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I. Introduction: Certiorari at Common Law

The writ of certiorari is an ancient and venerable procedural device which comes down to us from the antiquity of feudal times and remains as an ill-adjusted common law remnant in the midst of North Dakota's codified law. The practitioner is to be excused for looking askance at it. Indeed, it is probable that certiorari is rarely thought of in terms of state law; most attorneys seem to connect it with the United States Supreme Court and its use by that tribunal as a screening device for the selection of cases.

Certiorari is, however, an important part of the law of North Dakota dealing with administrative agencies. Enmeshed as it is in the midst of a group of constitutional and statutory provisions which are in many respects inharmonious, the writ has developed into an extraordinarily complex legal mechanism. This is unfortunate in many ways. Because of its unusual characteristics, certiorari's intricacies have played a major, if not decisive, part in the decision of many of the important administrative law cases which have been decided by the Supreme Court of North Dakota. To understand thoroughly the law of certiorari in North Dakota, and why it has developed as it has, it is necessary first to consider briefly its common law background.

Certiorari is ordinarily defined as a writ issuing out of a court directed to some inferior court or other tribunal or officer, generally exercising judicial functions, requiring the certification and return to the issuing court of the record of some proceeding then pending or terminated, to the end that the proceedings may be reviewed by the issuing court.[1] It is not a procedurally flexible remedy in the sense that it can be used to command a lower court or officer to take some affirmative action or to refrain from doing so; all that can be done by means of the writ is to have some order or action already taken set aside or quashed.[2] And it is a remedy which may be granted or withheld in the discretion of the court for

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[1] *In re* Dance, 2 N.D. 184, 49 N.W. 733 (1891); 1 Holdsworth, History of English Law 218 (1927); Goldberg, *The Extraordinary Writs and The Review of Inferior Court Judgments*, 36 Calif.L.Rev. 558, 562 (1948); Goodnow, *The Writ of Certiorari*, 6 Pol.Sci.Q. 493 (1891) (a basic discussion); Comment, 4 Miami L.Q. 367 (1950).

[2] Molander v. Swenson, 54 N.D. 391, 210 N.W. 9 (1926).

a variety of reasons, *e.g.* laches.[3] In the exercise of its discretion, however, the court will ordinarily be governed by a number of fairly well established rules growing out of the character of certiorari as an extraordinary remedy and its history of development at common law.

Certiorari developed in the early days of the common law in England, when the king as the repository of the nation's sovereign powers was considered the fountain of all justice.[4] Because the king was so considered, it was only natural that he should exercise his prerogative of doing justice by superintending and watching over the conduct of the English court system. The chief instrument through which this supervision was effected was the king's own court, the Court of King's Bench.[5]

To the Court of King's Bench, then, came the suitors who were unable to obtain justice in the regular courts. And from the King's Bench the crown exercised its powers by issuing various writs—the great writ of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.[6] These writs in the course of time became known as prerogative writs.[7] Blackstone, discussing this aspect of King's Bench jurisdiction, waxes eloquent: "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove the proceedings to be determined here, or prohibit their progress below . . . It commands magistrates and others to do what their duty requires, in every case where there is no specific remedy."[8]

The Court of King's Bench thus acquired a superintending control over the lower courts of the English system.[9] But

[3] Goodnow, *supra* Note 1, at 501-02. See also Morrissey v. Blasky, 22 N.D. 430, 134 N.W. 319 (1912); Schouweiler v. Allen, 17 N.D. 510, 117 N.W. 866 (1908).

[4] Goodnow, *supra* note 1, at 493.

[5] For discussion of this power in the North Dakota courts, see State *ex rel.* Lemke v. District Court, 49 N.D. 27, 41-42, 186 N.W. 381, 386-87 (1921); State *ex rel.* Moore v. Archibald, 5 N.D. 359, 372-73, 66 N.W. 234, 239-40 (1902); State *ex rel.* Fourth National Bank v. Johnson, 103 Wis. 591, 79 N.W. 1081 (1899).

[6] This pre-eminent position was later lost when the court was integrated into the High Court of Justice. 1 Holdsworth, *op cit. supra* note 1, at 210-11.

[7] Goodnow, *supra* note 1, at 493; 1 Holdsworth, History of English Law 92 (1908). Certiorari in England is still discussed under the title of "Crown Practice" in 10 Halsbury, Laws of England 155 et seq. (1909).

[8] 3 Bl.Com. *42.

[9] This supervisory power was also exercised over the machinery of local government, particularly the English justices of the peace, who exercised many powers which would not today be considered judicial. The fact foreshadowed the use of certiorari as a means of controlling administrative action in this country. Goodnow, *supra* note 1, at 515; 10 Holdsworth, *op cit supra* note 1, at 155, 244-46.

a tribunal in which the king himself occasionally sat exercised more authority than that. The cases which affected the king himself, as well as the problems which affected the important interests of the kingdom as a whole, were brought before it as original matters.[10] In such cases the Court of King's Bench exercised original as well as superintending jurisdiction.[11]

While statements may be found on both sides of the argument, the best authority on the point appears to indicate that as it was used in England, the writ of certiorari was not limited to errors which were "jurisdictional" in character, but could be used to quash any judgment based on errors of law appearing on the record and errors of jurisdiction whether they appeared on the record or not.[12] However, from time to time parliament, in various statutes, inserted provisions forbidding the removal of summary convictions into the Court of King's Bench on certiorari. It was held that these did not apply where the proceeding was invalidated by jurisdictional error, and as a result the mistaken belief spread in this country that certiorari could be used to test only jurisdictional mistakes.[13]

The consequences of this two-fold development—that King's Bench possessed supervisory and original as well as appellate jurisdiction, and that the mistaken belief arose that certiorari lay only to test questions of jurisdiction—remain very much with us today, as the subsequent discussion will make clear.

II. *Certiorari in North Dakota: Trial on the Record.*

As is true with so much of North Dakota's law, the provisions dealing with certiorari found in the present code stem from the Code of Civil Procedure prepared by David Dudley Field of New York in 1848.[14] Procedurally, certiorari's function remains unchanged from its use at common law. It still commands the party to whom it is addressed to prepare and certify to the issuing court a record of the proceedings, so that they may be reviewed by the court.[15]

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[10] See State *ex rel.* Moore v. Archibald, 5 N.D. 359, 372-73, 66 N.W. 234, 239-40 (1902); Goodnow, *supra* note 1, at 494-95.

[11] 1 Holdsworth, *op cit supra* note 1, at 205.

[12] Jackson v. People, 9 Mich. 111 (1860) and cases cited; Goldberg, *supra* note 1, at 562 et seq.; Hart, An Introduction to Administrative Law 55 (2d ed. 1950). But see Goodnow, *supra* note 1, at 527-30.

[13] Freund, Administrative Powers over Persons and Property § 136 (1928).

[14] N.D. Rev. Code 1895, preface v; Viesselman, Dakota Practice § 2 (1930).

[15] N.D. Rev. Code § 32-3304 (1943).

When the statutes were first enacted, no provision was made for supplementing the bare provisions of the record, although it was provided that if "the return to the writ be defective, the court may order a further return to be made."[16] The early case of In re *Dance*[17] laid down the proposition emphatically that the trial on a writ of certiorari was on the record alone. The case involved the validity of a judgment rendered by a justice of the peace. The applicant for certiorari contended the judgment was void because the justice of the peace had adjourned court indefinitely before rendering a decision, thereby losing jurisdiction. This fact was not shown on the original record, but a supplemental statement obtained from the justice after his term of office had expired disclosed its existence. The court held that the supplemental statement could not be considered. "To permit the record to be impeached by the recollections of the justice is, in effect, contradicting the return by parol evidence; and there is such an avalanche of authority against that proceeding that no one would claim that it could be done."[18]

The obvious rigidity inherent in the decision prompted a change in the law. Four years after the decision was rendered, a provision was included in the Revised Code of 1895 permitting the impeachment of the record.[19] The code was also amended to provide that the writ might be issued to officers whose term of office had expired,[20] and that supplemental proofs might be used where no record, or an insufficient record, was available.[21]

III. *Statutory Conditions for Use of Writ*

As it now stands, the code specifies that a "writ of certiorari shall be granted by the supreme court or district court when an officer, board, tribunal, or inferior court has exceeded the jurisdiction of such officer, board, tribunal or inferior court, as the case may be, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when, in the judgment of the court, it is deemed necessary to prevent miscarriage of justice."[22] Thus, several formal conditions must be met before the writ can be obtained in the ordinary case: (1) there must

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[16] Dak. Comp. Laws 1887, § 5514.
[17] 2 N.D. 184, 49 N.W. 733 (1891).
[18] *Id.* at 193, 49 N.W. at 735.
[19] N.D. Rev. Code § 32-3310 (1943).
[20] N.D. Rev. Code § 32-3305 (1943).
[21] N.D. Rev. Code § 32-3307 (1943). But see Red River Valley Brick Company v. Grank Forks, 27 N.D. 8, 30, 145 N.W. 725, 729 (1914).
[22] N.D. Rev. Code §32-3301 (1943).

be an official act in excess of jurisdiction; (2) there must be no appeal from that act; (3) there must be no other plain, speedy and adequate remedy. The effect of the provision as to miscarriage of justice will be discussed hereinafter, but it may be pointed out that in form it is not a *condition* but an *alternative ground* for the issuance of the writ. That these conditions do not always apply will become manifest from the later discussion, but in the ordinary application for the writ, particularly in the district court, they must be present.

It is to be noted that these conditions are imposed conjunctively—that is, there must be an act in excess of jurisdiction *and* a lack of appeal or other adequate remedy. The courts have held repeatedly that although a lower court may exceed its jurisdiction in entering an order, that fact alone is not sufficient to authorize the use of certiorari when there is a remedy by appeal.[23] In the discussion which follows, it is important to bear in mind that in those situations where the court has reviewed an act in excess of jurisdiction, it has simultaneously been forced to consider the question of whether an appeal or other adequate remedy existed.

IV. *What Constitutes an Excess of Jurisdiction?*

Despite the fact that the court must always decide the issue of appealability in order to reach the question of whether a given official act is or is not in excess of jurisdiction, a substantial number of decisions involving this point have come before the court. This result has been reached, contrary to the experience of other jurisdictions,[24] because of an unusual development in the law of North Dakota which has tended to increase the importance of certiorari as a mechanism for the review of administrative action. The general rule adopted in England with respect to the writ limited certiorari to instances where the act to be reviewed was of a judicial or quasi-judicial nature.[25] As certiorari developed in this country a majority of states followed English practice in this regard. Difficulties were soon experienced, growing out of the problem, familiar to all students of administrative law, which is encountered

[23] McLean v. McLean, 69 N.D. 406, 287 N.W. 495 (1939); Sell v. Davis, 61 N.D. 130, 237 N.W. 307 (1931); Squire v. County Court, 25 N.D. 468, 141 N.W. 1135 (1913); State *ex rel.* Noggle v. Crawford, 24 N.D. 8, 138 N.W. 2 (1912); St.P.,M. & M.Ry. v. Blakemore, 17 N.D. 67, 114 N.W. 730 (1908); Lewis v. Gallup, 5 N.D. 384, 67 N.W. 137 (1896).

[24] Goldberg, *supra* note 1, at 565.

[25] Rex v. Woodhouse (1906) 2 K.B. 501; Regina v. Salford Overseers (1852) 18 Q.B. 687, 118 Eng.Rep. 259; 10 Halsbury, Laws of England 171 (1909).

in attempting to define what actually constitutes a judicial as distinguished from a legislative, executive or administrative act.[26]

When the statutes concerning certiorari were first adopted in the Territory of Dakota, however, they contained no words of limitation restricting the use of the writ to cases where judicial or quasi-judicial acts were involved.[27] The significance of this omission was not lost upon the North Dakota court when the statutes were later carried over into the state's law. In *State* ex rel. *Johnson v. Clark*[28] the precise issue of how far the writ extended came before it for determination. The city of Minot, desiring to annex territory outside its corporate boundaries, published notice of annexation and entered an order purporting to annex the land. A writ of certiorari was obtained from the district court to review the action, on the ground that irregularities in the publication of notice had taken place. The defense was that the order of annexation was legislative in character and that the court had no authority to review it on certiorari.[29]

The court concurred in the view that the order was legislative. However, it held specifically that in view of the language of the statute it had authority to review by certiorari acts of an "administrative, legislative, judicial, and other" nature.[30] South Dakota, possessing a similar statute, had reached the same result earlier.[31] The effect of a decision of this type, of course, was bound to be far reaching. There are a multitude of government agencies—administrative boards, city councils and the like—from whose actions no direct appeal is given to the courts.[32] Often one has the remedy of a collateral suit, but this does not grant relief as to the precise subject matter of a void official order or action, and as the court had early pointed out, the right to relief which a person whose rights are infringed by such an order possesses is the right to have the order itself set aside, not a right to col-

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[26] Goodnow, *supra* note 1, at 506 et seq.; Pillsbury, *Administrative Tribunals*, 36 Harv.L.Rev. 405, 411 (1923); Stason, Cases and Materials on Administrative Tribunals 67-69 (2d ed. 1947).

[27] See text, Note 22.

[28] 21 N.D. 517, 131 N.W. 715 (1911).

[29] Cf. Glaspell v. Jamestown, 11 N.D. 86, 88 N.W. 1023 (1902) (statute authorizing district courts to exclude territory from city held unconstitutional as a delegation of legislative power to court).

[30] 21 N.D. at 528, 131 N.W. at 719.

[31] State *ex rel.* Dollard v. Hughes County, 1 S.D. 292, 46 N.W. 1127 (1890) (acts of county commissioners in setting up polling places held reviewable on certiorari though legislative in character).

[32] The effect of the Administrative Agencies Uniform Practice Act on what authorities are reviewable by certiorari is discussed *infra*, text to note 119.

lateral relief from it.[33] While certiorari has been used to review such orders even in other states, the review has generally been substantially hampered by the fact that the action under consideration must always be of a judicial or quasi-judicial nature.[34] At one stroke the North Dakota court attempted to bypass these difficulties, transforming certiorari into an important part of the state's developing administrative law.

But while the court had granted a right to review which was far-reaching in its coverage, it must be pointed out that there is a distinction between the *right* to a review and the *scope* or *extent* of the review once it is granted.[35] The question which remained was how far this review was to extend. The *Clark* decision attempted to answer this: "The questions for consideration are simply these: Have they jurisdiction and have they proceeded according to law in the exercise thereof? If they have, then it matters not whether the act complained of is judicial, administrative, or legislative. As to the wisdom of their conclusions thus legally given . . . we can have nothing to say."[36]

Several things may be noted about this decision. In the first place, the court was clearly looking forward to the develment of administrative law in the state and was attempting to provide a basis for future judicial supervision over the administrative agencies, boards and officials involved. It was planning to see to it that the agencies were held within proper limits while still retaining as much freedom and flexibility of action as possible. Secondly, the court was speaking of the questions for consideration, not the question. The emphasis was on the plural. In order to take official action which was safe from certiorari, the court had stated, two factors had to concur: (1) a government agency with jurisdiction which (2) had proceeded according to law. The court had drawn a distinction between the presence of jurisdiction and its proper exercise.[37]

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[33] Enderlin Bank v. Rose, 4 N.D. 319, 58 N.W. 314 (1894); State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1901).

[34] Goodnow, *supra* note 1, at 505-14.

[35] Larson, *The Doctrine of "Constitutional Fact,"* 15 Temp.L.Q. 185, 204-05 (1941).

[36] 21 N.D. at 528, 131 N.W. at 719.

[37] See the remarks of Judge Bronson in Baker v. Lenhart, 50 N.D. 30, 70, 195 N.W. 16, 32 (1923): "Want of jurisdiction must be distinguished from excess of jurisdiction . . . This court has pointed out a path of distinction in certiorari proceedings. It has recognized that the statute in its prescription has connected the phrase 'excess of jurisdiction' with a failure to proceed according to law . . . In other words, although there may be no want of jurisdition in a certiorari proceeding, yet, acts in excess of jurisdiction not consonant with law may appear in the course thereof."

The authorities make it clear that these two tests often tend to merge into one another. "The question of regularity of proceedings," says Professor Goodnow, "is . . . a part of the general question of jurisdiction."[38] In a similar vein, the *Restatement of Judgments* lists four main categories of limitations upon the power of a tribunal to render a binding judgment: (a) a tribunal may lack jurisdiction because the parties or property or status which it is sought to affect are not within the control of the state,[39] as witness the case where a court seeks to grant a divorce to a person not domiciled within the state;[40] (b) it may lack jurisdiction because it fails to employ reasonable methods of notification and give a reasonable opportunity to be heard to persons affected;[41] (c) it may lack jurisdiction because it does not possess competency to deal with the question before it,[42] as in the case of a justice of the peace who purports to try title to real property,[43] or a workman's compensation board which attempts to grant compensation where no employer-employee relationship exists;[44] (d) and lastly, it may lack jurisdiction because of failure to comply with the requirements imposed by law for the exercise of its power,[45] *e.g.*, failure to follow proper procedure.[46] It is therefore clear that the question of jurisdiction and the question of regularity of procedure are often intertwined and that a clear-cut line of demarcation is difficult to draw between the two. Indeed, most of the jurisdictions in this country have come to the conclusion that both questions are reviewable on certiorari.[47] Thus, the tests laid down in the *Clark* case were in line with the current of authority throughout much of the country. They were, moreover, in accord with the historical aims and purposes of certiorari as

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[38] Goodnow, *supra* note 1, at 518.

[39] Restatement, Judgments §5 (1942).

[40] Williams v. North Carolina, 325 U.S. 226 (1944); Smith v. Smith, 7 N.D. 404, 74 N.W. 783 (1898).

[41] Restatement, Judgments §6 (1942); Nelson v. Ecklund, 68 N.D. 724, 283 N.W. 273 (1938); Morrisey v. Blasky, 22 N.D. 430, 134 N.W. 319 (1912).

[42] Restatement, Judgments §7 (1942).

[43] See Enderlin Bank v. Rose, 4 N.D. 319, 332, 58 N.W. 514, 519 (1894).

[44] Uphoff v. Industrial Commission, 271 Ill. 312, 111 N.E. 128 (1916); Borgnis v. Falk, 147 Wis. 327, 133 N.W. 209 (1911).

[45] Restatement, Judgments §8 (1942); 4 Miami L.Q. 367, 368 (1950).

[46] State *ex rel.* Ness v. Fargo, 63 N.D. 33, 245 N.W. 887 (1932); State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1901).

[47] See the brief description of the law in a representative group of jurisdictions contained in 11 C.J. 92-95.

an extraordinary remedy.[48] Defined as it was in *State* ex rel. *Johnson v. Clark,* excess of jurisdiction was a broad and flexible concept. It consisted, to cite the language of a California decision, of any acts exceeding the defined power of any tribunal in any instance, "whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the court and followed under the doctrine of stare decisis . . ."[49]

This is not to say that the court meant that any unwise or unfortunate decision by an official agency was to be correctible on certiorari; the *Clark* case clearly contemplated no such result. What the decision appears to stand for is the proposition that the writ was to be used to see to it that legally correct methods were used in the conduct of official business, and that palpable errors committed in the course of administering the laws might be corrected by the writ when no other remedy was available.[50]

There is, however, a considerable difference between the review of decisions of administrative agencies or municipal governments, and the review of regular judicial or even quasi-judicial proceedings. And following the *Clark* case, as a series of administrative decisions was brought before it on certiorari, the court began veering toward a far more restricted view of what constituted an excess of jurisdiction. What influenced the court is not clear. It may have been simply an unquestioning acceptance of the mistaken belief that certiorari lay only to review questions of jurisdiction combined with a lack of analysis concerning the nature of jurisdictional error. It may have been the feeling of the court that the administrative agencies of the government were entitled to greater freedom of action. It may have been the

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[48] ". . . The scope of certiorari at the common law does not seem to have been limited to a particular class of error; the errors which were correctible were those shown on the face of the record . . . But a jurisdictional error could be shown by evidence outside the record. Thus summarizing briefly: the available evidence indicates that at the common law certiorari to quash could be used to quash any judgment based on errors of law appearing on the record and errors of jurisdiction whether or not they appeared on the record." Goldberg, *supra* note 1, at 562-63.

[49] Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 109 P.2d 942, 948 (1941). See also Jackson v. People, 9 Mich. 111, 119 (1860), where it is said: "If certiorari will lie for want of jurisdiction in cases where the common law remedy of certiorari, in its usual acceptation, is expressly or confessedly taken away, it follows, as an unavoidable conclusion, that the usual office of the common law writ is to inquire into something more than jurisdiction."

[50] This view is clearly supported by the statute, which provides that "the review upon a writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer has pursued regularly the authority of such court, tribunal, board, or officer." N.D. Rev. Code §32-3309 (1943).

effect of precedents from other western jurisdictions, where the idea that certiorari tests only jurisdiction has always been popular. More probably, the change in the court's view was caused by the stubborn continuance of the factor that *State* ex rel. *Johnson v. Clark* attempted to eliminate from the law of certiorari—the distinction between legislative and judicial acts, which may be hazy at times but which nevertheless is difficult if not impossible to disregard entirely. Regardless of what it was, the court shortly thereafter began to take the view that the type of jurisdictional error which was correctible on certiorari was error which prevented the administrative agency or municipal government from possessing jurisdiction over a case from its inception. The regularity of the proceedings—particularly the extent to which the decision was supported by the evidence—became less and less a factor.

The change appears to have begun with the case of *Albrecht v. Zimmerly*,[51] which involved removal proceedings against a county commissioner on the ground that he had accepted illegal fees while in office. The judge of the district court orally requested a judge from another district to try the case in his place. At a subsequent hearing, the petitioner made a special appearance and objected to the jurisdiction of the court on the ground that the file of the case contained no written request from the regular judge that the substituted judge sit in his place and that the complaint failed to state a cause of action. Neither the regular nor the substituted judge was present, but the clerk of court signed an order in the name of the substituted judge overruling the objections and reciting that since the petitioner had failed to demand a jury trial, the issues would be tried by the court. At this stage of the proceedings, the petitioner applied for a writ of certiorari to the supreme court,[52] contending that an excess of jurisdiction would occur if the case were brought on for trial. The court met the argument that the action of the clerk of court was invalid by sidestepping it. It pointed to the action of the petitioner in objecting to the complaint on the ground that it failed to state a cause of action and made the obvious reply that the court had personal jurisdiction over the person of the petitioner because in substance he had filed a demurrer. Since the court had personal jurisdiction, it was argued, it became unnecessary to consider the validity of the clerk's action. Thus, while the application for certior-

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[51] 23 N.D. 337, 136 N.W. 240 (1912).

[52] It might be pointed out that the errors claimed might very easily have been remedied on appeal. The argument made to the court was that the relator would be deprived of his office during the time of appeal should the court decide against him. The court did not discuss the point at length and does not appear to have considered it closely.

ari was made in part at least on the theory that the orders filed by the clerk of court were in excess of jurisdiction because procedurally irregular, the question of regularity was not even considered reviewable on the writ. Yet it is indicative of the natural scope of certiorari in such a situation that although, by the court's own view, it was unnecessary to discuss the validity of the clerk's order, the court strongly intimated that it felt the order was invalid and advised, though it did not direct, that it be set aside.

From this case on, repeated instances have occurred where relief from the effects of irregularity or error in the course of official proceedings has been denied because jurisdiction in the sense of power to hear and determine the case or to take the type of official action involved was present.[53] The most spectacular example of this development is *Baker v. Lenhart*,[54] which graphically illustrates the court's reversion from a broad to a narrow concept of excess of jurisdiction. The facts involved were that the petitioner owned land at the southwest corner of the city of Bismarck. A statute provided that upon petition it was the duty of the city council to exclude undeveloped territory from the city limits when the land lay upon the borders of the municipality. In an attempt to obtain the exclusion of his territory the petitioner presented a petition to the city council, which made a finding of fact that the land was bordered upon three sides and partly upon a fourth by other territory within the city limits. In fact this was a clear error or misstatement and the land was suitable for exclusion. The petitioner sought a writ of certiorari to have the action reviewed as an excess of jurisdiction, lost in the district court, and appealed.

On the first hearing of the case, the Supreme Court was split. The majority held that the city council was acting

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[53] The cases of State *ex rel.* Wehe v. Frazier, 47 N.D. 314, 182 N.W. 545 (1921) and State *ex rel.* Ness v. Fargo, 63 N.D. 85, 246 N.W. 243 (1932) must be classed as exceptions. In the first case cited, the order of the governor in removing a Workmen's Compensation Commissioner from office was set aside because of the governor's failure to swear in witnesses against the commissioner before requiring him to testify. In the second case the order of a city commission removing an assessor from office was set aside because the city commission had not followed judicial procedure in performing what the court considered a quasi-judicial function. The authority of both cases, however, must be considered as severely limited by subsequent decisions, notably State *ex rel.* Olson v. Welford, 65 N.D. 522, 260 N.W. 593 (1935), sustaining a very liberal use of the governor's power of removal, and State *ex rel.* Ness v. Fargo, 63 N.D. 85, 246 N.W. 243 (1932), the second appeal in the assessor's case, which upheld the city commission on the narrowest possible interpretation of the scope of certiorari.

[54] 50 N.D. 30, 195 N.W. 16 (1923).

legislatively,[55] and its action could not be set aside because it was the agency vested with the authority to determine the facts of the matter. The dissenting opinion made the obvious point that it was error to permit the city council to hide behind a flat misstatement of fact and thus avoid a duty imposed upon it by statute, regardless of whether the city would suffer loss in tax revenue by the exclusion of the land. Thus ended the first round of the case. The next commenced on rehearing, granted on the strength of the dissent and a change in the membership of the court. The opinion on rehearing and the further dissenting opinion provide the most exhaustive and carefully reasoned discussions of certiorari ever written by the North Dakota court.

The majority, on rehearing, reaffirmed the decision arrived at in the original opinion. The conclusion was reached by pointing to the fact that the petitioner had himself presented the application for exclusion to the city government, thus conferring upon it power to decide the case. Since the plaintiff had himself invoked the authority of the city commission, the reasoning went, "jurisdiction" in the city was clearly established. At this point, it was the thesis of the majority, inquiry into the merits of the case ceased. When once the court was satisfied that the city commission was competent to hear the issue, it was no longer concerned with the manner in which the jurisdiction was exercised.[56] The court could not review the evidence.[57] Cases cited to the contrary were distinguished on the ground that they involved the exercise of the court's supervisory power over lower courts in the judicial system, while this case was concerned with a tribunal over which the supreme court possessed no such inherent supervisory power.[58]

The dissent to the opinion on rehearing made abundantly clear what is obvious on the face of the decision: the majority was deliberately giving a highly restricted application to

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[55] *Contra*, Mogaard v. Garrison, 47 N.D. 468, 182 N.W. 758 (1921) (action held quasi-judicial).

[56] The result was reached, it may be noted, in the teeth of decisions pointing squarely at the doctrine of jurisdictional fact, several such cases being cited and discussed at length.

[57] *But cf.* Lowe v. District Court, 48 N.D. 1, 181 N.W. 92 (1921); Zinn v. District Court, 17 N.D. 135, 114 N.W. 472 (1908); Murphy v. District Court, 14 N.D. 542, 105 N.W. 728 (1905).

[58] See discussion, *infra*. *Cf.* State *ex rel.* Poole v. Nuchols, 18 N.D. 233, 119 N.W. 632 (1909).

the concept of excess of jurisdiction.[59] If the *Clark* case's test of excess of jurisdiction was not overruled specifically, its authority was at least disregarded. Excess of jurisdiction, in the majority's view, related to the competency of the agency involved to decide the case; it had little connection with the regularity of the proceedings once validly commenced.[60]

While there have been occasional exceptions[61] the court has adhered with considerable consistency to the doctrine of *Baker v. Lenhart* in administrative law matters ever since. Shortly afterward the court upheld a decision of the Workmen's Compensation Board refusing increased compensation to an injured claimant despite the fact that no evidence was introduced to meet the expert medical testimony he had presented.[62] While the result was influenced by the fact that the statutes provided no appeal from decisions of the Board on questions of fact,[63] and also by the element of expertness inherent in such a board, the justification for the decision was found in a limited concept of excess of jurisdiction.[64] In *Cofman v. Ousterhous*[65] it was implicit in the decision that the

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[59] "The majority opinion has given a very limited field of application to the term 'excess of jurisdiction' . . . This court has held . . . that in view of the express language of the statute, the supreme and district courts have the power to examine the acts of such tribunals as are exercising administrative, legislative, judicial and other functions *for the sole purpose of ascertaining whether they have proceeded according to law.*" 50 N.D., at 64-65, 195 N.W. at 30. (Emphasis is that of the dissenting opinion).

[60] A companion case, Lincoln Addition Improvement Company v. Lenhart, 50 N.D. 25, 195 N.W. 14, 33 (1922), is interesting because of the comment appearing in a concurring opinion. It was stated that excess of jurisdiction must consist of something beside failure to act, and therefore the order of the city council refusing to take action could not be considered an excess of jurisdiction. This has overtones of the "negative order" doctrine rejected in Rochester Telephone Company v. United States, 307 U.S. 125 (1939).

[61] See note 53, *supra*.

[62] State *ex rel.* Craig v. Workmen's Compensation Bureau, 53 N.D. 649, 207 N.W. 649 (1925).

[63] Crandall v. North Dakota Workmen's Compensation Bureau, 53 N.D. 636, 207 N.W. 551 (1926).

[64] "The fact of being the kind of employee subject to the act is jurisdictional; the fact of duration of disability or amount of wage loss is not. As to review of facts, denial of jurisdiction in the commission may be of one of two kinds. (1) The claimant may deny the jurisdiction on the ground that a certain jurisdictional fact has not been established, and that on the failure of that one fact alone the commission is deprived of jurisdiction. (2) The claimant may show that the commission's findings on certain non-jurisdictional facts are altogether unsupported by evidence. This in itself is action in excess of jurisdiction, as well as an error of law." Larson, *The Doctrine of "Constitutional Fact,"* 15 Temp.L.Q. 185, 204 (1941).

[65] 40 N.D. 390, 168 N.W. 826 (1918).

same limited view was being applied. The court refused to set aside an administrative decision affirming an *ex parte* preliminary order revoking the petitioner's license to operate a dairy, because even though the decision and hearing were rendered by the wrong official—the Secretary of Agriculture and Labor rather than the Dairy Commissioner—the petitioner had himself invoked the Secretary's authority. In *Livingston v. Peterson*[66] the court refused to set aside the order of a city commission refusing to grant a variance in a zoning ordinance, stating that the sole question for the court was whether the city had jurisdiction to act in the matter and quoting *Baker v. Lenhart* to the effect that "no matter how erroneous the decision may be, even on the face of the record, the reviewing court has no power to change, annul or reverse it in a proceeding on certiorari."[67] In *State* ex rel. *Olson v. Welford*[68] the determination of the governor in removing a state highway commissioner from office was upheld on extremely sparse evidence, the court stating: "It is not for this court to say that the evidence is trivial, that it does not support the charge . . . The determination 'whether based on sufficient evidence or not, is a determination arrived at in the exercise of . . . jurisdiction, and however erroneous it may be, it is not void for want of power in the court to render the decision.' "[69]

The restricted concept of excess of jurisdiction employed in these cases has been particularly evident in the cases involving municipalities, where a series of cases has upheld the idea that it is only the competency of the city to conduct the inquiry, rather than the manner in which the inquiry proceeds or the result which it reaches, which is reviewable on certiorari.[70] The latest case on the subject is *State* ex rel. *Dreyer v. Brekke*,[71] which is notable both for its clear grasp of the importance of the question of what constitutes an excess of jurisdiction and because it represents the most recent consideration of the question by the court. The case involved the validity of an ordinance adopted by the city of Minot authorizing the use of parking meters—manifestly a situation where the exercise of legislative powers by a municipality is involved. The majority opinion, upholding the ordin-

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[66] 59 N.D. 104, 228 N.W. 816 (1930).
[67] *Id.* at 109, 228 N.W. at 818.
[68] 65 N.D. 522, 260 N.W. 593 (1935).
[69] *Id.* at 542-43, 260 N.W. at 602.
[70] State *ex. rel.* Dreyer v. Brekke, 75 N.D. 468, 28 N.W. 2d 598 (1947); Bryant v. Olson, 68 N.D. 605, 282 N.W. 405 (1938); State *ex rel.* Ness v. Fargo, 63 N.D. 85, 246 N.W. 243 (1932); Livingston v. Peterson, 59 N.D. 104, 228 N.W. 816 (1930); State *ex rel.* Claver v. Broute, 50 N.D. 753, 197 N.W. 871 (1921).
[71] 75 N.D. 468, 28 N.W.2d 598 (1947).

ance against attack by certiorari, said, after a scholarly review of the cases: "Summed up, we think that jurisdiction within the meaning of that term as used in the statute . . . may be defined as the power and authority to act with respect to any particular subject matter . . . Accordingly . . . if the commission was empowered to regulate the use of the streets of the city to which the ordinance had application, then it had jurisdiction to enact such a regulatory ordinance as in its judgment seemed proper and efficacious to attain that end, and mere error of judgment in thus exercising its power would not constitute excess of jurisdiction."[72] And in a concurring opinion, the rule which has been followed since *Baker v. Lenhart* was stated even more accurately: "Jurisdiction is the power to hear and determine and *does not depend upon regularity of its exercise nor upon correctness of decision . . .*"[73] (Emphasis supplied). This must be accepted as an accurate statement of the function and limitations of the writ of certiorari as it is applied today in North Dakota to the actions of administrative agencies.

It should be clear from what has been said that the term "excess of jurisdiction" has varied remarkably in content and meaning during the course of decisions adopted in certiorari cases in this state. Generalizations about such a concept are tricky and difficult; it has been stated that the term "excess of jurisdiction" is "difficult, if not impossible," to define.[74] The task of making a comprehensive statement of the meaning of the term is therefore one which is not to be approached in a spirit of dogmatic certainty. Yet over the course of the decisions, it has been the *Baker v. Lenhart* doctrine which has been controlling, and it therefore appears possible to summarize by saying that after the early broad concept of excess of jurisdiction employed in *State* ex rel. *Johnson v. Clark,* the court has limited the meaning of excess of jurisdiction primarily to situations where the action of the agency or official under review was one which the agency or official was not empowered to take either because (a) no notice and hearing had been given to the party affected,[75] or (b) the

[72] *Id.* at 471-72, 28 N.W.2d at 600.

[73] *Id.* at 483, 28 N.W.2d at 604.

[74] 11 C.J., Certiorari, 103. Similar statements are made in State *ex rel.* Dreyer v. Brekke, *supra.* See also the dissenting opinion of Mr. Justice Frankfurter in City of Yonkers v. Interstate Commerce Commission, 320 U.S. 685 (1944): "Analysis is not furthered by speaking of such findings as jurisdictional, and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. 'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."

[75] Nelson v. Ecklund, 68 N.D. 724, 283 N.W. 273 (1938); Morrissey v. Blasky, 22 N.D. 430, 134 N.W. 319 (1912). *Cf.* State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1901); Enderlin Bank v. Rose, 4 N.D. 319, 58 N.W. 514 (1894).

agency or official was not competent to try the issue.[76] With rare exceptions the court has refused, while hearing cases in the exercise of its appellate jurisdiction, to reverse or set aside an official order or judgment because of procedural irregularities occuring during the course of the proceedings or because error or mistake took place.[77] The court has applied excess of jurisdiction in such a way as to make it mean a failure of inceptive jurisdiction, nothing more.[78]

V. *Extraordinary Jurisdiction and Certiorari*

To the general rule that it is only acts in excess of jurisdiction which are reviewable on certiorari, at least one clear-cut exception has developed, however. While the statutes prescribe excess of jurisdiction as the sole ground for the issuance of the writ, the Constitution of the State of North Dakota also provides that the Supreme Court may issue writs of certiorari and other prerogative writs when necessary to the proper exercise of its jurisdiction.[79] But the Supreme Court has several different jurisdictions, derived from its position as the successor in the State of North Dakota to the jurisdiction of the Court of King's Bench.[80] Briefly, it possesses appellate, original, and superintending jurisdiction.[81]

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[76] State *ex rel.* Dreyer v. Brekke, 75 N.W. 468, 28 N.W.2d 598 (1947); Bryan v. Olson, 68 N.D. 605, 282 N.W. 405 (1938); State *ex rel.* Olson v. Welford, 65 N.D. 522, 260 N.W. 593 (1935); State *ex rel.* Ness v. Fargo, 63 N.D. 85, 246 N.W. 243 (1932); State *ex rel.* Craig v. Workmen's Compensation Bureau, 53 N.D. 649, 207 N.W. 649 (1925); State *ex rel.* Claver v. Broute, 50 N.D. 753, 197 N.W. 871 (1923); Baker v. Lenhart, 50 N.D. 30, 195 N.W. 16 (1923); Lincoln Addition Improvement Company v. Lenhart, 50 N.D. 25, 195 N.W. 14, 33 (1922); Cofman v. Ousterhous, 40 N.D. 390, 168 N.W. 826 (1918); State *ex rel.* Poole v. Peake, 22 N.D. 457, 135 N.W. 197 (1912).

[77] See Peterson v. Points, 67 N.D. 631, 275 N.W. 867 (1937), for one of the exceptions. The court reviewed the sufficiency of the evidence in a certiorari proceeding brought to test the validity of an order granting relief from a mortgage under moratorium legislation, pointing out that the legislature had provided for review of such proceedings on certiorari, thus indicating a desire for a broadened review of these proceedings by the writ. *But cf.* Livingston v. Peterson, 59 N.D. 104, 228 N.W. 816 (1930).

[78] This is particularly true in the cases where the applicant for certiorari has himself invoked the jurisdiction of the agency involved. In such cases the doctrine of *Baker v. Lenhart* has been applied full force. Bishop v. Depositor's Guaranty Fund Commission, 55 N.D. 178, 212 N.W. 828 (1927). What this means in substance is that he who seeks relief from an administrative agency, by invoking the jurisdiction of the agency, waives all errors.

[79] N.D. Const. §87.

[80] See the discussion of these various jurisdictions contained in Newton, *Appellate Practice and Procedure in North Dakota*, 27 N.D.L.Rev. 155, 156-60 (1951).

[81] N.D.Const. §§86, 87; State *ex rel.* Conrad v. Langer, 68 N.D. 167, 277 N.W. 504 (1938); State *ex rel.* Jacobson v. District Court, 68 N.D. 211, 277 N.W. 843 (1938); Baker v. Lenhart, 50 N.D. 30, 195 N.W. 16 (1923).

And the uses to which the writ of certiorari may be put, as well as the extent of the review which it will permit, vary as the writ is used in the exercise of these different jurisdictions.

In the "ordinary" certiorari case coming before the court —where an administrative agency or municipality has taken action, a district court has agreed or refused to quash the action on certiorari, and the matter is taken up to the Supreme Court on appeal—it is the Supreme Court's power to hear and finally decide cases on appeal, the appellate jurisdiction,[82] which is exercised. And in such cases the scope of the review has been rigidly restricted by virtue of the limited concept of excess of jurisdiction developed by the court for the simple reason that the Supreme Court's power of superintending control does not reach to agencies not a part of the judicial system.[83]

But where it is the action of the lower court itself, not the action of an administrative agency, which is under scrutiny, the court is not restricted to the hearing of the case as a matter of appellate jurisdiction. By virtue of its superintending jurisdiction it possesses the inherent power to supervise and direct the work of the lower courts.[84] Nor is it restricted to situations where the lower court is acting in excess of jurisdiction, but may exercise its supervisory authority even though the lower court has kept within the bonds of its legal powers.[85]

When, therefore, the writ is used for the purpose of making this superintending control effective, the precedents make it plain that the writ is issued not by virtue of the prescription of the statute but by virtue of the provisions of the Constitution itself.[86] And it follows from this that when certiorari is used in the exercise of superintending jurisdiction it reaches questions beyond that of whether the lower court had jurisdiction to hear and decide the case. The statutory restrictions do not apply.[87]

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[82] State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921). See also Newton, *supra* note 80, at 156.

[83] State *ex rel.* Poole v. Nuchols, 18 N.D. 233, 119 N.W. 632 (1909).

[84] State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921); State *ex rel.* Moore v. Archibald, 5 N.D. 359, 66 N.W. 234 (1902).

[85] State *ex rel.* Shafer v. District Court, 49 N.D. 1127, 194 N.W. 745 (1923); State *ex rel.* Jacobson v. District Court, 68 N.D. 211, 277 N.W. 843 (1938).

[86] Baker v. Lenhart, 50 N.D. 30, 50 et seq., 195 N.W. 16, 23-24 (1923); State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921).

[87] See cases cited note 86, *supra.*

Illustrative of the use of certiorari for supervisory purposes are a series of change of venue cases decided by the court. The earliest of these is *Murphy v. District Court*,[88] involving a change of venue application in a criminal proceeding which had become enmeshed in political difficulties. The petitioner, defendant in the criminal proceeding, sought a review of the order of the lower court sending the case to a county in the far eastern part of the state for trial, contending that the added expense and difficulty involved were such that the trial judge abused his discretion in the selection. The court proceeded to review the facts and evidence at length, and eventually concluded otherwise. Although the court stated that the question was "whether the . . . presiding judge exceeded his jurisdiction in sending the case to Cass county," the major premise implicit in the decision is obvious: if an abuse of discretion appeared, the Supreme Court had power to correct it by use of certiorari. For purposes of supervisory jurisdiction over an inferior court, in other words, an abuse of discretion was regarded as "jurisdictional."

The conflict between this concept of jurisdictional error and the limited concept of jurisdictional error employed in the appellate jurisdiction cases quickly caused the court to entertain some doubts as to the wisdom of its decision. It later took pains to point out that some of its members were by no means approving of the doctrine that a writ of certiorari was the appropriate remedy.[89] Subsequent cases, however, exhibit traces of no such qualms, clearly recognizing the distinction between certiorari when used in aid of supervisory and appellate jurisdiction,[90] and the court's lengthy and considered discussion in *Baker v. Lenhart* wrote it firmly into the case law. So clearly has the distinction been drawn that the cases hold that certiorari will lie when the order is appealable, as is the case where an order granting a change

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[88] 14 N.D. 542, 105 N.W. 728 (1905).

[89] *See* Zinn v. Morton County, 17 N.D. 135, 140, 114 N.W. 472, 475 (1908).

[90] State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921); Lowe v. District Court, 48 N.D. 1, 181 N.W. 92 (1921); State *ex rel.* Red River Brick Corp. v. District Court, 24 N.D. 28, 138 N.W. 988 (1912).

of venue is concerned,[91] and the *Lenhart* case recognized as much.[92]

One extremely interesting consequence of this line of reasoning occurred in a case involving an application for a change of venue which the state itself had made in a criminal action. Obviously, the order of the trial court refusing the change could not be appealed after the verdict because the defendant would be in a position to plead double jeopardy. The remedy sought was an application for a writ of certiorari by the prosecution, which attempted to invoke the Supreme Court's supervisory power over the lower court. While relief was refused, the court considered the application on its merits and concluded that on the facts no abuse of discretion appeared.[93] The possibilities are obvious.

However, the court has made it plain that the supervisory jurisdiction may not be invoked in the routine case. The power of supervision and control is pre-eminently discretionary with the court, and circumstances of special hardship and injustice, sufficient to create a threat to the proper administration of some judicial proceeding, must be present.[94] The superintending power is used primarily in situations where a court is acting in abuse of its discretion or outside its discretionary power, or when the courts are proceeding within their jurisdiction "but by mistake of law, or willful disregard of it, are doing a gross injustice."[95] A factor to be considered seriously is the appealability of the action taken by the court or the existence of some adequate remedy,[96] but the

[91] Robertson Lumber Co. v. Jones, 13 N.D. 112, 99 N.W. 1082 (1904). But see Squire v. County Court, 25 N.D. 468, 141 N.W. 1135 (1913).

[92] "In the exercise of its superintending jurisdiction the court not only may issue all common law writs applicable to superintending control over inferior courts, but, if the exigencies of the case so require it may modify or enlarge the terms of such writs. . . . Where certiorari is invoked in aid of the superintending jurisdiction, if the exigencies of the case require, the writ may issue and appropriate action taken even though the action which it is sought to have corrected is in fact appealable." Baker v. Lenhart, 50 N.D. 30, 49-50, 195 N.W. 16, 23-24 (1923).

[93] State v. Winchester, 19 N.D. 756, 122 N.W. 1111 (1909). Accord, State *ex rel.* Fletcher v. District Court, 213 Iowa 822, 238 N.W. 290 (1931); Note, 18 Iowa L.Rev. 263 (1933) (discussing certiorari as a method of reviewing judicial discretion in Iowa).

[94] State *ex rel.* Jacobson v. District Court, 68 N.D. 211, 277 N.W. 843 (1938); State *ex rel.* Lemke v. District Court, 49 N.D. 27, 186 N.W. 381 (1921); Red River Valley Brick Co. v. Grand Forks, 27 N.D. 8, 145 N.W. 725 (1914).

[95] State *ex rel.* Lemke v. District Court, 49 N.D. 27, 42, 186 N.W. 381, 387 (1921).

[96] Schouweiler v. Allen, 17 N.D. 510, 117 N.W. 866 (1908) (use of superintending jurisdiction denied because erroneous order might be corrected on appeal); State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1901) (erroneous order reviewed by certiorari because not appealable); Enderlin Bank v. Rose, 4 N.D. 319, 58 N.W. 514 (1894) (collateral remedy inadequate, hence relief by certiorari granted).

fact that a remedy by appeal or collateral suit exists is not conclusive against the exercise of the Supreme Court's power.[97] An attitude of unfairness, prejudice or bias on the part of the trial judge would appear entitled, for historical reasons, to particular weight with the Supreme Court, since "the main office of a certiorari" is "the keeping of unfair magistrates within the compass of their power."[98] Yet the fact that the supervisory jurisdiction is discretionary remains the important point, and the court has recognized that its main business is the hearing and deciding of appeals and that the supervisory jurisdiction should be limited to situations of emergency or exigency.[99] To lay down any mechanical rule concerning the situations under which the court will exercise this authority, therefore, may well be to mislead. The matter appears to be one of degree and sound judgment.

There remains for consideration the third of the supreme court's trilogy of jurisdictions, original jurisdiction. By all odds, the leading as well as the earliest case on the exercise of original jurisdiction is *State v. Nelson County*,[100] decided only a few years after statehood was attained. The rule laid down in that case is simple, plain and concise: the original jurisdiction of the Supreme Court, just as the original jurisdiction of the Court of King's Bench, will be exercised only in cases which are *publici juris—i.e.*, affect the "sovereignty of the state, its franchises and prerogatives, or the liberties of its people."[101] In order to warrant the exercise of original jurisdiction, the case must be one of more than private importance, affecting the interests of the state or its people as a whole, *e.g.*, the question of whether the governor has been disqualified from holding his office,[102] whether an incumbent state official defeated in an election can contest the qualifications of his successor,[103] whether the governor's power of removal has been validly exercised,[104] whether the Superintendent of the State Hospital for the Insane may be removed by the board of trustees before his term expires,[105] whether a statewide tax levy exceeds constitutional limits,[106] whether an

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[97] See notes 91 and 92, *supra*.
[98] Enderlin Bank v. Rose, 4 N.D. 319, 332, 58 N.W. 514, 519 (1894).
[99] State *ex rel.* Red River Brick Corporation v. District Court, 24 N.D. 28, 138 N.W. 988 (1912).
[100] 1 N.D. 88, 45 N.W. 33 (1890).
[101] *Id.* at 101, 45 N.W. at 38.
[102] State *ex rel.* Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).
[103] State *ex rel.* Langer v. McDonald, 41 N.D. 389, 170 N.W. 873 (1919).
[104] State *ex rel.* Olson v. Welford, 65 N.D. 522, 260 N.W. 593 (1935); State *ex rel.* Wehe v. Frazier, 47 N.D. 314, 182 N.W. 545 (1921).
[105] State *ex rel.* Moore v. Archibald, 5 N.D. 359, 66 N.W. 234 (1902).
[106] State *ex rel.* Conrad v. Langer, 68 N.D. 167, 277 N.W. 504 (1938); *But cf.* Duluth Elevator Co. v. White, 11 N.D. 534, 90 N.W. 12 (1902).

act establishing a statewide board has been subjected to popular referendum,[107] whether the legislature has appropriated money to pay the salaries of the state tax commission,[108] whether the governor has the power to appoint a district judge,[109] and whether an act establishing a state bonding fund for municipal and county officers is constitutional.[110]

Conversely, the court has held that such questions as whether a tax levied by a county for the relief of needy farmers is valid,[111] whether valid proceedings have been taken to subdivide one county into two,[112] whether a county seat should be moved from one town to another,[113] and whether an assessment increasing the tax levy upon grain elevators and warehouses throughout the state is legal[114] are not appropriate for the exercise of original jurisdiction but should be tried in the district courts, on the ground that they do not represent issues of public, as distinguished from private or local importance. The controlling factor has been the importance of the question to the state as a whole, a matter which cannot be determined except in the context of particular cases, and for that reason generalizations are of little value. It is clear that the position taken by the attorney general with respect to a given case will be of the utmost weight, since in original jurisdiction cases the state is always the plaintiff and the attorney general represents the state.[115] But while this is an important consideration and application should ordinarily be made to the attorney general for action before an exercise of original jurisdiction is sought, refusal of the attorney general to act does not prevent the court from hearing the case as an original matter.[116]

The concept of excess of jurisdiction which has been applied by the court in the original jurisdiction cases has been closely akin to that used in the cases involving administrative action, rather than the broader view which has been taken in the supervisory jurisdiction cases.[117] It seems an unsettled question whether the Supreme Court is absolutely bound to

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[107] State *ex rel.* Baker v. Hanna, 31 N.D. 570, 154 N.W. 704 (1915).
[108] State *ex rel.* Birdzell v. Jorgenson, 25 N.D. 539, 142 N.W. 450 (1913).
[109] State *ex rel.* Erickson v. Burr, 16 N.D. 581, 113 N.W. 705 (1907).
[110] State *ex rel.* Linde v. Taylor, 33 N.D. 76, 156 N.W. 561 (1916).
[111] North Dakota v. Nelson County, 1 N.D. 88, 45 N.W. 33 (1890).
[112] State *ex rel.* Minehan v. Wing, 18 N.D. 242, 119 N.W. 944 (1909). *See* State *ex rel.* Steel v. Fabrick, 17 N.D. 532, 537, 117 N.W. 860, 862 (1908).
[113] State *ex rel.* Murphy v. Gottbreht, 17 N.D. 543, 117 N.W. 864 (1908).
[114] Duluth Elevator Co. v. White, 11 N.D. 534, 90 N.W. 12 (1902).
[115] State *ex rel.* Conrad v. Langer, 68 N.D. 167, 277 N.W. 504 (1938); State *ex rel.* Linde v. Robinson, 35 N.D. 410, 160 N.W. 512 (1916).
[116] State *ex rel.* Linde v. Robinson, *supra* note 115.
[117] State *ex rel.* Olson v. Welford, 65 N.D. 522, 260 N.W. 593 (1935).

those limitations, however. As in the case of superintending jurisdiction, the court appears to use prerogative writs in the original jurisdiction cases not by virtue of the statute but by virtue of the provisions of the Constitution; and if one accepts the argument in the supervisory writ cases at face value, the logical conclusion would seem to be that certiorari might be used in its common law scope rather than hindered by the restrictions of the statute, should the court wish to do so. The point has never been expressly decided, since it seems to have been assumed by all parties in the cases where original jurisdiction was exercised on certiorari that the court was bound by the terms of the statute, and there has therefore never been occasion for the court to decide otherwise.

VI. *Appealability; Adequate Remedy*

Since certiorari is classified as an extraordinary remedy, it will not be granted in the ordinary case where an appeal will serve to present an error to the higher court or where some other remedy is present. In the case of administrative agencies and municipalities, appealability presents few problems beyond those connected with the finality of administrative action and the proper timing of the request for judicial relief,[118] since the matter of whether an appeal will lie from the determinations of these bodies is ordinarily regulated specifically by statute.

While North Dakota was among the first states to enact a statute providing a uniform course of procedure for administrative agencies,[119] it is to be noted that the Administrative Agencies Uniform Practice Act does not "itself grant a right of review but merely sets up a code of procedure for those cases in which review is granted by some other statute."[120] Hence, while procedure on appeal from an administrative agency is regulated by the Uniform Practice Act, the appeal must be granted by some provision of law outside of the Act itself.[121] The result is that the Act will undoubtedly have small effect on the future availability of certiorari, although its effect on the future scope and extent of the review granted by the writ is distinctly another question, discussed *infra*.

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[118] While of technical interest, such problems are not discussed in this paper since cases involving certiorari have not turned upon them in this state.

[119] See the Administrative Agencies Uniform Practice Act, N.D. Rev. Code c. 28-32 (1943); Hoyt, *North Dakota Leads in Administrative Law Field*, 25 J.Am.Jud.Soc. 114 (1941).

[120] Hoyt, supra note 119, at 115; 27 N.D.L.Rev. 218, 219 (1951).

[121] For discussion of the effect of the act on administrative appeals, see Comment, 24 N.D. Bar Briefs 211 (1948).

It follows that the question of appealability ordinarily arises in the cases where it is an order of an inferior court—not an administrative agency—which is under review by certiorari. The question of appealability with respect to the orders which a court may issue turns on the interpretation of statutes specifically regulating the subject[122] and little discussion of the case law which has developed need be attempted here since in the great majority of cases in court the remedy by appeal is adequate and obviates the necessity for the use of an extraordinary remedy.[123] It may be observed, however, that the fact that a right of appeal at one time existed and was lost without fault of the party affected does not mean that the remedy of certiorari is unavailable.[124] Likewise, it has been noted that there have been instances where the court in the exercise of its superintending jurisdiction has intervened by certiorari, as in the change of venue cases.[125]

One point which has appeared from time to time in the cases concerns the question of whether an appeal may be taken from a judgment which is absolutely void as in excess of the court's jurisdiction. Since such a judgment may be set aside by a collateral attack, or its execution may be enjoined at the option of anyone whose rights it purports to affect, the superficially logical argument has been made that no appeal should lie from a judgment of this type and that the remedy sought should be a motion to vacate or to set aside the judgment in the lower court. There is actually some conflict of authority on the point in other states,[126] but the North Dakota Court has taken what seems the far more logical view, holding that either the remedy of a motion to vacate or an appeal is available to the person against whom such a judgment has been rendered, and it follows that there is no necessity to review such a judgment on certiorari.[127]

The existence of some other adequate remedy, of course, in the ordinary course of events will preclude resort to an extraordinary remedy. There are, however, a few cases which develop interesting aspects of this portion of the law. The earliest of these is *Enderlin Bank v. Rose*,[128] involving a conflict between an assignee for the benefit of creditors and a

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[122] N.D. Rev. Code §28-2702 (1943).
[123] Viesselman, Dakota Practice 322-51 (1930). See also the discussion appearing in Newton, *Appellate Practice and Procedure in North Dakota*, 27 N.D.L.Rev. 155, 160-64 (1951).
[124] Morrissey v. Blasky, 22 N.D. 430, 134 N.W. 319 (1912).
[125] See text, notes 90-92.
[126] 4 C.J.S. 205.
[127] Sell v. Davis, 61 N.D. 130, 237 N.W. 307 (1931). *Cf.* McLean v McLean, 69 N.D. 406, 287 N.W. 495 (1939).
[128] 4 N.D. 319, 58 N.W. 514 (1894).

non-assenting creditor who in the course of an action against the debtor had the assigned property attached. The assignee thereupon applied to the district judge for the return of the property and the judge issued an *ex parte* order granting the application. On petition for certiorari to the Supreme Court it was argued that the creditor had an adequate remedy at law, since he could bring suit for the value of the property against the sheriff, who could not justify his action on the basis of the court's order if it were void. It was held that the writ would be issued, since the remedy by collateral suit was neither certain nor speedy, there being uncertainity as to whether the petitioner could collect from the sheriff or his bondsmen, and the law's delays being proverbial. Moreover, the court held, the remedy of the collateral suit did not grant relief as to the precise subject matter of the order. The right which was being asserted on certiorari was the right to direct relief from an invalid order, not a right to collateral relief from it.

Following the same line of thought, the court granted relief on certiorari a few years later to a state's attorney who had come to the conclusion that a pending criminal action should not be prosecuted, and whose salary a district judge had as a result ordered withheld. The argument adopted by the court was that the remedy of a suit against the county auditor was not as efficient as the remedy by writ of certiorari, and *Enderlin Bank v. Rose* was cited in support of the decision.[129] How far these precedents are applicable to ordinary litigation is questionable, since both cases appear to be instances of the exercise of supervisory jurisdiction.

VII. *Summary and Discussion*

From the discussion thus far, it should be plain that the employment of the writ of certiorari by the practitioner involves problems of great complexity and intricacy. The truth of the matter seems to be that there is not one writ of certiorari in this state but two—the statutory writ, rigidly restricted in its concept of excess of jurisdiction, and the constitutional writ, which reaches mistakes of discretion, errors of law, and the regularity of proceedings with comparative ease.

It is this factor which accounts for much of the inconsistency in the cases. It operates to transform the seemingly plain and simple statutory requirements surrounding certiorari—that there be an official act in excess of jurisdiction and a lack of appeal or other adequate remedy—into a maze in which the unwary may easily be trapped and the careful attorney must grope his way by "feel" as well as by reliance

[129] State *ex rel.* Clyde v. Lauder, 11 N.D. 136, 90 N.W. 564 (1901).

on cases or rules. The question is whether this development is wise or necessary. Consider for a moment the statutory language which surrounds the employment of the writ.

In the first place, as has been noted, the Code specifically provides that proof *aliunde* the record may be brought in wherever it is necessary.[130] It is manifest that such provisions indicate a disposition on the part of the framers of the code to broaden and enlarge the scope of the writ of certiorari to a point where at least some portion of the record need not be accepted as conclusive. If this portion of the law alone were given the force and vitality which its framers obviously intended it to have, cases such as *Baker v. Lenhart* might easily be resolved by the simple medium of going behind the record in situations where it appears to be justified.

Secondly, not content with laying down the three-fold requirement of excess of jurisdiction, lack of appeal, and lack of other adequate remedy, the code provides specifically that "Except as otherwise provided by law, the review upon a writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board or officer has pursued regularly the authority of such court, tribunal, board or officer."[131] The language of this statute may be poorly chosen—it is framed in terms of a restriction upon the scope of review rather than in terms of a direction as to what the review shall consist of—but it is manifest that there is implied within this section a clear authority to review not only the question of whether the agency or tribunal whose action is under scrutiny by certiorari had authority to hear the issue and enter a decision, but whether the agency or tribunal proceeded in a lawful manner to a just result. It is not just jurisdiction to hear and decide which is reviewable on certiorari, if one reads the plain language of the statute. It is the regularity and probity of the proceedings.

Thirdly, even if the foregoing were not enough to decide the issue, the legislature has spoken out specifically on the question of what the review by means of certiorari is to involve. As early as 1919, apparently concerned by the drift toward a restrictive use of certiorari, the legislature adopted an amendment to the statute regulating the issuance of certiorari which provided specifically that a "writ of certiorari may be granted . . . *when, in the judgment of the court it is deemed necessary to prevent miscarriage of justice.*"[132] (Emphasis supplied). The history of this amendment

[130] See notes 19-21, *supra*.
[131] N.D. Rev. Code §32-3309 (1943).
[132] N.D. Sess. Laws 1919, c. 76.

presents a chapter remarkable even in the history of this most unusual of writs. The result of this sweeping amendment, which at first glance would seem to transform certiorari into a method of getting a hearing in almost every case where inequity was claimed, has been, to this day, precisely nil! In no case dealing with the writ of certiorari has the amendment played even the slightest part in the decision, though it has several times been presented in argument, apparently as a last resort. The court has contented itself with a simple statement that the amendment does not extend the scope of the writ.[133]

Reasons for this result, apparently completely inconsistent with common sense, are easy to suggest. As in the case of the section dealing with regularity of proceedings, the language is poorly chosen. It amounts to a vague admonition to do justice without specifying what justice is to consist of in any particular case. It is the expression, read literally, of a pious wish. It is so vague that it is of no help when placed in the context of a particular fact situation. Yet may it not be suggested that it is the purpose behind the statute, and not the choice of language, which is important? It remains the letter which killeth and the spirit which giveth life. And the amendment appears to be an open expression of the legislature's opinion that more satisfactory results might be obtained in certiorari cases if the court were given a broader avenue of approach. In view of the language of the statute, there is clearly nothing inappropriate about an increased review of the exercise of official discretion or the regularity of official proceedings, at least to the point where it is clear that the official discretion has been exercised in a reasonable and orderly manner and that the proceedings have conformed substantially to the requirements of the law.

It would seem particularly true that these sections of the statute could appropriately be given full play in the case of administrative action of the type involved in *Baker v. Lenhart.* There are sound reasons for granting a maximum of freedom of action and discretion to administrative bodies and municipalities, particularly when they are acting in the exercise of legislative rather than judicial powers. Yet it must strike one as disconcerting, to say the least, to have it solemnly adjudged the law that an administrative agency or city council may, in the words of the dissent in that case, conclude that "black is white and that two and two make

[133] See, *e.g.*, Sell v. Davis, 61 N.D. 130, 237 N.W. 307 (1931); Livingston v. Peterson, 59 N.D. 104, 228 N.W. 816 (1930); Baker v. Lenhart, 50 N.D. 30, 195 N.W. 16 (1923); State *ex rel.* Mayo v. Thursby-Butte School District, 45 N.D. 555, 178 N.W. 787 (1920).

five and not four" and that the "courts are powerless to grant a suitor any relief."[134] Yet it is to that position that the logic of the present concept of excess of jurisdiction leads.

It may be suggested that an appropriate method of meeting the situation where the findings of fact are clearly erroneous is simply to apply the rule that the making of a finding which is unsupported by substantial evidence is procedurally irregular and that official action taken on the strength of such proceedings will be set aside. This is the solution which has been developed by the court in construing the provisions of the Administrative Agencies Uniform Practice Act.[135] The concept of substantial evidence is one which has already found its way into the law of the state, it offers a means of extending the scope of the writ of certiorari in accordance with the spirit and tenor of the various amendments which the legislature has made to the statutes, it is well established as a basic part of the general law of administrative agencies, and it possesses the additional advantage of being easier to apply and simpler to understand than the limited concept of excess of jurisdiction which is now in use.

One possible objection which may be made to such a suggestion is that it extends the idea of excess of jurisdiction to the point where it might cover errors which would not be held "jurisdictional" or sufficient to invalidate the proceedings reviewed on collateral attack. So it would, but a simple reference to the authorities is sufficient to show that such an objection is entitled to little weight:

> "It should be made clear that the word jurisdiction has been used in a special sense in regard to the extraordinary writs. It certainly is not confined to jurisdiction in the fundamental sense, *i.e.*, that jurisdiction which a court must have in order to come within the limits prescribed by the due process clause of the Fourteenth Amendment. Nor is it confined to jurisdiction in the sense of 'competency,' *i.e.*, the situation where the state has jurisdiction, but has by statute or constitution provided that such jurisdiction shall be exercised only by certain courts. If jurisdiction in either of the above senses is lacking, a judgment is void and, generally, open to collateral attack. Lack of jurisdiction in the sense in which it is used in the extraordinary writ cases, however, is not necessarily a ground for collateral attack. As used

[134] Baker v. Lenhart, 50 N.D. 30, 59, 195 N.W. 16, 28 (1923).
[135] *In re* Hanson, 74 N.D. 224, 21 N.W.2d 341 (1945); *In re* Theel Bros. Rapid Transit Co., 72 N.D. 280, 6 N.W.2d 560 (1942); Comment, 24 N.D. Bar Briefs 211 (1948).

> in the extraordinary writ cases lack of jurisdiction means lack of authority to act except in a particular manner or to give certain kinds of relief, or to act without the concurrence of certain procedural requisites."[136]

It is submitted that much of the law of certiorari, therefore, could be simplified and improved if three basic ideas were accepted:

(1) The writ of certiorari should be extended to include a review of the regularity of the proceedings as well as the question of whether a given tribunal or officer is competent to hear and decide the case.

(2) The review into the regularity of the proceedings should include an inquiry into the evidence sufficient to make it clear that substantial evidence exists to support any finding of fact made in the case or proceeding. It should be borne in mind, however, that it is impractical and unwise to require of administrative agencies the same scrupulous regard for the law of evidence as regular judicial tribunals. The test ought to be whether the same case or proceeding would be upheld if it came to the court under the provisions of the Administrative Agencies Uniform Practice Act.

(3) If the tribunal has within its control the parties, property or status sought to be affected, employs reasonable methods of giving notice and hearing and has actually given them, is competent to hear and decide the case or issue presented, and has proceeded to exercise its authority in a lawful and regular manner, making findings of fact supported by substantial evidence, its decision should not be disturbed in order to give a maximum of freedom and flexibility of action to administrative agencies, executive officials, and municipal authorities.

Such an alteration in the law of certiorari, it is believed, would transform what has become a confusing and antiquated portion of the law into a smoothly operating device for the review of administrative action, which is the main function of certiorari today. Moreover, it would have the additional effect of bringing certiorari into line with the concept of the writ possessed by the men who drafted the code, as the statutes cited clearly indicate. Some eighty-three years ago, considering the identical problem, Judge Woodruff of the New York Court of Appeals said:

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[136] Goldberg, *supra* note 1, at 564.

"I cannot resist the belief that a disposition has been manifested to limit the office of this most useful writ within too narrow limits. Let it once be established that where an officer or board of officers have jurisdiction of the subject or of the persons to be affected and proceed in its exercise according to the prescribed mode or forms, their determination is final and beyond the reach of any review, whatever errors in law they may commit and however clear it may be upon undisputed facts that their judgment, decision or order is not warranted—and there is danger that much injustice and wrong may happen without possibility of redress . . . It may not be desirable to multiply cases in which appellate courts can be called upon to interfere in matters of small importance, but that furnishes no reason for denying the power to see that the rules of law are not violated, when wrong is done, and no great public inconvenience will result from its exercise."[137]

The time is overdue when a similar line of reasoning should be employed in the State of North Dakota.

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[137] People v. Board of Police, 39 N.Y. 506, 517 (1868).