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

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VI. QUO WARRANTO

A.

*Type of Administrative Action Subject to Control by  
Writ Quo Warranto*

AS MENTIONED in Chapter II of this study<sup>501</sup> there exist now in Minnesota two somewhat related types of proceedings: namely the statutory "action to prevent usurption, and to vacate charters and letters patent"<sup>502</sup> and the remedy called writ quo warranto which is specifically placed within the jurisdiction of both the district courts<sup>503</sup> and the Supreme Court.<sup>504</sup> It has already been pointed out in the introductory discussion that the original Revised Statutes of 1851 had abolished the writ of quo warranto and only authorized the statutory proceedings,<sup>505</sup> but that the writ of that name was later restored, first to the district courts<sup>506</sup> and subsequently to the supreme court.<sup>507</sup>

Although the provisions for the statutory proceedings have undergone a number of technical revisions in the course of time, their basic features have remained unaltered. Perhaps the most

\*For prior installments, see 33 Minn. L. Rev. 569, 685 (1949), 36 Minn. L. Rev. 435 (1952). Responsibility for this installment is borne by Professor Riesenfeld alone.

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501. 33 Minn. L. Rev. 569, at 573 (1949).

502. Minn. Stat. c. 556 (1949).

503. Minn. Stat. § 448.03 (1949).

504. Minn. Stat. § 480.04 (1949).

505. 33 Minn. L. Rev. 569, 573 (1949).

506. 33 Minn. L. Rev. 575, text to note 43 (1949).

507. 33 Minn. L. Rev. 575, text to note 44 (1949).

important change was the elimination in 1866<sup>508</sup> of the requirement of the Revised Statutes of 1851<sup>509</sup> that the Attorney General needed the leave of the Supreme Court or one of its justices to bring action for the purpose of vacating a corporate charter.<sup>510</sup>

Without going into the details of the differences between the statutory proceedings under Minn. Stat. c. 556 (1949) and the proceedings for and upon writs quo warranto it may be helpful to point out on this occasion that the proceedings for and upon writs quo warranto are also available to private relators, while the proceedings under Minn. Stat. c. 556 (1949) can be brought only by the Attorney General and contain certain limitations as to municipal corporations.<sup>511</sup>

In this study we are mainly concerned with the Minnesota law relating to the so-called writ quo warranto. Actually, as has been pointed out before<sup>512</sup> this writ is not the classical common law writ known as quo warranto,<sup>513</sup> but rather the information in the nature of quo warranto which replaced the old writ in the sixteenth century.<sup>514</sup> This character of the Minnesota writ of quo warranto has been recognized by the Supreme Court from the earliest days of its use.<sup>515</sup> The development in that respect is analogous to that in many other states.<sup>516</sup>

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508. Minn. Gen. Stat. 1866 c. 79.

509. Minn. Rev. Stat. 1851 c. 80 §§ 3 (last paragraph), 4.

510. For a construction of the import of this requirement see *State v. Berry*, 3 Minn. 190 (Gil. 1859).

511. Minn. Stat. § 556.07 (1949).

512. 33 Minn. L. Rev. 571 (1949).

513. Without going into too many details it may be mentioned that writs quo warranto are found in the earliest extant plea rolls. For two examples dating from 1194 see Maitland, *Three Rolls of the King's Court in the Reign of King Richard I*, 14 *Pipe Roll Society* 6, 33 (1891). The writ became notorious because of its use in connection with the royal inquiries into the appropriation of royal privileges by subjects in the days of Henry III and Edward I, see Cam, *The Hundred and the Hundred Rolls*, especially 36 ff., 248 ff. (1930); 1 Holdsworth, *A History of English Law* 88 (6th ed. 1938). While Glanville and the earliest Register of Writs do not contain a form of the writ, it can be found in a register dating from the early reign of Edward I, see Maitland, *The History of the Register of Original Writs*, 3 *Harv. L. Rev.* 97, 167, 212, at 216 (1889). The writ is contained in the printed edition of the [old] *Natura Brevium*, see Pynson's ed. 1528 at p. 192. For a more accessible reproduction from a later edition, see 1 Holdsworth, *A History of English Law* 659 (6th ed. 1938). The writ is referred to as a standard writ by Britton in his chapter on Franchises (Nichol's ed. 1865, p. 77).

514. See 1 Holdsworth, *A History of English Law* 230 (6th ed. 1938).

515. *State v. Sharp*, 27 Minn. 38, 6 N. W. 408 (1880); *Barnum v. Gilman*, 27 Minn. 466, 8 N. W. 375 (1881). See also *State v. Kent*, 96 Minn. 255, 269, 104 N. W. 948, 954 (1905); *State v. Mound*, 234 Minn. 531, 538, 48 N. W. 2d 855 (1951).

516. High, *A Treatise on Extraordinary Legal Remedies* 562 ff. (3d ed. 1896). See also Orloff, *Information in the Nature of Quo Warranto in the State of Washington*, 15 *Wash. L. Rev.* 165, 166 (1940).

The function of the writ of quo warranto in Minnesota has been recently defined in a thorough and illuminating opinion by Justice Matson "as a proceeding to correct the usurpation, misuser, or nonuser of a public office or corporate franchise."<sup>517</sup> The corporate franchise in question may be that of a private corporation, whether domestic or foreign,<sup>518</sup> or that of a municipal corporation, whether in the strict sense such as a village or city<sup>519</sup> or in the sense of a quasi-municipal corporation such as a county or a school district.<sup>520</sup> The office in question may likewise not only be a public office in the technical sense<sup>521</sup> but also the office in a private corporation.<sup>522</sup>

517. *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855, 863 (1951).

518. See, e.g., *State v. Sibley*, 25 Minn. 387 (1879) (involving the right to the name, franchises and property of the Minnesota Historical Society); *State v. St. P. & S. C. R.R.*, 35 Minn. 222, 28 N. W. 245 (1886); *State v. Minnesota Ry.*, 36 Minn. 246, 30 N. W. 816 (1886); *State v. Fidelity & Cas. Ins. Co.*, 39 Minn. 538, 41 N. W. 103 (1888) (foreign corporation); *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 41 N. W. 1020 (1889); *State v. Somnerby*, 42 Minn. 55, 43 N. W. 689 (1889) (foreign corporation); *State v. Park & Nelson Lumber Co.*, 58 Minn. 330, 59 N. W. 1048 (1894); *State v. Crookston Trust Co.*, 203 Minn. 512, 282 N. W. 138 (1938).

519. Of the vast number of cases involving usurpation or misuser of corporate franchises by villages or cities see as examples involving villages: *State v. Tracy*, 48 Minn. 497, 51 N. W. 613 (1892); *State v. Minnetonka Village*, 57 Minn. 526, 59 N. W. 972 (1894); *State v. Fridley Park*, 61 Minn. 146, 63 N. W. 613 (1895); *State v. Holloway*, 90 Minn. 271, 96 N. W. 40 (1903); *State v. Kent*, 96 Minn. 255, 104 N. W. 948 (1905); *State v. Harris*, 102 Minn. 340, 113 N. W. 887 (1907); *State v. Kinney*, 146 Minn. 311, 178 N. W. 815 (1920); *State v. Buhl*, 150 Minn. 203, 184 N. W. 850 (1921); *State v. Minnewashta*, 165 Minn. 369, 206 N. W. 455 (1925); *State v. Leetonia*, 210 Minn. 404, 298 N. W. 717 (1941); *State v. North Pole*, 213 Minn. 297, 6 N. W. 2d 458 (1942); *State v. Fridley*, 233 Minn. 442, 42 N. W. 2d 204 (1951); *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855 (1951). With reference to cities see *State v. Nashwauk*, 151 Minn. 534, 186 N. W. 694, 189 N. W. 592 (1922); *State v. Fraser*, 191 Minn. 427, 257 N. W. 776 (1934); *State v. Chisholm*, 196 Minn. 285, 264 N. W. 798, 266 N. W. 689 (1936), 199 Minn. 403, 273 N. W. 235 (1937); *State v. Columbia Heights*, 53 N. W. 2d 831 (1952).

520. For cases involving school districts see *State v. Sharp*, 27 Minn. 38, 6 N. W. 408 (1880); *State v. Independent School District*, 42 Minn. 357, 44 N. W. 120 (1890); *State v. School District*, 54 Minn. 213, 55 N. W. 1122 (1893); *State v. School District*, 85 Minn. 230, 88 N. W. 751 (1902); *State v. Common School District*, 54 N. W. 2d 130 (Minn. 1952). As to counties see *State v. Parker*, 25 Minn. 215 (1878) (Big Stone County); *State v. Board of County Comm'rs*, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631 (1896) (Crow Wing County); *State v. Board of County Comm'rs*, 67 Minn. 352, 69 N. W. 1083 (1897) (Red Lake County); *State v. Larson*, 89 Minn. 123, 94 N. W. 226 (1903) (Columbia County); *State v. McDonald*, 101 Minn. 349, 112 N. W. 278 (1907) (Koochiching County); *State v. Olson*, 107 Minn. 136, 119 N. W. 799 (1909) (Mahnomon County).

521. As examples of the variety of public offices contested by quo warranto we list the following cases: *State v. Sanderson*, 26 Minn. 333, 3 N. W. 894 (1880) (county treasurer); *State v. Gilman*, 27 Minn. 466, 8 N. W. 375 (1881) (lieutenant governor); *State v. Gates*, 35 Minn. 385, 28 N. W. 927 (1886) (alderman); *Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802 (1891) (county attorney); *Norwood v. Holden*, 45 Minn. 313, 47 N. W. 971 (1891) (county commissioner); *State v. Sutton*, 63 Minn. 147, 65 N. W.

Of the three traditional grounds for the issuance of an ouster, commonly designated as "usurpation," "non-user" and "misuser," the last category has probably perplexed the courts more than the others. Since it is a recognized principle that the writ of quo warranto cannot be employed to challenge official or corporate acts as ultra vires, unauthorized or illegal,<sup>523</sup> the question arises as to the course of the line separating true misuser of a franchise or office from mere perpetration of acts ultra vires or official misconduct. The court was first faced with that problem in the case of *State v. Minnesota Thresher Mfg. Co.*<sup>524</sup> in which the information was partly brought upon the grounds that the corporation had issued stock in exchange for the stock of another corporation which was of much lower value and that it had illegally purchased its own stock. Mr. Justice Mitchell took the view that there was a difference between a mere "excess" of corporate powers and "misuser" of the corporate franchise. Therefore if corporations "engage in any business not authorized by the statute, it is ultra vires, or

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262 (1895) (boiler inspector); *State v. Marr*, 65 Minn. 243, 68 N. W. 8 (1896) (county commissioner); *State v. Dahl*, 69 Minn. 108, 71 N. W. 910 (1897) (court reporter); *State v. Wilder*, 75 Minn. 547, 78 N. W. 83 (1899) (county commissioner); *State v. Glystrom*, 77 Minn. 355, 79 N. W. 1038 (1899) (boiler inspector); *State v. Moriarity*, 82 Minn. 68, 84 N. W. 495 (1900) (alderman); *State v. Megaarden*, 85 Minn. 41, 88 N. W. 412 (1901) (sheriff); *State v. Board of Control*, 85 Minn. 165, 88 N. W. 533 (1902) (board of control); *State v. Westfall*, 85 Minn. 437, 89 N. W. 175 (1902) (title examiner); *State v. Bergeron*, 156 Minn. 276, 194 N. W. 624 (1923) (member of village power commission); *State v. Quinlivan*, 198 Minn. 65, 268 N. W. 858 (1936) (member of board of regents of state university); *State v. Atwood*, 202 Minn. 50, 277 N. W. 357 (1938) (railroad and warehouse commissioner); *State v. Turnbull*, 212 Minn. 382, 3 N. W. 2d 674 (1942) (village assessor); *State v. Oehler*, 218 Minn. 287, 290, 15 N. W. 2d 783, 16 N. W. 2d 765 (1944) (city corporation counsel); *State v. Washburn*, 224 Minn. 269, 28 N. W. 2d 652 (1947) (court commissioner); *State v. Todd*, 225 Minn. 91, 29 N. W. 2d 810 (1947) (alderman); *State v. Brandt*, 225 Minn. 345, 31 N. W. 2d 5 (1948) (member of county board of tax levy); *State v. Beaudoin*, 230 Minn. 186, 40 N. W. 2d 885 (1950) (judge of municipal court); *State v. Thuet*, 230 Minn. 365, 41 N. W. 2d 585 (1950) (judge of municipal court).

522. *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885); *State v. Lockerby*, 57 Minn. 411, 59 N. W. 495 (1894); *State v. Otis*, 58 Minn. 275, 59 N. W. 1015 (1894); *State v. Oftedal*, 72 Minn. 498, 75 N. W. 692 (1898); *State v. Barnes*, 136 Minn. 438, 162 N. W. 513, 1050 (1917); *State v. Kylmanen*, 178 Minn. 164, 226 N. W. 401, 709 (1929); *Dennistoun v. Davis*, 179 Minn. 373, 229 N. W. 353 (1930); *Dollenmayer v. Ryder*, 205 Minn. 207, 286 N. W. 297 (1939).

523. *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 226, 41 N. W. 1020, 1025 (1889); *State v. Board of County Comm'rs*, 66 Minn. 519, 530, 69 N. W. 925, 926 (1897); *State v. Hays*, 105 Minn. 399, 400, 117 N. W. 615 (1908); *State v. Bergeron*, 156 Minn. 276, 278, 194 N. W. 624 (1923); *Dollenmayer v. Ryder*, 205 Minn. 207, 211, 286 N. W. 297, 299 (1939); *State v. Gravlín*, 209 Minn. 136, 137, 295 N. W. 654, 655 (1941); *State v. Common School Dist.*, 54 N. W. 2d 130 (Minn. 1952).

524. 40 Minn. 213, 41 N. W. 1020 (1889).

in excess of their powers, but not a usurpation of franchises not granted, nor necessarily a misuser of those granted."<sup>525</sup> He recognized that "acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture."<sup>526</sup> But he cautioned immediately "How far it must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting a gradual process of judicial inclusion and exclusion as the cases arise."<sup>527</sup> He held that the alleged acts did not amount to a misuser entailing a forfeiture.<sup>528</sup> While this opinion apparently proceeded upon the theory that a misuser of a franchise is only a ground for the issuance of an order of ouster, if it results in the forfeiture of the franchise in toto, this premise soon became qualified and restricted. In the case of *State v. Somerby*<sup>529</sup> the court intimated that quo warranto was the proper remedy to restrain a foreign corporation from unlawfully exercising its franchise by conducting an unlicensed insurance business in the state. In a recent case<sup>530</sup> the court likewise held, at least by implication, that quo warranto was the proper remedy to restrain a trust company from engaging in business reserved to state banks.

The court developed similar ideas in regard to the franchises of municipal and quasi-municipal corporations. The leading case on that subject is *State v. Board of County Comm'rs*.<sup>531</sup> In that case quo warranto proceedings were brought to oust a county from adjoining territory allegedly illegally annexed thereto. After quoting the principle that "quo warranto will not lie to prevent official acts in excess of jurisdiction or to correct official misconduct"<sup>532</sup> the court differentiated sharply the case where a municipal corporation has permanently and continuously exercised jurisdiction over territory beyond its de jure limits from that of mere official misconduct, which is usually of a casual and temporary character. It saw no reason why the remedy of quo warranto should be limited to the ouster of a municipal corporation in toto and should not also "lie to oust such corporation from specific territory

525. *Id.* at 226, 41 N. W. at 1025.

526. *Ibid.*

527. *Ibid.*

528. For an example of misuser entailing a forfeiture see *State v. Park & Nelson Lumber Co.*, 58 Minn. 330, 59 N. W. 1048 (1894) (failure to keep corporate office and books within the state).

529. 42 Minn. 55, 43 N. W. 689 (1889); see also *State v. Fidelity & Cas. Ins. Co.*, 39 Minn. 538, 41 N. W. 108 (1888).

530. *State v. Crookston Trust Co.*, 203 Minn. 512, 282 N. W. 138 (1938).

531. 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631 (1896).

532. *Id.* at 530, 69 N. W. at 926.

over which it is wrongfully exercising jurisdiction."<sup>533</sup> In a recent case<sup>534</sup> the court, speaking through Mr. Justice Matson, reiterated this principle and recognized that the writ of quo warranto was the proper remedy to oust a village from a territory purported to be annexed although not so conditioned as properly to be subjected to village government. The writ conversely is not available to test merely the legality or validity of certain action purportedly taken by the municipality or quasi-municipality.<sup>535</sup>

With respect to the misuser of a public office the situation is analogous. Ordinarily the illegal use of official authority will not be cause for restraint by means of an information in the nature of quo warranto. But if the abuse is so grave that it results ipso facto in a forfeiture of the public office and not merely in liability to removal proceedings the writ of quo warranto would be appropriate.<sup>536</sup> The latter would also lie to assert a suspension from office pending such proceedings.<sup>537</sup> In addition thereto, however, true misuser warranting judicial interference by means of the writ is present, when the legality of a statute delegating new functions to an existing governmental agency is in question or when the legality of the attribution of only some but not all functions to a newly created agency is to be challenged.<sup>537a</sup>

The cases of non-user as a ground for forfeiture of a franchise have become comparatively rare, but there are a few cases which illustrate the function of the information in the nature of quo warranto in these instances.<sup>538</sup>

The third ground, called "usurpation," is present where certain activities are exercised which require the possession of a franchise or title to an office but where such franchise was either not validly acquired or subsequently lost as a result of a withdrawal, expiration, etc., or where the office in question was either not validly created or subsequently abolished, or where the purported in-

533. *Id.* at 529, 69 N. W. at 926.

534. *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855 (1951). See also *State v. Chisholm*, 199 Minn. 403, 421, 273 N. W. 235, 244 (1937); *State v. Fridley*, 233 Minn. 442, 47 N. W. 2d 204 (1951); *State v. Columbia Heights*, 53 N. W. 2d 831 (Minn. 1952).

535. *State v. Common School Dist.*, 54 N. W. 2d 130, 136 (Minn. 1952).

536. See *State v. Gravlin*, 209 Minn. 136, 137, 295 N. W. 654, 655 (1941).

537. *State v. Megaarden*, 85 Minn. 41, 88 N. W. 412 (1901).

537a. *State v. Board of Control*, 85 Minn. 165, 88 N. W. 533 (1902).

538. *State v. St. P. & S. C. R. R.*, 35 Minn. 222, 28 N. W. 245 (1886); *State v. Minnesota Central Ry.*, 36 Minn. 246, 30 N. W. 816 (1886); see also *Trustees of Hamline University v. Peacock*, 217 Minn. 399, 408, 14 N. W. 2d 773, 778 (1944).

cumbent either did not validly acquire title to the office or lost the same because of resignation, expiration of his term and valid appointment or election of a successor, forfeiture, promotion to another office or other reasons. Generally speaking the court, on quo warranto will concern itself with all material issues regarding the validity of the acquisition of the franchise or the title to the office, including the constitutionality of the statute under which the franchise or title to the office is claimed to have been acquired or lost and other constitutional issues pertinent to the disposition of the case.<sup>539</sup>

There exists, however, the possibility that certain questions may be reserved to other proceedings and not open to inquiry on quo warranto proceedings.<sup>540</sup> Similarly caution must be observed in not transgressing into issues which require separate quo warranto proceedings.<sup>541</sup>

## B.

### *Other Conditions for the Issuance of the Writ.*

Perhaps the most perplexing questions connected with the use of the writ quo warranto in Minnesota concern the conditions under which the courts will grant or deny the application for the writ. This problem has produced a veritable flood of judicial pronouncements which have produced what Justice Matson recently has called with commendable judicial self-restraint "considerable

539. See, e.g., *State v. Board of Comm'rs*, 67 Minn. 352, 69 N. W. 1083 (1897) (quo warranto of the corporate existence of Red Lake County challenging the constitutionality of an act of 1893 providing for the creation and organization of new counties); *State v. Board of Control*, 85 Minn. 165, 88 N. W. 533 (1902) (quo warranto against board of control to test constitutionality of the statutory transfer to the newly created board of control of the management of the normal schools); *State v. Westfall*, 85 Minn. 437, 89 N. W. 175 (1902) (quo warranto against title examiner to challenge constitutionality of title registration law); *State v. Nashwauk*, 151 Minn. 534, 186 N. W. 694 (1922) (constitutionality of statute providing for incorporation of cities of fourth class); *State v. Quinlivan*, 198 Minn. 65, 268 N. W. 858 (1936) (quo warranto to test constitutionality of election to board of regents by joint convention of both houses of the legislature).

540. See *State v. Kinney*, 146 Minn. 311, 178 N. W. 815 (1920) holding that the validity of an election held on the issue of annexation could not be questioned in quo warranto proceedings challenging the legality of the annexation but only in an election contest.

541. See, for instance, *State v. Brandt*, 225 Minn. 345, 31 N. W. 2d 5 (1948) holding that in quo warranto proceedings to determine "title" to office A of the respondent his "status" as holder of office B can only be inquired into insofar as necessary to settle the principal issue. But the court stated in *Dennistoun v. Davis*, 179 Minn. 373, 381, 229 N. W. 353, 356 (1930) that in a contest regarding title to a corporate office it not only could find that respondents were not duly elected to that office but also that relators were the proper incumbents thereof, since "under modern practice, quo warranto is practically only another method of trying out the issues in a lawsuit."



confusion."<sup>542</sup> The reason for that situation lies apparently in the fact that the court has not always kept as distinct as might be desirable the three separate issues 1) as to the requirements for a *standing* to challenge<sup>543</sup> the exercise of a franchise or office, 2) as to the proper court and 3) as to the proper remedy. This failure in turn is explainable by the fact that in quo warranto proceedings special conditions prevail because 1) the issues of standing vary according to whether the attorney general or a private party is the relator, and in the latter alternative according to whether or not the private relator has secured the consent of the attorney general to his proceedings, 2) the Supreme Court and district courts have concurring jurisdiction<sup>544</sup> and 3) the writ of quo warranto and the statutory proceedings to prevent usurpation and to vacate charters and letters patent are in part overlapping.<sup>545</sup>

For a convenient presentation of the actual status of the case law in point it is convenient to differentiate the conditions a) when the attorney general himself is the moving party and relator and b) when a private party is in that position.

1) *Conditions for the issuance of the writ on application and relation of the Attorney-General.*

In terms of a preliminary summary it can be stated that the court has rarely questioned the standing of the attorney general to secure the issuance of a writ quo warranto to challenge the exercise of a franchise, whether of a private or municipal or quasi-municipal corporation, or of an office, whether public or corporate, and that the court has also left him a reasonably free hand in the choice between proceedings in the Supreme Court and the district court and between the writ and the statutory action. Rather the court has recognized that "the attorney general as a constitutional law officer of the state has a wide discretion not only in determining the occasion for the writ but also in selecting the tribunal from which it shall issue."<sup>546</sup>

In the leading case of *State v. Kent*<sup>547</sup> the Supreme Court held that if the attorney general in his official capacity presented an in-

542. *State v. Mound*, 234 Minn. 531, 536, 48 N. W. 2d 855, 860 (1951).

543. For a general discussion of the concept and the requirements of "standing to enforce and to challenge" see Davis, *Administrative Law* 676 (1951).

544. See *supra* text to notes 503 and 504.

545. See *supra* text to note 502.

546. *State v. Minnewashta*, 165 Minn. 369, 374, 206 N. W. 455, 457 (1925).

547. 96 Minn. 255, 104 N. W. 948 (1905).

formation sufficient to make a prima facie case the district court should order the writ to issue "as of course."<sup>548</sup> It declared later that where "the attorney general in his discretion decided that he should proceed there is nothing for any court to pass upon as to the necessity for or policy of proceeding,"<sup>549</sup> and that "in that field the discretion of the attorney general is plenary."<sup>550</sup> It has, however, been held that the attorney general's standing to challenge the exercise of a franchise or office is open to be questioned on the ground that his action is due to improper motive<sup>551</sup> or precluded by estoppel or laches.<sup>552</sup>

The attorney general also possesses great freedom in the choice of his remedy and court. It should be noted in this connection that in the Supreme Court the entire field is serviced by the information in the nature of quo warranto, while in the district courts the attorney general has both the statutory action "to prevent usurpation and to vacate charters and letters patent" under Minn. Stat. c. 556 (1949)<sup>553</sup> and the information in the nature of quo warranto at his disposal.

While it is true that the statutory action is somewhat broader in scope than the information in the nature of quo warranto,<sup>554</sup> in so far as the attorney general is concerned the two remedies in the district court are to a large degree concurrent.<sup>555</sup>

The Supreme Court recognized early that it would ordinarily not interfere with the attorney general's choice between quo warranto proceedings in the Supreme Court and the statutory action in the district court and that it would not relegate him to the latter

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548. *Id.* at 272, 104 N. W. at 955.

549. *State v. Fraser*, 191 Minn. 427, 432, 254 N. W. 776, 778 (1934).

550. *Id.* at 432, 254 N. W. at 778; quoted with approval in *State v. Chisholm*, 196 Minn. 285, 291, 264 N. W. 798, 801 (1936).

551. *State v. Crookston Trust Co.*, 203 Minn. 512, 282 N. W. 138 (1938).

552. *State v. School District*, 85 Minn. 230, 88 N. W. 751 (1902); *State v. Harris*, 102 Minn. 340, 113 N. W. 887 (1907).

553. It might be mentioned that the proceeding under Minn. Stat. c. 556 (1949) is "a civil action and not a special proceeding," *State v. Kent*, 96 Minn. 255, 268, 104 N. W. 948, 953 (1905). It is therefore not excepted from the Rules of Civil Procedure under Rule 81.01 and Appendix A. On the other hand, the rules do not specifically supersede the sections in question, Rules of Civil Procedure, Appendix B(2).

554. *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 224, 41 N. W. 1020, 1024 (1889); *State v. Kent*, 96 Minn. 255, 268, 104 N. W. 948, 953 (1905).

555. *See, Dennistoun v. Davis*, 179 Minn. 373, 375, 229 N. W. 353, 354 (1930); *Miller v. Minneapolis Underwriters Ass'n, Inc.*, 226 Minn. 367, 374, 33 N. W. 2d 48, 53 (1948). It should, however, be noted that the statutory action for the forfeiture of a charter does not apply to municipal corporations, Minn. Stat. § 556.07 (1949).

remedy.<sup>556</sup> At that time the jurisdiction of the district courts to issue writs quo warranto was not yet established.<sup>557</sup> When it became settled that the attorney general could also proceed with an information in the nature of quo warranto in the district courts the Supreme Court extended this freedom of choice also to the courts in which the attorney general wished to apply for the writ.<sup>558</sup> To be sure, the Supreme Court has subsequently intimated that "where there are issues of fact, the district court is the appropriate tribunal for their determination and in such cases the application should be made there."<sup>559</sup> But in practice the court has been liberal in issuing the writ and appointing a referee for the trial of factual issues pursuant to Minn. Stat. § 546.34(4) (1949).<sup>560</sup>

2) *Conditions for the issuance of the writ on the relation of a private party.*

Where the application is made by or on behalf of a private party and the proceedings are conducted by the latter,<sup>561</sup> the situation differs materially both as to the requirements for standing to sue out the writ in general and as to the choice between the Supreme Court and the district courts as the proper forum.<sup>562</sup>

556. *State v. St. P. & S. C. R. R.*, 35 Minn. 222, 223, 28 N. W. 245, 246 (1886), quoted with approval in *State v. Kent*, 96 Minn. 255, 270, 104 N. W. 948, 954 (1905); *State v. Kinney*, 146 Minn. 311, 313, 178 N. W. 815, 816 (1920).

557. This was settled only in *State v. Otis*, 58 Minn. 275, 59 N. W. 1015 (1894); see *supra* note 43.

558. *State v. Kinney*, 146 Minn. 311, 313, 178 N. W. 815, 816 (1920); *State v. North Pole*, 213 Minn. 297, 302, 6 N. W. 2d 458, 461 (1942).

559. *State v. Minnewashta*, 165 Minn. 369, 374, 206 N. W. 455, 456 (1925); followed in *State v. Fraser*, 191 Minn. 427, 432, 254 N. W. 776, 778 (1934); *State v. North Pole*, 213 Minn. 297, 303, 6 N. W. 2d 458, 461 (1942).

560. For cases see *State v. Sanderson*, 26 Minn. 333, 3 N. W. 984 (1880); *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885); *State v. Board of County Comm'rs*, 66 Minn. 519, 526, 532, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631 (1896, 1897); *State v. Chisholm*, 199 Minn. 403, 273 N. W. 235 (1937); *State v. Leetonia*, 210 Minn. 404, 298 N. W. 717 (1941); *State v. North Pole*, 213 Minn. 297, 6 N. W. 2d 458 (1942); *State v. Fridley*, 233 Minn. 442, 47 N. W. 2d 204 (1951); *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855 (1951); *State v. Columbia Heights*, 53 N. W. 2d 831 (Minn. 1952).

561. The mere fact that the attorney general signs the application does not signify that he is the relator if the attorney for the private party actually presents the same. The signature in such a case amounts merely to a consent. *State v. Moriarty*, 82 Minn. 68, 84 N. W. 495 (1900); *State v. Kent*, 96 Minn. 255, 271, 104 N. W. 948, 955 (1905). On the other hand, if it is the attorney general who initiates and conducts the proceedings he is the true relator although he moves at the instance of a private party, *State v. Sharp*, 27 Minn. 38, 6 N. W. 408 (1880), but see also the strange comment "This case belongs to the class . . . in which the control of the proceedings is intrusted very largely to the court" *State v. Kent*, 96 Minn. 255, 269, 104 N. W. 948, 954 (1905).

562. As the statutory action under Minn. Stat. c. 556 (1949) is not available to private parties no choice-of-remedy question arises for them.

Unfortunately the case law in point has lapsed into a state of perplexing obscurity and despite the fact that Justice Matson has made valiant efforts to delineate more sharply the contours of this amorphous body<sup>563</sup> it cannot be said that he was entirely successful.

Generally speaking it can only be stated that the private relator must demonstrate a special interest in legal protection and that in a great number of instances it is relevant whether he has secured at least the consent of the Attorney General to his application for the writ.

a) The court has been most liberal in cases where the writ is sought for the purpose of challenging the title to an office in a private corporation. In that class of cases it is immaterial whether the attorney general has given his consent.<sup>564</sup> All that matters is that the relator has a recognized interest in questioning the title to the office of one exercising it de facto either because he is a rival claimant who would have title to the office if respondent has not,<sup>565</sup> or because he is a stockholder in or member of the organization in question.<sup>566</sup> The Supreme Court has made it clear that generally the district court is the proper forum for such proceedings.<sup>567</sup> The correct procedure for the private party is to apply to the district court for leave to file the information. If the court grants such leave and issues the writ but discovers later, on appropriate motion by the respondent, that the writ has been improvidently issued, as for instance, because on the face of the application the relator did not make out at least a prima facie case, the writ may be quashed.<sup>568</sup>

b) Conversely the strictest requirements apply where a private relator wishes to attack the legal existence or scope of the franchise of a municipal corporation, and apparently also of a private

563. *State v. Mound*, 234 Minn. 531, 538, 48 N. W. 2d 855, 861 (1951).

564. *State v. Otis*, 58 Minn. 275, 59 N. W. 1015 (1894); *Dennistoun v. Davis*, 179 Minn. 373, 375, 229 N. W. 353, 354 (1930); see also *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885); *State v. Oftedal*, 72 Minn. 498, 75 N. W. 692 (1898); *State v. Barnes*, 136 Minn. 438, 162 N. W. 513 (1917); *State v. Kylmanen*, 178 Minn. 164, 226 N. W. 401 (1929); *Dollenmayer v. Ryder*, 215 Minn. 207, 286 N. W. 297 (1939).

565. *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885); *State v. Oftedal*, 72 Minn. 498, 511, 75 N. W. 692, 696 (1898); *State v. Kylmanen*, 178 Minn. 164, 226 N. W. 401 (1929).

566. *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885); *State v. Barnes*, 136 Minn. 438, 162 N. W. 513 (1917).

567. *State v. Lockerby*, 57 Minn. 411, 59 N. W. 495 (1894); *State v. Otis*, 58 Minn. 275, 59 N. W. 1015 (1894). The case of *State v. Chute*, 34 Minn. 135, 24 N. W. 353 (1885) in which the supreme court granted the writ can be explained by the fact that at that time the jurisdiction of the district courts over writs quo warranto was still an open question.

568. *Dollenmayer v. Ryder*, 205 Minn. 207, 286 N. W. 297 (1939).

corporation. At first the Supreme Court took the view that such attacks were reserved to the attorney general.<sup>569</sup> Recently, however, the court has receded from that position and in at least three cases permitted a private relator to challenge the franchise of a municipal corporation. In one of these cases the attorney general had even refused to consent to the proceedings,<sup>570</sup> while in two others such consent was given.<sup>571</sup> In all three cases a special interest of the relator was present. In the former case the relator was a town from which some territory was detached for the benefit of a newly incorporated city,<sup>572</sup> while in the latter cases the relator was either a resident of, or a business located in, the area over which the respondent asserted jurisdiction.<sup>573</sup> Without an interest which differentiates the relator from the general public, he has no standing.<sup>574</sup>

There is no direct authority with respect to a private relator's right to call in question the franchise of a private corporation with or without the consent of the attorney general. On principle, however, similar rules should apply in such a case as in that of a municipal corporation, unless a statute gives a private party a specific right to this effect.<sup>575</sup>

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569. *State v. Tracy*, 48 Minn. 497, 500, 51 N. W. 613 (1892): "Where the object is to test the right of a corporation to exercise the corporate franchise, a privilege derived from the sovereign, the information must be filed by the Attorney General on behalf of the state. . . and the prosecution be conducted on its behalf by the Attorney General. It is true that the application is indorsed with his approval, but that is mere matter of form. . . This does not satisfy the requirement of the law in such a case." The relator in that case claimed a special interest as an owner of land alleged to be improperly included in the new village.

570. *State v. Chisholm*, 196 Minn. 285, 294, 264 N. W. 798, 266 N. W. 689 (1936).

571. *State v. Fridley*, 233 Minn. 442, 47 N. W. 2d 204 (1951); *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855 (1951). See also *State v. Common School District*, 54 N. W. 2d 130 (Minn. 1952).

572. *State v. Chisholm*, 196 Minn. 285, 264 N. W. 798, 266 N. W. 689 (1936).

573. *State v. Fridley*, 233 Minn. 442, 47 N. W. 2d 204 (1951); *State v. Mound*, 234 Minn. 531, 48 N. W. 2d 855 (1951).

574. *State v. Olson*, 107 Minn. 136, 139, 119 N. W. 799, 800 (1909): ". . . the purpose of the proceedings is to assail the county organization, and unless relator has some interest in the matter distinct from the public he cannot be heard. . . . [H]is interest in the question whether the county was legally organized is identical with that of other citizens. . . . He occupies no better position than a general taxpayer or a legal voter who pays no taxes." Note in addition that in that case the attorney general had refused to institute proceedings and had not consented to the application before the court. It is perhaps unfortunate that the latter ground alone was considered decisive by the supreme court in upholding a decision by a district court refusing the writ to a private relator who wished to contest the validity of the creation of a new county within the boundaries of another county, claiming an interest merely as taxpayer of the parent county. *State v. McDonald*, 101 Minn. 349, 112 N. W. 278 (1907).

575. See for instance Minn. Stat. § 623.02 (1949) and *Miller v. Minneapolis Underwriters Ass'n*, 226 Minn. 367, 374, 33 N. W. 2d 48, 53 (1948).

c) The remaining class of cases—which in some respect can be considered as occupying a middleground—concerns the availability of the writ for a private relator to test the title to a public office. The standing of the relator in these instances seems to depend on two factors, *viz.* whether he is or is not entitled to the office in case the respondent does not have title and whether he has or has not obtained the consent of the attorney general for his application. Neither of the two conditions is indispensable but their exact importance is somewhat perplexing.

In the first case involving the problem,<sup>576</sup> a relator attempted to contest respondent's right to the office of lieutenant governor without consent of the attorney general. He did not make a showing that he was entitled to that office if respondent was not and the Supreme Court denied the application "on that ground alone, irrespective of any other question or consideration." The next case in point<sup>577</sup> concerned an application to the Supreme Court for the issuance of the writ by a private relator without consent of the attorney general for the purpose of contesting his removal as colonel of the militia by the governor and his replacement by the lieutenant colonel. The application was denied on constitutional grounds as considering a matter outside the province of the judiciary. *Taylor v. Sullivan*<sup>578</sup> was the first Minnesota case in which a private relator obtained the writ to test title to public office. Relator applied for the writ in the Supreme Court to test the validity of his replacement by the respondent as holder of the office of county attorney. He claimed to be entitled to hold over for the reason that respondent's election was invalid because of lack of citizenship. The Supreme Court in agreeing with the relator's legal position and issuing the writ neither stated whether the attorney general's consent was given to the application nor whether such consent was unnecessary. *State v. Dahl*,<sup>579</sup> the next decision in point, which is considered as a leading case, concerned an application for the writ in the Supreme Court filed without consent of the attorney general, by a private relator who wanted to contest the title of the respondent to an appointive office with no other interest than his interest as freeholder and resident in the county in question. The petition was denied. In reaching his conclusion Justice Collins was careful to point out that neither the refusal

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576. *Barnum v. Gilman*, 27 Minn. 466, 8 N. W. 375 (1881).

577. *State v. Harrison*, 34 Minn. 526, 26 N. W. 729 (1886).

578. 45 Minn. 309, 47 N. W. 802 (1891).

579. 69 Minn. 108, 71 N. W. 910 (1897).

of the attorney general to consent to the suit nor the fact that the relator did not claim title to the office himself barred him in all cases from resort to quo warranto to contest the purported incumbent's title. But he held that in this case the combination of the two factors deprived the relator of his standing in view of the fact that the defect in respondent's title was at the most a technical one and that the position in question was of a clerical nature.

In reviewing the case law following the *Dahl* decision it appears that the court has never questioned the propriety of the issuance of the writ where the private relator showed a prima facie title to the office or had otherwise a special interest in the office and had obtained the consent of the attorney general.<sup>580</sup> But conversely it has repeatedly denied the writ or upheld its denial by a lower court where relator did not obtain such consent and did not make a showing of his title to the office.<sup>581</sup> And it has reversed an order of the district court granting the writ where the petitioner failed to make out title to the office and therefore had no interest different from that as a member of the public, and where the attorney general had refused to cooperate.<sup>582</sup> Only in one case has

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580. *State v. Oehler*, 218 Minn. 287, 15 N. W. 2d 783 (1944) (information for writ filed by the City of St. Paul with the consent of attorney general to determine respondent's title to office of corporation counsel of said city); *State v. Washburn*, 224 Minn. 269, 28 N. W. 2d 652 (1947) (quo warranto upon relation of a private party claiming to be duly appointed to the office of court commissioner to test the title of respondent making the same claim, according to relator's brief the attorney general consented to the application); *State v. Brandt*, 225 Minn. 345, 31 N. W. 2d 5 (1948) (quo warranto issued upon relation of the county of Hennepin with the consent of the attorney general to test title to office of member of the board of tax levy for said county).

581. *State v. Johnson*, 201 Minn. 219, 275 N. W. 684 (1937) (district court denying petition of relator not validly elected because of tie vote); *State v. Ingelbretson*, 201 Minn. 222, 275 N. W. 686 (1937) (district court denying petition for writ made for the purpose of ousting respondent from office alleged to be forfeited without claim to such office by relator); *State v. Atwood*, 202 Minn. 50, 277 N. W. 357 (1938) (writ issued by supreme court quashed as improvidently granted where relator did not make out title to office and attorney general apparently had not consented); *State v. Thuet*, 230 Minn. 365, 41 N. W. 2d 585 (1950) (application to the supreme court for issuance of writ quo warranto to test respondent's title to the office of special municipal judge made without consent of the attorney general by a relator claiming no special interest).

582. *State v. Fredrickson*, 202 Minn. 79, 277 N. W. 407 (1938) (application for writ by private relator claiming no title or particular interest with respect to office made without consent of the attorney general in order to test title to appointive office; district court granted the writ but the supreme court holding that discretion was improperly exercised, ordered quashing thereof); *State v. Turnbull*, 212 Minn. 382, 3 N. W. 2d 674 (1942) (writ quo warranto applied for without consent of the attorney general by a relator claiming erroneously to be the duly elected village assessor; according to the writ printed in the record the attorney general refused to cooperate because he had ruled against the propriety of the election).

the Supreme Court issued the writ on the relation of private parties claiming no other interest in the office than that as residents, voters and taxpayers and refused to quash it as improvidently granted; but in that instance consent of the attorney general to the proceedings was given.<sup>583</sup> Thus while the Supreme Court has occasionally reaffirmed<sup>584</sup> the rule of the *Dahl* case which leaves it to the discretion of the court to issue a writ quo warranto to test title to a public office, at least if it be appointive, on the relation of a private party claiming no interest different from that of the public and without the consent of the attorney general provided that it is warranted by exceptional circumstances, so far no case has occurred in which it was proper to exercise such discretion.

The choice between the concurrent jurisdiction of the Supreme Court and the district courts has produced few practical difficulties in the cases where the writ was sought by a private party to test title to a public office. Only in one early case of this kind<sup>585</sup> has the Supreme Court refused the issuance of the writ despite the consent of the attorney general for the sole reason that no particular public interest was at stake and the party could have obtained the writ in the district court. In recent cases the court has granted the writ to private parties seeking the remedy with the consent of the attorney general, regardless of whether such relators were municipal corporations or natural persons.<sup>586</sup>

While it is recognized that the writ quo warranto is not available if the relator may resort to another adequate remedy, there exist only two early cases involving election contests where the writ was denied for that reason alone.<sup>587</sup> Generally the writ of quo warranto is the only method of challenging title to a public office or the validity or extent of a corporate franchise, barring any collateral attack in form of an injunction,<sup>588</sup> an action for the recovery of

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583. *State v. Todd*, 225 Minn. 91, 29 N. W. 2d 810 (1947).

584. See for instance *State v. Fredrickson*, 202 Minn. 79, 80 277 N. W. 407 (1938).

585. *State v. Moriarty*, 82 Minn. 68, 84 N. W. 495 (1900).

586. *State v. Oehler*, 218 Minn. 287, 15 N. W. 2d 783 (1944); *State v. Washburn*, 224 Minn. 269, 28 N. W. 2d 652 (1947); *State v. Brandt*, 225 Minn. 345, 31 N. W. 2d 5 (1948).

587. *State v. Dowlan*, 33 Minn. 536, 24 N. W. 188 (1885); *State v. Gates*, 35 Minn. 385, 28 N. W. 927 (1886).

588. *Burke v. Leland*, 51 Minn. 355, 53 N. W. 716 (1892); *School District v. Weise*, 77 Minn. 167, 79 N. W. 668 (1899); *Evens v. Anderson*, 132 Minn. 59, 155 N. W. 1040 (1916); *Hammer v. Narverud*, 142 Minn. 199, 171 N. W. 770 (1919); *Doyle v. Ries*, 205 Minn. 82, 285 N. W. 480 (1939); *Ryan v. Hennepin County*, 224 Minn. 444, 29 N. W. 2d 385 (1947); *Bowman v. Moorhead*, 228 Minn. 35, 36 N. W. 2d 7 (1949).



money,<sup>589</sup> another extraordinary remedy<sup>590</sup> or other special proceedings.<sup>591</sup> The difficulties resulting from the necessity of differentiating between mere abuses of an office or franchise and misuser warranting quo warranto proceedings have already been referred to.<sup>592</sup>

A final comment may be added regarding the problem of "ripeness"<sup>593</sup> for review by means of quo warranto. In a recent case<sup>594</sup> it was held that the writ was not available to restrain proceedings aiming at the grant of a municipal charter but only after an order to that effect has been made.<sup>595</sup>

### C.

#### *Procedural Aspects.*

##### 1) *Jurisdiction.*

It has already been pointed out at length that the issuance of writs quo warranto is within the jurisdiction of both the Supreme Court and the district courts and that the Supreme Court will entertain such application, either if the attorney general himself is the relator or if a private party prosecutes the remedy but important interests are at stake requiring speedy determination by the highest court.

##### 2) *Proper parties.*

The choice of the proper parties and their designation requires some care. If the writ is sought to challenge the validity of the creation of a municipal or quasi-municipal corporation the writ may be sought against the de facto entity of that name. In distinc-

589. *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050 (1878).

590. *State v. Williams*, 25 Minn. 340 (1879) (mandamus); *State v. District Court*, 90 Minn. 118, 95 N. W. 591 (1903) (mandamus); *State v. Magie*, 183 Minn. 60, 235 N. W. 526 (1931) (mandamus); *State v. McMartin*, 42 Minn. 30, 43 N. W. 572 (1889) (prohibition); *State v. Beaudoin*, 230 Minn. 186, 40 N. W. 2d 885 (1950) (prohibition).

591. *State v. Honerud*, 66 Minn. 32, 68 N. W. 323 (1896).

592. See *supra* text to notes 524 ff., 531 ff.; see also *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 226, 41 N. W. 1020, 1025 (1889): "It should also be borne in mind that acts *ultra vires* may justify interference on part of the state by injunction to prohibit a continuance of the excess of powers, which would not be sufficient ground for a forfeiture in proceedings quo warranto."

593. About the concept of "ripeness" in general see Davis, *Administrative Law* 640 (1951).

594. *State v. Mound*, 234 Minn. 531, 544, 48 N. W. 2d 855, 863, 864 (1951).

595. But see *Hammer v. Narverud*, 142 Minn. 199, 171 N. W. 770 (1919) suggesting that during the pendency of the proceedings injunction proceedings may be appropriate.

tion to the law in other jurisdictions<sup>596</sup> the proceeding against the de facto entity by its name constitutes no admission of its legal existence.<sup>597</sup> The addition of the qualification "so-called" is not necessary, but apparently permissible if the validity of the entire incorporation and not only of an annexation is at issue.<sup>598</sup> The Supreme Court, however, has found it also to be proper to address the writ to the governing body of a municipal or quasi-municipal corporation or its members to test the validity of the incorporation as the basis of their office and the scope of the territorial jurisdiction possessed,<sup>599</sup> and in addition has recognized that an attack on the existence of a public office may in effect be an attack on the existence of the municipality.<sup>600</sup> Nevertheless, if only the lack of authority of a foreign corporation to do business in the state is the ground for relief the writ must be directed to the corporation as such.<sup>601</sup> The joinder of parties not exercising the office or franchise in question, such as the signers of a petition for annexation, is improper and requires a refusal or quashing of the writ as to them.<sup>602</sup>

The Supreme Court has permitted other private contestants to intervene in quo warranto proceedings to test the propriety of the inclusion of certain territory of the newly created municipal corporation and intimated that the requirements as to standing would be less stringent for such intervention than for admission "as the original and only relators."<sup>603</sup>

### 3) Procedure.

Quo warranto proceedings have been characterized as "legal rather than equitable."<sup>604</sup> The procedure, while "not identical in all respects with the common law procedure for filing an informa-

596. See, for instance, *State v. Morrison*, 155 Neb. 309, 51 N. W. 2d 626, 629 (1952).

597. *State v. Tracy*, 48 Minn. 497, 500, 51 N. W. 613 (1892).

598. See, for instance, *State v. So-Called Village of Fridley*, 233 Minn. 442, 47 N. W. 2d 204 (1951).

599. See *State v. Parker*, 25 Minn. 215 (1892); *State v. Tracy*, 48 Minn. 497, 499, 51 N. W. 613 (1892); *State v. Board of County Comm'rs*, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631 (1896); *State v. Board of County Comm'rs*, 67 Minn. 352, 69 N. W. 1083 (1897); *State v. Larson*, 89 Minn. 123, 94 N. W. 226 (1903).

600. *State v. McDonald*, 101 Minn. 349, 112 N. W. 278 (1907); *State v. Olson*, 107 Minn. 136, 119 N. W. 799 (1909).

601. *State v. Somerby*, 42 Minn. 55, 43 N. W. 689 (1889).

602. *State v. Mound*, 234 Minn. 531, 543, 48 N. W. 2d 855, 863 (1951).

603. *State v. Chisholm*, 196 Minn. 285, 294, 266 N. W. 689 (1936).

604. *State v. Kylmanen*, 178 Minn. 164, 173, 226 N. W. 709, 710 (1929).

tion in the nature of a quo warranto<sup>605</sup> follows it substantially and differs materially from that applicable to ordinary suits or actions.<sup>606</sup> Thus no summons and complaint are necessary<sup>607</sup> nor is a notice of trial required.<sup>608</sup>

In cases where a private relator seeks the writ, whether in the Supreme Court or the district court, the first step to be taken is an application for leave to file the information for a writ quo warranto containing the proposed writ.<sup>609</sup> The petition may contain a request to issue the proposed writ *ex parte*. The court upon such application may either make an order to show cause why the requested leave should not be granted or grant it *ex parte* and issue the writ, either in the alternative form or outright. If the court permits the information for the writ to be filed and thereupon issues the writ it ordinarily thereby exhausts its discretionary powers over the proceedings.<sup>610</sup> This presumes, however, that the court actually exercised its discretion and it is not deprived of the right to quash the writ, if it subsequently appears that the court acted improvidently or through inadvertence and under a misapprehension of the facts.<sup>611</sup> The respondent before answering may make an appropriate motion to that effect, especially where the court granted the leave *ex parte*.<sup>612</sup> This motion should, however, not be based on a mere denial of the allegations of the petition.<sup>613</sup> The court may also quash the writ on its own motion<sup>614</sup> and in a case where the district court has granted leave erroneously the Supreme Court may order it on appeal to quash the writ.<sup>615</sup> After the writ is issued respondent may plead to the information within the time specified in the writ and the proceeding continues in the

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605. *State v. Mound*, 48 N. W. 2d 855, 861 (1951); see also *State v. Kent*, 96 Minn. 255, 267, 104 N. W. 948, 952 (1905) ("... the common law procedure, but slightly modified, prevails in this jurisdiction").

606. *State v. North Pole*, 213 Minn. 297, 6 N. W. 2d 458 (1948).

607. *State v. Mound*, 234 Minn. 531, 538, 48 N. W. 2d 855, 861 (1951).

608. *State v. North Pole*, 213 Minn. 297, 6 N. W. 2d 458 (1948).

609. See especially *State v. Mound*, 234 Minn. 531, 538, 48 N. W. 2d 855, 861 (1951).

610. *State v. Kent*, 96 Minn. 255, 258, 104 N. W. 948, 949 (1905); *State v. Todd*, 225 Minn. 91, 94, 29 N. W. 2d 810, 811 (1947); *State v. Mound*, 234 Minn. 531, 539, 48 N. W. 2d 855, 861 (1951).

611. *State v. Kent*, 96 Minn. 255, 258, 104 N. W. 948, 949 (1905); *Dollenmayer v. Ryder*, 205 Minn. 207, 209, 286 N. W. 297 (1939); *State v. Oehler*, 218 Minn. 287, 289, 15 N. W. 2d 783, 784 (1944).

612. See, for instance, *State v. Chisholm*, 196 Minn. 285, 294, 264 N. W. 798, 266 N. W. 689 (1936); *State v. Fredrickson*, 202 Minn. 79, 277 N. W. 407 (1938); *Dollenmayer v. Ryder*, 205 Minn. 207, 286 N. W. 297 (1939); *State v. Oehler*, 218 Minn. 287, 15 N. W. 2d 783 (1944).

613. *State v. Oehler*, 218 Minn. 287, 15 N. W. 2d 783 (1944).

614. *State v. Atwood*, 202 Minn. 50, 277 N. W. 357 (1938).

615. *State v. Fredrickson*, 202 Minn. 79, 277 N. W. 407 (1938).

same manner as in an ordinary civil action.<sup>616</sup> The burden of proof regarding the title to his office may, however, be on the relator.<sup>617</sup>

If the proceedings upon the writ in the Supreme Court involve the determination of facts the court will usually appoint a referee.<sup>618</sup> Although that court recognizes that it has the power to hear and determine factual issues upon affidavits and occasionally has done so,<sup>619</sup> it has stated that it will ordinarily not exercise this power if one of the parties objects.<sup>619a</sup> Findings of the referee have the effect of a special verdict.<sup>620</sup>

The final disposition of the case on the merits is either an order of ouster or other appropriate restraining order or a discharge of the writ.<sup>621</sup>

While the title of the proceedings should conform to Supreme Court Rule II, an irregularity in this respect has been condoned by the court.<sup>622</sup>

#### 4) *Costs.*

The question of costs and disbursements in quo warranto proceedings is regulated by Minn. Stat. § 549.15 (1949). Accordingly a private relator is entitled to, or liable for, costs and disbursements to the same extent as if the action had been instituted in his name.<sup>623</sup> If the attorney general is himself the relator he is not liable, officially or otherwise, to a prevailing respondent.<sup>624</sup>

### VII.

#### *Supplementary Methods of Judicial Control of Administrative Action: Injunctive and Declaratory Relief.*

While the main topic of this series is the study of the judicial control of administrative action by means of the so-called extraordinary remedies, the picture would be incomplete without an at least cursory discussion of the functions of equity and declaratory judgment<sup>625</sup> actions in that respect.

616. *State v. Mound*, 234 Minn. 531, 539, 48 N. W. 2d 855, 861 (1951), see also *State v. Oehler*, 218 Minn. 287, 289, 15 N. W. 2d 783, 784 (1944).

617. *State v. Gylstrom*, 77 Minn. 355, 79 N. W. 1038 (1899).

618. See note 560 *supra*.

619. See for instance *State v. Common School Dist.*, 54 N. W. 2d 130 (Minn. 1952).

619a. *State v. Oehler*, 218 Minn. 287, 15 N. W. 2d 783 (1944).

620. *State v. Chisholm*, 199 Minn. 403, 273 N. W. 235 (1937); *State v. Fridley*, 233 Minn. 442, 451, 47 N. W. 2d 204, 210 (1951).

621. In cases involving title to an office the court may also declare in whom the title is vested, *Dennistoun v. Davis*, 179 Minn. 373, 381, 229 N. W. 353, 356 (1930).

622. *Dollenmayer v. Ryder*, 205 Minn. 207, 286 N. W. 297 (1939).

623. *State v. Kylmanen*, 178 Minn. 164, 172, 226 N. W. 709 (1929).

624. *State v. Dover*, 113 Minn. 452, 457, 130 N. W. 539 (1911).

625. Minn. Stat. c. 555 (1949).

The previous investigation pursuing the meandering contours of the areas covered by the various prerogative writs has made it evident that these remedies do not dovetail but leave broad crevasses and large zones in which judicial relief is left to equity, i.e., the injunction, or to the declaratory judgment procedure. Since these two remedies cover the same ground at least in a number of important aspects<sup>626</sup> they may perhaps be dealt with together although they differ in the procedural aspects, the form of the final relief, and a number of important features flowing from these properties.<sup>627</sup>

By way of an introductory statement it can be said that the injunction—while not quite as all-important under Minnesota state law as under federal law in its function as a method of judicial review of administrative action<sup>628</sup>—has become increasingly more significant in this state and constitutes actually a mode of relief which is just as extensive in its application as any of the extraordinary remedies.

#### A.

##### *Type of Administrative Action Subject to Judicial Control through Injunction and Declaratory Judgment.*

While the distinction between quasi-legislative, quasi-judicial and ministerial administrative action was of pivotal importance in delineating the scope of the prerogative writs the distinction has not been invoked to circumscribe the scope of equitable relief. Actually it must be said that if the plaintiff shows a recognized interest which is either threatened to be infringed or actually infringed upon by illegal administrative conduct, if in addition the conditions of ripeness for review are fulfilled and if no other adequate remedy is available equity will intervene in his behalf. The type of the administrative action involved is immaterial.

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626. *Paron v. Shakopee*, 226 Minn. 222, 234, 32 N. W. 2d 603, 610 (1948).

627. The scope of the applicability of the declaratory judgment procedure as a practical method of judicial review of administrative action under Minnesota state law needs further investigation. For a brief discussion of the question in general see Davis, *Administrative Law* 748 (1951). But the author's comments on the "paucity of reported cases" is not borne out by the available material, although the cases are frequently not indexed as such. Davis under-estimates also the practical limitations of that procedure because of its failure to provide for temporary immediate relief.

628. Actions in the nature of the prerogative writs have only limited applicability in the federal constitutional courts. As a result the injunction, both mandatory and prohibitory, has taken their place as the principal modes of judicial review. See Davis, *Administrative Law* 731 (1951).

The Supreme Court has emphatically recognized that "it is a rule of very general application that where public officers are acting in breach of trust or unlawfully or without authority or threatening to do so and such acts result in irreparable injury, they may be enjoined."<sup>629</sup> The only general limitation on equitable intervention flowing from the type or content of the action in question is the broad principle that the courts will not control the legitimate exercise of administrative discretion but only act to prevent an illegal abuse thereof. Thus the court has said: "It appears to be the general rule that an injunction will not be granted against public officers to restrain them from exercising discretion where they are intrusted with discretionary power, and that such officers will not be restrained from performing official acts which they are by law required to perform or acts which are not in excess of the authority and discretion reposed in them."<sup>630</sup>

The category of officers and officials involved is likewise immaterial and includes the constitutional officers. The Supreme Court, however, has apparently found it somewhat difficult to hold a steady course in cases involving the latter class, especially the governor.<sup>631</sup> In what appears to be at the same time the most liberal and most recent case in point a taxpayer sought an order restraining the constitutional officers *in their capacity as members of the board of investment* from selling certain bonds alleged to be issued illegally.<sup>632</sup> Justice Stone speaking for the court emphasized that the constitutional officers were not sued in their capacity as such but as *ex officio* members of a statutory board. But he added, at least by way of dictum: "When litigation properly presents a question whether proposed administrative action of an executive or administrative official is within the law, constitutional or statutory, both the subject of inquiry and the duty of decision are at once and automatically removed from the field of executive to that of judicial action and duty. (Of course, if the question is political rather than legal, the courts will have nothing to do with it in any event). . . . No matter how exalted the office or how worthy the incumbent, he loses the protection of his office and its dignity; his

629. *School District v. Lindhe*, 195 Minn. 14, 17, 261 N. W. 486, 488 (1935).

630. *Ibid.*

631. See, for instance, *Cook v. Iverson*, 108 Minn. 388, 122 N. W. 251 (1909); *State v. District Court*, 141 Minn. 1, 168 N. W. 634 (1918); *State v. District Court*, 156 Minn. 270, 194 N. W. 630 (1923); *State v. Christianson*, 179 Minn. 337, 229 N. W. 313 (1930) (reference to injunction only *obiter*); *Rockne v. Olson*, 191 Minn. 310, 254 N. W. 5 (1934).

632. *Rockne v. Olson*, 191 Minn. 310, 254 N. W. 5 (1934).

acts become those of an ordinary individual rather than those of an officer of government; if and when he oversteps the limits of official power as declared by either constitutional or statutory law."<sup>633</sup> However, in previous cases the Supreme Court has held that the state courts lacked inherent power to restrain the state auditor from conducting an election to the United States Senate<sup>634</sup> and to cite the governor for contempt perpetrated by violating a temporary injunction which restrained him from enforcing a statute attacked as but not finally adjudicated to be unconstitutional<sup>635</sup> and had granted an injunction against a constitutional officer only on the narrow ground that the function in question was merely ministerial.<sup>636</sup>

Of course the limitations following from the requirements of the absence of another adequate remedy and the ripeness for review create certain definite restrictions upon the suitability of the injunction as a method of review of certain classes of administrative action. Thus the fact that the writ of mandamus performs the function of a mandatory injunction<sup>637</sup> will in practice eliminate the necessity for the latter type of relief and equitable intervention will "usually" take the form of a temporary or permanent prohibitory injunction.<sup>637a</sup> Similarly the availability of certiorari and prohibition to restrain or annul illegal quasi-judicial action will ordinarily obviate the resort to the injunction.<sup>638</sup> Nevertheless there exists at least one case where an injunction against action classified as quasi-judicial<sup>639</sup> was sought and the relief denied on grounds other than predicated upon the type of action invoked.<sup>640</sup> Finally quasi-legislative action as such will often not be ripe for judicial

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

634. *State v. District Court*, 156 Minn. 270, 194 N. W. 630 (1928).

635. *State v. District Court*, 141 Minn. 1, 168 N. W. 634 (1918).

636. *Cook v. Iverson*, 108 Minn. 388, 122 N. W. 251 (1909).

637. The Supreme Court of Minnesota itself has gone to the extent of speaking of "the affirmative form of the injunction which we call mandamus," *Reid v. Independent Union of All Workers*, 200 Minn. 599, 600, 275 N. W. 300 (1937), quoted in *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 97, 46 N. W. 2d 94, 98 (1950).

637a. See the comments to that effect by Justice Knutson in *State v. University of Minnesota*, 54 N. W. 2d 122, 129 (Minn. 1952).

638. *Scribner v. Allen*, 12 Minn. 148 (1866); *Schumacher v. Board of County Comm'rs*, 97 Minn. 74, 105 N. W. 1125 (1906); *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273 (1914); *Heller v. Schroeder*, 182 Minn. 353, 234 N. W. 461 (1931).

639. *Nemo v. Hotel & Restaurant Employees' Local*, 227 Minn. 263, 35 N. W. 2d 337 (1948).

640. *Quest Foundry Co. v. Int'l M. & F. W. Union*, 216 Minn. 436, 13 N. W. 2d 32 (1944).

intervention<sup>641</sup> and relief be postponed until the enforcement stage.<sup>642</sup> It is, however, recognized that quasi-legislative action may as such be the object of a restraining order if it affects immediately and directly legally protected interests.<sup>643</sup>

It would be a prohibitive and useless task to list all the types of administrative actions which have been held the proper object of restraining orders. There can be no doubt that the Minnesota case law fully reflects the large expansion which the processes of equity have undergone during the past half-century in the entire United States with respect to their availability "as a means of securing rights against governmental action."<sup>644</sup> Suffice it to state, by way of a random sample that injunctions have been upheld or held to be available for the purposes of restraining the county commissioners from constructing a public ditch threatening injury to owners not made parties to the proceedings establishing the ditch,<sup>645</sup> the county board and county auditor from approving and endorsing an application for the refund of property taxes levied by a school district,<sup>646</sup> the county board from holding an election to dissolve a consolidated school district pursuant to an unconstitutional statute,<sup>647</sup> the city and its officers from enforcing an invalid ordinance regulating the license and sale of non-intoxicating beverages,<sup>648</sup> the mayor from enforcing the revocation of a license without the requisite hearing,<sup>649</sup> a city and its officers from retaining a public employee hired in violation of the civil service rules,<sup>650</sup> the governor and other constitutional officers from making an unauthorized sale of state bonds,<sup>651</sup> and the state auditor from issuing warrants payable out of the general revenue funds for the construction of public highways in violation of the "internal improvement" clause of the state constitution.<sup>652</sup>

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641. *Basting v. Minneapolis*, 112 Minn. 306, 127 N. W. 1131 (1910).

642. *Nelson v. Minneapolis*, 112 Minn. 16, 127 N. W. 445 (1910).

643. *Basting v. Minneapolis*, 112 Minn. 306, 309, 127 N. W. 1131, 1132 (1910).

644. See the splendid survey of this development by the late Professor Simpson in his article *Fifty Years of American Equity*, 50 Harv. L. Rev. 171, especially 224 *et seq.*, at 229 and 247 (1950).

645. *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274 (1907).

646. *School District v. Lindhe*, 195 Minn. 14, 261 N. W. 486 (1935).

647. *Consolidated School District v. Christison*, 167 Minn. 45, 208 N. W. 409 (1926).

648. *Bernick v. Little Falls*, 191 Minn. 128, 253 N. W. 369 (1934).

649. *National Cab Co. v. Kunze*, 182 Minn. 152, 233 N. W. 838 (1930).

650. *Oehler v. St. Paul*, 174 Minn. 410, 219 N. W. 760 (1928).

651. *Rockne v. Olson*, 191 Minn. 310, 254 N. W. 5 (1934).

652. *Cook v. Iverson*, 108 Minn. 388, 122 N. W. 251 (1909).



## B.

*Conditions for the Granting of Injunctive or Declaratory Relief.*

Since a restraining order operates much more as a coercive interference with the governmental processes than a mere declaratory order it can be expected that judicial relief of the first type is predicated on more stringent requirements than that of the latter character. A separation of treatment is therefore in order.

a) *Conditions for injunctive relief against unlawful administrative action.*

Originally the Supreme Court of Minnesota was reluctant to consider relief against illegal administrative action within the cognizance of equity. In an early action<sup>653</sup> brought to have a tax lien declared as void and its enforcement perpetually restrained the court ruled that equitable relief against illegal action by public officers was proper only in three exceptional types of cases: "First, where the proceedings in the subordinate tribunal, or the official acts of public officers will necessarily lead to a multiplicity of suits. Second, where they lead, in their execution to the commission of irreparable harm to the freehold. Third, where the adverse party's claim to land is valid, upon the face of the instrument or proceedings to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality."<sup>654</sup>

Today it has become firmly accepted that equity has long since swept outside the three narrow channels recognized in that early case and that it is impossible to circumscribe with accuracy the bounds within which equity will counteract illegal governmental action. Certainly it is no longer open to question that injunctive protection will be accorded to a private party against actual or threatened illegal governmental action, if it constitutes an invasion of *any* recognized special interest of such party resulting in "real, substantial or irreparable harm" and if no other adequate legal remedy is available.<sup>655</sup> To an ever increasing degree, however, the courts will also intervene where the party claims no greater interest as infringed than that of a general taxpayer. The scope of these tax payer suits and the restrictions flowing from the neces-

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653. *Minnesota Linseed Oil Co. v. Palmer*, 20 Minn. 468 (1874).

654. *Id.* at 473.

655. For a recent judicial statement of these conditions, see especially *Quest Foundry Co. v. International Union*, 216 Minn. 436, 440, 13 N. W. 2d 32, 34 (1944) as explained in *Nemo v. Hotel & Restaurant Employees' Local No. 556*, 227 Minn. 263, 271, 35 N. W. 2d 337, 342 (1948).

sity of the absence of another remedy merit perhaps a few further observations.

The first decision by the Minnesota Supreme Court upholding *taxpayers suits* was rendered in 1873 and concerned the right of a property owner in the city of Red Wing to restrain this municipality from issuing bonds without full compliance with the controlling special act.<sup>656</sup> The court, affirming the overruling of a demurrer to the complaint, stated that "a tax paying property holder has a right, in his own name, to resort to equity to restrain by injunction a municipal corporation and its officers from illegally creating debts which will increase his burden of taxation."<sup>657</sup> The rule was soon extended to quasi-municipalities, such as counties and school districts and their officials, and to all illegal acts increasing the tax load, such as disbursements under illegal contracts or for unlawful purposes or useless expenditures under unconstitutional statutes.<sup>658</sup> In this jurisdiction taxpayers have also been accorded standing to enjoin action by *state* officials not only when resulting in illegal local expenditures<sup>659</sup> but also when unlawfully burdening state revenues.<sup>660</sup> The tax in question need not neces-

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656. *Hodgman v. Chicago & St. P. Ry.*, 20 Minn. 48 (1873).

657. *Id.* at 54.

658. See especially, *Todd v. Rustad*, 43 Minn. 500, 46 N. W. 73 (1890) (removal of county seat after election under act alleged to be unconstitutional); *Slingerland v. Norton*, 59 Minn. 351, 61 N. W. 322 (1894) (defective proceedings for removal of county seat); *Streissguth v. Geib*, 67 Minn. 360, 69 N. W. 1097 (1897) (unauthorized proceedings for removal of county seat); *Flynn v. Little Falls Electric & Water Co.*, 74 Minn. 180, 77 N. W. 38 (1898) (payment by city under invalid contract); *Grannis v. Board of County Comm'rs*, 81 Minn. 55, 83 N. W. 495 (1900) (payment of claim under illegal agreement with county); *Jensen v. Independent School District*, 163 Minn. 412, 204 N. W. 49 (1925) (election to change site of school held under invalid statute); *Consolidated School District v. Christison*, 167 Minn. 45, 208 N. W. 409 (1926) (election to dissolve school district under invalid act); *Oehler v. St. Paul*, 174 Minn. 410, 219 N. W. 760 (1928) (retention of public employee in violation of civil service rules); *Williams v. Klemmer*, 177 Minn. 44, 224 N. W. 261 (1929) (performance of invalid contract with city council); *Tousley v. Heffelfinger*, 184 Minn. 447, 234 N. W. 673 (1931) (illegal expenditure of county funds); *Behrens v. Minneapolis*, 199 Minn. 363, 271 N. W. 814 (1937) (expenditure of city funds for illegal purposes); *Cranak v. Link*, 219 Minn. 112, 17 N. W. 2d 359 (1944) (payment for services rendered under illegal agreement with city board); *Coller v. St. Paul*, 223 Minn. 376, 26 N. W. 2d 835 (1947) (contract for installation of parking meters without proper bidding); *Thomas v. Housing and Re-development Authority*, 48 N. W. 2d 175 (Minn. 1951) (establishment of low-rent housing project).

659. *School District v. McConnel*, 150 Minn. 57, 184 N. W. 369 (1921) (injunction against state commissioner of education to restrain filing of order relating to consolidation of school districts).

660. *Regan v. Babcock*, 188 Minn. 192, 247 N. W. 12 (1933) (disbursements by highway department); *Rockne v. Olson*, 191 Minn. 310, 254 N. W. 5 (1934) (illegal issuance of bonds); *State v. Werder*, 200 Minn. 148, 273 N. W. 714 (1937) (illegal settlement of condemnation compensation claim with attorney general).

sarily be a property tax.<sup>661</sup> The Supreme Court, however, has refused to go beyond this zone and held that a taxpayer has no standing to force a municipality to observe the conditions in a gift,<sup>662</sup> or to interfere with action not resulting in public expenditures.<sup>663</sup>

The traditional condition for equity jurisdiction requiring *the absence of an adequate remedy at law* has created particular troubles in the field of relief against illegal administrative action, because its satisfaction depends so much on the scope of the prerogative writs, especially certiorari and quo warranto.

Generally the availability of review by certiorari has been held to preclude an attack on the proceedings by injunction.<sup>664</sup> Of course, after the completion of the proceedings the doctrine of res judicata will constitute an additional bar.<sup>665</sup> But the injunction has been held the proper method of attack where certiorari either was not available because the aggrieved plaintiff was not a party to the proceedings in question<sup>666</sup> or was inadequate because the matters rendering the proceedings defective appeared only *dehors* the record.<sup>667</sup>

Similarly in the fields where quo warranto is appropriate a resort to the injunction is excluded regardless whether the exercise of a franchise or title to public office is in issue.<sup>668</sup> But the injunction is available where quo warranto does not lie because title to a public employment and not a public office is under attack<sup>669</sup> or because the final order conferring the franchise has not been completed<sup>670</sup> or because not misuser amounting to a forfeiture of the franchise or

661. *Regan v. Babcock*, *supra* note 660 (gasoline tax and auto license fee held to support standing).

662. *Loncor v. Red Wing*, 206 Minn. 627, 289 N. W. 570 (1940).

663. *Caton v. Board of Education*, 213 Minn. 165, 6 N. W. 2d 266 (1942).

664. *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273 (1914); *Heller v. Schroeder*, 182 Minn. 353, 234 N. W. 461 (1931).

665. *Slingerland v. Conn*, 113 Minn. 214, 129 N. W. 376 (1911); *Dalberg v. Lundgren*, 118 Minn. 219, 136 N. W. 742 (1912).

666. *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274 (1907).

667. *Slingerland v. Norton*, 59 Minn. 351, 61 N. W. 322 (1894); *Bilsborrow v. Pierce*, 101 Minn. 271, 112 N. W. 274 (1907); *School District v. McConnell*, 150 Minn. 57, 184 N. W. 369 (1921); *National Cab Co. v. Kunze*, 182 Minn. 152, 233 N. W. 338 (1930) (total absence of the required hearing).

668. *Evens v. Anderson*, 132 Minn. 59, 155 N. W. 1040 (1916); *Burke v. Leland*, 51 Minn. 355, 53 N. W. 716 (1892); *Doyle v. Ries*, 205 Minn. 82, 285 N. W. 480 (1939).

669. *Oehler v. St. Paul*, 174 Minn. 410, 419, 219 N. W. 760, 763 (1928).

670. *School District v. McConnell*, 150 Minn. 57, 184 N. W. 369 (1921); see also *Hammer v. Naverud*, 142 Minn. 199, 203, 171 N. W. 770, 772 (1919).

office but merely sporadic illegal acts are the substance of the grievance.<sup>671</sup>

The availability and adequacy of other special proceedings, as for instance election contests, so as to bar injunctions have also presented troublesome questions and in a number of instances equitable relief has been held proper.<sup>672</sup> On the other hand the possibility of a multiplicity of suits has been held to render inadequate a legal remedy which in individual cases has been deemed to be adequate.<sup>673</sup>

The issue of "ripeness" needs no special discussion since in the injunction cases it appears usually either under the guise of the need of a threat of real and substantial injury,<sup>674</sup> or of the adequacy of another and later chance of review.<sup>675</sup>

b) *Conditions for declaratory relief.*

An action for declaratory relief is a very valuable tool for the review of administrative action. The uniform declaratory judgment act which was adopted in this state in 1933 vests the courts with broad powers to declare rights, status, and other legal relations to terminate a controversy or remove an uncertainty.<sup>676</sup> The rules of civil procedure have not only preserved these provisions but added other advantages facilitating speedy determination.<sup>677</sup>

It was settled from the very beginning of the application of this statute that it authorized only proceedings which amount to a justiciable controversy.<sup>678</sup> Of course, it is impossible to give a universally applicable definition of a justiciable controversy. Broad concepts like that defy complete circumscription. The court itself has recognized that the authority under the statute comes into play "before disputes become serious or well-nigh irremediable."<sup>679</sup> Perhaps the most elaborate test has been given by Justice Matson:

671. See, for instance, the comment in *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 226, 41 N. W. 1020, 1025 (1889).

672. *Todd v. Rustad*, 43 Minn. 500, 46 N. W. 73 (1890); *Consolidated School District v. Christison*, 167 Minn. 45, 208 N. W. 409 (1926); *Repsold v. Independent School District*, 205 Minn. 316, 285 N. W. 827 (1939).

673. *Fairley v. Duluth*, 150 Minn. 514, 185 N. W. 390 (1921) (tax levied under invalid statute).

674. See, for instance, *Reed v. Hibbing*, 150 Minn. 130, 134, 184 N. W. 842, 845 (1921); *Quest Foundry Co. v. International M. & F. Union*, 216 Minn. 436, 13 N. W. 2d 32 (1944).

675. See for instance, *Heller v. Schroeder*, 182 Minn. 353, 354, 234 N. W. 461, 462 (1931).

676. Minn. Stat. §§ 555.01, 555.02, 555.03, 555.05 (1949).

677. Minn. R. Civ. P. 57 (1952).

678. *Reed v. Bjornson*, 191 Minn. 254, 253 N. W. 102 (1934).

679. *Montgomery v. Minneapolis Fire Department Relief Ass'n*, 218 Minn. 27, 31, 15 N. W. 2d 122, 124 (1944).

"Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing litigants. Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy. Although complainant need not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be affected in a prejudicial manner."<sup>680</sup> A justiciable controversy proper for resort to declaratory relief may be absent because plaintiff has no standing to challenge the legality of the action involved<sup>681</sup> or because no legal interest of his is threatened<sup>682</sup> or because the defendant is in reality not an adverse party, in the sense that his attitude emanates a threat.<sup>683</sup> On the other hand such controversy is present when the plaintiff has either a definite interest of his own involved<sup>684</sup> or claims standing as a taxpayer threatened by an illegal expenditure<sup>685</sup> and if the public official who is made the defendant can effectively control action affecting the interest sought

670. *State v. Haveland*, 223 Minn. 89, 92, 25 N. W. 2d 474, 477 (1946).

681. *Paron v. Shakopee*, 226 Minn. 222, 32 N. W. 2d 603 (1948) (former licensee lacks standing to challenge propriety of granting license to new applicants).

682. *State v. Haveland*, 223 Minn. 89, 25 N. W. 2d 474 (1946) (action to establish plaintiff's right to pay a tax despite applicability of an exemption statute challenged unconstitutional).

683. *County Board of Education v. Borgen*, 192 Minn. 510, 257 N. W. 82 (1934) (action against attorney general and county auditor to determine whether plaintiff possessed power to issue bonds for the financing of relief work despite the doubts expressed by a federal official); *Seitz v. Citizens Pure Ice Co.*, 207 Minn. 277, 290 N. W. 802 (1940) (action by undischarged employee against employer to determine coverage under state unemployment compensation law).

684. *Reed v. Bjornson*, 191 Minn. 254, 253 N. W. 102 (1934) (constitutionality of an income tax for the benefit of school districts); *Freeman v. Pine City*, 205 Minn. 309, 286 N. W. 299 (1939) (right of town to establish road on plaintiff's land); *Barron v. Minneapolis*, 212 Minn. 566, 4 N. W. 2d 622 (1942) (validity of ordinance imposing license fee on vending machines); *Montgomery v. Minneapolis Fire Department Relief Ass'n*, 218 Minn. 27, 15 N. W. 2d 122 (1944) (extent of pension rights acquired by plaintiff); *Leighton v. Minneapolis*, 222 Minn. 516, 25 N. W. 2d 263 (1946) (validity of statute authorizing special property tax in Minneapolis); *Land O' Lakes Dairy Co. v. Sebeka*, 225 Minn. 540, 31 N. W. 2d 660 (assertion of tax exemption); *Minneapolis Street Railway Co. v. Minneapolis*, 229 Minn. 502, 40 N. W. 2d 533 (1949) (validity of increase of annual license fee).

685. *Almquist v. Biwabik*, 224 Minn. 503, 28 N. W. 2d 744 (1947) (taxpayer's attack on home rule charter provision defining assessment district).

to be protected.<sup>686</sup> Although the question of the presence or absence of a justiciable controversy is perhaps not exclusively a matter of jurisdiction over the subject matter in the strict sense but may involve also aspects concerning merely the propriety of relief it seems to be bad practice for the court to decide a controversy on the merits although it refuses to admit that the question was properly brought before it.<sup>687</sup>

The new rules specify expressly that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."<sup>688</sup> This provision appears merely to codify the law as it was already applied previously by the Supreme Court<sup>689</sup> and the notes by the Supreme Court's Advisory Committee seem to confirm this view.<sup>690</sup> Accordingly the new provisions should not abrogate the holding by the court that declaratory relief is unavailable where a party has failed to make proper and timely resort to another special remedy construed to be exclusive.<sup>691</sup> Apparently the declaratory judgment procedure is likewise not available for a private party to question the validity of a corporate franchise or title to public office, at least in the instances where he needs the consent of the attorney general to proceed with a writ quo warranto.<sup>692</sup>

Of course, there exist no obstacles to combine a prayer for declaratory relief with one for an injunction.<sup>693</sup> The Supreme Court has likewise raised no objection to add such prayer to a petition for mandamus.<sup>694</sup>

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686. *Hassler v. Engberg*, 233 Minn. 487, 48 N. W. 2d 343 (1951) (action by policy holder against insurance commissioner to test validity of order requiring insurance companies to increase premium rates).

687. *Smith v. Holm*, 220 Minn. 486, 19 N.W. 2d 914 (1945) (validity of redistricting act of 1913).

688. Minn. R. Civ. P. 57 (1952).

689. *Barron v. Minneapolis*, 212 Minn. 566, 569, 4 N. W. 2d 622, 624 (1942); *Montgomery v. Minneapolis Fire Department Relief Ass'n*, 218 Minn. 27, 30, 15 N.W. 2d 122, 124 (1944); *Leighton v. Minneapolis*, 222 Minn. 516, 518, 25 N.W. 2d 263, 264 (1946).

690. Advisory Committee, Minnesota Rules of Civil Procedure, Tentative Draft, Note to Rule 57.

691. *Land O' Lakes Dairy Co. v. Sebek*, 225 Minn. 540, 31 N.W. 2d 660 (1948).

692. *Cf.* the intimation to that effect in *Almquist v. Biwabik*, 224 Minn. 503, 504, 28 N.W. 2d 744, 745 (1947): "It is conceded by petitioner that at this proceeding a judgment could not be rendered ousting the elected respondents from their offices, nor does he challenge the existence or incorporation of the city."

693. *Hassler v. Engberg*, 48 N. W. 2d 343 (Minn. 1951).

694. *State v. Haveland*, 223 Minn. 89, 25 N.W. 2d 474 (1946). Of course, mandamus is not superseded by the statutory remedy, *Farmers & Merchants Bank v. Billstein*, 204 Minn. 224, 183 N.W. 138 (1938).

## C.

*Procedural Aspects.*a) *Jurisdictional requirements: bond.*

Neither the action for the writ of injunction nor the action for declaratory relief have procedural characteristics which differentiate them radically from other civil actions. The new Rules of Civil Procedure preserve expressly the existing statutory law.<sup>695</sup> Perhaps the most important special requirement is the necessity of a bond as condition for the issuance of a restraining order.<sup>696</sup> The observance of this provision has been held to be jurisdictional in character.<sup>697</sup>

b) *Proper, necessary and indispensable parties in suits to enjoin governmental action.*

The only additional comments which seem to be indicated relate to the matter of parties in injunction suits. Since illegal action by administrative officials strips them automatically of their official capacity when perpetrating the same, it follows logically that the official in question is the proper party defendant. This "stripping doctrine" asserted forcefully by the federal Supreme Court in *Ex parte Young*<sup>698</sup> has become firmly rooted in the Minnesota practice.<sup>699</sup> If the officer in question leaves office and his successor in office threatens to continue the illegal action the successor should be substituted as party defendant.<sup>700</sup>

The governmental subdivision which is represented by the official in question is ordinarily only a proper party but neither an indispensable nor a necessary one.<sup>701</sup> However, the Supreme Court has held that in some instances the governmental subdivision may be a necessary party which under such conditions ought to be summoned to appear in the action.<sup>702</sup> Rule 19.02 is now the controlling provision.

Similar rules apply with respect to the necessity of a joinder of a third party who is alleged to be benefited or otherwise directly

695. Minn. R. Civ. P. 57, 65.

696. Minn. Stat. § 585.04 (1949).

697. *Bellows v. Ericson*, 233 Minn. 320, 46 N.W. 2d 654 (1951).

698. 209 U. S. 123 (1908).

699. *Cook v. Iverson*, 108 Minn. 388, 393, 122 N. W. 251, 252 (1909); *Rockne v. Olson*, 191 Minn. 310, 313, 254 N. W. 5, 7 (1934).

700. *Phillips v. Brandt*, 231 Minn. 423, 432, 43 N. W. 2d 285, 291 (1950).

701. *Williams v. Klemmer*, 177 Minn. 44, 48, 224 N.W. 261, 262 (1929); *National Cab Co. v. Kunze*, 182 Minn. 152, 155, 233 N. W. 838, 840 (1930);

*Cranak v. Link*, 219 Minn. 112, 118, 17 N. W. 2d 359, 362 (1944).

702. *Cranak v. Link*, 219 Minn. 112, 118, 17 N. W. 2d 359, 362 (1944).

affected by the governmental conduct challenged to be an illegal transaction. Of course, where the third parties are only indirectly interested in the outcome of the injunction suit, as for instance petitioners for a municipal election under an invalid statute, they are clearly neither indispensable nor necessary parties.<sup>703</sup> But even where a third party is directly interested in the validity of the contract or instrument, performance of which is sought to be enjoined, he apparently may occupy at the most the position of a necessary and not of an indispensable party. Thus while the Supreme Court in an early case decided that a complaint against a city and its officers which sought to enjoin payment of a municipal certificate of indebtedness held by a third party was demurrable on the ground of defect of parties because the holder of the certificate was not joined,<sup>704</sup> the court in a recent case<sup>705</sup> refused to reverse an order enjoining city officials from performing an illegal contract concluded by them with a third party where neither the city nor the third party were made defendants and the case was tried "without any objections to the complaint or as to the parties."<sup>706</sup> The court pointed out that the third party was not an *indispensable* party since his rights against the city were not in issue.<sup>707</sup> Although the court did not cite the previous case, the two cases seem to be perfectly consistent because in the previous case the issue was raised below on demurrer and because there the city was made a party and only the third party not joined.<sup>708</sup> Of course, even where the municipality and the third party are made defendants in the injunction suit the issues of quasi-contractual liability may remain to be settled in an independent action.<sup>709</sup>

Finally it may be mentioned that it has been held that at least under the limited circumstances of a proceeding in rem the action for injunction may be commenced by *quasi-intervention*.<sup>710</sup>

703. Consolidated School District v. Christison, 167 Minn. 45, 208 N. W. 409 (1926).

704. Graham v. Minneapolis, 40 Minn. 436, 42 N. W. 291 (1889).

705. Williams v. Klemmer, 177 Minn. 44, 224 N. W. 261 (1929).

706. *Id.* at 48, 224 N. W. at 262.

707. *Id.* at 48, 224 N. W. at 262; see also Grannis v. Commissioners, 81 Minn. 55, 83 N. W. 495 (1900).

708. Apparently the *Graham* case stands merely for the proposition that the third party was a necessary not an indispensable party, see the explanation in Consolidated School District v. Christison, 167 Minn. 45, 48, 208 N. W. 409, 410 (1926).

709. See the litigation which reached the Supreme Court in the two cases of Collier v. St. Paul, 223 Minn. 376, 26 N. W. 2d 835 (1947), and St. Paul v. Dual Parking Meter Co., 229 Minn. 217, 39 N. W. 174 (1949).

710. State v. Werder, 200 Minn. 148, 273 N. W. 714 (1937).



*Conclusion.*

The previous study of the existing system of review of administrative action by means of the extraordinary remedies of mandamus, certiorari, prohibition and quo warranto and its supplementation by means of the injunction and declaratory judgment shows the working of the forces of tradition and the tenacity of the out-dated writ system at its worst. Although the Supreme Court of Minnesota has succeeded admirably in welding the incompatible elements into a coherent and consistent pattern, the total structure still has too much resemblance to a labyrinth in which the unwary will get lost hopelessly and even the experienced guide will occasionally take a wrong turn. Thus, for example the decision whether to proceed by certiorari or mandamus or injunction will depend on the right guess whether the administrative action in question will be qualified as quasi-judicial, quasi-legislative or ministerial, whether or not the aggrieved party was technically a party, whether the desired result is phrased in positive or negative terms, and whether matters outside the record will or will not come in issue. The decision whether the writ quo warranto or the injunction will be appropriate will depend on the right guess whether a position is an office or public employment and whether the challenged abuse of official authority amounts to misuser or is mere misconduct.

The previous investigation however shows also patently that there is no need to preserve the status quo and that it would be comparatively easy to consolidate all means of judicial review of administrative action, *except those based on habeas corpus or special statutory provision* into one uniform proceeding for (judicial) relief against administrative action, without upsetting the established fabric of the relationship between courts and administrative agencies.

- 1) Such proceeding should be by *action* in the district courts and by *petition* in the Supreme Court, the Supreme Court taking jurisdiction only where urgency in the public interest is at stake or no factual issues are involved.
- 2) Such proceeding should not invade the legitimate sphere of administrative discretion.
- 3) Except where constitutionally required such proceeding should not try or re-try issues which should form, should have formed or

have formed the subject of an administrative determination and record, but should permit full trial of issues which do not and could not appear on the record or are not subject to be determined by formal administrative hearing.

4) Such proceeding should terminate in relief as is deemed to be appropriate under the circumstances and may consist either in a declaratory order or in an order which either enjoins certain conduct or commands the administrative agency to take a definite action including the holding of a hearing or remands a matter which has been the subject of a hearing and formal determination to the administrative agency for new consideration in conformity with the judicial opinion.

5) Such action or petition for relief finally should be limited to a certain time interval in cases where the administrative determination was made after a hearing and resulted in a formal order.

6) While settled principles regarding standing and ripeness should be preserved, the irrational and ill defined requirement of the consent by the attorney general to an action by a private party should be eliminated in toto.