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

STEFAN A. RIESENFELD,** JOHN A. BAUMAN,*** AND RICHARD C. MAXWELL****

V. PROHIBITION

A. Type of Administrative Action Subject to Control by Writ of Prohibition

The writ of prohibition goes back to the very beginnings of the Anglo-Norman writ system and is found both in the celebrated treatise of Glanvill376 and the earliest extant manuscript copies of the Register of Writs.377 Originally its function was to prevent ecclesiastical courts from encroaching upon the jurisdiction of the royal justices378 and only subsequently it became a means to keep inferior courts from usurping jurisdiction.379 The common law writ

*For prior installments, see 33 Minn. L. Rev. 569, 685 (1949). The final installment on quo warranto, injunctions and declaratory judgments is scheduled to appear in the December issue.

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379. Thus in 4 Comyns, A Digest of the Laws of England 452 (1764), sub. voce Prohibition, the law is stated as follows: "If courts exceed their jurisdiction a prohibition may be granted to them. And this, to temporal as well as spiritual courts. As if a Court Baron, County Court etc. or other inferior Court in a city, borough etc. hold a plea of a matter out of the limits of their jurisdiction, a prohibition may be granted." Similarly, Fitzherbert, New Natura Brevium 39, 88 (1686 ed.).
thus had as its field of application the preservation of the jurisdictional boundaries of the various tribunals.

As administrative tribunals became recognized in the legal system the writ was also resorted to for the purpose of restraining them from adjudicating subject matters outside their competency. The development was thus in that respect completely analogous to that discussed above with reference to the writ of certiorari.380 This similarity was clearly enunciated by Lord Atkin in a leading English case381 already mentioned.382 Said the learned Lord Justice: "I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage."383 The American jurisdictions followed in general the English pattern.384

The type of action subject to judicial control by means of the writ of prohibition in Minnesota conforms with the general common law pattern. The governing statute furnishes at the most a very vague definition of the scope of applicability of the writ by providing that the writ "command[s] the court and party or officers to whom it is directed to refrain from any further proceeding in the action or matter." [Italics added.]385 The italicized words which extended the writ beyond court proceedings in the strict sense were added to the original wording of the Revised Statutes of 1851386 by an amendment passed in the year subsequent to their passage.387

The applicability of the writ to action by public officers alleged to be illegal and the significance of the amendment of 1852 first came before the court in the early leading case of Home Insurance Company of St. Paul v. Flint.388 In that case an insurance company made an application for a writ of prohibition commanding the

382. Riesenfeld, Bauman & Maxwell, supra note 380, at 702.
383. Rex v. Electricity Commissioners [1924] 1 K. B. 171, 206 (C.A. 1923). Through oversight the quoted statement was attributed to the wrong Lord Justice of Appeal in the previous installment.
386. Minn. Rev. Stat. 1851 c. 83 § 18 (1852). This section was derived verbatim from Wis. Rev. Stat. 1849 c. 129 § 9, which in turn was copied from 2 N. Y. Rev. Stat. 1829 pt. III c. IX § 61. See Riesenfeld, Bauman & Maxwell, supra note 380, at 573.
387. Minn. Amendments to the Revised Statutes § 64 (1852).
388. 13 Minn. 244 (1868).
county attorney for Ramsey county to refrain from examining the financial condition of the relator under a statute authorizing such investigation in order to test the constitutionality of the act. Chief Justice Wilson, speaking for the court observed:

"Our statute confirms the use of the writ, but has not in respect to the proceedings sought to be restrained by it changed the common law; nor does it purport to limit, extend, or determine the cases in which the writ will lie. If therefore, the acts of the defendant complained of are not judicial, they cannot be restrained by this writ. . . . Some stress is laid by plaintiff’s counsel on the amendment of 1852. . . . Admitting that this amendment by implication justifies the issuing of a writ to an officer, not properly a court, its force or meaning cannot be extended further, for there is nothing in its language to justify or give the least color to the inference that acts not strictly judicial may thus be restrained. The amendment is silent on this subject and therefore the common law stands."³⁸⁹

On the basis of the principles thus stated the court held that the examination and the issuance of the certificate under the statute did not amount to the exercise of judicial power and that therefore compliance with the act on the part of the county attorney could not be restrained by means of the writ of prohibition. It is most significant that the learned Chief Justice concluded the opinion with the paragraph:

"If the plaintiff has suffered, or is in danger of suffering from the threatened act of the defendant, he has mistaken his remedy."³⁹⁰

The language used clearly suggests that in the opinion of the court the complainant should have proceeded by injunction. The case therefore immediately confronted the profession with one of the most troublesome problems in this area—When can the plaintiff proceed with the writ of prohibition, and when is an injunction the appropriate remedy?

The view that a writ of prohibition was allowed in Minnesota "for the purpose of arresting the proceedings of an officer who is not acting strictly as a court but . . . nevertheless, only to restrain the exercise of judicial power" was repeated by the same justice in another case decided during the same term.³⁹¹ While the term "quasi-judicial" was not used in defining the office of the writ in these early cases it made its appearance in the next important precedent mapping out the scope of applicability of the writ in Minne-

³⁸⁹. Id. at 246 and 248.
³⁹⁰. Id. at 248.
sota, viz., the case of State v. Young. The controversy there involved centered around the power of the legislature to create a special body for the purpose of adjudicating the question of whether or not the legislature had power to assume certain bond obligations without submitting the question to a popular vote. The governor appointed a number of district judges to sit as the tribunal so created, but before it took any formal action on the issue its jurisdiction was challenged by means of the writ of prohibition. On the threshold of the decision the Supreme Court had to meet the problem of whether the writ of prohibition was the appropriate remedy for questioning the powers of the special tribunal. Chief Justice Gilfillan, speaking for the court, held that the writ of prohibition was properly applied for:

"The writ of prohibition issues usually to courts, to keep them within the limits of their jurisdiction. But it may also issue to an officer, to prevent the unlawful exercise of judicial or quasi judicial power; and the other reasons for it existing, we see none why it should not issue to a person, or body of persons, not being in law a court, nor strictly officers; as if the legislature should assume in an unconstitutional manner to create a court of justice, and the person or persons appointed as its judge or judges should enter upon the exercise of the judicial function thus attempted to be conferred, the same reasons might exist for arresting their action as exist in the case of a court exceeding its jurisdiction."

The opinion concluded the discussion of the applicability of the writ with an enumeration of three conditions that must be fulfilled—a statement which has been repeated over and over again in subsequent cases—vis.:

"First, that the court, officer or person is about to exercise judicial or quasi judicial power;
second, that the exercise of such power by such court, officer or person is unauthorized by law;
third, that it will result in injury for which there is no other adequate remedy."

Minnesota thus clearly arrived at the result that the same type of administrative action is subject to review by the writ of prohibition as is subject to review by certiorari.

Accordingly, it can be concluded that on principle the same tests which have been developed as criteria for quasi-judicial

392. 29 Minn. 474, 9 N. W. 737 (1881).
393. Id. at 523, 9 N. W. 737, 738.
394. The statement was incorporated verbatim in the 3d edition of High's famous treatise on the extraordinary remedies, see op. cit. supra note 384, at 708.
395. State v. Young, 29 Minn. 474, 523, 9 N. W. 737, 738 (1881).
action in the certiorari cases should serve the same function with respect to the appropriateness of the writ of prohibition. The decisions fairly substantiate this position, although the court has not always had smooth sailing and has run into baffling dilemmas. These difficulties arose especially in the cases where the writ of prohibition was invoked to challenge the unconstitutional delegation of administrative functions—ministerial or quasi-legislative—to courts, especially of special or limited jurisdiction. This problem was first encountered in the already mentioned case of State v. Young. The merits of that controversy presented the question of whether the legislature could confer upon a special tribunal the duty to determine whether one of two mutually exclusive sections in a statute was valid, with the effect that in the case of affirmative decision this particular section was to become operative while in the case of a negative decision the alternative provision was to control. The court in effect reached the somewhat perplexing result that the exercise of such function was sufficiently legislative in substance to amount to an invalid delegation of legislative power but sufficiently quasi-judicial in form to be challenged by means of the writ of prohibition. A similar dilemma occurred again in the case of State v. Simons. In that case an application for a writ of prohibition was made to restrain the judges of the district court for Ramsey County from proceeding under an act of 1883 upon a petition for the incorporation of certain territory as a village. The act was challenged as an unconstitutional delegation of legislative powers to the judiciary. Justice Mitchell held on the merits that the act was unconstitutional for the asserted reason because it imposed upon the court the duty to decide whether public interests as determined by his views of expediency and public policy would be subserved by the creation of a municipal corporation. Yet despite this non-judicial character of the function as to the substance the Justice was constrained to hold that the function was "quasi-judicial" in form and effect so as to be subject to control by prohibition. The Justice intimated that the relator had no other adequate remedy.

396. For details see the discussion in Riesenfeld, Bauman & Maxwell, supra note 380, at 686 et seq.
397. See note 392 supra.
398. 32 Minn. 540, 21 N. W. 750 (1884).
399. An act to provide for the incorporation of villages, etc. Minn. Laws 1883 c. 73.
400. "Although the powers attempted to be conferred by this act are not judicial in the strict sense of the term, yet they are in many of the features and results, quasi-judicial and are conducted under judicial forms," 32 Minn. 540, 544, 21 N. W. 750, 752 (1884).
without discussing why the writ of quo warranto or perhaps an injunction would not perform such function.

The case of *State v. Simons* is particularly illuminating if compared with the decision of *State v. Ueland*\(^{401}\) decided only two years earlier. In the latter case the writ of prohibition was applied for to restrain the judge of probate of Hennepin County from proceeding under another statute\(^{402}\) upon a petition for the incorporation of certain territory as a city. In that case the statute was challenged as conferring upon the probate courts *judicial* power beyond that authorized by the constitution. In a curiously garbled opinion Chief Justice Gilfillan denied the writ for the reason that the functions imposed by the statute in question upon the judges of probate were not judicial in character and therefore neither properly challenged by the writ of prohibition nor "obnoxious to the objection made to it."\(^{403}\) The case is not only puzzling because of the apparent acquiescence in a delegation of non-judicial duties to probate judges\(^{404}\) but also significant because of its emphasis on the necessity of a concurrence of various criteria as to substance, effect and mode to make a determination judicial in character. It is also perhaps worth noting that this opinion which denied the writ made a special point of the possibility that the order could be "properly called in question" by quo warranto.\(^{405}\)

While the Supreme Court later apparently relaxed somewhat its views on the type of duties which could be conferred upon the courts without violating the phantom principle of the separation of powers,\(^{406}\) it has consistently clung to the requirement that a pro-

\(^{401}\) 30 Minn. 29, 14 N. W. 58 (1882).

\(^{402}\) Minn. Gen. Stats. 1878 c. 10 § 124.

\(^{403}\) 30 Minn. 29, 31, 14 N. W. 58, 59 (1882).

\(^{404}\) This apparent acquiescence was later retracted and explained as "a phase of the case that does not seem to have been suggested or considered." Foreman v. Board of County Commissioners, 64 Minn. 371, 372, 67 N. W. 207 (1896). See also State v. City of Nashwauk, 151 Minn. 534, 538, 186 N.W. 694, 696 (1922).

\(^{405}\) State v. Ueland, 30 Minn. 29, 31, 14 N. W. 58, 59 (1882). The writ of quo warranto was used successfully to challenge an incorporation under the statute in question in State v. City of Nashwauk, 151 Minn. 534, 186 N.W. 694, 189 N. W. 592 (1922).

\(^{406}\) For cases indicating this trend of relaxation see Foreman v. Board of County Commissioners, 64 Minn. 371, 372-373, 67 N. W. 207-208 (1896) ("The precise line of cleavage between judicial and ministerial functions never has been, and never can be, definitely located. There are many duties which may be either the one or the other, depending upon the officer or body performing them, and the effect to be given to the action or determination of such officer or body. When duties of this ambiguous or equivocal nature are imposed upon a judicial officer or tribunal, to whom none but judicial duties can be constitutionally assigned, the doubt should be solved in favor of the validity of the statute, and the duties held to be judicial, and the presump-
ceeding must be judicial or at least quasi-judicial in form and effect to warrant its intercession by means of the writ of prohibition.

In application of this rule and in addition to the cases already discussed the writ of prohibition was held to be an inappropriate remedy for the purpose of challenging as unauthorized or illegal the taking of depositions by justices of the peace in an election contest under a statute providing for such procedure, the holding of an election by county commissioners to remove a county seat and the placing of the name of a candidate for election on the ballots by a county auditor and his certifying copies of voters' certificates. Conversely, the Supreme Court has either actually found or at least intimated the requisite presence of a quasi-judicial function upon application for a writ of prohibition for the purpose of attacking the validity of proceedings before an administrative tribunal to remove a public official from office of an election

407. Home Insurance Co. v. Flint, 13 Minn. 244 (1868), discussed supra text to note 388; State v. Ueland, 30 Minn. 29, 14 N. W. 58 (1882), discussed supra text to note 401; State v. Simons, 32 Minn. 540, 21 N. W. 750 (1884), discussed supra text to note 398.

408. State v. Peers, 33 Minn. 81, 21 N. W. 860 (1885). The court held that the justices of the peace when taking depositions in an election contest under a special statute were not exercising judicial functions but merely acting as commissioners of the legislature. It is, perhaps, surprising to note that not long after, and in perfect cognizance of this decision, the court felt no embarrassment to hold that the appointment of election commissioners by district judges under a later statute was "at least quasi-judicial" and that consequently a refusal by them to make such appointment was subject to review by certiorari, State v. Searle, 59 Minn. 489, 492, 61 N. W. 553, 554 (1894). Still harder to explain is the fact that subsequently the court cited both State v. Searle and State v. Peers side by side for the proposition that "the character of the duties conferred upon judges and justices of the peace in these contests, has been well stated" in these opinions, State v. Nelson, 141 Minn. 499, 501, 169 N. W. 788, 789 (1919). The final step in this sequence of inconsistencies was reached when the court again characterized the statute providing for the appointment of election officers by the district judges as "grant of judicial jurisdiction," Williams v. Maas, 198 Minn. 516, 270 N. W. 586 (1936), and this despite the fact that in the interim it had held that district judges could not be clothed with a power to appoint other public officials because such function would be purely ministerial in nature, State v. Brill, 100 Minn. 499, 111 N. W. 294, 639 (1907).

409. State v. Ostrom, 35 Minn. 480, 29 N. W. 585 (1886) (note that the decision on the merits was specifically reserved).


411. State v. Ward, 70 Minn. 58, 72 N. W. 825 (1897) (order to show cause discharged because the tribunal did not exceed its jurisdiction); Brandt v. Thompson, 91 Minn. 279, 97 N. W. 887 (1904) (writ of prohibition granted).
contest before an administrative tribunal and of proceedings by the state labor conciliator to determine the proper bargaining agent. In the latter case the court found the quasi-judicial nature in the following characteristics: "In a proceeding of this kind, the labor conciliator, in a proper case investigates and finds facts and draws conclusions of law from which he determines the legal rights of the parties involved, consistent with the authority and power vested in him by law."

B. Other Conditions for the Issuance of the Writ

In addition to the requirement that the action subject to review by means of an application for the writ of prohibition must be of judicial or quasi-judicial character the case law has firmly settled that three further essentials must be present:

(a) In the first place it is necessary that the judicial or quasi-judicial proceedings are either imminent or already commenced but still in progress. The writ is ordinarily not available to seek redress against a determination already completed. As the Supreme Court has stated succinctly and repeatedly: "[Prohibition] is by nature a preventive, not a corrective, remedy." Yet the court has not felt this rule to be an obstacle to the issuance of a writ of prohibition for the purpose of annulling an unauthorized ex parte order.

412. State v. Craig, 100 Minn. 352, 111 N. W. 3 (1907) (order to show cause discharged because the tribunal possessed jurisdiction).
413. Nemo v. Hotel & Restaurant Employees' Local No. 556, 227 Minn. 263, 35 N. W. 2d 337, 811 (1948).
414. Id. at 267, 35 N. W. 2d at 340.
415. The three essentials necessary for the issuance of the writ were first laid down by Chief Justice Gilfillan in State v. Young, see note 395 supra and reiterated in numerous decisions, see for instance State v. Hense, 135 Minn. 99, 103, 160 N. W. 198, 200 (1916); Nemo v. Hotel & Restaurant Employees' Local No. 556, 227 Minn. 263, 271, 35 N. W. 2d 337, 340 (1948); Juster v. Grossman, 229 Minn. 280, 287, 38 N. W. 2d 832, 836 (1949); State v. Enersen, 230 Minn. 427, 438, 42 N. W. 2d 25, 31 (1950); Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 96, 46 N. W. 2d 94, 98 (1950); Bellows v. Ericson, 233 Minn. 320, 324, 46 N. W. 2d 654, 658 (1951).
416. The court so far has not had occasion to rule on the question when an application for the writ is premature, see State v. Ueland, 30 Minn. 29, 30, 14 N. W. 58, 59 (1882).
appointing a receiver or an unauthorized prohibitory injunction, at least where the latter order was not filed and served prior to the service of the alternative writ on the court. The writ will likewise not issue or be made absolute where the issues raised have become moot as by dismissal of the proceedings upon settlement, by lapse of time or because of other intervening events.

(b) The second of the accepted three requirements or essentials for the issuance of the writ is "that it must appear that the exercise of such [judicial or quasi-judicial] power by the court, officer or person is unauthorized by law." According to a principle established by numerous decisions of the Supreme Court this lack of authorization must be found in the conduct of proceedings by which the tribunal either wholly "usurps" jurisdiction or "exceeds its legitimate jurisdiction." Matters which pertain to the propriety of the tribunal’s action otherwise than "in the jurisdictional sense"

419. State v. District Court, 204 Minn. 415, 283 N. W. 738 (1939) (prohibition annulling appointment of ex parte receiver); Juster v. Grossman, 229 Minn. 280, 38 N. W. 2d 382 (1949) (writ made absolute annulling an order by the district court restraining relator from taking depositions in a wrongful death action). See also State v. Enersen, 230 Minn. 427, 42 N. W. 2d 25 (1950) (prohibition against injunction pendente lite denied because of harmful effects resulting from such annulment).

420. State v. District Court of the Twelfth Judicial District, 141 Minn. 502, 170 N. W. 916 (1919); State v. Weeks, 230 Minn. 581, 41 N. W. 2d 177 (1950); In re Guardianship of Wolff, 232 Minn. 144, 148, 44 N. W. 2d 465, 467 (1950); State v. Wilson, 48 N. W. 2d 513 (Minn. 1951).

421. For cases laying down this principle, see particularly State v. Wilcox, 24 Minn. 143, 147 (1877); State v. Municipal Court of St. Paul, 26 Minn. 162, 164, 2 N. W. 166, 167 (1879); State v. District Court for Ramsey County, 26 Minn. 233, 234, 2 N. W. 689, 700 (1879); State v. Young, 29 Minn. 474, 523, 9 N. W. 737, 738 (1881); State v. Cory, 35 Minn. 178, 28 N. W. 217 (1886); State v. Ward, 70 Minn. 58, 63, 72 N. W. 825 (1897); State v. Crosby, 92 Minn. 176, 178, 99 N. W. 636 (1904); State v. Craig, 100 Minn. 352, 355, 111 N. W. 3, 5 (1907); State v. Hense, 135 Minn. 99, 103, 160 N. W. 198, 200 (1916); State v. District Court, 141 Minn. 1, 165 N. W. 634 (1918); State v. District Court, 195 Minn. 169, 262 N. W. 155 (1935); State v. Laughlin, 204 Minn. 291, 293, 283 N. W. 395, 396 (1939); State v. Johnson, 216 Minn. 219, 223, 12 N. W. 2d 343, 344 (1943); Huhn v. Fofey Bros. Inc., 221 Minn. 279, 286, 22 N. W. 2d 3, 8 (1946); Heinsch v. Kirby, 222 Minn. 352, 355, 24 N. W. 2d 493, 494 (1946); Nemo v. Hotel & Restaurant Employees’ Local No. 556, 227 Minn. 263, 267, 35 N. W. 2d 337, 340 (1948); Juster v. Grossman, 229 Minn. 280, 288, 38 N. W. 2d 332, 336 (1949); Norris Grain Co. v. Seafarers’ International Union, 232 Minn. 91, 98, 46 N. W. 2d 94, 99 (1950); Bellows v. Ericson, 233 Minn. 320, 325, 46 N. W. 2d 654, 658 (1951); State v. Wilson, 48 N. W. 2d 513, 515 (Minn. 1951).

422. The somewhat artificial distinction between these alternatives mentioned in a number of Supreme Court opinions commencing with State v. Crosby, 92 Minn. 176, 178, 99 N. W. 636 (1904) consists apparently in that in the first case the tribunal is without authority to adjudicate the controversy or matter before it generally and in its entirety, while in the second case there exists authority in the premises, but the tribunal is temporarily without jurisdiction to proceed or is without jurisdiction to include issues reserved to different authorities or otherwise not properly before it. Thus the Supreme Court has issued
are not subject to review on prohibition. Thus proper causes for an application for the writ are neither "mere" procedural defects and irregularities nor errors on the merits such as lack of evidence or the application of erroneous rules of law. The lack of jurisdiction which can be challenged by prohibition may be either lack of jurisdiction over the person or lack of jurisdiction over the subject matter. Jurisdiction of the latter type has been found lacking, for example, where commitment proceedings involved a party not actually within the county boundaries where proceedings for removal from office involved an official not subject to the jurisdiction of the administrative tribunal in question where the matter was not subject to administrative intervention because of the lack of a controversy, where a party resorted to a writ of prohibition to prevent the consideration of matters not affecting a certain area, In re Judicial Ditch No. 9, 167 Minn. 10, 208 N. W. 417 (1918), and stated that a tribunal exceeded its legitimate powers by the denial of a stay under the Soldiers' and Sailors' Civil Relief Act, State v. Wilson, 48 N. W. 2d 515 (Minn. 1951). Of course, the existence of a particular issue may deprive a tribunal of its jurisdiction over the entire controversy, cf. State v. Municipal Court of St. Paul, 26 Minn. 162, 2 N. W. 698 (1879); State v. Cory, 35 Minn. 178, 28 N. W. 217 (1886); State v. Crosby, 92 Minn. 176, 178, 99 N. W. 638 (1904).

424. State v. Ward, 70 Minn. 58, 72 N. W. 825 (1897); State v. Crosby, 92 Minn. 176, 179, 99 N. W. 636 (1904); State v. Craig, 100 Minn. 352, 355, 111 N. W. 3, 5 (1907); In re Estate of Davidson, 168 Minn. 147, 210 N. W. 40 (1926) (wrong venue); State v. Laughlin, 204 Minn. 291, 283 N. W. 359 (1939); State v. District Court, 222 Minn. 546, 559, 25 N. W. 2d 692, 699 (1946).
425. State v. Craig, 100 Minn. 352, 111 N. W. 3 (1907) (sufficiency of evidence); State v. Johnson, 216 Minn. 219, 222, 12 N. W. 2d 343, 344 (1943); Heinsch v. Kirby, 222 Minn. 352, 355, 24 N. W. 2d 343, 344 (1946); State v. District Court, 222 Minn. 546, 553, 25 N. W. 2d 692, 696 (1946).
426. See, for instance, the discussion in State v. District Court for Ramsey County, 26 Minn. 233, 2 N. W. 698 (1879); State v. Ward, 70 Minn. 58, 64, 72 N. W. 825, 826 (1897) (administrative proceedings); State v. Laughlin, 204 Minn. 291, 293, 283 N. W. 395, 396 (1939) (criminal contempt); State v. Industrial Commission, 48 N. W. 2d 42 (Minn. 1951).
427. The traditional distinction between jurisdiction over the person and jurisdiction over the subject matter is, of course, not a hard and fast one and has become rather blurred in the light of recent federal cases involving the due process and full faith and credit clauses. Yet our court still attaches some practical significance to the classification; see Huhn v. Foley Bros., 221 Minn. 279, 286, 22 N. W. 2d 3, 8 (1946). See also the court's definition of jurisdiction over the subject matter in Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 98, 46 N. W. 2d 94, 99 (1950). For an even more questionable triple classification of jurisdiction see In re Guardianship of Hudson, 226 Minn. 532, 537, 33 N. W. 2d 848, 852 (1948).
429. State v. Thompson, 91 Minn. 279, 97 N. W. 887 (1904), see also State v. Ward, 70 Minn. 58, 72 N. W. 825 (1897).
430. Nemo v. Hotel & Restaurant Employees' Local No. 556, 227 Minn. 263, 35 N. W. 2d 337, 811 (1948).
type of proceedings reserved for other categories of plaintiffs,\textsuperscript{431} where certain issues involved an area not included in special proceedings,\textsuperscript{432} where the defendant in his official capacity was not subject to orders by the judiciary,\textsuperscript{433} where the controversy involved interstate commerce\textsuperscript{434} or was otherwise subject to exclusive federal control.\textsuperscript{435} It must be noted that the differentiation of jurisdictional defects from mere non-jurisdictional irregularities and other errors is susceptible to inherent difficulties and perplexities, since—as Justice Frankfurter has so pungently pointed out—"'jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."\textsuperscript{436} Thus despite the fact that the court once broadly stated that "whether there were fatal irregularities in the steps taken, such as failure to give the notices required by statute, is not a question that can be reviewed in this manner" [italics added],\textsuperscript{437} it felt subsequently compelled to scrutinize closely whether a procedural omission or other defect went to the jurisdiction\textsuperscript{438} and reached an affirmative conclusion in cases of failure to give a statutory bond,\textsuperscript{439} of abuse of discretion in the appointment of an \textit{ex parte} receiver or denial of a stay of the proceedings,\textsuperscript{440} of judicial bias\textsuperscript{441} and even of a judge acting outside his district.\textsuperscript{442}

While ordinarily lack of jurisdiction should have been asserted in the proceedings attacked by the application for the writ\textsuperscript{443} this is merely a rule of practice which might be dispensed with under appropriate circumstances.\textsuperscript{444}

\begin{center}
(c) The last of the three essentials for the issuance of the writ
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\textsuperscript{431} Kienlen v. Kienlen, 227 Minn. 137, 34 N. W. 2d 351 (1948).
\textsuperscript{432} \textit{In re} Judicial Ditch No. 9, 167 Minn. 10, 208 N. W. 417 (1926).
\textsuperscript{433} State v. District Court, 141 Minn. 1, 168 N. W. 634 (1918).
\textsuperscript{434} Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 46 N. W. 2d 94 (1950), see also State v. Enersen, 230 Minn. 427, 42 N. W. 2d 25 (1950).
\textsuperscript{435} Huhn v. Foley Bros., 221 Minn. 279, 22 N. W. 2d 3 (1946); see also State v. District Court of the Twelfth Judicial District Court of the Twelfth Judicial District, 141 Minn. 502, 170 N. W. 916 (1919).
\textsuperscript{436} Yonkers v. United States, 320 U. S. 685, 695 (1944).
\textsuperscript{437} State v. Crosby, 92 Minn. 176, 179, 99 N. W. 636 (1904).
\textsuperscript{438} State v. District Court, 222 Minn. 546, 559, 25 N. W. 8d 692, 699, (1946).
\textsuperscript{439} Bellows v. Erickson, 233 Minn. 320, 46 N. W. 2d 654 (1951).
\textsuperscript{440} State v. District Court, 200 Minn. 415, 283 N. W. 738 (1939); State v. Wilson, 48 N. W. 2d 513 (Minn. 1951) (denial of stay under Soldiers' and Sailors' Civil Relief Act).
\textsuperscript{441} Payne v. Ericson, 222 Minn. 269, 24 N. W. 2d 259 (1946); State v. Beaudoin, 230 Minn. 186, 40 N. W. 2d 885 (1950).
\textsuperscript{442} State v. Johnson, 173 Minn. 271, 217 N. W. 351 (1927).
\textsuperscript{443} State v. Wilcox, 24 Minn. 143, 146 (1877).
\textsuperscript{444} State v. District Court, 195 Minn. 169, 172, 262 N. W. 155, 156 (1935).
is the requirement that it must appear that injury will result from the threatened action and that there is no other adequate legal remedy.

The presence or absence of this condition confronts the courts frequently with complex and close problems. It early became apparent to the Supreme Court that the crucial question was not that of the mere existence of any other form of relief or review but that of the adequacy of such remedy. Thus the court stated in the early case of State v. Wilcox:446 "There are very few proceedings of a judicial character in which a party aggrieved by a usurpation of jurisdiction may not, either by some mode of review and correction, or by an action of trespass or otherwise, have an adequate remedy for the wrong."446 The court was keenly aware that if the existence of any other remedy were a ground for the refusal of the writ such rule "would almost entirely abolish the writ."447 In a search for a legitimate test as to when the availability of other usual remedies, especially appeal, writ of error or certiorari, would preclude resort to the writ of prohibition, the court hit on the somewhat formal distinction between ordinary actions and extraordinary proceedings and held that the possibility of correction by appeal or certiorari barred issuance of a writ of prohibition in the former class of cases but not in the latter.448 Almost immediately thereafter, however, in reconsidering the matter Chief Justice Gilfillan pointed out that the availability of the writ rested in the sound judicial discretion of the court issuing it, depending upon the balance between the relator's interest in speedy relief against unauthorized action and the general interest in an orderly administration of justice which militates against the interruption and suspension of proceedings in one tribunal to settle jurisdictional issues in another.449 He concluded that in application of this test "in general it is a good reason for denying [the writ] that the party has a complete remedy in some other and more ordinary form."450 As a result he ruled that the possibility of an appeal in an ordinary action precluded the resort to the writ of prohibition.

The principle that prohibition is not a writ of right, but rests in the sound discretion of the court has been reiterated many

445. State v. Wilcox, 24 Minn. 143 (1877).
446. Id. at 147.
447. Ibid.
448. Ibid.
449. State v. Municipal Court of St. Paul, 26 Minn. 162, 164, 2 N. W. 166, 168 (1879).
450. Ibid.
Obviously it is not the principle but its application in various types of cases which is of professional interest.

The court has followed in many instances its rule that prohibition will not be granted where there is an adequate remedy by appeal on which the jurisdictional issues can be raised. It has been articulated on the point that "[t]he fact that it may be less summary and more expensive does not ipso facto render appeal inadequate." In particular it has been held to militate against the issuance of the writ where the question of jurisdiction depended on contested factual issues. Yet the court, especially more recently, has evinced a tendency to greater liberality and granted the writ several times despite the availability of an appeal where the latter remedy would have led to undue delay and circuity of action or would have caused the relator the loss of evidence or other particular harm. Conversely, the writ has been denied in an instance where the court felt that its issuance prior to the completion of the proceedings in question would merely create a chaotic situation.

The court has followed the same principles which it laid down

451. State v. Hense, 135 Minn. 99, 103, 160 N. W. 198, 200 (1916); In re Estate of Davidson, 168 Minn. 147, 148, 210 N. W. 40, 41 (1926); Huhn v. Foley Bros., Inc., 221 Minn. 279, 286, 22 N. W. 2d 3, 8 (1946); State v. Enersen, 230 Minn. 427, 438, 42 N. W. 2d 25, 31 (1950).

452. State v. District Court of Ramsey County, 26 Minn. 233, 2 N. W. 698 (1879); State v. Cory, 35 Minn. 178, 28 N. W. 217 (1886); In re Estate of Davidson, 168 Minn. 147, 210 N. W. 40 (1926); State v. Funck, 211 Minn. 27, 299 N. W. 684 (1941); see also State v. Ferguson, 203 Minn. 603, 281 N. W. 765 (1938).


455. State v. District Court, 195 Minn. 169, 262 N. W. 155 (1935) (writ granted restraining one district judge from interfering by injunction with action pending in another district court); Huhn v. Foley Bros., Inc., 221 Minn. 279, 22 N. W. 2d 3 (1946) (prohibition restraining municipal court from hearing matter within exclusive jurisdiction of a federal administrative tribunal); State v. Schultz, 200 Minn. 363, 274 N. W. 401 (1937) (prohibition restraining judge from proceeding after filing of affidavit of prejudice); Payne v. Lee, 222 Minn. 269, 24 N. W. 2d 259 (1946) (prohibition restraining probate judge disqualified by reason of bias from proceeding).

456. State v. District Court, 204 Minn. 415, 283 N. W. 738 (1939) (prohibition annulling ex parte appointment of receiver); Juster v. Grossman, 229 Minn. 280, 288, 38 N. W. 2d 832, 837 (1949) (prohibition against injunction proceedings restraining relator from taking a deposition); Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 46 N. W. 2d 94 (1950) (prohibition restraining the enforcement of a labor injunction); Bellows v. Ericson, 233 Minn. 320, 46 N. W. 2d 654 (1951) (prohibition restraining enforcement of mandatory injunction issued without bond).

with respect to appeals in deciding whether the availability of a review by means of certiorari would bar the granting of the writ of prohibition. Thus it denied an application for the writ made for the purpose of restraining the Industrial Commission from hearing the merits of a claim under the Workmen’s Compensation Act where the relator claimed lack of jurisdiction by reason of improper service, because in the opinion of the court certiorari constituted an adequate remedy in such case. But conversely it granted the writ in another case involving commitment proceedings because it considered review by certiorari inadequate for the important reasons that the personal freedom of the relator was at stake and that the lack of jurisdiction was based on facts dehors the record and therefore excluded from consideration by the court in certiorari proceedings.

The availability of relief by means of the other extraordinary remedies or special proceedings apparently has presented but few difficulties to, and found little attention from, the court. On the one hand it has permitted the challenge of proceedings before a judge disqualified for prejudice by means of an application for the writ of prohibition although “a more expeditious and suitable remedy” was to be had by seeking a writ of mandamus; on the other hand it has ruled against the possibility of questioning the title to judicial office by means of the writ of prohibition for the reason that the writ of quo warranto was the proper remedy. It is also perplexing that in one case the court granted the writ of prohibition as the proper means for challenging the unconstitutionality of judicial proceedings for the incorporation of a village because of the lack of another adequate remedy without even considering the appropriateness of such attack by quo warranto, despite the fact that only shortly before when such proceedings had no safeguards of judicial character it had referred to quo warranto as the method to properly call in question the incorporation order. The judges, however, have been prone to point at the availability of other relief in cases where they denied the writ for other reasons, such as absence of a judicial or quasi-judicial character.

458. State v. Industrial Commission, 48 N. W. 2d 42 (Minn. 1951).
461. State v. McMartin, 42 Minn. 30, 43 N. W. 572 (1889); State v. Beaudoin, 230 Minn. 186, 40 N. W. 2d 885 (1950).
463. State v. Ueland, 30 Minn. 29, 14 N. W. 58 (1882).
464. See, for instance, State v. Ostrum, 35 Minn. 480, 29 N. W. 585 (1886).
The last problem to be discussed in connection with the essential that there must be no other adequate legal remedy available to the applicant for a writ of prohibition is the interrelation between that writ and the injunction. Strangely enough no case in this state has been found in which the Supreme Court considered this problem. An appropriate occasion for a discussion of this point would have been the above mentioned case of Nemo v. Hotel & Restaurant Employees' Local No. 556. In that case a local A.F. of L. union which had tried to negotiate an agreement with an employer but did not claim to represent the majority of the employees in his enterprise procured a writ of prohibition restraining the State Labor Conciliator from holding an election to determine whether or not the relator was the proper collective bargaining agent for said employees. The court held the action of the labor conciliator in ordering and holding an election was both quasi-judicial in nature and in the instant case in excess of his jurisdiction, since no controversy over the proper bargaining representative existed. It also found that there was a substantial threat of injury to the relator because of the loss of prestige among the employees following an adverse election and that no other adequate remedy at law was available for the prevention of such harm. No specific mention was made of the possibility of an injunction against the state labor conciliator and the hostile employer, except, perhaps, for a vague reference to "circuity of action." It is true that injunctive relief had been denied in a somewhat analogous previous case involving a labor election, but the reason for that refusal was that under the particular circumstances of that controversy the petition for a temporary restraining order was premature. Perhaps the true reason for allowing resort to the writ of prohibition in many instances despite the availability of an injunction is the fact that the writ of prohibition brings the matter immediately to the Supreme Court, constitutes a direct attack on the proceedings in question and thus brings the controversial "jurisdictional" issues to a swift and final solution. If the jurisdictional matter involves the trial of factual questions the injunction might, however, be the proper remedy.

466. Id. at 271, 35 N. W. 2d at 342.
467. Id. at 272, 35 N. W. 2d at 342.
468. Quest Foundry Co. v. International Molders & Foundry Workers Union, 216 Minn. 436, 13 N. W. 2d 32 (1944).
469. Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 98, 46 N. W. 2d 94, 99 (1950) ("prohibition is always a direct attack").
In that connection it must be added that the writ of prohibition not only resembles in some aspects the writ of certiorari as was mentioned in the beginning of this installment but that it possesses also some similarity to an injunction against proceedings. True, the injunction is normally addressed only to the party and not the tribunal, while the writ of prohibition is directed to both the court and the party. But the courts have frequently been inclined to minimize the consequences following from that distinction. Thus our Supreme Court has on the one hand quoted with approval a pronouncement by the Court of Appeals of New York stating that the writ of prohibition "is in effect an injunction against a court." On the other hand, it has also recognized that an injunction while not an order running against a court "effectively restrains action." Yet, even if one should agree with Justice Cardozo's vigorous assertion that "the reality of the distinction [between the two remedies because of the difference in the addressees] has illustration in a host of cases" this distinction fades away in the case of an administrative body or tribunal whose constituents themselves may be the addressees of an injunction. Thus it seems that, especially in cases of administrative proceedings, an injunction may or may not be an adequate remedy barring the writ of prohibition depending primarily upon the urgency for an intervention by the Supreme Court itself and the nature of the issues in question.

C. Procedural Aspects

In Minnesota the power to issue writs of prohibition is vested exclusively in the Supreme Court. Proceedings of this kind are "original proceedings" based on the constitutional clause which grants the Supreme Court "original jurisdiction in such remedial cases as may be prescribed by law." Since the constitutional prohibition against jury trial in the Supreme Court applies also to

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470. Supra text to note 381.
476. Minn. Const. Art. VI, § 7. For recent statements in the reports classifying applications for the writ of prohibition as original proceedings see, for instance, Bellows v. Ericson, 233 Minn. 320, 321 (1951); State v. Industrial Commission, 48 N. W. 2d 42 (Minn. 1951).
its original jurisdiction\(^{478}\) it is recognized that all issues in prohibition cases should be decided upon affidavits.\(^{479}\)

The statutes contain detailed provisions for the applicable practice.\(^{480}\) The writ is applied for upon affidavit by motion to the court or a judge thereof in vacation.\(^{481}\) The writ is directed to the court and party or officer who are engaged in the proceedings to be restrained or annulled.\(^{482}\)

The writ is first issued in a “temporary” ("preliminary")\(^{483}\) form, usually designated as an “alternative writ,”\(^{484}\) and contains an order restraining further proceedings by respondents until further order coupled with an order to show cause why the writ should not be made absolute.\(^{485}\) The writ is served upon the addressees in the same manner as a writ of mandamus.\(^{486}\) The court or the officer named ought to be identified by its official designation; if the officer is an administrative board its correct designation as, for instance, Industrial Commission, not the names of its members, should properly be selected.\(^{487}\)

The court or officer to whom the writ is directed is under a duty to make a return.\(^{488}\) The party as such is not required or permitted to make a return. He is only permitted to adopt the return of the court or tribunal, but not required to do so.\(^{489}\) He is, however, under a practical necessity of seeing to it that a return is made. If he fails to do so and no return is made, the Supreme Court will decide the question of whether or not the alternative writ should be made abso-

\(^{478}\) Harkins v. Board of Supervisors, 2 Minn. 342 (1858); Prignitz v. Fisher, 4 Minn. 366 (1860); see also supra text to note 36.

\(^{479}\) Prignitz v. Fisher, 4 Minn. 366 (1860); see also In re Estate of Davidson, 168 Minn. 147, 149, 210 N. W. 40, 41 (1926).

\(^{480}\) Minn. Stat. § 587.01 (1949).

\(^{481}\) Ibid.

\(^{482}\) Ibid.

\(^{483}\) The terms “temporary” and “preliminary” writ were used in older cases, see for instance State v. Peers, 33 Minn. 81, 21 N. W. 860 (1885); State v. Ostrum, 35 Minn. 480, 29 N. W. 585 (1886).

\(^{484}\) Minn. Stat. § 587.02 (1949) mentions “The first or alternative writ.” The latter designation is found in a host of cases extending to date, see for instance State v. Thompson, 91 Minn. 279, 97 N. W. 887 (1904); State v. Enersen, 230 Minn. 427, at 438, 42 N. W. 2d 25, at 31 (1950).

\(^{485}\) Minn. Stat. § 587.01 (1949).

\(^{486}\) Minn. Stat. § 587.02 (1949).

\(^{487}\) See State v. Industrial Commission, 48 N. W. 2d 42 (Minn. 1951); Dayton v. Paine, 13 Minn. 493, 496 (1869).

\(^{488}\) Minn. Stat. § 485.02 (1949); see also Dayton v. Paine, 13 Minn. 493, 496 (1869); State v. District Court, 195 Minn. 169, 172, 262 N. W. 155, 156 (1935).

\(^{489}\) Dayton v. Paine, 13 Minn. 493, 496 (1869); State v. District Court, 195 Minn. 169, 172, 262 N. W. 155, 156 (1935).
lute according to the showing made by the original application.\textsuperscript{490} Of course, the court or officer and the party are entitled to file separate briefs and to be heard separately on oral argument.\textsuperscript{491} As stated before, if a return is made and issue is joined upon such return the case must be decided upon proof by affidavits.\textsuperscript{492}

If the hearing upon the order to show cause convinces the court that there is no lack or excess of jurisdiction, or that there is another adequate remedy or that the issuance of the writ will create chaos or that the issues have become moot, the writ will not be made absolute. The final disposition in such case will be an order quashing or discharging the alternative writ, \textit{i.e.}, both the temporary restraining order and the order to show cause.\textsuperscript{493} Conversely, if the hearing on the order to show cause leads the court to the conclusion that the writ should be made absolute, the court will issue a final order to that effect and annul all or any of the proceedings as to which there was lack or excess of jurisdiction.\textsuperscript{494}

The statute provides that “The court may make and enforce such order concerning costs and disbursements, and the amount thereof, as justice shall require.”\textsuperscript{495} This provision was construed as leaving to the sound discretion of the court whether costs and disbursements should be taxed to the prevailing party.\textsuperscript{496} Although ordinarily the court has taxed costs and disbursements to the prevailing party it has not taxed costs and disbursements \textit{against} either party when both of them prevailed to some extent\textsuperscript{497} and not \textit{to} the prevailing party where the application was justified when made, although the issues became subsequently moot,\textsuperscript{498} or in other cases

\textsuperscript{490} State v. District Court, 195 Minn. 169, 172, 267 N. W. 155, 156 (1935).

\textsuperscript{491} See the implicit approval of this practice in Nemo v. Hotel & Restaurant Employees' Local No. 556, 227 Minn. 263, 35 N. W. 2d 811, 812 (1948).

\textsuperscript{492} See \textit{supra} text to note 478.

\textsuperscript{493} According to Minn. Stat. § 587.04 (1949) “The final order if it be against the relator, shall authorize further proceeding as if the first or alternative writ had not issued.” The court's formula varies slightly, see for instance State v. Industrial Commission, 48 N. W. 2d 42, 44 (Minn. 1951) (“The alternative writ is quashed and the order to show cause discharged”); State v. Wilson, 48 N. W. 2d 513, 515 (Minn. 1951) (order to show cause is discharged); State v. Weeks, 230 Minn. 581, 41 N. W. 2d 177 (1950) (“The writ is discharged”); State v. Enersen, 230 Minn. 427, 442, 42 N. W. 2d 25, 33 (1950) (“Writ discharged”).

\textsuperscript{494} Minn. Stat. § 587.05 (1949).

\textsuperscript{495} \textit{Ibid.}

\textsuperscript{496} Nemo v. Hotel & Restaurant Employees' Local No. 556, 227 Minn. 263, 272, 35 N. W. 2d 811, 812 (1948).

\textsuperscript{497} \textit{Ibid.}

\textsuperscript{498} State v. Wilson, 48 N. W. 2d 513, 515 (Minn. 1951).
where such arrangement appeared to the court as required by justice.\textsuperscript{499} The court or officer involved is not liable for costs and disbursements.\textsuperscript{500}

\textsuperscript{499} See for example State v. Industrial Commission, 48 N. W. 2d 42, 44 (Minn. 1951); Bellows v. Ericson, 233 Minn. 320, 330, 46 N. W. 2d 654, 661 (1951).

\textsuperscript{500} Nemo v. Hotel & Restaurant Employees’ Local No. 556, 227 Minn. 263, 272, 35 N. W. 2d 811 (1948).