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## REMOVAL FROM PUBLIC OFFICE IN MINNESOTA

By EDWARD G. JENNINGS\*

**M**ORE than half of the case-law relating to civil service administration has arisen out of restrictions on the removal power that appear "both substantively and procedurally in every state civil service law."<sup>1</sup> Security of tenure conditioned on satisfactory work is of first importance in any adequate civil service system. It has been suggested

"that when the state undertakes the management of business properly so called, and business which hitherto has been carried on by each individual citizen simply with a view to his own interest, the government . . . will be found to need that freedom of action necessarily possessed by every private person in the management of his own personal concerns."<sup>2</sup>

But the answer is at least threefold.

In the first place, it has long been too apparent that an unlimited removal power is exercised from motives entirely unrelated to the reasons calling for it as a strictly business proposition;<sup>3</sup> and the axe frequently falls upon the very ones whom the

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<sup>1</sup>Rice, *The Function of the Courts in Enforcing the Wisconsin Civil Service Law*, (1933) 2 Wis. L. Rev. 257, 261.

<sup>2</sup>Dacey, *Development of Administrative Law in England*, (1915) 31 Law Q. Rev. 148, 150. See also *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 76-77, 144 N. W. 453, 454-455: "A great deal might be said in favor of legislation which gives the city council free hand to remove a superintendent, manager or agent in the city waterworks for the efficient and economical conduct of which, as a business proposition, the council is held responsible. . . . We have no doubt that the legislature intends to give municipalities authorized to own and manage public utilities the same freedom and opportunities to make the ventures successful as if owned and managed by private corporations or parties." But compare *State ex rel. Village of Chisholm v. Bergeron*, (1923) 156 Minn. 276, 279-280, 194 N. W. 624, 625, involving a statute providing for a board of three water commissioners appointed by the council but with no provision relating to their removal. An antecedent general charter clause authorized the council to remove all officers appointed or elected by it "whenever, in its judgment, the public welfare will be promoted thereby." The court held that the statute, in requiring first appointments for one, two, and three years respectively and thereafter a new three-year appointment each year, and in providing that

economic self-interest of the private employer would require him to retain. Second, "As government becomes more complex, permanent officials become more and more necessary."<sup>4</sup> The very fact that government has invaded the realm formerly preempted to private business calls all the more for the carrying on of its functions as far as possible on a strictly business basis divorced from politics.<sup>5</sup> The more complex government becomes, the more difficult it is to replace the advantage of long experience in an administrative task either easily or quickly, and even with superior native talent.<sup>6</sup> Third, aside from the merits or demerits of the expansion of governmental activities and the conceded desirability of carrying on essentially business activities by business

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each member of the board be president during the last year of the term of his appointment, "indicates stability, and negatives the thought that a commissioner is subject to removal at the will of the council. . . . We think the manifest object of the legislature was to place the conduct of municipal owned enterprises in the hands of a stable and independent body free from the baneful influences which so often result from the frequent changes of the political complexion of an elective village council."

The State Reorganization Act of 1925 (1 Mason's 1927 Minn. Stats. ch. 3A) centers state administration in a department of administration and finance of three members responsible to and removable at will by the governor (sec. 53-5); and provides that "Except as herein otherwise provided . . . The term of office or employment of all state employes shall be at the pleasure of the appointing officer" (sec. 53-48). For its nature, purposes and scope see State ex rel. Kinler v. Rines, (1931) 185 Minn. 49, 51-52, 239 N. W. 670, 671; State ex rel. University of Minnesota v. Chase, (1928) 175 Minn. 259, 262, 220 N. W. 951, 952; State ex rel. Yapp v. Chase, (1925) 165 Minn. 268, 276, 206 N. W. 396, 399; Young. Reorganization of Administrative Branch of Minnesota Government, (1925) 10 MINNESOTA LAW REVIEW 40.

<sup>3</sup>See Sullivan, Our New Spoils System, (1936) 157 Atlantic Monthly 189; and compare the Wilmeth and other removals by President Harding, see 40th Report of the U. S. Civil Service Commission, 1922-1923, 152-153; 41st Report, 1923-1924, 105; Wilmeth v. United States, (1928) 64 Ct. Cls. 368; MacMahon, Selection and Tenure of Bureau Chiefs in the National Administration of the United States, (1926) 20 Am. Pol. Sci. Rev. 548, 568, 770.

<sup>4</sup>Lowden, Permanent Officials in the National Administration, (1927) 21 Am. Pol. Sci. Rev. 529, 531, pointing out further that the "political" or "policy determining" chief of a department cannot well serve his proper function of bringing to bear "the viewpoint of the public as to the results which are expected of the department," "unless he be relieved of the details of administration," which cannot be unless the department is otherwise organized, including an administrative chief, on a permanent basis.

<sup>5</sup>State ex rel. Village of Chisholm v. Bergeron, (1923) 156 Minn. 276, 279-280, 194 N. W. 624, 625; see also Mitchell, Merit Versus Spoils in Public Employment, (1933) 22 Nat. Mun. Rev. 492, 493.

<sup>6</sup>See Brown, The Administration of Workmen's Compensation 24: "Unless the state wishes to install as commissioners and examiners persons with formal technical education, which course would be prohibitively expensive, it is obvious that such expert knowledge as the commission now possesses can be acquired only by long and continuous experience in office."

methods, it must remain true that any social gains in fact derived can never be evaluated entirely in dollars and cents.<sup>7</sup> As public service inevitably bulks larger as a means of livelihood, in attempting an evaluation either prospectively or retrospectively of its utility the economic and human relations of the employees cannot be overlooked. Their opportunities for self-help are less than those of organized labor in private employment,<sup>8</sup> and if their interests are to be protected at all it must be inevitably and almost exclusively by legal means.<sup>9</sup>

There is the danger to be guarded against of veering too much in the direction of making the public service a haven of safety for the unfit when once in office,<sup>10</sup> or for the confirmed bureaucrat whose mentality as well as methods have become static. Consequently a complete adjustment of all interests can never rest solely on restrictions directed to the removal power, but must begin with an adequate system for the making of appointments on a strictly merit basis, and include an adequate scheme both of promotions and of disciplinary measures falling short of the final drastic one of removal.<sup>11</sup>

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<sup>7</sup>See *Finer, The Civil Service in the Modern State*, (1925) 19 *Am. Pol. Sci. Rev.* 277, 278-279: ". . . the state cannot be subjected to the commercial tests by which the private producer is judged. No accurate way has yet been invented of assaying the relationship between its output and its revenue. . . . Since . . . it is impossible for the final product of the civil service to be measured and controlled in anything like a satisfactory manner from the outside and retrospectively, it is of the highest importance that only the fittest shall be selected, that only the fittest shall be promoted, and that the conditions of discipline, reward and civic rights shall promote an atmosphere of contented and zealous activity."

<sup>8</sup>See *Finer, The Civil Service in the Modern State*, (1925) 19 *Am. Pol. Sci. Rev.* at 283; *White, Organization of Public Employees*, (1921) 15 *Am. Pol. Sci. Rev.* 267; 18 *U. S. C. A. sec. 54*; 5 *U. S. C. A. sec. 652*.

<sup>9</sup>"Legal means," as is shown in the text, need not necessarily include resort to "courts" in the constitutional "judicial" sense. On the "processes of law" the constitutional courts have no monopoly. See *McFarland, Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 *A. B. A. Journ.* 612, 613, 623.

<sup>10</sup>See *Anderson, Local Government and Finance in Minnesota* 113, noting that such a criticism has been made of the operation in practice of the tenure provisions of the home rule charter of Minneapolis. But see *Gallagher, Public Personnel Problems and the Depression*, (1933) 22 *Nat. Mun. Rev.* 199, 200, 206, 214, suggesting that "In St. Paul and Minneapolis the heavy cuts in appropriations for the civil service commissions were said to be due to the hostility of certain councilmen to the merit system and to effective personnel administration."

<sup>11</sup>There should also be adequate provisions for transfer, to avoid friction resulting from the reinstatement of an employee with whom, even though unjustifiably, the superior officer is dissatisfied. In all these respects Minnesota has as yet no adequate or unified civil service "system." Such as it has, has grown up piecemeal, without correlation, and mainly around the removal power in particular situations discussed in the text. In New York and Ohio a state civil service commission has general supervision over the local commissions.

Conceivably a complete adjustment need not include resort to courts, if an adequate scheme of infra-administrative self-regulation is provided. Conceivably judicial interference does not provide an adequate solution from the point of view either of the administrative service or of the employee;<sup>12</sup> and it may detract from the stature of the courts.<sup>13</sup> For one reason, a court when called upon to interfere in an isolated instance sees not the administrative problem steadily or as a whole, but only in its final drastic aspect. In this respect a specialized administrative court devoted exclusively to personnel problems would no doubt be more adequate than the common-law courts of general jurisdiction.<sup>14</sup> And there is nothing in the nature of the power of removal from public office that inherently requires a "judicial" trial de novo<sup>15</sup> or even "judicial" review.<sup>16</sup> It has become commonplace that public office

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<sup>12</sup>See Dimock, *Forms of Control Over Administrative Action, Essays on the Law and Practice of Governmental Administration* 297-298: "A very small percentage of administrative acts ever comes before the courts. . . . Judicial control of administrative conduct is . . . largely retroactive and compulsive. Court decisions create standards regarding property rights, but techniques, methods, and employee attitudes fall almost completely outside of judicial competence. The effect of judicial control is therefore more personal than institutional, more negative than positive." That judicial control is "more personal than institutional" is perhaps not entirely a point of criticism. Compare, as to a problem bearing some analogy to the one here under discussion, Stephens, *What Courts Can Learn from Commissions*, (1933) 19 A. B. A. Journ. 141, 144-159, note 16: "Administrative machinery and procedure are ill-adapted to evaluation and disposition of the human interests involved in alien deportation and exclusion cases. Grave injustice has resulted from the commitment of this essentially judicial subject to the field of administrative law."

<sup>13</sup>See McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 A. B. A. Journ. at 612: ". . . efforts to impose legal processes upon functions which are not in their nature subject to the methods of law would reflect upon the law itself." From the context of the article the author by "legal processes" is referring to the methods of the constitutional judicial courts. The same may have been the thought of Mitchell, J., in *State ex rel. Mortensen v. Copeland*, (1898) 74 Minn. 371, 376, 77 N. W. 221, 223, wherein he defends a result, rendering the first state veterans' preference law practically nugatory so far as judicial enforcement was concerned, as in part the consequence of "the inherent nature of the subject of which it treats."

<sup>14</sup>See Dimock, *Forms of Control Over Administrative Action, Essays on the Law and Practice of Governmental Administration* 298-314. As yet such methods of infra-administrative control have not been tried out in the United States to a sufficient extent to realize their full possibilities.

<sup>15</sup>Though compare *Fugate v. Weston*, (1931) 156 Va. 107, 112, 117, 157 S. E. 736, 738-739, 741: "To remove a man from office because of embezzlement, without giving him a day in court, runs counter to those fundamental instincts of fair dealing which lie at the base of all governments;" noted (1931) 20 Nat. Mun. Rev. 539; (1932) 9 N. Y. U. L. Q. Rev. 106; see also Pate, *State Supervision of Local Fiscal Officers in Virginia*, (1931) 25 Am. Pol. Sci. Rev. 1004, 1006.

<sup>16</sup>McFarland, *Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 A. B. A. Journ. 612, 613,

is no longer in any sense a "hereditament,"<sup>17</sup> but is more in the nature of a public trust exercisable only for the public good.<sup>18</sup> It is consequently not a "vested" property or contract right of the incumbent within the protection of the due process clauses of the federal and respective state constitutions or the obligation of contract clause of the former.<sup>19</sup>

points out that the phrase "judicial review" involves four different meanings: "(1) the popular demand for a right of appeal of *some sort*, (2) the professional demand for a right of appeal to *judicial* tribunals, (3) *statutory* judicial powers over administration, and (4) judicial powers under the Constitution of the United States and the constitutions of the several states." In the problem here dealt with (4) is seldom involved, and (2) is not noticeably present; conceivably (1) would suffice, and perhaps be better served by appellate *administrative* tribunals than by courts in the strictly judicial sense; however it is with judicial review in the third sense that this study is chiefly concerned.

<sup>17</sup>That the "common law offices" were so regarded in England, see *State ex rel. Clapp v. Peterson*, (1892) 50 Minn. 239, 243, 52 N. W. 655; 2 Blackstone, Commentaries, Christian's Ed., 36; 3 Kent, Commentaries, 8th ed., 567 et seq.; Mechem, Public Officers 295-296; Throop, Public Officers 3, 18. Removal from other offices may originally, as a common law principle, have required at least notice and hearing, see Throop, Public Officers 358. Dillon indicates that the power to remove municipal officers may originally have been only in the whole corporation, in full meeting. See Dillon, Municipal Corporations, 3d ed., 268.

<sup>18</sup>See *State ex rel. Clapp v. Peterson*, (1892) 50 Minn. 239, 243, 52 N. W. 655; *State ex rel. Childs v. Wadhams*, (1896) 64 Minn. 318, 324, 67 N. W. 64, 67; *State ex rel. Lull v. Frizzell*, (1884) 31 Minn. 460, 467, 18 N. W. 316, 319.

<sup>19</sup>See *State ex rel. Lull v. Frizzell*, (1884) 31 Minn. 460, 467, 18 N. W. 316, 319: "It is elementary that there is no contract, express or implied, between a public officer and the government, whose agent he is, for the continuance of his office or the permanency of his salary for the full term for which he was elected. Public officers have no proprietary interest in their offices, or any right of property in the prospective compensation attached thereto;" *Taylor v. Beckham*, (1894) 178 U. S. 576-580, 20 Sup. Ct. 890, 44 L. Ed. 1187; *State ex rel. Topping v. Houston*, (1913) 94 Neb. 445, 452, 143 N. W. 796, 799; *State ex rel. Buell v. Frear*, (1911) 146 Wis. 291, 298-299, 131 N. W. 832, 833-834; Mechem, Public Officers 297; Throop, Public Officers 345. An officer may acquire vested rights in a pension fund, see *Renz v. Hibbing Firemen's Relief Association*, (1932) 186 Minn. 370, 372, 243 N. W. 713, 714; *Stevens v. Minneapolis Fire Department Relief Association*, (1914) 124 Minn. 381, 384, 145 N. W. 35, 36; cf. *Lynch v. United States*, (1935) 292 U. S. 571, 54 Sup. Ct. 840, 78 L. Ed. 1434; and the same would appear to be true of emoluments already earned by a de jure officer so long as there are funds with which to pay him and the privilege of suit exists. But that a de facto officer may not recover compensation in Minnesota even for services actually performed, either on a contractual or quasi-contractual basis, see *Larsen v. City of St. Paul*, (1901) 83 Minn. 473, 475, 86 N. W. 459; *O'Brien v. City of St. Paul*, (1898) 72 Minn. 256, 75 N. W. 375; *Yorks v. City of St. Paul*, (1895) 62 Minn. 250, 252, 64 N. W. 565; see also *Stoner, Recovery of Salary by a De Facto Officer*, (1912) 10 Mich. L. Rev. 178, 291. Rights in public office or employment are occasionally determined on a contractual basis, though not necessarily with constitutional implications, wherever there is a contract of employment the employing body was statutorily authorized to make. See *Manley v. Scott*, (1909) 108 Minn. 142, 147-148, 121 N. W. 628, 629-630; *Hong v. Independent*

Approached from the angle of the separation of powers in government, the power of removal from public office appears to be one of those matters "which from their nature do not require judicial determination and yet are susceptible of it."<sup>20</sup> Confiding it to the courts either in first instance or by way of review imposes upon them no "non-judicial" function in a constitutional sense;<sup>21</sup> on the other hand confiding it in first instance or even exclusively to administrative officers or tribunals is not ordinarily subject to the objection of conferring upon them a part of the constitutional "judicial" power.<sup>22</sup>

Offices constitutionally created or recognized are subject to all provisions prescribing the power of appointment to them and their qualifications and tenure; and the power of the courts to enforce these particularized constitutional mandates cannot be excluded.<sup>23</sup>

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School Dist. No. 245, (1930) 181 Minn. 309, 312-313, 232 N. W. 329, 330-331; Backie v. Cromwell Consol. School Dist. No. 13, (1932) 186 Minn. 38, 40-41, 242 N. W. 389, 390-392; but compare Egan v. City of St. Paul, (1894) 57 Minn. 1, 5, 58 N. W. 267, 269.

<sup>20</sup>Van Devanter, J., in *Ex parte Bakelite Corporation*, (1929) 279 U. S. 438, 451, 49 Sup. Ct. 411, 413, 73 L. Ed. 789.

<sup>21</sup>For the extent to which courts serve as tribunals of first instance for this purpose, see Fairlie, *Judicial and Administrative Control of County Officers*, (1930) 28 Mich. L. Rev. 250, 259-262; Kneier, *Some Legal Aspects of the Governor's Power to Remove Local Officers*, (1931) 17 Va. L. Rev. 355.

<sup>22</sup>State ex rel. Attorney General v. Hawkins, (1886) 44 Ohio St. 98, 109, 5 N. E. 228, 232-233; State ex rel. Walters v. Oleson, (1886) 15 Neb. 247, 249-250, 18 N. W. 45, 46; though compare *Fugate v. Weston*, (1931) 156 Va. 107, 157 S. E. 736.

<sup>23</sup>Article 7, section 7 of the Minnesota constitution establishes the qualifications of elective officers. "This is a denial of power to the legislature to impose any greater restrictions or to add other qualifications for eligibility to those prescribed by the constitution." State ex rel. Childs v. Holman, (1894) 58 Minn. 219, 226, 59 N. W. 1006, 1007. "The constitutional provisions prescribing the qualifications for eligibility to office applies to all elective offices—to those created by statute as well as to those created by the Constitution." Hoffman v. Downs, (1920) 145 Minn. 465, 467, 177 N. W. 669, 670.

Article 5, section 4 of the constitution provides that the governor "shall have power, by and with the advice and consent of the senate, . . . to appoint . . . such . . . officers as may be provided by law." It has been held thereunder that while the legislature may "create an office, and itself appoint the officer thus provided for, or lodge the power of appointment elsewhere than with the chief executive," yet when it has brought the office within the constitutional provision by providing for appointment by the governor, the latter's power of appointment is vested in him by the constitution rather than by the statute creating the office, and any further provisions of the statute limiting his selection to a list provided by someone else are invalid. State ex rel. Childs v. Griffen, (1897) 69 Minn. 311, 312-313, 72 N. W. 117, 118, where the legislature had attempted to limit the governor's appointment of five members of a state board of pharmacy to a list of fifteen supplied by the state pharmaceutical association. "If he may be compelled to select one of five persons named by a natural or artificial person, he can

Also on the more negative side of preventing as distinguished from enforcing restrictions on the removal power, the courts will continue to determine the extent to which a blanket grant of the constitutional executive power may carry with it an absolute removal power that cannot be curtailed.<sup>24</sup> Otherwise than in these aspects, the problem is not a constitutional one; and herein legislative choice of the procedure calculated most effectively to secure all interests concerned is allowed wide scope. But the problem is not dulled in its significance as a legal one by the fact that it involves no vested rights in the constitutional sense, or by the fact that within the separation of powers principle its administration may be confined to other agencies than "judicial" courts. A tendency of minds wherein problems all too readily end as well as begin in the constitution<sup>25</sup> is to depart too far from the conception with which the common law started out.<sup>26</sup> All rights are in the last analysis only privileges created by law,<sup>27</sup> which may be done statutorily as well as constitutionally; and legislative no less than constitutional wisdom may create or recognize interests in their totality as deserving and socially no less than individually significant, as ever have been the interests committed to the aegis

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equally as well be obliged to choose as between two, or, for that matter, compelled to appoint without even exercising a discretion as between two . . . we do not intimate that the legislature . . . might not provide that appointees to legislative offices, as distinguished from offices created and fixed by the constitution, must possess certain qualifications." Compare *State ex rel. Buell v. Frear*, (1911) 146 Wis. 291, 131 N. W. 832.

As to the governor's power to remove elective officers authorized by the legislature pursuant to article 13, section 2 of the constitution, the court has said obiter in *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 77, 144 N. W. 453, 455, that "There can be no doubt that all elective officers come within this section, and that such may not be removed except for malfeasance or nonfeasance in office."

<sup>24</sup>See *Myers v. United States*, (1926) 272 U. S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160, as limited by *Rathbun v. United States*, (1935) 295 U. S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1710. For a most thoroughgoing analysis of the decision in *Myers v. United States*, see Corwin, *Tenure of Office and the Removal Power Under the Constitution*, (1927) 27 Col. L. Rev. 353.

<sup>25</sup>Compare Brown, *Administrative Commissions and the Judicial Power*, (1935) 19 MINNESOTA LAW REVIEW 261: "When once the courts have held that the law in question does not transcend constitutional provisions, our interest is apt to cease; the barriers are down, the propriety of the law is proved, and future development proceeds in a planless manner, undisturbed by doubts and questions." Compare also the extent to which the courts, by finding the constitutional issue rather easy of solution, as in importation and postal cases and the like, have failed to recognize that the whole problem was not thereby solved. *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Public Clearing House v. Coyne*, (1904) 194 U. S. 497, 506, 29 Sup. Ct. 789, 48 L. Ed. 1092.

<sup>26</sup>See footnote 17.

<sup>27</sup>See Pound, *Theories of Law*, (1912) 22 Yale L. J. 114, 140-146; Pound, *Interpretations of Legal History*, 158-160.



of due process clauses.<sup>28</sup> For the law to create or recognize the individual public servant's economic interest in his job may minister even more to the larger interest of society generally in an efficient and stable public service. An interest properly susceptible of the application of legal rules is thus established; and in this sense the courts that still occasionally assert that the incumbent of public office has something "in the nature" of a "property" right therein are perhaps not far wrong.<sup>29</sup> The facts are that in most jurisdictions a considerable degree of control is either confided to or assumed by the courts.

Except by wholly rejecting the principle of civil tenure, compliance with restrictions placed upon the removal power cannot be confided exclusively to the good faith of the officer or tribunal exercising it; and review by an independent administrative tribunal, if ever created specially for the purpose, need not necessarily involve fundamentally different legal rules or principles than those now applied by courts. The substitution for "judicial" courts of an "administrative" court of general supervision should retain at least the function already served by the former, though providing larger opportunity for experimentation in this field of social control.<sup>30</sup> The problem is therefore approached without predilection either in favor of or against the province which the courts now occupy in relation to it, but with the purpose of ascertaining the extent to which they, as the only independent agencies of control now supplied or available, achieve in behalf of all interests concerned the purpose of civil tenure where it has been provided.

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<sup>28</sup>See Field, *The Study of Administrative Law: A Review and a Proposal*, (1933) 18 Iowa L. Rev. 233, 237-238, for a criticism of the over-emphasis in the study and teaching of administrative law upon its constitutional aspects, and a recognition that "Some of the most provoking problems of analytical law and governmental policy," as well as of the adequate securing of human interests, concern the "status of the persons engaged in administration."

<sup>29</sup>See *State ex rel. Childs v. Wadhams*, (1896) 64 Minn. 318, 324, 67 N. W. 64, 67. The cases holding that as between a de facto officer who has performed the services and a de jure claimant of the office, the latter is entitled to the salary thereof, indicate to that extent something very much in the nature of a property right in the latter. See *Markus v. City of Duluth*, (1917) 138 Minn. 225, 229, 164 N. W. 906, 908; *Stoner, Recovery of Salary by a De Facto Officer*, (1912) 10 Mich. L. Rev. 178, 291-292.

<sup>30</sup>See *McFarland, Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations*, (1934) 20 A. B. A. Journ. 612, 623, pointing out that as administrative tribunals acquire by experience "a competence comparable to the traditional ability of . . . judges," and "the methods of deliberation and decision" of courts, they themselves become "courts in effect and in fact." "Administrative justice . . . [is] the trying ground—the subsidiary corporation so to speak—whereby the courts . . . [avoid] some of the embarrassments of experimentation in new fields of government."

## I. REMOVAL DIRECTLY BY COURT ACTION

In Minnesota the courts do not serve as tribunals of first instance for this purpose to the extent true in some jurisdictions.<sup>31</sup> Wherein they do consists chiefly in their exercise of the historic function of the common-law writ of quo warranto.<sup>32</sup> It may be

<sup>31</sup>See Fairlie, *Judicial and Administrative Control of County Officers*, (1930) 28 Mich. L. Rev. 250, 259-262; Kneier, *Some Legal Aspects of the Governor's Power to Remove Local Officers*, (1931) 17 Va. L. Rev. 355.

<sup>32</sup>The ancient writ of quo warranto is generally obsolete and an information in the nature of quo warranto its modern substitute. *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.*, (1889) 40 Minn. 213, 215, 41 N. W. 1020, 1021; *State ex rel. Wetzel v. Tracy*, (1892) 48 Minn. 497, 499-500, 51 N. W. 613. It may issue directly from the supreme court, see 1 Mason's 1927 Minn. Stat., sec. 132; or from the district court, see 1 Mason's 1927 Minn. Stat., sec. 156, "as the court of general original jurisdiction, the historical successor of the Court of King's Bench." *State ex rel. Young v. Village of Kent*, (1905) 96 Minn. 255, 256, 104 N. W. 948. Jury trial is not required, *State ex rel. Clapp v. Minnesota Thresher Mfg. Co.*, (1889) 40 Minn. 213, 217, 41 N. W. 1020, 1022; nor could it constitutionally be required where the writ issues directly from the supreme court, see *Lauritsen v. Seward*, (1906) 99 Minn. 313, 323, 109 N. W. 404, 408 (mandamus); *State ex rel. Colter v. Burr*, (1881) 28 Minn. 40, 43, 8 N. W. 899, 900 (mandamus).

In the supreme court the writ is discretionary even when applied for by the attorney general, and in the district courts when applied for by a private relator, see *State ex rel. Young v. Village of Kent*, (1905) 96 Minn. 255, 257, 104 N. W. 948, 949; *State ex rel. Bell v. Moriarty*, (1900) 82 Minn. 68-69, 84 N. W. 495, 496; *State ex rel. Simpson v. Dowlan*, (1885) 33 Minn. 536, 537, 24 N. W. 188, 189. Where the writ issues originally from the supreme court the practice is to appoint a referee to take the evidence, and the controversy is submitted for the court's determination upon his report and the pleadings. See *State ex rel. Young v. Ladeen*, (1908) 104 Minn. 252, 116 N. W. 486. Where the attorney general prosecutes the writ the burden of proof is thrown upon the respondent. See *State ex rel. Douglas v. Gylstrom*, (1899) 77 Minn. 355, 357, 79 N. W. 1038, 1039. In the discretion of the court, depending on the extent of the public interest involved, the writ may be prosecuted by a private relator claiming title to the office of which the respondent is in possession, in which case "There are two separate and dissimilar interests allowed to be united in this action," and the judgment may not only oust the respondent but also install the relator and award him damages for the usurpation of his rights. *Territory of Minnesota ex rel. Parker v. Smith*, (1859) 3 Minn. 240 (Gil. 164, 166); see also *State ex rel. Childs v. Marr*, (1896) 65 Minn. 243, 69 N. W. 8; *State ex rel. Childs v. Wadhams*, (1896) 64 Minn. 318, 325, 67 N. W. 64, 67. Though there were early cases assuming that where a private relator prosecutes the writ he must show a valid claim of his own to the office, see *Barnum v. Gilman*, (1881) 27 Minn. 466, 467, 8 N. W. 375, 376; *Taylor v. Sullivan*, (1891) 45 Minn. 309, 310, 47 N. W. 802, it is now recognized that the court "has the right, and that under some circumstances it may, in the exercise of sound judicial discretion, become its duty, to permit an information in the nature of quo warranto to be filed by a private person (having no personal interest in the question distinct from the public) to test the right of an incumbent of public office to hold the same, notwithstanding the attorney general has refused to give his consent to such filing." *State ex rel. Dowdall v. Dahl*, (1897) 69 Minn. 108, 113, 71 N. W. 910, 911; see also *State ex rel. Town of Stuntz v. City of Chisholm*, (Minn. 1936) 264 N. W. 798; 266 N. W. 689. Misconduct on the part of an otherwise rightful claimant of the office, or acquiescence by him in the respondent's usurpation, is no defense to ouster of the respondent

urged that the writ of ouster in quo warranto is not strictly an original exercise of the power of removal from public office, if by that is meant the termination by the removal order of an until then de jure incumbency;<sup>33</sup> for the grounds of quo warranto are only those operating of their own weight to vacate the office by rendering the respondent's incumbency illegal.<sup>34</sup> The writ is more in the nature of a proceeding to oust persons who are not officers than one to remove officers. And in some cases the prior vacating cause has been the valid exercise of a removal power of an officer or tribunal other than the court;<sup>35</sup> or the decision of a competent disputed elections tribunal;<sup>36</sup> or a "conviction of any infamous crime, or of any offense involving a violation of his [the officer's] official oath."<sup>37</sup> In all such cases the jurisdiction of a court in

where the attorney general prosecutes the writ. *State ex rel. Probstfield v. Sharp*, (1880) 27 Minn. 38, 39, 6 N. W. 408.

<sup>33</sup>Where a home rule charter provides that removals within the classified civil service shall only be by the civil service commission for cause, the mere existence of incompetency as a sufficient cause, or the commencement of removal proceedings, or an invalid removal order, do not vacate the office and disentitle the holder to the salary thereof; nor does a subsequent valid removal order relate back. *Markus v. City of Duluth*, (1917) 138 Minn. 225, 164 N. W. 906.

<sup>34</sup>In a quo warranto proceeding to oust a county superintendent, it was held that the court could not consider an alleged neglect of duties, but only whether the respondent had vacated his office by removing his residence from the county. *State ex rel. Young v. Hays*, (1908) 105 Minn. 399, 400, 117 N. W. 615 (issue of removal of residence determined in respondent's favor).

<sup>35</sup>2 Mason's 1927 Minn. Stat., sec. 6953 (3). See *State ex rel. Douglas v. Megaarden*, (1901) 85 Minn. 41, 88 N. W. 412; *State ex rel. Hilton v. Essling*, (1923) 157 Minn. 15, 195 N. W. 539.

<sup>36</sup>2 Mason's 1927 Minn. Stat., sec. 6953 (7). See Note, *Contested Elections—Delegation of Judicial Power to a Non-Judicial Body*, (1931) 15 MINNESOTA LAW REVIEW 822. Quo warranto will not lie to determine an election contest where the law specifically provides another remedy, see *State ex rel. Bell v. Moriarty*, (1900) 82 Minn. 68-69, 84 N. W. 495, 496; although it never has been settled in this state whether quo warranto is excluded as a concurrent remedy where a municipal legislative body is given power to determine the elections and qualifications of its own members. See *State ex rel. Simpson v. Dowlan*, (1885) 33 Minn. 536, 24 N. W. 188, where the court avoided determining this question by holding there was not a sufficient public interest to justify the writ at the suit of a private relator. See *Throop, Public Officers* 388-389. Quo warranto is unavailable to oust the presiding officer of a city council on the ground that another had been invalidly removed by the council from that office, see *State ex rel. Childs v. Kiichli*, (1893) 53 Minn. 147, 153-154, 54 N. W. 1069, 1070: ". . . it would require a clear and explicit expression of legislative intention . . . to justify the conclusion that it was the design to deprive this city council of the universally recognized parliamentary right of control over their own presiding officer."

<sup>37</sup>2 Mason's 1927 Minn. Stat., sec. 6953(5). The court and jury in the criminal proceeding by convicting the defendant are exercising original jurisdiction to remove from public office; and if supplemental aid by quo warranto is ever necessary to oust the one convicted from possession, the court has to determine only the easily proved fact of the prior conviction, and the more difficult legal question whether it was for the type of crime that disqualifies under the statute.

quo warranto, if required to effect an ouster from possession, is more by way of review, supplemental, or ancillary, than original. But in other cases the existence of a prior vacating cause presents an original issue of fact or law, or both; the court is the first tribunal of any sort to hear the evidence and determine its preponderance;<sup>38</sup> its writ of ouster is the first determination that the prior incumbency has been in fact illegal; and in the meantime the incumbent will usually have been the de facto officer whose acts as regards the public are entirely valid.<sup>39</sup> It is thought proper to consider such cases as instances of a direct and original removal power of courts over public officers. Depending on whether or not there is also a general removal power over the officer in question residing elsewhere, the removal power of the courts on grounds for which quo warranto lies may be either concurrent or exclusive.

Thus a court may oust an officer whose office exists only by virtue of an unconstitutional statute;<sup>40</sup> one whose appointment is invalid because of the unconstitutionality of the statute vesting the appointing power,<sup>41</sup> or because the controlling statute does not vest the appointing power in the one who has purported to exercise it;<sup>42</sup> one whom a board of county commissioners has improperly reappointed ad interim to the office of county treasurer from which he had been validly suspended by the governor;<sup>43</sup> a former member of the legislature from the office of boiler inspector to which he had been appointed in violation of article 4, section 9 of the state constitution,<sup>44</sup> interpreted by the court to apply to his appointment

<sup>38</sup>Though compare *State ex rel. Douglas v. Gylstrom*, (1899) 77 Minn. 355, 79 N. W. 1038, discussed in the text.

<sup>39</sup>See *State ex rel. Bales v. Bailey*, (1908) 106 Minn. 138, 141, 118 N. W. 676, 678; *State ex rel. Egan v. Schram*, (1901) 82 Minn. 420, 422-423, 85 N. W. 155, 156; *Carli v. Rhener*, (1880) 27 Minn. 292, 293, 7 N. W. 139; *State v. Brown*, (1867) 12 Minn. 538 (Gil. 448, 457). "But this principle does not apply when the officer himself claims the benefit of his acts." *State ex rel. Egan v. Schram*, (1901) 82 Minn. 420, 423, of 85 N. W. 156; and see *Larsen v. City of St. Paul*, (1901) 83 Minn. 473, 475, 86 N. W. 459; *O'Brien v. City of St. Paul*, (1898) 72 Minn. 256, 75 N. W. 375; *Yorks v. City of St. Paul*, (1895) 62 Minn. 250, 64 N. W. 565; *Stoner, Recovery of Salary by a De Facto Officer*, (1912) 10 Mich. L. Rev. 178, 291-292.

<sup>40</sup>See *State ex rel. Benson v. Peterson*, (1930) 180 Minn. 366, 230 N. W. 830.

<sup>41</sup>*State ex rel. Douglas v. Ritt*, (1899) 76 Minn. 531, 79 N. W. 535.

<sup>42</sup>*State ex rel. Forrer v. McIntosh*, (1909) 109 Minn. 18, 122 N. W. 462; see also *State ex rel. Grode v. Johnstone*, (1895) 61 Minn. 56, 63 N. W. 176; *State ex rel. Childs v. Routh*, (1895) 61 Minn. 205, 63 N. W. 621.

<sup>43</sup>*State ex rel. Childs v. Dart*, (1894) 57 Minn. 261, 59 N. W. 190.

<sup>44</sup>"No senator or representative shall . . . hold an office under the state which has been created or the emoluments of which have been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature."

although made after he had resigned as legislator;<sup>45</sup> the holder of two otherwise inconsistent offices from the first, it being automatically vacated by acceptance of the second;<sup>46</sup> one who has never had<sup>47</sup> or else has ceased to have<sup>48</sup> the citizenship or residence qualifications of his office; and one who has failed to file a required bond within the proper time,<sup>49</sup> or otherwise failed to qualify.<sup>50</sup>

In all such cases the issues of fact and law are clear and definite of ascertainment, though not necessarily of solution; and in all of them a court is deciding in the first instance the existence of a legal ground for the removal of one at least factually an officer.<sup>51</sup> Cases of somewhat more difficult import are those involving statutory qualifications of *competency* required as the basis of a valid appointment. Though a court may receive evidence relating to the existence of such qualifications,<sup>52</sup> there is here some danger of infringing unduly upon the proper province of the appointing power. This the courts have avoided by applying what is more in the nature of a rule of review than of weighing the evidence to ascertain its preponderance.

In *State ex rel. Douglas v. Gylstrom*<sup>53</sup> the proceeding was to oust the respondent from the position of boiler inspector to which he had been appointed by the governor. A statute provided: "No person shall be eligible . . . who has not had at least 10 years of actual experience in operating steam engines and steam boilers, . . . or who is not . . . suitably qualified by experience in the construction of steam boilers so as to enable him to perform the duties of the office, . . ."

<sup>45</sup>*State ex rel. Childs v. Sutton*, (1895) 63 Minn. 147, 65 N. W. 202. Compare *State ex rel. Dowdall v. Dahl*, (1897) 69 Minn. 108, 71 N. W. 910, disallowing the writ at the suit of a private relator against a member of the legislature to oust him from the appointive office of court stenographer. Dissent by Buck and Canty, JJ.

<sup>46</sup>*State ex rel. Hilton v. Sword*, (1923) 157 Minn. 263, 264-266, 196 N. W. 467; see also *Hoffman v. Downs*, (1920) 145 Minn. 465, 467, 177 N. W. 669, 670.

<sup>47</sup>*Taylor v. Sullivan*, (1891) 45 Minn. 309, 47 N. W. 802.

<sup>48</sup>See *State ex rel. Young v. Hays*, (1908) 105 Minn. 399, 117 N. W. 615.

<sup>49</sup>*County of Scott v. Ring*, (1882) 29 Minn. 398, 404, 13 N. W. 181.

<sup>50</sup>*State ex rel. Young v. Ladeen*, (1908) 104 Minn. 252, 116 N. W. 486.

<sup>51</sup>That the holder of an office existing only under an unconstitutional statute may yet be a de facto officer for some purposes, see Field, *The Effect of An Unconstitutional Statute* 90-113.

<sup>52</sup>The court's determination must necessarily be on the basis of its own record, since the appointing power will have preserved no formal record of evidence relied on in making the appointment. Also the original character of the proceeding requires that the court be allowed to take new evidence.

<sup>53</sup>(1899) 77 Minn. 355, 79 N. W. 1038.

The court, over the dissent of Start, C. J., and Buck, J.,<sup>54</sup> quashed the writ in quo warranto on the ground that the evidence, though definitely preponderating against the respondent's eligibility, nevertheless reasonably supported the opposite conclusion; saying, through Collins, J.:

" . . . the state, through its attorney general, having legally questioned respondent's eligibility to the office, the burden of proof is upon him to establish that he is eligible. . . . But the question of his eligibility is not to be determined by this court by merely weighing the testimony, and then determining the matter upon a preponderance of evidence, . . . for that would be an encroachment upon the functions of the governor, who has made the appointment, and in so doing has passed upon the qualifications of Mr. Gylstrom for the place. If there is evidence which reasonably tends to support the conclusion reached by the executive when he was called upon to determine this very question of eligibility under the statute, this court cannot interfere, and say that, because the proofs preponderate against the respondent, the action of the governor must be set aside."<sup>55</sup>

That a court may not pay the same deference to the appointing power of a municipal officer or body is shown by *State ex rel. Johnson v. Starkey*,<sup>56</sup> which involved an ordinance of the city of St. Paul requiring that the inspector of public buildings be "a practical architect and sanitary engineer." The court issued its writ of ouster, saying through Vanderburgh, J.:

"Within the designated class, the discretion of the council in the election of such officer cannot be reviewed; and, under any circumstances, the case ought to be very clear to authorize a quo warranto proceeding of this kind. . . . There must . . . be some line of distinction between those who are entitled to be denominated 'architects' and those who are not, and the latter are not eligible; and, if the person elected is claimed to be ineligible, the fact may be made the subject of judicial inquiry. The term 'architect' has a well-defined meaning. Whether a person is or is not 'a practical architect and sanitary engineer' is a matter susceptible of proof, and in this case must be determined upon the evidence as disclosed by the record. . . . While the respondent has had some experience in building for himself and others, and also in the construction of sewers, he admits that he had never practiced or followed the profession or business of an architect, and it is quite clear that he is not sufficiently skilled in the princip-

<sup>54</sup>At 77 Minn., 358-360, 79 N. W. 1040, based on an interpretation of the qualifications required by the statute as cumulative rather than alternative, and that "the evidence is conclusive that he [the respondent] never had 10 years', or any less numbers of years', actual experience in operating steam engines and boilers."

<sup>55</sup>At 77 Minn. 356, 79 N. W. 1039.

<sup>56</sup>(1892) 49 Minn. 503, 52 N. W. 24.

ples of architecture and sanitary plumbing, or in the application of the same in practice, to render him eligible to the office of building inspector under the ordinance. The city council has therefore failed to make a valid appointment. . . ."<sup>57</sup>

But the incompetency, to be the basis of a proceeding in quo warranto, must consist in a lack of the statutory qualifications required for a valid appointment, as distinguished from incompetency or neglect subsequently developing in the performance of his duties by an officer validly appointed. Incompetency of the latter sort does not of its own weight vacate the office or render the officer's incumbency illegal;<sup>58</sup> and the termination of his otherwise de jure character requires the exercise of an original removal power residing elsewhere than in the courts.<sup>59</sup> It is with their relation by way of review to removals of the latter sort that this study is chiefly concerned.<sup>60</sup>

## II. JUDICIAL REVIEW OF REMOVALS

Article 13, section 1 of the Minnesota constitution provides for the removal of the "governor, secretary of state, treasurer, auditor, attorney general and judges of the supreme and district courts" by the cumbersome and essentially political process of impeachment.<sup>61</sup> The grounds thereof are "corrupt conduct in office" and

<sup>57</sup>At 49 Minn. 508, 52 N. W. 26.

<sup>58</sup>Markus v. City of Duluth, (1917) 138 Minn. 225, 229, 164 N. W. 906, 908.

<sup>59</sup>State ex rel. Young v. Hays, (1908) 105 Minn. 399, 400, 117 N. W. 615.

<sup>60</sup>It has usually been assumed that the equitable remedy by injunction can never duplicate the function of quo warranto in trying title to public office. The reasons given are: (1) adequacy of the remedy at law, see *Burke v. Leland*, (1892) 51 Minn. 355, 357, 53 N. W. 716, 717; (2) equity's unwillingness to interfere in political matters; and (3) the earlier conception that equity protects only property rights in the technical sense. See Note, (1932) 6 Temple L. Q. 558. But in a code jurisdiction there is no sufficient reason why equity, having jurisdiction to protect the possession of a de facto officer, may not go ahead and finally determine title to the office, see *School Dist. No. 47 v. Weise*, (1899) 77 Minn. 167, 170-171, 79 N. W. 668, 669 (concurring opinion by Canty, J.); *Heyward v. Long*, (S.C. 1935) 183 S. E. 145, noted 20 MINNESOTA LAW REVIEW June, 1936. There is thus the possibility of a suit by a claimant in possession to enjoin a disturbance of his possession, proving a boomerang by requiring him to prove his own title, and opening the way for his own final ouster in the same proceeding. For the extent to which equitable jurisdiction may be conferred by a provision of a home rule charter, see *Oehler v. City of St. Paul*, (1928) 174 Minn. 410, 219 N. W. 760. But equitable jurisdiction is generally unavailable where the original plaintiff is not himself the one in possession of the office, see *Jensen v. Indep. Consol. School Dist. No. 85*, (1924) 160 Minn. 233, 199 N. W. 911.

<sup>61</sup>There is perhaps no better example of the defects of the impeachment process than that provided by the impeachment of Governor Cox of Minnesota in 1881. See Pound, *Outlines of Jurisprudence*, 4th ed., 57, pointing out

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"crimes and misdemeanors." As to the officers enumerated, impeachment is no doubt the exclusive method of removal, except to the extent that a disputed election contest or a quo warranto proceeding are available on grounds going to the validity of their election or the legality otherwise of their incumbency.<sup>62</sup> So also the grounds enumerated were no doubt intended to be the exclusive grounds of removal by impeachment; but even assuming a conviction by the senate<sup>63</sup> on evidence palpably insufficient to sustain the existence of either of the enumerated grounds, the inability of the courts to afford relief results not so much from deference to the co-ordinate legislative department as from the fact that for the trial of impeachment charges the senate is itself a "court" in the constitutional sense inferior to no other.<sup>64</sup> It has the same power to err, limited only by its own self-restraint, that necessarily inheres in any court of last resort.<sup>65</sup>

Section 2 of the same article of the constitution authorizes the legislature "to provide for the removal of inferior<sup>66</sup> officers . . . for malfeasance or nonfeasance in the performance of their duties." In so far as this section may be interpreted as limiting the grounds of removal of inferior officers to those embraced within "malfeasance or nonfeasance" in office,<sup>67</sup> it is more of a restriction than

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the extent to which senators participated in the arguments without having heard the evidence, and voted without having heard either the evidence or the arguments.

<sup>62</sup>See *State ex rel. Sothre v. Moodie*, (1935) 65 N. D. 340, 258 N. W. 558, permitting quo warranto against the governor-elect of North Dakota on the ground that he lacked the residence qualifications of his office.

<sup>63</sup>The method of impeachment, i. e., by charges brought by the house of representatives before the bar of the senate, is provided in art. 4, sec. 14 of the constitution. Compare the method in Nebraska, where the trial is before the supreme court of the state. Neb. constitution, art. 3, sec. 14.

<sup>64</sup>For a discussion of the judicial nature of the senate's function in impeachment proceedings, see *Van Hecke, Pardons in Impeachment Cases*, (1924) 24 Mich. L. Rev. 657, 670-673.

<sup>65</sup>Compare *Stone, J.*, dissenting in *United States v. Butler*, (1936) 56 Sup. Ct. 312, 325: ". . . the only check upon our own exercise of power is our own sense of self-restraint."

<sup>66</sup>Such officers presumably include all falling within the category of officers as distinguished from employees, municipal as well as state, excepting members of the legislature and those expressly enumerated in section 1 of article 13. See *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 77, 144 N. W. 453, 455. A probate judge has been held to be an "inferior" officer within the constitutional provision. *Martin v. County of Dodge*, (1920) 146 Minn. 129, 131, 178 N. W. 167, 168.

<sup>67</sup>See *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 77, 144 N. W. 453, 455. But compare *State ex rel. Townsend v. Ward*, (1897) 70 Minn. 58, 72 N. W. 825, involving a legislative charter provision authorizing a municipal council to remove an elective mayor "for cause," embracing somewhat wider grounds than "malfeasance or nonfeasance" in office. No constitutional issue was raised, and the decision was only to the effect that the



a grant of legislative power. But it has never been so interpreted as to appointive officers; and in Minnesota the law is clear that in the absence of legislative restrictions the power to remove appointive officers will be held to be at the pleasure of the appointing power.<sup>68</sup> As a grant of legislative power the constitutional provision has the decided merit of precluding, on the one hand, any doubt of legislative competence to provide for statewide supervision of local officers, elective as well as appointive, and of precluding on the other hand a decision in Minnesota such as *Myers v. United States*,<sup>69</sup> to the extent that that case holds a blanket grant of the constitutional executive power to carry with it an absolute removal power incapable of legislative curtailment.<sup>70</sup>

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writ of prohibition was not the proper remedy. See also *Townsend v. Common Council of Sauk Center*, (1898) 71 Minn. 379, 74 N. W. 150, where on certiorari to review the same removal proceeding the decision was on other grounds in favor of the relator, the only party to raise a constitutional issue.

<sup>68</sup>See *Parish v. City of St. Paul*, (1901) 84 Minn. 426, 429, 87 N. W. 1124, 1125: ". . . where no tenure of office is fixed by law, and no provision is made for the removal of the incumbent, the power of removal is a necessary incident to the power of appointment;" *Egan v. City of St. Paul*, (1894) 57 Minn. 1, 5, 58 N. W. 267, 268-269: ". . . where the tenure of an appointive office is not prescribed by the constitution or by statute, the appointee holds at the will of the appointing power and of himself, and he may be removed by the former at pleasure." In *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 144 N. W. 453, the same rule was applied though the term of the appointive officer was fixed by charter at two years, and the removal was before the expiration of that term. But compare *State ex rel. Village of Chisholm v. Bergeron*, (1923) 156 Minn. 276, 194 N. W. 624, where the court implied limitations on the removal power from other provisions of the controlling statute.

<sup>69</sup>(1926) 272 U. S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160, holding that the president's power to remove a first class postmaster appointed by himself with the consent of the Senate is derived from the constitution, and therefore exclusive and incapable of congressional curtailment. In *Rathbun v. United States*, (1935) 295 U. S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1710, the *Myers* decision was limited so as not to prevent congressional restriction of the president's power to remove a federal trade commissioner, on the theory that such an officer is of a quasi-judicial character outside the regular executive organization. Nor did the *Myers* decision determine that Congress may not limit the president's removal power over "inferior" federal officers so described by Congress, by vesting their appointment in the president alone, or in the heads of departments. See the thoroughgoing analysis in *Corwin, Tenure of Office and the Removal Power Under the Constitution*, (1927) 27 Col. L. Rev. 353.

<sup>70</sup>That the *Myers* case can have no significance in Minnesota, see *State ex rel. Clapp v. Peterson*, (1892) 50 Minn. 239, 244, 52 N. W. 655: "The power thus conferred [by the constitution upon the legislature] is plenary, and confers authority upon the legislature to vest the power of removal, and the determination of the question whether cause for removal exists, in any department of the government, or in any officer or official body, it may deem expedient;" In re *Application for Removal of Nash*, (1920) 147 Minn. 383, 385, 181 N. W. 570, 571: "The courts can in no way interfere with the exercise of the powers which the constitution vests in the governor, but the power of amotion from office is not given him by the constitution, but rests only on an act of the legislature, . . ."

The present study is not concerned with the legislative allocation of the removal power over the various categories of officers and employees, or with the removal power at all wherever it has been expressly made or impliedly left unrestricted; but only with the extent to which restrictions that have been imposed permit of some protection by the courts of the rights in public office or employment thereby recognized. So limited the subject-matter conveniently falls into five subdivisions: (A) restrictions on the governor's removal power; (B) veterans' preference; (C) firemen's and policemen's civil service tenure; (D) teachers' tenure; and (E) miscellaneous tenure provisions of special legislative and home rule charters or ordinances enacted thereunder. Cross-reference will frequently be made to cases apposite to the immediate discussion though logically falling in a later subdivision; and to avoid repetition, the discussion in each succeeding subdivision will be curtailed by reference to preceding ones.

A. *Restrictions on the Governor's Removal Power.*—As to his own appointees within the state executive or administrative services the governor's removal power is at present generally unlimited.<sup>71</sup> As to other state executive or administrative officers and employees who do not come under veterans' preference, the removal power is generally at the pleasure of an appointing officer responsible in turn to the governor.<sup>72</sup> The legislature has further empowered the governor to remove from office

"any clerk of the supreme or a district court, judge of probate, judge of any municipal court, justice of the peace, court commissioner, sheriff, coroner, auditor, register of deeds, county attorney, county superintendent of schools, county commissioner, county treasurer, or any collector, receiver, or custodian of public moneys, *whenever it appears to him, by competent evidence, that either has been guilty of malfeasance or nonfeasance in the performance of his official duties; first giving to such officer a copy of the charges against him, and an opportunity to be heard in his defense.*"<sup>73</sup>

<sup>71</sup> Mason's 1927 Minn. Stat., sec. 53 (5), 58.

<sup>72</sup> Mason's 1927 Minn. Stat., sec. 53 (48). This is not true of the independent elective heads who share the constitutional executive power with the governor. Minn. constitution, Art. 5, sec. 1.

<sup>73</sup> Mason's 1927 Minn. Stat., sec. 6954 (Italics supplied). There follow provisions for the appointment by the governor of a special commissioner to take and report testimony, to which it is required that the witnesses subscribe (sec. 6955); and provisions specially applicable to the suspension and removal of county treasurers (secs. 6959-6961). The governor may himself instigate removal proceedings under the statute, or act upon the petition of an interested party; however, in the latter event, the interested party has no way of compelling him to act upon the petition. *State ex rel. Birkeland v. Christianson*, (1930) 179 Minn. 337, 229 N. W. 313.

The officers enumerated no doubt do not exhaust the constitutional power of the legislature to center in the governor, through the removal power, a statewide supervision of "inferior" officers, elective as well as appointive and local as well as state.<sup>74</sup> As to the officers enumerated the governor's power of removal is exclusive, except as regards those grounds already considered that may render their appointment or election invalid or their incumbency otherwise illegal.<sup>75</sup> Although as regards a county treasurer the power to suspend pending a removal proceeding is specifically conferred,<sup>76</sup> the removal power alone as to the other enumerated officers has been held to include a summary power to suspend pending and before hearing.<sup>77</sup> An officer validly suspended or removed has been held ineligible for reappointment to the same office while the suspension order lasts or during the remainder of the term from which he has been removed.<sup>78</sup>

<sup>74</sup>The decision in *State ex rel. Hilton v. Essling*, (1923) 157 Minn. 15, 195 N. W. 539, holding the words of the statute "any collector, receiver, or custodian of public moneys" inapplicable to a custodian solely of municipal funds, was reached by statutory interpretation and in no way limits the constitutional grant of legislative power contained in section 2 of article 13. The history of the statute all the way down from territorial days is traced by the court at 157 Minn. 16-20, 195 N. W. 539-541. Judges of municipal courts and justices of the peace are considered state officers, see *State ex rel. Simpson v. Fleming*, (1910) 112 Minn. 136, 127 N. W. 473; *State ex rel. Rosckes v. Dreger*, (1906) 97 Minn. 221, 225, 106 N. W. 904. So also is a mayor, in connection with the enforcement of the state liquor laws, see *State ex rel. Young v. Robinson*, (1907) 101 Minn. 277, 283, 112 N. W. 269, 270.

<sup>75</sup>See *State ex rel. Young v. Hayes*, (1908) 105 Minn. 399, 400, 117 N. W. 615; *State ex rel. Martin v. Burnquist*, (1918) 141 Minn. 308, 321, 170 N. W. 201, 203.

<sup>76</sup>*Mason's* 1927 Minn. Stat., sec. 6959. In *State ex rel. Clapp v. Peterson*, (1892) 50 Minn. 239, 245, 52 N. W. 655, the court pointed out in answer to the contention that the power under the section to suspend a treasurer without hearing was in excess of the constitutional grant: "Such temporary suspension without previous hearing is fully in accordance with the analogies of the law. It is a constitutional principle that no person shall be deprived of his liberty except by due process of law, which includes notice and a hearing, yet it was never claimed that in criminal proceedings a person could not be arrested and deprived of his liberty until a trial could reasonably be had, and the rights of the parties determined."

<sup>77</sup>*State ex rel. Douglas v. Megaarden*, (1901) 85 Minn. 41, 47, 88 N. W. 412, 414-415 (sheriff); *Martin v. County of Dodge*, (1920) 146 Minn. 129, 131-132, 178 N. W. 167, 168 (judge of probate). In the *Martin* case the suspension order was followed by the appointment of a successor, and after the hearing by a removal order which was quashed on certiorari, see *State ex rel. Martin v. Burnquist*, (1918) 141 Minn. 308, 170 N. W. 201. It was held in the subsequent suit by the wrongfully removed officer for his salary that the suspension was nevertheless valid, and effective to deprive him of the salary for the time that the successor had served prior to the effective date of his own reinstatement.

<sup>78</sup>*State ex rel. Childs v. Dart*, (1894) 57 Minn. 261, 263, 59 N. W. 190: "Such removal proceedings are not merely for the purpose of ousting the

No appeal to the courts from the governor's action being specifically provided, their relation thereto must depend, first, upon the extent to which they may direct their extraordinary remedies to so high an officer as the chief executive of the state, and second, upon the nature and scope of such remedies. After some fluctuation in the earlier decisions in this state,<sup>79</sup> it seems now to be settled that as to high officers as well as low the main question in every case is the nature of the act or duty sought to be compelled, restrained, or reviewed, rather than one of mere courtesy to a co-ordinate department, or fear of intergovernmental friction or of inability to enforce the court's decree.<sup>80</sup> Whether to proceed at all in exercise of his removal power is clearly a matter committed by the statute to the governor's *executive* discretion, and it is settled that a court may not by mandamus compel him to do so.<sup>81</sup> May they compel him to refrain or desist from proceeding against an officer not one of those enumerated, and therefore not legally within his removal power under the statute?

In *State ex rel. Hilton v. Essling*,<sup>82</sup> the attorney general sought in quo warranto to oust from possession of his office the mayor of Eveleth, who had already been suspended by the governor in a proceeding for his removal for malfeasance in office. The court quashed the writ on the ground that although the mayor was a custodian of public moneys, the words of the statute "any collector, receiver, or custodian of public moneys" read in the light of the statute's history could not have been intended to include a custodian solely of *municipal* funds. The court thus collaterally determined the governor's lack of jurisdiction in the removal proceeding. Under a similar state of facts the writ of *prohibition* has been directed by the supreme court to a municipal body attempting to exercise a removal power wholly unauthorized as to

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person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. . . . Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so." See Finkelstein, Removal and Re-Election of Public Officers, (1932) 7 St. John's L. Rev. 42.

<sup>79</sup>See Kumm, Mandamus to the Governor in Minnesota, (1924) 9 MINNESOTA LAW REVIEW 21; Notes, (1930) 14 MINNESOTA LAW REVIEW 303, 572.

<sup>80</sup>See *Cooke v. Iverson*, (1909), 108 Minn. 388, 393, 122 N. W. 251; *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 314-320, 133 N. W. 857-860; and references cited in footnote 79.

<sup>81</sup>*State ex rel. Birkeland v. Christianson*, (1930) 179 Minn. 337, 229 N. W. 313.

<sup>82</sup>(1923) 157 Minn. 15, 195 N. W. 539.

the officer involved,<sup>83</sup> and the governor of the state has no greater discretion to proceed in a matter wholly beyond his jurisdiction. It is prerequisite to the writ of *prohibition*, as to the writ of certiorari, that the officer or tribunal against whom it is directed be acting or proceeding to act in a judicial or quasi-judicial capacity.<sup>84</sup> The term "judicial," in reference to permissive administrative action that nevertheless closely resembles the ordinary action of courts in both its method and effect on individual and property rights, is usually "softened by a quasi"<sup>85</sup> by way of tribute to the principle of the separation of powers in the very process of disregarding for practical reasons its full implications. The same matter may be non-judicial in the sense of permitting it to be confided to an officer or tribunal outside the regular judicial hierarchy, and at the same time judicial in the sense of permitting court review thereof by certiorari. The two problems involve entirely different considerations and approaches.<sup>86</sup>

The power of removal from public office, wherever it requires specific grounds or "cause," especially if coupled with requirements of notice and hearing, as in the instant statute, is "judicial" in the second sense.<sup>87</sup> As soon as the governor has decided upon action rather than non-action in the exercise of his removal power

<sup>83</sup>State ex rel. Brandt v. Thompson, (1904) 91 Minn. 279, 97 N. W. 887. The lack of jurisdiction must be complete, see State ex rel. Townsenc v. Ward, (1897) 70 Minn. 58, 63-64, 72 N. W. 825-826: "The charge and specifications may be vague, indefinite, and insufficient, but this does not affect the jurisdiction of the tribunal in question. If the specific acts charged are not such as, if proved, would sustain the action, no jurisdictional question is raised;" State ex rel. Jarvis v. Craig, (1907) 100 Minn. 352, 355, 111 N. W. 3, 5; Frignitz v. Fischer, (1860) 4 Minn. 366 (Gil. 275, 276). But the lack of jurisdiction is complete when the removal power does not include the particular officer over whom it is sought to be exercised. State ex rel. Brandt v. Thompson, (1904) 91 Minn. 279, 97 N. W. 887.

<sup>84</sup>State ex rel. Hahn v. Young, (1881) 29 Minn. 474, 523, 9 N. W. 737, 738. The writ may issue only from the supreme court, see 2 Mason's 1927 Minn. Stat., sec. 9734.

<sup>85</sup>Holmes, J., dissenting in Springer v. Government of the Philippine Islands, (1928) 277 U. S. 189, 210, 48 Sup. Ct. 480, 485, 72 L. Ed. 845.

<sup>86</sup>As a term differentiating the administrative from the judicial process, in order to sustain administrative action within the separation of powers principle, the word "quasi" is meaningless. See Brown, Administrative Commissions and the Judicial Power, (1935) 19 MINNESOTA LAW REVIEW 261, 265-275. As a term expressing sufficient similarity to permit of court review, it is useful.

<sup>87</sup>Dullam v. Wilson, (1884) 53 Mich. 392, 19 N. W. 112; State ex rel. Hart v. Common Council of Duluth, (1893) 53 Minn. 238, 242-243, 55 N. W. 118, 119-120; State ex rel. Fuslong v. McColl, (1914) 127 Minn. 155, 160, 149 N. W. 11, 13; see also Minnesota Sugar Co. v. Iverson, (1903) 91 Minn. 30, 33, 97 N. W. 454, 455; "The character of the office or tribunal does not determine the question, but, rather, the nature of the act performed;" (1932) 32 Col. L. Rev. 1252.

under the statute, his discretion has ceased to be wholly an executive one and become a legal one controllable by legal processes. It is settled that certiorari is available to review his action taken in reference to an officer within the enumerated group.<sup>88</sup> But in Minnesota certiorari is not the proper remedy in the event of a total absence of jurisdiction.<sup>89</sup> Since in the certiorari cases the court has so easily overcome both the obstacle of directing an extraordinary remedy to the chief executive and the requirement that he be acting in a judicial capacity, the writ of *prohibition* should be available in the event of his proceeding against an officer wholly beyond his jurisdiction. The mayor of Eveleth in the above case might himself have taken the initiative to compel discontinuance of the proceeding against him.

*In re Application for Removal of Nash*<sup>90</sup> was a proceeding by

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<sup>88</sup>State ex rel. Kinsella v. Eberhart, (1911) 116 Minn. 313, 314-320, 133 N. W. 857-860. On the history, prerequisites, scope and procedure of review by certiorari in this state, see also *City of St. Paul v. Marvin*, (1870) 16 Minn. 102 (Gil. 91); *In re Wilson*, (1884) 32 Minn. 145, 19 N. W. 723; *State ex rel. Hardy v. Clough*, (1896) 64 Minn. 378, 67 N. W. 202; *State ex rel. Narveson v. Village of McIntosh*, (1905) 95 Minn. 243, 103 N. W. 1017; *Bilsborrow v. Pierce*, (1907) 101 Minn. 271, 112 N. W. 274; *State ex rel. Ross v. Posz*, (1908) 106 Minn. 197, 118 N. W. 1014; *State ex rel. Brown v. Board of Public Works of Red Wing*, (1916) 134 Minn. 204, 158 N. W. 977. No new evidence is introduced, and the court acts only on the petition and the return by the officer or tribunal to whom the writ is directed. The return, "in so far as it is responsive to the writ, is conclusive and imports absolute verity," and should include all "proceedings in the nature of a record, and rulings of the inferior tribunal, and the evidence." "It is in the power of the court to require a further return, if it is apparent that the commands of the writ have not been fully complied with." *State ex rel. Sholund v. Duluth*, (1914) 125 Minn. 425, 427-428, 147 N. W. 820-821; see also *State ex rel. Holland v. Sudheimer*, (1925) 164 Minn. 437, 439, 205 N. W. 369, 370. The writ must be directed to the officer or tribunal in his or its official capacity, else it will be regarded as only a subpoena duces tecum. *State ex rel. Berg v. Village Council of Blackduck*, (1909) 107 Minn. 441, 120 N. W. 894. The writ may issue either directly from the supreme court, see 1 *Mason's 1927 Minn. Stat.*, sec. 132, or from a district court, see 1 *Mason's 1927 Minn. Stat.*, sec. 156; but where the proceeding is originally in the supreme court the practice is "to remit the parties to a proper district court except in cases where general public interest requires immediate determination." See *State ex rel. Grubbs v. Schulz*, (1919) 142 Minn. 112, 113, 171 N. W. 263, 264. In cases involving the governor's removal power a sufficient public interest to admit of an original proceeding in the supreme court has been assumed without discussion.

<sup>89</sup>State ex rel. Mansfield v. Mayor of St. Paul, (1885) 34 Minn. 250, 25 N. W. 449. This decision, involving an altogether nonexistent power in the person who purported to exercise it, should not preclude a court on review by certiorari of a removal proceeding already had, from considering whether or not the officer was within the enumerated class under the statute. See *State ex rel. Martin v. Burnquist*, (1918) 141 Minn. 308, 319, 170 N. W. 201, 202.

<sup>90</sup>(1920) 147 Minn. 383, 181 N. W. 570.

certiorari to review the removal by the governor of Nash as county attorney of Hennepin county.

"The governor found three charges true, namely: That the relator was a party to the so-called liquor conspiracy; that he had received a bribe in the *Max Brooks Case*; and that he had received a bribe in the cases of four women indicted for keeping houses of ill-fame. Any one of these findings, if sustained by the evidence, furnished a sufficient ground for the order of amotion."<sup>91</sup>

Implicit in this statement are two rules as to the scope of review by certiorari available to an officer within the enumerated group: (1) that the court will determine as a question of law whether the grounds relied on constitute "malfeasance or nonfeasance" in office; and (2) that the court will review the evidence to ascertain "whether it furnished any reasonable or substantial basis" for the existence in fact of the grounds relied on, although not to the extent of substituting the court's own judgment for that of the governor as to the preponderance of the evidence or the credibility of witnesses.<sup>92</sup>

Though the court has said that "Malfeasance in office . . . has a well defined and a well understood meaning,"<sup>93</sup> a conclusion somewhat opposed to the experience with the term and the trinity to which it belongs in the law of torts, it has also said more realistically in *State ex rel. Kinsella v. Eberhart*,<sup>94</sup> that the "terms 'malfeasance' and 'nonfeasance' have no technical meaning in the sense in which they are employed" in the statute. Though in the same case the court said that "general incompetency and neglect of duty" are sufficient, it suggested that as to a county attorney, ignorance of the law is his constitutional privilege and of itself no ground for his removal. His removal was sustained for the reason that the charges and the evidence showed "that he wholly failed to comprehend the duties required of him in the prosecution of liquor cases, and that he neglected and refused to take the proper steps to see that the laws were properly enforced" after demand was made upon him.

All the cases other than the only one wherein the governor's action was not sustained have involved matters of a somewhat more serious import than mere incompetency or neglect, and rather in the nature of intentional wrongdoing or corrupt conduct. "Con-

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<sup>91</sup>At 147 Minn. 387, 181 N. W. 572.

<sup>92</sup>At 147 Minn. 388, 181 N. W. 572.

<sup>93</sup>*State ex rel. Martin v. Burnquist*, (1918) 141 Minn. 308, 321, 170 N. W. 201, 203.

<sup>94</sup>(1911) 116 Minn. 313, 321, 133 N. W. 857, 861.

viction of crime is not essential,"<sup>95</sup> nor is it a sufficient defense that the accused officer has already been acquitted in a previous criminal prosecution of the same charge on which the removal proceeding is based.<sup>96</sup> On the other hand the mere fact that indictments have been returned against the officer is not of itself a legally sufficient ground of his removal;<sup>97</sup> nor does the fact that the charge against him embraces conduct of a criminal character render it for that reason alone sufficient. In *State ex rel. Martin v. Burnquist*,<sup>98</sup> the only case on review by certiorari wherein the court has failed to sustain the governor's action, the relator had been removed as probate judge of Dodge county on account of disloyal and seditious language uttered in war time. In quashing the governor's removal order the court, through Brown, C. J., stated the following criteria:

"The misconduct or misfeasance under our law must have direct relation and be connected with the 'performance of official duties,' and amount either to maladministration, or to wilful and intentional neglect and failure to discharge the duties of the office at all. This does not include acts and conduct, though amounting to a violation of the criminal laws of the state, which have no connection with the discharge of official duties, . . . as to an officer who is charged with the duty of enforcing and maintaining law and order, it is probable that conduct similar to that charged against relator would constitute misconduct in the performance of official duties, and be ground for removal under the statute. But we are clear that scolding the president of the United States, particularly at long range, condemning in a strong voice the war policy of the federal authorities, expressing sympathy with Germany, justifying the sinking of the *Lusitania*, by remarks made by a public officer of the jurisdiction and limited authority possessed by the judge of probate under the constitution and laws of this state, do not constitute malfeasance in the discharge of official duties and therefore furnish no legal ground for removal."<sup>99</sup>

<sup>95</sup>*State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 321, 133 N. W. 857, 861.

<sup>96</sup>*In re Application for Removal of Nash*, (1920) 147 Minn. 383, 387, 391, 181 N. W. 570, 572, 573-574. The prior acquittal had been in a federal court, but the same conclusion would have been reached had it been in a state court in a prosecution under state law. "The offenses are not the same, even if predicated on the same act, and neither proceeding can operate as a bar to the other." The question in the removal proceeding "is whether the accused officer has so misconducted himself in respect to the performance of his official duties that the good of the public service requires his removal from office." For the same reason misconduct on the part of the officer occurring in a previous term, despite subsequent re-election, may be considered, see *State ex rel. Douglas v. Megaarden*, (1901) 85 Minn. 41, 43, 88 N. W. 412, 413.

<sup>97</sup>*State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 321, 133 N. W. 857, 860.

<sup>98</sup>(1918) 141 Minn. 308, 170 N. W. 201.

<sup>99</sup>At 141 Minn. 322, 170 N. W. 203. In quo warranto proceeding to oust



With reservations owing to the extreme character of the relator's language and the prejudice with which as a result his mind might have been affected if called upon to administer possible war time measures concerning the devolution of property to alien enemies, the above case may be taken as a good example of a court keeping its head in a time of general hysteria, and perhaps as instancing "the difference in security of judicial over administrative process."<sup>100</sup> The Minnesota court has not yet had to deal with intoxication or personal immorality as grounds of removal. By a separate statutory provision "habitual" drunkenness is specifically made a ground for the removal of any officer "by the authority and in the manner provided by law."<sup>101</sup> To the extent that as to elective officers the legislative power to provide for removal may be deemed limited to "malfeasance or nonfeasance" within the meaning of the constitutional grant,<sup>102</sup> drunkenness, even though habitual, if not directly connected with the performance of official duties or impairing the officer's capacity to perform the same, may conceivably be a constitutionally insufficient ground of removal. It was so held in the case of a similar constitutional provision and statute of Kentucky.<sup>103</sup> Concerning adultery, somewhat more remote from the performance of official duties than intoxication, the South Carolina court has said:

" . . . the misconduct of an officer may be of such nature as to make his continuance in office a reproach to decent government, while his conduct might not necessarily affect the proper administration of his office."<sup>104</sup>

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the removed officer from possession the scope of court review is not as broad as on direct review by certiorari, see *State ex rel. Childs v. Dart*, (1894) 57 Minn. 261, 263-264, 59 N. W. 190-191: ". . . as long as he [the governor] kept within his jurisdiction, we cannot in this proceeding review the questions of fact tried by him, or determine how much or how little moral turpitude there was in these irregularities." The only charge against the county treasurer in the proceeding before the governor was that he held checks for a two months period before presenting them for payment. It would seem clear that such a ground of mere neglect resulting in no loss to the country would not now be sufficient to sustain a removal on review by certiorari.

<sup>100</sup>Brandeis, J., in *Ng Fung Ho v. White*, (1922) 259 U. S. 276, 285, 42 Sup. Ct. 492, 495, 66 L. Ed. 938; see also *Hughes, C. J.*, in *Crowell v. Benson*, (1932) 285 U. S. 22, 61, 52 Sup. Ct. 285, 296, 76 L. Ed. 598.

<sup>101</sup>2 Mason's 1927 Minn. Stat., sec. 6958.

<sup>102</sup>See *Sykes v. City of Minneapolis*, (1913) 124 Minn. 73, 77, 144 N. W. 453, 455.

<sup>103</sup>*Holliday v. Fields*, (1925) 210 Ky. 179, 275 S. W. 642. The sheriff's drunkenness held insufficient to constitute malfeasance in office was rather closely connected with the performance of official duties, in that it immediately followed his action in closing a poolroom. See *Turck, The Governor's Power to Remove County Officials*, (1926) 14 Ky. L. J. 330, 336, for a criticism of the case.

<sup>104</sup>*State ex rel. Wolfe v. Sanders*, (1920) 118 S. C. 498, 509, 110 S. E. 808, 812. The governor's removal power was "for cause," of somewhat

Looking to the procedural prerequisites as a third aspect of court review, the charges are required to be reasonably specific,<sup>105</sup> although the certainty required of an indictment is not necessary. "It is sufficient if the charges are stated with substantial certainty, and apprise the officer of the grounds upon which the charges are based."<sup>106</sup> Furthermore, the hearing need not be limited by the original charges. Further charges by way of amendment may be considered, provided the accused officer "be given a proper opportunity to meet the additional charges after they have been furnished to him."<sup>107</sup> Likewise instances of misconduct not specified in the charges may be shown at the hearing provided the accused officer is given "ample opportunity to place before the governor all the facts which might tend to explain his conduct."<sup>108</sup> The question in all cases is not one of technical pleading, but of substantial fairness in the hearing accorded; and it may be assumed that the court would refuse to sustain the governor's action if taken without charges, or on indefinite and evasive charges, or without giving the accused officer adequate opportunity to present his own evidence or cross examine and reply to evidence against him. Compliance by the governor with the "ordinary decencies" of a judicial hearing is fairly assured.

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broader implication than "malfeasance or nonfeasance" in office. But the court found some connection with the performance of official duties by emphasizing that "The defendant was the highest peace officer of the county, and when he deliberately violated the sanctity of the home of another, and put himself in a position in which he must have known that, if discovered by the outraged husband, a serious breach of the peace, if not a homicide, would almost certainly result, he was guilty of conduct unbecoming a peace officer, and that was official misconduct for which the governor rightly removed him from office." Considering the prevalence of single-ended divorces refused recognition in other states, there may perhaps be "degrees" of adultery so far as its significance in this connection is concerned.

<sup>105</sup>Compare *State ex rel. Hart v. Common Council of Duluth*, (1893) 53 Minn. 238, 245-246, 55 N. W. 118, 121-122, involving removal "for cause" under the provisions of a local charter: "Considering them [the charges] as a whole, they show on their face that they were not formulated in a very judicial frame of mind. They read more like a heated hostile declamation than a calm and deliberate statement of charges with a view to a fair investigation . . . We agree . . . that 'incompetency' and 'inefficiency' in the discharge of official duty may be good grounds for removal, and that it may not be necessary to specify in detail particular acts or facts. But . . . while it is not required to go into details, yet the charges ought at least to advise the officer in what respect he is claimed to be incompetent or inefficient."

<sup>106</sup>*State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 321, 133 N. W. 857, 860.

<sup>107</sup>*In re Application for Removal of Nash*, (1920) 147 Minn. 383, 387, 181 N. W. 570, 572.

<sup>108</sup>*State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 322, 133 N. W. 857, 861. Compare *People ex rel. Shuster v. Humphrey*, (1898) 156 N. Y. 231, 50 N. E. 860; *People ex rel. McAleer v. French*, (1890) 119 N. Y. 502, 23 N. E. 1061, applying a somewhat stricter rule.

The statutory requirement that the governor act on "competent evidence" has been construed to mean that "the governor is not bound to enforce the technical rules of evidence, and his decision cannot be reversed because incompetent or irrelevant evidence was received, if it is sufficiently supported by other competent and relevant evidence."<sup>109</sup> This is a rule frequently followed as to the applicability of the technical rules of evidence in administrative proceedings.<sup>110</sup> The governor may exclude evidence technically incompetent if he so desires. It has not yet been sufficiently recognized that administrative discretion either to apply or reject the technical rules of evidence may easily result in a denial of the rudiments of a fair hearing; as if the governor should admit incompetent evidence against the accused officer yet reject incompetent though relevant and material evidence offered in his behalf. It is suggested that in most cases the exclusion of competent evidence offered in behalf of the accused officer, and in some cases the rejection of concededly incompetent but nevertheless relevant and material evidence, should provide an adequate basis for the court to refuse to sustain the governor's action.

It may be urged as to the aspect of court review whereby the court determines for itself the legal sufficiency of the grounds relied on to constitute "malfeasance or nonfeasance" in office, that the language of the decided cases goes too far in restricting the governor's removal power to instances of intentional wrongdoing and corrupt conduct, thus hampering his use of the power over woefully incompetent though honest officials. Competency and efficiency as well as honesty are essentials of good government. But both involve questions of degree, and in a democracy it cannot be assumed that elective officers are even supposed to be the most competent or most efficient obtainable. Nor is there any set standard of competency or efficiency which may be assumed to have been a condition of the electorate's choice. As most of the

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<sup>109</sup>In *re* Application for Removal of Nash, (1920) 147 Minn. 383, 390-391, 181 N. W. 570, 573. See also *State ex rel. Kinsella v. Eberhart*, (1911) 116 Minn. 313, 321, 133 N. W. 857, 860: "Rulings on evidence may be considered, but a strict compliance with legal procedure is not required."

<sup>110</sup>See generally Stephens, *Administrative Tribunals and the Rules of Evidence*; 1 Wigmore, *Evidence*, 2d ed., 21-54; Wigmore, 1934 *Supp.*, 4-14; Ross, *The Applicability of Common Law Rules of Evidence in Proceedings before Workmen's Compensation Proceedings*, (1923) 36 *Harv. L. Rev.* 263; Sherman, *Evidence and Proof Under Workmen's Compensation Laws*, (1920) 68 *U. of Pa. L. Rev.* 203. Under 1 Mason's 1927 *Minn. Stat.*, sec. 4313, the same rule has been applied to court review of workmen's compensation proceedings, see *McDaniel v. City of Benson*, (1926) 167 *Minn.* 407, 408, 209 N. W. 26.

officers enumerated in the removal statute are elective, to construe very broadly the terms "malfeasance and nonfeasance" so as to include therein ordinary incompetency and inefficiency, would be to some extent to modify the purpose of other constitutional and statutory provisions in making such officers elective. It would seem therefore that in all three aspects of its review by certiorari of the governor's removal power the supreme court has followed criteria which, balancing all interests, including that of the electorate, are fundamentally sound. In no aspect of its review has it shown any inclination on its own part in the direction of hamstringing administration.

B. *Veterans' Preference.*—The Minnesota veterans' preference law<sup>111</sup> provides that "in every public department<sup>112</sup> and upon all public works in the state . . . and the counties, cities and towns<sup>113</sup> thereof" honorably discharged soldiers, sailors, and marines who have served in time of war "shall be entitled to preference in appointments, employment and promotion over other applicants therefor."<sup>114</sup> It specifically excepts "the position of private secretary or deputy of any official or department, or . . . any person holding a strictly confidential relation to the appointing officer."<sup>115</sup> In case a veteran applicant's right to preference is

<sup>111</sup>Mason's 1927 Minn. Stat., secs. 4368-4369.

<sup>112</sup>Held not to include school employees of any sort. *Holmquist v. Independent School Dist. of Virginia*, (1930) 181 Minn. 23, 24, 231 N. W. 406.

<sup>113</sup>Held to include villages. *State ex rel. Castel v. Village of Chisholm*, (1928) 173 Minn. 485, 490, 217 N. W. 681, 683.

<sup>114</sup>As interpreted, the statute "intends that the soldier applicant, to be entitled to preferential appointment, shall be capable of performing the duties of the position in a reasonably efficient manner. It does not intend that a soldier shall have a preference if he can perform the duties of the position merely after a fashion, though not with genuine efficiency. If the applicant has the degree of fitness stated, his relative efficiency, when compared with that of his own competitors, is unimportant." *State ex rel. Meehan v. Empie*, (1925) 164 Minn. 14, 16, 204 N. W. 572, 573.

<sup>115</sup>Although the exception does not expressly refer to "heads" of departments, the reason for it has been thought to require the inclusion therein of "heads" of departments and members of boards or commissions who have to have been appointed before there really is any "department." *State ex rel. McOsker v. City Council of Minneapolis*, (1926) 167 Minn. 240, 242, 208 N. W. 1005, 1006 (act held inapplicable to city clerk): "The language of the title and of the law falls short of suggesting that public officers vested with discretion in the performance of their duties, not subject to direction from superior authority but on the contrary possessing the necessary authority to appoint clerks and subordinates, were contemplated as coming within the act;" *State ex rel. Michie v. Walleen*, (1932) 185 Minn. 329, 330, 241 N. W. 318 (act held inapplicable for same reasons to county engineer). But compare *State ex rel. Tamminen v. City of Eveleth*, (1933) 189 Minn. 229, 231, 249 N. W. 184, 186 (act held applicable to "position of chief bookkeeper and office worker of a deputy clerk character"); *State ex rel. Trevarthen v.*

violated in the making of an appointment, the law provides that he shall be entitled "to a right of action therefor in any court of competent jurisdiction for damages, and also for a remedy for mandamus for righting the wrong." A veteran once appointed may not be removed "except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employe or appointee to review by writ of certiorari." But by the express terms of the statute, mandamus is a remedy concurrent with certiorari in the event of a wrongful removal; and most of the veterans' preference cases have been raised by mandamus.<sup>116</sup>

Extending as it does to local as well as state administration, the

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City of Eveleth, (1929) 179 Minn. 99, 102, 228 N. W. 447, 448 (held applicable to position of superintendent of waterworks). That the exception for employment of a "strictly confidential" character will be rather strictly construed is shown by *State ex rel. Blaski v. Fisher*, (1935) 194 Minn. 75, 78, 259 N. W. 694, 695-696, holding the position of assistant fire chief not within it: "Naturally, a certain degree of confidence must be observed by all members of the department, and the higher the rank the higher is the degree of confidence, but we are convinced that the confidential relationship existing between an assistant fire chief and the chief is not such as the legislature contemplated."

<sup>116</sup>As a method of reviewing the substantive grounds of a refusal to appoint, or of a removal, mandamus has thus been extended in connection with veterans' preference beyond the common law limitations precluding it from trying title to public office, see *State ex rel. Erickson v. Magie*, (1931) 183 Minn. 60, 61-62, 235 N. W. 526; *Mechem, Public Officers* 653. In all mandamus proceedings in the district courts the return is no longer conclusive, as at common law; and the writ and answer are to be "construed and amended in the same manner as pleadings in a civil action, and issues thereby joined shall be tried, and further proceedings had, as in a civil action." *State ex rel. Tracy v. Cooley*, (1894) 58 Minn. 514, 518, 60 N. W. 338; 2 *Mason's* 1927 Minn. Stat., sec. 9729; see also *State ex rel. McGill v. Cook*, (1912) 119 Minn. 407, 408-410, 138 N. W. 432, 433. In theory the proceeding is original rather than appellate, new evidence may be introduced, and jury trial may be had if requested. See 2 *Mason's* 1927 Minn. Stat., sec. 9733. For the reason that "The constitution only authorizes the legislature to confer upon the supreme court original jurisdiction in cases in which the remedy by mandamus would have been available at common law," see *Lauritsen v. Seward*, (1906) 99 Minn. 313, 323, 109 N. W. 404, 408, the district courts now have exclusive original jurisdiction of all mandamus cases except where the writ is directed to a district court or the judge thereof in his official capacity. 2 *Mason's* 1927 Minn. Stat., sec. 9732. From the veteran's point of view mandamus may seem preferable to certiorari because of the opportunity to introduce new evidence before a jury. But as the cases discussed in the text show, the jury in a mandamus proceeding or suit for salary will not be allowed to substitute its own judgment for that of the appointing or removing officer, and the only question is whether there is evidence before the court reasonably sufficient to sustain his action. See *State ex rel. Meehan v. Empie*, (1925) 164 Minn. 14, 16-18, 204 N. W. 572, 574. It must follow that even with a jury there is no question, except as to credibility of witnesses or special defenses such as a claim of abandonment by the plaintiff of his rights to the office, see *Schlawr v. City of St. Paul*, (1916) 132 Minn. 238, 242, 156 N. W. 283, 284, for which the trial court or an appellate court may not substitute its own independent judgment for that of the jury.

veterans' preference law is the most pervading single civil tenure provision yet enacted in Minnesota. While its provisions have been held in specific instances to be superseded by subsequent legislation conferring an absolute removal power,<sup>117</sup> or by the civil service provisions of municipal home rule charters and rules established thereunder,<sup>118</sup> the law has since been amended so as to provide for its application "notwithstanding any provision to the contrary in any other existing law or in any city charter relating thereto;"<sup>119</sup> with further directions that "No provision of any subsequent act . . . shall be construed as inconsistent . . . unless and except only so far as expressly provided in said subsequent act" and that "Every city charter provision hereafter adopted which is inconsistent . . . shall be void to the extent of such inconsistency."<sup>120</sup> The law itself has been said to be "in the nature of a civil service law,"<sup>121</sup> on the idea that "even if efficiency and the good of the service alone are considered,"<sup>122</sup> the training and discipline accompanying military service in war are well calculated to assure "courage, constancy, habits of obedience, and fidelity, which are valuable qualifications for any public office or employment."<sup>123</sup> Without discussing the soundness of this assumption, the law at least establishes a principle of tenure based on competency which is defective only in its restriction to veterans. Whatever criticisms may be leveled at veteran preference in appointment are hardly applicable to the provisions securing tenure to veterans once appointed who prove capable and efficient in the performance of their duties.

<sup>117</sup>See *State ex rel. Allen v. Rush*, (1915) 131 Minn. 190, 192, 154 N. W. 947-948; *State ex rel. Kinler v. Rines*, (1931) 185 Minn. 49, 51-52, 239 N. W. 670, 671.

<sup>118</sup>See *State ex rel. Schultz v. Scott*, (1925) 163 Minn. 190, 192, 203 N. W. 774, 775; *State ex rel. Giles v. Scott*, (1927) 171 Minn. 208-209, 213 N. W. 738.

<sup>119</sup>Minn. Laws 1931, ch. 347, sec. 1.

<sup>120</sup>Minn. Laws 1931, ch. 347, sec. 2. Held not to be retroactive, *State ex rel. Abati v. McDonald*, (1932) 185 Minn. 194, 240 N. W. 361. The court in this case sustained a rule of the firemen's civil service commission of Hibbing making 35 the maximum age of eligibility for appointment to the fire department, despite a provision of the veterans' preference law that age shall not disqualify so long as it does not render the applicant "incompetent to perform the duties of the position applied for." On the same facts a different result might now be reached, despite the desirability of a maximum age requirement in order to make a pension system effective.

<sup>121</sup>*State ex rel. Castel v. Village of Chisholm*, (1928) 173 Minn. 485, 489, 217 N. W. 681, 682.

<sup>122</sup>*State ex rel. Kangas v. McDonald*, (1933) 188 Minn. 157, 161, 246 N. W. 900, 901.

<sup>123</sup>*State ex rel. Kangas v. McDonald*, (1933) 188 Minn. 157, 161, 246 N. W. 900, 901, quoting from *Opinion of the Justices*, (1896) 166 Mass. 589, 595, 44 N. E. 625, 627.

Though the removal provisions are therefore of chief interest, the extent to which the courts may review the appointing power is involved at least indirectly as part of the general scheme of effective sanctions. Prior to the insertion in the statute of the express provision for review by mandamus of a disregard of preference rights in the making of an appointment, it had been held that a veteran applicant could not maintain mandamus to compel the discharge of a non-veteran appointed in his stead, and his own appointment, for the reason that this would devolve the appointing power upon the courts.<sup>124</sup> And a veteran not reappointed at the expiration of the term of his first appointment was held to have "no greater rights to the office than as though he had never held the office," and a remedy by mandamus was denied although the only reason given in the return to the writ for the failure to reappoint relator was "that it would be unsatisfactory to the friends of the state senator from Goodhue county."<sup>125</sup> Under the present statute it is clear that a review of the appointing power or of a failure to reappoint is to some extent devolved upon the courts. *State ex rel. Kangas v. McDonald*<sup>126</sup> was a mandamus proceeding to compel the firemen's civil service commission of Hibbing to certify the relator's name for appointment. Under the optional firemen's civil service law<sup>127</sup> which Hibbing had adopted, the civil service commission was directed to establish rules for the "creation and maintenance of lists of eligible candidates after successful examination in order of their standing in the examination"<sup>128</sup> and for the "certification of the name standing highest on

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<sup>124</sup>*State ex rel. Mortensen v. Copeland*, (1898) 74 Minn. 371, 375, 77 N. W. 221, 222: "The appointing power is in the board, and not in the courts; and, even if the latter could compel the former to remove the present incumbent, they could not compel the board to appoint the relator. The board would still have discretion as to what soldier or sailor they would appoint. . . . if a writ of mandamus was to issue, it would be merely to compel the board to execute the mandates of the law, not in favor of the relator in particular, but in favor of all persons within its provisions. This would be merely to duplicate the act of the legislature in enacting the statute."

<sup>125</sup>*State ex rel. Hawes v. Barrows*, (1898) 71 Minn. 178, 181, 184, 73 N. W. 704-706. It was further "admitted that the relator was a competent person, and possessed the necessary qualifications to discharge the duties of said office." The office was that of deputy oil inspector, to which the statute may have been inapplicable anyway. On similar facts as to a position within the statute a different result would now be reached. *State ex rel. Castel v. Village of Chisholm*, (1928) 173 Minn. 485, 490, 217 N. W. 681, 682; *State ex rel. Trevarthen v. City of Eveleth*, (1929) 179 Minn. 99, 102, 228 N. W. 447, 448.

<sup>126</sup>(1933) 188 Minn. 157, 246 N. W. 900.

<sup>127</sup>Minn. Laws 1929, ch. 57.

<sup>128</sup>Minn. Laws 1929, ch. 57, sec. 8 (d).

the appropriate list to fill any vacancy."<sup>129</sup> The rules so established provided for a passing mark of 75 and for the certification of two more names than positions to be filled, thus reserving to the appointing officer a limited field of selection based on considerations other than examination ranking.<sup>130</sup> Kangas had a qualifying mark of 85.24, but stood 19th on a list of 33 eligibles, and at a time when there were eight positions to be filled, the commission certified the ten names highest on the list, thereby excluding Kangas, a veteran, but including six non-veterans. The court held that in the case of a veteran attainment of the passing mark of 75 "establishes the qualification,"<sup>131</sup> and directed certification of Kangas' name ahead of the six non-veterans who had attained higher marks. As three others of the 33 eligibles were in the same position as Kangas, and one member of the fire department had resigned in the meantime, the decision necessitated the discharge of three non-veterans already appointed.<sup>132</sup> A hard and fast rule is established whereby in the certification of names by a civil service commission all veterans who have attained the minimum passing mark must be included ahead of all non-veterans, though within each group the examination ranking controls. The appointing officer's field of selection may thus become limited to veterans. But a civil service commission has an easy way of avoiding an extreme result by establishing a higher minimum qualifying mark, or by a stricter grading of examinations, for veterans and non-veterans alike. So long as preference is accorded to veterans who meet the commission's standard, a court will interfere neither with the fixing of the standard nor the commission's determination whether a particular applicant, veteran or non-veteran, has met it.<sup>133</sup>

Where the appointing officer may select from a larger certified list than the number of positions to be filled, or without being lim-

<sup>129</sup>Minn. Laws 1929, ch. 57, sec. 8 (f).

<sup>130</sup>Whether this was permissible under sec. 8(f) of the statute was not considered by the court in its opinion. The rule as adopted by the commission embodies a usual principle of civil service appointment; and in the light of the discretion otherwise conferred by the statute upon the commission, the wording of sec. 8(f) should not be construed to preclude it from adopting such a rule.

<sup>131</sup>At 188 Minn. 161, 246 N. W. 901.

<sup>132</sup>As to this aspect of the decision see *State ex rel. Thornton v. Ritchel*, (1934) 192 Minn. 63, 255 N. W. 627, and below pp. 760-61 of text.

<sup>133</sup>The fixing of the minimum standard of qualification appears to be confided entirely to the Commission's discretion. That a court will very rarely if ever interfere with a commission's determination of whether an applicant has passed the qualifying examination, see *Mitchell v. McKeyitt*, (1932) 128 Cal. App. 458, 17 P. (2d) 789; noted (1934) 7 So. Cal. L. Rev. 477; see also (1931) 17 Cornell L. Q. 103.



ited to a certified list, as is true wherever there is no separate civil service law applicable, his selection does not depend on the mathematical standards that governed the commission's certification in *State ex rel. Kangas v. McDonald*. He may consider other aspects of the veteran applicant's qualifications. And in all cases of refusal to make an original appointment that have come before the courts the veteran has been denied relief. In *State ex rel. Meehan v. Empie*,<sup>134</sup> a mandamus proceeding to compel the city council of Virginia to appoint relator to the position of marketmaster, the court in denying relief pointed out through Dibell, J., the following criteria of review:

"The question of qualification or fitness is first and primarily for the appointing body. The trial court on mandamus, or this court on review, cannot substitute its own view of the fact. Only when the appointing power declines to investigate, declines to apply the law, or proceeds with manifest arbitrariness, or some equivalent thereto, can relief be had by mandamus. The court does not determine the question of fitness. Evidence of it may be competent in determining whether the appointing body applied the law at all or, in applying it, proceeded with manifest arbitrariness. . . .

"The evidence was taken upon the theory, largely at least, that the issue was whether the relator was qualified for the appointment. The real question was whether the council applied the law at all, making the required investigation, or with manifest arbitrariness determined that the relator was not fit. The finding of the trial court is that the relator is possessed of the requisite fitness. That does not determine that he is entitled to the employment. The trial court, or this court, may think him fit, and yet concede that a contrary belief of the council is sustained, or at least not so arbitrary as to vitiate its finding."<sup>135</sup>

So also the court has emphasized that "Substantially every member of the council knew Moilan"<sup>136</sup> and their testimony that they did not consider him fit for the position; and has held that even though there is evidence "casting suspicion on acts of individual members" of the appointing body,<sup>137</sup> or evidence that a majority of its members attended the meeting at which the appointment was to be made with a predetermination to vote against the veteran applicant in favor of a non-veteran,<sup>138</sup> their appointment

<sup>134</sup>(1925) 164 Minn. 14, 204 N. W. 572.

<sup>135</sup>164 Minn. 16-18, 204 N. W. 574.

<sup>136</sup>*State ex rel. Moilan v. Brandt*, (1929) 178 Minn. 277, 278, 226 N. W. 841.

<sup>137</sup>*State ex rel. Moilan v. Brandt*, (1929) 178 Minn. 277, 279, 226 N. W. 841.

<sup>138</sup>*State ex rel. Bloomquist v. Barker*, (1933) 190 Minn. 370, 371-372, 251 N. W. 673, 674.

will not be disturbed so long as the veteran was allowed to present his case and there is evidence before the court reasonably justifying a conclusion that he was "not qualified to fill the position . . . and render reasonably efficient service."<sup>139</sup> The statute requires no specific formalities in the investigation and hearing to be accorded in the making of an appointment, and since the only record upon which a court passes is the one made in the mandamus proceeding, the case would be extraordinary in which the appointing power is unable retroactively to show reasonable justification of its action. The result is that veterans' preference in the making of original appointments has no very effective legal sanction, except to the extent that it is aided by civil service legislation circumscribing the appointing power's selection by a certified list that will be required to include all veterans who have met a commission's qualifying standard.

A refusal to reappoint a veteran at the expiration of the term of his first appointment, though at first treated the same as a refusal originally to appoint,<sup>140</sup> is somewhat more analogous to a removal; and a court has more adequate standards to judge of his competency and efficiency as shown by past service. If "It stands admitted that plaintiff was rendering efficient and entirely satisfactory service,"<sup>141</sup> that is an end of the matter and a court may direct reappointment. It is submitted that the same result must follow wherever the appointing power is unable to show reasonable justification of a conclusion that the veteran was *not* "rendering efficient and entirely satisfactory service." The burden is somewhat larger, and more confined to specific instances of incompetency, inefficiency, or misconduct, than in the case of showing reasonable grounds for believing that an as yet untried applicant would prove unfit.<sup>142</sup> If the appointing power proceeds without considering the veteran's claim to reappointment, a court may of its own independent judgment determine that the relator "had performed his duties in an efficient and satisfactory manner" and direct reappointment.<sup>143</sup> A new city council on coming into

<sup>139</sup>State ex rel. Bloomquist v. Barker, (1933) 190 Minn. 370, 372, 251 N. W. 673, 674.

<sup>140</sup>State ex rel. Hawes v. Barrows (1898) 71 Minn. 178, 73 N. W. 704.

<sup>141</sup>State ex rel. Castel v. Village of Chisholm, (1928) 173 Minn. 485, 490, 217 N. W. 681, 682.

<sup>142</sup>The appointing power has already resolved this question in the negative in making the original appointment, and it may perhaps be presumed that the same condition continues until negated by reasonably sufficient evidence.

<sup>143</sup>State ex rel. Trevarthen v. City of Eveleth, (1929) 179 Minn. 99, 102, 228 N. W. 447, 448. This is hardly to devolve the appointing power upon the court for the reason stated in footnote 142.

office may not refuse a veteran's application for reappointment under pretext of abolishing his position, at the same time appointing a non-veteran to perform the duties of the same position under a different name.<sup>144</sup> Where the question is one of promotion rather than reappointment, and as between a veteran and non-veteran applicant "The qualifications of each are admitted," as based on past service, a court may compel promotion of the veteran, although by civil service rules otherwise applicable the non-veteran was the one entitled on the basis of seniority.<sup>145</sup>

The removal section of the statute provides for (1) notice; (2) stated charges involving incompetency or misconduct; (3) a hearing; and (4) that "The burden of proving incompetency or misconduct shall rest upon the party alleging the same."<sup>146</sup> The only veterans' removal cases dealing with the notice and hearing requirements have involved their entire omission rather than their adequacy; and in such cases a court may without further ado direct reinstatement until such time as these procedural requisites have been complied with.<sup>147</sup> It has been so held even in the case of a veteran illegally appointed in violation of valid civil service requirements;<sup>148</sup> although by all previous decisions such a person

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<sup>144</sup>State ex rel. Tamminen v. City of Eveleth, (1933) 189 Minn. 229, 232, 234, 249 N. W. 184, 185. Since the preference law does not require that a non-veteran validly appointed be discharged to make room for a subsequent veteran applicant, it is submitted that the appointing power should always be permitted, though it cannot be compelled in the absence of other tenure provisions, to re-appoint a previous non-veteran incumbent in preference to veteran applicants. Treating a failure to re-appoint, in the cases of veterans and non-veterans alike, as more in the nature of a removal, avoids the difficulty which the courts have had in determining whether an appointment, the duration of which is not otherwise fixed by law, expires with the coming into office of a new elective council, or with the appointment of a new superior, etc., see State ex rel. Tamminen v. City of Eveleth, supra, at 189 Minn. 235, 249 N. W. 187; State ex rel. Castel v. Village of Chisholm, (1928) 173 Minn. 485, 489-490, 217 N. W. 681, 682-683; State ex rel. Hawes v. Barrows, (1898) 71 Minn. 178, 183-184, 73 N. W. 704, 705-706; and also avoids the "juggling" to prevent consideration of veteran applicants to replace previous non-veteran incumbents, which the new council on coming into office felt necessary and the court overlooked in State ex rel. Cote v. Village of Bovey, (1934) 191 Minn. 401, 254 N. W. 456.

<sup>145</sup>State ex rel. Blaski v. Fisher (1935), 194 Minn. 75, 77, 259 N. W. 694.

<sup>146</sup>1 Mason's 1927 Minn. Stat., sec. 4369.

<sup>147</sup>State ex rel. Bozicevich v. City of Eveleth, (1935) 194 Minn. 44, 47, 260 N. W. 223, 224.

<sup>148</sup>Johnson v. Pugh, (1922) 152 Minn. 437, 439-440, 189 N. W. 257-258 (the veteran had failed to pass the qualifying examination, but under the civil service rules had been given a 60-day temporary appointment which had expired): "Under the circumstances stated, it may have been contrary to the civil service rules to retain him on the police force after the expiration of 60 days, but it was shown that the rules were disregarded in other cases and apparently respondent was the only policeman singled out for removal because he had not passed the examination. In our opinion appellants were bound to

has no right to continue in his position or to compensation for services rendered.<sup>149</sup> As to the adequacy of the notice and hearing, the requirement of specific charges, and the right to amend the charges or to rely on grounds not embraced therein so long as there is no unfair element of surprise or lack of opportunity to reply, about the same rules are no doubt applicable as were found true of the governor's removal power in the preceding section. However, the statute contains no reference to "competent evidence," and the courts have not implied a requirement that there be any minimum of technically competent evidence sufficient to sustain the removal order.<sup>150</sup> The removal authority's handling of evidential matters should be significant only as it may bear on the adequacy or fairness of the hearing or fail to provide a reasonable support in fact of legally sufficient grounds. The requirement as to the burden of proving incompetency or misconduct is meaningless, since the party alleging the same is usually the primary trier of fact;<sup>151</sup> and it in no way affects the usual rule of court review of administrative action. In *State ex rel. Pete v. Eklund*,<sup>152</sup> the argument was made that the requirement "so enlarges the scope of review . . . under a writ of certiorari that [the court] becomes triers of the fact and must weigh the evidence, pass upon the credibility of witnesses, and determine the preponderance of the evidence." The court held that the statute "presents the same question for review as is frequently raised where it is claimed the evidence is insufficient to sustain a verdict of a jury or a finding of a court or tribunal. We determine here whether there was evidence reasonably sufficient to sustain the verdict or findings of the court or trier of the facts. . . . We

comply with the mandate of the statute and cannot justify respondent's removal without a hearing on the sole ground that his appointment was temporary within the meaning of the civil service rules." See Note, (1934) 18 MINNESOTA LAW REVIEW 837.

<sup>149</sup>See *Larsen v. City of St. Paul*, (1901) 83 Minn. 473, 475, 86 N. W. 459; *O'Brien v. City of St. Paul*, (1898) 72 Minn. 256, 75 N. W. 375; *Yorks v. City of St. Paul*, (1895) 62 Minn. 250, 252, 64 N. W. 565; *Stoner, Recovery of Salary by a De Facto Officer*, (1912) 10 Mich. L. Rev. 178, 291.

<sup>150</sup>In *State ex rel. Pete v. Eklund*, (Minn. 1936) 264 N. W. 682, 684-685, where the proceeding was by certiorari to review the record as certified by the removing tribunal, the court was satisfied that the evidence "Taken as a whole," without reference being made to the technical competency of any part thereof, was sufficient to sustain the removal order. Where review is by mandamus or a salary suit, the removing officer or body apparently is bound by the technical rules of evidence in establishing in such a proceeding sufficient justification of his or its order. See *Edie v. School Dist. No. 1 of Koochiching County*, (1931) 183 Minn. 522, 524-525, 237 N. W. 177, 178.

<sup>151</sup>See *State ex rel. Nelson v. Board of Public Welfare*, (1921) 149 Minn. 322, 328, 183 N. W. 521, 524.

<sup>152</sup>(Minn. 1936) 264 N. W. 682.

have held substantially the same rule applicable in cases where the relevant statute was silent as to burden of proof," and sustained the removal order although it also found evidence in the record "which would have sustained findings . . . that [the] charges were unfounded or unimportant and lacked substantial merit."<sup>153</sup>

In the above case the county board had removed relator as road patrol foreman on grounds the more important of which, as considered by the court, were that he had ordered road grading to be done on Sundays "when not necessary and until stopped by the superintendent," and that he had "had no experience in operating the heavy grader used in this work and did not know how to operate this expensive machine." The court sustained the legal sufficiency of the first ground not for moral or religious reasons, but because "Sunday work was paid for by the county at one and one-half times as much as work on other days." As to the second, in reply to relator's explanation that he was furnished an inexperienced man to operate the machine, the court pointed out that

"If the man who was to operate the grader under plaintiff's supervision was inexperienced and did not know how to operate the machine, it might be quite important, that the plaintiff, his supervisor, should be able to instruct the man how to operate it and do his work."

It is apparent that "incompetency or misconduct" have a wider application than "malfeasance or nonfeasance," and are in no way limited to corrupt conduct or intentional wrongdoing. From analogous cases interpreting the legal content of "cause" as a restriction on the removal power, occasional instances of mere bad judgment or honest mistake should not constitute legally sufficient grounds of removal.<sup>154</sup> It should be required in each case that the "ordinary decencies" of judicial fairness be accorded, and that the instances of incompetency or misconduct relied on reasonably justify a conclusion that the officer in the performance of his

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<sup>153</sup>(Minn. 1936) 264 N. W. 683-684.

<sup>154</sup>See *Townsend v. Common Council of Sauk Centre*, (1898) 71 Minn. 397, 382-383, 74 N. W. 150, 152, where the council, having power to remove an elective mayor for cause, removed him for having refused to sign an order in payment of property which the council had purchased: ". . . if it should be conceded that the proceedings were in all respects regular, and that it was his duty to sign the order, still the fact that he was mistaken as to his duty in this one instance would not show that he was generally incompetent to perform the duties of the office to such an extent as to warrant his removal on the ground of incompetency. There are, indeed, few officers who are not likely at some time or another to commit an error of judgment in deciding as to what is their duty."

duties has not fulfilled the expectations properly actuating his appointment to the position in question.<sup>155</sup> Court review thus limited is not so significant in the individual case where it is sought as in the constant restraint which knowledge of its availability may place upon the removal power in cases that never reach the courts.

Limitations on the removal power, in whatever connection, do not prevent the proper authorities

“from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position.”<sup>156</sup>

Here even the procedural requisites to the removal power are dispensed with. In *State ex rel. Boyd v. Matson*,<sup>157</sup> five of sixteen operators in the police and fire alarm telegraph bureau of St. Paul had been discharged for lack of work and funds. The five included relator, a non-veteran, who was senior in point of service to four veterans who were retained. The home rule charter of St. Paul provided that in the event of lay-offs “for lack of work or funds or for other causes,” employees were to be discharged in the inverse order of their seniority. In directing that relator be reinstated, thereby necessitating the discharge of a veteran, the court pointed out that as the preference act had never required the discharge of a non-veteran to make way for the original appointment of a veteran, so also it did not require

“that the seniority rights created by such [civil service] rules shall give way to the preference rights given by the act . . . as both can stand together and be given a fair and reasonable operation, effect must be given to both. . . . Reducing the force from sixteen to eleven, is in effect abolishing five positions. . . . By force of the soldier’s preference act, the positions held by the soldiers could not be abolished so long as a position held by a non-soldier, appointed at the same time or later, was continued. This accords to the soldiers the same preference right they had when

<sup>155</sup>Compare *State ex rel. Hart v. Common Council of Duluth*, (1893) 53 Minn. 238, 244, 55 N. W. 118, 120: “The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. . . . In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office, and the qualifications necessary to fill it.”

<sup>156</sup>*State ex rel. Boyd v. Matson*, (1923) 155 Minn. 137, 141-142, 193 N. W. 30, 32. See also *State ex rel. Tamminen v. City of Eveleth*, (1933) 189 Minn. 229, 232-234, 249 N. W. 184, 185; *State ex rel. Culver v. Board of Public Welfare*, (1928) 174 Minn. 571, 572-573, 219 N. W. 919; *State ex rel. Nelson v. Board of Public Welfare*, (1921) 149 Minn. 322, 183 N. W. 521; *Byrne v. City of St. Paul*, (1917) 137 Minn. 235, 163 N. W. 162.

<sup>157</sup>(1923) 155 Minn. 137, 193 N. W. 30.

they made their original applications—a right to be preferred over all others not in the service before they applied—but not a right to have old employes removed to make places for them.”<sup>158</sup>

C. *Firemen's and Policemen's Tenure.*—The legislature in 1929 enacted optional firemen's<sup>159</sup> and policemen's<sup>160</sup> civil service laws applicable to cities not of the first class and villages of over two thousand inhabitants having regularly employed paid departments. The method of appointment limiting the appointing officer's selection to names certified by the civil service commission in the order of their examination ranking has already been stated in connection with the effect thereon of the veterans' preference law. A six months' probationary period is provided during which the removal power is unlimited,<sup>161</sup> unless the employee is a veteran. The laws do not say who may exercise the removal power during the probationary period;<sup>162</sup> and although thereafter it is in the civil service commission rather than in the appointing or superior officer, “the power of any officer to suspend a subordinate for a reasonable period not exceeding sixty days for the purpose of discipline, or pending investigation of charges when he deems such suspension advisable” is still preserved.<sup>163</sup> If the suspension is made pending the determination of a removal proceeding by the civil service commission, and its decision is in favor of the employee, his pay for the period of suspension is restored.<sup>164</sup> Employees who have survived the probationary period may be removed

<sup>158</sup>At 155 Minn. 142-143, 193 N. W. 32.

<sup>159</sup>Minn. Laws 1929, ch. 57. Constitutionality sustained, *State ex rel. Benson v. Peterson*, (1930) 180 Minn. 366, 230 N. W. 830.

<sup>160</sup>Minn. Laws 1929, ch. 299. Constitutionality sustained, *Naeseth v. Village of Hibbing*, (1932) 185 Minn. 526, 242 N. W. 6. As to all provisions here material the two acts are entirely identical.

<sup>161</sup>Minn. Laws 1929, ch. 57, sec. 9; ch. 299, sec. 7. This was construed to give an unlimited power of removal, except as modified by veterans' preference, over hold-over employees from an earlier regime, until they had served more than six months under the new law. *Saholt v. City of Rochester*, (1932) 185 Minn. 510, 513, 242 N. W. 4, 5-6. Compare a similar construction of the civil service provisions of St. Paul's first home rule charter, in *State ex rel. Getchell v. O'Connor*, (1900) 81 Minn. 79, 86-87, 83 N. W. 498, 500. Following the *Saholt* Case the policemen's law was amended so as to provide that “Any police officer regularly employed at the time of the creation of the civil service commission shall automatically come under the jurisdiction of the civil service commission.” Minn. Laws 1933, ch. 197, sec. 17. See *McDougall v. Baich*, (1935) 194 Minn. 550, 261 N. W. 180 (law as amended held inapplicable to employee of separately organized park board, although employed to perform police duties and authorized by the village council to wear a police badge and make arrests).

<sup>162</sup>In *Saholt v. City of Rochester*, (1932) 185 Minn. 510, 242 N. W. 4, the removal was by the commission.

<sup>163</sup>Minn. Laws 1929, ch. 57, sec. 9; ch. 299, sec. 7.

<sup>164</sup>Minn. Laws 1929, ch. 57, sec. 14; ch. 299, sec. 12. The result of *Martin v. County of Dodge*, (1920) 146 Minn. 129, 178 N. W. 167 is thus avoided.

only by the civil service commission, for cause constituting "inefficiency, breach of duty, or misconduct," "upon written charges and after an opportunity to be heard" at a hearing open to the public and with a right to compel the attendance of witnesses.<sup>165</sup> A member of the commission who himself brings the charges is disqualified to sit at the hearing.<sup>166</sup> Following the hearing an order by the commission for suspension, reduction, or removal must be presented in writing to the employee, who by notice to the secretary of the commission within ten days thereafter may appeal to the district court, which, without a jury, is directed to determine the question, "Upon the evidence was the order of the commission reasonable?"<sup>167</sup>

These provisions are the most liberal in favor of employees to whom they apply of any civil tenure provisions yet enacted in Minnesota. The phrasing of the question, "Upon the evidence was the order of the commission reasonable?" may be of wider significance than had it been phrased "Was the order of the commission reasonably supported by the evidence?" The latter phrasing has a well theorized legal meaning, whereby credibility of witnesses is excluded, and the standard of reasonableness is the last outpost at which a court can conceive of a sane mind not its own reaching the conclusion of the tribunal below. The former may admit of a more subjective determination—within the whole wide range of reasonableness.<sup>168</sup> In another connection, in a salary

<sup>165</sup>Minn. Laws 1929, ch. 57, secs. 9, 13, 14; ch. 299, secs. 7, 11, 12. The removal provisions are held applicable to department "heads" as well as subordinates, *Naeseth v. Village of Hibbing*, (1932) 185 Minn. 526, 529, 242 N. W. 6, 7, against the argument based on the provision that a removal order of the commission "shall be forthwith certified to the chief or other appointed or superior officer, and will be forthwith enforced by such officer." Minn. Law 1929, ch. 57, sec. 9; ch. 299, sec. 7.

<sup>166</sup>Minn. Laws 1929, ch. 57, sec. 13; ch. 299, sec. 11. Compare *Stockwell v. Township Board*, (1871) 22 Mich. 341, where the same result was reached as a matter of common law by implication from the "judicial" character of the removal proceeding. But except where, as here, the removal power is in a separate and independent commission, the requirement of a hearing does not prevent the appointing officer in whom the removal power otherwise rests from being both prosecutor and judge. See *State ex rel. Nelson v. Board of Public Welfare*, (1921) 149 Minn. 322, 328, 183 N. W. 521, 524. For a criticism of this common characteristic of administrative action, see *Blachly and Oatman, Administrative Legislation and Adjudication* 241-242.

<sup>167</sup>Minn. Laws 1929, ch. 67, sec. 13; ch. 299, sec. 11.

<sup>168</sup>The statutory phrasing suggests the question "would a reasonably prudent man have so acted under the circumstances?" presented to the jury in negligence cases. In the usual court review of administrative action the question analogous to this has been answered by the administrative tribunal with at least the same finality as though by a jury. That the jury's function in negligence cases is very much akin to that of administra-



suit by a teacher discharged under a statute limiting the school board's power of removal to "cause," it has been held error to instruct the jury that it was for them to determine whether the board "acted in a reasonable and proper manner in the determination of the question before them."<sup>169</sup> In the same case the court recognized that the proper question was whether the board had "acted in bad faith or arbitrarily and capriciously upon the facts before it or properly within its knowledge." But a finding not *reasonably* supported by evidence or facts otherwise properly within the tribunal's knowledge is "arbitrary and baseless."<sup>170</sup> The case suggests a difference between the two phrasings, and that the question presented by the statutes for court determination, unless restrictively interpreted, may be more akin to the usual jury question in negligence cases than to the usual question in court review of either jury verdicts or administrative action.

As to the extent that the evidence before the commission, to which in all events court review will be limited, may be required to meet the tests of technical competency, the laws are silent.<sup>171</sup> No cases involving review by *appeal* have appeared.<sup>172</sup> *State ex*

title adjudication, in that the standards are largely created in the very process of their application, see Bohlen, *Studies in the Law of Torts* 605.

<sup>169</sup>Anderson v. Consolidated School Dist. No. 144, (Minn. 1936) 264 N. W. 784-785: "By so much, . . . there is permitted a judicial intrusion upon an executive function, and the judiciary is permitted, through the medium of a jury, to review and reverse executive action, whereas the only proper function of the courts in respect thereto is to inquire whether the executive has authority in law for the action. If there is such authority and there is any basis for the action taken, the executive determination of the problem should not be nullified judicially, for to do so would make the judicial decision paramount over that of the executive in a matter which, by express law, has been made an executive function." The trial court had properly warned the jury that the standard of reasonableness was not their own but that of "reasonable and competent men." The result of the case is that court review of administrative removals, though by mandamus or a suit for salary wherein jury trial is otherwise available, and unless expressly enlarged by statute, does not present a jury question for which the trial or appellate court may not substitute its own independent judgment for that of the jury. Of course the absence of an independent jury question does not in Minnesota preclude a court from seeking the aid of a jury in its own determination of such issues as are here involved.

<sup>170</sup>See *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, (1913) 227 U. S. 88, 91, 33 Sup. Ct. 185, 186, 57 L. Ed. 431. There is seldom much difference in meaning between saying that an administrative determination is final so long as it is *reasonably* supported by evidence, and saying that it is final so long as it is supported by *any* evidence. Both expressions come down to saying that it is final so long as it is not arbitrary, baseless, or capricious, with variations depending on the extent to which the administrative tribunal may be held entitled to act on its own presumed knowledge.

<sup>171</sup>As to the significance of the rules of technical competency in situations already considered, see above, pp. 746, 755.

<sup>172</sup>The provision for direct appeal would exclude review by certiorari, see

*rel. Thornton v. Ritchel*<sup>173</sup> was a mandamus proceeding by one of the three non-veterans discharged from the fire department of Hibbing as a result of the decision in *State ex rel. Kangas v. McDonald*.<sup>174</sup> Of the eight appointed at the same time as relator there were three non-veterans who had made lower marks in the qualifying examination than he had, one of whom was retained in preference to him.<sup>175</sup> In directing relator's reinstatement the court pointed out:

"While the commissioners testified that they spent an hour or more in considering which men to discharge, they presented not a single fact or reason for discharging relator in preference to men having lower examination grades. They presented no charges. They admitted that relator's services were entirely satisfactory, and that he was fully as efficient as any of the men retained . . . it was the duty of the commission to give effect to the rating of relator on the certified list and not to discharge him in preference to men having a lower rating, unless some cause was shown for granting preference to men with such lower rating. . . . The efficiency of the fire department should be best served by retaining the men who, upon examination had, showed the highest qualifications. . . .

"We recognize the rule that the courts cannot by *mandamus* control the exercise of discretion vested in an official or commission of this kind; but the courts have the power to determine whether, on a given state of facts and under the law and rules applicable thereto, a commission or official *had any discretion*."<sup>176</sup>

The court might well have indicated further that, although the removal provisions are otherwise inapplicable to necessitated lay-offs, they may become strictly applicable to a selection of the ones to lay off if based on any other considerations than seniority in service, or veterans' preference and examination ranking as applied to employees appointed at the same time.<sup>177</sup>

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*State ex rel. Hardy v. Clough*, (1896) 64 Minn. 378, 380, 67 N. W. 202, 203. For the same reason mandamus would be unavailable to review the substantive grounds of a removal by the commission, but it may still lie to compel the required hearing where none has been accorded, see *State ex rel. Thornton v. Ritchel*, (1934) 192 Minn. 63, 68, 255 N. W. 627, 630.

<sup>173</sup>(1934) 192 Minn. 63, 255 N. W. 627.

<sup>174</sup>(1933) 188 Minn. 157, 246 N. W. 900, for which see above, pp. 750-51.

<sup>175</sup>The rules provided only that in the event of necessitated lay-offs, "through lack of work or funds, or for other cause," employees should be laid off in the inverse order of their seniority.

<sup>176</sup>At 192 Minn. 67-68; 255 N. W. 629-630 (last italics supplied).

<sup>177</sup>It should follow, under the rules as to necessitated lay-offs of employees against whom no permanent removal proceedings have been instituted, that a court may by mandamus direct their reinstatement in the same order of seniority, veterans' preference, examination ranking, in preference to wholly new applicants.

D. *Teachers' Tenure*.—The removal power as to teachers in the public elementary schools is determined with reference, first, to statutory restrictions specifically applicable,<sup>178</sup> and second, to the terms of the contract the employing body is statutorily authorized to make.<sup>179</sup> In some cases the removal power has been held to be enlarged rather than curtailed by the terms of the individual contract of employment. A certificate to teach is prerequisite;<sup>180</sup> and a contract without one has no validity.<sup>181</sup> Moreover, every teacher's contract is subject to termination by the revocation or suspension of the certificate in a proceeding which since 1929 must be before the State Board of Education on the written complaint of a school board, county superintendent, or State Commissioner of Education.<sup>182</sup> The hearing may be before the whole

<sup>178</sup>Though not employees of a "public department" of the state or the "counties, cities and towns thereof" within the veterans' preference law, *Holmquist v. Independent School Dist. of Virginia*, (1930) 181 Minn. 23, 231 N. W. 406, school employees are "subject to the rules governing the appointment and removal of subordinate officers and employes of municipal corporations" in the respect that by such rules "the power to appoint . . . carries with it the power to remove . . . at pleasure unless . . . restricted by statutory law" or, it may be added, by the terms of a valid contract the employing body was empowered to make. *Oikari v. Independent School Dist. No. 40*, (1927) 170 Minn. 301, 302, 212 N. W. 598.

<sup>179</sup>A statutory authorization to "contract with necessary, qualified teachers," 1 Mason's 1927 Minn. Stat., sec. 2815 (5), enables teachers' contracts to survive changes in membership of the employing body; with which compare the result in *Egan v. City of St. Paul*, (1894) 57 Minn. 1, 5, 58 N. W. 267, 268-269 (custodian of public building appointed for two year term held without recourse on contractual grounds against summary removal at end of first year, since appointing authority, though a continuing body, was subject to individual changes in membership at end of each year and therefore without power to make binding agreement for a longer period). A school superintendent, unless specifically included, "is not a teacher" within the statutory authorization of school boards to make binding contracts for definite periods of time. See *Jensen, v. Independent Consol. School Dist. No. 85*, (1924) 160 Minn. 233, 234-237, 199 N. W. 911, 913: "The law regulating the employment and discharge of the one does not relate to the other . . . otherwise the board might tie the hands of its successors and wrest from the control of the people the school which they are required to support. . . . It cannot contract to keep him in office for any certain time. It cannot renounce or agree not to exercise its power of removal at pleasure."

<sup>180</sup>Minn. Laws 1929, ch. 388, sec. 2. By secs. 1 and 7 the requirement is made specifically applicable to "principals, supervisors or superintendents," and by sec. 3 the issuance of certificates is vested solely in the State Board of Education. The 1929 law supplants 1 Mason's 1927 Minn. Stat., secs. 2900-2935 previously applicable.

<sup>181</sup>*Ryan v. District No. 13 of Dakota County*, (1881) 27 Minn 433, 434, 8 N. W. 146-147. Provisions otherwise limiting the removal power should be inapplicable to the case of a teacher without the required certificate; though compare *Johnson v. Pugh*, (1922) 152 Minn. 437, 189 N. W. 257.

<sup>182</sup>Minn. Laws 1929, ch. 388, sec. 11. The grounds of revocation or suspension are limited to "a. Immoral character or conduct. b. Failure, without justifiable cause, to teach for the term of his contract. c. *Gross* inefficiency or *willful* neglect of duty. d. Affliction with active tuberculosis

board, or a member thereof;<sup>183</sup> but the decision is by the board, and "shall be final."<sup>184</sup> This, however, since all the attributes of a quasi judicial determination are present, need not preclude a remedy by certiorari against a failure to accord the procedural requisites, or against an "arbitrary or baseless" determination.<sup>185</sup> Under a previous statute the proceeding was in the first instance before the county superintendent, with an appeal to the state superintendent, whose action was to be "final."<sup>186</sup> In *State ex rel. Grubbs v. Schulz*,<sup>187</sup> the proceeding had been before the state superintendent in the first instance. On certiorari the supreme court held that although the statutory procedure was exclusive, and gave the state superintendent only appellate jurisdiction, the relator had waived the irregularity by making his defense to the merits without objection on this ground at the hearing before the state superintendent. The court assumed that certiorari was otherwise available for its proper purposes.<sup>188</sup>

The limitations as to grounds and method of revoking or suspending a teacher's certificate, which is the most drastic form of removal in that it also bars employment in any other public school in the state, neither precludes nor restricts otherwise exist-

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or some other communicable disease, while suffering from such disability." (a) and (c) are somewhat more narrowly phrased than the corresponding grounds of revocation or suspension in the earlier law. See 1 Mason's 1927 Minn. Stat. sec. 2927: ". . . . (a) Immoral character or conduct *unbecoming a teacher*. . . . (c) Inefficiency in teaching or in the management of a school. . . ." (Italics supplied for comparison.)

<sup>183</sup>The hearing is required to be public, if requested by the teacher, with the right to representation by counsel. The testimony is required to be sworn, although there is no other requirement as to evidential competency. A complete record is required to be kept, and in the event that the complaint has been brought by the Commissioner of Education, he is himself disqualified to sit. Minn. Laws 1929, ch. 388, sec. 11.

<sup>184</sup>Minn. Laws 1929, ch. 388, sec. 11.

<sup>185</sup>Compare *Ridgway v. Vaughan*, (1932) 187 Minn. 552, 553-554, 246 N. W. 115, allowing review by certiorari of a judgment of the municipal court of Minneapolis in a case removed from the conciliation court, "though the statute says there shall be no appeal" from the municipal court's judgment in such a case. 1 Mason's 1927 Minn. Stat., sec. 1382 (4) (d).

<sup>186</sup>1 Mason's 1927 Minn. Stat. sec. 2926.

<sup>187</sup>(1919) 142 Minn. 112, 171 N. W. 263.

<sup>188</sup>The writ had issued directly from the Supreme Court. At 142 Minn. 113-114, 171 N. W. 264, the court pointed out through Hallam, J.: "This court may undoubtedly entertain original jurisdiction by certiorari in such a case. . . . It has, however, been the practice . . . to remit the parties to a proper district court except in cases where general public interest requires immediate determination. We see nothing to take this out of the general rule. At the time this case came up for decision the time for issuance of a new writ had expired. In view of that fact and without intending to establish a precedent, the case is disposed of on the merits."

ing methods of removal from the particular employment.<sup>189</sup> In common, special, and independent school districts outside of first class cities, the school board is authorized to discharge teachers "for cause."<sup>190</sup> No specific procedural requisites are provided. "Cause" alone in Minnesota seems to imply at least some requirements of notice and hearing and "legal cause,"<sup>191</sup> thus enabling a court by certiorari or mandamus or in a salary suit to assure to a teacher at least a substantial minimum of fairness, and that some relation exists between the grounds of removal relied on and his teaching capacity, or the appropriateness of his continued employment in the position involved. The court in *Anderson v. Consolidated School District No. 144*,<sup>192</sup> though recognizing that the board in discharging a teacher "for cause" "acts not only in its executive character, but also as a quasi judicial tribunal," recognized further that "its function in the latter respect is not to be isolated and considered apart from its responsibility as the school manager," and that school administration involves more delicate considerations, as to which greater administrative finality must be accorded, than in other aspects of public administration. In this case a teacher conceded to be otherwise extremely competent had had three fainting spells epileptiform in nature over a seven months' period, one occurring in her classroom and badly frightening children averaging seven and eight years of age. Few would disagree with the court's conclusion that her dismissal was for legally sufficient cause, although the same result need not follow in the case of a public employee among only adult associates, whose duties are not of the type that require constant readiness for emergencies. So also it has been deemed sufficient in the case of a high school teacher that

"he had permitted dancing in the school building . . . in violation of the rules; [and that] he had, in company with students,

<sup>189</sup>*Backie v. Cromwell Consol. School Dist. No. 13*, (1932) 186 Minn. 38, 40, 242 N. W. 389, 390; *Edie v. School Dist. No. 1 of Koochiching County*, (1931) 183 Minn. 522, 524, 237 N. W. 177.

<sup>190</sup>1 Mason's 1927 Minn. Stat., sec. 2815 (5). Held inapplicable to a superintendent otherwise removable at pleasure, *Jensen v. Independent Consol. School Dist. No. 85*, (1924) 160 Minn. 233, 199 N. W. 911.

<sup>191</sup>See *State ex rel. Furlong v. McColl*, (1914) 127 Minn. 155, 160-161, 149 N. W. 11, 13; *State ex rel. Hart v. Common Council of Duluth*, (1893) 53 Minn. 238, 244, 55 N. W. 118, 120; *State ex rel. Early v. Wunderlich*, (1920) 144 Minn. 368, 370-371, 175 N. W. 677, 678.

<sup>192</sup>(Minn. 1936) 264 N. W. 784-785. The scope of review permitted by this case has been stated in footnote 169.

attended a party until a late hour at a lumber camp under circumstances which he himself termed indiscreet."<sup>193</sup>

Though customs may change in regard to the keeping of teachers in some communities "on duty" more outside the classroom than in it,<sup>194</sup> the interpretation of the requirements of public morality in this aspect can hardly be for a court so long as the ground of removal is not a palpably ridiculous one. It must also be recognized that any sizable dissatisfaction sufficient to result in removal, no matter how unsubstantiated, is peculiarly likely in the case of teachers to impair further effectiveness in the same position, and that a court proceeding, so far as the individual case is concerned, only adds fuel to the flames.

In cities of the first class the "teachers' tenure" law of 1927<sup>195</sup> supplants the home rule charter provisions previously applicable. It provides a probationary period of three years after which "such teachers as are thereupon re-employed shall . . . hold their respective positions during good behavior and efficient and competent service and shall not be discharged or demoted" except for specified causes<sup>196</sup> after adequate hearing, public if requested, and

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<sup>193</sup>*Eddie v. School Dist. No. 1 of Koochiching County*, (1931) 183 Minn. 522, 524, 237 N. W. 177-178. In a suit by the teacher for salary subsequent to discharge, a judgment for defendant was reversed because of the trial court's admission in evidence of a letter from the plaintiff's superintendent, who was not shown to be unavailable as a witness. The court failed to recognize that a letting down of the technical rules of evidence in an administrative proceeding requires that they be correspondingly let down in a court proceeding to review the action of the administrative tribunal, even as to new evidence permitted by the mode of review to be introduced in court. See *Standard Oil Co. v. Mealey*, (1925) 147 Md. 249, 127 Atl. 850. Otherwise the court may be passing on an entirely different case than that before the administrative tribunal whose action it is reviewing. The decision in the *Eddie* case may be sustained on the ground that there was no evidence of a hearing accorded the discharged teacher. Where this is an express or reasonably implied procedural requirement, it should follow that the teacher has not in fact been discharged until such hearing has been accorded, no matter how adequate may be the grounds of discharge that exist in fact.

<sup>194</sup>See *Ruth Suckow*, *The Folks* 150-153.

<sup>195</sup>1 Mason's 1927 Minn. Stat., secs. 2935 (1-14).

<sup>196</sup>1 Mason's 1927 Minn. Stat., sec. 2935 (6): ". . . (a) Immoral character, conduct unbecoming a teacher or insubordination. (b) Failure without justifiable cause to teach without first securing the written release of the school board or commissioner having the care, management or control of the school in which the teacher is employed. (c) Inefficiency in teaching or in the management of a school. (d) Affliction with tuberculosis or other communicable disease . . . while . . . suffering from such disability. (e) On account of discontinuance of position or lack of pupils." If the discharge is for (e), the teacher "shall receive first consideration for other positions in the district for which she is qualified." 1 Mason's 1927 Minn. Stat., sec. 2935 (13). (a) and (c) are somewhat broader in their phraseology than the corresponding grounds of the 1929 law for

with the right to representation by counsel. During the three-year probationary period "any annual contract with any teacher may, or may not be, renewed as the school board or commissioner may see fit," and otherwise within the period of each annual contract "The school board or commissioner may . . . discharge or demote a teacher" for the same causes to which removals are restricted after the probationary period has elapsed, by giving to the teacher "a written statement of the cause of such discharge . . . at least thirty days before . . . [it] shall become effective," with a further provision that the teacher "shall have no right of appeal therefrom."<sup>197</sup> Teachers so removed within the probationary period may have no opportunity for review by certiorari, not because of the provision for finality<sup>198</sup> but rather because the statute simply provides that the reasons for removal be stated, without providing an opportunity to the teacher to reply thereto.<sup>199</sup>

As to teachers surviving the probationary period, the opportunities for court review are enlarged proportionately by the more specific procedural requirements and the enumeration of the grounds of removal as contrasted with simply "cause" in the teachers' cases so far considered. In the larger school systems of the first class cities the relation of the teacher to the whole community is more impersonal, and there are greater opportunities for transfer within the same system; so that a court need not fear, to the same extent as in a case arising in a smaller community, that a decree reinstating the teacher will fly in the face of democracy in its purest environment. On the other hand, because in the larger

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the revocation or suspension of a teacher's certificate. Minn. Laws 1929, ch. 388, sec. 11 (a) and (c).

<sup>197</sup>1 Mason's 1927 Minn. Stat., sec. 2935 (4).

<sup>198</sup>See footnote 185; State ex rel. Grubbs v. Schulz, (1919) 142 Minn. 112, 171 N. W. 263.

<sup>199</sup>See State ex rel. Early v. Wunderlich, (1920) 144 Minn. 368, 370-371, 175 N. W. 677, 678-679, to the effect that although "cause," standing alone, may imply requirements of notice and hearing, yet it is otherwise where the statute is more specific and "points out a different procedure" by simply requiring reasons for the removal to be stated in writing; compare State ex rel. Martin v. City of Minneapolis, (1917) 138 Minn. 182, 184, 164 N. W. 806, where the removing authority was merely required to report the removal "in writing, together with the cause thereof," to the local civil service commission: "We are unable to see anything judicial or quasi-judicial in the act of making the report, even if it be considered part of the action removing the employee." See also Wilcox v. People, (1878) 90 Ill. 186. A teacher removed within the probationary period should be able at least to compel by mandamus the assignment in writing of one or more of the statutory causes, see the suggestion in State ex rel. Martin v. City of Minneapolis, (1917) 138 Minn. 182, 184, 164 N. W. 806; and to recover salary up to the time at which the removal order first becomes valid by compliance with the statutory requirements.

systems the relation of the board of education to the teachers employed by it is also more impersonal, the actual need of court review, from the point of view of preserving the teacher's rights, is somewhat less. But as to large and small school systems alike, the opportunity for court review is here again more significant for the restraints which knowledge of its availability may impose, than in the actual extent to which it may approximate an adequate balancing of interests in the individual case. The tenure law of 1927 is in a very real sense a complete civil service law as applied to teachers in first class cities, and presents questions of legal cognizance at least to the same extent found true of administrative removals in previous connections, with allowance for the considerations peculiarly involved in determining *teaching* competency and fitness.<sup>200</sup>

As already suggested, restrictions on the removal power as to teachers may sometimes be avoided by virtue of the contractual nature of the relation. In *Hong v. Independent School District No. 245*,<sup>201</sup> a teacher who had served five years and was under contract for the following year underwent an appendectomy in August and was unable to teach until October 17th, school commencing on September 8th. Though she had notified the board prior to September 8th that she would be unable to begin the year, and of the temporary nature of her illness, she learned for the first time on reporting for duty on October 17th that the board had hired another teacher permanently in her stead. In a suit by her for salary the court held that "The question of discharge does not enter into our case," and that "the inability of the plaintiff to serve for over five weeks was such nonperformance of a substantial and material part of an entire contract as to release the defendant from further liability thereunder."<sup>202</sup> Similarly in *Backie*

<sup>200</sup>Certiorari should be the proper remedy to review the adequacy of the hearing accorded, the sufficiency of the evidence reasonably to support the findings, and the legal sufficiency of the grounds relied on in relation to the grounds enumerated in the statute. Mandamus should be available to direct reinstatement where no hearing has been accorded; and a salary suit may be available in either situation with the opportunity to introduce new evidence, but with no greater scope of review thereby secured, see *Anderson v. Consolidated School Dist. No. 144*, (Minn. 1936) 264 N. W. 784, and without the effect of compelling reinstatement.

<sup>201</sup>(1930) 181 Minn. 309, 312-313, 232 N. W. 329, 330.

<sup>202</sup>Holt and Dibell, JJ., dissented on the ground that the statute restricting removals to "cause" governed, and that "It was a jury question: whether cause existed. . . ." 181 Minn. 314, 232 N. W. 331. As to it being a jury question, see *Anderson v. Consolidated School Dist. No. 144*, (Minn. 1936) 264 N. W. 784.



*v. Cromwell Consolidated School District No. 13*,<sup>203</sup> involving the discharge of a teacher for having married, the court decided against her by reading into the terms of her contract a rule of the school board, in force when the contract was made, providing that a contract with a single teacher "shall be in force only at the discretion of the board after marriage." In *Oxman v. Independent School District of Duluth*,<sup>204</sup> at the time the school board first adopted its rule against married teachers, the plaintiff had already served three years and had been given a permanent appointment not on a contractual basis. She was discharged just prior to the commencement of the ensuing school year for having married, and a judgment in her favor for salary to the date of the commencement of her suit was affirmed. The briefs, conclusions of the trial court, and opinion of the supreme court deal only with the applicability of the 1927 tenure law to a teacher who had served her three year probationary period prior to the date the law took effect, and the effect of the law in dispensing with the necessity of annual or other contracts in the cases of teachers having served the probationary period.<sup>205</sup> The law being held applicable, and to dispense with the necessity of a contractual basis for a permanent appointment, conceivably the judgment may be made to rest only on the ground that there had been no formal removal proceeding as required by the law. More logically it would seem to involve a holding that marriage is not a legally sufficient ground of removal under the tenure law, in the absence of a contractual relation expressly or impliedly containing a ban against marriage. Certainly marriage in itself has no genuine relation to any of the grounds of removal specifically enumerated in the law.<sup>206</sup> But the decision so construed need not necessarily prevent a school board from incorporating into permanent appointments a contractual ban against marriage. That such appointments do not require a contractual basis should not mean that they may not be given one within reasonable limits, so long as the effect is not to nullify the removal pro-

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<sup>203</sup>(1932) 186 Minn. 38, 40-41, 242 N. W. 389, 390-391. Holt, Dibell, and Loring, JJ., dissenting.

<sup>204</sup>(1929) 178 Minn. 422, 227 N. W. 351.

<sup>205</sup>Where the 1927 tenure law is inapplicable a written contract, authorized by the school board at a meeting for which due notice was given and at which a quorum was present, is in all instances necessary. 1 Mason's 1927 Minn. Stat., secs. 2814, 2903; *Martin v. Common School Dist. No. 3*, (1925) 163 Minn. 427, 204 N. W. 320. Where the school board has properly elected a teacher, the chairman may be compelled by mandamus to execute the required written contract. *State ex rel. Schwartz v. Middleton*, (1917) 137 Minn. 33, 162 N. W. 688.

<sup>206</sup>See footnote 196.

visions or frustrate the whole purpose of tenure. Nor need the decision prevent the school board from singling out married teachers in the discontinuance of positions for lack of funds, in the absence of binding rules making the inverse order of seniority the basis. This is to suggest only the legal implications and not the course of wisdom.

*E. Cases Arising Under Miscellaneous Tenure Provisions of Special Legislative or Municipal Home Rule Charters and Ordinances Enacted Thereunder.*—Most of the cases properly falling within this subdivision have already been cited in the preceding sections and involve no separate or unique aspects of the problem of court review. There is a compulsory civil service law for all cities of the first class without home rule charters;<sup>207</sup> but there are at present no such cities. A power to appoint municipal court bailiffs resting in the mayor with the consent of the municipal court judges, in the absence of an applicable removal provision, has been held to require

“that an incumbent . . . can only be removed by the appointment of his successor in the same way that the incumbent was originally appointed, . . . and [that] until then the incumbent is entitled to discharge the duties of the office and receive its salary.”<sup>208</sup>

But it would seem, as a corollary to the proposition that unless otherwise limited the removal power is in the appointing power, that in such a case a removal by the mayor, if concurred in by the municipal court judges or any other body sharing the appointing power, could take effect before the actual appointment of a successor.<sup>209</sup>

A municipal charter provision requiring that an otherwise unrestricted “removal or discharge shall be forthwith reported in writing, together with the cause thereof, to the [civil service] commission and the city comptroller” is not interpreted as restricting the removal power to “cause,” but only as making mandatory the assignment of some reason in writing.<sup>210</sup> There is nothing “judicial

<sup>207</sup>1 Mason’s 1927 Minn. Stat., secs. 1455-1478.

<sup>208</sup>Parish v. City of St. Paul, (1901) 84 Minn. 426, 429-430, 87 N. W. 1124, 1125-1126.

<sup>209</sup>Compare Myers v. United States, (1926) 272 U. S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160, holding that the power to remove a first class postmaster appointed with the consent of the Senate is in the president alone under the constitution. Aside from the peculiar requirements of this decision in relation to the federal administration, and wherever the removal power follows the appointing power, it is generally held that a body whose consent is necessary to an appointment must concur to render a removal effective. See Mechem, Public Officers 285.

<sup>210</sup>State ex rel. Martin v. City of Minneapolis, (1917) 138 Minn. 182, 164 N. W. 806.

or quasi-judicial in the act of making the report."<sup>211</sup> and the only way that a court may aid an employee under such a provision is by holding in a mandamus proceeding or suit for salary that he has not in fact been removed if the purely procedural requirement of assigning some cause and reporting the same has not been fulfilled. Similarly a charter provision that "the officer making the removal shall state specific reasons therefor in writing, and the person removed shall have an opportunity to reply in writing," though apparently permitting court determination "whether the reasons for removal . . . are sufficient in law to justify the removal," does not permit a court to go behind the assigned reasons to determine whether there is a reasonable basis for their existence in fact; since a specific provision for only an opportunity to reply in writing precludes the implication that might otherwise be made of a hearing requirement.<sup>212</sup> *State ex rel. Zimmerman v. City of St. Paul*<sup>213</sup> involved two seemingly inconsistent charter provisions, one to the effect that "Except as . . . otherwise provided, all members of said police department shall hold office during the pleasure of said board [of police]," and another authorizing the board to dismiss members "guilty of misconduct or neglect of duty," with requirements of notice and hearing, right to counsel, and compulsory attendance of witnesses. The court sought to harmonize the two provisions by holding the requirements of the second applicable only to removals allegedly for "misconduct or breach of duty," and not to limit "the powers of the board to remove men for other reasons of inefficiency, such as age, health, or temperament."<sup>214</sup> But in sustaining a summary removal that had not alleged any cause at all,<sup>215</sup> the court thereby deprived the second provision of any practical effect.

A change in the administrative activities of a city, or a transfer of functions from one department to another, will not be deemed to circumvent civil tenure provisions so long as "The change was not a sham or subterfuge to deprive the realtor of a position."<sup>216</sup> This principle received a rather extreme application

<sup>211</sup>At 138 Minn. 184, 164 N. W. 807.

<sup>212</sup>*State ex rel. Early v. Wunderlich*, (1920) 144 Minn. 368, 370-371, 373-374, 175 N. W. 677, 678-680.

<sup>213</sup>(1900) 81 Minn. 391, 84 N. W. 127.

<sup>214</sup>At 81 Minn. 395-396, 84 N. W. 128.

<sup>215</sup>The only cause alleged in the return to the writ of certiorari was "the good of the service."

<sup>216</sup>*State ex rel. Culver v. Board of Public Welfare*, (1928) 174 Minn. 571, 572-573, 219 N. W. 919; see also *State ex rel. Nelson v. Board of Public Welfare*, (1921) 149 Minn. 322, 327, 183 N. W. 521, 523.

in *Byrne v. City of St. Paul*.<sup>217</sup> On the reorganization of the St. Paul city government in 1914 the functions of the former department of public health were transferred to the department of public safety. The employees of the former department were re-employed, but as a condition of re-employment were required in advance "to sign and deposit . . . a formal resignation . . . to be accepted when the best interests of the service, in the judgment of the department, rendered it necessary." Six weeks later plaintiff's resignation was accepted, no reason being assigned. Plaintiff was denied relief, on the theory that his resignation "was wholly voluntary, he understood the effect of the resignation, and that the department could accept it and thus retire him from his position at any time it was deemed best for the service."<sup>218</sup> It is hard to see on the facts of the case how the resignation was "wholly voluntary;" and in the second place such a practice, if followed in every minor reorganization or transfer of functions not involving a reduction of personnel, may easily result in a complete circumvention of the purposes of civil tenure provisions. In *Gude v. City of Duluth*<sup>219</sup> the civil service rules provided that in the event of lay-offs in slack times or for lack of work in particular departments employees should be entitled to reinstatement in the order of their seniority in service. Plaintiff had been so laid off and not reinstated, "being excluded from the position by the employment of others to do the work, who as to plaintiff were junior in rank in the service." The court felt no hesitation in affirming a judgment in plaintiff's favor for his salary for the period of exclusion, pointing out: "The proper method of removing plaintiff from the employment was by direct proceedings under the civil service regulations, and not by indirection and without charges as here attempted."<sup>220</sup> It is submitted that the same considerations are applicable to removals by indirection under the guise of reorganizations wherever new employees are forthwith appointed to do the same work. In all such instances, however, it is prerequisite to relief that the plaintiff shall not have acquiesced without protest in his removal or abandoned his claim to the position so as to have "resigned by implication."<sup>221</sup>

<sup>217</sup>(1917) 137 Minn. 235, 163 N. W. 162.

<sup>218</sup>At 137 Minn. 237, 163 N. W. 163.

<sup>219</sup>(1919) 144 Minn. 109, 174 N. W. 614.

<sup>220</sup>At 144 Minn. 110, 174 N. W. 614.

<sup>221</sup>*Byrnes v. City of St. Paul*, (1899) 78 Minn. 205, 208-209, 80 N. W. 959; on abandonment see also *Schlawr v. City of St. Paul*, (1916) 132 Minn. 238, 242, 156 N. W. 283, 284; *State ex rel. Smallwood v. Windom*,

## CONCLUSION

The Minnesota courts, as the courts of most states, play a far more significant part in the enforcement of tenure in public office and employment than do the federal courts in relation to the federal civil service.<sup>222</sup> It is believed to be equally true that the Minnesota

(1915) 131 Minn. 401, 404-405, 155 N. W. 629, 630-631: "But one . . . still claiming his right to the office . . . and having and expressing a willingness to perform its duties, may surrender the office peaceably . . . without incurring a conclusive charge of abandonment . . . he was not obliged to use physical force to keep it;" *Larson v. City of St. Paul*, (1901) 83 Minn. 473, 478, 86 N. W. 459, 460-461; *Galvin v. City of St. Paul*, (1894) 58 Minn. 475, 477, 59 N. W. 1102.

<sup>222</sup>The federal law provides that "No person in the classified service . . . shall be removed . . . except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and . . . a reasonable time for personally answering the same in writing" (5 U.S.C.A. sec. 652); and more specifically excludes as grounds of removal membership of postal employees in outside organizations not proposing to assist them in any strike (5 U.S.C.A. sec. 652), and refusal of anyone within the classified service to contribute to party funds or render party services (5 U.S.C.A. sec. 633 (5)). But it further provides that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal" (5 U.S.C.A. sec. 652), who is in all cases the appointing officer rather than the civil service commission. See 30 Op. Atty. Gen. 79, 83. Under the federal decisions such restrictions as are imposed have no effective sanction. It has been held that a summary removal complying in no respect with even the minimum procedural requirements is nevertheless a removal in fact, and that an employee so removed has no right to sue for salary in the Court of Claims. *Wilmeth v. United States*, (1928) 64 Ct. Cls. 368, 374-375; *O'Neil v. United States*, (1921) 56 Ct. Cls. 89, 95. These decisions may perhaps be regarded as overruled by *Rathbun v. United States*, (1935) 295 U. S. 602, 55 Sup. Ct. 869, 79 L. Ed. 1710. But where the procedural requirements have been fulfilled, the employee is entirely without recourse to courts. *Eberlein v. United States*, (1921) 257 U. S. 82, 83-84, 42 Sup. Ct. 12, 66 L. Ed. 140; (1918) 53 Ct. Cls. 466, 471-472; *White v. Berry*, (1898) 171 U. S. 366, 378, 18 Sup. Ct. 917, 43 L. Ed. 199; *Morgan v. Nunn* (C.C. Tenn. 1898) 82 Fed. 551, 553-555; *United States ex rel. Taylor v. Taft*, (1904) 24 App. D. C. 95, 98-99; *Kellom v. United States*, (1920) 55 Ct. Cls. 174, 179; *Golding v. United States*, (1934) 78 Ct. Cls. 682, 685: "It appearing from the averments of the petition that every step requisite to the removal from office of an employee of the government in the classified service was taken by the bureau officials in the plaintiff's case, their action in removing him from office is conclusive and is not subject to review by the court." See also *Rice*, *The Function of the Courts in Enforcing the Wisconsin Civil Service Law*, (1923) 2 Wis. L. Rev. 257, 260-261, fn. 12-15. There appears to have been at one time an extra-legal practice in the attorney general's department of reviewing informally removals from the federal service for the purpose of recommending reinstatement to the president if the removal was found to have been unjustified. See *Eberlein v. United States*, (1921) 257 U. S. 82, 83-84, 42 Sup. Ct. 12, 66 L. Ed. 140; *Wilmeth v. United States*, (1928) 64 Ct. Cls. 368, 371. Some of the more flagrant removals by President Harding resulted in reinstatement through this process by President Coolidge, see 41st Report of the U. S. Civil Service Commission, 1923-1924, 105, although without retroactive effect.

courts have not gone too far in the opposite direction of impairing effective administration.<sup>223</sup> The extent to which they have failed fully to effectuate the purpose of tenure provisions from the public employees' point of view has resulted from an accurate perception of the dangers of a too large or too technical control, and perhaps in some degree from the "inherent nature of the subject."<sup>224</sup>

The present state of the law provokes a criticism not directed at the courts. In the first place, the occasions for removals may become less frequent through more adequate and uniform provisions for original selection on a strictly merit non-partisan basis, and for discipline, promotion, and transfer. Second, assuming removal from public office to be primarily an administrative function, it requires all the more for that reason an adequate method of administration, rendering less frequent the occasions for resort to courts. In place of the numerous superior officers now acting as both prosecutor and judge in the exercise of a supposedly restricted removal power, there might well be substituted a central personnel agency in each community or public department of any size, together with a statewide supervisory body. This need not call for an enlargement of officialdom, but only for a better *ex officio* organization of the officialdom that already exists. And third, with the need of resort to courts thus minimized, the scope of court review retained and the remedy or procedure of invoking it might well be more accurately defined and made uniform as to all classes of removal cases. Individual removal cases necessarily involve but small remuneration to counsel, and for that reason frequently do not secure the best of legal talent. Yet in the present state of the law each case involves an inordinate amount of research into a broad variety of statutory provisions and the interpretations placed upon them by the courts, and into the nature of the extraordinary remedies to ascertain the proper proceeding to bring. It is for the legislature to choose between the civil service principle and the spoils system. But to the extent that the former is chosen, it is submitted that a single, state-wide, uniform law, with a single, state-wide, uniform method of administration and a single, uniform remedy for invoking the aid of courts, is

<sup>223</sup>This is not to suggest that public administration in Minnesota is entirely effective and free from criticism, but that its weaknesses are attributable to other reasons than judicial hampering.

<sup>224</sup>State *ex rel.* Mortensen v. Copeland, (1898) 74 Minn. 371, 376, 77 N. W. 221, 223.

far preferable to the haphazard, piecemeal, and sometimes overlapping development that already has taken place. By making such a law optional as to municipalities, and by leaving the greater part of its administration to the local personnel agencies, the demands of local self-government may be satisfied.<sup>225</sup> It is true that most suggestions in the direction of effective public personnel administration have proved barren. Perhaps in the life of a state as of an individual, a stage of emotional as well as of intellectual maturity is ultimately reached. Only when that occurs will this particular problem have been fully surmounted.

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<sup>225</sup>In these respects the firemen's and policemen's civil service laws of 1929 represent a good beginning. There is no need, however, for separate civil service commissions for fire and police departments, and these laws might well be brought together and enlarged so as to embrace public employees generally.