone. 178M442, 227NW891.

Judgment on the pleadings. State v. Magie, 183M60, 235NW526. See Dun. Dig. 5778(28).

Where mandamus is used to review an order of trial court on motion to change place of trial to promote convenience of witnesses and ends of justice, only matters presented to trial court can be considered. State v. District Court of Brown County, 194M595, 261NW701. See Dun. Dig. 5764a, 10126, 10127, 10129.

Questions arising out of disputes on filing of nomination petitions must be presented to court promptly so they may be considered properly. Johnson v. H., 198M 192, 269NW405. See Dun. Dig. 5763.

Parties who submit a mandamus case on files, records, and affidavits are not in a position to complain that they were not accorded a trial as in an ordinary civil action under statute. State v. St. Cloud Milk Producers' Ass'n., 200M1, 273NW603. See Dun. Dig. 5781.

Upon mandamus to change place of trial for convenience of witnesses, merits of case cannot be considered. State v. District Court of Hennepin County, 200M633, 274 NW673. See Dun. Dig. 5764a.

On appeal from judgment quashing writ of mandamus allegations of petition must be accepted as true. Farmers & Merchants Bank v. B., 204M224, 283NW138. See Dun. Dig. 5776.

9730. Effect of judgment for plaintiff—Appeal.

No costs or disbursements should be taxed against secretary of state unsuccessfully defending mandamus proceeding. State v. Holm, 186M331, 243NW133. See Dun. Dig. 2207.

A direction that a peremptory writ of mandamus issue is an irregular judgment from which an appeal will lie as from a judgment. State v. St. Cloud Milk Producers' Ass'n., 200M1, 273NW603. See Dun. Dig. 5778, 5781(41).

9732. Jurisdiction of district and supreme courts.

Where the trial court has settled and allowed a case in obedience to a peremptory writ of mandamus issued by supreme court after full hearing, case so settled cannot be stricken from record on ground that it was not properly settled, remedy being in mandamus proceeding, within time permitted for petitions for rehearing, for a modification of writ. Krom v. F., 192M520, 257NW812. See Dun. Dig. 5768.

PROHIBITION**9734. Issuance and contents.**

Writ may issue where court is exceeding its legitimate powers in any matter over which it has jurisdiction if no other speedy and adequate remedy is available. 173 M271, 217NW351.

Writ issued to lower court only when that court is exceeding its jurisdiction. 173M623, 217NW494.

A writ of prohibition will not be granted where the petitioner had an adequate remedy by writ of certiorari. Martin's Estate, 182M576, 235NW279. See Dun. Dig. 7842.

Where an appeal will give an adequate remedy, prohibition does not lie. State v. District Court, 195M169, 262 NW155. See Dun. Dig. 7842.

Rule that an absolute writ of prohibition will not issue unless petitioner has first raised question of its jurisdiction in subordinate tribunal, is one of practice and not of jurisdiction, and will not prevent issue of writ in a clear case where interests of justice require it. Id. See Dun. Dig. 7845.

Prohibition is properly used to restrain a judge from hearing a matter in which he is disqualified to sit by reason of filing of affidavit of prejudice. State v. Schultz, 200M363, 274NW401. See Dun. Dig. 7841.

Writ of prohibition will not be granted upon contention that criminal complaint does not charge a public offense for reason that alleged contemptuous publication related to matters which had been finally determined by court, since court had jurisdiction of person and of offense attempted to be charged and of determination of whether or not complaint stated a public offense. State v. Laughlin, 204M291, 283NW395. See Dun. Dig. 7840.

If county attorney is not proper party to maintain action for the state, it constitutes only a defect of parties, and objection must be taken by demurrer and not by prohibition out of supreme court. State v. District Court, 204M415, 283NW738. See Dun. Dig. 7323.

While in ordinary case writ of prohibition will not issue out of supreme court until application has been made to district court, such requirement is a matter of practice and is not to be insisted upon where it appears to be useless. Id. See Dun. Dig. 7842.

Prohibition will lie from supreme court where district court appoints a receiver ex parte in absence of extreme emergency. Id. See Dun. Dig. 7845.

Writ of prohibition to court christian. 20 MinnLawRev 272.

9735. Service and return of writ.

Though return to an alternative writ of prohibition is required to be made by court or officer to whom it is directed, it is duty of counsel for party litigant to see that it is made. State v. District Court, 195M169, 262 NW155. See Dun. Dig. 7848.

HABEAS CORPUS**9739. Who may prosecute writ.****1. Unconstitutional law.**

On habeas corpus constitutionality of law under which court proceeded and jurisdiction of court may be challenged. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4132(76).

Constitutionality of law under which court proceeded and jurisdiction of court may be challenged in habeas corpus proceeding. Id.

2. Want of jurisdiction.

A defendant's constitutional right to plead former jeopardy may be waived and if such a plea is not entered at proper time, it is waived by defendant and jurisdiction of trial court is not affected by fact that such a plea might have been interposed. State v. Utrecht, 287NW229. See Dun. Dig. 2442.

3. Not a substitute for appeal.

A writ of habeas corpus cannot be used as substitute for writ of error or appeal for review of a judgment of conviction, nor serve as cover for a collateral attack on such a judgment. State v. Wall, 189M265, 249NW37. See Dun. Dig. 4129(56).

Habeas corpus is not to be used as substitute for an appeal or writ of error, and therefore cannot be used to determine whether or not there was an erroneous decision of issue whether relator was or was not able to pay alimony supporting order of imprisonment for contempt. State v. Gibbons, 199M445, 271NW873. See Dun. Dig. 4129.

An application for a writ of habeas corpus may not be used as a substitute for a writ of error or appeal, as a cover for a collateral attack upon a judgment of a competent tribunal having jurisdiction of subject matter of offense and of person of defendant, nor does fact that petitioner has permitted time to elapse within which a review by appeal might be obtained, and has thereby lost opportunity for such a review, give him a right to resort to habeas corpus as a substitute. State v. Utrecht, 287NW229. See Dun. Dig. 4129.

3a. Office of writ.

Where a summary court-martial has convicted a member of the National Guard, the only questions reviewable by habeas corpus are whether the military court had jurisdiction over him and power to impose the penalty inflicted. 174M82, 218NW542.

On habeas corpus, where respondent justifies detention of relator under a warrant of commitment fair on its face issued upon an adjudication of a competent court having jurisdiction, errors in proceeding prior to commitment are of no avail. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4132(74).

An application for a writ of habeas corpus is an independent proceeding to enforce a civil right and is a collateral attack upon a criminal judgment. State v. Utrecht, 287NW229. See Dun. Dig. 4127.

In a habeas corpus proceeding involving a contention of former jeopardy in connection with a conviction of a state offense state court is bound to follow decisions of United States Supreme Court only so far as due process under 14th amendment is involved. Id. See Dun. Dig. 4127.

3b. Custody of children.

Habeas corpus lies to determine right to possession of child but court will give effect to divorce judgment. 173M177, 216NW937.

If child was awarded to third party who has never had nor sought possession of him, on controversy between parents, court will make such provision for his custody as it deems for the best interest of the child. 173M177, 216NW937.

Custody of children given to maternal grandmother as against father. 175M18, 221NW868.

Custody of child given to aunt and uncle as against father and stepmother. 176M193, 222NW927.

Fact that adjudication of delinquency by probate court committed delinquent to guardianship until 21 years of age instead of until 19 years of age, as prescribed by §8637, does not release her, before she has not yet attained the age of 19 years. State v. Patterson, 188M492, 249NW187. See Dun. Dig. 4431.

3c. Insane persons.

Statute directing district court not to try a person for a crime while he is in a state of insanity, imposes a duty on, but does not go to jurisdiction of, the court, and failure to comply with statute is no ground for collateral

attack, as by habeas corpus, on judgment of conviction. State v. Utrecht, 203M448, 281NW775. See Dun. Dig. 4132.

4. Review of evidence.

Governor's rendition warrant creates a presumption that accused is a fugitive from justice, and to entitle a prisoner held under such a warrant to discharge on habeas corpus evidence must be clear and satisfactory that he was not in demanding state at time alleged crime was committed. State v. Owens, 187M244, 244NW 820. See Dun. Dig. 3713(30).

9740. Petition—To whom and how made.

An order of court commissioner and writ of habeas corpus having been issued, it was error for district court judge to vacate one and quash other upon order to show cause directed to and served upon court commissioner alone, without notice to petitioner for writ, real party in interest, or his attorney. State v. Hemenway, 194M124, 259NW687. See Dun. Dig. 2331.

9742. Statements in petition.

An allegation in a petition for a writ of habeas corpus that two criminal informations were based upon exactly same facts is not an allegation of a conclusion of law but one of fact, admission of which by state concedes truth of statement except in so far as statement is contradicted by copies of informations attached to petition. State v. Utrecht, 287NW229. See Dun. Dig. 4137.

9746. Return to writ.

Where original warrant of governor was not produced at hearing on habeas corpus but no objection was made thereto and relator did not traverse return of sheriff which contained an alleged copy of original warrant, and in verified petition for writ it was alleged that warrant had been issued, held, that relator was not entitled to discharge because of absence of original warrant. 172M401, 215NW863.

9752. Prisoner remanded, when.

(3).

A commitment which embodies judgment of conviction of criminal contempt, which is unmistakably charged in commitment, is adequate to entitle sheriff to custody of defendant until service imposed has been served. State v. Syck, 202M252, 277NW926. Cert. den., 59SCR64. See Dun. Dig. 4132.

If trial court had jurisdiction of offense and of defendant it is only where extraordinary circumstances surrounding trial make it a sham and a pretense rather than a real judicial proceeding that habeas corpus will lie on ground that judgment is a nullity for want of due process, and this is true even though there is a claim of denial of constitutional rights. State v. Utrecht, 287 NW229. See Dun. Dig. 4132.

9753. Held under process, when discharged.

Scope of review by court in extradition proceeding. 178M368, 227NW176.

9754. Bailed, remanded, etc., when.

Where a person is held as a fugitive from justice under a rendition warrant issued by the Governor of this state, he ordinarily should not be released on bail pending a decision in a habeas corpus proceeding to test the legality of his arrest. State v. Moeller, 182M369, 234 NW649. See Dun. Dig. 3713.

9760. Re-arrest of persons discharged.

A justice of the peace has no power to amend, suspend or set aside a sentence once imposed; but when he has issued a commitment which is found to be erroneous, he may issue a new one, correctly setting forth the sentence. Op. Atty. Gen., Feb. 28, 1931.

9763. Service of writ—Bond.

Where there has been no attempt to create a corporation de jure there can be no corporation de facto. 172 M471, 215NW845.

9767. Appeal to supreme court.

The trial on habeas corpus in the above court is a trial de novo. 172M401, 215NW863.

9768. Hearing on appeal.

179M472, 229NW582.
172M401, 215NW863; note under §9767.

Maternal grandmother awarded custody of female child in preference to father. 179M472, 229NW582.

Trial de novo. 179M532, 229NW787.

On appeal in habeas corpus proceeding, supreme court will not disturb action of trial court awarding custody of child, where all contesting persons are of excellent character and well-fitted for responsibilities of guardianship. State v. Hedberg, 192M193, 256NW91. See Dun. Dig. 4142.

On appeal in a habeas corpus proceeding to determine custody of a child, hearing is de novo. State v. Sivertson, 194M380, 260NW522. See Dun. Dig. 4142(13).

CERTIORARI

9769. Within what time writ issued.

1. In general.

171M519, 214NW795; note under §9770.

In certiorari to review a holding of department of commerce, Supreme Court makes but a limited review and disturbs its holding only where it has gone beyond its jurisdiction or acts arbitrarily or oppressive, or without foundation in the evidence. 174M200, 219NW81.

The record certified by the tribunal, whose proceedings are under review is conclusive. 175M222, 220NW 611.

On the record involved, certiorari would not give plaintiff an adequate remedy. National Cab Co. v. K., 182M 152, 233NW838. See Dun. Dig. 1391.

An order of the probate court, directing an executor to turn over to decedent's aunt certain funds which he claimed to hold as an individual was a final order, and reviewable by certiorari. Martin's Estate, 182M576, 235NW279. See Dun. Dig. 1394, 7842.

In our practice, writ of certiorari is used as a substitute for a writ of error. Mark v. K., 188M1, 143NW 472. See Dun. Dig. 1391, 1402.

Extension of time to redeem from a mortgage foreclosure sale is granted by an order and not by judgment, and review of such order is by certiorari. Swanson v. C., 192M81, 255NW812. See Dun. Dig. 1400.

Entry of judgment instead of order extending time for redemption from mortgage foreclosure sale under the moratorium statute did not prevent a review by certiorari. Id.

Supreme court has a certain discretion in matter of reviewing nonappealable orders by certiorari. State v. District Court, 196M56, 264NW227. See Dun. Dig. 1393.

Order denying motion of attorney general to strike out return made by state auditor to alternative writ of mandamus and to strike names of attorneys appearing for him from record is not appealable; but by certiorari, court may review order on its merits. Id. See Dun. Dig. 1394.

Certiorari will not lie to review an intermediate order of lower court, such as an order granting a new trial. Salters v. U., 196M541, 265NW333. See Dun. Dig. 1395.

Where city police civil service commission classified all police employees of city, and classification made is alleged to be erroneous, and in violation of soldiers' preference act, proper remedy is certiorari to review the classification made and not mandamus to compel a reclassification. State v. Ernest, 197M597, 268NW208. See Dun. Dig. 1391.

Judgment in action by mortgagor under moratorium statute denying relief asked and granting foreclosure is appealable, and is therefore not subject to review on certiorari. Flakne v. M., 198M465, 270NW566. See Dun. Dig. 1395.

Writ of certiorari is a writ of review in nature of a writ of error or an appeal to review and correct decisions and determinations already made. State v. Probate Court of Hennepin County, 199M297, 273NW636. See Dun. Dig. 1391.

Questions not raised by the record will not be decided. Id.

An attorney at law does not have a right, by reason of appearance in litigation for a client, to have a review of a judgment or decision rendered in such litigation. Id.

In certiorari to review conviction for contempt in violating a temporary injunction, latter is under collateral attack which must fail unless injunction is shown to be a nullity. Reid v. I., 200M599, 275NW300. See Dun. Dig. 1391.

An order discharging an order to show cause and dismissing a criminal contempt proceeding can only be reviewed by certiorari, and fact that trial court may have based its order on mistaken belief that it lacked jurisdiction does not affect mode of review. Spannaus v. L., 202M497, 279NW216. See Dun. Dig. 1391.

Premature motion to bring in additional parties was not reviewable by certiorari. Levstek v. N., 203M324, 281 NW260. See Dun. Dig. 1395.

An order for inspection of books and papers is an intermediate order and so not reviewable by certiorari. Asplund v. B., 203M571, 282NW473. See Dun. Dig. 1396.

In reviewing the determination of administrative boards such as the optometry board court will inquire no further than to determine whether board kept within its jurisdiction, whether it proceeded upon a proper theory of law, whether its action was arbitrary or oppressive and unreasonable, and whether evidence affords a reasonable and substantial basis for order sought to be reviewed. State v. Jensen, 286NW305. See Dun. Dig. 1402.

2. Time for issuance.

Certiorari to review an order granting or refusing a petition for an extension of time within which to redeem mortgaged premises sold at foreclosure sale must be had within 15 days after notice of such order. Hjeltness v. J., 195M175, 262NW158. See Dun. Dig. 1408.

6. Compensation proceedings.

Jurisdiction of industrial commission to vacate a decision rendered pursuant to §4295 was adequately raised so as to be reviewed on certiorari. Hawkinson v. M., 196 M120, 264NW438. See Dun. Dig. 1402.

8. Supersedeas.

Certiorari operates as a supersedeas. *Aylmer v. N.*, 195M661, 262NW257. See Dun. Dig. 1414.

During pendency of certiorari proceedings to review proceedings to extend time for redemption under mortgage foreclosure, plaintiff was required to either file a supersedeas bond or pay to clerk of district court monthly sums required by order as condition for extension. *Id.*

Certiorari stops further proceedings in municipal court, but does not preclude judge of that court from making return to show what actually occurred in his court, prior to time writ issued. *State v. Municipal Court*, 197M141, 266NW433. See Dun. Dig. 1414.

9. Remand of case.

Pending certiorari by mortgagors from order denying second extension of time to redeem from mortgage fore-

closure, supreme court remanded case on motion by mortgagee on showing that condition had changed since hearing in district court and that mortgagors were in position to take care of the mortgage and redemption. *Sjodin v. O.*, 195M507, 263NW543. See Dun. Dig. 1404.

In habeas corpus proceedings judgment of conviction for criminal contempt must be taken as a finality as to all questions presented and decided by supreme court on certiorari. *State v. Syck*, 202M252, 277NW926. Cert. den., 59SCR64. See Dun. Dig. 4132.

9770. When served.

Certiorari to review decision of Industrial Commission was quashed because not served upon the adverse party or his attorney within 60 days. 171M519, 214NW795.

CHAPTER 88

Actions against Boats and Vessels

9774. For what liable.

Defendant having executed a charter party in which it purported to contract as principal, is liable for breach of the contract, whether in fact contracting as principal or as agent for an undisclosed principal. 171M507, 214NW510.

Evidence held to sustain finding that contract was breached by the failure of the vessel to report for loading within the time required by the contract; also that the delay was caused by the voluntary act of the owner; also that plaintiff had not waived its claim for damages. 171M507, 214NW510.

CHAPTER 89

Assignments for Benefit of Creditors

9782. Requisites.**1. Nature of proceeding.**

Transfer of property by managing officer or bank to certain directors to secure payment of his debts to the bank, held a mortgage and not an assignment for benefit of creditors, though it rendered him insolvent. 172M148, 214NW787.

3. To what applicable.

Not applicable to state banks in liquidation. 181M1, 231NW407.

11. Releases.

An assignment in favor of only those creditors who will file releases is void. *Kobler v. H.*, 189M213, 248NW698. See Dun. Dig. 614.

9783. Assignment of real estate—Record.

Certified copy of assignment for benefit of creditors does not require certificate of auditor that taxes have been paid. Op. Atty. Gen. (363B-7), Sept. 15, 1939.

9789. Proof of claims—Order of payment.

Money received by bankrupt representing proceeds of hunting and fishing license fees, held preferred claim in favor of the state in bankruptcy proceeding. 47F(2d) 1073. See Dun. Dig. 612(93).

Subd. 1.

State is a preferred creditor entitled to all assets if not sufficient to pay claim in full. Op. Atty. Gen., Aug. 1, 1933.

CHAPTER 90

Insolvency

Certified copies of petitions, decrees and orders in bankruptcy under §21g, may be recorded in register of deeds office. Laws 1939, c. 117.

The persons and property of farmers are excluded from the operation of the state insolvency law so long as the national act is in force. *Adrian State Bk. of Adrian v. K.*, 182M57, 233NW588. See Dun. Dig. 4542(96).

COMMON LAW

DECISIONS RELATING TO BANKRUPTCY
IN GENERAL**1. In general.**

An insane person may not file petition in bankruptcy but may become involuntary bankrupt. *Tobin*, (DC-Minn), 24FSupp325.

Construction of bankruptcy act by United States Supreme Court prevails over any contrary interpretation by state courts. *Landy v. M.*, 193M252, 258NW573. See Dun. Dig. 738.

Lien of a judgment procured less than four months preceding filing of petition in bankruptcy is annulled thereby, even as to homestead set aside as exempt. *Id.* See Dun. Dig. 741.

Mortgagors' bankruptcy did not suspend court's order extending time for redemption from mortgage sale, order having fixed terms and conditions, compliance with which was wholly lacking. *Butts v. T.*, 194M243, 260NW308. See Dun. Dig. 740.

A trustee in bankruptcy, who brings suit in state court alleging conversion of property of bankrupt estate by reason of an invalid foreclosure of chattel mortgage, is bound by measure of damages in state jurisdiction and is entitled to recover only difference between value of property and amount of lien, and where property converted was worth less than amounts of chattel mort-

gage liens, judgments were rightly entered for defendants. *Ingalls v. E.*, 194M332, 260NW302. See Dun. Dig. 746.

Reason why interest is generally disallowed in bankruptcy and other similar proceedings is that equality among general creditors as of date of insolvency is thereby attained, but where ideal of equality is served, interest is properly allowed. *Equitable Holding Co. v. E.*, 202M529, 279NW736. See Dun. Dig. 4883a.

A claim for damages for pure tort arising out of negligence of debtor, not reduced to judgment at time of adjudication in 1936, was not provable as a debt under §63(a) (6½) of the 1898 Act, and could not be liquidated and allowed under §63(b) of such act, and amendment of the act of 1938 permitting proof of claim in pending negligence case did not render such a claim provable in proceeding wherein there was a previous adjudication. *Jones v. F.*, 204M333, 283NW535. See Dun. Dig. 743a.

Contracts from which provable debts may arise are express contracts or contracts implied in fact or in law. They do not include obligations imposed by law where the remedy is other than by action on contract, express or implied. Wholly contingent claims are not provable as debts in bankruptcy. So long as a claim remains uncertain as to whether a contract or liability will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt. *Peterson v. J.*, 204M300, 283NW561. See Dun. Dig. 743a.

Primary purpose of bankruptcy legislation is to effect an equitable distribution of bankrupt's property among his creditors, and so far as may be, to preserve existing business relations and not to upset them or interfere with fundamental incidents thereof. *Id.* See Dun. Dig. 745.

Fact that contract containing mutual covenant not to compete in business was not entered in bankrupt's