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John A. Bauman

*Indiana University School of Law*

Stefan A. Riesenfeld

*University of Minnesota School of Law*

Richard C. Maxwell

*University of North Dakota School of Law*

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

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

### I

#### PURPOSE AND SCOPE OF THE STUDY

JUDICIAL CONTROL of administrative action in Minnesota as well as in the other states, in the absence of special statutes, has been accomplished until recently by means of the so-called extraordinary legal remedies which stem from the "prerogative writs" of habeas corpus, mandamus, quo warranto, prohibition and certiorari,<sup>1</sup> supplemented by the equitable remedy of the injunction.<sup>2</sup>

The interrelation of these various remedies, their availability and function as well as the choice of the appropriate remedy in a particular case has confronted the practitioners of the various states with a host of perplexing problems. The situation varies

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\*Professor of Law, University of Minnesota.

\*\*Assistant Professor of Law, University of New Mexico.

\*\*\*Associate Professor of Law, University of North Dakota.

1. About the history of the prerogative writs see 1 Holdsworth, *History of English Law* 226-31 (6th rev. ed. 1938), Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*, 18 *Can. B. Rev.* 10 and 172 (1940); Goodnow, *The Writ of Certiorari*, 6 *Pol. Sci. Q.* 493, 501 (1891), Jenks, *The Prerogative Writs in English Law*, 32 *Yale L. J.* 523 (1923), Jenks, *The Story of Habeas Corpus*, 18 *L. Q. Rev.* 64 (1902). The standard but somewhat antiquated treatises on the subject are: High, *A Treatise on Extraordinary Legal Remedies* (1896), Short, *Informations, Mandamus and Prohibition* (1st Am. ed., Heard, 1889), Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* (2d ed. 1901), Merrill, *Law of Mandamus* (1892).

2. About the development of the injunction as a means of judicial review see Simpson, *Fifty Years of American Equity*, 50 *Harv. L. Rev.* 171, 229 (1936).

greatly from state to state<sup>3</sup> and again shows peculiar features with reference to the regular federal courts apart from those of the District of Columbia.<sup>4</sup>

The shortcomings of this condition have become increasingly disturbing as the range of the governmental functions exercised by administrative action has increased. As a result the Bar Associations and legislatures of a number of states have focused attention on the problem of finding a means to obtain judicial review of administrative action or inaction and have attempted to simplify and unify the procedure.<sup>5</sup>

The Minnesota Bar Association, in the course of its annual meeting in 1946, adopted the following resolution

"BE IT RESOLVED, That the Minnesota State Bar Association favors the passage by the legislature of an act abolishing the writs of certiorari, and review, mandamus, and prohibition and substituting therefore a simple practice act based upon a petition and order."<sup>6</sup>

Again the Report of the Committee on Administrative Law adopted by the State Bar in 1948 referred to the desirability of a "uniform and simple procedure for judicial review in contested cases."<sup>7</sup>

The purpose of the present study is to investigate the present status of the availability and scope of judicial review by means of

3. For noteworthy articles and studies dealing with the problem in other states see Brown, *The Use of Extraordinary Legal and Equitable Remedies To Review Executive and Administrative Action in Massachusetts*, 21 B. U. L. Rev. 632 (1941), 22 B. U. L. Rev. 55 (1942), McGovney, *Administrative Decision and Court Review thereof, in California*, 29 Calif. L. Rev. 110 (1941), New York State Constitutional Convention Committee, *Judicial Review of State Administrative Decisions*, 9 Problems Relating to Judicial Administration and Organization, c. 6 (1938), Report of the Administrative Law Committee, 45 Pa. B. A. Rep. 344, 375 (1939), Notes, *Administrative Law: Scope of Trial de Novo in Mandamus Proceedings To Review Decisions of State Administrative Body*, 31 Calif. L. Rev. 436 (1943), *Administrative Adjudication in California and Its Review by the Writ of Certiorari*, 25 Calif. L. Rev. 694 (1937), *Judicial Control of Administrative Agencies in New York*, 33 Col. L. Rev. 105 (1933)

4. In the federal courts, except in the District of Columbia, the remedies of certiorari and mandamus have a much more restricted scope of application than in most state courts. See, e.g., *Degge v. Hitchcock*, 229 U. S. 162 (1913) (certiorari), *Truth Seeker Co. v. Durning*, 147 F. 2d 54 (2d Cir. 1945) (mandamus), *Kohlman v. Smith*, 71 F. Supp. 73 (W.D. Pa. 1947) (mandamus)

5. Excellent general information about the activities of the various states in relation to reform of various aspects of administrative procedure can be obtained from Byse, *Administrative Procedure Reform*, 97 U. of Pa. L. Rev. 22 (1948), and from the Symposium on State Administrative Procedure 33 Iowa L. Rev. 193 (1948)

6. 1946 Proceedings of the Minn. State Bar Ass'n 8 (June 6, 1946)

7. 1948 Proceedings of the Minn. State Bar Ass'n 17 (June 24, 1948)

the extraordinary remedies in Minnesota with the view of exposing possible shortcomings of the system and determining what remedial measures are needed.

## II

### HISTORY OF THE MINNESOTA STATUTES PERTAINING TO THE EXTRAORDINARY REMEDIES IN GENERAL

The extraordinary remedies of today are not entirely identical with the original prerogative writs. A considerable layer of statutory regulation has accumulated which should be briefly discussed before turning to the present day scope of the remedies.

The statutory development commenced in England prior to the American Revolution. The ancient writ of quo warranto probably was subjected to the greatest change. The original writ, which was cumbersome and had many undesirable effects for the crown, fell into an early disuse, although it had served as one of the main weapons of the crown to prevent a dispersal of its powers of government through the claim of franchises by barons or boroughs.<sup>8</sup> It was superseded by a speedier remedy called the "Information in the Nature of a Quo Warranto." This remedy served the same purpose as the original writ,<sup>9</sup> and was, for instance, resorted to in 1683 to accomplish a cancellation of the corporate charter of the Massachusetts Bay Colony.<sup>10</sup> In 1711 the "Information in the Nature of a Quo Warranto" was regulated and extended to private relators by a statute which also made certain provisions with respect to the writ of mandamus.<sup>11</sup> Since the American law adopted the common law writs in the form thus modified by the pre-revolutionary statutes the solution of some present day questions

8. Cf. Jenks, *The Prerogative Writs in English Law*, 32 Yale L. J. 523, 527 (1923).

9. For a discussion of this development, see 3 Bl. Com. \*363, Jenks, *supra* note 8.

10. Cf. 3 Osgood, *The American Colonies In the Seventeenth Century* 331 (1907); Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 Minn. L. Rev. 103, 135 (1949). Actually the final cancellation was not accomplished by the Information in the Nature of a Quo Warranto but by use of the writ of scire facias in chancery. The reason was that no proper service of the quo warranto could be perfected. Cf. *Calendar of State Papers Col. Ser., Am. and West Indies 1681-1685*, p. 631 (1898). For the judgment of the Chancery see 4 Coll. Mass. Hist. Soc. vol. 2,246 (1852). For details about the writ of scire facias see 2 Archbold's Practice 96 (1838), 2 Wm. Saunder 72p (1681).

11. 9 Anne c. 20.

is still predicated upon their effects.<sup>12</sup>

The statutory development of the regulation of the writs in Minnesota commences with the Act concerning Courts of Record passed by the Legislative Assembly of the Territory of Minnesota shortly after its organization.<sup>13</sup> This statute provided

"Sec. 2 That the supreme court shall have power to issue writs of quo warranto, mandamus, procedendo, prohibition, error, super-sedeas, scire facias, injunction, certiorari, and all other manner of process which shall or may be necessary for the full and perfect administration of right and justice throughout the Territory

Sec. 11 The said (District) courts in term time, and the judges thereof in vacation, shall have power to award throughout the Territory, returnable to the proper county, writ of injunction, ne exeat, and all other writs or process which may or shall be necessary to the perfect exercise of the powers with which they are vested, and the due administration of justice."

For the history of these provisions it may be mentioned that they amount to a slight modification of the corresponding provisions of the former Territory of Wisconsin, first enacted in 1836,<sup>14</sup> which in turn were borrowed with adaptations, partly from Michigan (with respect to the writs issuing out of the supreme court)<sup>15</sup> and partly from Illinois (with respect to the writs issuing out of the district courts)<sup>16</sup>

In 1851 the Territorial Laws of Minnesota underwent their first great revision. Since the revisors had less than sixty days time to complete their task<sup>17</sup> they relied heavily on other sources, as comparison indicates.

The power of the supreme court in regard to the writs was stated in the following form

"The Supreme Court shall have power to issue writs of error, certiorari, mandamus, prohibition and all other writs and processes, not especially provided for by law, to all courts of inferior jurisdiction, to corporations and to individuals, that shall be necessary to the furtherance of justice and the execution of the law"<sup>18</sup>

12. *See, e.g.*, the learned discussion of Justice Elliot in *State ex rel. Young v. Village of Kent*, 96 Minn. 255, 104 N. W. 148 (1905)

13. Minn. Terr. Acts 1849, c. 20, p. 55.

14. Wis. Terr. Acts 1836, No. 9, §§ 2 and 7, p. 23. Incorporated with slight modification in Terr. of Wis. Rev. Stat. 1839 p. 196.

15. Mich. Terr. Rev. Laws 1827, § 2, p. 118. It may be observed that this Michigan section itself succeeded a similar section in a Michigan statute of 1820, 1 Mich. Terr. Laws 1805-1821, p. 714. The two Michigan provisions were modeled closely after corresponding provisions in Ohio statutes of 1816 and 1824, 14 Ohio Acts 1816, c. 78, § 3, p. 310 and 22 Ohio Acts 1824, § 3, p. 50.

16. Ill. Rev. Laws 1833, § 19, p. 147 (incorporating an act of 1829).

17. See "Advertisement," Minn. Terr. Rev. Laws 1851.

18. Minn. Terr. Rev. Laws 1851, c. 69, art. 1, § 5.

It is revealing of the technique of the compilers to note that this section constitutes a combination of the corresponding provisions contained in the Wisconsin statutes and the Massachusetts Revision of 1835.<sup>19</sup>

The corresponding new Minnesota section with respect to the district courts<sup>20</sup> was a reenactment of the provision of 1849 quoted above.

In addition, the Revision contained detailed provisions with respect to the writ of mandamus,<sup>21</sup> the writ of prohibition,<sup>22</sup> and the writ of habeas corpus.<sup>23</sup> In tracing the sources of these sections comparison shows that the regulation of prohibition and habeas corpus came from the Revised Statutes of Wisconsin of 1849,<sup>24</sup> while the portion on the writ of mandamus was a verbatim copy of the proposed draft of the New York Code of Civil Procedure of 1850.<sup>25</sup>

Probably the most interesting feature of the Revised Laws of 1851 in this connection was the express abolition of writs of scire facias, quo warranto and the proceeding by information in the nature of quo warranto and their replacement by civil "actions to vacate charters and letters patent, and to prevent usurpation of an office or franchise"<sup>26</sup> in accord with the proposed draft of the New York Code Commissioners<sup>27</sup> and the Code amendment of 1849<sup>28</sup> from which the provisions were copied verbatim.

The Revision also contained certain provisions in regard to injunctions which again came from the Wisconsin Revision of 1849.<sup>29</sup> In 1853, however, the chancery side of the district courts was abolished,<sup>30</sup> and as a result the Revision of 1866 repealed the

19. Mass. Rev. Stat. 1835, c. 81, § 5, Wis. Rev. Stat. 1849, c. 82, § 5.

20. Minn. Terr. Rev. Laws 1851, c. 69, art. 2, § 4.

21. Minn. Terr. Rev. Laws 1851, c. 83, §§ 3 ff.

22. Minn. Terr. Rev. Laws 1851, c. 83, §§ 18 ff.

23. Minn. Terr. Rev. Laws 1851, c. 83, §§ 24 ff.

24. Wis. Rev. Stat. 1849, c. 125, §§ 9 ff. (prohibition), *id.* at c. 124 (habeas corpus). The Wisconsin provisions relating to habeas corpus were originally enacted in 1838. Wis. Terr. Rev. Laws 1839, p. 219. In turn the Wisconsin provisions relating to both prohibition and certiorari were copied with minute changes from the New York Rev. Stat. 1829, pt. 3, c. 9, art. 3, §§ 61 ff. and art. 2, §§ 21 ff.

25. N. Y. Code of Civil Procedure, Comm'r Report 1850, pt. 3, tit. 1, c. 3, p. 537

26. Minn. Rev. Stat. 1851, c. 80.

27. N. Y. Code of Civil Procedure, Comm'r Report 1850, pt. 2, tit. 11, c. 9, p. 437

28. N. Y. Laws 1849, c. 438, pt. 2, tit. 13, c. 2, p. 697

29. Compare Minn. Rev. Stat. 1851, c. 94, § 42, p. 466 with Wis. Rev. Stat. 1849, c. 84, § 95, p. 425.

30. Terr. of Minn. Sess. Laws 1853, c. 1, § 1.

existing provisions relating to injunctions and replaced them<sup>31</sup> with the corresponding section of the New York Code of Civil Procedure of 1851,<sup>32</sup> supplemented by a section,<sup>33</sup> the substance of which had been a rule of court until that date.<sup>34</sup>

The subsequent territorial period brought only minor changes. The most important one was probably the addition of the words "or office" to "court and party" in the list of persons against whom a writ of prohibition would lie.<sup>35</sup>

The constitution of 1858, adopted as a consequence of the acquisition of statehood, redefined the jurisdiction of the supreme court by confining it to appellate jurisdiction except "in such remedial cases as may be prescribed by law" and by expressly abolishing any trial by jury.<sup>36</sup> This change and subsequent needs in the judicial administration, together with mere improvements in draftsmanship, produced a number of modifications in the wording of the pertinent statutory sections from their original version to their present form.<sup>37</sup> While it would serve no purpose to labor all details, a few of the major developments are worthy of note.

The jurisdiction of the district courts in mandamus was made exclusive in 1866 except in cases where the writ was directed to one of the district courts or a judge thereof.<sup>38</sup> In 1869 the concurrent jurisdiction of the supreme court was temporarily restored<sup>39</sup> but abolished again in 1881.<sup>40</sup>

The Revision of 1866 deleted<sup>41</sup> the section in the Revision of 1851 which had abolished<sup>42</sup> the writs of quo warranto and scire facias and the information in the nature of quo warranto, and

31. Minn. Rev. Stat. 1866, c. 66, tit. 11, §§ 181 ff.

32. N. Y. Code of Civil Procedure 1851, tit. 7 c. 3, p. 175.

33. Minn. Rev. Stat. 1866, c. 66, tit. 11, § 186.

34. Minn. Gen. Stat. Prepared by the Comm'r Appointed to Revise the Statutes of the State 1865, c. 66, tit. 11, § 186, marginal note, p. 577

35. Minn., Amendments to the Revised Statutes of the Territory of Minnesota, 1852, § 64.

36. Minn. Const. Art. VI, § 2.

37. These pertinent sections are 2 Minn. Stat. § 480.04 (writs by the supreme court), § 484.03 (writs by the district courts) c. 606 (certiorari) c. 586 (mandamus), c. 587 (prohibition) c. 589 (habeas corpus), c. 556 (action to prevent usurpation, etc.) c. 585 (injunctions) (1945)

38. Minn. Rev. Stat. 1886, c. 80 § 12. Prior to that time the supreme court possessed jurisdiction concurrently with the district courts, except that there could be no trial by jury in the supreme court. *Crowell v Lambert*, 10 Minn. 369 (1865)

39. Minn. Gen. Laws 1869, c. 79, p. 95.

40. Minn. Gen. Laws 1881, c. 40, § 1, amended, Rev. Stat. 1905, § 4567 See *State v. Burr*, 28 Minn. 40, 8 N. W. 899 (1881), *State ex rel. Railroad and Warehouse Comm. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 293, 37 N. W. 782, 783 (1888)

41. Cf. Minn. Rev. Stat. 1866, c. 79.

42. See *supra* text to note 26.

thereby "revived" these common law remedies in the district courts as the state courts of general jurisdiction and successors of the King's Bench.<sup>43</sup> In 1876 a statute specifically conferred on the supreme court jurisdiction over quo warranto proceedings<sup>44</sup> and the Revision of 1905 contained the express legislative confirmation of the cases which had held that the district courts likewise possessed such jurisdiction.<sup>45</sup> The actions to vacate charters etc. and to prevent usurpations which had been designed to replace the writ of quo warranto were, however, retained.

The district courts obtained jurisdiction in certiorari in 1881.<sup>46</sup> Some rules regulating the practice pertaining to this remedy were added in 1909.<sup>47</sup>

These statutory provisions give only meager information on the actual functions and scope of these remedies, particularly as to their use in controlling the administrative action. That understanding can be obtained only from an analysis of the existing case law.

### III.

#### MANDAMUS

##### A.

#### Type of Administrative Action Subject to Control by Mandamus

The Minnesota Statutes provide.

"The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an

43. State *ex rel.* Whitcomb v. Otis, 58 Minn. 275, 59 N. W. 1015 (1894), see State *ex rel.* Young v. Village of Kent, 96 Minn. 255, 256, 104 N. W. 948 (1905).

44. Minn. Gen. Laws 1876, c. 58, § 1, discussed and held to be constitutional in State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 224, 41 N. W. 1020, 1025 (1889).

45. Minn. Rev. Stat. 1905, § 92. Theoretically the deletion by the Revision of 1866 of the particular section in the Revision of 1851 which abolished the writs of quo warranto and scire facias revived also the latter writ. It could, however, be argued that express legislative recognition of the revival of quo warranto by the above mentioned amendments of 1876 and 1905 thereby impliedly abolished scire facias. At any rate, the latter writ seems to be obsolete in Minnesota. Its main fields of application were the revival of judgments, recovery on bailbonds, enforcement of liability for costs, cancellation of letters patent and corporate charter, etc., which are now taken care of by specific statutory provisions or ordinary civil actions.

46. Minn. Gen. Laws 1881, Extra Sess., c. 8, p. 24. An amendment of this section made in 1895 inadvertently omitted the reference to certiorari, Minn. Laws 1895, c. 25, p. 145, but it was re-inserted in the next session, Minn. Laws 1897, c. 7, p. 7.

47. Minn. Laws 1909, c. 410.



office, trust or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion."<sup>48</sup>

This section, which is the result of the endeavor of the New York Commissioners on Practice and Pleading to codify the existing law,<sup>49</sup> circumscribes, in perhaps not too fortunate terms, the types of action which are subject to control by mandamus.

1. *Necessity of a pre-existing public, or not wholly private, legal duty to perform an act.*

The terms of the statute indicate that in Minnesota, as under the common law in general, mandamus is the appropriate remedy only for the enforcement of legal duties which possess certain, more or less well defined, characteristics and properties.

Mandamus, accordingly, lies only for the enforcement of legal duties which exist independent of, and prior to, the remedy. It is not "a creative remedy", it neither establishes new duties nor commands the performance of an act which is unauthorized in the absence of the writ.<sup>50</sup> It will not lie to compel an act which would not be lawful without such command<sup>51</sup> nor to enforce a moral or incomplete obligation.<sup>52</sup>

The words of the controlling section likewise make it plain that not every pre-existing legal duty is enforceable by mandamus but that, in addition, such duty must follow from the existence of a particular legal status or relation of the person upon whom it rests.

Thus mandamus is the appropriate remedy to enforce, under proper circumstances, a public or official duty to act. But, as the

48. 2 Minn. Stat. § 586.01 (1945).

49. See *supra* text to note 25.

50. See dictum by Justice Elliott in *Lauritsen v. Seward*, 99 Minn. 313, 323, 109 N. W. 404, 409 (1906). The case involved the constitutionality of a statute which granted the supreme court original jurisdiction upon information to direct compliance with the laws regulating primary elections. The court held that the procedure thus provided amounted in substance to a mandamus and that the state constitution confined the original jurisdiction of the supreme court in mandamus only to cases in which mandamus was proper by the rules of the common law, without permitting statutory enlargement such as was here attempted.

51. See State *ex rel.* *Hathorn v. United States Express Co.*, 95 Minn. 442, 445, 104 N. W. 556, 558 (1905) (denying a writ of mandamus against a common carrier by which relator sought to compel the acceptance of packages containing materials violative of the state antilottery law).

52. State *ex rel.* *Ahlstrom v. Bauman*, 194 Minn. 439, 260 N. W. 523 (1935) (mandamus will not lie on the information of teachers for the payment of certain sums out of excess taxes as "salary dividends" where agreement with board of education authorized reductions of salary whenever they became necessary in the opinion of the board).

terms corporation, person, trust and station used by the statute indicate, mandamus has also been considered to be the proper remedy in cases in which the duty to perform an act which is sought to be enforced cannot be classified strictly as one imposed by public law.<sup>53</sup> Particularly in the case of domestic corporations, compliance by their officers with their statutory or charter duties toward the corporation or individual members has been enforced by mandamus in a variety of cases.<sup>54</sup> Apparently, the chief basis for this extension is the feeling that such duties are not strictly speaking a purely private matter because domestic corporations are "subject to the visitatorial powers of the state."<sup>55</sup> As a consequence of this reasoning, the Minnesota Supreme Court has been unwilling to accord the remedy of mandamus for "the regulation of the purely internal affairs of a foreign corporation"<sup>56</sup> or of an unincorporated domestic organization.<sup>57</sup> The court, however, has granted relief by mandamus against foreign corporations and domestic unincorporated associations for the enforcement of their duties to the public or in the public interest, as is the case of

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53. For a good judicial discussion of the availability of mandamus for the enforcement of other than public duties, see the leading case of *Bassett v. Atwater*, 65 Conn. 355, 32 Atl. 937 (1895).

54. Mandamus has been considered the proper remedy for the enforcement of the statutory or common law right to inspect corporate books and records, *State ex rel. Humphrey v. Monida & Y. Stage Co.*, 110 Minn. 193, 124 N. W. 971, 125 N. W. 676 (1910); *State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n*, 200 Minn. 1, 273 N. W. 603 (1937), *State ex rel. Gustafson Co. v. Crookston Trust Co.*, 222 Minn. 17, 22 N. W. 2d 911 (1946), or for the right of a member of an incorporated benefit association to be placed on the pension roll, *McKenzie v. Minneapolis Police Relief Assn.*, 181 Minn. 444, 232 N. W. 797 (1930). The law in other American jurisdictions is similar, see Note, 4 Minn. L. Rev. 296 (1920), Ballantine, *Corporations* 386 (rev. ed. 1946). In England mandamus lies apparently only if the right to inspection or delivery of corporate books flows from a particular public interest due to the public character of the corporation, while the enforcement of the statutory rights of a shareholder in a strictly private company is left to an order in the nature of a mandatory injunction, *cf. R. v. Barnes Borough Council, ex parte Conlan*, 3 All Eng. 226 (K.B. 1938), *with Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 708 (C.A.). See also, Palmer, *Company Law* 226 (18th ed., Topham, 1948). The practical significance seems to be slight, except that mandamus is still a discretionary remedy, *Crown Proceedings Act, c. 44, § 40 (5)* (1947).

55. *State ex rel. Lake Shore Tel. & T. Co. v. De Groat*, 109 Minn. 168, 176, 123 N. W. 417, 419 (1909), *State ex rel. McGill v. Cook*, 119 Minn. 407, 411, 138 N. W. 432, 434 (1912).

56. *State ex rel. Lakeshore Tel. & T. Co. v. De Groat*, 109 Minn. 168, 123 N. W. 417 (1909) (mandamus will not be granted to compel secretary of foreign corporation to call special meeting of stockholders for amendment of the articles of incorporation).

57. *State ex rel. McGill v. Cook*, 119 Minn. 407, 138 N. W. 432 (1912) (mandamus on relation of treasurer of unincorporated welfare organization denied where remedy was sought to compel other officers to sign order for payment of sum voted by majority of members).

common carriers or other public utilities.<sup>58</sup>

Particularly in the case of railroads, domestic or foreign, the court has followed the general rule that "a railroad is a quasi public corporation, and all its rights and powers are conferred upon it not merely for the benefit of the corporation itself, but also in trust for the benefit of the public, and whenever it neglects or fails to perform any of its corporate duties, it may generally be compelled to perform the same by an action of mandamus."<sup>59</sup> The limits of the general rule are, however, somewhat obscure.<sup>60</sup>

## 2. *Necessity of a clear and present legal right to the performance of such duty.*

It is frequently stated that mandamus does not lie unless there exists a clear and present legal right to the performance of the duty. This implies a) that the relator must have a legally recognized interest in the enforcement of the duty, b) that the enforcement of the duty must be feasible and not subject to unperformed conditions and c) that the performance of the duty must not involve the exercise of discretion or a judicial function. The statute recognizes expressly the first and third of these requirements.<sup>61</sup>

### a. *Beneficial interest of the relator in the performance of the duty.*

In contrast to the law of some other jurisdictions,<sup>62</sup> in Minne-

58. State *ex rel.* Hilton v. Four Lakes Telephone Co., 141 Minn. 124, 169 N. W. 480 (1918) (mandamus proper remedy to enforce order of Railroad and Warehouse Commissioner directing copartnership engaged in furnishing telephone service to public to install facilities to relator), see also State *ex rel.* Railroad & Warehouse Com. v. Adams Express Co., 66 Minn. 271, 68 N. W. 1085 (1896), where the court decided that a writ of mandamus ordering a joint stock association of New York, operating as a common carrier in Minnesota, to print certain schedules required by the Railroad & Warehouse Commission could be validly served on its local agent without discussing the propriety of the remedy. Of course, *a fortiori*, mandamus lies in such cases against domestic public utilities corporations. State *ex rel.* Mason v. Consumers Power Co., 119 Minn. 225, 137 N. W. 1104 (1912)

59. State *ex rel.* City of St. Paul v. Minnesota T. Ry. Co., 80 Minn. 108, 114, 83 N. W. 32, 34 (1900) The rule has been applied consistently to enforce the duties of railroads to construct or maintain certain structures for the purpose of not interfering with public traffic and safety, see *infra* note 101.

60. In State *ex rel.* Becker v. Brotherhood of American Yeomen, 111 Minn. 39, 126 N. W. 404 (1910), the court held that a writ of mandamus to direct a foreign fraternal association to restore relator to membership could properly be served on the State Insurance Commissioner, but unfortunately it refrained from intimating whether mandamus was the proper remedy in such case.

61. 2 Minn. Stat. § 586.01 (1945) " it [the writ] cannot control judicial discretion," and § 586.02 "The writ shall issue on the information of the party beneficially interested."

62. See Goodnow, *Interest in Mandamus Cases*, 8 Pol. Sci. Q. 48 (1898), Note, *Mandamus—Right of Individual to Enforce a Public Right*, 43 Col. L. Rev. 124 (1943)

sota the statutory requirement that the relator be "beneficially interested" in the enforcement of the duty has not been narrowly construed, particularly in the case of a strictly public duty. In *State v. Weld*<sup>63</sup> the supreme court affirmed a judgment directing peremptory writs of mandamus against the register of deeds and the auditor of Murray County to remove their offices to the county seat, as required by law. The court held that relators, as freeholders, taxpayers and legal voters of the county, were sufficiently interested to be entitled to move as relators. Mr. Justice Mitchell, speaking for the court, stated the controlling principles as follows

"Who is 'beneficially interested,' so as to entitle him to file an information, depends on the object to be obtained. When *mandamus* is resorted to to enforce a private right, the person interested in having the right enforced must be the relator. But the great weight of American authority is that where the object is, as in these cases, to enforce a public duty, not due the government as such, any private person may move to enforce it."

While, on at least two occasions,<sup>64</sup> the court has explicitly reaffirmed these broad principles by quoting them with approval, it has in some instances been curiously reluctant to afford the remedy of mandamus to a relator who could not show an individual right, though of public nature, corresponding to the statutory duty. In fact, in both cases in which the court quoted Mr. Justice Mitchell's language, it denied the writ of mandamus. In one it found that a public duty such as relied upon by relators did not actually exist.<sup>65</sup> In the other the court denied the relief because other persons more directly interested than relators had an adequate remedy.<sup>66</sup> The latter decision is particularly interesting. Relator, a qualified woman voter, prayed for mandamus to compel the county board of Renville county to prepare a jury list from the qualified voters of the county without discrimination against women. The district court entered judgment against the county board. The supreme court reversed. It agreed with the lower court that such discrimination was unconstitutional, but held that "the question remains

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63. 39 Minn. 426, 40 N. W. 561 (1888).

64. *State ex rel. Schwartzkopf v. City of Brainerd*, 121 Minn. 182, 141 N. W. 97 (1913); *State ex rel. Passer v. Renville County Board*, 171 Minn. 177, 213 N. W. 545 (1927).

65. *State ex rel. Schwartzkopf v. City of Brainerd*, 121 Minn. 182, 141 N. W. 97 (1913), denying relators, who were citizens of Brainerd, relief in the form of a writ of mandamus by which they sought to compel the city council to hold a hearing for the purpose of preferring charges against certain city officers. The court held that the city charter merely authorized, but did not require, such hearings.

66. *State ex rel. Passer v. Renville County Board*, 171 Minn. 177, 213 N. W. 545 (1927).

whether any person, as the self-appointed representative of a class, can maintain a suit such as this."<sup>67</sup> The court then quoted the principle laid down by Mr. Justice Mitchell, but added "The distinction between cases where a private person may act as relator to enforce a public duty and where he must show an interest before he can obtain a writ has not been drawn very clearly" It conceded that "if the county board neglected or refused to prepare any jury lists at all, there would be a failure to perform a duty owing to the public and probably any citizen, without showing a special interest, would have the right to compel performance of the duty" But in the instant case, where such lists had been prepared, persons having trials by a jury of that county had a right to move to quash the panel. As a consequence, the court held "that mandamus is not the proper remedy here, because persons whose interests may be affected by the action of the grand or petit juries of Ren-ville county have 'a plain, speedy, and adequate remedy in the ordinary course of law' "

The most important application of the doctrine of *State v. Weld* is found in those cases permitting taxpayers to enforce by mandamus the assessment, levy and collection of taxes on property properly subject thereto.<sup>68</sup>

b. *Possibility of performance: absence of unperformed conditions.*

Even where the relator has an individual interest or where no such interest is required, mandamus will not lie if the performance of the duty is impossible or subject to unperformed conditions precedent. A good example of the application of the rule barring the remedy of mandamus in case of impossibility or unperformed conditions is found in *State v. Davis*.<sup>69</sup> In that case a school teacher tried to enforce by mandamus an order for \$60 drawn by the district school board on the treasurer to pay for back salary. The affidavit alleged that the school district treasurer had in his hands \$43 and that the county treasurer held, further, \$25.90 belonging to the school district and duly apportioned by the county auditor. The writ prayed for commanded the school district treasurer to collect the outstanding money from the county treasurer and then

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67 171 Minn. 177, 180, 213 N. W. 545, 546 (1927)

68. *State v. Archibald*, 43 Minn. 328, 45 N. W. 606 (1890), *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898), *State ex rel. Oliver Min. Co. v. City of Ely*, 129 Minn. 40, 151 N. W. 545 (1915). Another instance of the granting of mandamus without the existence of an individual right in relator is *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 8 N. W. 2d 227 (1943), ordering county commissioners to redistrict the county on petition of a resident.

69. 17 Minn. 429 (1871)

to pay the order for \$60 to relator. The supreme court affirmed an order of the district court denying the writ on the narrow technical ground that, since relator had not alleged that he had requested the treasurer to collect the outstanding sum, there was no violation of a duty in this respect entitling relator to a writ of mandamus for its enforcement and that, until the money was thus obtained, mandamus could not lie for the full amount as prayed because the treasurer lacked sufficient funds.

The rule that relator is not entitled to a writ of mandamus for the purpose of compelling an official to perform an act owed to him individually without a previous demand and refusal was also reiterated in a case involving the certification of the amount required for the redemption from a tax sale.<sup>70</sup> But the rule has not been applied in cases where the statutory duty was fixed and owed to every resident in the county. Thus in the above mentioned case of the failure of certain county officials to keep their office at the county seat, the court held, "It was not necessary for the relators to precede their application for a *mandamus* with a demand on respondents to move their offices to the county-seat. The law itself pointed out their whole duty. It was purely a public duty, and there was no particular person upon whom devolved either the duty or the right to demand its performance. The statute was a standing demand, and the omission of the respondents to obey was a refusal."<sup>71</sup>

The principle that lack of funds might defeat the writ of mandamus for payment or performance of an act involving expenditures has been applied in other cases, and the supreme court has held that the nature of the writ justifies the requirement that the writ must, in appropriate cases, expressly allege that the officer or board has sufficient funds.<sup>72</sup> But the court has also held that where the statute imposed the burden upon public officials to publish annually certain statements they were presumed to be able to perform such governmental duty and had the burden of proving that the situation was so unusual or extraordinary as to

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70. *State v. Schaack*, 28 Minn. 358, 10 N. W. 22 (1881). The court based its denial of the writ upon the additional ground that relator, as a matter of substantive law, had no right of redemption under the circumstances of the case. See also *State ex rel. Hendrickson v. Strom*, 198 Minn. 173, 269 N. W. 371 (1936) (mandamus will not lie to compel county auditor to reclassify property as homestead in the absence of timely demand).

71. *State v. Weld*, 39 Minn. 426, 428, 40 N. W. 561, 562 (1888).

72. *Powell v. Township of Carlos*, 177 Minn. 372, 225 N. W. 296 (1929) (mandamus to compel the township of Carlos in Douglas County and its officers to remove trees, hedges and shrubbery, under 1 Minn. Stat. § 160.28 [1945]).

make performance impossible.<sup>73</sup> Impossibility of performance at the time of the petition of the writ will, however, generally defeat its issuance despite the existence of a previous violation of an official duty. This is particularly the case if respondent no longer holds the office.<sup>74</sup>

Not only must such conditions be performed which make fulfillment of the duty possible, but also all other conditions upon which the existence of a clear and immediate right to the act depends. That is true both where relator fails to comply with certain conditions which a statute or ordinance specify or which the officer or agency may lawfully require,<sup>75</sup> and where the duty by statute depends on conditions to be performed by the officer or

73. *State ex rel. Phillips v. Neisen*, 173 Minn. 350, 353, 217 N. W. 371, 372 (1928).

74. *See, e.g., Olson v. Honett*, 133 Minn. 160, 166, 157 N. W. 1092, 1094 (1916) (involving mandamus to compel the town board of Lake Fremont to repair certain roads, and containing the following statement "The writ issued October 16, 1915, and was made returnable December 3, 1915.

It is certain that in this climate nothing at all could be accomplished by them prior to the expiration of their term of office had a peremptory writ issued on the return day. In this aspect it may be of importance that the action is brought against individuals whose tenure of office is limited."), *State v. Archibald*, 43 Minn. 328, 333, 45 N. W. 606, 608 (1890) (a writ of mandamus compelling defendant as assessor to assess real and personal property in a certain territory was denied because "The defendant could not have obeyed it, [as] his authority to make the assessment had ended, the books had been returned to the auditor, and he was practically out of office."). The holding of *Clark v. Buchanan*, 2 Minn. 346 (1858), that a board of canvassers after adjournment cannot be reconvened by mandamus for the correction of palpable errors, has been practically superseded by the contrary rule, based on a special statute, of *Hunt v. Hoffman*, 125 Minn. 249, 146 N. W. 733 (1914), and *Haroldson v. Norman*, 146 Minn. 426, 178 N. W. 1003 (1920).

75. *State v. Reed*, 27 Minn. 458, 8 N. W. 768 (1881) (peremptory writ of mandamus to compel warden and inspectors of the state prison to lease prison shops and grounds on relation of highest bidder denied because of his refusal to comply with certain conditions), *State ex rel. Minnesota Mutual Indemnity Co. v. Wells*, 167 Minn. 198, 208 N. W. 659 (1926) (failure to comply with statutory conditions required for certificate by Insurance Commissioner), *State ex rel. Oak Hill Cemetery Ass'n v. Harrington*, 167 Minn. 410, 209 N. W. 6 (1926) (mandamus to compel commissioner of public health of Minneapolis to issue a burial permit denied because of failure of relator to secure consent of city council for the use of the lot as a cemetery pursuant to a city ordinance), *International Harvester Co. v. Elsberg*, 197 Minn. 360, 268 N. W. 421 (1936) (mandamus to compel commissioner of highways to pay certain claims out of funds specially appropriated for that purpose denied because the controlling act required judicial determination by ordinary action of law as a condition for payment), see also *Yoselowitz v. People's Bakery, Inc.*, 201 Minn. 600, 608, 277 N. W. 221, 225 (1938) (mandamus against rating bureau to procure compensation insurance for employer under "assigned risk" statute requires prior compliance by relator with all prescribed formalities)

board itself.<sup>76</sup>

c. *Unavailability of mandamus to compel performance of duty insofar as it involves exercise of discretion or judicial function.*

By far the most important limitation flowing from the "clear-and-present-right-requirement" is the rule that mandamus is not available to compel official action *insofar* as it involves the exercise of a discretionary or judicial function or, in other words, to direct the manner of the exercise of discretion.

(1) The problem as to which acts are discretionary or judicial in nature, and therefore withdrawn from control by mandamus, has presented difficult practical and analytical questions to courts and text writers.<sup>77</sup> The question is particularly obscured by the fact that the court uses frequently, but apparently not always, the terms "discretionary" and "(quasi-) judicial" as synonymous, and that it bases its denial of the writ on three overlapping but not wholly identical reasons, *viz.* a) that the act is not of the type that can be controlled by mandamus, b) that control by mandamus in such cases would amount to a prohibited collateral attack,<sup>78</sup> c) that in a number of cases control by certiorari is available as an adequate remedy.<sup>79</sup>

For a proper analysis of the problem in the light of Minnesota case law it is necessary to distinguish two different though frequently interrelated aspects of it a) In the first place it is necessary to determine what factors and elements the agency must or may lawfully consider in making its determination or taking its

76. *State ex rel. Samuel Mathews v. Olson*, 55 Minn. 118, 56 N. W. 585 (1893) (mandamus to secure the refunding of money paid for tax certificate denied because of failure to allege in the information that the board had inquired or refused to inquire into the truth of the facts alleged, as required by statute).

77. See, particularly, Patterson, *Ministerial and Discretionary Official Acts*, 20 Mich. L. Rev. 848 (1922).

78. For decisions viewing the writ of mandamus in case of discretionary or quasi-judicial determinations as a method of collateral attack *see, e.g.*, *State ex rel. Townsend v. Board of Park Comm'rs*, 100 Minn. 150, 155, 110 N. W. 1121, 1123 (1907) (mandamus to compel park to resume control and maintenance of formally abandoned parkway denied since determination that maintenance was impracticable is conclusive and not open to attack "... in this collateral proceeding."), *Hunt v. Hoffman*, 125 Minn. 249, 255, 146 N. W. 733, 735 (1914) (mandamus to board of canvassers ordering them to reconvene and correct plain mistake does not violate "The rule which forbids collateral attack upon the determination of quasi-judicial tribunals . . ."), *see also* the language in *State ex rel. Spurck v. Civil Service Board*, 226 Minn. 253, 262, 32 N. W. 2d 583, 588 (1948), and *State ex rel. Dybdal v. State Sec. Comm.*, 145 Minn. 221, 176 N. W. 759 (1920).

79. See, for instance, *State ex rel. Jenkins v. Ernest*, 197 Minn. 599, 268 N. W. 208 (1936) (mandamus will not lie for reclassification of employees, where original classification alleged to be erroneous was subject to review by certiorari).



action. b) In the second place it is necessary to classify the function as ministerial or discretionary in light of the basis for the action or determination thus ascertained as proper or necessary. The first aspect of this *operational diagnosis* involves essentially a question of legal interpretation, while the second is primarily a question of classification or definition.

(a) The positive criteria which makes a function discretionary are not easily stated. The supreme court itself has probably given the best succinct definition "Discretion is the power or right of acting officially according to what appears best and appropriate under the circumstances."<sup>80</sup> As this definition implies, and the cases bear out, official determinations properly to be made on the basis of value judgments regarding necessity, usefulness, fitness, practicality, propriety, convenience, safety, feasibility, economic security, etc., are discretionary.<sup>81</sup> In fact the upshot of the Minnesota cases seems to be that discretionary acts are such which by the controlling law are in some respect left to the judgment of the official so long as expertise, in other than purely legal matters, is its contemplated basis. While the supreme court, in the case mentioned, has also stated that an act is considered ministerial only if nothing is left to the discretion *or judgment*,<sup>82</sup> it has, in another case, explained that a determination involving judgment merely about the legality of certain claims or transactions is not exercise

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80. *Romsdahl v. Town of Long Lake*, 175 Minn. 34, 36, 220 N. W. 166, 167 (1928) (mandamus will not be granted to compel supervisors to make a road suitable for travel, if refusal is based on use of available funds for more urgent expenditures). Conversely for the existence of a ministerial duty see *Cook v. Trovatten*, 200 Minn. 221, 225, 274 N. W. 165, 167 (1937) (a case involving tort liability but invoking the test controlling the availability of mandamus) "the duty is ministerial when it is in obedience to the mandate of legal authority and the act is to be performed in a prescribed manner, without the exercise of the officer's judgment of the propriety of the act."

81. For illustrative examples of cases holding determinations based on such considerations to be discretionary, see *State ex rel. Casmev v. Teal*, 72 Minn. 37, 74 N. W. 1024 (1898) (approval of official bond for treasurer involves discretion as to the amount of the penal sum necessary), *State ex rel. Townsend v. Board of Park Comm'rs*, 100 Minn. 150, 110 N. W. 1121 (1907) (determination to abandon parkway involves discretion as to practicability of maintenance), *State ex rel. Haney v. Clarke*, 112 Minn. 516, 128 N. W. 1008 (1910) (issuance of certificate of approval for drain involves discretion as to its proper construction in compliance with the specifications), *State ex rel. Labovich v. Redington*, 119 Minn. 402, 138 N. W. 430 (1912) (issuance of license for operation of moving picture shows in particular building involves discretionary determination as to whether character of exhibition or proposed location is not contrary to public welfare), *State ex rel. Mergens v. Babcock*, 175 Minn. 583, 222 N. W. 285 (1928) (ascertaining which bid is lowest where technical interpretation is involved is discretionary action).

82. *Romsdahl v. Town of Long Lake*, *supra* note 80.

of "discretion in the sense in which that word is used when coercive action by mandamus is resisted."<sup>83</sup> The mere necessity of ascertaining, without a value judgment, the existence or non-existence of certain facts is even less sufficient to elevate a determination based thereon into the class of discretionary or quasi-judicial acts.<sup>84</sup>

(b) Probably most difficulties are less due to the question of what constitutes a discretionary act than to the problem of whether, and how far, the controlling statute, charter, by-law, ordinance or regulation has left the official determination to expert value judgments of the indicated type. No general canon of interpretation exists. The supreme court has well summarized the situation with the statement: "The use of the words 'may' or 'shall' is not controlling; either word in a statute may be held mandatory or directory. The courts will consider the language used, the subject matter, the importance of the provisions and the object intended to be secured, and ascertain the legislative intent."<sup>85</sup> In another case the court has added a somewhat more specific rule: "The fact that the language of the act . . . is not in terms mandatory is not conclusive of the question whether the board may be compelled [to act] by mandamus. The rule is that whenever public interests or individual rights call for the exercise of a power given to public officers, the language used in conferring the power, although permissive in form, is in effect imperative."<sup>86</sup>

(2) In the application of these general principles, deductible

83. *State ex rel. Village of Chusholm v. Trask*, 155 Minn. 213, 215, 193 N. W. 121 (1923) (signing of bonds by president of village council following a resolution by village council deciding their issuance is mere ministerial act though president has to determine legality of issuance prior to his signature). See also a similar statement in *State ex rel. Morris v. Clark*, 116 Minn. 500, 502, 134 N. W. 129, 130 (1912), "Nor does it affect this question that it was the duty of the treasurer to refuse payment of warrants when he had knowledge of facts which made them illegal. Such duty did not make the payment of legal warrants other than a ministerial duty."

84. *O'Ferrall v. Colby*, 2 Minn. 180, 188 (1858) (clerk of board of supervisors may be compelled by mandamus to issue a certificate of election to relator since ". . . the simple duty of counting votes and computing numbers . . . does not require judicial knowledge. "), *State ex rel. Morrison County Agri. Asso. v. Iverson*, 120 Minn. 247, 252, 139 N. W. 498, 499 (1913) (determination which of two societies was the older and therefore entitled to a certain statutory grant-in-aid is purely ministerial and subject to control by mandamus although it was actually made on the basis of a formal hearing. The court intimated that mandamus was "probably the only remedy" without ever discussing the possibility of certiorari).

85. *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 346, 229 N. W. 313, 316 (1930).

86. *State ex rel. Skyllingstad v. Gunn*, 92 Minn. 436, 443, 100 N. W. 97, 100 (1904); see also the similar pronouncements in *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 8 N. W. 2d 227 (1943), *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 516, 20 N. W. 2d 345, 349 (1945).

from the current of Minnesota cases, it has been held that mandamus will lie to compel the execution, countersigning or delivery of contracts,<sup>87</sup> bonds,<sup>88</sup> pay warrants,<sup>89</sup> or even licenses<sup>90</sup> by an administrative officer, if either the discretionary function of their approval, allowance, issuance or grant has been exercised by another body entrusted with such function or the statute does not contemplate such action. Similarly, a treasurer may be compelled by mandamus to honor warrants properly executed by competent authority.<sup>91</sup> That the officer in question had the right and duty in these instances to ascertain whether the body vested with discretionary authority had jurisdiction in the particular case and made its determination by following the correct procedure was held to constitute no obstacle to mandamus. On the other hand mandamus was denied where the addressee of the proposed writ was himself the officer vested with discretionary powers and any other action preceding his determination was held to be merely advisory.<sup>92</sup> The fact that the legality of a claim or the correctness of a determination of a non-discretionary character by a board might have to be decided in the hearing following the grant of the alternative writ does not in itself preclude resort to this remedy<sup>93</sup> so long as the statute does not provide otherwise.<sup>94</sup>

Conversely, mandamus will not lie to enforce a legal duty if

87. *State ex rel. Benz v. District Court of Ramsey County*, 32 Minn. 181, 19 N. W. 732 (1884) (dictum)

88. *State ex rel. Minnesota Loan & Trust Co. v. Ames*, 87 Minn. 23, 91 N. W. 18 (1902), *State ex rel. Corrison v. Rogers*, 93 Minn. 55, 100 N. W. 659 (1904), *State ex rel. Village of Chisholm v. Trask*, 155 Minn. 213, 193 N. W. 121 (1923).

89. *State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 440, 18 N. W. 277 (1884) (containing the fullest judicial discussion of the subject), *State ex rel. Trebby v. Nichols*, 83 Minn. 3, 85 N. W. 717 (1901), *State ex rel. Trebby v. Vasaly*, 98 Minn. 46, 107 N. W. 818 (1906), *State ex rel. Clark v. Jack*, 126 Minn. 367, 148 N. W. 306 (1914), *State ex rel. Child v. City of Waseca*, 195 Minn. 266, 262 N. W. 633 (1935).

90. *State ex rel. Miller v. Reiter*, 140 Minn. 491, 168 N. W. 714 (1918)

91. *State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792 (1909), *State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 129 (1912)

92. *State ex rel. Haney v. Clarke*, 112 Minn. 516, 128 N. W. 1008 (1910) (certificate by city engineer that contractor complied with specifications is merely advisory)

93. *State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 129 (1912) (mandamus to compel town treasurer to honor certain warrants issued by town supervisors), see also *State ex rel. St. Paul Gaslight Co. v. McCardy*, 62 Minn. 509, 64 N. W. 1133 (1895) (mandamus to compel city comptroller to audit claim which appeared to be legal and covered by appropriate funds) The question of the legality of the claim, however, does not comprise the issue of proper performance of a contract by relator if the controlling provision requires "approval" by a public body. *State ex rel. Haney v. Clarke*, 112 Minn. 516, 128 N. W. 1008 (1910)

94. *International Harvester Co. v. Elsberg*, 197 Minn. 360, 268 N. W. 421 (1936), discussed *supra* note 74.

its actual performance necessitates a choice between individual projects, expenditures, applicants, candidates or other alternatives which can be made only on the basis of a value judgment as to comparative urgency, usefulness, fitness, etc. Accordingly, the appropriation or allotment of funds for a particular purpose or project cannot be compelled by mandamus unless the governing law has not entrusted the agency in control of the funds with any judgment of the kind indicated. For instance, a statute which "authorized and directed" the city council of Minneapolis to annually appropriate and set aside from the general fund of the city a specified sum as a contingent fund for the mayor was construed to permit the city council to reduce the sum "upon a fair and just appreciation" of all expenses to be met by the general fund, and the writ of mandamus was consequently denied.<sup>95</sup> A similar result was reached under a statute which provided that the school boards "may" provide for free transportation of school children.<sup>96</sup> Mandamus has likewise been held not to lie on the relation of individual petitioners when it was sought for the purpose of compelling public officers or boards to undertake a specific local improvement or repair work despite its reasonableness or necessity and the availability of funds covering its costs if, and insofar as, these funds were also designated to cover other local improvements that might be necessary but insufficient to take care of all of them.<sup>97</sup> Only where the expense was so trifling as to make the refusal of an appropriation arbitrary, has the writ been accorded under such

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95. *State ex rel. Ames v. City Council of Minneapolis*, 87 Minn. 156, 91 N. W. 298 (1902).

96. *State ex rel. Klimek v. School District No. 70*, 204 Minn. 279, 283 N. W. 397 (1939).

97. *State of Minnesota ex rel. Smith v. Town of Somerset*, 44 Minn. 549, 551, 47 N. W. 163, 164 (1890) (mandamus will not lie to compel town supervisors to reconstruct a bridge connecting two portions of a public highway that had been washed away by a storm in the absence of a showing "that there are funds sufficient to construct this bridge and to do whatever else may, in the reasonable judgment of the board, be needful on the town highways."); *Olson v. Honett*, 133 Minn. 160, 167, 157 N. W. 1103 (1916) (upheld demurrer to petition for alternative writ of mandamus to compel members of town board to repair and place in passable condition certain listed public roads and parts of roads in the absence of a pleading of facts ". . . which clearly negative that the repairs sought to be compelled are those which the law has left to the board to perform in such manner and at such times as its discretion and judgment might dictate."), *Romsdahl v. Town of Long Lake*, 175 Minn. 34, 220 N. W. 166 (1928) (mandamus denied in so far as it sought to compel town supervisors to make a road suitable for travel by construction of a necessary bridge, etc., although granted removal of fences and obstructions), *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N. W. 2d 345 (1945) (mandamus denied in view of the controlling statute insofar as petitioned for the improvement of a cartway).

circumstances.<sup>98</sup> Mandamus is the appropriate remedy, however, to compel a particular local improvement or repair work if, and to the extent that, the project in question is the object of a special statutory duty<sup>99</sup> or for other reasons not left to any reasonable choice by the addressee of the writ,<sup>100</sup> as particularly in the case of local improvements to be undertaken or financed by railroads pursuant to statute, charter or city ordinance.<sup>101</sup> It is necessary in such case that the project be sufficiently particularized<sup>102</sup> though equitable adjustments and modifications may be ordered in the hearing on the alternative writ.<sup>103</sup>

The same considerations govern the cases involving the grant or revocation of professional or business licenses, building permits or admission to schools. Insofar as such issuance or revocation is predicated upon exercise of a judgment as to fitness, propriety, conduciveness to the public interest, etc., the action by the agency in

98. *Romsdahl v. Town of Long Lake*, *supra* note 97. *But see Powell v. Township of Carlos*, 177 Minn. 372, 225 N. W. 296 (1929) (demurrer to petition for mandamus to order removal of trees, hedges and other obstructions on a public road sustained because of failure to allege availability of any public funds), followed in *State ex rel. Linbo v. Martin*, 179 Minn. 463, 229 N. W. 577 (1930).

99. *State ex rel. Olson v. Board of County Commsrs.*, 83 Minn. 65, 85 N. W. 830 (1901) (mandamus against county officials to compel reconstruction of bridge, the maintenance of which, was imposed upon the county by special act providing for the original erection of the bridge).

100. *State ex rel. Lang v. Anderson*, 164 Minn. 134, 204 N. W. 925 (1925) (mandamus granted to compel trustees of school district to acquire designated school house site and to proceed to erect school thereon after selection of site and provision of the necessary funds by the electors of the district), see also *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 511, 20 N. W. 2d 345, 346 (1945) (order of mandamus by district court affirmed insofar as ordering town board to establish a cartway between certain lots and the highway "the exact route and location of which was to be determined by the town board in the exercise of its discretion . ." but reversed insofar as ordering improvement).

101. *State v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 35 Minn. 131, 28 N. W. 3 (1886), *State ex rel. City of St. Paul v. Minnesota T. Ry. Co.*, 80 Minn. 108, 83 N. W. 32 (1900), *State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261 (1906), *State ex rel. City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 122 Minn. 280, 142 N. W. 312 (1913), *City of Owatonna v. Chicago, R. I. & P. Ry. Co.*, 156 Minn. 475, 195 N. W. 452 (1923), *State ex rel. City of Duluth v. Duluth St. Ry. Co.*, 179 Minn. 548, 229 N. W. 883 (1930), *State ex rel. City of St. Paul v. St. Paul City Ry. Co.*, 180 Minn. 329, 230 N. W. 809 (1930).

102. *State ex rel. City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 135 Minn. 277, 279-80, 160 N. W. 773, 774 (1916) ("Before the defendant can be required by *mandamus* to separate the grades there must be a plan sufficiently specified to afford a working basis.")

103. *State v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 219, 39 N. W. 153 (1888), *State ex rel. City of Duluth v. St. Paul & D. R. Co.*, 75 Minn. 473, 78 N. W. 87 (1899), see *Parker v. Truesdale*, 54 Minn. 241, 246, 55 N. W. 901, 902 (1893).

charge is quasi-judicial<sup>104</sup> and cannot be compelled by mandamus.<sup>105</sup> Where the statute, however, does not involve such discretion, but accords a right to a license, admission, etc., upon the fulfillment of certain conditions ascertainable without involving a value judgment, mandamus is the proper remedy against a denial thereof and to test the proper construction of the pertinent provisions.<sup>106</sup>

Another group of cases which deserve special mention in illustrating the application of the general principles stated are those in which mandamus has been held to be an appropriate or improper remedy to compel appointment or reinstatement to public office. Predominantly, though not always, they involve the applications of civil service or veterans' preference provisions. Consequently, some care in evaluating the decisions is required because the veterans' preference acts since 1907 expressly provided on the one hand that "any person whose rights may be in any view prejudiced contrary to any of the provisions of this section, shall be entitled to a writ of mandamus to remedy the wrong," and on the other hand until 1943, that there should be a right of review by certiorari of removals which were permitted only "for incompetency or misconduct, after a hearing upon stated charges."<sup>107</sup>

104. *Hunstger v. Kilian*, 130 Minn. 474, 538, 153 N. W. 869, 1095 (1915).

105. *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238 (1884) (the correctness of a decision denying relator certificate to practice involves the exercise of judgment and cannot be brought into review by mandamus), *State ex rel. Labovich v. Reddington*, 119 Minn. 402, 138 N. W. 430 (1912) (mandamus to compel city clerk to issue license authorizing use of building as movie theater properly denied where city council had not exhausted its right to control the issuance of licenses by an ordinance pertaining to license fees); *State ex rel. Howie v. Common Council of Northfield*, 94 Minn. 81, 101 N. W. 1063 (1904) (mandamus will not lie to compel issuance of liquor license denied because of number of extant licenses where city charter and licensing ordinance left such consideration to discretion of council); *State ex rel. Greenville v. Nash*, 134 Minn. 73, 76, 158 N. W. 730, 732 (1916) (mandamus to revoke building permit for noncompliance with building code denied where code reserved to building inspector the right to accept "an equally good and more desirable form of construction in any specific case"), *Zion L. Church v. City of Detroit Lakes*, 221 Minn. 55, 21 N. W. 2d 203 (1945) (mandamus not proper remedy to review denial of building permit).

106. *State ex rel. Crosland v. Board of Education*, 91 Minn. 268, 97 N. W. 885 (1904) (mandamus by district court to compel admission of children in school upheld since evidence supported finding of residence of relator), *American Railway Express Co. v. Holm*, 169 Minn. 323, 211 N. W. 467 (1926) (mandamus proper remedy to test right of relator as public service corporation to motor vehicle license without payment of fee).

107. Minn. Gen. Laws 1907, c. 263, § 2, now 1 Minn. Stat. § 197.46 (1945). The court has intimated that this statutory grant of mandamus made the remedy available where it otherwise would have been improper, *State ex rel. Kane v. Stassen*, 208 Minn. 523, 294 N. W. 647 (1940), followed in *State ex rel. Butters v. Railroad and Warehouse Comm.*, 209 Minn. 530, 296 N. W. 906 (1941).

The first case<sup>108</sup> which came before the court involved an attempt by a Civil War veteran to compel by mandamus the board of public works of St. Paul to appoint him to a clerical position held by a non-veteran in reliance on the veterans' preference act then in force. The court denied the writ because the statute did not "provide any method for determining which one of several [veterans] shall be appointed" and because "the determination of the qualification of a person for employment in the public service involves the exercise of judgment and discretion, which is vested in the appointing officers or body, and not in the courts." The court added, however, cautiously "We can conceive of a statute constituting a full body of civil service rules, which, when applied to the facts, would identify the particular person entitled to an appointment so as to give him a legal right to it which could be enforced by him. But this is not such a law" The court similarly construed the subsequent veterans' preference acts so as to vest the appointing boards with a judgment as to the reasonable fitness of the veteran which, however informally or cursorily exercised, could not be reviewed by mandamus<sup>109</sup> unless he had filled the same position before in a satisfactory manner<sup>110</sup> or unless the judgment of unfitness was otherwise manifestly arbitrary

Analogous rules apply in the cases in which reinstatement is sought because of wrongful dismissal. Generally a discharge cannot be questioned by mandamus but, if at all, by certiorari.<sup>111</sup> Thus it

108. *State ex rel. Mortensen v. Copeland*, 74 Minn. 371, 374, 77 N. W. 221, 222 (1898).

109. *State ex rel. Meehan v. Empie*, 164 Minn. 14, 18, 204 N. W. 572, 574 (1925) (mandamus to compel appointment of relator to position of marketmaster, the court reversed a judgment for peremptory writ upon the ground that trial court was only entitled to determine "whether the council applied the law at all, making the required investigation, or with manifest arbitrariness determined that the relator was not fit."), followed in *State ex rel. Moilan v. Brandt*, 178 Minn. 277, 226 N. W. 841 (1929), *State ex rel. Bloomquist v. Barker*, 190 Minn. 370, 251 N. W. 673 (1933), *State ex rel. Cote v. Village of Bovey*, 191 Minn. 401, 254 N. W. 456 (1934).

110. *State ex rel. Trevarthen v. City of Eveleth*, 179 Minn. 99, 228 N. W. 447 (1929) (mandamus granted for reappointment as superintendent of waterworks).

111. See the discussion of this point in *State ex rel. Hart v. Common Council of City of Duluth*, 53 Minn. 238, 55 N. W. 118 (1893), and *State ex rel. Furlong v. McColl*, 127 Minn. 155, 149 N. W. 11 (1914) (certiorari is proper remedy even in the absence of the necessity of a formal hearing if removal is permissible only for cause after an opportunity to reply to charges), followed in *State ex rel. Nelson v. Board of Public Welfare*, 149 Minn. 322, 183 N. W. 521 (1921), and *State ex rel. Holland v. Sudheimer*, 164 Minn. 437, 205 N. W. 369 (1925). *But see State ex rel. Martin v. City of Minneapolis*, 138 Minn. 182, 164 N. W. 806 (1917) (no relief by certiorari where charter authorizes removal at will and requires merely a written record of discharge)

was held in the leading case of *State ex rel. Early v. Wunderlich*<sup>112</sup> that mandamus was not the proper remedy to review the merits of the discharge of a school teacher where the controlling statute did not require a formal hearing, but was satisfied if the commissioner of education assigned a legally sufficient cause for his action. The court intimated, however, that "Mandamus will lie to reinstate an officer or appointee unlawfully removed from his position, where it clearly appears as a matter of law from the undisputed facts that he was entitled to retain such position."<sup>113</sup> This dictum was subsequently carried into actual holdings and the supreme court affirmed numerous writs of mandamus which ordered reinstatement of an officer because the procedure of, or the reasons for, his discharge violated provisions of the veterans' preference acts or civil service rules.<sup>114</sup> However, in at least one instance the disregard of the preference act in a discharge was tested by certiorari.<sup>115</sup> The latter remedy alone was proper (prior to the amendment of 1943) to test the sufficiency of the evidence to sustain a discharge for cause under the veterans' preference act. One interesting case involved two successive discharges, one reviewable by mandamus, the other by certiorari.<sup>116</sup> The difficulty of determining whether certiorari or mandamus is the proper remedy to obtain review of determinations affecting the employment status is also illustrated by *State ex rel. Jenkins v. Ernest*.<sup>117</sup> The court held that an erroneous classification of relators in violation of their rights under the veterans' preference act was quasi-judicial and could not be remedied by mandamus but should have been attacked

112. 144 Minn. 368, 175 N. W. 677 (1920) (demurrer sustained to petition for mandamus to compel reinstatement where merits of discharge were questioned).

113. *Id.* at 373, 175 N. W. at 680.

114. *Johnson v. Pugh*, 152 Minn. 437, 189 N. W. 257 (1922) (reinstatement ordered by mandamus for lack of requisite hearing under veterans preference law), followed in *State ex rel. Castel v. Village of Chisholm*, 173 Minn. 485, 217 N. W. 681 (1928), *State ex rel. Thorton v. Ritchel*, 192 Minn. 63, 255 N. W. 627 (1934) (mandamus granted to compel reinstatement where discharge violated civil service rules), *State ex rel. McCauley v. Warren*, 195 Minn. 180, 261 N. W. 857 (1935) (mandamus proper remedy to order reinstatement where discharge was without legal cause as recognized by charter); *State ex rel. Coduti v. Hauser*, 219 Minn. 297, 17 N. W. 2d 504 (1945) (mandamus for reinstatement because of applicable civil service rules); see also dicta to the same effect in *State ex rel. Jenkins v. Ernest*, 197 Minn. 599, 600, 268 N. W. 208, 209 (1936); *State ex rel. Spurck v. Civil Service Board*, 226 Minn. 253, 259, 32 N. W. 2d 583, 586 (1948).

115. *State ex rel. Nelson v. Board of Public Welfare*, 149 Minn. 322, 183 N. W. 521 (1921) (certiorari to test validity of discharge alleged to be in violation of preference law).

116. *State ex rel. Lund v. City of Bemidji*, 209 Minn. 91, 295 N. W. 514 (1940).

117. 197 Minn. 599, 268 N. W. 208 (1936).



by certiorari. The decision is hard to justify, except on the basis that certiorari provided an adequate remedy, since the relators did not question any exercise of discretion but the disregard of relators' plain right to a preference.<sup>118</sup> Finally, mandamus is the proper remedy to obtain allocation of a position, the right to which is adjudicated by certiorari.<sup>119</sup>

(3) The rule that mandamus cannot be used to compel official action if and *insofar as* the same involves the exercise of discretion or, in other words, that mandamus cannot be used to direct the exercise of discretion *in a particular manner*, implies the availability of mandamus for particular purposes or in particular circumstances, which can be spelled out by listing the following special categories of cases

(a) It has been held that mandamus is the proper remedy to set discretion in motion where the agency has failed to take any required formal action whatsoever. The leading case is *State ex rel. Casmey v. Teal*<sup>120</sup> in which the supreme court directed the lower court to order a school district clerk by mandamus to take action by either approving or disapproving a proffered bond. The rule has been applied in a number of cases. Thus mandamus has been issued, for instance, to compel a county auditor to consider and pass upon certain construction bids,<sup>121</sup> to compel a board of county commissioners to redistrict their county<sup>122</sup> and to compel the state director of civil service to classify and allocate relator in his position under the civil service act.<sup>123</sup>

(b) Where the law prescribes affirmatively the rendition of certain services or the construction of certain structures or improvements, leaving the details within certain limits to the discretion of the person responsible therefor, mandamus will be available for the enforcement. But the writ must carefully avoid encroachment upon the discretion left to the addressee and may

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118. The grounds stated in the decision seem irreconcilable with *State ex rel. Kangas v. McDonald*, 188 Minn. 157, 246 N. W. 900 (1933) (permitting correction by mandamus of a certified list of eligible candidates for appointment made in violation of the preference law)

119. *State ex rel. Spurck v. Civil Service Board*, 226 Minn. 240, 32 N. W. 2d 574 (1948), 226 Minn. 253, 32 N. W. 2d 583 (1948)

120. 72 Minn. 37, 74 N. W. 1024 (1898)

121. *State ex rel. Landong v. Anding*, 132 Minn. 36, 155 N. W. 1048 (1916)

122. *State ex rel. Laurisch v. Pohl*, 214 Minn. 221, 8 N. W. 2d 227 (1943)

123. *State ex rel. Spurck v. Pennebaker*, 215 Minn. 79, 9 N. W. 2d 259 (1943).

expressly contain an appropriate reservation.<sup>124</sup>

(c) If an administrative board acts so arbitrarily or capriciously that in law it does not amount to a proper exercise of its discretion, mandamus will lie to make a new determination or to require other appropriate action. Thus in *Gleason v. University of Minnesota*<sup>125</sup> the supreme court upheld the decision of the lower court which overruled the demurrer to a petition for an alternative writ of mandamus to compel reinstatement of relator as a student of the law department. The petition alleged that relator had been charged with but not tried for or found guilty of acts of in subordination. The court ruled that a denial of admission under such circumstances was beyond the range of the regents' discretion and therefore ordered admission. Similarly, the court in *State ex rel. Lewis v. City Council of Minneapolis* ordered the approval of a plat where the rejection of the same by the city was not in the lawful exercise of its discretion but was "purely arbitrary or was predicated on a ground not warranted by law."<sup>126</sup> Another important case belonging in this class is *Zion E. L. Church v. City of Detroit Lakes*.<sup>127</sup> It involved a petition for an alternative writ of mandamus to compel the city council to issue a building permit. Petitioner alleged that the city council granted a full and complete hearing but arbitrarily and capriciously in the abuse of its discretion refused the permit on the fictitious reason that its issuance would result in an increased traffic hazard. The district court sustained a demurrer and the supreme court affirmed. The court ruled that certiorari, and not mandamus, should have been the proper remedy in the case. It interpreted the allegations of the pleading so as to defeat on its face the claim of arbitrariness and capriciousness in the council's action. Hence "once that discretion has been *actually* exercised, as here, the court is wholly without power through *mandamus* to compel such quasi-judicial body to reverse, reconsider, or repeat its action." Mr. Justice Youngdahl dissented, chiefly because he felt that the majority was unwarranted in reading the allegation of arbitrariness and capriciousness out of the petition. While the case actually turned on the narrow question of the construction of a pleading, it possesses great significance because it indicated that in appropriate circumstances and by proper

124. *State ex rel. Olson v. Board of County Commrs.*, 83 Minn. 65, 85 N. W. 830 (1901), *State ex rel. Mason v. Consumers Power Co.*, 119 Minn. 225, 137 N. W. 1104 (1912), *State ex rel. Rose v. Town of Greenwood*, 220 Minn. 508, 20 N. W. 2d 345 (1945).

125. 104 Minn. 359, 116 N. W. 650 (1908).

126. 140 Minn. 433, 434, 168 N. W. 188 (1918).

127. 221 Minn. 55, 21 N. W. 2d 203 (1945).

pleading the purported exercise of discretionary action may be so arbitrary as to warrant a writ of mandamus ordering reconsideration or even a particular action. Although it may be surmised that the lapse of the 60 day period required for certiorari was the chief reason in the instant case for proceeding by mandamus, Mr. Justice Youngdahl emphasized correctly its substantial advantage over review by certiorari because it is possible to show arbitrariness de hors the record by trial on that issue. In the appointment cases involving the veterans' preference acts, the court has also at least intimated if not actually held that it would permit mandamus for the purpose of determining not whether the relator was actually fit but whether the appointing board "with manifest arbitrariness determined that the relator was not fit."<sup>128</sup>

Akin to if not identical with the type of cases here discussed are the exceptional situations previously mentioned in which a determination usually involving the exercise of discretion can be made only in one way without being clearly arbitrary and capricious. Mandamus will then be available.<sup>129</sup>

Mandamus is likewise not barred by a determination which is so perfunctory or in excess of jurisdiction as legally to be disregarded.<sup>130</sup>

(d) Finally, the court has permitted review by mandamus of acts involving value judgments where the discretion was actually exercised in favor of relator and the denial of his claim by the agency was based on extraneous legal grounds.<sup>131</sup> This category is

128. *State ex rel. Meehan v. Empie*, 164 Minn. 14, 18, 204 N. W. 572, 574 (1925), see also *State ex rel. Trevarthen v. City of Eveleth*, 179 Minn. 99, 102, 228 N. W. 447, 448 (1929) (mandamus granted partly for the reason that the board "acted arbitrarily and unfairly in refusing to appoint him [relator]." For a similar dictum in a license case see *State ex rel. Ratner v. City of Minneapolis*, 164 Minn. 49, 52, 204 N. W. 632, 633 (1925).

129. See *State v. Town of Somerset*, 44 Minn. 549, 550, 47 N. W. 163, (1890), *Olson v. Honett*, 133 Minn. 160, 163, 157 N. W. 1092, 1093 (1916), *Rohsdahl v. Town of Long Lake*, 175 Minn. 34, 36, 220 N. W. 166 (1928), *Powell v. Township of Carlos*, 177 Minn. 372, 375, 225 N. W. 296, 297 (1929).

130. *State ex rel. Spurck v. Pennebaker*, 215 Minn. 79, 9 N. W. 2d 259 (1943) (perfunctory classification), *State ex rel. Spurck v. Civil Service Board*, 226 Minn. 253, 32 N. W. 2d 583 (1948) (reinstatement in excess of statutory jurisdiction)

131. *State ex rel. Zien v. City of Duluth*, 134 Minn. 355, 159 N. W. 792 (1916) (petition for mandamus to compel grant of liquor license was not subject to demurrer where it contained allegation that the sole reason for the refusal by city council was the passage of a contested ordinance prohibiting such issuance) But it has been held that the city may plead, in mandamus proceedings, the true reasons for the rejection of a license although the same were not correctly communicated to applicant. *State ex rel. Ratner v. City of Minneapolis*, 164 Minn. 49, 204 N. W. 632 (1925)

in the main constituted by the host of cases in which building permits were denied to the applicant not because the proposed structure was unsafe, etc., but because of building restrictions in zoning ordinances, the validity of which was thus tested by mandamus.<sup>132</sup>

3. *Unavailability of mandamus in the presence of another adequate remedy.*

2 Minn. Stat. § 586.02 (1945) codifies a well known rule by providing that the writ " shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law." The application of this rule sometimes presents embarrassing questions.

a. *Mandamus vs. ordinary civil action for money.*

The mere fact that the relator may also have an action for damages or reimbursement because of the failure of the officials or other persons to take the demanded action does not necessarily preclude its enforcement by mandamus, although it may have this effect. Thus an early leading case<sup>133</sup> held that a newspaper could obtain a writ of mandamus to compel the mayor of Minneapolis to sign an order drawn by the city clerk, pursuant to the order of the city council on the city treasurer, for the amount of a printing bill instead of resorting to an ordinary action. The court reasoned that the payment of an ordinary civil judgment would require a number of formal steps, particularly a special appropriation and levy of a tax, and that such remedy was therefore neither speedy nor adequate; it would not afford the relator the particular right afforded to him by the law, *viz.*, to have a properly authenticated warrant upon the treasurer as evidence of indebtedness and as a means of securing prompt payment out of existing funds. The rule has been applied in a number of subsequent cases involving claims against municipalities.<sup>134</sup> Similarly, it has been held that a municipi-

132. *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, 158 N. W. 1017 (1916); *State ex rel. Roerig v. City of Minneapolis*, 136 Minn. 479, 162 N. W. 477 (1917); *Meyers v. Houghton*, 137 Minn. 481, 163 N. W. 754 (1917); *State ex rel. Banner Grain Co. v. Houghton*, 142 Minn. 28, 170 N. W. 853 (1919); *State ex rel. Twin City B. & I. Co. v. Houghton*, 144 Minn. 1, 174 N. W. 885 (1919), *rev'd on rehearing*, 144 Minn. 13, 176 N. W. 159 (1920); *State ex rel. Beery v. Houghton*, 164 Minn. 146, 204 N. W. 569 (1925), *aff'd*, 273 U. S. 671, (1926); *State ex rel. McKusick v. Houghton*, 171 Minn. 231, 213 N. W. 907 (1927).

133. *State v. Ames*, 31 Minn. 440, 18 N. W. 277 (1884).

134. For instance, *State ex rel. Skyllingstad v. Gunn*, 92 Minn. 436, 443, 100 N. W. 97, 100 (1904); *State ex rel. Trebby v. Vasaly*, 98 Minn. 46, 107 N. W. 818 (1906); *State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 129 (1912). The dictum to the contrary in *State ex rel. Ahlstrom v. Bauman*, 194 Minn. 439, 441, 260 N. W. 523, 524 (1935), is apparently too

pality is not prevented from compelling a railroad by means of mandamus to undertake certain local improvements merely because it would have a right to reimbursement in case it would itself complete such construction.<sup>135</sup> The court, likewise, has not hesitated to grant a writ of mandamus ordering reinstatement in favor of employees who have been wrongfully discharged although apparently they could have recovered their salary by an ordinary lawsuit.<sup>136</sup> The court has, however, in two early cases refused to compel the issuance of stock certificates because an action for damages would afford full relief<sup>137</sup> to test the legality of the imposition of a tax since relator could pay under protest and sue for recovery.<sup>138</sup> Of course where mandamus is inapposite because of the nature of the controversy or for other reasons, a resort to an ordinary civil action is necessarily the only remedy.<sup>139</sup>

b. *Mandamus vs. other extraordinary remedies or declaratory relief.*

The availability of other extraordinary remedies or declaratory relief in itself likewise does not necessarily preclude mandamus. In those instances, however, other considerations frequently come into play.

As far as certiorari is concerned, the type of administrative action ordinarily reviewable by certiorari will not be subject to an attack by mandamus and *vice versa*. Certiorari and mandamus are for that reason generally mutually exclusive,<sup>140</sup> although the dividing line is tenuous and obscure. Only in the rare cases suggested by the above mentioned *Zion Church* case<sup>141</sup> where the exercise of

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broad. See also *State ex rel. Fitzgerald v. Foot*, 98 Minn. 467, 108 N. W. 932 (1906), illustrating that mandamus is not necessarily the proper remedy to enforce a money judgment against a municipality.

135. *State ex rel. City of St. Paul v. Minnesota T. Ry. Co.*, 80 Minn. 108, 83 N. W. 32 (1900). The court gave as a reason that in mandamus proceedings the necessary specifications and details would be judicially determined in advance and thus the city relieved of the risk that the railroad could later successfully contest some or all of the expenditures.

136. Compare, for instance, cases like *Holmquist v. Independent School District of Virginia*, 181 Minn. 23, 231 N. W. 406 (1930), and *Kuen v. School District No. 70*, 221 Minn. 443, 22 N. W. 2d 220 (1946) with the mandamus cases cited *supra* note 113 ff.

137. *Baker v. Marshall*, 15 Minn. 177 (1870).

138. *State ex rel. McCardy v. Nelson*, 41 Minn. 25, 42 N. W. 548 (1889). But see *American Railway Express Co. v. Holm*, 169 Minn. 323, 211 N. W. 467 (1926).

139. Such instances may be the exhaustion of available funds for payment, *Martin v. Elwood*, 35 Minn. 309, 29 N. W. 135 (1886), or the absence of a requisite approval, *State ex rel. Haney v. Clarke*, 112 Minn. 516, 128 N. W. 1008 (1910).

140. Cf. *State ex rel. Jenkins v. Ernest*, *supra* note 117.

141. See *supra* note 131.

quasi-judicial determination was so arbitrary, perfunctory or in excess of jurisdiction as not to amount to an obstacle to mandamus will a duplication of the remedies be possible. As the dissenting opinion of Mr. Justice Youngdahl pointed out, mandamus would be the only adequate remedy in such a case.<sup>142</sup>

Apparently only one reported Minnesota case exists in which relator sought relief through both a writ of mandamus and a writ of prohibition.<sup>143</sup> Although it involved proceedings in a probate court, the principles enunciated would be controlling for administrative proceedings. The case arose because the respondent probate judge neglected to set a hearing for the probate of a will upon the petition of relator but subsequently set a hearing on petition by another party for letters of administration and the probate of the will. Relator brought mandamus proceedings in the district court to compel the probate judge to act on his petition and petitioned the supreme court for a writ of prohibition to restrain the judge from acting on the petition by the other party. The supreme court held that mandamus was the proper remedy which would afford relator full relief and denied the writ of prohibition. It is obvious that the writ of prohibition standing by itself would not have given adequate relief to relator because it would not have compelled the respondent judge to act on his petition while such action would have nullified any proceedings on the other petition. Hence the result reached cannot be generalized to a rule concerning the relative rank of the two extraordinary remedies.<sup>144</sup>

It is the recognized rule that mandamus cannot be used to obviate the necessity of a resort to quo warranto. Hence mandamus will not lie if the controversy involves an attack upon the validity of an incorporation<sup>145</sup> or title to an office.<sup>146</sup> The reason for this result is not so much based on the relative effectiveness of the two remedies as on the general principle that a charter or title to office cannot be collaterally attacked. Mandamus is, however, available to obtain possession of an office during a contest if relator is *prima*

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142. See text following note 131 *supra*.

143. *In re Estate of Stenzel*, 210 Minn. 509, 299 N. W. 2 (1941).

144. *But see Payne v. Lee*, 222 Minn. 269, 24 N. W. 2d 259 (1946) in which the court granted a writ of prohibition, because of bias, to prevent respondent as judge of probate from taking further proceedings but suggested that mandamus would be a more expeditious and speedy remedy.

145. *Lee v. City of Thief River Falls*, 82 Minn. 88, 84 N. W. 654 (1900).

146. *State ex rel. Addison v. Williams*, 25 Minn. 340 (1879) (enunciating the reasons for the rule), *State ex rel. Carlson v. Strunk*, 219 Minn. 529, 18 N. W. 2d 457 (1945).

*facie* entitled thereto by reason of a certificate of election and other factors.<sup>147</sup>

The supreme court has intimated in an early case that an injunction may be “ a plain, speedy, and adequate remedy in the ordinary course of law” so as to preclude mandamus proceedings.<sup>148</sup> The occasion was a suit for damages and injunction against a railroad as a result of its encroachment upon private land which it could have acquired by eminent domain proceedings under its charter. It should be observed that the dictum, if valid at all, applies only in case of encroachments by public utilities. If the state or one of its subdivisions perpetrates such encroachment in connection with its public works projects, relief by injunction would meet insurmountable obstacles. Hence, mandamus ordering institution of condemnation proceedings would be the proper relief.<sup>149</sup>

The passage of the Declaratory Judgment Act has not affected the scope of the relief available by mandamus. Thus the recognized practice of using mandamus as the proper remedy for obtaining an official certificate from the county auditor of the proper amount required for redemption from a tax sale may still be followed.<sup>150</sup>

c. *Mandamus vs. appeal.*

The possibility of a statutory appeal from an administrative action would ordinarily seem to preclude the resort to mandamus. The court has always been extremely hostile to attempts to “ use mandamus as a judicial short cut.”<sup>151</sup>

d. *Mandamus vs. relief by or against other parties.*

The possibility of a writ of mandamus against a municipality will not bar the same remedy against its officers.<sup>152</sup> But it has been held that other judicial relief against illegal action available to a person more directly affected precludes resort to mandamus by a relator more remotely interested.<sup>153</sup>

147. State *ex rel.* Erickson v. Magie, 183 Minn. 60, 235 N. W. 526 (1931) and authorities cited.

148. Harrington v. St. Paul & Sioux City Ry. Co., 17 Minn. 188, 202 (Gil. 1871).

149. See State, by Peterson, v. Anderson, 220 Minn. 139, 150, 19 N. W. 2d 70, 75 (1945).

150. Farmers & Merchants Bank v. Billstein, 204 Minn. 224, 283 N. W. 138 (1938).

151. State *ex rel.* Backus-Brooks Co. v. District Ct., 108 Minn. 535, 536, 122 N. W. 314, 315 (1909) (involving attempted relief from a tax judgment). See also the strong language of Justice Stone in Swanson v. Alworth, 159 Minn. 193, 196, 198 N. W. 453, 454 (1924).

152. See Olson v. Honett, 133 Minn. 160, 162, 157 N. W. 1092 (1916).

153. State *ex rel.* Passer v. Renville County Board, 171 Minn. 177, 213 N. W. 545 (1927).

4. *Special constitutional limitations on the availability of mandamus or certain defenses in such proceedings.*

The law regarding the functional area of the writ of mandamus as set forth in the preceding sections is subject to limitations with curiously shifting boundaries produced by an oversolicitude of the supreme court for the doctrine of separation of powers.

a. *Availability against the constitutional officers constituting the executive department.*

The availability of the writ of mandamus to compel action by the five constitutional officers constituting the executive department of the state government has perplexed the court over a long period.<sup>154</sup> In fact the position of the court has described a complete cycle during the course of time. In the earliest case on the point the court compelled the governor by a peremptory writ of mandamus to issue certain bonds to the Minnesota & Pacific Railroad Co. as relator pursuant to a clause of the state constitution, the interpretation of which had produced the controversy between the parties.<sup>155</sup> In the following case, which involved substantially the same subject, the court arrived at the opposite result.<sup>156</sup> It explained that in the previous case the governor had been desirous of a judicial interpretation of the clause in question and therefore refrained from raising the issue. The court differentiated between official duties of the governor devolving upon him as the chief executive by virtue of the constitution and other duties imposed upon him by statute which might have been delegated to other officials. Only in the latter case would mandamus lie. This distinction was abandoned in *Rice v. Austin*<sup>157</sup> and declared to be spurious in *County Treasurer of Mille Lacs County v. Dike*.<sup>158</sup> As a result, both ministerial and discretionary duties of the constitutional officers were thought to be shielded from enforcement by mandamus. Gradually, however, the court receded from its position regarding the effect of the separation of powers on the scope of judicial review. The development culminated in *State ex rel. Kinsella v. Eberhart* in which the court announced the rule that ". . . duties imposed by law upon the chief executive which are purely ministerial in their nature, and which do not necessarily

154. See Kumm, *Mandamus to the Governor in Minnesota*, 9 Minn. L. Rev. 21 (1924) and the discussion by Justice Olsen in *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 229 N. W. 313 (1930).

155. *Minnesota & Pacific Railroad Co. v. Sibley*, 2 Minn. 13 (1858).

156. *Chamberlain v. Sibley*, 4 Minn. 309 (1860).

157. *Rice v. Austin*, 19 Minn. 103 (1872).

158. *County Treasurer of Mille Lacs County v. Dike*, 20 Minn. 363 (1874).



pertain to the functions of the office, and which might have been imposed upon any other state officer, are subject to judicial control."<sup>159</sup> While that case involved a petition for a writ of certiorari, the rule was declared to be applicable in mandamus proceedings in *State ex rel. Birkeland v. Christianson*.<sup>160</sup> The court pointed out, however, that the issuance of mandatory commands to the governor by the legislature was hardly customary. So far, apparently no relator has succeeded in obtaining the sanction of the supreme court to a writ against the governor.<sup>161</sup> The issuance of such writ against the other constitutional officers likewise meets intrinsic difficulties.<sup>162</sup>

b. *Availability to contest the constitutionality of a statute.*

The other limitation which is deduced from the doctrine of separation of powers and its underlying policy is the rule that the courts will not permit a public officer, by way of defense, to assail the constitutionality of a law which imposes the performance of a ministerial duty upon him. This rule which was invoked and applied by the supreme court only once in mandamus proceedings<sup>163</sup> is said to be subject to at least two important exceptions *viz.*, if the execution of an unconstitutional law exposes the officer to a personal liability or impeachment, or if the determination of the constitutional issue is in the public interest. A cursory survey of the authorities reveals that actually the supreme court has decided the constitutionality of statutory provisions upon their attack by an official such as respondent in a number of mandamus cases without the necessity of justifying such determination by an explicit reliance on either of the exceptions to the so-called general rule.<sup>164</sup>

159. *State ex rel. Kinsella v. Eberhart*, 116 Minn. 313, 318, 133 N. W. 857, 859 (1911)

160. *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 229 N. W. 313 (1930)

161. The only case found involving such attempt is *State ex rel. Kane v. Stassen*, 208 Minn. 523, 294 N. W. 647 (1940) in which relator failed.

162. See *State ex rel. Schmidt v. Youngquist*, 178 Minn. 442, 227 N. W. 891 (1929).

163. *State ex rel. Clinton Falls Nursery Company v. County of Steele*, 181 Minn. 427, 232 N. W. 737 (1930), 15 Minn. L. Rev. 340 (1931) (mandamus to compel board of county commissioners to attach relator's land to certain school districts and to prorate the bonded indebtedness affecting such lands pursuant to Minn. Laws 1929, c. 183)

164. See for instance *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210 (1898), *rev'd on other grounds sub. nom.* 179 U. S. 223 (1900), *State ex rel. Board of Education v. Minor*, 79 Minn. 201, 81 N. W. 912 (1900), *State ex rel. Minnesota Loan & Trust Co. v. Ames*, 87 Minn. 23, 91 N. W. 18 (1902), *State ex rel. Jennison v. Rodgers*, 87 Minn. 130, 91 N. W. 430 (1902), *State ex rel. Skyllingstad v. Gunn*, 92 Minn. 436, 100 N. W. 97 (1904), *State ex rel. City of Waseca v. Babcock*, 151 Minn. 321, 186 N. W. 688 (1922), *State ex rel. Beery v. Houghton*, 164 Minn. 146,

## B.

## Powers of the Court in Mandamus Proceedings

1. *Principles controlling judicial discretion in granting writ.*

The best and most encompassing discussion of the powers of the court in reference to the granting or withholding of the relief prayed for is contained in the opinion of Mr. Justice Lees in *Dexner v. Houghton*.<sup>165</sup> The case involved a petition for mandamus to compel a building inspector to issue a permit for the erection of an apartment house in a location which had been zoned as a restricted residential district subsequent to both the application for the license and the issuance of the alternative writ. According to the controlling law relator could legally proceed with the construction of his proposed structure until the completion of the statutory condemnation proceedings which had been promptly instituted and thus increase the amount of compensation payable to him. The district court, after a hearing on the alternative writ, quashed the same and denied the peremptory writ. The supreme court affirmed. The issuance of the peremptory writ *at that time*, under the circumstances of the case, would have subserved no legal purpose but would have only burdened the public. Mr. Justice Lees enunciated the following controlling principles<sup>166</sup> which are worth quoting in full:<sup>167</sup>

"The proceeding by mandamus has lost its original prerogative character and has become a civil action in which, upon a proper showing, the writ ordinarily issues as a matter of course.<sup>168</sup> But this does not mean that a court may never refuse the writ where a prima facie right to it is shown. In line with the general current of authority, this court has held that the writ will not be issued when it would be of no avail,<sup>169</sup> or when it is sought to compel the performance of an act having an illegal object in view;<sup>170</sup> or to compel a technical compliance with the letter of the law which

204 N. W. 569 (1925); *State ex rel. Wharton v. Babcock*, 181 Minn. 409, 232 N. W. 718 (1930).

165. 153 Minn. 284, 190 N. W. 179 (1922).

166. *Id.* at 286, 190 N. W. at 180.

167 The footnotes are supplied by the authors in lieu of the citations in the context of the opinion. Non-Minnesota authorities listed by the justice are omitted. The brief statements of the holdings of the cases cited are added by the authors.

168. *Lauritsen v. Seward*, 99 Minn. 313, 109 N. W. 404 (1906).

169. *State ex rel. Lum v. Archibald*, 43 Minn. 328, 45 N. W. 606 (1890) (denying writ of mandamus compelling county assessor to assess property located in territory recently attached to county where order would have been "useless and ineffectual" because assessor could no longer obey as his authority to make assessment had ended, the books had been returned to auditor and he was practically out of office).

170. *State ex rel. Waitt v. Hill*, 32 Minn. 275, 20 N. W. 196 (1884) (denying mandamus to compel city comptroller to countersign pay warrant drawn by direction from the city council and signed by mayor where relator was not legally entitled to such payment).

would be contrary to the spirit of the law<sup>171</sup> The consensus of opinion is that the writ still remains a discretionary writ and should be refused if sound judicial discretion bespeaks that course. In saying that in a proper case the writ issues as a matter of course, no more is meant than this It may not be refused arbitrarily or capriciously, but only in the exercise of discretion guided by law and reason."

The principle that mandamus is " 'a legal remedy granted on equitable principles' "<sup>172</sup> has been reiterated by the court in equivalent phrases many times<sup>173</sup> and has found frequent application and elaboration. Thus it has been held that mandamus will be denied to a relator who lacks a "clear record" because of his failure to comply with a technical requirement " however meritorious the application may be on other grounds."<sup>174</sup> Relator must come into court with clean hands. His right to relief must not be tainted by misconduct in relation thereto;<sup>175</sup> he must not seek the remedy in aid of an illegal transaction<sup>176</sup> or in bad faith and for an improper purpose.<sup>177</sup> Relief will be denied if relator has been guilty of laches<sup>178</sup> except where the act which is sought to be compelled

171. *State ex rel. Hathorn v. U. S. Express Co.*, 95 Minn. 442, 104 N. W. 556 (1905) (denying mandamus to compel public carrier to accept packages from relator where relator was engaged in an unlawful lottery business and did not come into court " with clean hands and for a rightful purpose.").

172. *State ex rel. Hathorn v. U. S. Express Co.*, 95 Minn. 442, 444, 104 N. W. 556, 557 (1905).

173. See e.g., language to that effect in *State ex rel. Phillips v. Neisen*, 173 Minn. 350, 353, 217 N. W. 371, 372 (1928), *State ex rel. Barnes v. Tauer*, 178 Minn. 484, 487, 227 N. W. 499, 500 (1929), *State ex rel. Erickson v. Magie*, 183 Minn. 60, 61, 235 N. W. 526 (1931)

174. *Dale v. Johnson*, 143 Minn. 225, 173 N. W. 417 (1919) (mandamus to compel county auditor to issue certificate of election to relator was denied for the reason that he had failed to file a statement of his campaign expenses, despite the fact that he had received the greatest number of votes)

175. *State ex rel. Erickson v. Magie*, 183 Minn. 60, 235 N. W. 526 (1931) (misconduct of relator in obtaining an election certificate may, in the sound discretion of the trial court, justify the denial of a writ of mandamus ordering delivery of the office pending an election contest)

176. *State ex rel. Barnes v. Tauer*, 178 Minn. 484, 227 N. W. 499 (1929) (mandamus is not available to compel county board to publish financial statements as prescribed by law if all the newspapers in the county had formed a combination contrary to public policy)

177. This rule has been invoked and discussed in several cases in which stockholders attempted to enforce their right of inspection of corporate books. *State ex rel. Humphrey v. Monida & Y. Stage Co.*, 110 Minn. 193, 124 N. W. 971, 125 N. W. 676 (1910), *State ex rel. Boldt v. St. Cloud Milk Producers' Assn.*, 200 Minn. 1, 273 N. W. 603 (1937), *State ex rel. Gustafson Co. v. Crookston Trust Co.*, 222 Minn. 17, 22 N. W. 2d 911 (1946).

178. *Sinell v. Town of Sharon*, 206 Minn. 437, 289 N. W. 44 (1939) (mandamus to order opening and grading of township road was denied because road has been established 62 years prior to the proceedings), see also the dictum to that effect by Justice Mitchell in *State ex rel. Zeglin v. Board of County Commissioners*, 60 Minn. 510, 512, 62 N. W. 1135 (1895)

is still of sufficient public interest so that its performance will not work unnecessary hardship.<sup>179</sup> The writ of mandamus, finally, will be denied where its issuance would be "futile, unavailing and ineffective."<sup>180</sup> Such a situation exists in particular if the writ could not order the performance of any specific action but only the obedience to a general statutory mandate.<sup>181</sup>

The exercise of discretion by the district court in granting or withholding the writ is subject to a similar supervision by the supreme court as in traditional equity cases.<sup>182</sup>

## 2. *Scope of judicial review.*

At the hearing on the alternative writ the court will try all material issues including that of arbitrariness and capriciousness in making the determination attacked. In the latter respect the scope of review available in mandamus proceedings exceeds considerably that accorded upon certiorari. This important feature has been stressed twice before.<sup>183</sup>

It may be added that the frequently quoted statement that the writ of mandamus will only issue where there exists a legal right ". . . 'so clear that it does not admit of any reasonable controversy'"<sup>184</sup> is obviously not meant to imply any restriction on the court's power to ascertain the necessary facts.

The propriety of the issuance of a peremptory writ is not determined on the basis of the facts and conditions as they existed at the initiation of the proceedings but on the basis of the situation existing when the court decides whether or not to grant the peremp-

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179. Thus, in *State ex rel. Phillips v. Neisen*, 173 Minn. 350, 217 N. W 371 (1928), the court denied a writ of mandamus on the relation of taxpayers who sought to compel county officials to publish the county financial statement as prescribed by law because the directory 30 day period had long expired and relatively few persons were still interested in the information which was otherwise available, but in *State ex rel. Heidrich v. Heffelfinger*, 209 Minn. 343, 296 N. W 181 (1941) the court compelled the belated publication of public assistance lists where it was still of beneficial service to the people of county and relators had sought the writ promptly.

180. *State ex rel. Smith v. Haveland*, 223 Minn. 89, 25 N. W 2d 474 (1946), following *State ex rel. Lum v. Archibald*, *supra* note 169. See also *Oakman v. City of Eveleth*, 163 Minn. 100, 203 N. W 514 (1925).

181. Thus, in *State ex rel. Mortensen v. Copeland*, 74 Minn. 371, 375, 77 N. W 221, 222 (1898), the court held that a statute prescribing preferential hiring of veterans was unenforceable by mandamus since ". . . this would be merely to duplicate the act of the legislature in enacting the statute." Obviously an opposite result would have created the unanswerable problem as to who is entitled to enforce such writ by contempt proceedings.

182. *State ex rel. Erickson v. Magie*, *supra* note 175.

183. See *supra* p. 593 and p. 596.

184. *State ex rel. Coduti v. Hauser*, 219 Minn. 297, 302, 17 N. W 504, 507 (1945), *Olson v. Honett*, 133 Minn. 160, 157 N. W 1092, 1103 (1916), *International Harvester v. Elsberg*, 197 Minn. 360, 268 N. W 421 (1936).

tory writ.<sup>185</sup> If later events make such relief improper or terminate the duty sought to be enforced the alternative writ must be quashed. Thus a wrongfully discharged employee is entitled to an order for reinstatement only if his employment has not been validly terminated at the time of the hearing.<sup>186</sup>

### C.

#### Procedural Aspects

##### 1 *Alternative and peremptory writs: their relation.*

The writ of mandamus is either alternative or peremptory.<sup>187</sup> The alternative writ commands the defendant to do the required act or show cause before the court why he has not done so. The peremptory writ commands the defendant to do the required act without giving him the opportunity to show why he has not done so.<sup>188</sup> The statute expressly provides that a peremptory writ may be allowed in the first instance only when the right to require the performance of the act is clear and it is apparent that no valid excuse for nonperformance can be given, and that in all other cases the alternative writ shall first issue.<sup>189</sup> As a consequence peremptory writs will be rarely granted except after a hearing on the alternative writ. It is, however, not necessary that the peremptory writ follow the alternative writ in all matters of detail. The mandamus proceedings are elastic and enable the court to deviate from the original command in the alternative writ and to adjust the commands of the peremptory writ in accord with the results of the trial.<sup>190</sup> If a peremptory writ be granted in the first instance the proper remedy is appeal and not collateral attack in the ensu-

185. *Dexner v. Houghton*, *supra* note 165, *City of Owatonna v. Chicago, R. I. & P. Ry. Co.*, 156 Minn. 475, 195 N. W. 452 (1923), *State ex rel. Phillips v. Neisen*, 173 Minn. 350, 217 N. W. 371 (1928), *State ex rel. Rose Brothers L. & S. Co., Inc. v. Clousing*, 198 Minn. 35, 268 N. W. 844 (1936), *Reed v. Trovatten*, 209 Minn. 348, 296 N. W. 535 (1941)

186. *Compare Reed v. Trovatten*, 209 Minn. 348, 296 N. W. 535 (1941) (employment validly terminated after illegal discharge), *with State ex rel. Coduti v. Hauser*, 219 Minn. 297, 17 N. W. 2d 504 (1945) (change of departmental rules regulating lay-off under certain conditions does not affect status of employee *ex post facto* and consequently does not impair his right to reinstatement).

187. 2 Minn. Stat. § 586.03 (1945).

188. *Ibid.*

189. 2 Minn. Stat. § 586.04 (1945)

190. *State ex rel. City of Duluth v. St. Paul & D. R. Co.*, 75 Minn. 473, 78 N. W. 87 (1899), *State ex rel. Babcock v. County of Chisago*, 115 Minn. 6, 131 N. W. 792 (1911)

ing contempt proceedings.<sup>191</sup> If the district court grants a peremptory writ in the first instance in violation of the statute the judgment ordering such writ to issue may be appealed from and the supreme court will direct the court to issue the alternative writ.<sup>192</sup>

## 2. Jurisdiction.

Since 1881<sup>193</sup> the district courts have been vested with exclusive original jurisdiction in mandamus cases except where such writ is to be directed to a district court or a judge thereof in his official capacity.<sup>194</sup>

## 3. Practice.

The practice in mandamus proceedings is, in many respects, assimilated to that in ordinary civil actions.<sup>195</sup> The court has vacillated somewhat in regard to the details. In one case it announced categorically that ". . . the writ not the petition, constitutes the complaint,"<sup>196</sup> while in another case it was said that "The petition and alternative writ in mandamus cases constitute, in legal effect, the complaint."<sup>197</sup> Accordingly the court has required that respondent must demur to "the petition and alternative writ."<sup>198</sup>

The content of the writ is specifically prescribed by statute,<sup>199</sup> but the supreme court has upheld the denial by the district court of a motion to quash where the writ incorporated the allegation of the petition by reference.<sup>200</sup> The statute does not allow any reply to the answer.<sup>201</sup> New matter in the answer stands as though denied.<sup>202</sup> Respondent's motion for judgment on the pleadings consequently must rest solely on the petition and writ.<sup>203</sup>

191. State *ex rel.* Tuthill v. Giddings, 98 Minn. 102, 107 N. W 1048 (1906).

192. Home Ins. Co. v. Scheffer, 12 Minn. 382 (1867).

193. See *supra* text to note 40.

194. 2 Minn. Stat. § 586.11 (1945). For the proper practice in cases where the supreme court has original jurisdiction; see Lenhart v. Lenhart Wagon Co., 211 Minn. 572, 2 N. W 2d 421 (1942).

195. State *ex rel.* McGill v. Cook, 119 Minn. 407, 138 N. W 432 (1912).

196. State *ex rel.* Schmidt v. Youngquist, 178 Minn. 442, 443, 227 N. W 891, 892 (1929).

197. State *ex rel.* McGill v. Cook, 119 Minn. 407, 408, 138 N. W 432, 433 (1912).

198. *In re* Estate of Stenzel, 210 Minn. 509, 511, 299 N. W 2, 3 (1941); State *ex rel.* McGill v. Cook, *supra* note 195.

199. 2 Minn. Stat. § 586.03 (1945).

200. State *ex rel.* Senske v. City of Waseca, 116 Minn. 40, 133 N. W 67 (1911). Even less can a defect in the title in the mandamus proceedings be raised on demurrer, *In re* Estate of Stenzel, 210 Minn. 509, 299 N. W 2 (1941).

201. 2 Minn. Stat. § 586.08 (1945), Yess v. Michael Ferch, 213 Minn. 593, 5 N. W. 2d 641 (1942).

202. State *ex rel.* Schmidt v. Youngquist, *supra* note 196.

203. State *ex rel.* Goar v. Hoffmann, 209 Minn. 308, 296 N. W 24 (1941).

The proper practice requires the entry of a formal judgment upon the court's conclusions of law, the same as in ordinary civil actions.<sup>204</sup> An order directing that a peremptory writ issue is, however, appealable as an irregular judgment.<sup>205</sup>

4. *Proper parties: conclusiveness of adjudication.*

There is no identity of parties between a municipal corporation and its officers for the purpose of precluding mandamus proceedings. A municipality, therefore, may compel its officers to perform their duties by mandamus.<sup>206</sup> If an official has been succeeded by another, the latter is the proper party in mandamus proceedings.<sup>207</sup> Furthermore "all persons who have a special interest in the subject-matter of mandamus proceedings, and whose rights will be collaterally determined or substantially affected by a judgment awarding a writ therein, may properly be joined as parties respondent."<sup>208</sup>

In general, the ordinary principles of res judicata are applicable to mandamus proceedings, although some qualifications may be necessary. Thus a relator whose petition for an alternative writ had been dismissed on the merits was held to be barred from subsequent proceedings on the same cause of action.<sup>209</sup> It has likewise been held that the determination of an issue in mandamus proceedings initiated by a taxpayer or resident for the enforcement of a duty owed to the public at large is conclusive on other taxpayers or residents. "The people at large must necessarily, in the absence of fraud or collusion, be concluded by the final judgment rendered therein. They were in privity with relator, within the meaning of the law, and bound equally with him."<sup>210</sup> It should, however, be noted that Mr. Justice Mitchell thought that the doctrine of estoppel by verdict could not be invoked *against* an officer since he "

204. *State ex rel. Mortensen v. Copeland*, 74 Minn. 371, 77 N. W. 221 (1898).

205. *State ex rel. Board of Co. Commrs. v. McKellar*, 92 Minn. 242, 99 N. W. 807 (1904), *State ex rel. Boldt v. St. Cloud Milk Producers' Assn.*, 200 Minn. 1, 273 N. W. 603 (1937).

206. *State ex rel. Board of County Commrs. v. Johnson*, 111 Minn. 10, 126 N. W. 480 (1910), *State ex rel. Village of Chusholm v. Trask*, 155 Minn. 213, 193 N. W. 121 (1923).

207. *State ex rel. Young v. Holgate*, 107 Minn. 71, 73, 119 N. W. 792, 793 (1909), *State ex rel. Board of County Commrs. v. Johnson*, 111 Minn. 10, 14, 126 N. W. 480, 481 (1910).

208. *State ex rel. Board of County Commrs. v. Johnson*, 111 Minn. 10, 16, 126 N. W. 480, 482 (1910), *see Robinette v. Price*, 214 Minn. 521, 530, 8 N. W. 2d 800, 806 (1943).

209. *State ex rel. Morgan v. Hard*, 25 Minn. 460 (1879).

210. *Kaufer v. Ford*, 100 Minn. 49, 53, 110 N. W. 364, 366 (1907).

could not, by any act or omission of his, estop the public, whom he represents."<sup>211</sup>

#### D.

#### Statutory Mandamus

A number of statutes contain specific provision for the use of mandamus in connection with their administration.<sup>212</sup> While the legislature, of course, cannot change the constitutional limitations on the jurisdiction of the courts, especially the supreme court,<sup>213</sup> by calling a remedy mandamus, it may enlarge the function of the remedy both as to its availability and scope of review.<sup>214</sup> Except where statutory construction implies such result the general principles governing mandamus will apply.

Where statutory mandamus is used for the enforcement of an administrative order the question arises whether the validity of such order can be challenged in the mandamus proceedings. On principle, orders which are subject to review by appeal or certiorari should not be open to attack in the enforcement stage except where a statute provides otherwise. Such apparent exception seems to exist in 1 Minn. Stat. § 217.12 (1945) which authorizes the Railroad and Warehouse Commission to enforce its orders by "petition of enforcement," and specially provides that the findings of fact by the commission shall be only *prima facie* evidence. However, the true significance of this section can only be understood in the light of its history. The original act of 1887 gave the commission broad supervisory powers and provided for the enforcement of the commission's orders by writ of mandamus.<sup>215</sup> As a result of a decision by the United States Supreme Court which held the statute unconstitutional,<sup>216</sup> the procedural portions of the act were radically amended in 1891. The provisions for appeal

211. State *ex rel.* Tracy v. Cooley, 65 Minn. 406, 407, 68 N. W. 66, 67 (1896).

212. See, *e.g.*, 1 Minn. Stat. § 164.28 (1945) (mandamus by county to compel town to levy special bridge maintenance tax), 1 Minn. Stat. § 256.35 (1945) (mandamus by Division of Social Welfare to compel counties to comply with social welfare acts), 1 Minn. Stat. 197.46 (1945) (enforcement of veterans preference acts), 2 Minn. Stat. § 340.33 (1945) (mandamus to enforce compliance with local option laws regarding intoxicating liquors); 1 Minn. Stat. § 64.60 (1945) (mandamus to enforce compliance by officers of beneficiary associations with certain state laws).

213. Lauritsen v. Seward, 99 Minn. 313, 109 N. W. 404 (1906).

214. Cf. State *ex rel.* Kane v. Stassen, 208 Minn. 523, 294 N. W. 647 (1940).

215. Minn. Laws 1887, c. 10, § 8 (g).

216. Chicago etc. Railway Co. v. Minnesota, 134 U. S. 418 (1890).



from orders of the commission were greatly enlarged<sup>217</sup> and a new detailed section regarding the enforcement of orders inserted which contained the above mentioned *prima facie* clause.<sup>218</sup> The state supreme court continued to permit mandamus proceedings for the purpose of enforcing the commission's orders and held that, in view of a special clause added in 1891, a carrier need not appeal from an order but could raise the issue of the validity of the order as a defense in the mandamus proceeding.<sup>219</sup> In 1907 the appeal provisions were amended by making the commission's order conclusive in the absence of an appeal and depriving the parties of their prior right to have the facts re-examined in the enforcement proceedings.<sup>220</sup> As a result of this development the *prima facie* clause in 1 Minn. Stat. § 217.12 (1945) must be considered to be greatly limited by 1 Minn. Stat. § 216.25 (1945)

A related problem exists under a statute codifying prior law, authorizing the council of any city in the state " to prescribe reasonable requirements, standards, and conditions of service and operation of any street railway property by any street railway within such city " and provides for enforcement of such council orders by mandamus.<sup>221</sup> The supreme court has held many times that the defendant in such proceedings may challenge the order sought to be enforced as arbitrary and unreasonable and have this issue tried by the court.<sup>222</sup> Apparently the court has never considered whether and under what conditions certiorari would ever be the proper remedy to review such council resolutions.

[To be continued]

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217 Minn. Laws 1891, c. 106, § 3.

218. Minn. Laws 1891, c. 106, § 4.

219. State *ex rel.* Railroad & Warehouse Commissioners v. Minneapolis & St. Louis Railroad Co., 76 Minn. 469, 79 N. W. 510 (1899) (mandamus to enforce order of railroad and warehouse commission for erection of depots at certain localities), State *ex rel.* R. & W. C. v. St. L. R. Co., 80 Minn. 191, 83 N. W. 60 (1900) (mandamus for enforcement of rate order)

220. Minn. Laws 1907, c. 167, § 2, now 1 Minn. Stat. § 216.25 (1945)

221. 1 Minn. Stat. § 220.09 (1945)

222. See, e.g., State *ex rel.* City of St. Paul v. St. Paul City Ry. Co., 122 Minn. 163, 142 N. W. 136 (1913), State *ex rel.* City of Duluth v. Duluth St. Ry. Co., 179 Minn. 548, 229 N. W. 883 (1930), State *ex rel.* City of St. Paul v. St. Paul City Ry. Co., 180 Minn. 329, 230 N. W. 809 (1930)