

1962

# Judicial Review of Administrative Procedures in Minnesota

Duncan H. Baird

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Baird, Duncan H., "Judicial Review of Administrative Procedures in Minnesota" (1962). *Minnesota Law Review*. 1169.  
<https://scholarship.law.umn.edu/mlr/1169>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# Judicial Review of Administrative Procedures in Minnesota

*The author of this Article examines in detail the use of "extraordinary remedies" in Minnesota. He analyzes the remedies of mandamus, quo warranto, prohibition, injunction, and declaratory judgment. The emphasis of the Article is placed upon the decisions and statutory changes which have developed since Professors Riesenfeld, Bauman and Maxwell wrote their brilliant Article entitled "Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota." Professor Baird also examines generally the current attitude of the Minnesota Supreme Court toward the subject of administrative action in Minnesota.*

Duncan H. Baird\*

## I. REVIEW BY MEANS OF THE EXTRAORDINARY REMEDIES

The term "extraordinary remedies" as used in connection with review of administrative action is generally held to include the remedies of mandamus, certiorari, quo warranto (information in the nature of quo warranto), prohibition, injunction, and declaratory judgment. These were the remedies which Prof. Riesenfeld and his associates dealt with in their brilliant and exhaustive article, *Judicial Control of Administrative Action By Means of the Extraordinary Remedies in Minnesota*.<sup>1</sup> Since the publication of that

---

\* Assistant Professor of Political Science, Macalester College; member of the Minnesota Bar.

1. Riesenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota* (pts. 1 & 2), 33 MINN. L. REV. 569, 685 (1949) [hereinafter cited as 33 MINN. L. REV.]; Riesenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota*, 36 MINN. L. REV. 435 (1952) [hereinafter cited as 36 MINN. L. REV.]; Riesenfeld, Bauman & Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota*, 37 MINN. L. REV. 1 (1953) [hereinafter cited as 37 MINN. L. REV.].

article the remedies of mandamus and quo warranto and information in the nature of quo warranto have been abolished in the district courts of Minnesota by an amended Rule 81.01(2) of the *Rules of Civil Procedure for the District Courts*.<sup>2</sup> This rule simply provides:

The writ of mandamus and the writ of quo warranto and information in the nature of quo warranto are abolished. The relief heretofore available thereby may be obtained by appropriate action or appropriate motion under practice prescribed in these rules.

Quite apparently the remedies are abolished only as to the district courts, but remain in effect as far as practice in the supreme court is concerned. The actual results of the attempt to abolish the remedies in the district courts have become somewhat obscured by the court's treatment of the rule in two recent cases, *Williams v. Rolfe*<sup>3</sup> and *Marine v. Whipple*.<sup>4</sup> In the *Williams* case a taxpayer attempted to obtain an injunction and a declaratory judgment to prevent a county superintendent from proceeding to issue an order consolidating certain school districts under section 127.25 of the Minnesota Statutes, which provides expressly for review limited to questions of jurisdiction, excess of jurisdiction, arbitrary action, and erroneous application of law. Plaintiff was attempting to attack the action collaterally by asserting unconstitutionality of the empowering statute. The lower court granted the injunction but denied declaratory relief. The defendant appealed, asserting that plaintiff could make such a collateral attack only by means of quo warranto. Plaintiff replied that, since the new rule abolished quo warranto, he was merely attempting to obtain relief in accord with the new rule. The Minnesota Supreme Court held that injunction was unavailable for that purpose, because relief by quo warranto is traditionally not available until an actual usurpation of power has taken place and, therefore, this same limitation holds for injunction used in place of quo warranto. Thus, the case is a rather unclear indication that perhaps the substance of the old writs survives and that the rule merely abolished the name rather than the substance. In the *Whipple* case the court issued its writ of prohibition to prevent a district court from proceeding with an action aimed at requiring the county board to hold a hearing on a petition for creation of a new school district. The court fairly

---

2. This amendment to the *Minnesota Rules of Civil Procedure* became effective July 1, 1959.

3. 257 Minn. 237, 101 N.W.2d 923 (1960).

4. 259 Minn. 18, 104 N.W.2d 657 (1960).

clearly applied the old mandamus standards to the action, although it was brought under the new rule:

The proceedings sought to be prohibited are essentially what would have been in the nature of an alternative writ of mandamus prior to Rule 81.01(2) of the Rules of Civil Procedure. . . . It follows that the propriety of the order to show cause issued by the district court should be governed by the established rules relative to the availability of writs of mandamus.<sup>5</sup>

Following the *Whipple* case it would seem that only the form and not the substance of the writs has been abolished. Presumably the form of action to be used in place of the abolished writs will be the injunction coupled with the usual order to show cause, and the test of availability of injunctive relief will be in each case whether mandamus or quo warranto would have been available. It should be stressed, however, that the matter has had no clear pronouncement by the court.

Since the writing of the Riesenfeld article, it has been made clear by statute that declaratory relief is available to anyone injured, or threatened with injury, by administrative rules.<sup>6</sup> Whether the scope of the new administrative provision is broader in scope than the old declaratory judgment action<sup>7</sup> is a question which has yet to be determined, along with other possible questions under the new statute, such as standing of potential parties or ripeness for review. It is to be noticed that, although the Declaratory Judgments Act does not expressly provide that the existence of other and adequate remedies is not a basis for denying declaratory re-

---

5. *Id.* at 19, 104 N.W.2d at 659.

6.

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the district court where the principal office of the agency is located, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. . . . The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

MINN. STAT. § 15.0416 (1957). Upon careful reading it appears that under the terms of this statute a declaratory judgment is in order if the *threatened* application of the rule *threatens* to interfere in or impair rights. This may be getting a bit far from the usual requirement in declaratory judgment actions of a justiciable controversy. Also, the phrase "legal rights or privileges" will need some interpretation before we can be sure of the scope of standing to petition under the statute. How far the last sentence will go toward eliminating requirements of exhaustion of remedies prior to suit is also in doubt.

7. MINN. STAT. §§ 555.01-.15 (1957).

lief,<sup>8</sup> this principle has been recognized in the cases<sup>9</sup> as well as in the *Minnesota Rules of Civil Procedure*, where Rule 57 provides:

The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

It is not at all clear whether the provisions of section 15.0416 of the Minnesota Statutes are considered a declaratory judgment statute within the meaning of Rule 57. If not, of course, the availability of declaratory relief under the latter statute is perhaps limited. The final question, that of the relation between section 15.0416 and section 555.01, is still to be worked out. That section 555.01 applies to administrative adjudications we already know from dictum in the *Williams* case. At any rate, it should be kept in mind that whatever remedy the new review statute provides, it is undoubtedly cumulative in that it does not disturb statutory appeal or extraordinary relief already available. It should also be kept in mind that the present Minnesota statutes on administrative procedure do not apply to several important administrative bodies, among them the Industrial Commission and the Department of Employment Security.<sup>10</sup>

It appears relatively safe to assert, therefore, that whatever the situation was when it was examined by Prof. Riesenfeld and his associates, the changes mentioned above have produced significant alteration of basic structure; it remains then for us to examine their conclusions at some length and bring to light any further developments in the cases in the last decade.

The basic thesis of the Riesenfeld article was that the system of review by use of the extraordinary remedies is a haphazard and jerry-built structure. The writs themselves (mandamus, certiorari, quo warranto, prohibition, and injunction, to which is added relief by way of declaratory judgment, which is, of course, a statutory, not an extraordinary, remedy)<sup>11</sup> have had a long evolution from the original medieval prerogative writs, but this evolution has fallen far short of divorcing the writs from their traditional limitations and of producing a homogeneous and integrated system of review. This is, in fact, the final conclusion of the authors:

---

8. MINN. STAT. § 555.01 (1957).

9. *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960); *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Baron v. City of Minneapolis*, 212 Minn. 566, 4 N.W.2d 622 (1942). *But see* *Land O'Lakes Dairy Co. v. Village of Sebeka*, 225 Minn. 540, 31 N.W.2d 660, *cert. denied*, 334 U.S. 844 (1948); *Farmers & Merchants Bank v. Billstein*, 204 Minn. 224, 283 N.W. 138 (1938).

10. See MINN. STAT. § 15.0411(2) (1957).

11. The authors mention habeas corpus as being one of the prerogative writs, but do not discuss it.

The previous study of the existing system of review of administrative action by means of the extraordinary remedies of mandamus, certiorari, prohibition and quo warranto and its supplementation by means of the injunction and declaratory judgment shows the working of the forces of tradition and the tenacity of the out-dated writ system at its worst. Although the Supreme Court of Minnesota has succeeded admirably in welding the incompatible elements into a coherent and consistent pattern, the total structure still has too much resemblance to a labyrinth in which the unwary will get lost hopelessly and even the experienced guide will occasionally take a wrong turn.<sup>12</sup>

Upon examination the analogy of the labyrinth is not completely satisfactory because the actual trouble seems to be the failure of the whole structure to fit together and, consequently, there are overlappings or what is worse, there are holes. In outline an ideal system of judicial control of administrative procedure would provide the following:

#### I. *Jurisdictional Remedies.*

1. A means to prevent agencies from trespassing into areas not authorized by their constitutive statutes. (Excess of jurisdiction).
2. A means to prevent agencies from using authorized powers in an unauthorized way. (Excess or abuse of power).
3. A means to challenge the existence of the acting agency. (Usurpation of office or unconstitutionality of constitutive statutes).

#### II. *Procedural Remedies.*

1. A means to compel an agency to begin or continue procedures in a proper case, where such action is a legal duty.
2. A means to correct erroneous application of law by the administering agency.
3. A means to obtain redress for unfair, oppressive, or inadequate procedures before the agency.
4. A means to challenge the factual substratum of the agency decision upon the ground that the evidence is inadequate according to legal standards.

These remedies ought to be provided in the light of certain general standards applicable to the whole scheme, such as:

---

12. 37 MINN. L. REV. at 32.

1. That any remedy must be available at the appropriate time;
2. That persons actually affected, within reasonable limits, have access to the remedy;
3. That the appellant should obtain all the relief to which he is logically entitled under the circumstances, even if it means the concurrent application of two or more of the traditional remedies.

Reference to the plan of review as it exists in Minnesota and as outlined by Prof. Riesenfeld and his associates shows that this ideal is met in its rough outline only.

An analysis of the Riesenfeld article should properly begin with a statement of the pegs upon which the whole course of the article hangs or, to vary the metaphor, of the points which appear to determine the whole structure of review by extraordinary remedies.

First, there is the constitutional problem of interference of one branch of the government in the concerns of one of the other branches. Separation of powers is explicitly enjoined by article 3, section 1 of the Minnesota constitution, which provides:

The powers of government shall be divided into three distinct departments—legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances especially provided in this constitution.

The degree of penetration of judicial review in any case is limited by this provision to the extent that the judiciary is prohibited from making decisions which properly lie within the legislative or executive sphere.<sup>13</sup> In effect this means that the judiciary is denied any power to decide between legitimate administrative alternatives, but can pass only upon the procedure (using this term in a broad sense) by which an alternative was reached or upon the jurisdiction of the administrative body to make such a decision. It follows that such a constitutional limitation will immediately give rise to a number of specific questions concerning the exercise of discretion by the judiciary.

Second, and related intimately to the first point, is the distinction which is to be made between administrative decisions which are quasi-judicial, quasi-legislative, administrative and purely ministerial.<sup>14</sup> These distinctions are not only necessary to prevent un-

---

13. See 33 MINN. L. REV. at 691.

14. *Id.* at 690.

warranted trespass by the judicial power into constitutionally interdicted territory but are also ultimately related by history and practice to the various writs. *Mandamus*, for example, applies only to acts defined as ministerial or to a definitively prescribed duty to act; *certiorari* applies only to acts which are quasi-judicial; prohibition applies only to a threatened exercise of judicial power beyond jurisdiction. It is apparent at once that these categories are blurred; the lines between them are often vague and sometimes arbitrary.<sup>15</sup> It follows that the placement of a particular administrative act within one of the above categories determines not only the form of review but indirectly determines its scope and timing as well. In short, we are still at the primitive stage of judicial development where the legal characteristics of the act, rather than the practical requirements of the total situation, prescribe the remedy.

Third, there is the problem of the application of the ancient principle of adequate remedy. Since all the remedies (except declaratory judgment) are extraordinary or equitable remedies, they are generally subject to the rule that they will not be applied if another adequate remedy of a less drastic or more satisfactory nature exists,<sup>16</sup> and questions often arise about the possibility of leaving the appellant to some other form of relief. Therefore, consideration must be given to questions of the relative effectiveness of remedies,<sup>17</sup> about their remoteness in time or in procedure,<sup>18</sup> and about the possibility of irreparable damage.<sup>19</sup>

Not one of these three things is a matter of precise definition; all three of them are to some extent interrelated and depend upon the fact situation in each instance. It requires no elaboration to explain the difficulties of any system involving two or perhaps three mutually interdependent variables.

Against the woof and warp of this background then, we must consider the extraordinary remedies as they are discussed in the

---

15. For example, an administrative agency acting contrary to the evidence in a judicial matter is reviewable only by *certiorari*, but if the act is so arbitrary as to involve no exercise of discretion at all the matter is also reviewable by *mandamus* as an entire failure to act. 33 MINN. L. REV. at 593, 708.

16. 33 MINN. L. REV. at 595-600 (*mandamus*); *id.* at 704 (*certiorari*); 36 MINN. L. REV. at 446 (prohibition); 37 MINN. L. REV. at 15 (*quo warranto*); *id.* at 26 (*injunction*).

17. See 33 MINN. L. REV. at 595, where it is mentioned that *mandamus* will lie in cases where a remedy at law for damages is adequate but roundabout and time-consuming; *id.* at 597, where prohibition and *mandamus* are compared along these same lines.

18. 33 MINN. L. REV. at 598, 702; 36 MINN. L. REV. at 446, 448-49.

19. 37 MINN. L. REV. at 26.

Riesenfeld article. The remedies are taken up in the same order as in the Riesenfeld article.

### 1. *Mandamus*

Mandamus has now been replaced at least as to form by other appropriate procedures under Rule 81.01(2) of the *Minnesota Rules of Civil Procedure*.<sup>20</sup> At the district court level, therefore, mandamus would now take the form of an application for mandatory injunctive relief through the well-known means of the order to show cause.<sup>21</sup> No conflict should result with injunctive relief in its traditional role, since a mandatory injunction and mandamus have been held to be equivalents,<sup>22</sup> and the abolition of mandamus by Rule 81.01(2) ought to wipe out any lingering questions. Since the substance of mandamus seems to continue anyway, the term will be used as a convenient designation of the newer remedy in the ensuing discussion.

Mandamus, or injunctive relief in lieu of it, as an administrative remedy lies only to compel performance of a pre-existing unconditional legal duty<sup>23</sup> by a public officer or body. It follows that if there is any discretion involved, making the administrative act a choice between alternatives, mandamus will not lie, and some other form of review is necessary.<sup>24</sup> However, in spite of this limitation mandamus can apply where the exercise of discretion by the administrative body has been so capricious or arbitrary that it amounts to no exercise of discretion at all, in which case the result is to declare the administrative act void and remand the matter with directions to act.<sup>25</sup> At this point there is the possibility of collision with the remedy of certiorari.<sup>26</sup> Strangely enough, one of the greatest problems in mandamus cases is to distinguish between instances where the administrative act is discretionary and where it is ministerial.<sup>27</sup> For example, mandamus lay to compel a village council to issue a building permit in a case where all preconditions to issuance had been met and refusal was solely upon the ground that a pending referendum, the legality of which was in question, might invalidate a zoning ordinance which permitted the particu-

---

20. See note 2 *supra* and accompanying text.

21. *Marine v. Whipple*, 259 Minn. 18, 104 N.W.2d 657 (1960).

22. See 37 MINN. L. REV. at 22. See also *State ex rel. Sholes v. University of Minn.*, 236 Minn. 452, 54 N.W.2d 122 (1952).

23. *State ex rel. Longman v. Kachelmacher*, 255 Minn. 255, 96 N.W.2d 542 (1959); 33 MINN. L. REV. at 576, 578.

24. 33 MINN. L. REV. at 587.

25. *Id.* at 593.

26. See *Ramberg v. District Court*, 241 Minn. 194, 62 N.W.2d 809 (1954).

27. 33 MINN. L. REV. at 584.

lar use.<sup>28</sup> The duty to issue the permit was unconditional and against the mandamus action the village could not raise the question, collaterally, of potential illegality.

Since mandamus runs to correct an act (or failure to act) which has a neutral character constitutionally, there is no problem of the scope of review under this head, once it has been established that the administrative act demanded is of a ministerial nature. In a mandamus action the court will then try all issues which are material to a decision in the proceedings, including those of arbitrariness or capriciousness, which render a discretionary act nugatory.<sup>29</sup> The fact that review can be complete within the area assigned to mandamus has a bearing, of course, on its desirability as a means of review in comparison with other remedies.<sup>30</sup> It should be noticed, however, that mandamus by its very nature is not used to challenge excess of jurisdiction or excess of power, since the basis of the action is the asserted duty of the administrative agency to act, and in this respect must be considered a less drastic remedy than either prohibition or quo warranto, or perhaps injunction.

Mandamus presents one other minor problem arising out of the statutory requirement that the relator be beneficially interested in the enforcement of the duty.<sup>31</sup> While this provision has been interpreted broadly, the general statements made have been broader than the actual application of the provision, and the Riesenfeld article notes that mandamus has been denied in cases where another party has a more direct interest than that asserted by the relator.<sup>32</sup> The very absence of cases questioning standing in mandamus cases indicates, however, that the point seldom is a critical one and only in exceptional cases should there be any need for caution.

As when the Riesenfeld article was written, the major problem of mandamus action is still the factual one of determining in marginal cases what is or is not a ministerial act or a complete abuse of discretion of the kind which renders administrative action void, and it is at this point that the unwary can make a fatal guess. If the act is in fact not ministerial, the court has no alternative but to refuse the relief requested and to leave the relator to other remedies.

---

28. *Minneapolis-Honeywell Regulator Co. v. Nadasdy*, 247 Minn. 159, 76 N.W.2d 670 (1956).

29. See 33 MINN. L. REV. at 603.

30. *Id.* at 597.

31. MINN. STAT. § 586.02 (1957).

32. 33 MINN. L. REV. at 579.

## 2. *Certiorari*

In spite of the remark in the Riesenfeld article to the effect that certiorari ranks second in usefulness to the writ of mandamus,<sup>33</sup> a much greater number of cases are decided on review by certiorari, which is the usual procedure to review discretionary quasi-judicial decisions including (by statute) the decisions of a number of important state administrative agencies.<sup>34</sup> Certiorari also involves a number of difficult questions centering in the three main factors discussed earlier.

First, the historical scope of certiorari confines it to a review of the record in quasi-judicial proceedings,<sup>35</sup> although there appears to be no particular constitutional objection to extending it to a review of quasi-legislative acts on the same basis.<sup>36</sup>

Second, the constitutional provision against mingling of functions prohibits by its operation a review under a writ of certiorari which goes beyond the record and substitutes the judgment of the court for that of the agency where alternative decisions reasonably exist.

Third, the limitation of certiorari to matters which are in or implicit in the record bears upon its relative adequacy as a remedy in cases where jurisdictional questions are involved. Thus, for example, in *Ramberg v. District Court*<sup>37</sup> a question arose concerning the relative merits of certiorari and mandamus for review of an order of the Industrial Commission, which the appellant asserted was void because of adoption by improper procedure. Since this matter could not be shown by reference to the record, but only by extrinsic evidence, it was held that certiorari was improper and that such collateral attack could only be made by mandamus.<sup>38</sup>

---

33. *Id.* at 685.

34. For example, the Railroad and Warehouse Commission, the Insurance Commissioner, the Commissioner of Banks, the Securities Commissioner, the State Medical Examination Board, the Water Pollution Control Commission, the Industrial Commission, the Board of Tax Appeals, the Tax Commissioner, and the Commissioner of Employment Security.

35. *Ramberg v. District Court*, 241 Minn. 194, 62 N.W.2d 809 (1954); *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81 (1951); *Nelson v. Reid*, 228 Minn. 137, 36 N.W.2d 544 (1949); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949); 33 MINN. L. REV. at 686.

36. 33 MINN. L. REV. at 691.

37. 241 Minn. 194, 62 N.W.2d 809 (1954).

38. *But cf.* *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240 & 253, 32 N.W.2d 574 & 583 (1948), where the situation was somewhat reversed. The cases involved the wrongful allocation of a civil service employee. Certiorari was first used to review the board's erroneous allocation of relator to class attorney I, and then mandamus was combined with it to compel reinstatement to a position as class attorney IV.

Reflection on these matters indicates that the problems of certiorari as a method of review fall into two classes. The first is the question of what is a judicial or quasi-judicial function to which certiorari is appropriate. The second is a question of the scope of review once the first hurdle is crossed and certiorari is found to be appropriate.

As to the first of these problems, the Riesenfeld article goes into considerable detail: first, as to what is a quasi-judicial action<sup>39</sup> (where a functional test is developed);<sup>40</sup> second, as to the distinction between what is quasi-legislative and what is quasi-judicial;<sup>41</sup> and third, as to the distinction between what is quasi-judicial and what is legislative.<sup>42</sup> No startling innovations have appeared in the cases since the article, although the fundamental distinctions have been reiterated in *Sellin v. City of Duluth*,<sup>43</sup> in which the court was at some pains to point out that an administrative act may be legislative or executive for the purpose of determining what branch of the government it falls under functionally, but the same act may be quasi-judicial for purposes of review—a sort of double standard, which does not seem to clarify an already tangled situation.

As to the second of these problems somewhat more can be said. The scope of review by certiorari has been stated conclusively as the rule in *State ex rel. Dybdal v. Commissioner*.<sup>44</sup> It is to be noted that the *Dybdal* rule permits review of a situation where the agency has not kept within its jurisdiction.<sup>45</sup> Both excess of power and excess of jurisdiction are apparently included under this rubric.<sup>46</sup> The old phrase about arbitrary and oppressive action as being reviewable has acquired a corollary in the form of reviewability for irregularity of proceedings.<sup>47</sup> However, as the decision in the *Ramberg* case<sup>48</sup> makes clear, these matters must appear within the record in order to be amenable to review by certiorari, and where this is the case, certiorari is the remedy to be preferred to other extraordinary remedies going to the matter of jurisdiction, such as prohibition<sup>49</sup> or injunction.<sup>50</sup> Certiorari is

39. 33 MINN. L. REV. at 686-98.

40. See also *State ex rel. Huntley School Dist. v. Schweickhard*, 232 Minn. 342, 45 N.W.2d 657 (1951).

41. 33 MINN. L. REV. at 690.

42. *Id.* at 692-93.

43. 248 Minn. 333, 80 N.W.2d 67 (1956).

44. 145 Minn. 221, 176 N.W. 759 (1920).

45. *Ibid.*

46. 33 MINN. L. REV. at 708 & n.340.

47. *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942).

48. 241 Minn. 194, 62 N.W.2d 809 (1954).

49. 36 MINN. L. REV. at 447.

50. 37 MINN. L. REV. at 26.

the proper method of determining in a quasi-judicial matter whether there is evidentiary support for the findings of fact made by the administrative agency. Largely through what appears to be carelessness, the Minnesota Supreme Court has haphazardly applied a series of tests of the sufficiency of evidence which, if taken literally, seem to be conflicting. It cannot be denied that any test in this area is merely an attempt to verbalize a subjective attitude, but, even so, a uniform rule would appear desirable. In *Sevcik v. Commissioner of Taxation*<sup>51</sup> the test was "whether the evidence was such that it [the Board of Tax Appeals] might reasonably make the determination in question," while in *Hamlin v. Coolerator Co.*<sup>52</sup> the question was whether the decision of the agency was "sustained by the evidence." A somewhat more objective test was applied in *Judd v. Sanatorium Comm'n*,<sup>53</sup> where the function of the reviewing court was to "determine whether the findings have sufficient basis of inference reasonably to be drawn from the facts." But in a similar case only two years later the court became somewhat more vague by stating that it would affirm if "there is sufficient competent evidence to support the findings. . . ."<sup>54</sup> A somewhat more complex test was proposed in *Caputa v. Land O'Lakes Creameries, Inc.*,<sup>55</sup> where it was said that findings of the agency will stand "unless a consideration of the evidence and the permissible inferences require reasonable minds to adopt contrary conclusions." It is to be understood, doubtless, that the court did not mean exactly that, but meant that reversal would occur only where reasonable minds were all compelled to an opposite conclusion. A still more obscure rule is that set out in *Schmoll v. J. W. Craig Co.*<sup>56</sup> where it was said:

A mere preponderance of medical testimony does not prevent a trier of fact from reaching a conclusion to the contrary where such conclusion is sustained by other reasonable testimony . . . . All the testimony must be considered, and when that is done and there is still room for reasonable minds to come to different conclusions, a case is presented where a court of review cannot disturb the findings . . . .

In *State ex rel. Spurck v. Civil Serv. Bd.*<sup>57</sup> it was held that the court must reverse in a case where there is no supporting evidence

51. 257 Minn. 92, 104, 100 N.W.2d 678, 687 (1959).

52. 227 Minn. 437, 448, 35 N.W.2d 616, 622 (1949).

53. 227 Minn. 303, 306, 35 N.W.2d 430, 433 (1948).

54. *Williams v. W. W. Wallwork, Moorhead, Inc.*, 231 Minn. 244, 246, 42 N.W.2d 710, 711 (1950).

55. 234 Minn. 514, 516, 48 N.W.2d 895, 896 (1951). See also *McGuire v. Viking Tool & Die Co.*, 258 Minn. 336, 104 N.W.2d 519 (1960).

56. 228 Minn. 429, 433-34, 37 N.W.2d 539, 542 (1949).

57. 226 Minn. 240, 249, 32 N.W.2d 574, 580 (1948).

or "the evidence as a matter of law compels a finding contrary to the administrative one"—a possible example of tautology. In the same vein there are a number of cases<sup>58</sup> which assert that reversal can only be ordered where the findings are "manifestly" or "clearly and manifestly" against the evidence. And in *Graf v. Montgomery Ward & Co.*<sup>59</sup> the court put in a little of everything by holding that it would not disturb findings below "unless . . . manifestly contrary to the evidence" and if, after consideration "of the evidence and of the inferences which may fairly and reasonably be drawn therefrom, reasonable minds might reach different conclusions upon the question. . . ." The court is perhaps making a distinction between the situation where it is seeking to uphold findings in the face of some evidence on both sides and the instance where it is justifying an overturn of the administrative findings. It is quite apparent that findings will be upheld on considerably less evidence than is required to force a reversal. It is submitted, however, that the rule can be stated in either case in the same terms, to wit: that findings of fact cannot stand unless, upon all the evidence in the entire record, they could be reached by a reasonable mind.

The matter of what evidence can be relied on in such cases raises the question of the "legal residue" rule, which says that in any event no finding can stand unless it is supported by a residue of legally competent evidence. This rule does not appear to be in effect in Minnesota,<sup>60</sup> and it is a little too exacting for application in administrative cases.

Examination of the dealing with the question of sufficiency of evidence reveals that the court does not always distinguish between findings of fact on the one hand, where it is more or less bound to take the administrative findings as they are, and conclusions of law where it is free, under review by certiorari, to substitute its conclusions for those of the administrative agency. This confusion occurs typically in those instances where there is a so-called mixed question of law and fact and where it is difficult to separate what is law from what is fact. The court, for example, has no difficulty in substituting its legal interpretation for that of an agency in case of an interpretative ruling,<sup>61</sup> but some difficulty is experienced in

58. *Honeymead Prods. Co. v. Christgau*, 234 Minn. 108, 47 N.W.2d 754 (1951); *Nelson v. Reid*, 228 Minn. 137, 36 N.W.2d 544 (1949); *Amundsen v. Poppe*, 227 Minn. 124, 34 N.W.2d 337 (1948).

59. 234 Minn. 485, 490, 49 N.W.2d 797, 800-01 (1951).

60. See *Stronge & Lightner Co. v. Commissioner*, 228 Minn. 182, 36 N.W.2d 800 (1949).

61. See *Sevcik v. Commissioner of Taxation*, 257 Minn. 92, 100 N.W.2d 678 (1959).

cases where it is necessary to consider a "fact" such as employment, which can be either a fact or a legal relation. Such confusion occurred, for instance, in *Hamlin v. Coolerator Co.*,<sup>62</sup> where the court applied the rule of evidentiary support to uphold a conclusion of law—in this case the legal effect under the statutes of the terms of a labor contract. A similar confusion appears to have been made in other cases.<sup>63</sup>

In one respect the remedy of certiorari is freer of difficulty, and this is in regard to the matter of parties having standing to appeal. In the usual case, of course, the appellant is without question entitled to standing, as a party to the proceeding before the agency.<sup>64</sup> This is not the complete test, however, since a person whose substantial legal rights are directly affected by operation of administrative action probably may appeal by certiorari even though not a formal party to the record.<sup>65</sup> This is the same test as that applied in the cases of statutory appeal.<sup>66</sup>

### 3. Prohibition

Prohibition is one of the more drastic and specialized writs, used at the present time to prevent administrative agencies from adjudicating matters outside their competency.<sup>67</sup> Like certiorari, the writ runs only against those matters which are deemed to be quasi-judicial,<sup>68</sup> and for this reason the court held in *O'Neill v. Kallson*<sup>69</sup> that prohibition was not available to prevent a county auditor from placing plaintiff's name on an election ballot, since this was not a quasi-judicial act but a ministerial one because the auditor's duty was prescribed by statute in such cases and involved no discretion. The other requirements for review by prohibition

---

62. 227 Minn. 437, 35 N.W.2d 616 (1949).

63. *Koktavy v. City of New Prague*, 246 Minn. 550, 75 N.W.2d 774 (1956); *Nelson v. Reid*, 228 Minn. 137, 36 N.W.2d 544 (1949); *Judd v. Sanatorium Comm'n*, 227 Minn. 303, 35 N.W.2d 430 (1948); but see *Williams v. W. W. Wallwork, Moorhead, Inc.*, 231 Minn. 244, 42 N.W.2d 710 (1950).

64. 33 MINN. L. REV. at 701 & 711.

65. See *In re Acquisition of Flying Cloud Airport*, 226 Minn. 272, 32 N.W.2d 560 (1948), in which appellant predicated its right to appeal upon the fact that it was a taxpayer upon whom acquisition of an airport would have an adverse effect. The court held that this was insufficient interest to sustain the right of appeal.

66. See *In re County Ditch No. 15*, 238 Minn. 15, 55 N.W.2d 305 (1952); *Singer v. Allied Factors, Inc.*, 216 Minn. 443, 13 N.W.2d 378 (1944); *Davis, Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 422 (1955).

67. 36 MINN. L. REV. at 436. See MINN. STAT. §§ 587.01-.05 (1957).

68. *State ex rel. Minnesota Amusement Co. v. County Bd.*, 255 Minn. 413, 96 N.W.2d 580 (1959).

69. 222 Minn. 379, 24 N.W.2d 715 (1946).

are that the administrative body be about to exercise its power illegally and that there be no other adequate remedy at law.<sup>70</sup> It is at once apparent, then, that in prohibition one will encounter the same difficulties as are encountered in certiorari in determining what is quasi-judicial.<sup>71</sup>

The most difficult question in the application of prohibition seems to be its relation to other remedies, particularly in view of the fact that it involves a somewhat delicate problem of timing since it applies prospectively to action which is threatened. The first problem under this heading grows out of the distinction between administrative acts in excess of jurisdiction and those in excess of power. The line between these two is very fine in many cases; nevertheless, it is the rule that the writ applies only to prevent usurpation of judicial power, that is, excess of jurisdiction, and *not* to prevent excessive use of power,<sup>72</sup> for which the appropriate remedy is either injunction or certiorari if the illegality appears on the face of the record.

An equally difficult question, especially in view of prohibition's prospective operation, is the matter of relative adequacy of remedy.<sup>73</sup> In *State ex rel. Adent v. Industrial Comm'n*,<sup>74</sup> relator sought a writ of prohibition to prevent the Commission from proceeding to hear a claim on the ground that it had no jurisdiction over the employer; a preliminary determination of the jurisdictional point was, therefore, necessary to prevent a possible waiver of the jurisdiction of the Commission by a general appearance on the merits. Prohibition was denied on the ground that the jurisdictional point could be raised on appeal and the added expense of a defense on the merits was not a sufficient burden to justify resort to prohibition. The relator was then left to his remedy by way of certiorari. By contrast there was the situation in *State ex rel. Sheehan v. District Court*<sup>75</sup> in which the insurance commissioner sought the writ to prohibit the district court from enjoining him in a proceeding against an insurance company allegedly engaged in unfair practices under the statute. The court stated that prohibition was available only where there was no adequate remedy at

70. *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 93 N.W.2d 1 (1958), cert. denied, 359 U.S. 909 (1959); *Nemo v. Hotel Employees Local 556*, 227 Minn. 263, 35 N.W.2d 337 (1948); 36 MINN. L. REV. at 438.

71. See *O'Neill v. Kallson*, 222 Minn. 379, 24 N.W.2d 715 (1946); 36 MINN. L. REV. at 439.

72. 36 MINN. L. REV. at 443-45.

73. *Id.* at 445-50.

74. 234 Minn. 567, 48 N.W.2d 42 (1951).

75. 253 Minn. 462, 93 N.W.2d 1 (1958).

law, and found that in this case such remedy did not exist even though the Commission could have appealed from the injunction suit against him in case of an adverse verdict; the resultant delay in enforcement of the statutes would constitute an "undue and detrimental delay to be inflicted upon the public. . . ." <sup>76</sup> Even a cursory examination of these two cases taken together will reveal a rather involved calculus of factors is used by the court to determine the point of adequacy of remedy. It may be questioned, for example, how far the public interest was determinative in the *Sheehan* case.

One point which has not yet been resolved in any manner by the Minnesota cases is the question of ripeness of a proceeding for control by prohibition. The Riesenfeld article notes that "it is necessary that the judicial or quasi-judicial proceedings are either imminent or already commenced but still in progress."<sup>77</sup> However, it is noted that no cases have yet passed upon the question of when an application for the writ is premature.<sup>78</sup> This gap in the law has not as yet been filled by any pronouncement.

One other point about prohibition ought to be noted in passing, and that is that the writ is available only from the supreme court,<sup>79</sup> a jurisdictional requirement which may reduce the number of occasions on which litigants have resort to it.

#### 4. *Quo Warranto*

The abolition of the form, at least, of quo warranto proceedings by Rule 81.01(2) of the *Minnesota Rules of Civil Procedure* would seem to follow from the treatment of the writ of mandamus which was abolished by the same rule at the same time.<sup>80</sup> No case involving quo warranto-type relief has as yet been decided under the new Rule, but there seems little reason to doubt that it will be accorded the same treatment as mandamus. However, the question is somewhat complicated because of the historic requirement that the attorney general consent to the application where the relator is a private party. While the rules about this consent are far from clear,<sup>81</sup> it does appear that "the strictest requirements apply where a private relator wishes to attack the legal existence or scope of the franchise of a municipal corporation,"<sup>82</sup> which is precisely the

---

76. *Id.* at 467, 93 N.W.2d at 5.

77. 36 MINN. L. REV. at 442.

78. *Id.* at 442 n.416.

79. MINN. STAT. §§ 480.04, 587.01 (1957).

80. See note 2 *supra* and accompanying text.

81. See 37 MINN. L. REV. at 7-15. The article refers to the "most perplexing questions" raised by this requirement of consent. *Id.* at 7.

82. *Id.* at 11.

office of the writ as a means of judicial control. Somewhat less stringent are the requirements to test a right to exercise a public office, where it appears that a private relator can do so if he claims the office himself; if he does not, certainly consent of the attorney general is necessary.<sup>83</sup> It would follow that under the revised procedure prescribed by Rule 81.01(2) the prudent practitioner would either attempt to join the attorney general as an applicant for injunctive relief, or obtain his endorsement of approval on the application for the order to show cause why such relief should not be granted. This requirement is based on the supposition, already alluded to, that the form, rather than the substance, of the writ has been done away with.

Since the function of quo warranto is the drastic one of challenging the validity of official acts by attacking the right of the acting officials to act as such officials, the writ has a somewhat limited application. Traditionally, the writ lies to test three kinds of official action: usurpation, nonuser, and misuser of office; there is not too much trouble with the first two.<sup>84</sup> The identification of misuser is more difficult because it is necessary to distinguish misuser from mere *ultra vires* acts of an official.<sup>85</sup> This distinction is apparently a matter of degree which in the end must be left to the courts. However, it is clear that quo warranto is the proper procedure to prevent any governmental unit from exercising its powers beyond its *de jure* geographical limits.<sup>86</sup> It therefore applies to review the legality of annexations of territory by governmental units.<sup>87</sup> However, the attack on the particular body must be direct and not collateral. In *State ex rel. Grozbach v. Common School Dist. No. 65*<sup>88</sup> relator attempted to test by quo warranto the validity of a school bond issue on the ground that the assumption of indebtedness by the school board under a reorganization plan was illegal. It was held that quo warranto could be used to test the legality of the school board's right to office, but not the legality of the bond issue; in short, the writ cannot be used to test, collaterally, the legality of official actions, but only the actual right to office. However, the constitutionality of a statute may be collaterally attacked by a challenge, by means of quo warranto, of the right of officials to act under it. Thus, in *State ex rel. La Jesse v.*

83. *Id.* at 14. See also *State v. Dahl*, 69 Minn. 108, 71 N.W. 910 (1897).

84. 37 MINN. L. REV. at 4.

85. *Ibid.*

86. *Id.* at 5.

87. *State ex rel. Harrier v. Village of Spring Lake Park*, 245 Minn. 302, 71 N.W.2d 812 (1955).

88. 237 Minn. 150, 54 N.W.2d 130 (1952).

*Meisinger*<sup>89</sup> the relator challenged the appointment of a special municipal judge on the ground that the statute under which the latter was appointed was unconstitutional. A writ of ouster under the writ was issued on the ground of unconstitutionality.

It should be borne in mind that the remedy of quo warranto actually consists of two remedies: a statutory action to prevent usurpation and to vacate charters and letters patent, which can be brought either in the district courts or in the supreme court but only by the attorney general,<sup>90</sup> and a common-law writ of quo warranto, available to private relators in either court.<sup>91</sup> Rule 81.01(2) would appear to apply to both of these.

### 5. Injunction

While not technically an extraordinary remedy, injunction qualifies as such by reason of its nature as an equitable remedy and its requirement of no other adequate remedy. Unlike other extraordinary remedies, such as mandamus and certiorari, the nature of the administrative act is not a factor in the granting of injunctive relief,<sup>92</sup> and while this permits escape from the complicated tangle typical of other remedies, it still leaves substantial questions of ripeness for review, of adequacy of remedy, and of scope of review.

The question of ripeness for review in the case of injunctive relief comes up as a question of relative imminence of real or substantial injury.<sup>93</sup> The court discussed the matter thoroughly in *Thomas v. Ramberg*,<sup>94</sup> where plaintiff sought an injunction to prevent promulgation by the Industrial Commission of rules in the process of adoption by alleged illegal procedures under a statute. The defense was that until the rules were adopted the injunction suit was premature; after adoption, there was a statutory remedy by way of certiorari. In this situation the court held that plaintiff should not have his injunction because of absence of imminent irreparable injury.

[A]bsent a showing that plaintiff is faced with the actual or imminent peril of sustaining irreparable harm—that is, real and serious in-

---

89. 258 Minn. 297, 103 N.W.2d 864 (1960).

90. MINN. STAT. §§ 556.01–.13 (1957).

91. MINN. STAT. § 480.04 (1957).

92. *Thomas v. Ramberg*, 240 Minn. 1, 60 N.W.2d 18 (1953); *Martin v. Wolfson*, 218 Minn. 557, 16 N.W.2d 884 (1944); 37 MINN. L. REV. at 20.

93. *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960); *Jenswold v. St. Louis County Welfare Bd.*, 247 Minn. 60, 76 N.W.2d 639 (1956); *Thomas v. Ramberg*, *supra* note 92; *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *J. F. Quest Foundry Co. v. Local 132, International Molders Union*, 216 Minn. 436, 13 N.W.2d 32 (1944); 37 MINN. L. REV. at 27.

94. 240 Minn. 1, 60 N.W.2d 18 (1953).

jury—if the pending administrative proceedings are continued to their final completion, the sole allegation that the administrative agency has or is about to exceed its jurisdiction is not of itself sufficient to invoke injunctive relief . . . .<sup>95</sup>

Consequently a plaintiff is to be left to his administrative remedies unless he can show a special interest which will be immediately affected by administrative action based upon jurisdictional defects, or unless the cost of administrative procedures under the circumstances is prohibitively high.<sup>96</sup> In the usual case, therefore, the plaintiff will be held to an exhaustion of prescribed remedies.

Since injunction is an equitable remedy, the availability of another adequate remedy will bar its use.<sup>97</sup> As usual, however, the test of adequacy is a relative one, and so injunction is the appropriate remedy in a case where the scope of a statutory remedy was not quite extensive enough to review defects in administrative procedures.<sup>98</sup> In a similar way it applies to cases which are for technical reasons just beyond the scope of review by the extraordinary writs, for example, cases of official misconduct which do not constitute "misuser" reviewable by *quo warranto*.<sup>99</sup>

Scope of review is not such a problem in the case of injunction as in the case of the more restricted extraordinary remedies, although the scope of review by injunction is related to questions of ripeness and relative adequacy of remedy. The simplicity of questions in this area is traceable principally to the fact that injunction lies in any kind of situation: quasi-judicial, quasi-legislative, administrative or ministerial.<sup>100</sup> It is also true that under injunction the requirements of standing to sue are not as restrictive as they are in the case of *certiorari* or the statutory appeals since injunc-

---

95. *Id.* at 5, 60 N.W.2d at 20.

96. See *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960).

97. 37 MINN. L. REV. at 26. This rubric is so well established that it scarcely needs any further support. See *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960).

98. *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960).

99. 37 MINN. L. REV. at 26.

100. The rule is stated in this form in *Martin v. Wolfson*, 218 Minn. 557, 16 N.W.2d 884 (1944). Later cases illustrate the point. For example *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960), involved an attempt to interfere by injunction with a legislative process—the formation of a new school district. Injunction would have been the proper remedy if the school district had been formed at the time of suit. In *Nielsen v. City of St. Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958), an injunction was denied (on other grounds) in a case involving administrative acts; see also *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951). In *Jenswold v. St. Louis County Welfare Bd.*, 247 Minn. 60, 76 N.W.2d 639 (1956), the administrative action involved was quasi-judicial.

tion is available to anyone who can prove damage or imminent threat.<sup>101</sup> It is this principle which permits a taxpayer to bring suit in certain cases where his standing is based upon unwarranted expenditures or other action which would increase his tax burden.<sup>102</sup> While injunctive relief can be used to rectify illegal action, it is still subject to the limitation imposed by the constitutional requirement of separation of powers. For this reason injunction cannot go so far as to prescribe how either quasi-judicial or quasi-legislative discretion shall in fact be used, or conversely, will overturn such exercise only where it is arbitrary, capricious or unreasonable as a matter of law.<sup>103</sup> This is again the matter of reviewing procedure, rather than attempting to substitute the judgment of the court for that of the agency where a choice of alternatives truly exists.

The main difficulty with the use of injunction is, then, its actual breadth and flexibility, which tempt the unwary practitioner into attempting judicial control by this means rather than by the appropriate extraordinary writ. And since the application of injunction is determined by the bounds of the scope of the extraordinary writs, to the extent those bonds are blurred, so is the area in which the injunctive remedy applies.

It has already been noted in connection with the discussion of remedy by mandamus that the mandatory injunction is probably now the *form* which that remedy will now take. Since the *substance* is still the same as the former writ, no further discussion of mandatory injunction is needed here.

## 6. *Declaratory Judgment*

Even a hasty review of administrative review in Minnesota should convince the student that the remedy of declaratory judgment is one of the most neglected methods of review. The remedy has a great many advantages: it has broad application to all types of administrative action;<sup>104</sup> it can be granted in spite of other al-

---

101. 37 MINN. L. REV. at 20; see *Thomas v. Ramberg*, 240 Minn. 1, 60 N.W.2d 18 (1953).

102. See *Jenswold v. St. Louis County Welfare Bd.*, 247 Minn. 60, 76 N.W.2d 639 (1956); *Phillips v. Brandt*, 231 Minn. 423, 43 N.W.2d 285 (1950).

103. *Nielsen v. City of St. Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958); *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951).

104. MINN. STAT. § 555.01 (1957) simply provides, in part, that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations . . ." Under interpretations of this statute all that is necessary is a legal interest or right in the hands of a party legally competent to assert it. See 37 MINN. L. REV. at 28.

ternative or adequate remedies;<sup>105</sup> standing to bring an action is not restricted as in the case of certiorari or statutory appeal.<sup>106</sup> It can be brought to determine the status of rights under a threatened situation,<sup>107</sup> which tends to reduce sensitivity to ripeness questions. The critical factor in the application of conventional declaratory judgment<sup>108</sup> is the necessity for the presence in the case of a justiciable controversy. Upon examination the term "justiciable controversy" obviously is one which implies some kind of immediacy of conflict, and the conclusion, then, is that this immediacy may be tested in one or more dimensions. Therefore, the limits of application of declaratory judgment may be tested in terms of standing of persons applying for it, which in turn is a function of their remoteness from the subject matter of the action.<sup>109</sup> Or the requirement of justiciable controversy may appear as critical in cases where the threat of injury or conflict is remote. For example, in *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*<sup>110</sup> plaintiff brought an action under the statute to have himself declared eligible for a pension. The defendant association had taken no official action except to indicate their opinion that plaintiff was ineligible in a letter to the plaintiff, replying to his *informal* notification of intention to apply. The defense was that the suit was prematurely brought, because there was no justiciable controversy at least until *formal* denial. The court held that the suit was timely brought, there was a justiciable controversy, plaintiff asserted a substantial legal right which was challenged, and declaratory relief was intended to apply in just such cases. While the controversy may seem in this case to be somewhat remote, the court had in mind the plaintiff's alternative, which was to quit his job, to apply for pension, and upon refusal then to sue. If the suit failed, how-

105. "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." MINN. STAT. § 555.01 (1957). This is supplemented by Rule 57, *Minnesota Rules of Civil Procedure*, which provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." The same view is expressed in the cases. See, e.g., *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957).

106. The statute makes no statement about the standing of parties. Declaratory relief is available to any party having a legal right or interest. See note 104 *supra*.

107. *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944); 37 MINN. L. REV. at 27.

108. That is, as provided by MINN. STAT. §§ 555.01-15 (1957), as distinguished from the administrative remedy provided by MINN. STAT. § 15.0416 (1957).

109. 37 MINN. L. REV. at 28.

110. 218 Minn. 27, 15 N.W.2d 122 (1944).

ever, plaintiff could not return to his job because of age limitations, and so by quitting he would hazard all upon the chance that his view of his pension rights was correct.

Of particular interest to those seeking some kind of quick review of administrative action is the availability of declaratory judgment even in the face of other administrative remedies, and this is true not only of those cases where the prescribed administrative remedies are insufficient,<sup>111</sup> but also to cases where they are. An example of the latter instance is the case of *Connor v. Township of Chanhassen*,<sup>112</sup> in which plaintiff's right to proceed with a declaratory judgment action was challenged on the ground that he had not exhausted administrative remedies, which in fact he had not. The court permitted the plaintiff to continue on the ground that since declaratory judgment is intended as an alternative form of relief, and the other prerequisites of standing and a threatened legal right were present, the case was a proper one for declaratory judgment. The court stated, "We are presented here with a controversy as to legal rights which requires judicial interpretation and are of the view that the declaratory judgment action was an appropriate remedy."<sup>113</sup> This rule is not applicable where the plaintiff has not resorted to remedies which are considered to be exclusive.<sup>114</sup>

Attention has already been directed to the statute providing for declaratory relief for the purpose of reviewing rules made by administrative agencies.<sup>115</sup> So far no cases have been decided in the Minnesota Supreme Court under the statute; therefore, it is premature to attempt to answer the questions which can be raised about its scope and application. It probably is safe to say that the statute will be interpreted as far as possible in accordance with settled view of declaratory judgment actions. Since the statute describes the relief afforded by it as "declaratory,"<sup>116</sup> there seems to be little doubt about the application to the statute of the terms of Rule 57 of the *Minnesota Rules of Civil Procedure*; but even if this is not so, the statute in its last sentence declares that "the declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass on the validity of the rule in

111. *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955).

112. 249 Minn. 205, 81 N.W.2d 789 (1957).

113. *Id.* at 209, 81 N.W.2d at 794.

114. *Land O'Lakes Dairy Co. v. Village of Sebeka*, 225 Minn. 540, 31 N.W.2d 660, *cert. denied*, 334 U.S. 844 (1948); *Farmers & Merchants Bank v. Billstein*, 204 Minn. 224, 283 N.W. 138 (1939); 37 MINN. L. REV. at 29.

115. MINN. STAT. § 15.0416 (1957). See note 6 *supra*.

116. "The validity of any rule may be determined upon the petition for a declaratory judgment thereon . . . ." MINN. STAT. § 15.0416 (1957).

question"—a provision which seems to be aimed at eliminating requirements for prior exhaustion of administrative remedies.

Because of its purely "declaratory" nature a petition for declaratory judgment is often combined with application for injunctive relief, and the two together form a system of complete relief.<sup>117</sup>

If there is any objection at all to the use of declaratory judgment as a means of judicial control of administrative action, it is that its status as an alternative remedy even at the "threatening" stage of administrative proceedings may cause its application to such proceedings at a time when declaratory relief is in fact premature, giving rise to situations of unwarranted judicial interference in the course of administrative proceedings. This would be more true of the adjudicative type of administrative action than of the rule-making type, where the review statute permits declaratory judgment even if no further administrative procedures have been requested by the petitioner.<sup>118</sup> So far there do not seem to be any cases in which such interference has been unwarranted,<sup>119</sup> possibly because lower courts are cautious to deny declaratory relief in such cases either upon the ground of exclusiveness of the provided remedial scheme or upon the ground of no justiciable controversy. But there seems to be no reason why courts could not legally interfere in administrative procedures in this way.

## II. THE JUDICIAL CONCEPT OF THE SCOPE OF REVIEW

The analysis of the law contained in Part I is incomplete for the purposes of this study unless supplemented by some exposition of the current attitude of the Minnesota Supreme Court toward the subject of the scope of review of administrative action generally. It would certainly be presumptuous, if not improper, to say that no such attitude exists; however, it is correct to say that it does not exist in any systematized form. The outlines of the concept must

---

117. This method was attempted in *Williams v. Rolfe*, 257 Minn. 237, 101 N.W.2d 923 (1960). However, the lower court in that case had denied the requested declaratory relief for reasons which do not appear in the reported case, but granted injunctive relief. On appeal, the injunction was deemed to be premature since the administrative body had not yet taken formal action; therefore, standing unsupported by any declaratory decree, the injunction collapsed. This raises the interesting question of the propriety of an injunction in a case where declaratory relief has already declared a threatened act to be illegal, unconstitutional or improper. Can such a declaratory decree support an injunction in a case where the injunctive relief alone would not be granted?

118. See MINN. STAT. § 15.0416 (1957).

119. *But see* *Montgomery v. Minneapolis Fire Dept. Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944), a case which was saved from possible charges of this nature only because of the peculiar facts of that case.

therefore be gathered from a study of the *ad hoc* application of principles from case to case. This is not to say, however, that the system as it has evolved is without reason or purpose, or that it makes no sense. On the contrary, unsystematized as it is, the scope of judicial review is nevertheless reasonably well adapted to its primary function, which is to bridge the transition from administrative procedures to judicial ones. On the other hand, the court appears in some instances to have come out at the proper place, but for the wrong or irrelevant reasons.

### 1. *Scope of Review Limited by Constitutional Provisions*

The most important limitation on the scope of judicial review is the positive provision contained in article 3, section 1 of the Minnesota constitution, which divides the state government into "distinct departments"—legislative, executive, and judicial branches—whose respective powers cannot be exercised by either of the other branches.<sup>120</sup> The supreme court has universally interpreted this as preventing it, or any other court, from substituting its judgment upon review for that of an inferior tribunal on anything except questions of law. It seems apparent that the court has fallen into this attitude through an understandable tendency to follow the line of least resistance and to apply rules already familiar to it in the field of appellate procedure.<sup>121</sup> The exact nature of the proceedings in the administrative agency therefore make no difference; the court will apply a rule of non-disturbance of findings of fact by administrative agencies whether the administrative process be legislative, executive or administrative.<sup>122</sup> It is to be understood, of course, that this rule is subject to the usual exception that review of findings of fact does not prevent a court from investigating to

---

120. MINN. CONST. art. 3, § 1 reads as follows:

The powers of government shall be divided into three distinct departments—legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution.

121. See 1 DUN. DIG., *Appeal & Error*, §§ 384, 388, 392 (3d ed. 1951) and cases cited therein.

122. *State ex rel. Dybdal v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759 (1920). Quasi-legislative action: *Northern States Power Co. v. City of St. Paul*, 256 Minn. 489, 99 N.W.2d 207 (1959); *State ex rel. McGinnis v. Police Civil Serv. Comm'r*, 253 Minn. 62, 91 N.W.2d 154 (1958); *In re Consolidation of School Dist.*, 246 Minn. 96, 74 N.W.2d 410 (1956); *Northern Pac. Ry. v. City of Duluth*, 243 Minn. 84, 67 N.W.2d 635 (1954); *St. Paul City Ry. v. City of St. Paul*, 242 Minn. 188, 64 N.W.2d 487 (1954); *In re Independent Consol. School Dist. No. 16*, 241 Minn. 454, 63 N.W.2d 543 (1954). Administrative action: *State ex rel. McGinnis v. Police Civil Serv. Comm'r*, *supra*; *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942).

find out whether, by some test, the findings are legally unsupported by evidence.<sup>123</sup>

The particular form of judicial review, whether by statutory form or extraordinary remedy, likewise makes no difference. The court has refused to substitute its discretion in cases where a statutory appeal has been provided,<sup>124</sup> in the certiorari line of cases,<sup>125</sup> in cases where an injunction is sought,<sup>126</sup> and especially in the mandamus cases.<sup>127</sup> It also follows that the rule applies whether the review is confined to a review of the record only<sup>128</sup> or whether it permits introduction of evidence *dehors* the record,<sup>129</sup> although some question may then be raised concerning the use of evidence *dehors* the record.

There is only one exception to the rule, if indeed it is an exception at all, and that is the often asserted judicial right to review the rate base in proceedings by the Railroad and Warehouse Commission to fix rates for public utilities and its corollary, the right to review compensation awards by trial *de novo* in eminent domain proceedings. In both these cases the rationale is that the right to compensation is one which is constitutionally guaranteed and, therefore, the court must be free to examine the total situation to determine whether the compensation provided in fact meets a standard of due process.<sup>130</sup> In rate-making cases, then, the

123. *Ibid.*

124. State *ex rel.* McGinnis v. Police Civil Serv. Comm'r, 253 Minn. 62, 91 N.W.2d 154 (1958); *In re* Consolidation of School Dist., 246 Minn. 96, 74 N.W.2d 410 (1956).

125. That is, today, in the long line of cases stemming from the *Dybdal* case.

126. Nielsen v. City of St. Paul, 252 Minn. 12, 88 N.W.2d 853 (1958); Otter Tail Power Co. v. Village of Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951).

127. Minneapolis-Honeywell Regulator Co. v. Nadasdy, 247 Minn. 159, 76 N.W.2d 670 (1956); State *ex rel.* Sholes v. University of Minn., 236 Minn. 452, 54 N.W.2d 122 (1952); Muehring v. School Dist. No. 31, 224 Minn. 432, 28 N.W.2d 655 (1947); Zion Ev. Luth. Church v. City of Detroit Lakes, 221 Minn. 55, 21 N.W.2d 203 (1945). Of course, if there is any discretion to be exercised on the part of the administrative body, the remedy of mandamus by definition does not apply.

128. As in the certiorari cases and the other cases following the *Dybdal* rule.

129. Minneapolis St. Ry. v. City of Minneapolis, 251 Minn. 43, 86 N.W.2d 657 (1957). This case was decided under a statute, MINN. STAT. § 216.25 (1957), which permits evidence *dehors* the record on appeal. The court in Minneapolis St. Ry., *supra* at 61, 86 N.W.2d at 670, held:

The function of the district court is to determine whether, in the light of all the evidence presented before the commission and district court, the commission's order was lawful and reasonable . . . . [T]he court may not substitute its judgment for the findings of the commission and it may not try the case *de novo*.

130. See St. Paul City Ry. v. City of St. Paul, 242 Minn. 188, 64 N.W.

court is able to indulge itself in a rather unconvincing bit of sophistry that it is not in fact fixing rates at all, but is determining the legal sufficiency of the rate base and the reasonableness of the specified return in the light of due process requirements.<sup>131</sup> It goes without saying that this approach of the court has been subjected to criticism,<sup>132</sup> and while it is difficult to see why, sophistry or not, such extensive review ought to be granted in these cases if not allowed elsewhere, the tradition of such review poses a practical question of the feasibility of eradicating it for the sake of mere conformity. It is not amiss to point out that the federal rule is evolving in a different direction.<sup>133</sup>

The stringency of the Minnesota constitutional requirement of separation of powers has had the effect of preventing the court from moving into areas of review which it is not equipped to enter and which on any sound theory of judicial review it should not enter. The Minnesota system of judicial review has thus been able to avoid some of the difficulties encountered under the federal system of review, where the courts have not had a clear constitutional barrier and where, as a result, the courts have had a more difficult time confining themselves to a purely appellate role. To the extent that the court has invoked the constitution as the basis for its refusal to trespass upon administrative discretion it is assigning a sufficient reason for its action, but not necessarily a logical one.

---

2d 487 (1954); *Arrowhead Bus Serv. v. Black & White Duluth Cab Co.*, 226 Minn. 327, 32 N.W.2d 590 (1948). In *Northern States Power Co. v. City of St. Paul*, 256 Minn. 489, 99 N.W.2d 207, 211 (1959), for example, it was said:

We have often held that prescribing or fixing rates for a public utility involves a legislative function which may not be usurped by the courts.

It is equally well settled that some form of judicial review of the reasonableness of rates fixed by the ratemaking body is an essential requirement in the exercise of due process.

This entire matter of the requirements of the due process clauses of the state and federal constitutions and their bearing upon judicial review will be considered at length *infra* in subsection 2 of Part II.

131. The best statement of this rule occurs in *St. Paul City Ry. v. City of St. Paul*, 242 Minn. 188, 64 N.W.2d 487 (1954). See also the discussion *infra* in subsection 2 of Part II.

132. 4 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.09, 29.08 (1958); Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Question of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932); Mendelson, *Smyth v. Ames in State Courts, 1942 to 1952*, 37 MINN. L. REV. 159 (1953).

133. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); *Railroad Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, *opinion amended*, 311 U.S. 614 (1940); 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.09 (1958). But see Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957).

The circumstance that the two happen to coincide should not permit the distinction to go unnoticed.

There are a large number of review statutes which provide expressly for trial *de novo* of some or all of the fact issues in the administrative determination.<sup>134</sup> It seems clear that if the determination in any such case is legislative or executive in nature then such trial *de novo* must be unconstitutional. This exact point was made in the recent case of *State ex rel. McGinnis v. Police Civil Serv. Comm'n*,<sup>135</sup> which involved the discharge of a civil service officer and appeal from this discharge under Minnesota Statutes, section 197.46, which provides, in part, upon such appeal "issues of fact shall be framed upon motion of either party and the trial thereof shall be by jury . . . ." The district court to which appeal was taken permitted trial *de novo* with jury trial of disputed facts, but the Minnesota Supreme Court reversed and remanded the case on the ground that the discharge action was administrative even though accomplished in a "judicial" manner; the statute providing trial *de novo* was, therefore, unconstitutional because it was an unwarranted trespass.<sup>136</sup> The court was apparently aware of the implications of its holding for other statutes of a similar nature, for it commented:

McGinnis also cites numerous statutes dealing with appeals from such administrative bodies as the Minnesota Board of Nursing, State Board of Pharmacy, Commissioner of Insurance, etc. These statutes all use the words "de novo" in their provisions for review by the district court on appeal from the particular administrative body involved. The village on the other hand cites several cases where the statutes have used the words "de novo" and the courts have held that the function being performed by the board is not judicial and have construed the words to allow only a limited review in the courts . . . . In regard to this contention two things are to be noted: (1) The wording of the review sections of those statutes are [sic] not the same as the provisions for review in the statute before us; (2) those statutes are not before us on this appeal. Thus, whether review of orders from the administrative bodies concerned in those statutes is to be full or limited is not to be considered or decided at this time.<sup>137</sup>

We can assume that from now on the court will not permit trial *de novo* in the face of an express statute authorizing or directing it if the action being reviewed is legislative or administrative. But

134. *E.g.*, MINN. STAT. §§ 49.18, 64.26, 82.07, 88.37, 88.49, 145.07, 148.261, 151.06, 160.22, 168.68, 178.09, 257.111, 325.62, 326.16, 326.335, 380.13, 381.10, 431.23 (1957).

135. 253 Minn. 62, 91 N.W.2d 154 (1958).

136. Compare *Sellin v. City of Duluth*, 248 Minn. 333, 80 N.W.2d 67 (1956).

137. 253 Minn. at 72, 91 N.W.2d at 161.

it is difficult, if not impossible, to determine to what degree the court will resort to its power of interpretation to remove any administrative action from these categories and to characterize it as judicial in nature, and how far, even in such "judicial" cases, the court will feel itself qualified or empowered to review previously found facts.

In theory the constitutional inhibitions on exercise of other powers by the judiciary do not apply to review by the court of administrative actions which are purely judicial, and the court has made statements implying as much.<sup>138</sup> The implication would seem to be that here trial *de novo* is permitted. However, at this point any authorizing statute runs into another constitutional block in the form of the rule that constitutionally granted powers cannot be delegated; therefore, delegation of *pure* judicial power to an administrative body would be unconstitutional.<sup>139</sup> The conclusion is that any such power granted to an administrative body is "quasi-judicial" and applies only to the form of the proceeding, rather than to the actual content of it. Thus, the court has recently held that "a particular act may be administrative for the purpose of deciding which branch of the government it comes under but judicial for the purpose of allowing review by certiorari . . . ."<sup>140</sup> The fact that a proceeding may be judicial in form does not mean it is judicial or quasi-judicial; rather, a functional test is to be applied regardless of the form of the proceedings, and this has been made clear in the careful opinion in the *McGinnis* case,<sup>141</sup> where it was said:

However, it cannot be said that the character of the act alone determines whether a given function is judicial or non-judicial for the purpose of determining into which branch of the government that func-

---

138. *State ex rel. McGinnis v. Police Civil Serv. Comm'r*, 253 Minn. 62, 91 N.W.2d 154 (1958); *Sellin v. City of Duluth*, 248 Minn. 333, 80 N.W.2d 67 (1956); *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942); *Hunstiger v. Kilian*, 130 Minn. 474, 153 N.W. 869 (1915). Where pure judicial power is concerned, the courts may, of course, try *de novo*, as in the case of appeals from justice courts. See MINN. STAT. § 532.41 (1957).

139. *State ex rel. Turnblad v. District Court*, 107 N.W.2d 307 (Minn. 1961); *State ex rel. McGinnis v. Police Civil Serv. Comm'r*, 253 Minn. 62, 91 N.W.2d 154 (1958); *Sellin v. City of Duluth*, 248 Minn. 333, 80 N.W.2d 67 (1956); *State v. Nolan*, 231 Minn. 522, 44 N.W.2d 66 (1950); *Hunstiger v. Kilian*, 130 Minn. 474, 153 N.W. 869 (1915); *Steenerson v. Great No. Ry.*, 69 Minn. 353, 72 N.W. 713 (1897); *State ex rel. Hart v. Common Council*, 53 Minn. 238, 55 N.W. 118 (1893). MINN. CONST. art. 6, § 1, vests "judicial power" in the courts.

140. *Sellin v. City of Duluth*, 248 Minn. 333, 337, 80 N.W.2d 67, 70 (1956).

141. 253 Minn. 62, 91 N.W.2d 154 (1958).

tion falls. The decision cannot turn on the fact that the given function involves such things as formal charges, notice, and hearing.<sup>142</sup>

To characterize an administrative action as "quasi-judicial," then, is merely to define the extent of judicial review, which is the "certiorari" scope of review, or to put it more plainly, review in accordance with the rule of *State ex rel. Dybdal v. State Sec. Comm'n*<sup>143</sup> as modified by *State ex rel. Ging v. Board of Educ.*<sup>144</sup> The rule as so modified specifies five grounds upon which review may be sought:

- (a) The administrative body had no jurisdiction.
- (b) The administrative body exceeded its granted powers.
- (c) Action of the administrative body was arbitrary, capricious and totally unreasonable.
- (d) The administrative findings of fact were not properly supported by evidence.
- (e) There was procedural irregularity.

The result, then, of the combined operation of the constitutional principle of no delegation of powers is to place all administrative action—quasi-judicial, quasi-legislative, and executive—(with the exception of rate-making and eminent domain) on exactly the same level, and in the absence of some restriction upon the scope of appeal, imposed either by statute or by the method of review selected by the appellant, to apply the same standard to the whole group. Except as the identification of administrative action as "quasi-legislative" or "quasi-judicial" happens to bear upon the choice of the extraordinary remedies, the court might just as well characterize all administrative action which is not unconstitutional as "administrative" and, therefore, subject to review under the modified *Dybdal* rule.

## 2. Scope of Review Required by Constitutional Provisions

If on the one hand the Minnesota constitution operates as a barrier to judicial control of administrative action, it also operates to require certain areas of review. Care should be taken to distinguish between constitutional requirements of procedural fair play<sup>145</sup> and constitutional requirements relating to scope of review, which are

142. *Id.* at 69, 91 N.W.2d at 159. See also *State ex rel. Turnbladh v. District Court*, 107 N.W.2d 307 (Minn. 1961).

143. 145 Minn. 221, 176 N.W. 759 (1920).

144. 213 Minn. 550, 7 N.W.2d 544 (1942).

145. These procedural requirements operate at the level of administrative proceedings, and consequently fall beyond the scope of this work. In the Minnesota cases, the doctrine seems to stem principally from *Morgan v. United States*, 304 U.S. 1 (1940), which was imported into Minnesota

a different matter entirely. And while the constitutional requirements are not many, mention of them is certainly necessary.

The constitutional requirements stem from the "due process" clauses of the Minnesota constitution<sup>146</sup> and the fourteenth amendment to the federal constitution. Article 1, section 7 of the Minnesota constitution provides in part:

No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

The last clause is further fortified by the provisions of article 1, section 13 of the Minnesota constitution:

Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.

These provisions of the Minnesota constitution, taken together, appear to be much more explicit on the matter of property rights than does the fourteenth amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These due process clauses of the state and federal constitutions require the reviewing court to examine the factual basis of a finding even in the face of a statutory provision making certain evidence conclusive if, in fact, such conclusiveness deprives the appellant of his day in court or of his rights, or is manifestly contrary

---

law in *State ex rel. Rockwell v. State Bd. of Educ.*, 213 Minn. 184, 6 N.W.2d 251 (1942). The court, citing the *Morgan* case, held:

Neither the federal nor the state constitution guarantees any particular form of administrative procedure . . . . All that is required is "adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." *Morgan v. United States*, 304 U.S. 1, 14 . . . . 213 Minn. at 191-92, 6 N.W.2d at 258. This basic position was reiterated a year later in the leading case of *Juster Bros. v. Christgau*, 214 Minn. 108, 7 N.W.2d 501 (1943). See also *Railroad & Warehouse Comm'n v. Chicago & N.W. Ry.*, 256 Minn. 227, 98 N.W.2d 60 (1959); *State v. Duluth, M. & I.R. Ry.*, 246 Minn. 383, 75 N.W.2d 398, *appeal dismissed*, 352 U.S. 804 (1956); *Festler v. Wallach*, 245 Minn. 222, 71 N.W.2d 836 (1955); *In re Amalgamated Food Handlers*, 244 Minn. 279, 70 N.W.2d 267 (1955).

146. MINN. CONST. art. 1, §§ 7, 13.

to the actual underlying state of facts in the matter. A presumption cannot be substituted by statute for a fact and be made conclusive. Thus, in the leading case of *Juster Bros. v. Christgau*<sup>147</sup> the court held unconstitutional a rule, promulgated by the Commissioner of Employment and Security pursuant to statute, which purported to permit the Commissioner to make a binding determination of the applicable employers' contribution rate without, however, any hearing on the matter. Due process forbade the cutting off by this means of the employer's right to a hearing and to the presumption of evidence which would have clearly rendered unjust the rate as fixed. The court said:

Could the legislature, without violating the due process clauses of the state and federal constitutions, delegate to the commission or director the power to make a binding determination of the employer's contribution rate without affording the employer an opportunity to be heard and to show the actual facts bearing upon such rate? If such power did not exist, it will not be presumed that the legislature . . . itself does not have the power to declare what shall be conclusive evidence contrary to the fact . . . .

"The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court." [Citation omitted.]

Clearly, what the legislature cannot do itself is *ultra vires* an administrative body . . . .<sup>148</sup>

However, the constitutional rule is not violated by a statute which raises presumptions which are reasonable and operate merely to shift the burden of proof. "Unquestionably the legislature, or its administrative adjunct, may declare that certain things shall constitute *prima facie* evidence or create a rebuttable presumption."<sup>149</sup> A statute which did exactly that (Minnesota Statutes, section 216.25) was expressly upheld in *State & Port Authority v. Northern Pac. Ry.*<sup>150</sup>

Constitutional due process, both state and federal, likewise requires review in cases where the activities of an administrative board result in alleged confiscation, and this review must go farther than a mere review of the record for sufficiency of evidence. Since the law in Minnesota seems to be somewhat cloudy on this issue, a little elaboration is desirable. The cases falling in this category are, of course, principally cases involving rate-making for util-

147. 214 Minn. 108, 7 N.W.2d 501 (1943).

148. *Id.* at 117, 7 N.W.2d at 506.

149. *Id.* at 118, 7 N.W.2d at 507.

150. 229 Minn. 312, 39 N.W.2d 752 (1949).

ities, which are governed by applicable statutes having varying provisions. An authoritative expression of the doctrine occurs in *Western Buse Tel. Co. v. Northwestern Bell Tel. Co.*<sup>151</sup> in which Mr. Justice Wilson said:

The same statute [*i.e.*, the statute providing for appeals in rate-making cases] must also be and is construed as meaning that the appeal to the district court contemplates, when the question of confiscation is involved, that that tribunal will also make its findings as if it tried the case in the first instance. It can no longer be said to be the law that the order of the commission is final and conclusive under the statutory direction that it would be considered *prima facie* reasonable. The appellant is entitled to have the issue of confiscation submitted to a judicial tribunal for determination upon its own independent judgment as to both the law and the facts.<sup>152</sup>

Significantly, the court relied heavily upon the authority of *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>153</sup> a leading federal case in which the same view was enunciated in 1920. In 1936 the United States Supreme Court decided the case of *St. Joseph Stockyards Co. v. United States*,<sup>154</sup> in which the Court reaffirmed the rule that in cases where confiscation was alleged the sufficiency of the administrative body's findings was to be reviewed by the appellate court for the purpose of reaching an independent judgment. Then, both the *Western Buse* and the *St. Joseph* cases formed the basis for a very extensive discussion of the doctrine in the Minnesota case of *State v. Tri-State Tel. & Tel. Co.*,<sup>155</sup> in which Chief Justice Gallagher, speaking for the court, adopted the language of the *St. Joseph* case<sup>156</sup> in respect to the matter of independent judgment:

Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation . . . . But to say that their findings of fact may be made conclusive where constitutional rights . . . have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.<sup>157</sup>

---

151. 188 Minn. 524, 248 N.W. 220 (1933).

152. *Id.* at 530, 248 N.W. at 223.

153. 253 U.S. 287 (1920).

154. 298 U.S. 38 (1936).

155. 204 Minn. 516, 284 N.W. 294 (1939).

156. 298 U.S. 38, 51-52 (1936).

157. 204 Minn. at 529, 284 N.W. at 303.

And he decided that an allegation of confiscation warranted independent judicial review:<sup>158</sup>

It is agreed that the company is entitled to a judicial determination of the issue of confiscation . . . that it is the duty of the court in passing upon that issue to make findings of fact . . . and that the rulings of the commission upon questions of law are without finality . . . .

In adopting the language of the *St. Joseph* case, however, Chief Justice Gallagher also adopted the rationale of that case, which dealt with the evidentiary effect of the administrative agency's findings, a matter not made clear in the *Ben Avon* case. The court noted that the *Ben Avon* case stands for the proposition that "the district court, when reviewing an allegedly confiscatory order of the commission, must weigh the evidence and determine the facts upon its own independent judgment and without the least regard to the findings of the commission,"<sup>159</sup> but added that "since the *Ben Avon Borough* case the United States Supreme Court appears to have receded from the position there taken."<sup>160</sup> This reliction, the court intimates, must perforce be in the direction of the rule which existed prior to *Ben Avon*, that is, that administrative findings were conclusive provided they had a legally adequate basis in the evidence. Caught between the *Ben Avon* position of independent judgment and the opposite position of conclusiveness of findings, the court takes the middle way out offered by the *St. Joseph* case:

But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. . . . The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established.<sup>161</sup>

This sort of reasoning would seem to justify the trenchant remark of one commentator that "the difference between such a partially dependent judgment and the test of reasonableness or substantial

---

158. *Id.* at 525-26, 284 N.W. at 302-03.

159. *Id.* at 525, 284 N.W. at 302.

160. *Ibid.*

161. 298 U.S. 38, 53 (1936).

evidence is left unclear; for all that appears the difference may have become negligible or nonexistent."<sup>162</sup>

The court does not mention the possible effect of the statute, Minnesota Statutes, section 237.25, under which the appeal in the *Tri-State* case was brought, which provides that "at such trial the findings of fact made by the commission shall be prima facie evidence of the matters therein stated, and the order shall be deemed prima facie reasonable . . . ."

The court's pronouncements since the *Tri-State* case leave some doubt as to the present attitude of the court. Thus, in 1948 in *Arrowhead Bus Serv. Inc. v. Black & White Duluth Cab Co.*<sup>163</sup> the court was called to pass upon the propriety of the action of a district court which upon review of an order of the Railroad and Warehouse Commission had heard evidence *de novo* and had made its own order. By way of dictum, the court said: "In a proper case, [the appellate court] may determine the sufficiency of the evidence to support a finding or examine questions of law arising from such findings or in rate cases determine whether rates are confiscatory."<sup>164</sup> The last clause, being in addition to the express right to pass upon the legal sufficiency of the evidence, might be interpreted as a revival of the *Ben Avon* doctrine, or at least a re-assertion of the *modified Tri-State* rule. One should not lose sight of the fact that this statement was made by the Minnesota Supreme Court after further significant developments at the national level from which it could be inferred that the United States Supreme Court had finally rejected the *Ben Avon* rule.<sup>165</sup> In 1940 the Court decided *Railroad Comm'n of Tex. v. Rowan & Nichols Oil Co.*,<sup>166</sup> in which case it was argued that administrative proration orders, which prorated oil well production, were discriminatory. The Supreme Court refused to review the orders, saying that the fixing of proration formulas was a legislative function, and where there appeared to be a choice between reasonable alternatives, the courts could not exercise the power of discretion. In 1942, soon after the *Rowan & Nichols* case, the Court decided *FPC v. Natural Gas Pipeline*.<sup>167</sup> This case involved the validity of a rate fixed by the Federal Power Commission under a statute authorizing the FPC to fix "just and reasonable" rates and making

162. 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.09 at 165 (1958).

163. 226 Minn. 327, 32 N.W.2d 590 (1948).

164. *Id.* at 329, 32 N.W.2d at 592.

165. See on this entire subject 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.09 (1958).

166. 310 U.S. 573, *opinion amended*, 311 U.S. 614 (1940).

167. 315 U.S. 575 (1942).

the findings of fact by the commission conclusive "if supported by substantial evidence." The Court was unconcerned with independent judgment on the matter of confiscation and was content to go no farther than the statutory authorization of examination to determine substantial evidentiary support. And in 1944 the Court added another indication of its position in *FPC v. Hope Natural Gas Co.*,<sup>168</sup> where it reaffirmed its position in the *Natural Gas Pipeline* case and, in addition, aimed a blow at the entire idea that rate-making involved confiscation at all.

In 1949 the Minnesota Supreme Court decided *Twin City Motor Bus Co. v. Rechtzigel*<sup>169</sup> under Minnesota Statutes, section 216.25, the provisions of which are identical to the section quoted above from Minnesota Statutes, section 237.25. The court in the *Rechtzigel* case held:

On appeal from an order of the commission under § 216.25, the district court must examine the evidence before the commission in order to determine whether it reasonably supports the commission's order. Apparently, it may receive additional evidence, but only for the purpose of determining whether, in the light thereof, the commission's order becomes illegal or unreasonable as unsupported by the evidence as of the time of its making. It cannot retry the matter and substitute its own findings for those of the commission.<sup>170</sup>

And the court avoided the question whether appellant could raise on appeal for the first time the matter of confiscation, pointing out that an affirmative argument would rest upon the *Western Buse* and *St. Joseph* cases.

The position of the *Rechtzigel* case was reaffirmed in *State & Port Authority of St. Paul v. Northern Pac. Ry.*<sup>171</sup> and *Northern Pac. Ry. v. Village of Rush City*,<sup>172</sup> both of which appear to reject, at least in the case of Minnesota Statutes, section 216.25, any idea of independent judgment. Final expression of the rule, at least as regards appeals under statutes in the form of Minnesota Statutes, section 216.25, appears in *State v. Duluth, M. & I. R. Ry.*,<sup>173</sup> in which the court first noted that any attempt on the part of the court to try a rate-making matter *de novo* would be unconstitutional as an invasion by the court of the legislative sphere. The court then stated the rule:

---

168. 320 U.S. 591 (1944).

169. 229 Minn. 196, 38 N.W.2d 825 (1949).

170. *Id.* at 204, 38 N.W.2d at 829.

171. 229 Minn. 312, 39 N.W.2d 752 (1949).

172. 230 Minn. 144, 40 N.W.2d 886 (1950).

173. 246 Minn. 383, 75 N.W.2d 398, *appeal dismissed*, 352 U.S. 804 (1956).

We have held in a number of cases that the rule of review by the district court is the same as that of an appellate court in reviewing the findings of a jury. There is, however, an obvious difference in procedure, in that, on reviewing the order of the commission, the trial court may receive new evidence not submitted to the commission, while a review in this court of the findings of a jury is limited to the record made in the trial court. As was said by Mr. Justice Hallam in *State v. G. N. Ry. Co.* . . . [130 Minn. 57, 153 N.W. 247 (1915)] it does seem somewhat anomalous to hold that the order of the commission is prima facie reasonable and lawful and that, on appeal, new evidence may be received to overcome the prima facie standing of the order and that, at the same time, the trial court cannot hear the case de novo. However, it is now clear that such evidence is admitted for the limited purpose of testing the reasonableness and the lawful nature of the order.<sup>174</sup>

It is submitted that there is good ground for the court's anomalous feeling and that its attempt at resolution of the difficulty is not itself completely clear or satisfactory. Some further confusion is added when one considers the court's decision in *Minneapolis St. Ry. v. City of Minneapolis*,<sup>175</sup> which adopted the rule in the line of cases just discussed, but then expressly adopted the view of the *Hope* case that the old "fair value" rule of *Smyth v. Ames*<sup>176</sup> was no longer applicable, at least where the applicable statute did not use those words.

While the above cases seem to point to some attrition of the position the court took in the *Western Buse* case, there are other indications in an opposite direction. For example, in *St. Paul City Ry. v. City of St. Paul*<sup>177</sup> there was an appeal by the City of St. Paul from orders of the Railroad and Warehouse Commission fixing fares, and on such appeal the district court made independent findings of fair value and reasonable rate of return. It was objected that the court lacked such power. However, the supreme court upheld the power of the district court in this respect, pointing out that the statute expressly provided for trial *de novo* in the district court,<sup>178</sup> and furthermore, that such a process was not "fixing a

---

174. *Id.* at 394, 75 N.W.2d at 406. This case is cited by Professor Davis as proof of a rejection by Minnesota of the *Ben Avon* rule. 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 29.09 at 177 (1958).

175. 251 Minn. 43, 86 N.W.2d 657 (1957).

176. 169 U.S. 466 (1897).

177. 242 Minn. 188, 64 N.W.2d 487 (1954).

178. The statute here involved was MINN. STAT. § 220.15 (1957), which provides that upon appeal

[t]he matters involved therein shall be tried and determined by the court without a jury in the same manner as though originally commenced therein . . . . Upon any appeal the district court shall have jurisdiction of and try the whole matter in controversy including mat-

rate"—a legislative function—because the court was merely finding independently some of the elements that entered into a determination of the rate. The latest pronouncement of the court is found in *Northern States Power Co. v. City of St. Paul*,<sup>179</sup> which was decided under Minnesota Statutes, sections 451.07 and 451.08, which authorize cities to fix utility rates but provide no means of review. In this respect the case can then be distinguished from both the *Minneapolis St. Ry.* case where the statute expressly provided for trial *de novo*, and the *St. Paul City Ry.* case and others like it where the statute provides that administrative findings are *prima facie* correct. The court said:

Just where the legislative function involving the power to fix rates ends and the judicial function involving a review of the reasonableness of such rates begins, is not always easy to determine. It is clear, however, that while the courts may not usurp the legislative function of ratemaking, neither are they impotent to grant relief from confiscatory or noncompensatory rates established by the ratemaking authority. Courts must and do have the power to prevent the unlawful taking of property without due process of law by the establishment of rates which are confiscatory or noncompensatory.<sup>180</sup>

The court then found it unnecessary to go further into this matter since the sole question in the case was the propriety of the granting of a temporary injunction on the enforcement of the rates *pendente lite*.

It is significant that in this case the court had a clear opportunity to express the law, if it had chosen to do so, and to clear away some of the questions about scope of review in rate-making cases. Instead, the court chose to make the general statement above with its reference to the power of courts to check confiscatory rates as a matter of due process, all of which has the overtones at least of the *Ben Avon* rule.

In view of all of the foregoing cases, it can be said that the law in Minnesota is far from clear on several points. First, it is doubtful how far, and under what conditions, the court will go in permitting trial *de novo*, the admission of additional evidence, or the exercise of independent judgment by the court. Second, it is doubtful whether the court has rejected the *Ben Avon* rule where con-

---

ters of fact as well as law and make findings upon all material facts . . . .

It is to be noted that this statute, the Brooks-Coleman Act, was enacted in 1921, (L. 1921, ch. 278), after the *Ben Avon* decision; the court in the *Minneapolis St. Ry.* case expressly distinguished the *St. Paul City Ry.* case on the ground of the difference in statutes.

179. 256 Minn. 489, 99 N.W.2d 207 (1959).

180. *Id.* at 494, 99 N.W.2d at 211.

fiscation by fixed rates is alleged. Third, the court has left in doubt a wide zone in which it can, if it chooses, avoid the implications of the separation of powers rule by making the determination of certain facts or conditions "judicial" instead of "legislative" (*i.e.*, the determination by the court of a fair rate base is not legislative; only determination of the rate thereon is legislative). Perhaps the safest course to take in regard to the *Ben Avon* rule is to regard its demise with the same scepticism shown by the Supreme Judicial Court of Massachusetts in *Opinion of the Justices*<sup>181</sup> in passing on this same question. After reviewing many of the cases cited above, that court observed:

One writer announces that the doctrine of these cases [*i.e.*, the *Ben Avon* case] has "gradually died," because of subsequent decisions inconsistent with it. Davis, Administrative Law, § 255, at page 919. Perhaps so, but we would prefer to see the death certificate.<sup>182</sup>

Again, also on due process considerations, the Minnesota Supreme Court has held that it will review administrative action even where the legislature attempts to make the administrative action final in the sense of providing a single administrative remedy. In *Breimhorst v. Beckman*<sup>183</sup> the court was faced with a contention that the Workman's Compensation Act was invalid since it cut off the employee's common-law action against his employer or the malefactor and left him to a quasi-judicial remedy. It was held that this process was not unconstitutional as long as the usual judicial review was provided. A similar result was reached in *Fairview Hosp. Ass'n v. Public Bldg. Serv. Union*,<sup>184</sup> in which the right of certain classes of employees to strike was removed by statute in favor of compulsory procedures.

In still another class of cases, the court, if called upon to do so, must exercise its power to prevent usurpation of power. This class of cases involves the question of delegation of legislative power by the legislature to administrative agencies. Underlying the problem is the strict constitutional provision regarding separation and exercise of powers,<sup>185</sup> and this provision has been interpreted by the courts as prohibiting the delegation of legislative power. The most complete formulation of this rule appears in the case of *Lee v. Delmont*,<sup>186</sup> which also has the virtue of being comparatively

181. 328 Mass. 679, 106 N.E.2d 259 (1952).

182. *Id.* at 683, 106 N.E.2d at 262. For a view in accord, see Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957).

183. 227 Minn. 409, 35 N.W.2d 719 (1949).

184. 241 Minn. 523, 64 N.W.2d 16 (1954).

185. MINN. CONST. art. 3, § 1.

186. 228 Minn. 101, 36 N.W.2d 530 (1949).

recent. In that case the court was dealing with the matter of a legislative delegation to the Board of Barber Examiners of power to make rules and regulations. There was no question but that the delegation was very broad, particularly in the grant of power to prescribe the matters upon which the applicants for barbers' teacher licenses were to be examined.<sup>187</sup> Speaking through Mr. Justice Matson, the court said:

It is elementary that the legislature—except where expressly authorized by the constitution, as in the case of municipalities—cannot delegate purely legislative power to any other body, person, board or commission. . . . Although purely legislative power cannot be delegated, the legislature may authorize others to do things (insofar as the doing involves powers which are not exclusively legislative) which it might properly, but cannot conveniently or advantageously, do itself. . . . It does not follow, because a power may be wielded by the legislature directly, or because it entails an exercise of discretion and judgment, that it is exclusively legislative. . . . Pure legislative power, which can never be delegated, is the authority to make a complete law—complete as to time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment. Although discretion to determine when and upon whom a law shall take effect may not be delegated, the legislature may confer upon a board or commission a discretionary power to ascertain, *under and pursuant to the law*, some fact or circumstance upon which the law, by its own terms makes, or intends to make, its own action depend. The power to ascertain facts, which automatically brings a law into operation by virtue of its own terms . . . and not according to the whim or caprice of the administrative officers, the discretionary power delegated to the board or commission is not legislative.<sup>188</sup>

A careful study of this exposition may justifiably result in a certain amount of confusion in the mind of the reader. First, it appears that delegation of legislative power is bad, if it is a delegation of "pure" legislative power. Next, the court moves to a definition of "pure" legislative power, which turns out to be the power to make a complete law; and then there appears to be a further definition. The power to make a complete law is, according to the *Delmont* case, the power to decide upon the expediency of the law; upon its content; upon the time it is to take effect; and upon the objects of the legislation, that is, the persons upon whom it is to take effect. It is to be assumed that the legislature could not delegate to any other body the power to exercise in any one case all four

187. The statutes governing the matter of licensing of teachers in barber schools are MINN. STAT. §§ 154.065-.07 (1957). MINN. STAT. § 154.065 (5) (1957) grants power to the Board of Barber Examiners to "make appropriate rules and regulations to carry out the intents and purposes" of the act.

188. 228 Minn. at 112, 36 N.W.2d at 538.

of the powers which taken together (at least according to the court's test) constitute legislative power; at any rate, it is obvious that if the statement from the *Delmont* case is to be taken literally a body other than the legislature may exercise bits or parts of the legislative power without running afoul of constitutional inhibitions. Thus, while an administrative body cannot determine the time when a law is to take effect (which is one of the elements of legislative power), an administrative body can determine "facts" or the existence of "facts" which determination is enough to activate the law according to its own terms. Just how much sophistry there is in this position is a matter of individual judgment. Perhaps it might be argued that indeed the court's position is sound if in fact the administrative agency has a duty to find the existence of the facts, so that its function is purely ministerial. But this is not the case, for the court has held that there is no unconstitutional delegation of legislative power even where the power to find the critical facts is to be exercised by the administrative agency at its own discretion.<sup>189</sup> A more obvious delegation of the actual power to decide whether a law shall come into effect or not is hard to imagine. And although in the *Delmont* case the court stated that "discretion to determine . . . upon whom a law shall take effect cannot be delegated," an examination of the cases indicates that the court has permitted arrangements which come very close to such delegation. For instance, in *Thomas v. Housing & Redev. Authority*<sup>190</sup> the Minnesota Housing and Redevelopment Act was challenged on the ground that a delegation to the commissioner of administration of the power to determine who were eligible low-income families was unconstitutional. The court found the act to be constitutional since the duty imposed upon the commissioner was purely ministerial; he had only to determine eligibility upon a calculation of "net family income falling within the lowest 20 percent by number of all family incomes in the area of operation"<sup>191</sup> and this position was not altered by a power granted to the commissioner to modify this statutory standard where the commis-

189. *Johnson v. Richardson*, 197 Minn. 266, 266 N.W. 867 (1936); *State ex rel. Benson v. Board of County Comm'rs*, 186 Minn. 524, 243 N.W. 851 (1932). In *Cook v. Trovatten*, 200 Minn. 221, 274 N.W. 165 (1937), officials were empowered to collect delinquent real estate taxes by distraintment of rentals due the owner from tenants of the property. It was totally discretionary with the officials when and where they would apply the remedy, if at all, but the statute was upheld against the claim that it amounted to an unconstitutional delegation of power. This discretion was justified, according to the court, because of the necessity of keeping the remedies flexible to fit varying situations.

190. 234 Minn. 221, 48 N.W.2d 175 (1951).

191. MINN. STAT. § 462.491 (1957).

sioner believed such modification of the standard was necessary "to make satisfactory progress in the provision of low-rent housing . . . ." <sup>192</sup> With this kind of authority behind them the court had no trouble a few years later in *Welsand v. Railroad & Warehouse Comm'n* <sup>193</sup> in holding constitutional a rule of the commission which distinguished between common carriers by truck and contract carriers by truck, and applied different rules to each.

Another of the elements of legislative power which presumably cannot be delegated, although the *Delmont* case does not expressly say so, is the power to decide upon the content of the law. It is at this point that there appears the well-worn rule that no constitutional prohibition is violated if the administrative agency simply fills in the details of a plan which the legislature has sufficiently outlined by the provision of adequate standards. <sup>194</sup> The Minnesota court, conceding that "the policy of the law and the standard of action to guide the administrative agencies may be laid down in very broad and general terms," <sup>195</sup> nevertheless appears to insist upon some legislative standard. <sup>196</sup> Upon examination, however, this insistence tends to lose a considerable part of its force, since the court has carried quite far the principle that adequate standards are present in the delegating statutes. For ex-

---

192. *Ibid.*

193. 251 Minn. 504, 88 N.W.2d 834 (1958). Compare *Reyburn v. Minnesota State Bd. of Optometry*, 247 Minn. 520, 78 N.W.2d 351 (1956), in which it was charged that a statute, MINN. STAT. § 148.57 (1957), was unconstitutionally broad because it granted to the Board the right to revoke optometrists' licenses for "unprofessional conduct" and defining the term "unprofessional conduct" by various standards "among other things." The court upheld the statute against the complaint that the phrase "among other things" left the definition up to the whim of the Board. It was the court's view that the term "unprofessional conduct" imported its own standard without more since, as a practical matter, it had a widely understood ethical content.

194. See generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE, § 2.11 (1958); *Fairview Hosp. Ass'n v. Public Bldg. Serv. Union*, 241 Minn. 523, 64 N.W.2d 16 (1954); *Hassler v. Engberg*, 233 Minn. 487, 48 N.W. 343 (1951); *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947); *Johnson v. Richardson*, 197 Minn. 266, 266 N.W. 867 (1936). The clearest statement of the rule occurs in the *Fairview Hospital* case.

195. *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530, 539 (1949). For similar language see *Fairview Hosp. Ass'n v. Public Bldg. Serv. Union*, 241 Minn. 523, 64 N.W.2d 16 (1954); *Welsand v. Railroad & Warehouse Comm'n*, 251 Minn. 504, 88 N.W.2d 834 (1958); *State ex rel. Dison v. Hanson*, 248 Minn. 87, 78 N.W.2d 679 (1956).

196. *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949); *Fairview Hosp. Ass'n v. Public Bldg. Serv. Union*, 241 Minn. 523, 64 N.W.2d 16 (1954); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947).

ample, as early as 1937 the court in *Cook v. Trovatten*<sup>197</sup> had no trouble with a statute which left up to the commissioner of agriculture the right to determine the time, manner and other details of proceedings to rescind wholesale produce dealers' licenses. In *Welsand v. Railroad & Warehouse Comm'n*<sup>198</sup> a power to define classes of truckers was inferred from the mere mention, without further definition, of two such classes in the statute. And in *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*<sup>199</sup> the court had to deal with a statute which conditioned a state license to operate an airport in the metropolitan area upon "approval" and "consent" of the commission. It was contended that the use of these words without more left it entirely at the whim of the commission to approve or deny approval of a local airport as no standards were prescribed in the statute. The court held that the statute was not an unconstitutional delegation of power to the commission, since the requirement of "consent" or "approval" must be interpreted against the background of the broad purposes and powers of the act setting up the commission,<sup>200</sup> and in particular those delegated duties relating to air safety. While this approach is not entirely illogical or unjustified, it does seem to come fairly close, at least in this case, to a judicial attempt at "bootstrap lifting."

While it would undoubtedly be rash to assert that the constitutional requirement of standards is dead, it is certainly true that the court will go to considerable lengths to uphold delegating statutes. It would also be true to say that a statute with no standards at all, either express or implied, would be considered to be an unconstitutional delegation of power. However, it seems unlikely that any statute, enacted with the usual opening statements of policy and with some fairly clearly designated area of application, is likely to be held unconstitutional. A rough, but not by any means sure, test of constitutionality might be to examine the particular statute; if no more than one of the elements of legislative power is left to the discretion of the agency, then there is a pretty good chance that the statute will be held constitutional. It is interesting to note what may possibly be a clue to the court's thinking about this whole problem in the holdings in two of the more recent cases. In both *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*<sup>201</sup> and *Thomas*

---

197. 200 Minn. 221, 274 N.W. 165 (1937).

198. 251 Minn. 504, 88 N.W.2d 834 (1958).

199. 223 Minn. 175, 25 N.W.2d 718 (1947).

200. See MINN. STAT. §§ 360.018(9), 360.11 (1957).

201. 223 Minn. 175, 25 N.W.2d 718 (1947).

*v. Housing & Redev. Authority*,<sup>202</sup> the court upheld a very broad delegation of power on the ground that it could not be held to be illegal since it must be assumed that the grantee of the power will act legally. In the *Thomas* case, for example, the court held that they could not "anticipate that the commissioner will take unconstitutional action under the statutes" and, therefore, would not take any action until he did; this is tantamount to saying that a grant of power is not an illegal grant of power until it is illegally exercised—a novel view indeed. Regardless of the logic of the matter, it may be argued that this type of case indicates that the court is not so much interested in legislative grants of power but, rather, is more inclined to direct its efforts against the unreasonable use of such power after it has been delegated, applying perhaps the well-known tests of arbitrariness, whim, capriciousness, and plain unreasonableness in the premises, which are exactly the tests, of course, that the court would apply to any legislation.

### 3. *Scope of Review Upon Challenge of the Jurisdiction*

The right to challenge the jurisdiction of the administrative body is one which, in theory at least, is amply hedged by constitutional safeguards. As the court said in *Martin v. Wolfson*:<sup>203</sup>

The Constitution is a standing guarantee to all litigants that the order or judgment of any board, commission, or court must fall, whenever attacked, upon a showing that fundamental requirements have not been observed.

Whatever be the character of a particular administrative act, whether executive, quasi-judicial, or quasi-legislative, its legality may be inquired into by a court, even in a collateral proceeding.

It follows that some kind of redress exists to review administrative action allegedly in excess of power no matter what the nature of the administrative act. For those administrative acts which are quasi-judicial (at least classified as such for purposes of review) there is review by way of certiorari; where certiorari is inapplicable, the recourse is to some form of statutory review or review through the extraordinary remedies including injunction and declaratory judgment. It is not enough, however, simply to say that if there is some form of challenge of the power of the administrative agency to act there is an obvious remedy at hand. For while

202. 234 Minn. 221, 48 N.W.2d 175 (1951). See also *Krakowski v. City of St. Cloud*, 257 Minn. 415, 101 N.W.2d 820 (1960). In the latter case, the court applied the presumption to imply that the city mayor's assistant was duly authorized to act for the mayor in discharging the plaintiff, where such authority did not appear affirmatively in the record.

203. 218 Minn. 557, 566, 16 N.W.2d 884, 889 (1944).

the court is generally sympathetic, there are problems of various sorts which bear upon the scope of judicial review.

In that great mass of cases which are reviewed by writ of certiorari, there is no doubt of the power of the court to determine whether the administrative agency has the power to act,<sup>204</sup> and it makes no difference whether this potential lack of power is lack of power in the sense of total lack of power, or whether it is lack of power in the sense of excess of granted power.<sup>205</sup> Chiefly, however, the problem involved is one of the record, for the court on certiorari cannot look *dehors* the record to make its determination. Therefore, if jurisdiction is to be challenged by certiorari, the lack of jurisdiction must be at the very least inferable from the record.<sup>206</sup> In this connection it is important to note that the record includes more than just the transcript of testimony; under the expanded concept of the office of the writ the extent of the return which must be made to the writ has expanded also, so that it includes the record, proceedings in the nature of the record, the rulings of the inferior tribunal, and the evidence.<sup>207</sup> Even though this kind of return gives the appellant considerably more material than formerly out of which to spell lack of jurisdiction, the rule that there can be no evidence *dehors* the record precludes any challenge by the appellant to the completeness of the return.<sup>208</sup> Some question then may be raised concerning the course of action

---

204. *Anchor Cas. Co. v. Bongards Co-op. Creamery Ass'n*, 253 Minn. 101, 91 N.W.2d 122 (1958); *State ex rel. Anoka County Airport Protest Comm'n v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 248 Minn. 134, 78 N.W.2d 722 (1956); *Western Auto Supply Co. v. Commissioner*, 245 Minn. 346, 71 N.W.2d 797 (1955); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947); *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942); *State ex rel. Benson v. Board of County Comm'rs*, 186 Minn. 524, 243 N.W. 851 (1932); *State ex rel. Dybdal v. Commissioner*, 145 Minn. 221, 176 N.W. 759 (1920).

205. *State ex rel. Anoka County Airport Protest Comm'n v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 248 Minn. 134, 78 N.W.2d 722 (1956); *Anchor Cas. Co. v. Bongards Co-op. Creamery Ass'n*, 253 Minn. 101, 91 N.W.2d 122 (1958). No certiorari case makes any such distinction between lack of power and excess of power. It should be pointed out that the lines between the various grounds justifying certiorari are always vague; lack of power shades into excess of power, which shades into arbitrary action, which shades into no substantial evidentiary support.

206. *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81 (1951); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949). See 21 DUN. DIG., *Workmen's Compensation*, § 10426 (3d ed. 1951); *Ramberg v. District Court*, 241 Minn. 194, 62 N.W.2d 809 (1954).

207. *State ex rel. Sholund v. City of Duluth*, 125 Minn. 425, 147 N.W. 820 (1914).

208. *State ex rel. Weich v. City of Red Wing*, 175 Minn. 222, 220 N.W. 611 (1928); *State ex rel. Sholund v. City of Duluth*, 125 Minn. 425, 147 N.W.2d 820 (1914).

to be taken by the unlucky appellant who has elected review by certiorari only to find that the certifying officer has omitted critical materials from his return to the writ. The most obvious, but somewhat devious, course would be to compel the offending officer to complete his return by an action in mandamus (or mandatory injunction, as it is now). The appellant might then be faced with the reluctance of the appellate court to stay certiorari proceedings upon a record which it must consider conclusive pending the coercive proceedings. Minnesota law is quite clear that the administrative agency must develop a sufficient record, and if it is insufficient, the court will remand to the agency with instructions to complete the record.<sup>209</sup>

In the case of the other extraordinary remedies, there is no question of their ability to reach and test questions of jurisdiction. The only difficult point here involved comes in the application of quo warranto, which applies to test the right of an officer to exercise a power (complete lack of jurisdiction), but does not apply where the officer is merely exceeding a power already granted.<sup>210</sup> This is not an easy line to distinguish, of course; other extraordinary remedies are not so fussy, and are willing to challenge jurisdiction on any basis. One of the points not to be overlooked is that in many instances this attack on jurisdiction through extraordinary remedies (except certiorari) is a collateral attack, and there seems to be no particular objection to this mode of attack by the court. As the court noted in *Martin v. Wolfson*, "Whatever be the character of an administrative act . . . its legality may be inquired into by a court, even in a collateral proceeding."<sup>211</sup> Mandamus may be used, for instance, to challenge the legal right of municipal authorities to discharge an employee;<sup>212</sup> to challenge the legal right of a city council to change the basis of a municipal judge's compensation;<sup>213</sup> to challenge the legality of a tax forfeiture;<sup>214</sup> or to compel reinstatement of a state employee discharged without statutory authority.<sup>215</sup> The same is true of the remedy by way of quo

209. *Minneapolis St. Ry. v. City of Minneapolis*, 251 Minn. 43, 86 N.W.2d 657 (1957); *Festler v. Wallach*, 245 Minn. 222, 71 N.W.2d 836 (1955); *Hunter v. Zenith Dredge Co.*, 220 Minn. 318, 19 N.W.2d 795 (1945).

210. See 37 MINN. L. REV. at 4.

211. 218 Minn. 557, 566, 16 N.W.2d 884, 889 (1944).

212. See *State ex rel. McCauley v. Warren*, 195 Minn. 180, 261 N.W. 857 (1935).

213. See *State ex rel. Child v. City of Waseca*, 195 Minn. 266, 262 N.W. 633 (1935).

214. See *Farmers & Merchants Bank v. Billstein*, 204 Minn. 224, 283 N.W. 138 (1938).

215. See *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 253, 32 N.W.2d 583 (1948).

warranto.<sup>216</sup> Prohibition, although in many respects merely an anticipation of certiorari, is designed for the express purpose of challenging jurisdiction *in limine*. However, by its very nature it generally does not involve collateral attack, but rather a direct attack upon jurisdiction.<sup>217</sup> However, in a proper case prohibition can involve collateral attack, as in the case of *Ramberg v. District Court*,<sup>218</sup> in which prohibition was sought to restrain the district court from proceeding further in an action in mandamus to compel the plaintiff, the Minnesota Industrial Commission, to fix wage rates in accordance with law. The Commission had already fixed certain wage rates which, it was contended, were void because the Commission had neglected certain formal prerequisites to such wage-fixing, and the action, therefore, called this jurisdictional point into question. Injunction has also been used for the purpose of collateral attack upon jurisdiction.<sup>219</sup>

The extraordinary remedies are not the only means of attacking the jurisdiction of an administrative body, since under recognized principles the same result may be obtained by collateral attack on jurisdiction in a civil suit, either by way (typically) of defense to enforcement of administrative orders<sup>220</sup> or by way of an attempt to enforce some kind of liability in the face of a contrary administrative ruling. As usual the situation here is not completely clear, since under well recognized principles of Minnesota law collateral attack can reach only judgments or administrative action which are either unconstitutional or are made by a body without jurisdiction.<sup>221</sup> It is not so difficult to decide cases on the

---

216. See *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N.W. 175 (1902); *State ex rel. Clapp v. Fidelity & Cas. Ins. Co.*, 39 Minn. 538, 41 N.W. 108 (1888); *State ex rel. Lindholm v. Parker*, 25 Minn. 215 (1878).

217. See *State ex rel. Minnesota Amusement Co. v. County Bd.*, 255 Minn. 413, 96 N.W.2d 580 (1959); *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 93 N.W.2d 1 (1958), *cert. denied*, 359 U.S. 909 (1959); *State ex rel. Adent v. Industrial Comm'n*, 234 Minn. 567, 48 N.W.2d 42 (1951); *Nemo v. Hotel & Restaurant Employees' Local 556*, 227 Minn. 263, 35 N.W.2d 337 (1948); *Arrowhead Bus Serv., Inc. v. Black & White Duluth Cab Co.*, 226 Minn. 327, 32 N.W.2d 590 (1948).

218. 241 Minn. 194, 62 N.W.2d 809 (1954). See also *State ex rel. Sheehan v. District Court*, 253 Minn. 462, 93 N.W.2d 1 (1958).

219. *Slingerland v. Norton*, 59 Minn. 351, 61 N.W. 322 (1894); *Todd v. Rustad*, 43 Minn. 500, 46 N.W. 73 (1890).

220. *Martin v. Wolfson*, 218 Minn. 557, 16 N.W.2d 884 (1944).

221. *Martin v. Wolfson*, 218 Minn. 557, 16 N.W.2d 884 (1944). In this case the court notes the difficulty of permitting collateral attack upon all points, and says:

A rule which subjects an administrative order to the vicissitudes of indiscriminate attack in controversies between individuals as they arise can bring forth a variety of results, none of them final as between the next set of litigants. Only by adopting a rule limiting to jurisdictional and constitutional questions the right to attack such order

constitutional issue, but it is often very difficult to draw a line between lack of jurisdiction and excess of power; in the latter case, of course, collateral attack is not permitted under the rationale of the cases.<sup>222</sup> To the extent that this point is unclear, it places appellants at the hazard of selecting the wrong, or a premature, remedy.

A question of jurisdiction may be raised at any stage of the proceedings—even upon appeal, although no objection was raised in the course of administrative proceedings.<sup>223</sup> This is a necessary corollary of the proposition that jurisdictional questions may be raised by collateral attack.<sup>224</sup>

It is safe to say that jurisdiction of an administrative body to make a rule or decision can always be challenged in some manner, at least so long as the charge of lack of jurisdiction rests upon firm foundations of complete lack of power. The only borderline cases, where the litigant may involve himself in difficulties, are the situations in which lack of jurisdiction is defined as an *ultra vires* exercise of power, and even those are assailable in a proper action or appeal, such as *certiorari*. It, therefore, behooves the appellant to select the appropriate remedy within the designated time for appeal.

#### 4. *Challenge of Administrative Action on the Ground of Arbitrary Action*

One of the grounds upon which administrative action may be challenged is that the action of the administrative agency is so whimsical, arbitrary or capricious that it represents no exercise of administrative discretion at all. Quite obviously this challenge is closely akin to the charge of lack of jurisdiction because of *ultra vires* activity, although it is stated as a separate ground of appeal. Cases under this heading are comparatively few, but they may be grouped into two general categories: those cases which approach the problem from the point of view that the arbitrary activity of

---

in a collateral action can there be such uniformity in interpretation and application of administrative orders as public policy demands. *Id.* at 563-64, 16 N.W.2d at 888. The constitution itself guarantees the right to collateral attack for jurisdictional or constitutional question, and when such a question exists, there is no further question of the nature of the administrative action. "Whatever be the character of a particular administrative act, whether executive, quasi-judicial, or quasi-legislative, its legality may be inquired into by a court, even in a collateral proceeding. . . ." *Id.* at 566, 16 N.W.2d at 889.

222. *Dunn v. Schmid*, 239 Minn. 559, 60 N.W.2d 14 (1953).

223. *State ex rel. Adent v. Industrial Comm'n*, 234 Minn. 567, 48 N.W.2d 42 (1951).

224. *Martin v. Wolfson*, 218 Minn. 557, 16 N.W.2d 884 (1944).

the agency vitiates the administrative act, leaving the whole matter to be collaterally attacked by a mandamus action to compel the agency to act (exercise its discretion);<sup>225</sup> and those cases which review the action of the administrative agency by one of the other extraordinary remedies, which constitute a more or less direct attack on agency action. Of these the most common form of attack is by certiorari,<sup>226</sup> or to the same extent under the appeals statutes.<sup>227</sup> Of course, in the certiorari cases the action of the agency must have the requisite quasi-judicial character; where the activity is quasi-legislative, injunction will lie to test the arbitrary nature of exercise of discretion.<sup>228</sup>

Questions of abuse of discretion, however, represent something of a move away from the comparatively clear-cut questions of jurisdiction and to the extent that this is so, courts become involved in value assessments concerning the weight to be given to the objective circumstances of administrative adjudication or rule-making. Assessment of such matters is not the kind of speculation which judges care to make if some kind of formula affords escape; therefore, the degree of penetration of judicial review in this particular area is limited by perfectly predictable rules concerning the presumptive regularity of administrative proceedings. The burden is, therefore, definitely on the party asserting the abuse of discretion to prove such abuse.<sup>229</sup> Sometimes the same result is reached by asserting that the administrative agency has broad discretion and deference must therefore be paid to the opera-

---

225. See *State ex rel. Gopher Sales Co. v. City of Austin*, 246 Minn. 514, 75 N.W.2d 780 (1956); *State ex rel. So. St. Paul v. Hetherington*, 240 Minn. 298, 61 N.W.2d 737 (1953); *Zion Evangelical Lutheran Church v. City of Detroit Lakes*, 221 Minn. 55, 21 N.W.2d 203 (1945).

226. See *State ex rel. City of Minneapolis v. Minneapolis St. Ry.*, 238 Minn. 218, 56 N.W.2d 564 (1952); *Northern Pac. Ry. v. Village of Rush City*, 230 Minn. 144, 40 N.W.2d 886 (1950); *Stepan v. J.C. Campbell Co.*, 228 Minn. 74, 36 N.W.2d 401 (1949); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947).

227. See *In re Applications of Minneapolis and St. Paul St. Ry.*, 228 Minn. 435, 37 N.W.2d 533 (1949); *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942); *State ex rel. Dybdal v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759 (1920). See generally 1 DUN. DIG., *Appeal & Error*, § 397(b) (3d ed. 1951, Supp. 1959).

228. See *Nielson v. City of St. Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958); *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951).

229. *Range Oil Supply Co. v. Chicago, R.I. & Pac. R.R.*, 248 F.2d 477 (8th Cir. 1957); *Northern Pac. Ry. v. City of Duluth*, 243 Minn. 84, 67 N.W.2d 635 (1954); *State ex rel. Interstate Air-Parts, Inc. v. Minneapolis-St. Paul Metropolitan Airports Comm'n*, 223 Minn. 175, 25 N.W.2d 718 (1947).

tion of the agency's judgment within these limits.<sup>230</sup> In effect, this approach permits decisions of doubtful nature to pass the scrutiny of the court, but the danger is that the court may sometimes unjustifiably enlarge the limits of discretion in order to avoid the painful necessity of overturning some administrative decision (usually in the legislative field). In other words, the tests applied by the court in the matter of abuse of discretion are subjective in nature and, for that reason, not entirely satisfactory, although it seems difficult to attempt any other approach. Some comfort may be derived from the thought that courts have applied their judgment analogously to the question of abuse of discretion by inferior tribunals as a practice of long standing,<sup>231</sup> and it may be inferred that the same judicial attitude carries over to the assessment of administrative actions. On the positive side, the situation is one of those case-by-case empirical matters, which common-law courts have handled with considerable success in the history of law. Of course, the charge of abuse of discretion can be raised in other forms of attack, for example, under the more restricted challenge that the administrative agency was guilty of the application of an erroneous theory of law, or that the evidence totally fails to support the agency's findings of fact. Both of these circumstances may in aggravated form constitute an abuse of discretion.

##### 5. *Scope of Review Upon Challenge of the Sufficiency of the Factual Base*

Certainly the most frequent of the challenges to administrative action is the charge that administrative action is not supported by the evidence. This type of challenge is for practical purposes and for obvious reasons confined to the type of administrative action, either rule-making or adjudicative, where a record is compiled. By its very nature this challenge confines itself to the record, but it is not to be inferred that the court views the question involved as being a factual one. On the contrary, and in keeping with the theory that the function of the appellate court is to consider matters of law only, the rationale applied by the court is that it can consider the record evidence only to determine its sufficiency *as a matter of law*. Under this theory the court cannot justify any interference with the administrative findings of fact unless the evi-

---

230. *Nielson v. City of St. Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958); *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951).

231. See 1 DUN. DIG., *Appeal & Error*, §§ 382, 399, 400 (3d ed. 1951, Supp. 1959) and cases cited therein.

dence in the record lacks probative force as a matter of juristic logic.<sup>232</sup> What is a matter involving juristic logic seems to be in the end a subjective matter, and since the test to be applied is a subjective one, it follows that the administrative findings are hedged by stout presumptions of regularity and support.<sup>233</sup>

Because the test of sufficiency of evidence is often even more subjective than that of abuse of discretion, which after all is an extreme case, the limits are even less clear and the problems are correspondingly more difficult. Some of this difficulty can be seen in the differing statements of the rule which the court has made from time to time.<sup>234</sup> In the light of these statements it is difficult to start with a formulation of the rule regarding limits of review of evidence. If there is one starting point more firm than any other, it is the often-mentioned deference to administrative expertise in the form of a pervasive presumption that adminis-

---

232. The rule apparently has its origin with the often quoted remarks of Justice Mitchell in *State ex rel. Hart v. Common Council*, 53 Minn. 238, 242, 55 N.W. 118, 119 (1893):

Other courts hold that the evidence may be brought up, not for the purpose of weighing it, to ascertain the preponderance, but merely to ascertain whether there was any evidence at all to sustain the decision of the inferior tribunal,—whether it furnished any legal and substantial basis for the decision. The latter is the doctrine of this court . . . .

The latest complete statement of the proposition is in *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 248, 32 N.W.2d 574, 580 (1948):

The function of the court on certiorari in reviewing the determination of an administrative agency is to decide questions of law raised by the record, but not disputed questions of fact on conflicting evidence. Where there is no evidence to support an administrative finding or the evidence as a matter of law compels a finding contrary to the administrative one, as where the evidence was all one way and the administrative agency found to the contrary, the finding so made constitutes error of law, which it is the duty of the court to reverse.

*Accord*, *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81 (1951); *State ex rel. Dybdal v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759 (1920); *State ex rel. Schafer v. Buckham*, 108 Minn. 8, 121 N.W. 217 (1909).

233. See *In re Application of Land O'Lakes Creameries, Inc.*, 248 Minn. 230, 79 N.W.2d 366 (1956); *Oliver Iron Mining Co. v. Commissioner*, 247 Minn. 6, 76 N.W.2d 107 (1956); *Koktavy v. City of New Prague*, 246 Minn. 550, 75 N.W.2d 774 (1956); *Otter Tail Power Co. v. Village of Wheaton*, 235 Minn. 123, 49 N.W.2d 804 (1951); *Caputa v. Land O'Lakes Creameries, Inc.*, 234 Minn. 514, 48 N.W.2d 895 (1951); *Otter Tail Power Co. v. Village of Elbow Lake*, 234 Minn. 419, 49 N.W.2d 197 (1951); *Honeymead Prods. Co. v. Christgau*, 234 Minn. 108, 47 N.W.2d 754 (1951); *Schmoll v. J. W. Craig Co.*, 228 Minn. 429, 37 N.W.2d 539 (1949); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949); *Judd v. Sanatorium Comm'n*, 227 Minn. 303, 35 N.W.2d 430 (1948); *Amundsen v. Poppe*, 227 Minn. 124, 34 N.W.2d 337 (1948); *Liakos v. Yellow Taxi Co.*, 225 Minn. 34, 29 N.W.2d 481 (1947).

234. See text accompanying notes 51–59 *supra*.

trative fact findings must stand in the face of anything except the most convincing evidence on the other side. But at this point the problems immediately set in, for the court must avoid any implication that it is deciding the facts of the case by determining the preponderance of the evidence. We are left with one clear case—that which occurs where the findings of fact are supported by absolutely no evidence in the record. But beyond this, in spite of protestations, the court must weigh evidence on both sides to decide whether such evidence as there is does, in legal fact, support the findings. It may be going somewhat beyond permissible inference to say so, but in effect the rule may be that the evidence will be examined to determine whether the evidence which purports to support the fact finding, taken in the light of all the record, including opposing evidence, amounts to more than a nullity. If it does, then there is support for the finding. This is the process which the court has characterized as a matter of law and hence, within the reach of certiorari and mandamus,<sup>235</sup> although it should be apparent that the application of the rule involves the use of a subjective calculus based on the relative volume, quality, and internal consistency of the evidence.

In its attempt to state a workable rule the court has used two approaches, the first a positive statement of the rule and the second a negative one. In its positive form the rule is stated as a variation of the rubric that administrative findings will not be disturbed if there is a reasonable and substantial basis in the evidence for the finding.<sup>236</sup> This rule has a number of variations

---

235. This is made explicit in *State ex rel. Dybdal v. State Sec. Comm'n*, 145 Minn. 221, 225, 176 N.W. 759, 761 (1920):

It [the court] can only interfere when it appears that the commission has not kept within its jurisdiction, or has proceeded upon an erroneous theory of the law, or unless its action is arbitrary and oppressive and unreasonable so that it represents its will and not its judgment, or is without evidence to support it. This principle of review is applied when it is sought to review by mandamus or on statutory appeal

236. See *State ex rel. McGinnis v. Police Civil Serv. Comm'n*, 253 Minn. 62, 91 N.W.2d 154 (1958); *State ex rel. Duluth Clearing House Ass'n v. Department of Commerce*, 245 Minn. 529, 73 N.W.2d 790 (1955) ("whether there is any evidence to support the action taken"); *Nyberg v. R. N. Cardozo & Bro.*, 243 Minn. 361, 67 N.W.2d 821 (1954); *Bozied v. Edgerton*, 239 Minn. 227, 58 N.W.2d 313 (1953); *Beck v. Council of the City of St. Paul*, 235 Minn. 56, 50 N.W.2d 81 (1951); *Rinne v. W. C. Griffis Co.*, 234 Minn. 146, 47 N.W.2d 872 (1951); *Honeyamead Prods. Co. v. Christgau*, 234 Minn. 108, 47 N.W.2d 754 (1951); *Nelson v. Reid & Wackman*, 228 Minn. 137, 36 N.W.2d 544 (1949) (evidence "such that the board might reasonably make the order"); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949) ("evidence reasonably tending to sustain the findings"); *Judd v. Sanatorium Comm'n*, 227 Minn. 303, 35

which can be taken to amount to the same thing.<sup>237</sup> The negative statement of the rule is that administrative findings will be disturbed if clearly and manifestly contrary to the evidence.<sup>238</sup> In some cases the court is careful to state the rule both ways.<sup>239</sup> The point about both these tests is that they both indicate some kind of examination of the record in the case followed by a weighing process; but in the case of the "substantial basis" rule there is no indication that the court must consider anything other than the supporting evidence, and no Minnesota case has been found which clearly states that the reasonableness of support must be determined by consideration of all the evidence in the appeal record. On the other hand the "manifestly contrary" rule imports a weighing of all the evidence in the appeal record to determine relative weight.<sup>240</sup>

The whole question of weight of evidence is made more perplexing by a failure on the part of the court to distinguish between law and fact, particularly in those cases which involve so-called mixed questions of law and fact. It is respectfully submitted that such mixed questions of law and fact upon examination turn either into a question of fact or a question of law or two questions, one of law and one of fact. The usual example of a mixed question of law and fact is the matter of employment, often a question

---

N.W.2d 430 (1948); *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 32 N.W.2d 574 (1948); *Chellson v. State Div. of Employment & Security*, 214 Minn. 332, 8 N.W.2d 42 (1943); *State ex rel. Ging v. Board of Educ.*, 213 Minn. 550, 7 N.W.2d 544 (1942); *State ex rel. Rockwell v. State Bd. of Educ.*, 213 Minn. 184, 6 N.W.2d 251 (1942) ("reasonable or substantial basis"); *State ex rel. Hart v. Common Council*, 53 Minn. 238, 55 N.W. 118 (1893) ("without evidence to support").

237. See text accompanying notes 51-59 *supra*.

238. See *McGuire v. Viking Tool & Die Co.*, 258 Minn. 336, 104 N.W.2d 519 (1960); *In re Application of Land O'Lakes Creameries, Inc.*, 248 Minn. 230, 79 N.W.2d 366 (1956); *Koktavy v. City of New Prague*, 246 Minn. 550, 75 N.W.2d 774 (1956); *Graf v. Montgomery Ward & Co.*, 234 Minn. 485, 49 N.W.2d 797 (1951); *Nelson v. Reid & Wackman*, 228 Minn. 137, 36 N.W.2d 544 (1949) (the proposition is stated in the court's syllabus); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949); *Amundsen v. Poppe*, 227 Minn. 124, 34 N.W.2d 337 (1948); *Lading v. City of Duluth*, 153 Minn. 464, 190 N.W.2d 981 (1922).

239. See *McGuire v. Viking Tool & Die Co.*, 258 Minn. 336, 104 N.W.2d 519 (1960); *In re Application of Land O'Lakes Creameries, Inc.*, 248 Minn. 230, 79 N.W.2d 366 (1956); *Koktavy v. City of New Prague*, 246 Minn. 550, 75 N.W.2d 774 (1956); *Nelson v. Reid & Wackman*, 228 Minn. 137, 36 N.W.2d 544 (1949); *Hamlin v. Coolerator Co.*, 227 Minn. 437, 35 N.W.2d 616 (1949).

240. The rule is usually stated in the form that findings will be disturbed only if "manifestly contrary to the evidence." See *McGuire v. Viking Tool & Die Co.*, 258 Minn. 336, 104 N.W.2d 519 (1960); *Koktavy v. City of New Prague*, 246 Minn. 550, 75 N.W.2d 774 (1956). In such cases the court appears to review the record as a whole.

in labor or workmen's compensation cases. Here the question may be, "Was he hired?"—a question of fact; or "Given the surrounding circumstances, was he employed?"—a question calling for a legal conclusion; or, "What were the surrounding circumstances, and does a particular configuration of them amount to employment?"—a question of fact and a question of law. At the outset, it should be noted that there is nothing inherently wrong with review of questions of law upon appeal by certiorari or statutory appeal; such questions fall within the certiorari rule. The vice appears to be in treating a question of law as a question of fact, and thereby applying to it presumptions of validity which it might not enjoy if analyzed as a pure question of law. This has led to peculiar results in several cases. For example, in *Koktavy v. City of New Prague*<sup>241</sup> the appellant brought certiorari to review the order of the Industrial Commission denying him workmen's compensation. The facts were complicated, but the question was a legal one of status of employment. The court referred to the question as one of fact, advertent to the usual tests of support for evidentiary findings, and then reversed the Industrial Commission in the face of what was apparently a fair amount of supporting evidence. It is hard to escape the conclusion that the court was actually treating the whole matter as a matter of law, although its statement of the case was in terms of a matter of fact. A reversal on the law would not be subject to the very rules which the court stated in the body of the opinion.<sup>242</sup> In *Judd v. Sanatorium Comm'n*<sup>243</sup> there were two questions involved. The first one was whether the appellant under all the circumstances was employed; the second was as to the capacity in which she was employed, if the employment relation did exist. The first question appears to be one of law inferable from fact findings based on disputed evidence; the second appears to be a fact question growing out of the evidence directly. However, the court treated both the questions as questions of fact, and on this basis sustained the finding of the commission regarding the legal fact of employment on the basis of the usual presumptions regarding evidence in the record. In

241. 246 Minn. 550, 75 N.W.2d 774 (1956).

242. The court, of course, could substitute its view of the law for that of the commission without the necessity of justifying it on the ground of lack of evidence. Compare *Northern Pac. Ry. v. Village of Rush City*, 230 Minn. 144, 40 N.W.2d 886 (1950), where the court in a similar fashion reversed the Railroad & Warehouse Commission's order eliminating a grade crossing in the Village in the face of what appears to be a substantial amount of credible evidence pro and con.

243. 227 Minn. 303, 35 N.W.2d 430 (1948).

*Nelson v. Reid & Wackman*<sup>244</sup> the rule of substantial support was applied to uphold what was apparently a legal conclusion. The referee in that case denied compensation to an employee on the ground that there was no "statutory notice" to the employer. Appellant argued that this finding (one of fact, of course) applied only to the lack of written notice mentioned in the statute, and that it did not negate actual knowledge on the part of the employer, a circumstance also mentioned in the statute. Invoking the rule of substantial support, the court refused to go back of the term "statutory notice," holding that it was broad enough to cover either kind of notice mentioned in the statute.<sup>245</sup> Quite obviously, interpretation of the statute was a legal matter, as was the effect of the referee's finding in respect thereto.

From this review of the application of the substantial evidence rule in the Minnesota cases it can be inferred that the details of the rule are lacking in precision and that the court proceeds in each case upon some sort of subjective feelings about the state of the evidence. One may speculate as to whether in actual practice the court can do anything else. The court can at the proper time make certain things clear: for example, whether a determination of the probative value of supporting evidence must be made upon an examination not only of the supporting evidence, but of the record as a whole (or all relevant parts of it). However, it seems to be an almost impossible task to define with any success at all the mental processes which the justices must follow in deciding upon the substantiality of evidence, short of a far-reaching behaviorist study. This is, after all, a matter of judicial expertise which has been handled by appellate courts for a long time, and attempts to define or refine are rather likely to be unsuccessful.

#### 6. *Scope of Review Under Proceedings for Declaratory Judgment*

While the remedy of declaratory judgment apparently has somewhat limited application to administrative proceedings as a means of judicial review, except as applied to administrative rules, where it is expressly prescribed as a means of review,<sup>246</sup> it is sufficiently different from other remedies to require separate treatment. Under the chapter of the statutes which provides for the remedy,<sup>247</sup> specific sections grant broad powers to the court to

---

244. 228 Minn. 137, 36 N.W.2d 544 (1949).

245. See also *Graf v. Montgomery Ward & Co.*, 234 Minn. 485, 49 N.W.2d 797 (1951); *Honeymead Prods. Co. v. Christgau*, 234 Minn. 108, 47 N.W.2d 754 (1951).

246. MINN. STAT. § 15.0416 (1957).

247. Uniform Declaratory Judgments Act, MINN. STAT. §§ 555.01-.15 (1957).

adjudicate rights in any situation where there is prejudicial doubt.<sup>248</sup> And while this breadth of power enables a court to review any kind of administrative action, the jurisdiction of the court has its limit in the requirement of a "justiciable controversy."<sup>249</sup> The definition of this term is not without difficulty. A justiciable controversy is predicated upon a judicially protectable right or status in the plaintiff which is placed in jeopardy by the ripe or ripening seeds of an actual controversy.<sup>250</sup> It may be argued that it is tautological to define "justiciable controversy" in terms of a legally protectable right or status, since to identify a right as

248.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be granted.

MINN. STAT. § 555.01 (1957). MINN. STAT. §§ 555.02-.04 (1957) provide for application of declaratory judgment to explicit kinds of cases—contracts, statutes, and in connection with wills and estates. MINN. STAT. § 555.05 (1957) then expressly provides that the enumeration of the previous sections is not to be deemed to limit the general power granted in the first section; this view has been given judicial sanction in *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944).

249. This limitation is nowhere found in the statute, but is derived from the classic statement of the limits of judicial power under the constitutional grant of judicial power to the courts. See *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102 (1934); MINN. CONST. art. 6, § 1 provides:

The judicial power of the state is hereby vested in a supreme court, a district court, a probate court, and such other courts, minor judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish.

250. The statement in the text is a paraphrase of the language used in *Minneapolis Fed'n of Men Teachers v. Board of Educ.*, 238 Minn. 154, 157, 56 N.W.2d 203, 205 (1952):

Clearly, in order to constitute a justiciable controversy, there need not be such an actual right of action in one party against the other as would justify a granting of consequential relief but only a right on the part of the complainant to be relieved of an uncertainty and insecurity arising out of an actual controversy with respect to his rights, status, and other legal relations with an adversary party. Jurisdiction exists to declare the rights, status, and other legal relations of the parties if the complainant is possessed of a judicially protectible right or status which is placed in jeopardy by the ripe or ripening seeds of an actual controversy with an adversary party. . . .

An even more complete definition of the term "justiciable controversy" is found in *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946):

Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing litigants. Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy.

Perhaps it is of little importance to point out the difficulties of a definition which includes as one of its terms the desideratum itself—the existence of a legal right.

legally protectable is to say that it is justiciable and to say that it is justiciable is to say that it is legally protectable. To define justiciable controversy in terms of legal right is therefore to indulge in *petitio principii*. However this may be, this definition on its face implies an even further elaboration in order to explain when there is a controversy, which in turn depends upon either or both of two factors. The first of these is the relative remoteness of the plaintiff's interest in the subject matter of the alleged dispute;<sup>251</sup> the other is the relative ripeness of the threat to plaintiff's right or status.<sup>252</sup> The first of these factors relates more nearly to the problem of standing to invoke the court's aid to review, but the second is closely related to the problem of scope of review. Complete absence of a threat means that there is no justiciable controversy, as in the case of *State ex rel. Smith v. Haveland*<sup>253</sup> in which the plaintiff, as a taxpayer, sought to compel action by the deputy county auditor which would have been *adverse* to the plaintiff. In addition, the scope of review of administrative action is circumscribed by the selection of parties defendant, since the court cannot grant declaratory relief against threats posed by parties who are not before the court.<sup>254</sup> In a fairly typical case, *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*,<sup>255</sup> declaratory relief was granted over the objection of "no justiciable controversy" in a case where the plaintiff, a fireman about to retire, had been unofficially informed by the defendant that upon his retirement he would be ineligible for benefits. The alternative nature of declaratory relief,<sup>256</sup> added to its anticipatory nature and object,<sup>257</sup> has permitted its use as an alternative to pursuit of administrative remedies.<sup>258</sup>

251. *Minneapolis Fed'n of Men Teachers v. Board of Educ.*, 238 Minn. 154, 56 N.W.2d 203 (1952); *State ex rel. Smith v. Haveland*, 223 Minn. 89, 25 N.W.2d 474 (1946).

252. *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Arens v. Village of Rogers*, 240 Minn. 386, 61 N.W.2d 508 (1953), *appeal dismissed*, 347 U.S. 949 (1954); *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944).

253. 223 Minn. 89, 25 N.W.2d 474 (1946).

254. *Frisk v. Board of Educ.*, 246 Minn. 366, 75 N.W.2d 504 (1956).

255. 218 Minn. 27, 15 N.W.2d 122 (1944).

256. See MINN. STAT. § 555.01 (1957); MINN. R. CIV. P. 57; *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 15 N.W.2d 122 (1944).

257. The court has recognized the anticipatory nature of the remedy by pointing out its efficacy "before disputes become serious or well-nigh irremediable." *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 31, 15 N.W.2d 122, 124 (1944).

258. *Connor v. Township of Chanhassen*, 249 Minn. 205, 81 N.W.2d 789 (1957); compare *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955).

As stated above, the remedy of declaratory judgment can be applied in a proper case to review any kind of administrative action.<sup>259</sup> But in doing so the court cannot transcend the limits prescribed by the constitution and custom. Therefore, while administrative proceedings may be attacked on the ground that they are authorized by an unconstitutional statute,<sup>260</sup> or on the ground that such proceedings are illegal because not in accordance with the authorizing statute,<sup>261</sup> the remedy of declaratory judgment may be used to challenge administrative or executive discretion only if its exercise is capricious or arbitrary.<sup>262</sup> Administrative acts which are purely ministerial may be attacked only if they are contrary to law.<sup>263</sup> A suit for declaratory relief may be brought against the state if the purpose is to clarify the operation of a regulation affecting the plaintiff, even if the incidental effect is to charge the state with a financial burden.<sup>264</sup> In general, it can be concluded that the rules which apply to the certiorari type of review also apply to declaratory relief with the exception that under the certiorari type of review the objectionable matter must appear from the record, whereas there is no such limitation upon review by declaratory judgment. No cases have been decided in Minnesota where declaratory judgment has been used by a party aggrieved to review adjudicatory administrative action (although declaratory judgment has been used *in lieu of* such action in *Connor v. Township of Chanhassen*<sup>265</sup>); therefore, nothing can be said concerning

259. See *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W.2d 633 (1960); *Frisk v. Board of Educ.*, 246 Minn. 366, 75 N.W.2d 504 (1956); 37 MINN. L. REV. at 20.

260. *Reyburn v. Minnesota State Bd. of Optometry*, 247 Minn. 520, 78 N.W.2d 351 (1956); *Arens v. Village of Rogers*, 240 Minn. 386, 61 N.W.2d 508 (1953), *appeal dismissed*, 347 U.S. 949 (1954); *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949).

261. *Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 79 N.W.2d 428 (1956); *Minneapolis Fed'n of Men Teachers v. Board of Educ.*, 238 Minn. 154, 56 N.W.2d 203 (1952); *Nollet v. Hoffmann*, 210 Minn. 88, 297 N.W. 164 (1941).

262. *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W.2d 633 (1960); *Ketterer v. Independent School Dist. No. 1*, 248 Minn. 212, 79 N.W.2d 428 (1956); *Frisk v. Board of Educ.*, 246 Minn. 366, 75 N.W.2d 504 (1956).

263. See *Nollet v. Hoffmann*, 210 Minn. 88, 297 N.W. 164 (1941).

264. *Ibid.* The case involved a suit by an employee of the highway department to interpret a ruling made by the commissioner pursuant to statutory authority and covering the matter of vacation pay. A determination of eligibility of the plaintiff would have incidentally imposed a financial obligation on the state to pay for vacation time not actually taken. Nevertheless, the court was of the opinion that the suit was not one against the state.

265. 249 Minn. 205, 81 N.W.2d 789 (1957). The plaintiff had the choice of either bringing an action for a declaratory judgment or of pursuing

the possibility of reviewing this type of administrative action by declaratory judgment. It would seem logical to presume that declaratory judgment would be available to review such action through charges of lack of jurisdiction, unconstitutionality of statute, erroneous application of law, and abuse of discretion; on the other hand, a declaratory judgment action would seem to be a long way around to obtain review for lack of substantial evidence. It may be argued that declaratory relief would be available in all such cases where recourse to further administrative relief or to regular appeal procedures is cut off by lapse of time and the plaintiff is now threatened by enforcement procedures. In *Starkweather v. Blair*<sup>266</sup> a somewhat similar situation arose. Starkweather, a state employee, was laid off because a legislative appropriation bill explicitly provided that no part of the funds were to be used to pay his salary. He did not appeal the decision to the Civil Service Board, but instead brought a suit to have his civil service status declared by the court, alleging that through a special fund there was money available to pay his salary. The court held that the suit was not barred by plaintiff's failure to pursue his administrative remedies, but appeared to place its decision upon the ground that plaintiff could not have been granted relief through administrative proceedings because he was asserting the unconstitutionality of the appropriation act, and the Civil Service Board was incompetent to hear such an objection. The court did not consider the point that the plaintiff, upon administrative refusal to hear his case, could have had the point decided by the court upon certiorari; the case, therefore, stands for the proposition that pursuit of administrative remedies is not required where it is futile to do so. This leaves the question whether this rule will be extended to permit the use of declaratory judgment action when administrative relief is not only futile but impossible. Since the *Connor* case suggests that in some instances declaratory judgment can preclude recourse to administrative agencies entirely, it would appear that the implication of these two cases leaves a large open-ended area in the field of review by declaratory judgment.

---

administrative remedies, in this case by attempt to get a variance from a zoning ordinance. The court was doubtlessly influenced by the fact that a substantial fine for violation accrued from day to day, thus putting the plaintiff to a substantial hazard if he should choose the administrative route and ultimately lose.

266. 245 Minn. 371, 71 N.W.2d 869 (1955).

### 7. Scope of Review as Limited by the Extent of Permissible Judicial Relief

One of the ubiquitous offspring of the constitutional provision on separation of powers<sup>267</sup> is the limitation upon the authority of the court to prescribe relief upon review of administrative action. The logic of this position, assuming the constitutional separation of powers, is unassailable—it is not the province of the court to trespass upon either legislative or executive prerogative; therefore, review of administrative action must not include, in the guise of relief, action which would amount to trespass upon one of the coordinate preserves. The province of the court is law and law alone; upon appeal to it, it can pass only on legal points. Its choice in cases of appeal or certiorari or mandamus is either to affirm, in which case the matter is at an end, or to reverse.<sup>268</sup> The court cannot direct discretionary action of the administrative body, since this would be an unconstitutional substitution of its judgment for that of the administrative body.<sup>269</sup>

The question then arises, what is the effect upon the administrative body of such a reversal? The effect is best stated in *State ex rel. Spurck v. Civil Serv. Bd.*<sup>270</sup> where the court said:<sup>271</sup>

It is sometimes said that on certiorari the judgment should either affirm or reverse (quash) the proceedings brought up for review. This is not a strictly accurate statement of the rule. A remand by the court to an administrative agency upon reversal of the latter's determination does not dismiss or terminate the administrative proceedings. The administrative agency is bound by the court's decision on questions of law . . . . Where the judgment is one reversing the determination of an administrative agency, the case should be remanded for further proceedings according to law. While questions of fact and policy are for administrative and not judicial determination, the courts have power to determine questions of law. . . . Where the court's decision determines the rule of law governing subsequent administrative proceed-

---

267. MINN. CONST. art. 3, § 1. See note 120 *supra* and accompanying text.

268. The basic rationale is stated in *State ex rel. Dybdal v. State Sec. Comm'n*, 145 Minn. 221, 176 N.W. 759 (1920). Specifically, on limitation of the power of the court to affirmance or reversal, see *Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc.*, 239 Minn. 284, 58 N.W.2d 723 (1953); *State v. Northern Pac. Ry.*, 229 Minn. 312, 39 N.W.2d 752 (1949); *Arrowhead Bus. Serv., Inc. v. Black & White Duluth Cab Co.*, 226 Minn. 327, 32 N.W.2d 590 (1948); *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 32 N.W.2d 574 (1948).

269. See cases cited in note 268 *supra* and *School Dist. No. 1 v. Lindhe*, 195 Minn. 14, 261 N.W. 486 (1935); *Rockne v. Olson*, 191 Minn. 310, 254 N.W. 5 (1934); *Cooke v. Iverson*, 108 Minn. 388, 122 N.W. 251 (1909). See also 3 DUN. DIG., *Constitutional Law* § 1593 (3d ed. 1951).

270. 226 Minn. 240, 32 N.W.2d 574 (1948).

271. *Id.* at 251, 32 N.W.2d at 581.

ings, its decision is not a mere "gesture," but rather a final and indisputable basis of action in all further proceedings.

The court has directly held that a reversal by the court, even without any express order for remand in its judgment, operates as a remand and the administrative body is to act accordingly.<sup>272</sup> Where the court's determination of the law is conclusive of the case, as in a case where the court finds the administrative body to be without jurisdiction or its application of the law to be erroneous, this would terminate administrative proceedings effectively.<sup>273</sup> However, in a case where the evidence has been found to be insufficient to support the findings of fact, remand to the agency would in most cases leave it open to the agency to repair its position by further proceedings;<sup>274</sup> the same alternative would be open in cases of abuse of discretion or of failure to follow prescribed procedures. One interesting and logical result of the general rule concerning judicial power is that the court must either affirm or reverse (remand) the administrative order as a whole, since affirmance of a part of an order amounts to a revision of it, thereby carrying into effect by indirection that which the court cannot do directly.<sup>275</sup>

The constitutional requirement of separation is effective also in regard to the other means of review of administrative action—injunction and prohibition. Since quo warranto is used to attack jurisdiction by questioning the authority of the agency as a legal matter, it is obviously not involved here. Injunction, therefore, will not be permitted to control the *discretionary* acts of administrative officers acting within the scope of duly delegated legislative or executive authority. However, an opposite result is indicated where such acts are without authority, or in excess of it, and the other prerequisites for equitable relief are present.<sup>276</sup> Of course, an administrative official cannot be enjoined from performing a legal ministerial act which he had a duty to do.<sup>277</sup> And although the court has wavered somewhat in the past,<sup>278</sup> it now appears

272. *Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc.*, 239 Minn. 284, 58 N.W.2d 723 (1953).

273. *State ex rel. Spurck v. Civil Serv. Bd.*, 226 Minn. 240, 32 N.W.2d 574 (1948).

274. See text accompanying note 209 *supra*.

275. *Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc.*, 239 Minn. 284, 58 N.W.2d 723 (1953); *State v. Northern Pac. Ry.*, 229 Minn. 312, 39 N.W.2d 752 (1949).

276. *School Dist. No. 1 v. Lindhe*, 195 Minn. 14, 261 N.W. 486 (1935); *Rockne v. Olson*, 191 Minn. 310, 254 N.W. 5 (1934); *Cooke v. Iverson*, 108 Minn. 388, 122 N.W. 251 (1909).

277. *Cooke v. Iverson*, 108 Minn. 388, 122 N.W. 251 (1909).

278. *Cooke v. Iverson*, 108 Minn. 388, 122 N.W. 251 (1909), discusses

clear that injunction will lie even against constitutional officers of the state, at least since *Rockne v. Olson*,<sup>279</sup> where Justice Stone said:<sup>280</sup>

Therein is no derogation of the independence of the governor, the attorney general, the auditor, and the treasurer of the state in their respective fields as constitutional executive officers of the state. Within the constitutional limits of their jurisdiction they have an independence of official action no less complete and no less important than that of the judiciary. But when litigation properly presents a question whether proposed administrative action of an executive or administrative official is within the law, constitutional or statutory, both the subject of inquiry and the duty of decision are at once and automatically removed from the field of executive to that of judicial action and duty.

An exception is made for questions which are purely political.

The writ of prohibition is limited in its scope to prevent judicial or quasi-judicial actions which are illegal; therefore, the writ cannot be used against threatened administrative action which is classified under any other head, including acts which are ministerial, quasi-legislative, or administrative.<sup>281</sup>

---

a number of previous cases in the development of the law. See also *School Dist. No. 1 v. Lindhe*, 195 Minn. 14, 261 N.W. 486 (1935); 37 MINN. L. REV. at 21.

279. 191 Minn. 310, 254 N.W. 5 (1934).

280. *Id.* at 313, 254 N.W. at 7.

281. *Nemo v. Hotel & Restaurant Employees Local 556*, 227 Minn. 263, 35 N.W.2d 337 (1948); *O'Neill v. Kallsen*, 222 Minn. 379, 24 N.W. 2d 715 (1946). The court stated the matter as follows in *O'Neill v. Kallsen*, *supra* at 381-82, 24 N.W.2d at 716.

In no case is the writ available to prevent courts, corporations, officers, or individuals from performing a purely ministerial act that is neither judicial nor quasi-judicial in its nature. It will not issue to restrain individuals or nonjudicial bodies from exercising purely political, legislative, or administrative functions.

