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JUDICIAL CONTROL OF ADMINISTRATIVE ACTION BY MEANS OF THE EXTRAORDINARY REMEDIES IN MINNESOTA*

By STEFAN A. RIESENFELD,** JOHN A. BAUMAN,*** and RICHARD C. MAXWELL****

IV.
CERTIORARI

A. TYPE OF ADMINISTRATIVE ACTION SUBJECT TO CONTROL BY CERTIORARI

Next to the writ of mandamus, which is the most versatile and frequently applied means of judicial control of administrative action in Minnesota, ranks the writ of certiorari in importance as a method of judicial review by means of the extraordinary remedies. As a matter of fact, owing to the constant expansion of governmental functions coupled with the development of modern administrative techniques the field controlled by certiorari gradually seems to outstrip in significance that reserved to its rival mandamus.

The appropriateness of certiorari as a means of judicial control of administrative action in Minnesota is essentially predicated on the fact that the supreme court has not confined this remedy to its narrow and technical common law "office," but has construed the statutory writ as "a certiorari with increased scope."

This increased scope manifests itself both in respect to the type of action subject to control by certiorari and to the extent of control in the cases where it is available. The first aspect of this

*For prior installment see 33 Minn. L. Rev. 569 (1949).
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223. The Minnesota Central R. R. Co. v. McNamara, 13 Minn. 508, 513 (1868).
extension will be in connection with the subject of the present subsection while the second remains reserved for discussion in the following subsection.

1. Necessity of an administrative action of quasi-judicial character.

In the absence of a specific statutory provision modifying the general rule certiorari will lie to review administrative action of a "quasi-judicial" character. In that respect Minnesota follows the general trend of Anglo-American law which has gradually, though commencing at a comparatively early date, expanded the scope of the writ.

The leading Minnesota case on that point is In re Wilson, in which Mr. Justice Mitchell made the following statement:

"Originally, and in English practice, a certiorari was an original writ issuing out of the court of chancery or king's bench, directed to the judges or officers of an inferior court, commanding them to certify or return the records or proceedings in a cause before them, for the purpose of a judicial review of their action. In the United States, the office of this writ has been extended, and its application is not now confined to the decision of courts, properly so called, but it is also used to review the proceedings of special tribunals, commissioners, magistrates, and officers of municipal corporations exercising judicial powers, affecting the rights or property of the citizen, when they act in a summary way, or in a new course different from that of the common law."^225

a. Criteria which identify administrative action as quasi-judicial.

The properties of an act which characterize it as quasi-judicial are not easily defined and subject to controversy and confusion.

(1) In the first place it must be observed that the qualifying prefix "quasi" in the adjective "quasi-judicial" which is frequently used in the American cases is a concession to, and necessitated by, the doctrine of separation of powers.

In England, where this constitutional doctrine has no traditional foothold, the rule is usually stated that certiorari is available

^224. The development of English law is discussed by Lord Justices Bankes and Atkin in the leading case of Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co., [1924] 1 K. B. 171 (C.A. 1923). Lord Justice Bankes stated it as follows: "Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word 'Court.' As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies." Id. at 193. Lord Justice Atkin used similar language, id. at 205. The cases which are usually credited with the initiation of this evolution are Rex v. Inhabitants in Glamorganshire, 1 Ld. Raym, 580 (1700), and Case of Commissioners of Sewers for Yorkshire, 1 Strange 609 (1724).

^225. 32 Minn. 145, 150, 19 N. W. 723, 725 (1884).
generally to review the exercise of judicial functions by inferior tribunals, including those designated as special tribunals, and it is now recognized that any administrative tribunal acting judicially is subject to such control. 226 "... it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari..." 227

It must be admitted that in Minnesota, as well as elsewhere in the United States, the courts have not succeeded in developing universally applicable functional criteria (i.e., such that pertain to the effect, the basis, or the method of the determination) which permit a differentiation of judicial and quasi-judicial functions. Negatively it is established that such criteria cannot be found in the fact alone that the particular determination in question necessitates

226. See, particularly, Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co., supra note 224.
227. Rex. v. The London County Council, Ex parte the Entertainment Protection Association [1931] 2 K. B. 215, 233 (C.A.). To prevent an erroneous impression it should be specifically stated that the notion of a special category of quasi-judicial functions has also found acceptance in English case law, official reports and documents and scholarly treatments. It was developed in the wake of the celebrated decision of the House of Lords in Local Government Board v. Arlidge [1915] A. C. 120 (1914) for the purpose of establishing judicially enforceable minimum standards of fairness in certain types of administrative proceedings. Thus the equally famous Report of the Committee on Ministers' Powers (1932, Cmd. 4060) differentiated carefully quasi-judicial decisions as a class distinct both from judicial and purely administrative decisions and saw its distinguishing criteria in the fact that after having ascertained certain facts involved in a dispute between parties by means of a formalized procedure the administrative agency is free to make its final determination thereon according to its discretion, guided by considerations of public policy (ibid. pp. 73, 74). Although not without grumbling, see for instance Marriott v. Minister of Health [1936] L. J. K. B. 125, 129 (1935); In re City of Plymouth Declaratory Order 1946 (1947) K. B. 702, 715 (C.A.), the concept has been adopted in a number of judicial opinions, see Errington v. Minister of Health [1935] 1 K. B. 249, 266, 271; Cooper v. Wilson [1937] 2 K. B. 309, 340 (C.A.); Denby and Sons v. Minister of Health [1936] 1 K. B. 337, 342 The majority of British students of administrative law have been hostile to the notion, but recently Prof. Wade has published an interesting essay in its defense, "Quasi-Judicial" and Its Background, 10 Camb. L. J. 216 (1949), mainly in order to soften the severe blow which the doctrine received from the House of Lords in Franklin v. Minister of Town and Country Planning [1948] A. C. 87 (1947). It should be noted that the English notion of a quasi-judicial function is on the one hand much more restricted than that accepted in the United States, since according to English law administrative officers may sit as truly judicial tribunals and on the other hand embraces functions which in the U. S. would be characterized as quasi-legislative. In the absence of special review provisions, certiorari would apparently also be available in England for the purpose of controlling the legality of the exercise of quasi-judicial functions in the English sense. See the strong dicta to that effect by Greer, L. J., in Errington v. Minister of Health [1935]1 K. B. 249, 265, 266 and the intimations by Viscount Haldane and Lord Parmoor in the Arlidge Case [1915] A. C. 120, 133, 140; but see also the reservations in that respect by Lord Moulton, ibid. 149.
the exercise of judgment or affects individual private rights. Thus Mr. Justice Dibell in upholding a statute against an attack based on the claim that it amounted to an unconstitutional delegation of judicial power stated: "that it [the administrative agency] determines facts or passes upon questions which may affect parties and exercises judgment and discretion does not imply that it has judicial power." Similarly Mr. Justice Olsen commented, when dealing with the same issue: "... the power of administrative and executive officers of the government to hear and determine many matters more or less directly affecting public or private rights, not being in the nature of a suit or of an action between the parties, is not the exercise of judicial power, within the meaning of these constitutional provisions." The qualification of the latter statement seems to imply positively that an adjudication of a controversy between parties amounts to a truly judicial function. But actually this is not correct. An adjudication is not permanently stamped as judicial rather than merely quasi-judicial by virtue of the fact that the type of controversy which constitutes its object once belonged within the jurisdiction of the ordinary courts of justice. This is illustrated in Minnesota by the transfer of the workmen's compensation cases in 1921 from the courts to the Industrial Commission without constitutional amendment. This transfer met no constitutional obstacle and remained unchallenged even after the transition to the compulsory system in 1937. For the same reason it seems more than questionable whether, as apparently has been suggested by Mr. Chief Justice Brown, the exercise of a function can be classified as judicial rather than quasi-judicial in the constitutional sense because it necessitates resort to "a course of judicial reasoning." On the other hand it cannot be accepted,


230. Apparently the Minnesota Supreme Court has not passed specifically on that point since the 1937 amendment.

231. See State ex rel. Nat. Bond & Security Co. v. Dunn, 88 Minn. 444, 93 N. W. 306 (1903). The case involved the validity and application of a statute which required the state auditor to authorize the refundment of taxes whenever a tax certificate presented to him was invalid within the principle of any supreme court decision. It was held that this act could not and did not clothe the officer with the power to determine that question by a course of judicial reasoning and therefore delegated no judicial functions. Nevertheless the case was decided on the merits on certiorari. Whether this is consistent is somewhat dubious, inasmuch as in a similar case which was
although it was intimated by Mr. Justice Streissguth, that there is a distinction between administrative and judicial tribunals based on their "modus operandi," because the former need not observe the procedural standards of the common law courts. Because this distinction, insofar as it exists, is at best a consequence of the existence of two distinct types of tribunals and not a reason for their difference. There are, however, functions which have been classified as quasi-judicial and which, according to strong dicta, nevertheless could not have been conferred upon the courts of justice. The typical example of this type is the exercise of the licensing power. The determination of whether the statutory requisites of fitness, reasonable public demand, etc., are complied with in the case of a particular application is in the first instance the performance of a quasi-judicial function, which cannot be entrusted to the constitutional courts, although the question of its legal—but not of its correct—exercise may be the proper subject of a truly judicial determination. In cases of this type then, both the nature of the issues to be decided and the content of the final act, via., the grant or the denial of the particular privilege, are differentiating functional criteria. But there are apparently other cases where the only remaining basis for a distinction between judicial and quasi-judicial determinations is the tautological and question-begging ground of the nature of the agency which is entrusted therewith; i.e., whether the latter is considered as a court in the constitutional sense or as an administrative agency. It seems to be the law in Minnesota, in contrast, e.g., to California that the separation cited as precedent, mandamus was held to be the proper remedy, State ex rel. Stanchfield v. Dressel, 38 Minn. 90, 35 N. W. 580 (1887).


233. See the discussion and collection of authorities on this point in Hunstiger v. Kilian, 130 Minn. 474, 478, 153 N. W. 869, 871 (1915).


235. Other cases of this type are the dismissal cases. The determination whether an employee under the particular circumstances should be discharged in a quasi-judicial question, while the issue whether he validly could be discharged under given circumstances may be judicial in the constitutional sense. See also State ex rel. Ging v. Board of Education, 213 Minn. 550, 569, 572, 7 N. W. 2d 544, 557, 565 (1942).

236. Compare the criticism by Jennings, Removal from Public Office in Minnesota, 20 Minn. L. Rev. 721, 740 (1936). It may be noted that even the differentiation between truly judicial and quasi-legislative or purely administrative acts on a strictly functional basis is not always easy, State ex rel. Young v. Brill, 100 Minn. 499, 111 N. W. 294, 639 (1907); cf. State ex rel. Board of Comms. of St. Louis County v. Dunn, 86 Minn. 301, 304, 90 N. W. 772, 773 (1902).

237. In California it has been held that in the absence of special constitutional authorization administrative agencies with state-wide jurisdiction
of powers doctrine is not violated by any delegation of adjudicatory functions to an administrative agency, at least as long as judicial review in a court in the constitutional sense remains open.

It may be added that the nebulous doctrine of the United States Supreme Court which apparently permits certiorari under the Federal Judicial Code only with respect to such judicial functions as are exercised by regular "tribunals," whatever this term may imply, does not find a counterpart in the Minnesota decisions.

(2) The adjective "quasi-judicial" is used to differentiate the administrative acts subject to review by certiorari from other types of administrative acts not subject to such review viz., quasi-legislative and purely administrative, particularly ministerial acts.

The Minnesota law in this respect was likewise chartered by Mr. Justice Mitchell through his opinion in In re Wilson.

"The acts of municipal corporations, or rather of municipal officers, are divided into legislative, ministerial, and judicial. Of course, municipal officers do not, strictly speaking, possess judicial powers; but they do possess certain powers, in the exercise of which they perform acts which, both from the nature of the acts themselves and their effect upon the rights or property of the citizen, bear a close analogy to the acts of courts, and are, therefore termed 'judicial,' or quasi 'judicial,' to distinguish them from those that are merely ministerial or legislative. The authorities are

cannot be vested with judicial powers and are, therefore, not amenable to control by certiorari. Standard Oil Co. v. State Board of Equal., 6 Cal. 2d 557, 59 P. 2d 119 (1936); LaRue v. Cal. St. Bd. of Optometry, 19 Cal. 2d 831, 123 P. 2d 457 (1942). This ruling is criticized in McGovney, Administrative Decisions and Court Review Thereof, in California, 29 Calif. L. Rev. 110 (1941); Turrentine, Restore Certiorari to Review State-Wide Administrative Bodies in California, 29 Calif. L. Rev. 275 (1941).

238. Degge v. Hitchcock, 229 U. S. 162 (1913). The decision is actually based on at least four separable grounds: (a) that the Postmaster General in refusing mail service to the petitioners, while "... he may be said to have acted in a quasi-judicial capacity..., was not an officer presiding over a tribunal" rendering a judgment, id. at 171; (b) that the determination could be attacked in equity and was thus subject to an adequate remedy; (c) that certiorari would cause manifest inconvenience; and (d) that review by certiorari of a decision of the type in question would violate the separation of powers doctrine.

239. Some Minnesota cases advance the theory that the class of administrative acts which are neither quasi-legislative nor quasi-judicial and consequently purely administrative in nature is not necessarily confined to ministerial acts, though the latter constitute the great bulk of that class. See especially State ex rel. Ging v. Board of Education, 213 Minn. 550, 560, 7 N. W. 2d 544, 557 (1942). The typical example of these purely administrative acts which are not ministerial are the hiring or discharge of public employees or officers, where and insofar as the administrative discretion is not controlled by any particular substantive or procedural standard. See State ex rel. Martin v. City of Minneapolis, 138 Minn. 182, 164 N. W. 806 (1917) (denying certiorari). In general see also Oikari v. Indep. School District No. 40, 170 Minn. 301, 212 N. W. 598 (1927); State ex rel. Ging v. Board of Education, 213 Minn. 550, 7 N. W. 2d 544 (1942); State ex rel. Young v. Brill, 100 Minn. 499, 111 N. W. 294, 639 (1907).
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almost uniform in holding that mere legislative or ministerial acts, as such, of municipal officers cannot be reviewed on certiorari; that only those which are judicial or quasi judicial can be thus reviewed."

It should, however, be noted that the exclusion of quasi-legislative administrative acts from review by certiorari is based solely on the construction of the scope of the writ in the light of the common law. There is no constitutional ground which would prevent the legislature from extending the application of the writ to administrative acts which generally, and for other purposes, may be classified as "quasi-legislative." The Supreme Court of Minnesota has recognized that a limited review in whatever form (appeal, injunction, etc.) by the courts of quasi-legislative acts does not militate against the doctrine of separation of powers as embodied in the state constitution. Thus, in the leading case of Steenerson v. Great Northern Ry. Co., the Minnesota Supreme Court held that the district courts had power to review, on appeal from an order of the Railroad and Warehouse Commission, by trial de novo the findings of the commission for the purpose of determining whether or not the rates fixed were so unreasonable as to be confiscatory, although the court adopted the view that "The fixing of rates is a legislative or administrative act, not a judicial one," and that the commission is "... not a judicial tribunal, but an administrative body, whose powers are somewhat legislative in their character." Similarly it has been held that the district courts had the power, in an action to enjoin the State Minimum Wage Commission from enforcing a wage order, to ascertain whether such orders "... are made without jurisdiction, or under a mistaken interpretation of the law, or are so arbitrary and unreasonable that they deprive a party of guaranteed property rights." The court added the following significant remarks:

"The scope of review is such as has been announced from time to time, in cases involving various situations, and often recently, as in administering statutes enacted under the police power duties are increasingly cast upon boards and commissions. The cases following illustrate applications of the principle when relief has been sought by different appropriate remedies" (italics added).242

240. 32 Minn. 145, 150, 19 N. W. 723, 725 (1884).
241. 69 Minn. 353, 375-76, 72 N. W. 713, 716 (1897). See also Arrowhead Bus Service, Inc. v. Black & White D. C. Co., Inc., 226 Minn. 327, 32 N. W. 2d 590 (1948), commenting on the limits of the judicial function in such cases.
243. The court referred to the following authorities: State v. State Medical Examining Board, 32 Minn. 324, 20 N. W. 238 (1884); Steenerson
Apparently no Minnesota statute has actually ever extended review by certiorari to administrative acts which have been classified as quasi-legislative. The closest instances in that respect are probably the review provisions in the Casualty Insurance and Surety Rate Regulatory Act and the Fire and Inland Marine Insurance Rate Regulatory Act which prescribe that “any order or decision of the commissioner shall be subject to review by writ of certiorari at the instance of any party in interest.” It should be noted, however, that under these acts technically the commissioner “reviews” the rate filings of the individual carriers or the approved rating organizations to determine their compliance with the legislative standards—and does not “make” the rates. The nature of his functions is, therefore, not completely like that of the rate making activities of other agencies.

It may be added that the English courts seem to have declined to recognize a special class of quasi-legislative acts as distinct from judicial and ministerial acts and applied certiorari to administrative determinations which in the United States might have been excluded from the scope of this remedy because of their quasi-legislative nature.

(3) The differentiation of quasi-judicial from purely ministerial acts which are not reviewable by certiorari involves tests which

v. Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713 (1897); Diamond v. City of Mankato, 89 Minn. 48, 93 N. W. 911 (1903); Hunstiger v. Kilian, 130 Minn. 474, 153 N. W. 869 (1915); Brazil v. County of Sibley, 139 Minn. 458, 166 N. W. 1077 (1918) (containing an excellent discussion and citation of the authorities); State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759 (1920). For other cases containing at least language to the same effect see State v. Great Northern Ry. Co., 130 Minn. 57, 153 N. W. 247 (1915); M. & St. P. S. R. Co. v. Village of Birchwood, 186 Minn. 563, 244 N. W. 57 (1932).

244. Minn. Laws 1947, c. 119, § 17(3); c. 120, § 16(3).

245. Minn. Laws 1947, c. 119, § 4(3); c. 120, § 4(3).

246. See the discussion by Lord Justices Bankes and Atkin in Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co., [1924] 1 K. B. 171, 197, 209 (C.A. 1923), and, particularly, the statement of Lord Justice Bankes that “The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts.” Id. at 195. There exist, however, also in England, rare instances of administrative acts which cannot be properly classified as either judicial or ministerial, and which, consequently, are not subject to control by either certiorari or mandamus. Examples of this type of case are Reg. v. Hastings Local Board, 6 B. & S. 401 (Q.B. 1865) (involving an administrative ruling which according to the controlling statute was intended merely to take the place of the report by a Parliamentary committee); Rex v. Barnstaple Justices, Ex parte Carder, [1938] 1 K. B. 385 (1937) (involving administrative proceedings not provided for by any law). See also supra Note 227.

247. See, e.g. State ex rel. Grant v. Iverson, 92 Minn. 355, 100 N. W. 91 (1904); State ex rel. O’Connell v. Canfield, 166 Minn. 414, 208 N. W. 181 (1926), cited in the dissent by Mr. Justice Youngdahl in Zion E. L. Church v. City of Detroit Lakes, 221 Minn. 55, 63, 21 N. W. 2d 203, 208 (1945).
have been discussed in connection with mandamus. Generally speaking, a duty is quasi-legislative or quasi-judicial and not ministerial if it involves the exercise of discretion, i.e., an expert value judgment. The mere necessity of deciding the legality of certain acts or transactions or the applicability of a statute to a set of facts as prerequisite for the performance of a duty is not sufficient to make the latter quasi-judicial. However, it has been held that a decision by an administrative officer may be quasi-judicial, and not merely ministerial, although in a particular case “he exercised no discretion in the consideration of evidence, but, upon an undisputed state of facts, determined what the law was,” provided that his decision a) was made after notice and hearing, b) settled an actual controversy between different parties and c) affected substantial legal rights of them. A determination is likewise not of a quasi-judicial character and subject to review by certiorari simply because it depends upon the ascertainment of certain “facts”, as a prerequisite for a correct performance of a statutory duty. But if the ascertainment of facts requires a process of proof which necessitates a certain degree of expertise, such as is presumed to exist in the ordinary courts, the determinations based thereon become quasi-judicial, particularly if they are to be made after notice and a hearing, however cursory and informal. Ordinarily...

248. See supra at p. 583.

249. This rule was apparently first announced by the supreme court in a case involving the availability of the writ of prohibition, Home Insurance Co. v. Flint, 13 Minn. 244 (1868), and has been reiterated in the mandamus cases cited supra note 83. Its applicability to the writ of certiorari was announced in Sinclair v. Com'rs of Winona Co., 23 Minn. 404 (1877); see also State ex rel. Grant v. Iverson, 92 Minn. 355, 100 N. W. 91 (1904) (statute requiring the state auditor to issue mineral lease on state lands to applicant complying with certain statutory conditions did not necessitate the exercise of a quasi-judicial function in respect to questions of title).

250. State ex rel. Board of County Commrs. of St. Louis County v. Dunn, 86 Minn. 301, 305, 90 N. W. 772, 774 (1902) (involving the decision of the state auditor determining which of two counties had power to tax relator's property); see also Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454 (1903), holding that the refusal of state auditor to pay bounty under a statute because he considered it to be unconstitutional was quasi-judicial in nature and therefore reviewable on certiorari. The correctness of this decision was subtly questioned by Mr. Justice Lewis in State ex rel. Grant v. Iverson, supra note 249.

251. Thus, in State ex rel. Hardy v. Clough, 64 Minn. 378, 380, 67 N. W. 202, 203 (1896), involving the reviewability by writ of certiorari of proceedings for the detachment of certain portions of an unorganized county before a special commission, Mr. Justice Mitchell stated the rule as follows: "The fact that a board or officer has, in the performance of their duties, to ascertain certain facts, and in doing so, to determine what the law is, does not of itself render its acts judicial. That has to be done every day by public bodies and officers, in the discharge of purely legislative or executive acts." Similarly, Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930 (1889).
narily in such cases, however, the determinations will involve 
value judgments of some kind. Thus, e.g., workmen's compensa-
tion cases will usually not only require the simple ascertainment
of facts, but also value judgments, such as the credibility of wit-
tnesses or findings about the causal connection between accident and
injury, degree of impairment of earning power, etc.

(4) The differentiation of quasi-judicial from quasi-legislative
duties for the purpose of determining whether certiorari is avail-
able or not has created the greatest difficulties for the court and
litigants. The difficulties lie essentially in the fact that the quasi-
judicial and the quasi-legislative acts both involve ex hypothesi
the exercise of discretion. Although it is often asserted that legis-
lative and judicial discretion are different in nature or at least in
scope, it would be impracticable if not impossible to develop any
test which is based on this distinction as such. This is especially 
true as to the differentiating of quasi-legislative from quasi-judicial
discretion since the former, because of the prohibition against
delegation of powers, must always be fettered by legislative or 
common law standards—while the latter may involve expertise
which the judges are thought incapable of possessing.

The Supreme Court of Minnesota has apparently been well
aware of these difficulties and endeavored to develop some funda-
mental policy and guiding criteria for the scope of the writ. The
basic judicial labor was performed by Mr. Justice Mitchell in a
number of fairly consecutive opinions.

The earliest and leading of these cases is In re Wilson which
has been mentioned and quoted from before. It involved an attack
by means of a petition for a writ of certiorari against an ordinance
of the city of Minneapolis which restricted the grant of liquor
licenses to patrol districts to be established by the mayor. The
court, though it denied the writ, announced in an elaborate and
intentional dictum that petitioner was correct in his contention
that the ordinance was invalid because it called for "legislative dis-
cretion" which could not be delegated to the mayor. Mr. Justice
Mitchell took the occasion to enunciate the guiding principles which
should govern the availability of certiorari for the review of the
acts of administrative, and particularly, municipal officers. He
pointed out that "... in every case ... where a court has assumed
the right to review the acts of municipal officers on certiorari, either
the act itself was judicial in its nature, or else its validity was in-
volved in judicial proceedings which were the subject of re-

252. See notes 214 and 221 supra.
view.”253 As belonging to the class of acts quasi-judicial in nature he defined those "... which, both from the nature of the acts themselves and their effect upon the rights or property of the citizen, bear a close analogy to the acts of courts..."254 The Justice conceded that "The courts are not always agreed as to what acts are judicial," and that some "have gone a great length in holding certain acts judicial, which, on principle, it would be very difficult to place under that head."255 But he repudiated the argument that even the ordinance in question was judicial because "the city council must have exercised their discretion in passing it," with the terse comment, "Every legislative act calls for the exercise of discretion as to its expediency and propriety."256

In the subsequent decisions Mr. Justice Mitchell watched carefully against an extension of the writ to such administrative acts as the organization of new towns, the formation of school districts, or the detachment of county territory.257 He declared such acts to be "political or legislative in nature"258 and not "proceedings judicial in their nature which affect the citizen in his rights of person or property."259 He justified his holdings with the principle and policy of judicial self-limitation which should guard the courts against transcending their legitimate province by assuming supervisory or advisory jurisdiction.260 In State ex rel. Hardy v. Clough,261 Mr. Justice Mitchell summed up his views again and redefined the two properties which determined the quasi-judicial nature of administrative acts, viz., their nature and effect on the citizen. He paraphrased the term "nature" with "the manner of performing them,"262 and he defined the requisite effect by the following explanation:

"Neither does it render an act judicial in its nature because it, in a general sense, affects the relator's interests in common with

253. 32 Minn. at 151, 19 N. W. at 726.
254. Id. at 150, 19 N. W. at 726.
255. Ibid.
256. Id. at 152, 19 N. W. at 727.
257. Lemont v. County of Dodge, 39 Minn. 385, 40 N. W. 359 (1888); Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930 (1889); Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435 (1890); State ex rel. Hardy v. Clough, 64 Minn. 378, 67 N. W. 202 (1896). The proper remedy in such cases is the writ of quo warranto. See State ex rel. Childs v. Board of County Comrs., 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 731 (1896).
258. Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930 (1889).
259. Lemont v. County of Dodge, 39 Minn. 385, 40 N. W. 359 (1888).
260. See particularly, Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435 (1890).
261. 64 Minn. 378, 67 N. W. 202 (1896).
262. Id. at 380, 67 N. W. at 203.
those of other members of the public. It is difficult to conceive of any legislative or executive act which does not in this way affect the interests of every member of the community. To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights or property of the citizen in a manner analogous to that in which they are affected by the proceedings of a court acting judicially. 263

In application of these principles Mr. Justice Mitchell held that certiorari was available to a municipal employee who by the governing city charter could be removed only for sufficient cause after notice and hearing for the purpose of contesting his dismissal despite the city's contention that its decision was "quasi political." 264

Later decisions by and large have followed the course thus chartered by Mr. Justice Mitchell and have applied and further refined his tests. Probably the most important contribution in these further efforts toward a formulation of the criteria which characterize administrative action as quasi-judicial is the definition enunciated by Mr. Justice Brown in the above mentioned case of State ex rel. Board of County Commrs. of St. Louis County v. Dunn. 265 After repeating the test laid down in State v. Clough the Justice added: "It may be said generally that the exercise of judicial functions is to determine what the law is, and what the legal rights of parties are with respect to a matter in controversy; and whenever an officer is clothed with that authority, and undertakes to determine those questions he acts judicially." While this test was laid down in that case for the purpose of establishing a line of demarcation between quasi-judicial and ministerial acts, Mr. Justice Brown also applied it to differentiate quasi-judicial and quasi-legislative functions. Thus the equitable distribution by the board of county commissioners of certain funds, following a division of a school district pursuant to a statutory mandate to that effect, was held to be quasi-judicial in nature because it determines the measure of legal rights accorded by the statute even though the formation of the new school districts is itself a quasi-legislative matter. 266 The court sometimes has gone to surprising lengths in considering a determination to be quasi-judicial in nature rather than quasi-legislative. Thus, on the one hand, it has been held that certiorari and not an injunction was the proper method of

263. Ibid.
265. 86 Minn. 301, 304, 90 N. W. 772, 773 (1902).
266. State ex rel. School Dist. No. 44 v. County Board, 126 Minn. 209, 148 N. W. 52 (1914).
challenging the legality of a determination by a board of town commissioners to construct a town ditch across certain private lands. Mr. Justice Taylor reasoned that while the determination of the propriety or necessity of constructing a ditch was legislative in character, the existence of a public purpose was a judicial question affecting private rights which was subject to review by certiorari. On the other hand in a case (which, however, did not involve reviewability by means of certiorari) it was held that the decision to compromise certain claims of a city against former city employees was quasi-judicial and not quasi-legislative and therefore not subject to the referendum provisions of the city charter. The court emphasized the necessity of certain factual determinations, and Mr. Chief Justice Wilson stated the controlling test in the following manner: "The term 'quasi-judicial' indicates acts of the city officials, which are presumably the product or result of investigation, consideration and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power. It is the performance of an administrative act which depends upon and requires the existence or nonexistence of certain facts which must be ascertained and the investigation and determination of such facts cause the administrative act to be quasi-judicial." It is submitted that this last test, for which no Minnesota precedent was cited, is not in complete harmony with the line of cases heretofore discussed. Whether it is explainable and distinguishable on the ground that it was enunciated for a different purpose is difficult to say. At any rate it seems correct to conclude that the characterization of an act as "quasi-judicial," for purposes of its reviewability by certiorari, depends essentially upon functional criteria, which involve its effect upon the rights or property of a citizen, the type of judgment to be made, and the process by which it is reached. It is apparently not always necessary that these three criteria be simultaneously present. Thus the necessity of formal proceedings is apparently sufficient but not necessary to give an act its quasi-judicial character.

267. Webb v. Lucas, 125 Minn. 403, 147 N. W. 273 (1914).
268. Okrman v. City of Eveleth, 163 Minn. 100, 203 N. W. 514 (1925).
269. Id. at 108, 203 N. W. at 517.
270. See the statement by Collins, J., in Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 33, 97 N. W. 454, 455 (1903) : "The character of the office or tribunal does not determine the question, but, rather, the nature of the act performed."
271. State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914) (where city charter permits removal of officers only for cause though not requiring a formal trial, a discharge may be reviewed by certiorari where the employee was neither advised of the charges against him nor accorded an opportunity to answer them).
(5) The determination whether a function is quasi-judicial or not does not depend upon what the officer has assumed to do but what he is required to do. Accordingly a decision remains reviewable on certiorari despite the fact that the officer rendering the same failed completely to follow the procedure required by law. "The extent of the deviation is not material. The writ lies even if the action was arbitrary and without jurisdiction and void." Conversely, if a statute or charter does not confer any quasi-judicial function of the type in question upon an officer, an usurpation thereof cannot be challenged or remedied on certiorari.

b. Application of the test and criteria developed by the cases discussed.

Certiorari is now well established as the proper method of judicial review in a number of typical categories of administrative determinations. Thus it is recognized that ordinarily the refusal or revocation of professional or occupational licenses or certificates required for other business activities of various types can and should be reviewed in that manner, although under exceptional circumstances mandamus or injunction may be available and more suitable because of the broader scope of review. Similarly the proper allocation, classification, or declaration of status of public employees or officers under civil service, as

272. State ex rel. Grant v. Iverson, 92 Minn. 355, 360, 100 N. W. 91, 92 (1904).
274. State ex rel. Mansfield v. Mayor of St. Paul, 34 Minn. 250, 25 N. W. 449 (1885) (no review on certiorari of the revocation of a license attempted by city mayor where city council had no power to delegate such authority); State ex rel. Holden v. Village of Lamberton, 37 Minn. 362, 34 N. W. 336 (1887) (certiorari will not lie to review wholly unauthorized canvassing of election results and grant of a liquor license as a result of such determination).
276. State ex rel. Sholund v. City of Duluth, 125 Minn. 425, 147 N. W. 820 (1914); State ex rel. Colberg v. Jensen, 205 Minn. 410, 286 N. W. 305 (1939); State ex rel. Peterson v. City of Alexandria, 210 Minn. 260, 297 N. W. 723 (1941); Walker v. Corwin, 210 Minn. 337, 300 N. W. 800 (1941); Dehning v. Marshall Prochno Co., 215 Minn. 339, 10 N. W. 2d 229 (1943); see also National Cab Co. v. Kunze, 182 Minn. 152, 235 N. W. 838 (1930).
277. See Zion E. L. Church v. City of Detroit Lakes, supra note 275 and the discussion of this problem in the section on mandamus supra.
279. State ex rel. Jenkins v. Ernest, 197 Minn. 599, 268 N. W. 208 (1936); State ex rel. Butters v. Elston, 214 Minn. 205, 7 N. W. 2d 750
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(1943); State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 32 N. W. 2d 574 (1948).

280. State ex rel. Hart v. Common Council of the City of Duluth, 53 Minn. 238, 55 N. W. 118 (1893); State ex rel. Zimmerman v. City of St. Paul, 81 Minn. 39, 84 N. W. 127 (1900); State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 133 N. W. 857 (1911); State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914); State ex rel. Nelson v. Board of Public Welfare, 149 Minn. 322, 183 N. W. 521 (1921); In re Application for Removal of Nash, 147 Minn. 383, 181 N. W. 570 (1920); State ex rel. Sudheimer, 164 Minn. 437, 205 N. W. 369 (1925); State ex rel. Pete v. Eklund, 196 Minn. 216, 264 N. W. 682 (1936); State ex rel. Lund v. City of Bemidji, 209 Minn. 91, 295 N. W. 514 (1940); State ex rel. Rockwell v. State Board of Education, 213 Minn. 184, 6 N. W. 2d 251 (1942). Of course in the absence of any tenure the dismissal cannot be questioned by certiorari as a matter of substantive law. State ex rel. Martin v. City of Minneapolis, 138 Minn. 182, 164 N. W. 806 (1917); Johnson v. City of Minneapolis, 209 Minn. 67, 295 N. W. 406 (1940) (demotion); see also Jennings, Removal from Public Office in Minnesota, 20 Minn. L. Rev. 721 (1936).

281. State ex rel. Brandt v. Thompson, 91 Minn. 279, 97 N. W. 887 (1904).

282. See the discussion in the text to footnotes 111 ff.

283. See, e.g., Egan v. City of St. Paul, 54 Minn. 1, 55 N. W. 854 (1894); Parish v. City of St. Paul, 84 Minn. 426, 87 N. W. 1124 (1901); Sykes v. City of Minneapolis, 124 Minn. 73, 144 N. W. 453 (1913); Oikari v. Independent School District, 170 Minn. 301, 212 N. W. 598 (1927); Backie v. Cromwell Consolidated School Dist. No. 13, 186 Minn. 38, 242 N. W. 389 (1932); and cases cited supra note 136.

284. State ex rel. Childs v. Dart, 57 Minn. 261, 59 N. W. 190 (1894); State ex rel. Douglas v. Meegarden, 85 Minn. 41, 88 N. W. 412 (1901); State ex rel. Village of Chisholm v. Bergeron, 156 Minn. 276, 194 N. W. 628 (1923).

285. In re Acquisition of Flying Cloud Airport, 226 Minn. 272, 32 N. W. 2d 566 (1948) (acquisition of airport by metropolitan airports commission pursuant to Minn. Laws 1947, c. 563, §§ 15, 19). But in American State Bank v. Jones, 184 Minn. 496, 239 N. W. 144 (1931), Mr. Justice Olsen suggested that a decision of the commissioner of banks to place a bank into liquidation, though quasi-judicial in character, could be reviewed by injunction.

286. State ex rel. Utick v. Board of County Comrs. of Polk County, 87 Minn. 325, 92 N. W. 216 (1902); State ex rel. Wickstrom v. Board of County Comrs., 98 Minn. 89, 107 N. W. 730 (1906); State ex rel. Ross v. Posz, 106 Minn. 197, 118 N. W. 1014 (1908); State ex rel. Hunt v. City of Montevideo, 135 Minn. 436, 161 N. W. 154 (1917); see also Bilbro v. Pierce, 101 Minn. 271, 112 N. W. 274 (1907) (injunction proper under the particular circumstances although certiorari would also be available); Schumacher v. Board of County Comrs., 97 Minn. 74, 105 N. W. 1125
Certiorari is also now by statutory mandate the proper remedy to obtain a review by the supreme court of decisions of the Board of Tax Appeals. Formerly it was held that certiorari would not lie against a decision of the Minnesota Tax Commission or other taxing authorities if there existed an adequate possibility of review in the enforcement proceedings. It may be added finally that administrative determinations of claims for workmen’s compensation and unemployment benefits are likewise reviewable by certiorari, although again express statutory provisions to that effect dispense with the necessity of relying on general principles.

2. Necessity of a sufficient interest of relator in the matter which forms the subject of the quasi-judicial function.

In an early case involving a petition for certiorari by a taxpayer to review the proceedings of a village council which granted a liquor license after illegally recanvassing the results of the election under the local-option law the supreme court quashed the writ, among other reasons, because the relator as taxpayer and resident had not a sufficient peculiar interest in the matter in question. The opinion stated that relator’s interest as taxpayer and resident was, under general principles, not enough to entitle him to a judicial review and correction of the official action of public officers.

When it became established under the rule of State ex rel.
Board of Co. Commrs. v. Dunn291 that a criterion for the quasi-judicial character of administrative action was that it affected "substantial legal rights" of relator, this test became simultaneously the determinative standard for the requisite interest in the relator.292 In order to be a "proper relator" it is not necessary that relator was made a formal party in the administrative proceedings, it suffices that he was a "party in substance," i.e., that the particular determination affected a legal right and did not produce merely damnum absque injuria.293 A mere economic interest by relator in the matter of the administrative proceedings, however, is not sufficient, even if it was recognized by the administrative tribunal as sufficient to give him the opportunity to present argument. Thus, in the recent case of In re Acquisition of Flying Cloud Airport, an aviation corporation was held not to be entitled to a writ of certiorari to review a decision of a metropolitan airports commission to take over an airport owned by another aviation corporation. The court pointed out that according to the record relator did not own any of the surrounding property and that neither its "active participation in aviation" nor "its appearance and participation in the public hearing, coupled with its status as a taxpayer" made it a party to the proceeding such as would be entitled to review.294

Even where relator possesses a sufficient legal interest in the subject he can question the legality of an administrative decision only insofar as it directly affects this interest.295 The interest must subsist until the time of the final decision on the writ. If the question has become moot the writ will be discharged.296 It is no longer necessary to plead affirmatively good faith. If the facts stated show a meritorious case and a prima facie right to the writ, good faith will, in the absence of anything to the contrary, be presumed.297

291. See supra text to note 265.
292. Cf. State ex rel. Ross v. Posz, 106 Minn. 197, 199, 118 N. W. 1014, 1015 (1908): "The remedy is appropriate in all such cases, where the substantial legal rights of the applicant have been so far invaded as to prejudicially affect him if the proceeding or judgment remains unreversed."
293. State ex rel. Wickstrom v. Board of County Commrs., 98 Minn. 89, 107 N. W. 730 (1906); followed in Bilsborrow v. Pierce, 101 Minn. 271, 274, 112 N. W. 274, 276 (1907).
294. In re Acquisition of Flying Cloud Airport, 226 Minn. 273, 275, 276, 32 N. W. 2d 360, 363 (1948).
295. See State ex rel. Sammons v. Nelson, 136 Minn. 272, 159 N. W. 758, 159 N. W. 376 (1916) (in judicial ditch proceedings owner may attack proceedings only insofar as his own land is affected, while illegality of the assessment against the village can be raised by him only in proceedings instituted by village to tax his land to pay for the village assessment).
3. Absence of an adequate remedy.

It is established in a long line of cases that certiorari is not available to review the decision of an administrative board if and insofar as the relator is entitled to appeal, while of course the converse is not true and the mere absence of an appeal by itself is only a necessary but not a sufficient condition to make any administrative order reviewable on certiorari. Since certiorari itself is in the nature of an appeal, the reason for that rule is perfectly self-evident.

It is likewise well recognized that the existence of any other adequate method of review or legal remedy will exclude the writ of certiorari. Some difficulties exist in regard to the question as to what remedies or other methods of review will be considered as adequate in comparison with the writ of certiorari.

Apparently review by certiorari is not precluded by the fact that relator may question the validity of administrative determination collaterally by an action at law either for salary, etc., or for damages against the officials responsible therefor.

The relationship of certiorari to mandamus which is fraught with doubts and uncertainties has been discussed before. The other writs cause little trouble, since prohibition fulfills the function of certiorari at an earlier stage and quo warranto offers little possibility of conflict with certiorari.

No case has held or suggested that certiorari might be unavailable because plaintiff could seek relief by injunction, although conversely the possibility of the writ of certiorari will ordinarily

298. See, e.g., Webb v. Lucas, 125 Minn. 403, 147 N. W. 273 (1914); State ex rel. Sholund v. City of Duluth, 125 Minn. 425, 147 N. W. 820 (1914); State ex rel. School District No. 44 v. County Board, 126 Minn. 209, 148 N. W. 52 (1914); State ex rel. Furlong v. McColl, 127 Minn. 155, 149 N. W. 11 (1914); State ex rel. Hunt v. City of Montevideo, 135 Minn. 436, 161 N. W. 154 (1917), 142 Minn. 157, 171 N. W. 314 (1919); Heller v. Schroeder, 182 Minn. 353, 234 N. W. 461 (1931).

299. See State ex rel. Hardy v. Clough, 64 Minn. 378, 380, 67 N. W. 202, 203 (1896); State ex rel. Grant v. Iverson, 92 Minn. 355, 361, 100 N. W. 91, 92 (1904).

300. State ex rel. Sholund v. City of Duluth, supra note 298; Johnson v. City of Minneapolis, 209 Minn. 67, 295 N. W. 406 (1940).

301. See for instance State ex rel. Board of County Commissioners v. Dunn, 86 Minn. 301, 90 N. W. 772 (1901); State ex rel. Ross v. Post, 106 Minn. 197, 118 N. W. 1014 (1908); State ex rel. Brown v. City of Red Wing, 134 Minn. 204, 158 N. W. 977 (1916); State ex rel. Cunningham v. Board of Public Works of St. Paul, 27 Minn. 442, 8 N. W. 161 (1881).

302. See supra note 283.

303. Cf. the reasoning in State ex rel. Wickstrom v. Board of County Commissioners of Isanti County, 98 Minn. 89, 107 N. W. 730 (1906).

304. See supra p. 596.

305. See Bankes, L. J., in Rex v. Electricity Commissioners, [1924] 1 K. B. 171, 206 (C.A. 1923) and infra, next section.
cause a denial of relief by injunction unless the limited scope of review by certiorari permits a different result under particular circumstances.

Certain difficulties have arisen in Minnesota in regard to the question of how far administrative determinations to establish certain improvements to be financed by assessment or decisions by tax authorities can be attacked by the taxpayer directly on certiorari rather than subsequently and collaterally in the tax enforcement proceedings. It is now settled that certiorari will not lie insofar as relator is permitted to raise the same issues in the enforcement proceedings.

4. Necessity of finality and possibility of correction.

Lastly, to be reviewable on certiorari an administrative decision must be final and not merely of an interlocutory nature.

5. Special constitutional limitations on the availability of certiorari or on certain issues raised in such.

Similarly to the principles controlling the functional scope of mandamus the supreme court recognizes now that the separation of powers doctrine does not curtail the power of the courts to issue writs of certiorari for the purpose of reviewing quasi-judicial decisions of the governor and other constitutional officers constituting the executive department.

Likewise in accordance with the rules governing mandamus proceedings it is possible for administrative officers to resort to certiorari proceedings for the purpose of asserting the unconstitu-

306. Schumacher v. Board of County Commrs., 97 Minn. 74, 105 N. W. 1125 (1906); Webb v. Lucas, 125 Minn. 403, 147 N. W. 273 (1914); State ex rel. Hunt v. City of Montevideo, 135 Minn. 143, 161 N. W. 154 (1917); Heller v. Schroeder, 182 Minn. 353, 234 N. W. 461 (1931).

307. Bilsborrow v. Pierce, 101 Minn. 271, 112 N. W. 274 (1907); National Cab Co. v. Kunze, 182 Minn. 152, 233 N. W. 838 (1930). Sometimes the court has failed to take account of the problem. Thus in the Alexander Co. v. City of Owatonna, 222 Minn. 312, 24 N. W. 2d 244 (1916), it was held that plaintiff could not enjoin the city from prohibiting plaintiff from cutting the curb in front of his building. Plaintiff had made an application to the city council and the latter had rejected the same after a public hearing pursuant to the City Ordinance. The court did not discuss whether plaintiff should have proceeded by petition for writ of certiorari rather than for injunction.


tionality of a statute forming the basis of the quasi-judicial adjudication, if public interest requires such action.311

B. POWERS OF THE COURT ON CERTIORARI (SCOPE OF REVIEW)

1. Discretion of court in granting the writ.

There exists language in a Minnesota case to the effect that it rests in the discretion of the court whether a writ should be granted.312 But actually the courts seem to grant the writ as a matter of course if the administrative determination in question is of such nature that it is subject to review by certiorari and if relator has a legitimate interest in such review and cannot resort to another adequate or even more effective remedy.

2. Scope of review.

The scope of review on certiorari has formed the subject of a great number of not always consistent statements by the members of the Minnesota Supreme Court. Actually, however, the differences seem to be reducible to a matter of formulation and, sometimes, lack of caution, rather than to a real and substantial disagreement.

a. Character and limits of review in general.

It was settled in this state at an early date that the power of the courts on certiorari varied in several important respects from those exercised by the English courts under the common law writ. On the one hand at common law the office of the writ was not always restricted to the purpose of review but was also used to remove causes into king's bench for new trial whereas in Minnesota the writ is strictly a corrective, not a preventive, remedy, in the nature of a writ of error or appeal.316 On the other hand

311. Loew v. Hagerle Brothers, 226 Minn. 485, 33 N. W. 2d 598 (1948).
313. See the statement by Mr. Justice Mitchell in Grinager v. Town of Norway, 33 Minn. 127, 128, 22 N. W. 174 (1885).
314. Cf. Grinager v. Town of Norway, supra note 313; State ex rel. Tolverson v. District Court for Jackson County, 134 Minn. 435, 159 N. W. 965 (1916); Bilsborrow v. Pierce, 101 Minn. 271, 274, 112 N. W. 274, 275 (1907). See also the wording of 2 Minn. Stat., § 606.01 (1945).
316. State ex rel. Sholund v. City of Duluth, 125 Minn. 425, 427, 147 N. W. 820, 821 (1914); State ex rel. Nordin v. Probate Court, supra note 315. Accordingly it has been held in some cases that the jurisdiction exercised on certiorari, whether by the district courts or the supreme court, is technically appellate and not original, and that even where the writ lies to an
certiorari is in this state a certiorari with increased scope or a proceeding merely "in the nature of a certiorari," both with respect to the type of decisions reviewable on certiorari and the scope of review.

The basic rules indicating the scope and the limits of review on certiorari were announced in early cases and firmly anchored into Minnesota law by Mr. Justice Mitchell. In the leading case of *State ex rel. Hart v. Common Council of City of Duluth* he stated:

"Some courts, restricting the writ to its original common law office, hold that it brings up for review only the record, and not the evidence and hence that they will not look into the evidence at all, but merely inspect the records, to see whether the inferior tribunal had jurisdiction, and had not exceeded it, and had proceeded according to law. . . . 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 as to the office of certiorari."

From this statement which essentially still represents the authoritative exposition of the Minnesota law it can be seen that the scope of review and the powers of the court are essentially limited. Their review is confined to the record in the larger sense and considers only "the legal aspect of facts appearing on the record." The court on certiorari can only reverse an erroneous decision of the administrative tribunal and remand for purposes of proceeding under the correct theory; it can neither, as with mandamus, order the officer to actually perform a particular act nor, as in injunction proceedings, restrain him from acting in a par-

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317. Minnesota Central R. R. Co. v. McNamara, 13 Minn. 508, 513 (1868).
318. See supra, section 1.
319. See particularly Minnesota Central R. R. Co. v. McNamara, supra note 317.
320. 53 Minn. 238, 242, 55 N. W. 118, 119 (1893).
321. Record in the larger sense includes the matters listed by Mr. Justice Mitchell in the *Common Council of Duluth* case, supra note 320, and even to acts in which a record in that sense is totally lacking, but required by law; *State ex rel. Furlong v. McColl*, 127 Minn. 155, 149 N. W. 11 (1914).
ticular way. Only if the proceedings are consolidated with mandamus can a different result be accomplished.

On certiorari the court cannot look dehors the record. While the scope of the return in response to the writ has been enlarged in accord with the increased scope of review in Minnesota and embraces now a certification of the record, the proceedings in the nature of the record, the rulings of the inferior tribunal and the evidence, the return of the administrative board is conclusive and cannot be impeached by outside evidence. The reviewing court may require a further return, if the command of the writ is not fully complied with, but it may not make findings or determine questions of fact. This applies also to the question whether relator is a proper party, i.e., a party in substance. The courts have, however, held that these limitations on the review will not prevent them, in a proper case, from considering all legal questions presented by the record.

These limitations on the scope of review on certiorari may, under particular circumstances, constitute a considerable weakness or defect in this method of judicial review of administrative action in comparison with other methods. Ordinarily, it is true, the scope

323. State ex rel. Ging v. Board of Education, 213 Minn. 550, 589, 7 N. W. 2d 544, 564 (1942); State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 251, 32 N. W. 2d 574, 582 (1948); see also Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 34, 97 N. W. 454, 455 (1903) ("We can merely review his determination at this time, and, if found erroneous, another and further remedy must be discovered by the petitioner"); Bilsborrow v. Pierce, 101 Minn. 271, 274, 112 N. W. 274, 275 (1907) ("Nor does it enable the court . . . by a proper mandate to carry its findings into effect").

324. State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 32 N. W. 2d 574 (1948).

325. State ex rel. Roberts v. Hense, 135 Minn. 99, 104, 160 N. W. 198, 200 (1916); see also In the Matter of the Petition of Johnson, 150 Minn. 524, 184 N. W. 214 (1921); State ex rel. Butters v. Elston, 214 Minn. 205, 211, 7 N. W. 2d 750, 753 (1943); Zion E. L. Church v. City of Detroit Lakes, 221 Minn. 55, 64, 21 N. W. 2d 203, 208 (1945) (dissenting opinion).

326. State ex rel. Sholund v. City of Duluth, 125 Minn. 425, 147 N. W. 820 (1914); followed in State ex rel. Peterson v. City of Alexandria, 210 Minn. 260, 297 N. W. 723 (1941); In re Acquisition of Flying Cloud Airport, 226 Minn. 205, 32 N. W. 2d 560 (1948).

327. State ex rel. Sholund v. City of Duluth, supra note 326.

328. State ex rel. Butters v. Elston, 214 Minn. 205, 212, 7 N. W. 2d 750, 753 (1943); State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 32 N. W. 2d 574 (1948).

329. In re Acquisition of Flying Cloud Airport, 226 Minn. 205, 32 N. W. 2d 560 (1948); State ex rel. Wickstrom v. Board of County Commrs. of Isanti County, 98 Minn. 89, 107 N. W. 730 (1906).

330. State ex rel. Butters v. Elston, 214 Minn. 205, 212, 7 N. W. 2d 750, 753 (1943). See also State ex rel. Beise v. District Court, 83 Minn. 464, 466, 86 N. W. 455 (1901) ("if there were questions of law improperly decided, such may be considered under the return . . . we are not included to consider . . . the objection to our right of review in that respect too strictly against petitioners"); Schumacher v. Board of County Commrs. of Isanti County, 97 Minn. 74, 76, 105 N. W. 1125 (1906).
of judicial review of administrative action will not vary, regardless whether methods of direct attack such as appeal or certiorari, methods of collateral attack such as injunction or action for damages, or finally methods of incidental attack such as defenses in enforcement proceedings are resorted to. Mr. Justice Dibell emphasized this point in two noteworthy opinions with copious citation of authorities. But where the propriety of an administrative judgment but not the correctness of its exercise is in question the presentation of factors outside the records may be desirable but possible only in mandamus, injunction, or, apparently, also in tax enforcement proceedings.

b. Matters reviewable on certiorari.

(1) Classes of errors correctible. Generally speaking it can be said that the courts will review the record for all errors deductible therefrom except a) those which might be committed in the formation of judgments as to the existence or non-existence of facts, supporting or ultimate, if and insofar as they are made rationally on the basis of substantial probative evidence, and b) those which pertain to the evaluation of such facts with reference to correctly interpreted legal standards.

It has become customary to group the errors thus reviewable into four or five classes. Thus the leading Minnesota case in point laid down the rule that the reviewing court "... can interfere only 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." A recent case adds a fifth class, viz. irregularity of the proceedings.

331. See particularly Diamond v. City of Mankato, 89 Minn. 48, 93 N. W. 911 (1903); The Alexander Co. v. City of Owatonna, 226 Minn. 312, 329, 24 N. W. 2d 244, 255 (1946). For injunction as method of collateral attack, see Schumacher v. Board of County Comm’rs, supra note 330.


333. See the dissent by Youngdahl, J., in Zion E. L. Church v. City of Detroit Lakes, 221 Minn. 55, 21 N. W. 2d 203 (1945), discussed supra in the section on mandamus.


336. State ex rel. Dybdal v. State Securities Commission, 145 Minn. 221, 225, 176 N. W. 759, 761 (1920), quoted with approval in many cases, e.g., recently in Stronge & Lightner Co. v. Commissioner of Taxation, 36 N. W. 2d 800 (Minn. 1949).

While these four or five classes appear at first blush to be simple, clear and easily applied, closer analysis shows that they are vague, have blurred boundaries, and shade into one another. This holds true in the first place in respect to the class of defects which is ascribed to the error that the determination was made in an excess of jurisdiction. On the one hand it should be recalled that some early cases held that an administrative agency may act "so completely" outside its jurisdiction that the determination is no longer quasi-judicial and therefore not reviewable on certiorari. But subsequent cases have at first asserted distinctions and later seemingly ignored the precedents by declaring that the extent of the deviation of an administrative determination from the required legal standards is immaterial for purposes of reviewability on certiorari. On the other hand not every erroneous determination is in itself in excess of jurisdiction. Administrative tribunals, like other courts have the power to err within certain limits. The location of these limits is not clarified by using the term jurisdiction which, as Mr. Justice Frankfurter has observed, is one of the most deceptive legal pitfalls; besides it would be utterly confusing to consider every judicially correctible error of an administrative tribunal as committed in excess of jurisdiction.

The class of "defects in procedure" shades without clear lines of demarcation both into the category of errors called excess of jurisdiction and into that labelled arbitrariness and capriciousness. The latter in turn shades into the class formed by the absence of substantial evidence and has caused troubles by pro-


340. State ex rel. Furlong v. McColl, 127 Minn. 155, 162, 149 N. W. 11 (1914): "In all cases where the writ is invoked there is some alleged deviation from the requirements of the law. The extent of the deviation is not material. The writ lies even if the action was arbitrary and without jurisdiction and void."

341. State ex rel. Ging v. Board of Education, 213 Minn. 550, 571, 7 N. W. 2d 544, 556 (1942) quoting from Lindquist v. Akkett, 196 Minn. 233, 240, 265 N. W. 54, 57 (1933). A similar statement was made by Mr. Chief Justice Stone in Pope v. United States, 323 U. S. 1, 14 (1914): "Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision."


343. Yet Mr. Justice Peterson wrote recently in State ex rel. Spurck v. Civil Service Board, 226 Minn. 253, 262, 32 N. W. 2d 583, 588 (1948): "An administrative agency has no power or jurisdiction (1) to make findings for which there is no evidentiary support."

344. See State ex rel. Furlong v. McColl, supra note 340, in which the agency failed completely to follow the controlling discharge procedure.

345. See State ex rel. Lund v. Bemidji, 209 Minn. 91, 96, 295 N. W.
The decisions have been fairly generous in regard to the extent that administrative errors due to an incorrect application of the law will be corrected by the courts. Theories and interpretations as to the proper bases of computation or proper causes for a discharge are included.

(2) *Absence of evidence to support a finding in particular.* The class of reviewable errors described as absence of evidence to sustain a finding deserves particular attention. It should be noted that Mr. Justice Mitchell who first defined this category paraphrased any evidence as evidence which furnishes "any legal and substantial basis for the decision." Minnesota consequently follows the so-called substantial evidence rule. This follows also from Mr. Justice Dibell's statement of the controlling principles which has become the accepted rule: "The province of this court in reviewing proceedings brought before it by writ of certiorari is well defined. It may examine the evidence, but only for the purpose of ascertaining whether it furnished any reasonable or substantial basis for the decision. It cannot reweigh the evidence for the purpose of determining where the preponderance lies, nor substitute its judgment as to the credibleness of the testimony of a witness for that of the tribunal charged with the duty of determining the facts" (italics added). "Unfortunately"; as Dean Stason in a celebrated article discussing the "substantial evidence" rule has correctly observed, "the term does not lend itself to expression by a simple formula. There are sporadic expressions in some cases which border danger-

514, 516 (1940), where the lower court had characterized the absence of evidence as "arbitrary and oppressive and unreasonable."

346. See the discussion of the *Zion E. L. Church* case *supra* in the section on mandamus.


348. *State ex rel. Hart v. Common Council of Duluth,* 53 Minn. 238, 244, 55 N. W. 118, 120 (1893); *State ex rel. Rockwell v. State Board of Education,* 213 Minn. 186, 6 N. W. 2d 251 (1942).

349. See the quotation from *State ex rel. Hart v. Common Council of Duluth* in the text to note 320.

350. *In re Application for Removal of Nash,* 147 Minn. 383, 388, 181 N. W. 570, 572 (1920). It should be noted that the Minnesota court, in contrast to some other jurisdictions, has not qualified the rule with respect to so-called "jurisdictional" facts. Consequently the substantial evidence rule applies with equal force to all facts regardless of whether other jurisdictions would classify them as jurisdictional or even quasi-jurisdictional and re-weigh the evidence in respect to them. A possible reservation may, however, be necessary because of the Fourteenth Amendment in regard to so-called constitutional facts, particularly such bearing on a possible confiscatory effect of an administrative adjudication.

ously close to the now discarded scintilla rule, if they do not go beyond that." Thus Mr. Justice Bunn stated that administrative findings are conclusive even if the evidence "is clearly and palpably against the decision." And in a recent case the power of the court to reverse an administrative agency seems to be restricted to the cases "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 most elaborate discussion of the various formulae used by the court is contained in the case of State ex rel Pete v. Eklund, in which Mr. Justice Olsen arrived at the short and workable test of "evidence reasonably sufficient to sustain the . . . findings. . . ."

While this definition was made in view of the wording of a particular statute a generalization was suggested as possible and later accepted. The formula implies that the evidence sustaining the finding must be "competent," i.e., endowed of a rational, probative force.

It may be observed in conclusion, that sometimes the particular status of a party, such as that of the injured worker in compensation cases, requires, according to the cases, a review of findings in his favor "in the light most favorable to such findings"; but actually this rule does not dispense with the requirement that the findings of the commission must have "reasonable support in the evidence."

C.

PROCEDURAL ASPECTS

1. Jurisdiction of the supreme court and the district courts.

Jurisdiction to issue the writ of certiorari is vested in the supreme court and the district courts. The latter obtained their

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353. State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 249, 32 N. W. 2d 574 (1948). Contra: Amundsen v. Poppe, 34 N. W. 2d 337 (Minn. 1948) (findings "manifestly contrary to the evidence" will be disturbed).
357. Larson v. Le Mere, 220 Minn. 25, 29, 33, 18 N. W. 2d 696, 699 (1945).
358. 2 Minn. Stat. § 480.04 (1945).
359. 2 Minn. Stat. § 484.01 (1945).
jurisdiction in 1881\textsuperscript{360} and retained it, except for a brief interruption due to a legislative oversight, until the present.\textsuperscript{361}

A number of statutes provide expressly that the review of decisions of certain administrative tribunals with state-wide jurisdiction shall be had on certiorari by the supreme court.\textsuperscript{362} In the absence of such provision the petition for the writ for the purpose of reviewing an administrative order should normally be directed to the district court. The supreme court will take jurisdiction in such cases only when general public interest requires immediate determination.\textsuperscript{363}

2. Parties to the proceedings.

It has already been discussed that in order to be a proper relator the petitioner must be a formal party to the administrative proceedings or a party in substance, identifiable as such by the return.\textsuperscript{364} Adverse parties, upon all of whom the writ must be served to effect a valid review,\textsuperscript{365} are all persons who would be prejudiced by a reversal or modification of the administrative determination, and all parties thus served are brought before the court.\textsuperscript{366} In administrative proceedings the tribunal which renders the decision also frequently represents the public interest adverse to the relator. In such case not only is the writ of certiorari directed to it for the purpose of bringing the proceedings up for review, but it is also an adverse party who may appeal from a decision of the district court reversing its decision. In that respect it has a substantially different position from that of a court in certiorari proceedings. Mr. Justice Mitchell who first laid down this rule in a case concerning the establishment of school districts gave the following reason for that distinction: "The court or judge

\begin{footnotesize}
\textsuperscript{360} See supra text to note 354. The statute was passed as a result of the decision in Goar v. Jacobson, 26 Minn. 71, 1 N. W. 799 (1879).

\textsuperscript{361} See supra note 354; Schultz v. Talty, 71 Minn. 16, 73 N. W. 521 (1897).

\textsuperscript{362} See, e.g., 1 Minn. Stat. § 80.27 (commerce commission and commissioner of securities), § 176.61 (industrial commission), § 268.10(8) (director of the division of employment and security), § 271.10 (board of tax appeals, construed in Strong & Lightner Co. v. Commissioner of Taxation, 36 N. W. 2d 800 [Minn. 1949]), § 298.09(3) (commissioner of taxation) (1945).

\textsuperscript{363} State ex rel. Grubbs v. Schulz, 142 Minn. 112, 171 N. W. 263 (1919) (revocation of teacher's certificate by state superintendent of education). For a recent instance where the supreme court issued the writ, see Dehning v. Marshall Produce Co., 215 Minn. 339, 10 N. W. 2d 229 (1943) (record does not show an allegation in the petition to the effect that public interest required determination by the supreme court).

\textsuperscript{364} See supra text to notes 293, 294.

\textsuperscript{365} 2 Minn. Stat. § 606.02 (1945); Supreme Court Rules, rule II; cf. Larson v. Le Mere, 220 Minn. 25, 18 N. W. 2d 696 (1945).

\textsuperscript{366} Larson v. Le Mere, supra note 365.
\end{footnotesize}
in the case supposed has no representative capacity, but is merely
the tribunal by whom the rights of others have been determined.
But the board of county commissioners is the representative of the
county or the public to which is entrusted the matter of forming
new school districts . . . as public interests require. The public has
a special interest in the establishment . . . of these districts, and
we think that the board of county commissioners, to whom that
matter is entrusted, is, as the representative of the public in that
regard, a party interested in and aggrieved by the order of the
court reversing and setting aside their action and therefore has the
right of appeal."

It is consequently the proper practice in such
case not only to name the administrative board as the tribunal to
which the writ is directed, but also as the adverse party in the
title of the proceedings.

3. Practice on certiorari.

The statute contains very few special provisions relating to the
practice in certiorari proceedings. The most important one is
the requirement that the writ must issue and be served on the
adverse party within sixty days after relator has been notified of
the decision to be reviewed, unless a special statute provides other-
wise. The supreme court rules add little. The leading case
discussing the nature of certiorari proceedings in Minnesota is
Johnson v. City of Minneapolis. The case involved the appeal
from an order of the district court affirming a determination of
the civil service commission which demoted relator and which was
brought to review by the writ. The court had merely affirmed the
administrative decision and made no order for entry of a judgment.
On appeal the supreme court held that the practice followed was
correct and that the entry of a formal judgment was not required
nor permitted. It declared that certiorari is not an “action” within
the meaning of 2 Minn. Stat. § 605.09(1) (1945), since the action
was not “commenced” in the district court or “brought there from
another court,” but rather the cause had its origin before the ad-
ministrative tribunal. The opinion stressed the fact that certiorari
as used in Minnesota, is not the common law writ, but rather

367. Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435 (1890).
368. The title accordingly would be State of Minnesota ex rel. . . . v.
   Board.
369. 2 Minn. Stat. c. 606 (1945).
370. 2 Minn. Stat. §§ 606.01, 606.02 (1945).
371. Supreme Court Rules II, III.
372. 209 Minn. 67, 295 N. W. 406 (1940), followed in State ex rel.
   Ging v. Board of Education, 213 Minn. 550, 7 N. W. 2d 544 (1942).
a writ in the nature of certiorari, and that it is in its very nature and purpose an appeal—a review to correct order. Consequently proceedings thereon are “special proceedings” within the meaning of 2 Minn. Stat. § 605.09(7) (1945).

The final order on the merits in such proceedings should ordinarily either affirm the administrative decision below or vacate the same, and, where appropriate, remand for further proceedings not inconsistent with the order. The final disposition may be different when mandamus and certiorari proceedings in related matters are consolidated.

The final order, on certiorari, shall decide the cause as of the date of that decision. If the controversy has become moot or the writ cannot be obeyed because the tribunal to which it is directed has ceased to exist, the writ should be quashed or discharged. [To be continued]

374. Ibid.