St. John's Law Review

Volume 38
Number 1 *Volume 38, December 1963, Number 1*

Article 3

May 2013

Statutory Procedures Governing Judicial Review of Administrative Action: From State Writs to Article 78 of the Civil Practice Law and Rules

Harold Weintraub

STATUTORY PROCEDURES GOVERNING JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: FROM STATE WRITS TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES *

HAROLD WEINTRAUB †

MANDAMUS

The introductory note to the provisions governing mandamus in the Code of Civil Procedure, which became effective September 1, 1880,[1] described the existing provisions of the Revised Statutes on the subject as "very meager." [2] This is truly an understatement if we recall the seven bare statutory sections which had to suffice to guide and to govern the great variety and large volume of mandamus actions in the pre-Civil Code period.[3] The members of the Throop Commission [4] were acutely aware of this fact and set out in earnest to rectify the omission. Where the chief draftsman of the 1848 Code of Procedure, David Dudley Field, had concentrated on stating the general rules which should govern,[5] The Throop Code was drafted upon the principle that detailed precision must be established for each stage of the mandamus proceeding.

---

* This paper is part of a study entitled, "Development of Judicial Review of Administrative Action in New York," submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science at New York University School of Law. The guidance of Professor Bernard Schwartz of the School of Law throughout the period of preparation of this study is gratefully acknowledged.

† The author is a member of the New York Bar; awarded LL.B., St. John's University School of Law; LL.M., New York University School of Law; J.S.D., New York University School of Law. He serves as an attorney for the New York City Housing Authority.

1 N.Y. Sess. Laws 1880, ch. 178, § 3356.

2 REVISERS' PRELIMINARY NOTE TO THE NEW YORK CODE OF CIVIL PROCEDURE, ch. 16, art. 4 [hereinafter cited as CCP REV. NOTE].

3 N.Y. REV. STAT. (1859) Pt. III, ch. 9, tit. 2, art. 3, §§ 54-60.

4 So designated after its chairman and chief draftsman, Montgomery Throop.

5 3 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 234-235 (Coan ed. 1890).

After allowing the courts to proceed virtually unhindered for one hundred years in working out the procedures for the writ, the time was finally considered ripe for codification because the avalanche of mandamus litigation had also brought a great diffusion and diversity of practice and procedure, uncontrolled by a central source or authority. Questions of practice rarely reached the highest court, allowing differences to grow up in the various judicial divisions of the state.

Although a revolutionary change had been effected by the Field Code of 1848 in abolishing the common-law forms of action and simplifying the rules of practice and pleading, the procedure for mandamus was specifically preserved by that portion of the code which was enacted into law.[6]

CODE OF CIVIL PROCEDURE

The codifiers of 1870, finding that the "rules of law, defining the cases where the writs may issue . . . have been tolerably well settled," directed their exclusive attention to practice and procedure, and stated that "no material alteration" was made "in the general plan and framework of the original system." [7]

First, the writs which English courts had denominated as prerogative writs were now placed into a new classification called "state writs," with the addition of the writ of assessment of damages. This followed the recommendation of the Field Commission in its final report which substituted the term state writ for prerogative writ in belated recognition of the absence of royal prerogative at this point in our history.[8] Also, in accordance with legislative direction, Latin terms for the writs themselves had been supplanted by the Field Commission by writ of review of inferior jurisdictions (certiorari) and writ of mandate (mandamus), among others,[9] but was not followed by the later codifiers.

---

[6] N.Y. Sess. Laws 1848, ch. 379, § 390; N.Y. Sess. Laws 1849, ch. 438.
[7] CCP REV. NOTE.
[8] COMPLETE REPORT OF THE COMMISSIONERS OF 1850 § 1264 [hereinafter cited as COMPLETE REPORT OF 1850].
[9] *Id.* at § 1266.

General procedures applicable to all of these writs, *viz.*, habeas corpus, certiorari to inquire into the cause of detention, mandamus, prohibition, assessment of damages, certiorari to review the determination of an inferior tribunal, under varying conditions, were specified.[10] This could have been the precursor of article 78 but was lacking a sufficient body of rules. In particular, the final determination was styled by section 1997 a final order, and the practice provisions of the Code relating to amendments, motions and intermediate orders as in an action were made applicable to these special proceedings.

Although the codifiers disclaimed the intention of making any material alteration in the prior system, only six of the twenty-four new mandamus sections represent the basic provisions of the former Revised Statutes.[11] Writs of mandamus are declared to be "either alternative or peremptory" [12] and "may be granted upon an affidavit, or other written proof showing a proper case therefor" with or without notice.[13] As a practical matter the service of notice of application for a writ did not matter too much because the writ itself was and from earliest time had functioned in the nature of an order to show cause. Sharply departing from the practice followed in regard to certiorari, no effort was made to define substantially the occasion or circumstance for allowing the writ; the revisers were satisfied to allow the courts to continue to issue the writ in a "proper case." Ultimately, this proved of immense significance in the development of this writ allowing it to later evolve as a mechanism for challenging government action involving the exercise of discretion in matters not reviewable by certiorari. On the other hand, the unadopted Code of the Field Commission had specifically defined, albeit quite broadly, the appropriate occasion for the issuance of the writ, "to compel the performance of an act, which the law specifically enjoins, as a duty resulting from an office, trust or station." The Field provision did not end there

---

[10] N.Y. CODE OF CIV. PROC. §§ 1992-2007 [hereinafter cited as CCP].
[11] CCP §§ 2073, 2082, 2084, 2088-90.
[12] See also COMPLETE REPORT OF 1850 § 1285.
[13] CCP § 2067.

but took cognizance of prevailing substantive law in codifying the current concept that the writ "cannot control judicial discretion." [14] The former part of this proposal was, a century later, substantially introduced into article 78. [15]

Under the common law, prior to 1873, the writ only ran to inferior bodies and jurisdictions. However, in that year,[16] it was authorized to be directed to any judge holding a special term of the supreme court or acting as a judge of that court. The writ was to be issued in such case by the general term, to avoid the necessity of one supreme court's justice granting a writ against another justice of the court. This provision was incorporated into the Code.[17]

A peremptory writ may be applied for where the applicant believes, and shows in his papers and by a proper notice, that the "right to the mandamus depends only upon questions of law," and in such case the court will treat as true only such allegations of the writ as are undisputed.[18] The revisers' notes to section 2070 stress that the granting of a peremptory mandamus, in the first instance, is uncommon except in an urgent case.

The person or persons served with the writ were given the option of filing a return which could incorporate denials and defenses of new matter as in an action, or could file a demurrer as if addressed to a complaint. The alternative writ could not be quashed nor set aside on motion on any question involving the merits.[19]

Although a further return could not now be compelled under the Code, a departure from the prior procedure followed under common-law mandamus, the relator could demur to the return as being insufficient in law.[20]

Issues of fact are defined with utmost simplicity, as arising from a denial or an allegation of new matter contained in a return, unless a demurrer is taken. The re-

---

[14] COMPLETE REPORT OF 1850 § 1283.
[15] N.Y. CIV. PRAC. ACT § 1296(1) [hereinafter cited as CPA].
[16] N.Y. Sess. Laws 1873, ch. 70.
[17] CCP § 2069.
[18] People *ex rel.* Corrigan v. The Mayor, 149 N.Y. 215, 43 N.E. 554 (1896) (construing CCP § 2070).
[19] CCP §§ 2075-77.
[20] CCP § 2078.

visers state that a reply is not necessary.[21] Oral pleadings are abolished and all pleading must follow this article.[22] After issue is joined, the proceedings are the same as in an action, and the writ and return are deemed pleadings therein, following the principles of the Field Code of 1850. The final order is the same as a final judgment and may be docketed as such.[23]

Returning to issues of fact, once issue is joined upon an alternative writ, it must be tried by a jury as in an action unless a jury trial is waived or consent made to a reference.[24] Although a relator may prevail upon an issue of fact raised in an alternative mandamus, he is not thereby entitled to a peremptory mandamus when there is no legal basis in the record to award the writ to him.[25] Section 2083 also incorporates the early statutory provision that the relator may recover damages as if the issues were joined in an action against defendant for making a false return, which would of itself have presented a rather difficult and unwieldly cause of action. Where an alternative mandamus has been awarded, costs are to be awarded as in an action; if a peremptory mandamus is granted without a prior alternative mandamus, costs, not exceeding fifty dollars and disbursements may be awarded to either party, as upon a motion.[26] The fifty dollar limitation has remained in effect to this day. Where a peremptory mandamus has issued without a prior alternative writ, the appeal is taken as from a final order in a special proceeding; however, where there has been an alternative mandamus, the appeal is taken as from a judgment.[27] The guidelines followed here were the standards established for motion practice (peremptory mandamus) and for trial (alternative mandamus).

Although the revisers' note states that section 2083 makes provision that the relator may be awarded damages

---

[21] CCP Rev. Note § 2079.
[22] CCP § 2080.
[23] CCP § 2082.
[24] CCP § 2083.
[25] People *ex rel.* D.W. & P.R.R. v. Batchellor, 53 N.Y. 128, 137 (1873); People *ex rel.* Hanrahan v. Metropolitan Bd. of Police, 26 N.Y. 316 (1863).
[26] CCP § 2086.
[27] CCP § 2087.

as in an action on a false return, section 2088 repeats this provision verbatim. This is typical of the considerable amount of overlapping and surplusage of wordage throughout the mandamus article.

Appropriate authority and discretion for granting a stay in the mandamus proceeding and for an enlargement of time in other respects is also provided.[28] Where the court is convinced that the public officer or body against whom a peremptory mandamus is awarded has without just excuse refused or neglected to perform the duty enjoined in the proceeding, it may impose a fine not exceeding $250 in addition to awarding relator his damages and costs. It has been ruled that this fine relates and is confined to inexcusable neglect of duty which occurred before the issuance of the writ.[29]

The extended disquisitions in the opinions of the courts prior to the adoption of the Code in regard to prerogative writ procedures plainly betrayed the fact that the common-law intricacies of pleading and practice on these writs had not been adequately mastered. The influx of new uses to which the writs were applied added, moreover, to the confusion. The bare bones of the Revised Statutes had failed to keep pace with and provide answers to these new problems, and the revisers sought in this article to restore a basis for order and uniformity in dealing with these uncertainties and new demands.

They prescribed, in the main, from existing common-law practice, that the peremptory writ could be granted in the first instance where only a question of law was raised. The alternative writ would issue either where the peremptory writ itself, improvidently issued, showed that a question of fact existed, or where the relator in the first instance employed that mode of proceeding because he con-

---

[28] CCP § 2089.

[29] People *ex rel.* Garbutt v. R. & S.L.R.R., 76 N.Y. 294 (1879), derived from 3 N.Y. Rev. Stat. (1829) ch. 587, § 60. According to the revisers' note on the Revised Statutes, this provision was not originally proposed by them but was inserted by the legislature. It was presumably patterned upon an existing penalty imposed on a supervisor neglecting to perform duties incumbent upon him and was intended "To save further action, and to ensure the performance of public duties."

sidered that a question of fact existed to be tried. The defendant was required to serve and file a return, unless he decided to demur to an alternative writ or move to quash a peremptory writ. The pleadings and the practice were to be assimilated to that of an action, after the service of the return, as far as it was consistent with the mandamus article. After the return was filed to an alternative mandamus which showed that an issue of fact existed, it was to be tried by a jury unless waived. The relator who prevailed was entitled to a peremptory mandamus directing that a public duty enjoined by law be performed. He was entitled also to an assessment of damages if he showed that the return was falsified; to be awarded any other damages which he sustained, and to costs and disbursements. The court could impose, in addition, a fine not exceeding $250 for an unreasonable refusal to perform the duty found incumbent upon the defendant in the action. Although provision is made for a stay of the mandamus proceedings in order to maintain the parties in *status quo* while an appeal is taken, there is none made in the first instance for staying the action of the public body or officer while the mandamus proceeding is pending undecided. There is no statute of limitations prescribed for the time in which a proceeding is to be brought on. This omission was based on the likely theory that mandamus resembled an action, and in any event, the court retained discretion under the common-law decisions to refuse the writ where it considered that an excessive period of time had been allowed to elapse.

Such was the substance of the new enactment which addressed itself exclusively to matters of procedure. The basis for awarding the writ would continue to be governed by common-law principles derived from the case law. The article made no visible attempt to set forth any substantive conditions for awarding or denying mandamus. However, the new problem of ferreting out and correlating the various provisions of the mandamus article had now replaced the problem of the lack of adequate statutory provisions. The statute did not follow a logical and chronological sequence and provisions frequently overlapped, creating further con-

fusion. The large volume of mandamus actions which flowed into the courts at this period required simple, clear and concise rules to obviate pitfalls for the uninitiated and to speed the action to an ultimate decision on the merits, if at all possible. A start had been made in providing statutory guides, but in turn, the new statutory aids had to be mastered if the hoped-for benefit was to be realized.

CERTIORARI

Where doubt and confusion had previously prevailed in regard to the common-law procedure surrounding the writ of mandamus, there was conflict and uncertainty in the law in regard to the circumstances when issuance of a writ of certiorari was legally justified.[30] Basically a mode of reviewing judicial action of judicial and nonjudicial tribunals, both statutory and non-statutory, the uses of certiorari, by pressure of rising demands resulting from rapidly changing conditions, had extended its function far beyond its original purpose of examining jurisdiction.

The codifiers spoke of this in their preliminary note on the certiorari article. It was their opinion that statutes relating to special proceedings had made the appeal provisions of the Code also applicable to cases previously reviewed by certiorari. They leaned strongly towards codifying this viewpoint and to dispense with treating certiorari altogether, but finally resolved upon a separate article for certiorari in considering "the risk of doing more harm than good by the change." It would appear, therefore, that the ancient writ of certiorari for review of official action had hovered close to extinction as this part of the Code of Civil Procedure was in the process of formulation. It would appear also that the revisers had taken the right tack in considering abolition of the writ, but for the wrong reasons. Although the old writ system had outlived its usefulness, the subject matter of certiorari writ review could not be equated to judicial action by a judicial tribunal, warranting full assimilation for review of such administration action as

[30] CCP REV. NOTES; CCP § 2140.

upon appeal. The narrow technicalities then common to our law, and the broad spectrum of judicial action immune to revision upon appeal would have been imported with full force in regard to an area where tradition had not as yet elevated the transactions involved to the status of a judicial transaction. A large number of these actions would thereby have been placed beyond the reach of practical judicial review. In addition, this would have occurred at a time when mandamus allowed but cursory judicial review, and certiorari was the remaining bastion of relief for testing the fairness and the legality of administrative action. Although the test for review by certiorari was theoretically based upon judicial action, the lines between judicial and administrative action had not as yet been clearly drawn.

What emerges for us today as a matter of central interest is that certiorari was close to extinction because it was considered to be a writ which resembled an appeal in almost all respects. This view had ample support in the Revised Statutes where statutory certiorari was placed between the article "Of Writs of Error" and another "Of Appeals from the Court of Chancery," all of them falling under the title of "Of Writs of Error and Appeals."[31] Consistent with the viewpoint that certiorari resembled an appeal, the provisions of the Code relating to the writ were tailored towards that end, assimilating all the possible methods of the appeal process. However, even more than in the case of mandamus, the Code drew heavily upon the leading cases which had gained acceptance and currency by the cogency of their decisions, creating a body of substantive certiorari law where isolated decisions without definitive authority had existed before. This body of viable certiorari law had moved rapidly in many directions in the decades just prior to the adoption of the Code.

In addition, certiorari was a familiar writ, having been extensively employed in conjunction with the writ of habeas corpus;[32] to review actions from mayors' courts;[33] to

[31] N.Y. REV. STAT. (1859) Pt. III, ch. 9.
[32] N.Y. REV. STAT. (1859) Pt. III, ch. 9, tit. 1, art. 2.
[33] N.Y. REV. STAT. (1859) Pt. III, ch. 7, tit. 2.

remove decisions for review under absconding debtors' acts;[34] to review awards by canal appraisers;[35] to review complaints of entry and detainer;[36] to review summary proceedings for recovery of possession of land.[37] It is readily apparent, therefore, that in establishing general statutory procedures for certiorari as a mechanism of review there was ample precedent. Although some of the statutory certiorari proceedings referred to were self-sufficient in prescribing the entire procedure to be followed, a general statute for common-law certiorari had long been needed because there were no general statutory provisions applicable at that time. The preliminary note of the codifiers specifically emphasizes that the provisions of the article would "therefore be confined to a common-law certiorari," in "defining the jurisdiction of the court to issue a certiorari." However, in those situations where statutory certiorari made no special provision in respect to matters touched by the certiorari article, the latter would apply and govern.

The writ is defined as a means of reviewing a determination of a body or officer.[38] It can be issued only where authorized expressly by statute, or where it may be issued at common law and the right to the writ is not expressly taken away by statute.[39] It cannot be issued, as it had in the past, to review a determination made in a civil action or in a special proceeding in a court of record.[40] Falling back on decisional law, it was also established that it cannot issue (1) to review a determination which is not final; (2) where it can be adequately reviewed by appeal to a court or some body or officer; or (3) where there was a right to request a rehearing, unless a rehearing was had or the time for it had expired.[41] The writ is allowed to issue out of courts other than the supreme court; by a court of record exercising appellate functions to bring up

---

[34] N.Y. REV. STAT. (1859) Pt. III, ch. 9, tit. 3, art. 2.
[35] N.Y. REV. STAT. (1859) Pt. I, ch. 9, tit. 9, art. 3.
[36] N.Y. REV. STAT. (1859) Pt. III, ch. 8, tit. 10, art. 1.
[37] N.Y. REV. STAT. (1859) Pt. III, ch. 8, tit. 10, art. 2.
[38] CCP § 2120.
[39] *Ibid.*
[40] CCP § 2121.
[41] *Ibid.*

additional data or to correct a defect in the record before the court.[42] This latter proviso is of arresting interest because the earliest beginnings of certiorari were primarily concerned with the ancillary function of supplying data to a higher tribunal or officer. Acting upon the premise that certiorari was akin to an appeal, the codifiers set a period of four months as the time in which the proceeding was to be brought.[43] This was a new provision and the explanatory note to this section observed that the period here prescribed was twice the period of time allowed for taking an appeal from an order under the Code. It recognized that the varying periods of limitation prescribed by various statutes will continue to be applicable to such statutory certiorari proceedings. The period of limitation was qualified by the following section which listed nonage, insanity or imprisonment as grounds for an extension of time up to twenty months for bringing on the writ.[44]

The writ is to be applied for by or in behalf of the person aggrieved by the determination to be reviewed and must be founded upon an affidavit or a verified petition, or other proof showing a proper case for the intervention of certiorari relief. The granting or refusal of the writ is expressly made a matter of discretion with the court,[45] again incorporating decisional law on a statutory point. Inasmuch as the writ was a court order necessary to institute the proceeding, vesting discretion in the court in regard to its issuance differentiated it sharply from an appeal which could, in the first instance, normally be taken as of right. Also, noteworthy is the requirement that a petitioner must show himself aggrieved, *i.e.*, have standing, before the court would authorize issuance of the writ. Sharp distinctions between certiorari and mandamus are now being codified, in the light of the different purposes to which the writs had been applied in the recent past.

The next several sections present matters of procedure as to notice, nomenclature of defendants and mode of

---

[42] CCP §§ 2123-24.
[43] CCP § 2125.
[44] CCP § 2126.
[45] CCP § 2127.

service.[46] In recognition of the importance of the matters coming within the purview of certiorari, and notably absent in the mandamus article, provision is made for authorizing a stay of the determination to be reviewed, according to the court's discretion and upon suitable undertaking.[47]

In regard to the return, it is required that a transcript of the record of the proceedings be annexed together with other matters specified in the writ.[48] The earlier cases had not required that verbatim evidence be included in the return because jurisdiction could be determined without it, but this Code requirement now accorded recognition to the enlarged scope of review allowed by certiorari.

The Code stated that: "if a return is defective, the court may direct a further return." [49] But the long standing rule of case law that the facts in the return were conclusive and could not be contradicted was perpetuated by statute.[50] This was an anachronism which had been mitigated in mandamus long earlier and could have been wiped out in certiorari by allowing the relator to request a further return.[51] It was also provided that "a person, specially and beneficially interested in upholding a determintion" could be admitted as a party defendant in the discretion of the court, subject to such terms as justice required.[52]

Indicative of the importance attached to this type of proceeding and to the fact that it was to be treated on a par with an appeal, is the provision which directs that the cause be heard at a general term of the supreme court; [53] the general term was shortly succeeded by the appellate division as the intermediate court of appeal in the state. Another section, consonant with the practice formerly followed in respect to writs of error, authorized the receipt of additional affidavits or written proof from either party relating to any alleged error of fact or question of fact

---

46 CCP § 2128-30.
47 CCP § 2132.
48 CCP § 2134.
49 CCP § 2135.
50 People *ex rel.* Miller v. Wurster, 149 N.Y. 549, 44 N.E. 298 (1896).
51 *Cf.* COMPLETE REPORT OF 1850 § 1280.
52 CCP § 2137.
53 CCP § 2138.

essential to the jurisdiction of the body or the officer to make the determination, where the facts are not sufficiently stated in the return.[54]

Section 2140 was the most significant and lasting contribution made by the codifiers in the field of administrative law. By this section full recognition was extended to the labors of a small number of judges whose vision was not limited by the boundaries of precedent. Exhibiting a broad grasp of current practices which had left much of administrative adjudication free from judicial review, these men had issued decisions which gradually brought such action within the folds of the common law. In this manner, modified but effective common-law standards of judicial review were thereafter to be applicable by means of certiorari. In addition to the traditional tests of examining whether there was jurisdiction and regularity in the proceedings, these pioneering judicial decisions were utilized to enlarge the scope of review by statute to embrace the basic constituents of a fair trial. The enduring value of these provisions is amply demonstrated by their retention, in the virtual original terminology, through several revisions of our practice codes. A clear-cut, palpable standard for measuring and evaluating the propriety of judicial action taken by an administrative body or officer had been promulgated for the guidance of the courts and the administrators alike.[55]

Section 2140 prescribed that the scope of review upon certiorari was to be determined and tested in accordance with the following standards:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority, conferred upon the body or officer, in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or him to make a determination.

---

[54] CCP § 2139.

[55] The Field Code of 1850 predated these important decisions and therefore confined its proposed scope of review to jurisdiction and regularity; *cf.* COMPLETE REPORT OF 1850 §§ 1275-76.

3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.
4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.
5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of the evidence.

The law of certiorari had finally been emancipated from the loose generalities of the early decisions, *i.e.,* jurisdiction and regularity, some of which had paid lip service to the rights of the plaintiffs and concluded by awarding judgments to the defendants. A clear rule of law had been established for testing the validity of official action in the nature of a judicial determiantion, which would enable the courts to focus their review upon appropriate questions of legality. All the errors of omission and commission which critics of the Code later heaped upon the revisers are somehow mitigated by this exceptional achievement of legislating fair play into administrative judicial determinations, albeit by indirection. This was the first time that a substantive test of the actions of administrative bodies upon judicial review had been placed in a general statute.

Disregarding decisional law in the next instance,[56] the article further provided that the reviewing court may make a final order annulling or confirming, wholly or partly, or modifying the determination; another provision patterned upon the powers of the appellate courts.[57] To supplement the authority granted in the preceding section, the reviewing court was also given power to award restitution in like manner as upon an appeal.[58] It is an irony of legal de-

---

[56] People *ex rel.* Robinson v. Ferris, 36 N.Y. 218 (1867).
[57] CCP § 2141; *cf.* CCP § 1337.
[58] CCP § 2142.

velopment that although the writ of mandamus may owe part of its paternity to the equally ancient writ of restitution,[59] the mandamus article does not contain a corresponding provision regarding restitution. Costs of fifty dollars, together with disbursements, may be awarded in the discretion of the court.[60]

To complete the article, definitions of "body," "officer," and "determination" are given which elaborate but do not truly elucidate because the central feature of certiorari review, the nature of the judicial act, is not defined.[61] Also, all procedures in existing statutes providing for the issuance of certiorari in express cases are preserved.[62] The article is expressly made inapplicable to determinations made in any criminal matter, except criminal contempt of court.[63]

Questions of tax assessments and tax valuation had frequently occupied the courts in certiorari proceedings, and by separate statute, the right to review such action by certiorari was extended to such matters in the same year as this article became effective.[64] Tax certiorari, as provided by Section 2147 of the Code, was to be governed by its own statutory provisions. The scope of review in such cases was enlarged by statute to permit a re-determination in the reviewing court of questions of fact and also for the taking of additional testimony.[65]

Considerable effort went into the creation of the first general statutes governing mandamus and certiorari proceedings. Much that was beneficial resulted from this notable effort. Before the adoption of the Code provisions, it was regarded as a formidable task for the average lawyer of the time to acquaint himself with the procedure in special proceedings,

---

[59] See the writer's dissertation on file in New York University School of Law, DEVELOPMENT OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN NEW YORK 18-20, 23-28.

[60] CCP § 2143.

[61] CCP § 2146.

[62] CCP § 2147.

[63] CCP § 2148.

[64] N.Y. Sess. Laws 1880, ch. 269.

[65] People *ex rel.* Manhattan Ry. v. Barker, 152 N.Y. 417, 46 N.E. 875 (1897); People *ex rel.* Troy Union R.R. v. Carter, 52 Hun 458, *aff'd*, 117 N.Y. 625, 22 N.E. 1128 (1889).

because the rules of law thereon had to be gathered from text books, statutes and a great many decisions, which were often in conflict and hopelessly confused.[66]

It may appear that a more imaginative effort by the revisers might have led to a broader definition of the functions of mandamus. Although the rule of absolute discretion sounds quite harsh to us today, it was in complete harmony with contemporary case law. More important, such a statutory definition might have prevented the development of the writ on the broader basis which ultimately emerged thirty years later. In certiorari there could have been a better definition of judicial action, which is the subject of the writ, because the courts had fumbled with the problem for a long time and were hardly closer to a solution in 1880 than they were at the beginning. Perhaps that is a measure of the difficulty to be resolved in framing an all-inclusive but precise definition of judicial action. The judges in the post-Civil War period were the first to attempt to mark out the limits for scope of review in certiorari by assimilating administrative judicial activity to judicial action per se. They were so conspicuously successful that these codified common-law standards have remained in our law to this day. At best, the effort to lay down ground rules open to all who would consult the statute book was a vast improvement over the hazards and uncertainties faced earlier in seeking to locate and choose the applicable rule of law from the welter of judicial decisions which were sometimes in conflict with each other. In time, the confusion, incongruities and verbosity of the Code would be smoothed out.

The solid achievement attained in codifying the writ procedure for mandamus and certiorari was, however, generally overlooked in the barrage of criticism which soon descended against the mass of detail and poor arrangement of the new Code as a whole, consisting, as it did, of 3356

---

[66] 1937 N.Y. LEG. DOC. No. 48, THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL 140 [hereinafter cited as THIRD ANNUAL REPORT].

sections.[67] J. Newton Fiero, Dean of Albany Law School and Chairman of the Committee on Law Reform of the New York State Bar Association, submitted proposals to the 1895 annual meeting of the Association for Simplification of the State Writ Procedure. In the main, the alternative and peremptory writs were to be abolished, substituting orders for the writs on the plain premise that a writ was a relic of English practice emanating from the royal prerogative and no longer suited to our legal system. This plan also urged the amalgamation, in the interests of simplicity and uniformity, under one head, of all provisions relating to mandamus, certiorari and prohibition, ancestor of the article 78 concept.[68] The report was approved but the necessary legislative support did not eventuate.

Fiero continued to drum away at his objectives and at the 1899 meeting of the Association again presented proposals for the revision of the Code with particular emphasis on the writs of certiorari, mandamus and prohibition.[69] As a former president, and again as Chairman of the Committee on Law Reform of the Association, he urged that it was "absolutely necessary some action should be taken" [70] because the Code provisions were "crude, diffuse, badly arranged and illy adapted," and the precedents "serve rather to cloud its meaning than to assist in its interpretation." [71] In addition, "the Legislature will not let it alone," having enacted 432 amendments in the fifteen years since its adoption; adding that "the present New York Code . . . has been aptly characterized as revision gone mad."[72] Chief Judge Alton B. Parker of the New York Court of Ap-

---

[67] REPORT OF COMMITTEE ON LAW REFORM, 5 N.Y.S.B.A.R. 60 (1881), which is a general attack upon the Code as an attempt to frame a body of law which is neither a correct statement of the common-law decisions nor an accurate re-enactment of the statute law. (The writer is indebted to the painstaking research contained in the THIRD ANNUAL REPORT for much of what follows).

[68] Fiero, *Proposed Revision, the Code of Civil Procedure Relative to Certiorari, Mandamus and Prohibition*, 18 N.Y.S.B.A.R. 194-212 (1895).

[69] REPORT OF COMMITTEE ON LAW REFORM, 22 N.Y.S.B.A.R. 161-180, 233-251 (1899).

[70] *Id.* at 161.

[71] *Id.* at 172.

[72] *Id.* at 174-75.

peals called the Code a "legal monstrosity;" [73] that it restored "many of the objectionable features of the common-law practice which the original code [of 1848] was intended to eliminate. This is more especially the case with reference to special proceedings." [74] The state writ proceedings were considered to be, in view of the stream of proposals for their revision, in special need of condensation and simplification. But, periodic resolutions and detailed recommendations by the New York State Bar Association failed to evoke the necessary corrective action by the legislature, except for the appointment of another commission on code revision in 1895.[75]

A drastic proposal for the revision of the practice in special proceedings, including the state writs, was made by the Board of Statutory Consolidation in 1915. It was recommended to the legislature, in conjunction with a complete overhauling of the Code, that almost all special proceedings be abolished and replaced with a remedy by action.[76]

Although this plan was considered by one authority to be "only a continuation of the reform effected by the Code of 1848," [77] it went far beyond Field's proposals of 1850 by abolishing the special proceedings entirely, including the state writs, which that unadopted code retained in separate chapters.[78] The Board of 1915 had determined to make a complete break with the past and it substituted a streamlined Civil Practice Act of only 71 sections and 401 rules for the Code's 3384 sections which were in effect in 1914. It proposed to reduce certiorari to just four sections in a new Civil Rights Law, retaining the substance of Section 2140 of the Code and the limitations upon review; mandamus was virtually obliterated except for a single

---

[73] *Id.* at 177.
[74] *Id.* at 180.
[75] N.Y. Sess. Laws 1895, ch. 1036. The report of this body, REPORT OF THE COMMISSIONERS OF CODE REVISION 63, agreed "That our civil procedure ought to be revised," but proceeded to do nothing about it.
[76] 1 REPORT OF BOARD OF STATUTORY CONSOLIDATION ON SIMPLIFICATION OF THE CIVIL PRACTICE IN NEW YORK 168 (1915) [hereinafter referred to as BOARD REPORT].
[77] THIRD ANNUAL REPORT 143.
[78] COMPLETE REPORT OF 1850 at 531; see also CCP § 1266.

provision to authorize recovery of damages in a mandamus action.[79] In effect, the substantive code provisions of certiorari were retained, and almost all else in mandamus and certiorari was to be assimilated to the practice and procedure followed in an action.[80]

The Board's recommendations of 1915, which conscientiously sought to provide answers to a long pressing need, went too far to the opposite extreme by extirpating all traces of Code practice and procedure, and its proposals went unheeded. A tremendous amount of effort and research of considerable value had gone to waste by reason of the Board's intense desire to correct the utter chaos and confusion of the Code. In making a complete break with the past it lost the opportunity to effect some essential much needed reforms.

Although commissions, committees and boards had persevered in seeking a solution to this demanding problem, and Field, Fiero and others had unstintingly toiled to provide concrete proposals for simplifying mandamus and certiorari practice, their energy, scholarship and earnestness achieved almost nothing. A minor revision of the Code in 1915 authorized a court to allow a certiorari or mandmus proceeding to be amended where it appeared that the other remedy, *i.e.,* either mandamus or certiorari, was in fact the proper one under the facts alleged in the papers,[81] but that was all.

Although the Board of Statutory Consolidation entirely failed of its purpose, it had directed attention once again to the need for code revision. Meanwhile, mounting criticism of the entire Code of Civil Procedure now made revision imperative. In 1920, under the aegis of a Joint Legislative Committee on the Simplification of Civil Practice, which had been named to consider the recommendations of the Board of Statutory Consolidation, the Code was supplanted in its entirety by the Civil Practice Act.[82] The Committee re-

---

[79] 3 BOARD REPORT 169; proposed N.Y. CIV. RIGHTS LAW, §§ 94-97, 195-96; proposed N.Y. CIV. PRAC. RULE 87.

[80] *Cf.* COMPLETE REPORT OF 1850 §§ 1033, 1036.

[81] N.Y. Sess. Laws 1915, ch. 231.

[82] N.Y. Sess. Laws 1920, ch. 925.

jected the proposals of the Board almost completely, although the latter had given long study and careful consideration to the many problems of Code practice.

CIVIL PRACTICE ACT

In its report to the legislature, the Committee noted that one of the criticisms of the Throop Code was the perpetuation of state writs as special proceedings instead of their assimilation to the practice and procedure of actions. It answered this by stating: "Our system of practice has been an evolution. Important changes should be made only after careful study and mature consideration." [83] It conceded that "The practice should be made less rigid in some respects," [84] and then proceeded to re-enact the mandamus and certiorari provisions of the Code with but minor changes. According to one authority, this "did not represent much of an improvement over the Code, in respect to the provisions governing the remedies of certiorari, mandamus and prohibition." [85] The only significant change "was the substitution of a verified petition and an order for the corresponding affidavit and writ of the Code." [86] Proceedings were no longer brought and entitled in the name of the "People." In the words of another authority on pleading and practice, the change effected by the Civil Practice Act in "regard to proceedings instituted by State writ seems simply a matter of detail." [87] The zeal and the efforts of a long line of legal reformers, who had given years of study to the problem, had gone for naught by the simple fiat of this particular legislative committee. In regard to state writs, the substitution of the Civil Practice Act for the Code of Civil Procedure was a fiction if there was any intent to convey the idea that substantial reforms had been effected thereby.

---

[83] 1919 N.Y. LEG. DOC. No. 111, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE 27-28.

[84] *Id.* at 30.

[85] THIRD ANNUAL REPORT 143.

[86] *Ibid.*

[87] Alden, *The New Civil Practice Act and Rules,* LECTURES ON LEGAL TOPICS 249 (1921-1922) (auspices of Association of the Bar of the City of New York). See also 10 CARMODY, PLEADING AND PRACTICE 2 (1934).

The retention of separate provisions for proceedings in certiorari, mandamus and prohibition, almost a century after the Field Code had abolished the several common-law forms of action, remained a glaring anomaly. The dead hand of the past laid a heavy yoke upon a suitor seeking relief against government action. Instituting a mandamus or certiorari proceeding was a special hazard because the suit often had to work its way to the Court of Appeals before the hapless suitor discovered that he had chosen the wrong one of the two possible remedies, and now was without relief at all.[88] The Judicial Council of the State of New York, after a careful study, issued a report in 1937 which meticulously marshalled the evidence, demonstrating in case after case how outmoded and unjust the Civil Practice Act provisions were in regard to certiorari, mandamus and prohibition.[89] The report cited practices and procedures which were confused, conflicting and contradictory.

The report showed that the application of the remedies of certiorari and mandamus by the courts, including the Court of Appeals, was uncertain and almost arbitrary.[90] A great number of cases are cited and analyzed to indicate that the harassed suitor had no way of knowing when he selected certiorari as his remedy, based upon the highest authority, that after two appeals the court could determine that mandamus was the only appropriate remedy and he had lost his rights to judicial review.[91] The same dilemma existed with respect to prohibition, injunction and quo warranto, posing unfathomable pitfalls to the prospective litigant in regard to the choice of remedy.

In mandamus, the petitioner was required, before he even had the benefit of the respondent's return, to decide whether a question of law or a question of fact was primarily involved for determination by the court. In the case of the

---

[88] THIRD ANNUAL REPORT 154-56. See, *e.g.*, People *ex rel.* R. & J. Co. v. Wiggins, 199 N.Y. 382, 92 N.E. 789 (1910); see also cases noted in note 90 *infra*.

[89] THIRD ANNUAL REPORT 133-98.

[90] *Compare* People *ex rel.* Schau v. McWilliams, 185 N.Y. 92, 77 N.E. 785 (1906), *with* People *ex rel.* Sims v. Collier, 175 N.Y. 196, 67 N.E. 309 (1903).

[91] THIRD ANNUAL REPORT 144-56.

former, he requested a peremptory order, and for the question of fact situation he sought an alternative order. Although the courts were liberal in allowing alternative orders of mandamus to issue where a peremptory order had been mistakenly requested, it was, nevertheless, a waste of time for all concerned.[92]

Another wasteful feature of the Code, perpetuated in the 1920 Civil Practice Act, was the necessity of securing a preliminary order requiring the respondent to file a return to the petition. This was nothing more than a formality, in most cases, in the nature of an order to show cause, and moreover, was not an essential paper in the proceeding, as was the petition.[93]

The procedure whereby the petition could be challenged on a point of law in certiorari was not expressly provided for. In mandamus there were varying provisions in regard to alternative and peremptory mandamus; in the latter case, although a question of law was primarily presented for determination in the first instance, no practice machinery existed for challenging the petition for legal insufficiency. In addition, no time limit was prescribed for raising a legal objection.[94]

The Report of the Judicial Council observed that "the provisions governing the separate proceedings duplicate each other on many points," and could be greatly reduced by combining the features common to all of them.[95]

Several differences existed in regard to the two proceedings which the Report found particularly unnecessary: (1) although the certiorari statute prescribes when the remedy may be invoked and the specific questions to be determined by the court, there are no corresponding provisions in this regard for mandamus; (2) in mandamus, the statement of facts in the petition and the return are subject to the provisions of law governing a complaint and answer, but there is no corresponding requirement in regard to certiorari; (3) certiorari is required to be instituted

---

[92] *Id.* at 160-61.
[93] *Id.* at 161.
[94] *Id.* at 161-62.
[95] *Id.* at 162.

within four months after the determination to be reviewed becomes final, while there is no time limit for mandamus; (4) while there is a provision for a stay where a certiorari proceeding is brought, there is none prescribed for mandamus; (5) although failure to make a return may constitute a contempt in certiorari or mandamus, there is no provision for granting a final order by default; (6) no reply affidavits are allowed in mandamus and certiorari, although authorized in prohibition.[96]

Another injustice of long standing had been the rule that a return in a certiorari proceeding was conclusive as to the facts. A party's only remedy was by a separate action against a respondent for making a false return. It was not even clear that if a petitioner prevailed in the action for a false return that he could thereafter institute another certiorari proceeding based upon the new, corrected state of facts. Mandamus had long discarded this archaic concept of conclusiveness, and there was no reason at this time to continue the distinction between the remedies in that respect. The complicated suit for damages could hardly provide adequate recompense in such a case.[97]

Thus there was a need for greater flexibility in the procedure to permit summary disposition in favor of either party where the facts and the law indicated that a proper determination could be made expeditiously.[98]

The circuitous procedure whereby questions of fact raised in mandamus must be determined at Trial Term and then, after a verdict or decision is rendered, the proceeding is shifted back to Special Term for definitive disposition, was wholly unncessary and made only for needless delay.[99]

In mandamus, the petitioner was seriously prejudiced if he should fail to join a necessary party, whereas a more liberal rule prevailed on the certiorari side. There was no sound reason why they should not be uniformly liberal in this respect.[100]

---

[96] *Id.* at 163.
[97] *Id.* at 164-67.
[98] *Id.* at 167-69.
[99] *Id.* at 169-70.
[100] *Id.* at 170.

There was a lack of clarity and an undue limitation in the provision for the recovery of damages in a mandamus proceeding. In addition, it was not certain that damages could be recovered at all if a peremptory mandamus had been sought in the first instance, although the courts later construed the provision to authorize imposition of damages.[101]

Because the distinctions between the form of the remedies had been stressed so strongly in judicial opinions, the petitioner who succeeded in overturning an administrative determination by certiorari was forced to resort, sometimes, to mandamus to secure enforcement of the newly won right.[102]

The overly complicated and confusing provisions of mandamus and certiorari, resulting in frequent injustice where narrow technicalities were applied, stood fully revealed in the comprehensive bill of particulars prepared by the Judicial Council. Copious case citations fortified each position taken in regard to criticism directed against existing practices. Immediate results followed this irrefutable presentation to the legislature of the defects in these procedures. In the very year of its submission, 1937, the mandamus, certiorari and prohibition provisions of the Civil Practice Act were repealed and the recommendations of the Judicial Council adopted almost *in toto*.[103] Twenty-four sections of the new article 78 were substituted for the seventy-four sections of the former separate articles on certiorari, mandamus and prohibition.

ARTICLE 78 PROCEEDINGS

The best description of what was accomplished by the revision of 1937 is given in the Fourth Annual Report of the Judicial Council:

The entirely new Article 78 which was enacted abolishes the former separate forms required in the proceedings of certiorari to review,

---

[101] *Id.* at 171-72.

[102] *Id.* at 173.

[103] N.Y. Sess. Laws 1937, ch. 526. CCP Article 78, §§ 1283-1312 (relating to certiorari), article 79, §§ 1313-40 (relating to mandamus), article 80, §§ 1341-55 (relating to prohibition) were repealed. They are replaced by CPA article 78 (entitled Proceeding Against a Body or Officer).

mandamus and prohibition, and as was done one hundred years ago with the forms of action, a litigant hereafter need only set forth his facts and his prayer for relief and such relief as is proper may be given to him.[104]

The opening provision of the new article 78, section 1283, abolished "the classifications, writs, and orders of certiorari to review, mandamus and prohibition. . . . The relief heretofore obtained by such writs or orders shall hereafter be obtained as provided in this article." The section provides that reference in a statute to certiorari, mandamus or prohibition shall be deemed to refer to the proceeding authorized by article 78. The Council's comment on this section is modest, for it states that it "makes no change in the present substantive law as to the right to relief" in regard to these various remedies, "but establishes a uniform procedure for obtaining such relief." [105] However, the legal terminology associated for several centuries with certain usages was now entirely swept away in the abolition of certiorari, mandamus and prohibition, or so it was supposed. There is no doubt that new, broader concepts could be forged now that the restrictive terminology confining the remedies had been dropped, despite the disclaimer of the Council.

In section 1284, which contains the definitions for the article, the supplanted section of the former article on certiorari was drawn upon. "To review a determination" is given a broad scope to encompass relief theretofore available in a certiorari or mandamus proceeding to review the act, or refusal to act, of a body or officer exercising judicial, quasi-judicial, administrative or corporate functions which involves an exercise of judgment or discretion. Judicial and nonjudicial action are brought together in this section on definitions because, in the Council's opinion, "similar questions are involved in the review of all three types of determinations which should be afforded uniform treatment."[106]

---

[104] 1938 N.Y. LEG. DOC. No 48, FOURTH ANNUAL REPORT OF THE JUDICIAL COUNCIL 19.
[105] THIRD ANNUAL REPORT 180.
[106] *Id.* at 181.

Relief theretofore available in mandamus or prohibition are comprehended in the remaining definitions of this section which the Council repeats is,

> only a codification of the present substantive law as to the right to relief in which are now known as certiorari, mandamus and prohibition proceedings. . . . The only purpose of the differentiation between the three types of relief is to enable special treatment to be accorded to particular cases where necessary, within the uniform framework. There is no intention to preserve the distinctions now drawn between the remedies of certiorari, mandamus and prohibition. No matter which type of relief the petitioner seeks, the procedure to be followed under the new article will, on the whole, be the same.[107]

Relief under article 78 is not available to review a determination made in a civil action or special proceeding by a court of record; nor, where it was made in a criminal matter except criminal contempt of court; nor, where it is not a final determination; nor, where it can be adequately reviewed by appeal to a court or to some body or officer; nor, where the body or officer making the determination is authorized by statute to re-hear the matter, with certain other qualifications on re-hearing.[108] The Council notes that these limitations are nothing more than a rearrangement of existing provisions.[109]

For the first time, proceedings in the nature of mandamus are made subject to a time limitation, *i.e.*, four months,[110] the same period which had been applicable to certiorari since the adoption of the Code of Civil Procedure in 1880. The disabilities of non-age, insanity and criminal incarceration are included in this same section and the time for bringing a proceeding in such instances is enlarged from twenty months to two years. The Council notes that "no change in the present law as to the necessity of a demand in mandamus is intended."[111]

---

107 *Id.* at 181-82.
108 CPA § 1285.
109 THIRD ANNUAL REPORT 182.
110 CPA § 1286.
111 THIRD ANNUAL REPORT 183.

Provision is made as to venue and parties respondent.[112] The new statutes provided that:

> The application for relief shall be founded upon a petition, verified as in an action, which shall contain a plain and concise statement of the material facts on which the petitioner relies, may be accompanied by affidavits and other written proof, and shall demand the relief to which the petitioner supposes himself entitled, in the alternative or otherwise.[113]

The Council remarks that "the task of determining the issue will be made easier for the court if only the material facts are alleged in the petition, and the evidentiary facts are set forth in the accompanying papers." [114]

Eight days notice of application for relief shall be served upon respondent unless a shorter time is prescribed by order to show cause granted by the court. At least two days prior to the return date, unless a different time is fixed in the order to show cause, the respondent shall serve and file a verified answer which must contain proper denials, and statements of new material, as in an action, and must set forth such facts as may be pertinent and material to show the grounds of the action taken which is complained of. A certified transcript of the record of proceedings subject to review shall also be annexed to the answer and the respondent shall also submit affidavits or other written proof showing the existence of evidentiary facts as shall entitle respondent to a trial of any issue of fact.[115]

The Council states that the term "answer" has been substituted for that of "return" in the interest of achieving uniformity and simplicity between the proceedings subsumed under the new article and that of actions. Sometimes review by certiorari has not involved the taking of testimony under oath in judicial fashion, and consequently the "pertinent and material" facts referred to in this section are derived, in part, from applicable provisions in the General City Law, the Village Law, the Town Law and the former Greater New York Charter.[116] The purpose of requiring affidavits

---

[112] CPA §§ 1287, 1291.
[113] CPA § 1288.
[114] THIRD ANNUAL REPORT 184.
[115] CPA §§ 1289, 1291.
[116] Applicable statutory citations are noted in THIRD ANNUAL REPORT 186.

or other written proof with the answer is to enable the court to make a summary disposition of the matter, comparable to summary judgment under Rule 113 of the Rules of Civil Practice.[117]

To do away with the harsh rule of the conclusiveness of the return in the former certiorari article, provision is made for reply by the petitioner. In this manner he can "dispute any matter, other than denials, set forth in the answer, or the accuracy or completeness of the transcript of the record of proceedings annexed to the answer . . . which may be accompanied by affidavits or other written proof." [118] The Council explains that this provides a broader opportunity to submit additional proof after the answer and it will also facilitate a summary disposition of the matter.[119] But petitioner's failure to serve a reply in regard to new matter in the answer constituted an admission, sometimes decisive of the suit. This created a new pitfall for unwary suitors, however correct its logic.

The existing law was continued in allowing the respondent to raise objections in point of law warranting dismissal of the petition by setting them forth in his answer or applying to the court on the return day for such relief. Provision is also made allowing the petitioner to move on the return day to strike out the defense of new matter on the ground of insufficiency in law.[120]

On the return day, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. If a triable issue of fact is duly raised, it shall be determined by a court or before a referee, except where the proceeding is one to review a determination or to compel performance of a duty specifically enjoined by law, proceedings which are in the nature of mandamus, a jury trial may be had if properly requested.[121] Proceedings in the appellate division will not be considered here.

---

117 *Ibid.*
118 CPA § 1292.
119 THIRD ANNUAL REPORT 186-187.
120 CPA § 1293.
121 CPA § 1295.

The Council indicates that section 1295 is "almost wholly new." It empowers the court to dispose of the cause summarily as in an action under Rule 113 of the Rules of Civil Practice and retains the provisions for a jury trial in a proceeding which is in the nature of mandamus because of constitutional requirements that a right to a jury trial shall remain inviolate where theretofore afforded. The jury trial provision is also extended, for the first time, to proceedings in the nature of certiorari,[122] presumably in those cases where a quasi-judicial determination was made without the formalities which attended judicial proceedings in the courts.

Section 1296 is the heart of article 78 because it defines the scope of review for questions brought before the court. These are:

1. Whether the respondent failed to perform a duty specifically enjoined upon him by law;
2. Whether the respondent, if a body or officer exercising judicial or quasi-judicial functions, is proceeding or is about to proceed without or in excess of jurisdiction;
3. Whether the respondent, if a body or officer exercising judicial, quasi-judicial, administrative or corporate functions, had jurisdiction of the subject matter of a determination under review;
4. Whether the Authority conferred upon the respondent in relation to that subject matter has been pursued in the mode required by law in order to authorize him to make the determination;
5. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner. Where the determination under review was made as the result of a hearing held and at which the evidence was taken, pursuant to statutory direction, the following questions shall also be determined;

---

[122] THIRD ANNUAL REPORT 188.

6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.
7. If there was such proof, whether upon all the evidence, there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, confirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of evidence.

Although the Council states that this section is almost wholly new,[123] five out of seven subdivisions, *i.e.,* subsections 3, 4, 5, 6 and 7 were taken in *haec verba* from former Section 1304 of the Civil Practice Act, which, in turn, derived them from Section 2140 of the Code of Civil Procedure, in the certiorari article. The last portion of section 1296, not set forth above, is, however, new material.

Subsection 1, of section 1296 is derived in large measure from the unadopted Field Code of 1850, section 1283. It codifies the traditional basis for resort to mandamus relief, based upon a right to mere ministerial action. Subsection 2 relates to proceedings in the nature of prohibition. Significant changes were effected by the addition of subsections 3, 4 and 5 to the class of questions for determination upon a proceeding brought in the nature of mandamus. Before this time, Code practice and the Civil Practice Act contained no provision defining scope of review for mandamus. It was now fully released from the bonds of its narrow traditional purpose. The courts had laid the groundwork for this change several decades earlier in ameliorating the narrow application of mandamus.[124] In the interest of reducing expense, saving time and work, the issues under subdivisions 3, 4 and 5 which formerly had to be referred to the appellate division in certiorari proceedings, could now be decided at special term in certain instances as questions of law. The full machinery of the appellate

---

[123] *Id.* at 190.

[124] People *ex rel.* Lodes v. Department of Health, 189 N.Y. 187, 82 N.E. 187 (1907); People *ex rel.* Empire City Trotting Club v. State Racing Comm'n, 190 N.Y. 31, 82 N.E. 723 (1907).

division did not have to be placed in motion where a certiorari-type proceeding could be disposed of summarily. The Council also notes that "the last paragraph changes the present law as to the conclusiveness of a return in certiorari." [125] This portion of section 1296 has not been quoted, but it is noteworthy that the provisions of section 1292, dealing with the reply, also conduced to the same result.

There are further provisions regarding proceedings upon default, bringing in of third parties, and stays.[126]

In the final order to be awarded, the court is given authority to grant the relief to which it deems the petitioner entitled; to dismiss the proceeding on the merits or with leave to renew; if the proceeding was brought to review a determination, as in certiorari, to annul or confirm, wholly or partly, or modify the determination reviewed and may direct appropriate action or inaction by the respondent. Power to award a restitution and damages where just and proper, is granted.[127]

The Council notes that the first sentence of section 1300 is new, designed to allow the court to award or withhold relief in its discretion, according to the nature and the merits of the case. The court's power in regard to a determination is derived directly from the language of former Section 1305 of the Civil Practice Act, and the last clause, referred to above, obviates the need for a proceeding in the nature of mandamus after a party has prevailed in regard to a certiorari-type proceeding. Restitution is now made available in mandamus-type proceedings and the provision for awarding damages is freed from outmoded restrictions and technicalities.

Costs and fines are perpetuated in the same amounts and under the same conditions as they existed in the nineteenth century.[128] Enforcement of the final order and stay of proceedings pending appeal are also provided for.[129]

---

[125] THIRD ANNUAL REPORT 190.
[126] CPA §§ 1297-99.
[127] CPA § 1300.
[128] CPA §§ 1301-02.
[129] CPA §§ 1303, 1305.

Unless otherwise ordered by the court, an appeal from an intermediate order in a proceeding under article 78 can only be taken in conjunction with an appeal from the final order made therein.[130] The Council states that this is a new provision calculated "to prevent delay in the disposition of the cause on its merits." [131] The provisions of law governing actions are made applicable to proceedings under article 78 as far as possible, which is a reiteration of the existing rule.

The provisions of article 78 have been strengthened since its enactment by several amendments. The most notable change was the addition of subsection 5-a to section 1296, vesting the court with authority to review a penalty, discipline or punishment imposed by an administrative body or officer.[132] It would appear that adequate authority to annul or modify the measure of punishment already existed in article 78,[133] but case law had ruled otherwise.[134]

The new article 78 achieved a minor miracle, in its way, by clearing away the accumulation of centuries of procedural technicalities, superimposed upon each other, perhaps needful in the days of prerogative writ infancy, but impeding the machinery of justice in any age moving at a rapid tempo under greatly matured concepts of law. It ranks as high, or perhaps higher, than the Code of 1880 which had also achieved a signal breakthrough in establishing procedure for judicial review of official action by placing such review on a full statutory basis. Whereas the earlier Code synthesized existing widely scattered, disparate common-law rules, decisions and procedures into a comprehensive system, the achievement of article 78 rests in the abolition of the prerogative writ system and terminology. An authority has described this system as a method "cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation." [135]

---

130 CPA § 1304.
131 THIRD ANNUAL REPORT 194.
132 N.Y. Sess. Laws 1955, ch. 661.
133 *Cf.* CPA § 1300.
134 Barsky v. Regents, 305 N.Y. 89, 111 N.E.2d 222 (1953); Sagos v. O'Connell, 301 N.Y. 212, 93 N.E.2d 644 (1950).
135 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 24.01 (1958).

Quite apart from removing the booby traps of the multiple prerogative remedies and reducing the practice to simplicity itself, article 78 strengthened the weakest part of the former writ procedures in the new composite statute by infusing it with the best portions of each of the old. For example, where the courts had exercised a free hand in respect to the time required for instituting mandamus proceedings, the rule of the four month limitation applicable to certiorari was invoked for both. The fair play and jurisdiction standards expressly governing only certiorari by statute were now extended to proceedings in the nature of mandamus.[136]

Before this, there were no substantive standards in the mandamus article and litigants were obliged to muster common-law precedents for support in presenting a case in court, with no assurance that they would be applied with the uniformity and the certainty which a statutory directive commands. Conversely, the return in a proceeding in the nature of certiorari was now no longer conclusive upon the petitioner, an injustice which had been rectified much earlier in mandamus; the damages provision in mandamus was broadened and made applicable to both types of proceedings,[137] an area which still remains to be exploited to its fullest extent in article 78. What particularly emerges is the enhancement of safeguards for the less formal proceedings of administrative bodies or officers which were previously applicable only to certiorari-type proceedings.

Certain distinctive features inherent in the nature of certiorari as a mode of appellate review were retained,[138] while the free-wheeling nature of mandamus to adapt itself to new circumstances is made implicit in the single provision which is exclusively applicable to that type of proceeding.[139] Common law principles emanating from case law can nourish that growth and allow it to extend the reach of its remedial purposes wherever needed. Where certiorari was treated in a static manner retaining its basic function as an appeal, mandamus was allowed to serve more like an action on

136 CPA §§ 1296(3), (5).
137 CPA § 1300.
138 CPA § 1296(6), (7).
139 CPA § 1296(1).

the case, which completes a cycle because these different concepts now ironically return to their respective common-law origins.

It is evident that although article 78 overhauled and wiped out many shortcomings of the separate, confusing mandamus and certiorari proceedings, it was not intended and could not qualify as the panacea to cure the enduring problems of judicial review of administrative action.

It achieved a major break-through in bringing a remedy, increasingly important to the public, to a point of simplicity by eliminating pitfalls, hazards and technicalities, and expediting a decision on the merits. It truly represents the work of many unseen hands from Field through Throop, and from Fiero to The Judicial Council. The latter wove the many threads which predecessors had originated into an integrated mechanism. Field was the proponent of a short, simple Code; Throop, however ineptly, undertook and carried through the enormous task of codifying the common law rules of writ procedure; Fiero advocated consolidation of the provisions common to all the writs, of eliminating the alternative and peremptory writs of mandamus and of assimilating the practice in actions as much as possible; the 1915 Board of Statutory Consolidation was the most ardent advocate of simplification to the point of converting the writs into actions, and thereby abolishing the terms, mandamus, certiorari and prohibition. The Judicial Council carried its major suggestions through to completion by the force of a closely documented study.

This recapitulation of the progress achieved by article 78 does not mean that it has brought us to the millennium in judicial review of administrative action. Robert M. Benjamin, a Moreland Commissioner under Section 8 of the Executive Law of the State of New York, only a few years after the adoption of article 78, observed in his notable report to the governor, that the use of the language in section 1296, subsection 7, applicable to juries in a trial was not suitable for defining scope of review of administrative determinations.[140] He also urged that in the inter-

[140] BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 340 (1942).

est of conforming to current usage and understanding as practiced in the courts, subsections 6 and 7 of section 1296 be combined into a single section, employing the phrase "substantial evidence" to describe the test for weighing action taken by an administrative body pursuant to a statutory hearing.[141] These subsections, borrowed from Section 2140 of the Code of Civil Procedure, and derived originally from one decision at General Term,[142] and another in the Court of Appeals,[143] have lost their original value at this date when judicial opinions have become more sophisticated in defining the scope of such review as the test of substantial evidence. Adventitious judicial decisions had, through the inertia of codifiers and revisers, maintained a dominant and sometimes confusing position in judicial review of administrative determinations long after they had outlived their usefulness. In mitigation, it should be stated that the revisers of article 78 did not undertake to innovate, but only to integrate and simplify. Commissioner Benjamin's suggestion has been incorporated into the new Civil Practice Law and Rules which went into effect September 1, 1963.[144]

For similar reasons, where a term or a phrase has attained wide currency in judicial opinions, such as "arbitrary or capricious," this should become part of the statutory terminology governing the scope of review even though it may actually represent mere judicial shorthand for one or more sub-sections of Section 1296 of the Civil Practice Act. A more serious omission in the statute is the failure to specifically authorize remand by the court for partial, specified or *de novo* determination, although some agency statutes so provide.[145] Several agency statutes, Commissioner Benjamin points out, provide for judicial review by certiorari despite the fact that quasi-judicial hearings are

---

141 *Id.* at 339.

142 People *ex rel.* Crandall v. Overseers of the Poor, 15 Barb. 286 (1853); see also People *ex rel.* Haines v. Smith, 45 N.Y. 772, 777 (1871).

143 People *ex rel.* Cook v. Board of Police, 39 N.Y. 506 (1868).

144 N.Y. Sess. Laws 1962, ch. 308; CPLR § 7803(4).

145 N.Y. LAB. LAW § 111(3) (State Board of Standards and Appeals); § 707(2) (Labor Relations Act); N.Y. UNCONSO; LAWS § 8589 L. MCKINNEY 1961) (Rent Control).

not held, which creates an apparent anomaly. He resolves that question by invoking that part of section 1296 which prescribes certiorari-type review only after a hearing held "pursuant to statutory direction," and he notes that section 1283 has abolished the category of certiorari altogether. Therefore, he holds, this type of determination would be subject to mandamus-type review under article 78.[146]

Commissioner Benjamin also observes that the definitions and the categories of administrative action made subject to article 78, as laid down in sections 1284 and 1296, have not been sufficiently utilized by the courts in their decisions.[147] It would appear to be helpful if the language of the statute were more extensively employed by counsel and court to lay the basis for establishing a coherent body of law emanating from the categories specified in the statute, as construed by the courts. Perhaps the terminology employed in these categories is outmoded and has thereby failed to gain acceptance on its own merits.

Although the adoption of article 78 must be considered a victory in light of the long prior inaction, this has not been altogether complete because part of its achievement has been slowly whittled away by judicial construction. The Court of Appeals has held that article 78 was not intended to abrogate the relief previously available by the writs which were abolished, but only "to wipe out technical distinctions which had been a snare for suitors."[148] It was further indicated that the nature of the alleged grievance will continue to govern "the form of hearing before the court . . . the questions to be determined at such hearing, and the relief which the court has the power to grant." This would appear to have reinstated mandamus and certiorari to full primacy in everything but name. Although subsequent cases in the Court of Appeals have confirmed this position,[149] the restoration of mandamus and certiorari as

---

146 BENJAMIN, *op. cit. supra* note 140, at 359-60.

147 *Id.* at 351-52.

148 Newbrand v. City of Yonkers, 285 N.Y. 164, 174 33 N.E.2d 75, 80 (1941).

149 Gimprich v. Bd. of Educ., 305 N.Y. 401, 406, 118 N.E.2d 578 (1954); Toscano v. McGoldrick, 300 N.Y. 156, 161, 89 N.E.2d 873, 875 (1950); Newbrand v. City of Yonkers, 285 N.Y. 164, 174, 33 N.E.2d 75, 80 (1941).

distinct types of proceedings is impossible under article 78.[150] However, a retreat from the progress achieved by article 78 is evident as a result of these Court of Appeals decisions, and by the increasing reference to certiorari and mandamus in the opinions of current court decisions. Where a petitioner presents a grievance under one of the categories specified in section 1296, the courts have proceeded to determine his rights under article 78, but much of the rhetoric associated with the writs has crept back into judicial opinions.[151]

What the Court of Appeals actually ruled in these cases was that the limited objective of article 78 in effecting certain procedural reforms did not alter the basic questions which the courts must consider in determining whether relief is to be awarded under article 78.

CIVIL PRACTICE LAW AND RULES

The advent of a new code of practice, the Civil Practice Law and Rules[152] (hereinafter referred to and cited as CPLR) has provided an unexpected opportunity for taking stock of the impact of the changes wrought by article 78 in 1937, and offers the chance to again weed out outmoded and timeworn statutory formulae and to overhaul conflicting and confusing provisions.

The latest revisers state that the new practice code "has left the underlying law dealing with the prerogative writs intact, restricting its efforts to a simplification and clarification of present provisions."[153] Such modest disclaimers are not always to be taken too seriously. For one, the twenty-four sections of the Civil Practice Act have been reduced to a mere six in the CPLR through considerable combination and elimination of subject matter.

Unquestionably, the statutory guidelines have been shortened, leaving greater scope to judicial discretion and invention. This has always characterized prerogative law,

---

150 CPA § 1283.

151 See GELLHORN & BYSE, ADMINISTRATIVE LAW 372 (1st ed. 1954).

152 N.Y. Sess. Laws 1962, ch. 308, as amended.

153 1958 N.Y. LEG. DOC. No. 13, SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 395. *Cf.* THIRD ANNUAL REPORT 19.

and should so remain. The rigidity and constraints of statute hardly offer the flexibility which is necessary to keep pace with the expanding facets of government activity and the ever-changing concepts in regard thereto.

The benefits reaped by the revision of 1937, in abolishing mandamus, certiorari and prohibition, are retained in the opening lines of section 7801. That section likewise sets forth the substantive limitations for recourse to article 78 review much as they previously existed.

Although the phrase "interested persons" is not defined or elaborated in section 7802(d), it is unsafe to assume that the modifying terms "specially and beneficially" of the parallel Civil Practice Act section [154] will not be followed in most circumstances, inasmuch as the concept of "standing" is not susceptible of serious modification in the absence of specific statutory alteration by agency statute.

The major feature of the article 78 revision, section 7803, dealing with scope of review, has compressed eight sections of the corresponding Section 1296 of the Civil Practice Act into a mere four in the CPLR. The main accomplishment is that practice and theory have been brought together in subsection 3 by the inclusion of "arbitrary and capricious" as a test upon judicial review. This addition reflects the widespread use of that phrase by the courts over a considerable period of time in describing improper or unreasonable administrative action, of a nonjudicial nature. However, the inclusion of "abuse of discretion" as an additional standard or test in this subdivision is entirely superfluous, and to a great extent will tend to confuse. It introduces a confusing element upon judicial review because "abuse of discretion" is most commonly applied to describe action of a judicial tribunal, properly speaking. It thereby tends to assimilate the action of a judicial tribunal to that of an administrative body or officer, whereas, in fact, they perform different functions, under disparate auspices. In a word, "abuse of discretion" adds little or nothing to the concept covered by "arbitrary and capricious" action, but may tend to mislead some courts into believing

---

[154] CPA § 1298.

that administrative action is to be judged much the same as judicial action. Inasmuch as judicial-type action is not even contemplated as falling within the scope of subsection 3, it being within the purview of subsection 4, this innovation becomes all the more questionable. The mere fact that it has cropped up in some judicial opinions is hardly a warrant for its adoption as a statutory standard.

The introduction of "substantial evidence" as a test in scope of review represents an important and long-needed step forward in this area.[155] The outmoded tests for adjudging the validity of judicial-type administrative action according to standards applied to jury verdicts should have been discarded a long time ago. Now we have the plain requirement that such administrative action must measure up to the minimum standards of quality (competence) and quantity (weight) of evidence established in decisions of the appellate division[156] and the Court of Appeals.[157] And thereby, the legal residuum rule,[158] which never entered the mainstream of our decisions on scope of review, has now finally been relegated to merited discard.

Taking cognizance of the realities of contemporary practice which reflects the importance of the rights involved, the eight days' notice of hearing requirement of the Civil Practice Act,[159] assimilated to that of motion practice, has now been extended to a full twenty days,[160] as in an action. The time requirements for subsequent steps in the proceeding have been commensurately extended.[161] A new departure in the century-long statutory history of prerogative proceedings is the right of the respondent to now plead a counterclaim.[162] Time alone will determine whether a

---

155 CPLR §7803(4). See also text at *supra*. This will also conform to the prevailing practice in the Federal jurisdiction.

156 See, *e.g.*, In the Matter of Phinn v. Kross, 8 App. Div. 2d 132, 186 N.Y.S.2d 469 (1st Dep't 1959).

157 See, *e.g.*, Humphrey v. State Ins. Fund, 298 N.Y. 327, 83 N.E.2d 539 (1949); Stork Restaurant v. Boland, 282 N.Y. 256, 26 N.E.2d 247 (1940).

158 Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916); Reynolds v. Triboro Bridge & Tunnel Auth., 276 App. Div. 388, 94 N.Y.S.2d 841 (1st Dep't 1951).

159 CPA § 1289.

160 CPLR § 7804(c).

161 *Ibid.*

162 CPLR § 7804(d).

functional purpose will be served by this provision; it was prohibited in the Civil Practice Act.[163]

The remaining procedural provisions of section 7804 largely follow the Civil Practice Act except that it is silent on the right to trial by jury of an issue of fact.[164]

The judgment provisions[165] are closely aligned to the statutory language of the corresponding section of the Civil Practice Act,[166] with one notable exception. It is now specified that the award of restitution or damages can only be subsidiary to the primary relief granted to petitioner, and must be such as could be recoverable on the same facts in a supreme court action or proceeding. This additional proviso seems to impose conditions not required in the parallel section of the Civil Practice Act and may render the recovery of monetary damages somewhat more difficult than before.

There is complete silence in this last section of article 78 in regard to a practice now widely followed by the courts, *i.e.*, remand. Although some agency statutes provide for remand,[167] and courts have frequently remanded on their own initiative without the benefit of statutory authorization, such widespread practice, exemplifying a need, should be accorded statutory recognition and control.

If any doubt existed heretofore on the score of allowing discovery in an article 78 proceeding, it is now resolved by Section 408 of the CPLR. It is only required that the parties proceed by court order in all cases except for a notice to admit under section 3123, where the parties may proceed by notice alone. This device can eventually become a valuable instrument for "fleshing out" a case where the petitioner has a limited knowledge of the facts in possession of the respondent at the time of the commencement of the proceeding.

---

163 CPA § 1291.

164 CPLR § 7804(h); CPA §1295; *but see* CPLR § 410, applicable to all special proceedings, where trial by jury is authorized. In like manner, the four-month limitation for bringing an article 78 is not contained in the revised article but is found in § 217; the former tolling provisions of CPA § 1286 are now found in CPLR § 208.

165 CPLR § 7806.

166 CPA § 1300.

167 See note 145 *supra*.

CONCLUSION

Of necessity, assessment of the new provisions of Article 78 in the CPLR has been gauged narrowly due to the need for implementation by judicial decision. But with another statutory revision of prerogative law upon us it is well to take stock of what has been achieved by legislative action in this area in the past. This branch of our law has travelled a long road, deriving basic principles from the English common law and erecting an *ad hoc* system of indigenous law upon that foundation by a century of judicial decision. Ultimately, this body of decisional law was codified and then over a period of another century, it was successively consolidated and clarified by a series of statutory enactments. Initial legislative intervention in the late nineteenth century became imperative when all other measures, including judicial innovation, were found unequal to the task of establishing clear and definitive rules of law and procedure. This was especially true of certiorari decisional law.

In our own generation we have witnessed a virtual revolution whereby the ancient writs of certiorari, mandamus and prohibition were consigned to oblivion, if we accept the plain mandate of Section 1283 of the Civil Practice Act. In other respects, however, statutory revision, apart from codification, has hardly succeeded in serving more than a stop-gap for dealing with problems in this area; it did not seem to have the capacity to reach the deep-rooted problems.

The larger task still remains, and that is for the courts to exercise their common-law powers to the fullest extent so that the remedies of article 78 are brought to the side of every just grievance. It is the lesson of our experience with legislation that statutory procedures cannot be expected to meet the day-to-day problems in this area. We do know that difficult problems in New York administrative law can be resolved by judicial decision.[168] The courts should continue to call upon the innate resources of the common law in meeting the difficult problems which lie ahead in this constantly expanding branch of our law.

[168] See, *e.g.*, Mitthauer v. Patterson, 8 N.Y.2d 37, 167 N.E.2d 731, 201 N.Y.S.2d 321 (1960).