

# MASON'S MINNESOTA STATUTES

1927

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EMBRACING THE ORGANIC LAWS, THE CONSTITUTION, AND THE STAT-  
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THOSE WHICH HAVE BEEN REPEALED OR SUPERSEDED  
BY THE SUBSEQUENT LEGISLATION OF 1925  
AND 1927

AND ALSO EMBRACING LAWS OMITTED FROM THE GENERAL STATUTES  
1923, AND THE LAWS OF THE 1925 AND 1927 SESSIONS OF THE  
LEGISLATURE UNDER APPROPRIATE CLASSIFICATION.

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## CHAPTER 85

## OFFICIAL AND OTHER BONDS—FINES AND FORFEITURES

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9677. Bonds, etc.—Sureties, qualifications—Save when otherwise specially provided by statute, every bond, recognizance, or undertaking required or permitted to be made, given, tendered, or filed for the security or protection of the state, or of any person, corporation, municipality, or department thereof, or any other organization whatever and conditioned for the doing or not doing of anything in such instrument of security specified, shall be signed by two or more sureties, who shall be residents and freeholders of the state, and shall justify as provided in § 9686. Every bond or recognizance shall also be signed by the principal, and every bond shall be acknowledged by the principal and sureties. (4523) [8231]

Not applicable to bonds other than statutory official bonds (120-399, 139+714).

126-435, 148+454; 133-461, 157+998.

The fundamental essential of mutual insurance, that the insured and insurer are identical, will not permit a mutual company to write surety bonds for public officials 167-198, 208+659.

9678. Surety bonds to federal government—Whenever the laws of the United States, or the regulations or orders of any department of the federal government, require the delivery of a properly executed surety bond, conditioned in a specified manner, as a condition precedent to receiving military property, or equipment, or property of the federal government, from the federal government, or as a prerequisite to doing any specified act, then and in such case the chief executive officer of any institution under the financial control of the state board of control may execute and deliver such bond, and if corporate sureties join in the execution of the same, then the cost thereof may be paid by such executive officer out of the funds at his disposal. ('19 c. 98 § 1)

9679. Liberty loan bonds security—Any person or corporation who may make a contract with the state,

or with any municipal corporation, or any public board or department thereof, for the doing of any public work, including construction of any drainage ditch, may, in lieu of giving the usual bond or undertaking, pledge United States liberty or victory loan bonds, now or hereafter issued, as security for the protection of the state, or such corporation, board or department with which such contract is made, and of all persons doing work or furnishing skill, tools, machinery, or materials under or for the purpose of executing such contract. Such bonds so pledged shall be security for the payment, as they become due, of all just claims for work, tools, machinery, skill and materials, and for the performance and completion of the contract in accordance with its terms, and as security for all costs and charges that may accrue on account of the doing of the work specified and compliance with the laws relating thereto. ('19 c. 346 § 1)

9680. How deposited—Said bonds so pledged shall be delivered to the officer or department required by law to receive the bonds of public contractors, or who may be designated by the state or other municipal corporation or department with which the contract may be made. The deposit of said securities shall be in lieu of and substitution for the bonds required by law to be given by such contractors. ('19 c. 346 § 2)

9681. Market value—The market value of the bonds so pledged shall not be less than the contract price. ('19 c. 346 § 3)

9682. Protection of pledge on commencing action—Any person entitled to the protection of such pledge, wishing to avail himself of its benefits at the time of commencing any action against either the contractor or any subcontractor engaged in said work, shall notify in writing the state or corporation or department with which such pledge is made, of the commencement of such suit, giving the names of the parties and the amount and nature of his claim. No judgment shall be entered within 30 days after the giving of such notice and the state or other corporation or department with which such bonds are pledged and any other person entitled to the protection of such pledge may be admitted on its or his motion as a party to said action, and the court shall determine the rights of all parties in the premises. In such suit or other appropriate action in which the corporation or department holding said bonds is a party, the court may order the bonds, or a part of them sufficient to pay the unpaid claims, sold at public auction or private sale or on the New York Stock Exchange and from the proceeds, after deducting the costs of sale, make payments among the parties to the suit entitled thereto; if the proceeds are insufficient to pay said claims in full, they may be paid pro-rata. If the state or other corporation or department does not appear and defend, it may after entry of judgment in favor of such claimants, enforce said pledge and sell the securities at public or private sale or upon the New York Stock Exchange, and it shall have in addition any and all rights and remedies given pledgees by law for the enforcement of their securities, but it shall not be required to sell such security until 90 days after com-

pletion of contract and acceptance of the work done as provided in the succeeding section, or until the work is completed at the instance of the corporation if abandoned by the contractor. ('19 c. 346 § 4)

9683. Additional security—Whenever in its judgment other or further security is required, the state or such other corporation or department may require the contractor to furnish other or further security of the same nature within ten days, and thereupon if so ordered, the work on such contract shall cease until such other or further security is furnished. If such other or further security is not furnished within such time, the pledgee may at its option terminate the contract and complete the same as the agent and at the expense of such contractor. ('19 c. 346 § 5)

9684. Notice of claim—No action shall be maintained by any person seeking to avail himself of the benefit of such pledge, unless within 90 days after the completion of the contract and acceptance by the proper public authorities of the work done, the plaintiff shall serve upon the contractor and upon the state or such corporation or department a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice. ('19 c. 346 § 6)

9685. Receivers bonds to run to state—Bonds given by receivers and trustees appointed by the district court in any action or proceeding shall run to the State of Minnesota for the benefit of all persons in interest. Any person interested may maintain an action in his own name upon any such bond. ('21 c. 17 § 1)

9686. Modes of justification—The justification of sureties mentioned in § 9677 shall be by affidavit, annexed to the bond or other security, wherein each surety shall state under oath that he is worth a certain definite amount above his debts and liabilities and exclusive of his property exempt from execution, but the aggregate of the amount sworn to as aforesaid by all the sureties shall be not less than double the amount of the penalty of such bond or other security. Where in the cases provided by law exception is taken to sureties, they shall be examined by the judge or officer before whom they are required to attend for purposes of justification, in such manner as he shall deem proper. The examination shall be reduced to writing and filed in the cause, and, if the judge or officer deems the sureties sufficient, he shall endorse his approval upon the instrument, and return the same to the proper custodian thereof. (R. L. § 4524, amended '07 c. 311 § 1) [8232]

9687. State and county officers—Uniform bond—Whenever by law an official bond is required of any state or county officer, it shall be sufficient for all purposes if the same be substantially in the following form:

Know all men by these presents that ..... as principal, and ..... as suret...., are jointly and severally held and firmly bound to the state of Minnesota in the sum of ..... dollars, lawful money of the United States, to the payment of which, well and truly to be made, we hereby bind ourselves, and each of us, our, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this ..... day of ..... A. D. 19....

The condition of the above obligation is such, that whereas, the above bounden was heretofore duly elected (or appointed) to the office of .....

Now therefore, if the said ..... shall faithfully and impartially, in all things, during his continuance in office, perform the duties thereof without fraud, deceit or oppression, and pay over without delay to the officer entitled by law thereto all moneys which shall come into his hands by virtue thereof, then this obligation shall be void; otherwise to remain in full force and effect.

.....(Seal)  
Signed, sealed and delivered in presence of  
.....

('09 c. 107 § 1) [8233]  
\*122-504, 142+899.

9688. Bonds executed under other provisions—All those rights and obligations which would be created were the bond of any such officer executed under any other law are hereby declared to exist and be of the same force where such bond is executed in the foregoing form. ('09 c. 107 § 2) [8234]

9689. Surety companies—Whenever the bond or other instrument is required to be made with one surety, or with two or more sureties, it shall be sufficient if the same be executed, or the conditions thereof be guaranteed, solely by a corporation authorized by law so to do. But no such corporation shall be accepted or approved as a surety or guarantor unless it holds the certificate of the insurance commissioner, showing that it is authorized to contract as such. (4525) [8235]

126-188. 148+55; 140-494, 168+714.

9690. When surety is to be subrogated—Whenever the surety upon the bond of any state officer shall have fulfilled the conditions of such bond and compensated the state for any loss occasioned by any act or omission of such officer, such surety shall be subrogated to all the rights of the state and if there shall be any property, evidence of indebtedness, or other obligation, or evidence thereof, in the possession of any official of the state and which shall have been received in connection with the transaction wherein such loss shall have occurred, the governor upon satisfactory proof that such loss has been so paid and the obligation of such bond fulfilled by said surety, shall thereupon by sufficient instruments of transfer, assign, transfer or convey to such surety any such property, evidence of indebtedness or obligation. ('17 c. 492 § 1)

9691. Sureties for part of penalty—Sureties may be accepted, in the discretion of the approving officer or body, for a part only of the penalty, and may justify in separate and different sums; but the aggregate liability of the sureties shall in all cases be not less than that required by law if each surety had justified in the full amount. (4526) [8236]

9692. Undertaking in lieu of bond—In all cases of appeal from a county board to the district court upon the allowance or disallowance of claims, in all actions brought before justices of the peace, in all appeals from a justice or probate court to the district court, in all actions begun in the district court, in all cases of appeal or writ of error to remove a cause or proceeding therein to the supreme court, and in all cases of special or equitable proceedings in the district or supreme courts, the filing or service or both, as may be required, of an undertaking, signed by a surety or sureties as the law may require, containing a condition substantially the same as required for bonds, with like sureties, qualifications, and justifications, and without acknowledgment or signature of the principal, shall be deemed a sufficient compliance with the law to sus-

tain any such action, appeal, or proceeding. Every such undertaking shall save and secure all rights and liabilities to the same extent as a bond, and the damages presumed to accrue to the party against whom such proceeding is taken shall be deemed a sufficient consideration for such undertaking, though no consideration be mentioned therein; but no undertaking or bond need be given upon any appeal or other proceeding instituted in favor of the state, or any county, city, town, or school district therein, or of any executor or administrator as such. (4527) [8237]

29-367, 13-194; 32-277, 20+195; 35-307, 29+131; 63-265, 65+445; 78-142, 80+871, 81+529; 144-236, 175+542.

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

9694. Bonds, by whom approved—Except as otherwise provided by law in particular cases, bonds shall be approved as follows:

1. The official bonds of all state officers, including those of the treasurers, superintendents, and other officials, and employees of the several public educational, charitable, penal, and reformatory institutions belonging to the state, shall be approved, as to form, by the attorney general, and in all other respects by the governor and the public examiner, or one of them;

2. The official bonds of county, town, city, village, and school district officers and employees by the governing body of the municipality for whose security they are respectively given;

3. Those required or permitted by law to be given in any court, by the judge or justice of the court in which the proceeding is begun or pending.

No officer, official, or employee required to give bond shall enter upon his duties until his bond is duly approved and filed. (4529) [8239]

139-146, 165+692.

9695. Place of filing bonds—Except when otherwise especially provided by law, the bonds of public officials shall be filed as follows:

1. Those of all state officers, including the officials and employees of the several departments and institutions thereof, with the secretary of state, who shall record and retain the same;

2. Those of all county officers, and of all other officials or persons, given to the county, with the register of deeds; and after the same have been recorded by

the register, he shall file them with the secretary of state for safekeeping;

3. Those of all city, village, and borough officers, with the clerk of such municipality;

4. Those of school district officers, with the clerk of the district. (4530) [8240]

9696. In court proceedings—All bonds required or permitted by law to be given in actions or proceedings in any court shall be filed in said court, unless especially required by law to be filed, delivered, or deposited elsewhere, or unless the judge or justice of such court shall by written order direct some other disposition thereof. (4531) [8241]

9697. Examination of accounts of public officers—In case of the filing of a new official bond or other security, the expiration of the term of office, or the death, resignation, or removal of the officer, the officer, board, committee, or body required or permitted to accept or approve such bond or other security, having jurisdiction or being authorized or required to examine the accounts of such officer, shall make or cause to be made a thorough examination of his accounts, and, if any shortage or irregularity is discovered, shall at once notify such officer and his sureties of the amount claimed to be due, or the nature of the irregularity. Such statement shall be in writing, and be served upon such officer and his sureties, or their agents or attorneys, by mail, addressed to their residences, if known; but failure to make the examination or give such notice shall not discharge the sureties. (4532) [8242]

9698. Official bonds, security to whom—Actions—The official bond or other security of a public officer, whether with or without sureties, shall be security to all persons severally for the official delinquencies against which it is intended to provide, as well as to the obligee designated therein, and when no other provision is made by law it shall run to the state. When a public officer, by official misconduct or neglect, forfeits his bond or renders his sureties liable thereon, any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the officer and his sureties, to recover the amount to which he is entitled by reason of the delinquency; and a judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency. (4533) [8243]

22-97; 35-167, 28-191; 64-313, 67+64; 89-68, 93+1056; 119-168, 137+816; 156 Fed. 21, 84 C. C. A. 187; 198 Fed. 606; 133-274, 158+394; 137-100, 162+1054.

In this action by a sheriff on the bond of his deputy, a judgment was properly ordered for defendant surety on the pleadings, where the complaint failed to show any loss to plaintiff by reason of the deputy's wrongdoing. 163-410, 204+158.

9699. Leave to bring action—Indorsement on execution—Before an action shall be brought by a plaintiff other than the state or body politic named in the bond, leave shall be obtained of the district court of the county in which the action is triable, or a judge thereof, by the production of a copy of the bond and an affidavit showing the delinquency; and if the delinquency be such that, if established on the trial, it would entitle the applicant to recover, leave shall be granted. Upon the execution issued on a judgment recovered upon the official security of a public officer, against him and a surety, there shall be indorsed a direction to the officer to whom the same is delivered to collect the same out of the property of the principal, if sufficient can be found, and, if not, out of the property of the surety. (4534) [8244]

35-167, 28+191; 42-57, 43+690; 53-309, 55+123; 89-68, 93+1056; 137-353, 163+533.

In proceeding to decide the case on the merits, without entering an order granting leave to sue as of the date of the commencement of the action, none of the surety's substantial rights were prejudiced, and there was no error in the denial of its motion for a new trial based solely on the failure to obtain leave to sue on the bond before the action was commenced. 167-32, 208+526.

In view of section 9255, G. S. 1923, permitting a defendant to plead all the defenses he may have, the common-law rule that a plea in abatement is waived by answering to the merits does not obtain in this state. 167-32, 208+526.

That no leave of court to sue on an official bond has been obtained cannot be raised, where the answer consists only of a general denial. 210+161.

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

#### 1. In general.

69-336, 72+565; 77-92, 79+649; 82-187, 84+956; 93-336, 101+495; 94-45, 101+940; 94-246, 102+703; 96-290, 104+1077; 103-43, 114+262; 106-208, 118+794. Cited (33 Sup. Ct. 17, 226 U. S. 276, 57 L. Ed. —).

One who furnishes materials and labor in performance of contract for public works as subcontractor, pursuant to contract with original contractor, entitled to benefit of bond (108-508, 122+312). One unpaid for materials furnished contractor held entitled to sue, though bond does not recite that it was for benefit of such persons (110-267, 125+269). Bond not invalid because penalty less than amount required by statute (110-267, 125+269). Right of contractor performing work which is accepted without giving bond (116-500, 134+129). See 119-60, 137+192; 125-211, 146+359; 126-188, 148+55; 133-54, 157+901; 133-336, 153+432; 135-10, 159+1075; 137-100, 162+1054; 139-389, 166+533; 145-438, 177+664; 152-343, 183+733, 191+733; 195+796.

165-158, 206+49; 209+911; 213+543.

Effect of failure to require bond. 160-293, 199+919.

The bond was conditioned for the payment by the contractor of claims for camp supplies and equipment furnished to him. This provision made the surety liable for the value of such supplies when furnished to a subcontractor at his request, in which the contractor joined. 160-433, 200+839.

The surety is liable for the value of goods furnished to laborers employed by the contractor and the subcontractor, when furnished on orders they had given to

their men, the amount thereof being deducted from the wages due to the men. The indorsement and delivery of such orders to the merchants furnishing the goods operated as an assignment of the amount of the labor claims represented by the orders. 160-453, 200+839.

As a general rule a public contractor's bond is not to be interpreted so as to subject the surety to liability for labor claims arising after the work is abandoned, but special facts and circumstances may give rise to liability. When the surety has taken an assignment of the contractor's interest in his equipment, to become effective if the contractor defaults in the performance of the contract, it is liable for the rental value of horses hired by the contractor and retained in his possession, with the knowledge of the surety, after work has ceased. 160-453, 200+839.

The surety is also liable for the value of feed for the horses during the period mentioned above. 160-453, 200+839.

It is also liable for the wages of men employed at the contractor's camp in caring for the horses and other property after work has ceased; the surety having knowledge of the situation. 160-453, 200+839.

There being nothing in the contract excusing defendant's performance for that reason, a general car shortage did not excuse performance by defendant. 161-178, 201-414.

Upon defendant's default plaintiff procured paying blocks from other sources, paying no more than the fair market value thereof. It is entitled to recover damages accordingly, notwithstanding the fact that, if it had waited some time, it might have procured the blocks from defendant under the contract at the contract price. Plaintiff was not compelled to await defendant's convenience. 161-178, 201+414.

So far as surety is concerned, the case is within the rule of *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621, for the bond sued upon recited the existence of the contract, and therefore prevents the surety from asserting its invalidity on account of any defect in its execution. 161-178, 201+414.

That the moneys so unconditionally paid to the subcontractor became its money, and it could use it as its own, and the surety cannot direct application of payments, and that the plaintiff may recover the balance of its account from the original contractor and the surety. *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74, followed. Chapter 105, Laws 1915, does not modify this rule of law, nor reflect any intent of the Legislature to adopt as the public policy of the state any contrary rule. 161-231, 200+410.

The contract for the construction of the road obligated the contractor to place "shoulders" on each side of the roadway, and the surety on its bond is liable to plaintiff for the amount due him under an agreement with the contractor which covered "shoulder work." 166-7, 206+934.

Extent of liability of surety. 212+171.

#### 2. "Materials."

Provisions, groceries, and meats are not included in the word "materials." 157-198, 195+796.

The contractor's bond conditioned for the payment, among other things, for "materials under or for the purpose of the contract," covers lubricating oil used by the engine furnishing power for the excavation of gravel, and lubricating oils and gasoline used by the motor trucks in transporting the gravel from the pit to the embankment. 161-169, 200+937.

Provisions and commissary supplies are not material, though because of the remoteness of the construction it is necessary for the contractor to provide boarding camps, following *Westling v. Republic Cas. Co.*, 157 Minn. 198, 195 N. W. 796. 212+460.

#### 3. Bank advancing money.

Equity of bank advancing money to contractor. 167-352, 209+315.

#### 4. Workmen's Compensation Act.

209+644.

#### 5. Time to bring suit.

A provision in a contract and bond given pursuant to section 9700, Gen. St. 1923, limiting the time to bring suit to a less period than fixed in section 9705, is held unreasonable and void. 165-313, 206+450.

#### 6. Venue. 166-499, 207+648.

Venue. 166-499, 207+648.

**9701. Bidders to have right of action in certain cases**—From and after the passage of this act any bidder upon any public work or public improvement of any kind in the state of Minnesota where bids therefor

are received and where in connection with such bids a deposit of money, or a certified check, or bond or other security is required to be given for the performance of said bid if accepted, the political subdivision of the state causing said public work or other public improvement to be made or done shall be liable to such bidder for a return to him of the money, certified check or other thing of value so deposited by him in the event of the non-acceptance of his bid on such public work or improvement, or in the event of the acceptance of his bid, during the interval between such acceptance and the entering into of a contract for such work and the giving of security in connection therewith by him and this liability shall exist even though the failure to return such money, certified check or other thing of value be occasioned by the defalcation or unlawful conversion thereof by the officer of such political subdivision clothed with the custody thereof. ('23 c. 348 § 1)

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

Liability imposed on corporation, when it neglects to take bond, is incurred when contract is valid and is for construction of public improvements made by corporation in exercise of its public governmental, as well as its private corporate powers (97-487, 107+560). Where contract was entered into and acted on by both parties, municipality could not urge irregularities in formation, to defeat recovery for failure to require bond (103-43, 114+262). Liability for failure to require bond, extends to losses suffered by those dealing with contractor by his insolvency. No liability attaches where he is solvent (103-43, 114+262). See 112-474, 128+672; 226 U. S. 276, 33 Sup. Ct. 17, 57 L. Ed.—; 152-343, 188+733.

**9703. Action on bond**—Any person entitled to the protection of such bond may maintain an action thereon for the amount due him. He shall notify the obligee named in the bond of the beginning of such action, giving the names of the parties, describing the bond sued upon, and stating the amount and nature of his claim. No judgment shall be entered in such action within thirty days after the giving of such notice. The obligee, or any other person having a cause of action on such bond, may be admitted, on his motion, as a party to such action, and the court shall determine the rights of all parties thereto. If the amount realized on said bond be insufficient to discharge all such claims in full, such amount shall be distributed among the parties pro rata. (4537) [8247]

Cited (33 Sup. Ct. 17, 226 U. S. 276, 57 L. Ed. —).

The surety on the statutory bond may be sued alone, without joining his principal. 161-169, 200+937.

**9704. Insolvent or insufficient sureties**—Whenever in its judgment any of the sureties on such bond have become insolvent, or for any cause are no longer proper or sufficient sureties, the obligee may require the contractor to furnish a new or additional bond within ten days; and thereupon, if so ordered by such obligee, all work on such contract shall cease until such new or additional bond is furnished. If such

bond be not furnished within such time, the obligee may at its option determine the contract, and complete the same as the agent, and at the expense of such contractor and his sureties. (4538) [8248]

Cited (33 Sup. Ct. 17, 226 U. S. 276, 57 L. Ed. —).

**9705. Limit of time to bring action**—No action shall be maintained on any such bond unless within ninety days after the completion of the contract and acceptance of the building by the proper public authorities, the plaintiff shall serve upon the principal and his sureties a written notice specifying the nature and amount of his claim and the date of furnishing the last item thereof, nor unless the action is begun within one year after the service of such notice. (R. L. § 4539, amended '09 c. 413 § 1) [8249]

94-45 101+940. Effect of amendment of 1909 as to notice (115-382, 132+259).

A change in the remedy without substantial modification of the obligation of the contract is all that is effected by applying to an action on the bond of a contractor the provision of 1909 c. 413 changing the requirements in force when the bond was executed (33 Sup. Ct. 17, 226 U. S. 276, 57 L. Ed. —).

126-435, 148+454; 133-90, 157+998; 134-124, 158+803; 137-353; 163+776.

An itemized and verified statement of the account of a subcontractor against the general contractor, indicating the job out of which the charges arose and stating the date of the last item, is sufficient notice to the surety of a claim against the general contractor. The verdict establishes that the agent of the surety, served with such notice had apparent authority to receive it. 162-501, 203+410.

A provision in a contract and bond given pursuant to section 9700, Gen. St. 1923, limiting the time to bring suit to a less period than fixed in section 9705, is held unreasonable and void. 165-313, 206+450.

**9706. Actions for fines, forfeitures, and penalties**—**Collusion**—Actions for fines and forfeitures may be prosecuted by the officers or persons to whom they are by law given, or who by special provisions of law are authorized to recover them; and, whether prosecuted by public officers or by private persons, shall be governed by the same rules as other civil actions, except as herein otherwise prescribed. When an action is brought for a penalty, the amount of which is limited by law, it may be brought for the amount so limited, and upon trial the amount recovered shall be in proportion to the offence. Recovery of a judgment for a penalty or forfeiture, by collusion between the parties and with intent to save the defendant from the consequences contemplated by law, where the same is given wholly or partly to the prosecutor, shall not prevent a recovery of the same by another person. (4540) [8250]

Section permissive, and does not exclude attorney general (101-277, 112+269).

**9707. Fines, how disposed of**—Fines and forfeitures not specially granted or appropriated by law shall be paid into the treasury of the county where the same are incurred. (4541) [8251]

47-521, 50+700; 116-101, 133+469.

**9708. Prosecution for fines, etc.**—**Court—Commitment**—All fines and forfeitures imposed as a punishment for any offence or for the violation of any duty imposed by statute may be prosecuted for and recovered by indictment in the district court, or, when the amount or value thereof does not exceed one hundred dollars, before a justice of the peace, who shall have jurisdiction therefor concurrently with the district court; and in all cases of the imposition of a fine pursuant to statute, as punishment for any offence, the offender may be committed until the same is paid or he is otherwise discharged according to law. (4542) [8252]

29-187, 12+529; 38-143, 36+443; 55-183, 56+688; 84-367, 87+916; 117-173, 134+509.

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

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

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

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

#### 17a. Instructions.

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

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

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

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

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

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

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

## CHAPTER 85

### Official and Other Bonds—Fines and Forfeitures

#### 9677. Bonds, etc.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**9679. Liberty loan bonds security.**

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

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

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

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

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

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

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

**9689. Surety companies.**

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

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

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

174M56, 218NW444.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3).

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

**9695. Place of filing bonds.**

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

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

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

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

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

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

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

**1. In general.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**1½. Persons protected.**

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

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

**2. "Materials."**

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

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

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

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

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

**3. Bank advancing money.**

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

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

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

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

#### 7. Attorney fees.

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

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

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

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

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

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

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

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

#### 9703. Action on bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notice on surety held to sufficiently specify the "nature of the claim." Any deficiency in notice was waived by the surety retaining and acting on it without suggesting defect. 176M113, 222NW573.

The amendment by Laws 1929, c. 369, §2, does not apply to St. Paul, which has a home-rule charter. *Guaranteed Concrete Co. v. G.*, 185M454, 241NW588.

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

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

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

**9705-1. Notice.**—The commissioner of insurance or the county auditor in whose office the written notice above specified is filed shall upon receipt of said written notice mail one copy of the same by registered mail to the principal contractor, at his last known address, and to each of the sureties on his bond, at their last known addresses, and the claimant shall at the time he files said written notice furnish the commissioner of insurance or the county auditor in whose office the notice is filed at least two copies of said notice. The commissioner of insurance or county auditor with whom said notice is filed shall be entitled to charge a fee of \$1.00 for filing said notice and mailing the copies as herein provided; and provided further that the failure of the commissioner of insurance or the county auditor with whom said notice is filed to mail said copies as herein provided, shall in no way affect the validity of the claim or the right of the claimant to maintain an action thereon. (Act Apr. 25, 1929, c. 369, §3.)

**9705-2. Not to affect pending actions.**—This act shall not affect any action or proceedings now pending in any of the courts of this state. (Act Apr. 25, 1929, c. 369, §4.)

**9705-3. Effective May 1, 1929.**—This act shall take effect and be in force from and after May 1, 1929. (Act Apr. 25, 1929, c. 369, §5.)

**9706. Actions for fines, forfeitures, and penalties, etc.**

Actions with respect to money found in forfeited gambling devices. Op. Atty. Gen., June 19, 1931.

**9707. Fines, how disposed of.**

Amount of forfeited bail bond paid into municipal court must be paid into county treasury. Op. Atty. Gen., Oct. 5, 1929.

Fine of one under complaint of inspector in department of agriculture, dairy and food, was properly remitted to county of conviction. Op. Atty. Gen., July 9, 1932.

Fines provided for in Laws 1933, c. 170 (§5015-40), are "not specially granted or appropriated by law," and in absence of any agreement, by charter or otherwise, between city of South St. Paul and County of Dakota, they shall be paid into the treasury of the county. Op. Atty. Gen., Dec. 18, 1933.

Fines and costs in state cases in municipal courts, such as misdemeanors, are to be paid to county treasurer. Op. Atty. Gen. (306b-6), Apr. 6, 1934.

Fines collected under §835-3 should be paid into the county treasury and not into the state treasury. Op. Atty. Gen. (135a-4), Aug. 3, 1934.

Justice of the peace is personally responsible for check taken in payment of fine. Op. Atty. Gen. (266b-9), Sept. 5, 1934.

Fines collected under §5015-40 are to be paid to county treasurer and not credited to railroad and warehouse commission fund. Op. Atty. Gen. (306h-6), Dec. 15, 1936.

Fine voluntarily paid and transmitted to state treasurer cannot be refunded. Op. Atty. Gen. (199b-7), Aug. 13, 1937.

Fines collected for violations of Veterinarians' Act. Op. Atty. Gen. (465a), May 15, 1939.

Fines collected for violation of ordinances or by-laws of a town regulating traffic on town roads must be paid into county treasury. Op. Atty. Gen. (989B-4), May 20, 1939.

Subject to Laws 1939, c. 359, amending Mason's Stat., §202-158, town of Minnetonka in Hennepin County through its board may enact and enforce ordinances or by-laws relating to streets and highways, vehicles thereon, parking, and traffic, and fines for violation should be paid into town treasury, and not into county treasury. Op. Atty. Gen. (989B-4), July 13, 1939.

**9708 1/2. \* \* \* \* \***

**DECISIONS RELATING TO CHAPTER IN GENERAL**

**1. Liability in general.**

Official bond covering term of officer and "until successor is elected and qualified" extends only for a reasonable time after expiration of term. American Surety Co. v. Independent School Dist. (CCA8), 53F(2d)173. Cert. den., 284US683, 52SCR200. See Dun. Dig. 8021.

**CHAPTER 86**

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

**9709. To annul act of incorporation—Fraud.**

179M373, 229NW353.

**9710. To vacate charter, etc.**

179M373, 229NW353.

**9711. For Usurpation of office, etc.**

Action by quo warranto to test title to office in private corporation may be brought in the district court by other officers and stockholders of the corporation without application to, or action by, the attorney general. 179M373, 229NW353.

On respondents' motion, court properly vacated an ex parte order issuing a writ of quo warranto directing respondents to show by what warrant they claimed right to act as trustees of a named religious corporation, organized under laws of this state, it conclusively appearing from petition, writ and affidavits filed that respondents were in fact and law such trustees, and hence that writ had been improvidently issued. Dollenmayer v. R., 286NW297. See Dun. Dig. 8065.

Attorney General will not institute quo warranto proceedings against one in possession of a public office and discharging the duties thereof unless there exists very

substantial ground for believing his possession to be unlawful. Op. Atty. Gen. (63b-3), Jan. 17, 1939.

Statutory provisions for quo warranto are not exclusive, since common law proceedings for same writ may be brought by any taxpayer in either district court or supreme court. Op. Atty. Gen. (361e-2), Jan. 24, 1939.

**9713. Relator to be joined.**

Title of proceeding in quo warranto. Dollenmayer v. R., 286NW297. See Dun. Dig. 8070.

**9717. Judgment for usurpation—Fine.**

Where a county commissioner accepts an incompatible office and enters upon the performance of the duties of such office, a vacancy as county commissioner exists, and he may not reassume the duties of the office of county commissioner after having resigned the incompatible office before the board of appointment had acted. Op. Atty. Gen., Feb. 8, 1932.

Where office of county commissioner is rendered vacant by officer's acceptance of an incompatible office, such officer may not be reappointed even after he has resigned the incompatible office. Op. Atty. Gen., Feb. 8, 1932.

**CHAPTER 87**

**Special Proceedings**

**MANDAMUS**

**9722. To whom issued.**

**1. When will lie.**

Where commerce commission suspends sale of registered securities pending a hearing to show cause why registration should not be cancelled, and before the hearing the corporation requests a cancellation of the registration, the commission has no right to compel the production of its records and papers, in the absence of some specific allegation of a violation of the Blue Sky Law. 172M328, 215NW186.

A writ will not be granted where, if issued, it would prove unavailing or where lapse of time has rendered the relief sought nugatory. 173M350, 217NW371.

Petitioner must show he is entitled to relief sought but where he seeks to compel public officials to form a governmental duty they are presumed able to perform and the burden is upon them to show the contrary. 173M350, 217NW371.

Where discretion of town supervisors with respect to the opening of a road has been exercised in an arbitrary and capricious manner, the court may exercise control, but it must be made to appear that there are not only available funds but also sufficient available funds to do whatever else may, in the reasonable judgment of the board, be needful on the other town roads. 175M34, 220NW166.

When an executive or administrative body determines a matter involving the exercise of its discretionary power the courts do not interfere. 175M583, 222NW286.

Mandamus is not the proper remedy to correct an error in fixing the time of trial, but if the trial court refuses to proceed with trial, mandamus is the remedy. State ex rel. Collins v. Dist. Ct. of Ramsey County, 176M636, 222NW931.

Power given by §2609 to town board to determine necessity of cutting down hedges and trees in highway is discretionary and cannot be controlled by mandamus. 177M372, 225NW296.

Mandamus does not issue from this court to review a judgment of the district court entered upon the hearing of a motion to dismiss an action brought by the relator, a resident and citizen of another state, under the Federal Employers' Liability Act to recover damages sustained while in the employ of a railroad engaged in interstate commerce in such other state. State ex rel. Boright v. Dist. Ct. Steele County. 178M236, 226NW569.

The writ will not lie to compel the attorney general to try a civil action brought by the state at the "next term" of court. 178M442, 227NW891.

Will not be granted to compel county to publish annual statement in newspaper unlawfully entering into agreement with other papers to obtain contract. 178M484, 227NW499.

The duties imposed on the governor by Mason's Minn. St., §56954, 6955, relating to the removal of officers, is discretionary and not ministerial, and mandamus will not lie. 179M337, 229NW313.

Where town board was without funds, and agreement between towns as to allotment of town road for repairs