Administrative Determinations and the Extraordinary Writs in the State of Washington [Part 1]

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It is a commonplace that administrative tribunals have multiplied exceedingly in the past score of years. They have flourished in both federal and state governments. Economic and social interests have increasingly become subjects of legislation, and boards and commissions have been entrusted with powers of control. The theory has been that administrative agencies, having specialized training and experience, are more competent than courts to deal with certain economic and social problems. World War II has not retarded the growth of administrative tribunals; rather, it has brought with it new boards and commissions. Emphasis has been shifted from the promotion of social ends to the stimulation of production and the winning of a complete victory.

A complaint frequently heard is that administrative tribunals are not subject to judicial restraint. Of course, this is not literally true. One has difficulty in naming a board or commission which has absolute freedom to act as it pleases within its jurisdiction without having to answer in some way in a court of law. The complaint, then, reduces to this: administrative tribunals are not under sufficient judicial restraint; within wide bounds they may act as they see fit, and one aggrieved has no remedy. Many people—no doubt lawyers are conspicuous among them—feel that a fuller opportunity to resort to a court of law would give security against administrative injustice.

The purpose of this article is to investigate to what extent administrative determinations in the State of Washington may be judicially reviewed by use of the extraordinary writs. These writs include certiorari, mandamus, quo warranto, injunction, prohibition, and habeas corpus. Statutory appeal is allowed from many state agencies, and its scope will be discussed with care. Consideration will also be given to the distinction between direct and collateral attacks upon administrative proceedings. No conclusion will be drawn as to whether or not the tendency to set up boards and commissions is to be deplored. But light should be thrown on the question whether or not there exist adequate procedures in Washington to secure court review of erroneous, arbitrary, or fraudulent administrative determinations.

**Statutory Appeal**

A profusion of statutes is to be found in Washington providing for appeal from administrative bodies to the superior courts. A large number of statutes permit appeal from special assessments for improve-
Another large group of statutes permits appeal from the action of a board in revoking, or refusing to grant or to renew, a license to carry on an occupation. Valuations of particular types of real and personal property for certain governmental purposes may be appealed. Removal from a civil service position and from other offices is cause for appeal. Rights to pensions and to compensation for unemployment and for industrial injuries may be brought to a superior court for adjudication. Several appeal statutes concern the refusal to permit incorporation of certain types of banking and investment houses. A number of statutes provide broadly for appeals from orders and decisions of specified state officers. Not included in this rough classification are many other statutes providing for appeal from a variety of administrative determinations.

In making provision for statutory appeal a legislature may go to either of two extremes. It may declare that the appeal is to be a trial anew of the facts and law. The court may render judgment on the results of the trial, giving no weight to the administrative determination. On the other hand, the legislature may restrict the appeal to matters of law only: whether or not the administrative tribunal had jurisdiction and whether or not it committed any material legal error. In between these extremes the court may be given jurisdiction to review the facts, but presumptions of different degrees may be attached to the administrative findings, and limitations may be placed on the introduction of evidence.

The appeals statutes of Washington are liberal in permitting judicial review of administrative determinations. Under the great majority a re-trial of the facts and law may be had. Almost one-half of them expressly provide for a "trial de novo." An equal number stipulate for REVIEW STAT. §§ 2778-6, 2799, 4249, 4367, 4436, 4508, 7505-3, 9242, 9243, 9374, 9438, 9455, 9975, 9908, 9309, 11591; REV. REV. STAT. (1940 Supp.) §§ 7464-1, 9963-10.


3 REV. REV. STAT. §§ 3805, 7797-111, 7797-137, 7986, 8093, 9336, 11097, 11219-6; REV. REV. STAT. (1940 Supp.) §§ 3717-95, 8370-199.

4 REV. REV. STAT. (1940 Supp.) §§ 3217, 3717-18, 9558-9, 9558a-9.

5 REV. REV. STAT. §§ 5018, 5020-25; REV. REV. STAT. (1940 Supp.) §§ 7697-2; REV. REV. STAT. (1943 Supp.) §§ 7697, 9998-106 (i).


7 REV. REV. STAT. §§ 2906, 4076, 5065, 5065, 7361; REV. REV. STAT. (1940 Supp.) §§ 9663A-17.

8 REV. REV. STAT. §§ 4762, 5399, 5366-5382, 6962, 7402-265, 7500, 7503, 7609, 7788, 7797-112, 7797-125, 7808-7814, 9317, 9324; REV. REV. STAT. (1940 Supp.) §§ 7119c, 7724.

a court trial or a determination as in an ordinary civil action. Some of these statutes declare that the trial shall be "summary," others that the suit shall be tried as are "equitable causes." In no case has either of these expressions prevented a full trial of the issues. Several of the statutes make provision for a procedure similar to that of an appeal taken from a justice of peace court to a superior court. This leads to a new trial.

A number of the statutes provide simply for the right of appeal, and there appears to be no limitation on the re-trial of issues. The different ways in which these statutes have been worded do not seem to have taken on any significance. The legislative intent is clear: appellant is to have a court determination of all matters in issue—both as to facts and as to law.

Most of the appeal statutes impose no restrictions on the introduction of evidence and attach no presumption of correctness to the administrative determination. Frequently the statutes require a copy of the record and the decision appealed from to be filed with the court, but this circumstance of itself does not add to appellant's burden in trying his case anew. A minority of the statutes expressly require the trial court to give consideration to the administrative determination. Some of the statutes declare the findings of fact prima facie correct, and the appellant has the burden of proof to show that the determination was erroneous. Limitations on the introduction of evidence appear in a few of the statutes. A small number of statutes make the administrative

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10 Rem. Rev. Stat. §§ 2906, 3805, 4508, 5399, 5853-16, 6312-74, 7039, 7090, 7361, 7402-265 et seq., 7500, 7503, 7505-3, 7797-111, 8340-14, 9242, 9243, 9324, 9336, 9374, 9438, 9455, 9808-9810, 11097, 11591; Rem. Rev. Stat. (1940 Supp.) §§ 3838-6, 7000-4, 8306-11, 9558-9, 9658-9a, 9663-10, 9663A-17. Rem. Rev. Stat. §§ 5366-5382 make provision for election contests concerning county offices. For specified causes the superior court has jurisdiction to nullify a certificate of election issued by an election board, and the trial is conducted as an ordinary civil action. The contestant has the burden of proof. See Moyer v. Van DeVanter, 12 Wash. 377, 41 Pac. 60 (1895); State v. Superior Court, 19 Wash. 166, 113 Pac. 277 (1911); Quigley v. Phelps, 74 Wash. 73, 132 Pac. 738 (1913).


12 Rem. Rev. Stat. § 1914. (Appellant) . . . shall file with the clerk of the superior court a transcript . . . together with . . . other papers relating to the case . . . , and upon filing of such transcript, the superior court shall become possessed of the case, and shall proceed in the same manner, as near as may be, as in actions originally commenced in that court . . .


findings of fact conclusive and forbid the introduction of evidence.\textsuperscript{17} Under these statutes the appeal is solely on questions of law.

For the most part, a person aggrieved by an administrative determination in Washington has very satisfactory recourse to the courts where statutory appeal is allowed him. The appeal is not hedged in by conditions and restrictions as are the extraordinary writs but is a matter of right. Under most of the statutes any relevant evidence may be introduced, and the superior court is authorized to make a new determination. However, there are reasons to believe that the decision of an administrative tribunal has some persuasive effect even where no statutory presumption has been set up.

A fuller understanding of the efficacy of statutory appeal in securing relief from faulty administrative determinations may be obtained by considering the specific matters reviewed. Of course, questions of law will be decided: whether or not the administrative body had jurisdiction over the controversy and whether or not it construed and applied the law properly. A finding of fact unsupported by any substantial evidence is an error of law which will be corrected, and this appears to be true, even though statute makes the factual determination of an administrative tribunal final and conclusive.\textsuperscript{18} Often the court is called upon to decide whether or not a particular array of facts or uncontroverted evidence is sufficient to set into operation a statute or rule of law. For example, under the Workmen's Compensation Act, judicial decisions have held, frequently contrary to the Department of Labor and Industries, that the facts made out a "disability," or an injury resulting from a "fortuitous event," or an injury "in the course of employment," or an employment relation of the type protected by the legislation.\textsuperscript{19}


\textsuperscript{18} In re Persons Employed at St. Paul & Tacoma L. Co., 7 Wn. (2d) 580, 110 P. (2d) 375 (1941); In re Farwest Taxi Service, 9 Wn. (2d) 134, 114 P. (2d) 164 (1941); Virginia Mason Hospital Assn. v. Larson, 9 Wn. (2d) 224, 114 P. (2d) 976 (1941); In re North River Logging Co., 15 Wn. (2d) 204, 130 P. (2d) 64 (1942); Unemployment Compensation Dept. v. Hunt, 17 Wn. (2d) 61, 135 P. (2d) 89 (1943). These decisions declare that the administrative determination may also be overturned if it is "clearly arbitrary or capricious." The Virginia Mason case goes a step further and holds that the superior court may make additional material findings of fact if they do not controvert the conclusive findings made by the administrative agency. Otherwise, the agency could, by incomplete and biased findings, force the reviewing court to sustain the administrative determination in every case.

\textsuperscript{19} Zapalla v. Industrial Insurance Comm., 82 Wash. 314, 144 Pac. 54 (1914); Guerrieri v. Industrial Insurance Comm., 84 Wash. 266, 146 Pac. 608 (1915); Stertz v. Industrial Insurance Comm., 91 Wash. 583, 158 Pac. 255 (1916); Kostida v. Dept. of Labor & Industries, 159 Wash. 622, 247 Pac. 1014 (1925); Brewer v. Dept. of Labor & Industries, 149 Wash. 49, 254 Pac. 831 (1927); Hama Hama Logging Co. v. Dept. of Labor & Industries, 157 Wash. 96, 288 Pac. 685 (1930); Dewey Fish Co. v. Dept. of Labor & Industries, 181 Wash. 95, 41 P. (2d) 1099 (1935); Dalmaso v. Dept. of Labor & Industries, 181 Wash. 294, 43 P. (2d) 32 (1935); Jannak v. Dept. of Labor & Industries, 181 Wash. 386, 43 P. (2d) 805 (1935).
not the uncontroverted facts or evidence come within the meaning of a statute or rule of law may be found.\(^{20}\)

A great advantage of the appeal procedures under most of the statutes is that factual determinations may be challenged. Trial de novo means that evidence is to be heard anew and the court is to make its own findings of fact.\(^{21}\) However, in important instances a distinct burden is placed upon the appellant to prove that the administrative action was wrong. Without statutory warrant a presumption has operated that the action was correct. Thus, in making assessments for street improvements, eminent domain commissioners will not be reversed in laying out the district specially benefited, in apportioning the cost between the district and the general public, or in assessing individual lots, in the absence of fraud, mistake of law or fact (but not of opinion), or arbitrary action.\(^{22}\) A person appealing can only succeed by coming forward and proving by a preponderance of evidence the existence of one of these errors.\(^{23}\) Where a county superintendent, after proper hearing, transfers part of one school district to another, the burden appears to be on the persons appealing to prove the action wrong.\(^{24}\)

It is unsafe to infer from these cases that an appellant invariably, or even generally, has the specific burden of proving an administrative action wrong. Under the statutes providing for trial anew and saying nothing of presumptions, probably in most instances appellant has the same burden he had before the administrative tribunal, and no more. If he asserts a claim or advantage, he still has the burden to prove it by a preponderance of evidence. If a claim or penalty is asserted against him, the burden remains with the tribunal. These conclusions appear sound, and warranted by the language of most of the appeal statutes

\(^{20}\) In re West Marginal Way, 112 Wash. 418, 192 Pac. 961 (1920); Polson Logging Co. v. Martin, 195 Wash. 179, 80 P. (2d) 767 (1938).

\(^{21}\) In re Littlefield, 61 Wash. 150, 112 Pac. 234 (1910); Russell v. Dibble, 137 Wash. 51, 231 Pac. 18 (1924).

\(^{22}\) In re Westlake Avenue, 40 Wash. 144, 82 Pac. 279 (1905); In re Seattle, 50 Wash. 402, 97 Pac. 444 (1908); In re Ninth Avenue, 79 Wash. 674, 141 Pac. 61 (1914); In re Western Avenue, 93 Wash. 472, 161 Pac. 381 (1916); In re Aurora Avenue, 180 Wash. 523, 41 P. (2d) 143 (1935).

\(^{23}\) Spokane v. Fennell, 75 Wash. 917, 135 Pac. 211 (1913); In re Boyer Avenue, 79 Wash. 664, 141 Pac. 58 (1914); In re Tenth Avenue Northeast, 125 Wash. 503, 217 Pac. 28 (1923); Appeal of Johnson, 148 Wash. 140, 268 Pac. 164 (1928); In re Taylor Avenue Assessment, 149 Wash. 214, 270 Pac. 827 (1928); Towers v. Tacoma, 151 Wash. 577, 276 Pac. 888 (1929).

\(^{24}\) In re Metropolitan Bldg. Co., 144 Wash. 469, 258 Pac. 473 (1927); In re Jefferson County, 153 Wash. 133, 279 Pac. 392 (1929).

\(^{25}\) School District No. 88 v. Morgan, 147 Wash. 321, 266 Pac. 150 (1928); see In re School Districts No. 12 and 133, 141 Wash. 538, 251 Pac. 382 (1927).
correct character exists and is understandable. A court is inclined to give weight to the findings of a body which is set up to make the determination in the first place and which has special facilities and training to do the job. If an appellant wants to be sure of success, he should come to court prepared to prove by a preponderance of evidence that an administrative finding is wrong. In some instances, at least, he must do this to win his suit.

Appeals from the Department of Labor and Industries in adjudicating claims under the Workmen's Compensation Act have been more numerous than from any other administrative agency. Under the act, no evidence other than that presented before the department may be introduced in court; the decision of the department is prima facie correct, and appellant has the burden of proof. Before 1939 the verdict of the jury was only advisory, and the trial judge decided whether or not the evidence preponderated against the department. If substantial evidence supported the administrative determination and, on the whole, did not preponderate against it, the department was sustained. Since 1939 the verdict of the jury has been binding, if there is substantial evidence to support it. The case must be given to the jury if evidence has been presented on which reasonable men may have an honest difference of opinion. The jury is instructed that the decision of the department is prima facie correct and that it is to be reversed or modified only if the evidence preponderates against it. The burden of proof imposed in workmen's compensation cases is statutory, but it is suggestive of what an appellant must undertake to do where the administrative board complained of has special qualifications and experience in settling issues brought before it.

Not all administrative determinations are subject to appeal even where statute seems to provide for it. For instance, the statute of appeal from the board of county commissioners is very broad. But no appeal may be had where the commissioners act as a board of equalization, reduce the salary of a court commissioner, remove the


30 Alfredson v. Dept. of Labor & Industries, 5 Wn. (2d) 648, 105 P. (2d) 37 (1940); McLaren v. Dept. of Labor & Industries, 6 Wn. (2d) 164, 107 P. (2d) 230 (1940); Darling v. Dept. of Labor & Industries, 6 Wn. (2d) 651, 108 P. (2d) 1034 (1940); Summerlin v. Dept. of Labor & Industries, 8 Wn. (2d) 43, 111 P. (2d) 603 (1941); Calkins v. Dept. of Labor & Industries, 10 Wn. (2d) 565, 117 P. (2d) 940 (1941).

county seat, open up or vacate a county road, grant a franchise to erect a toll bridge, or let a contract for county printing. One reason given is that these are special matters not coming within the scope of the appeal statute. Another reason is that the determination is "legislative," "administrative," "political" or "ministerial" in character. Courts must confine themselves to "judicial" controversies. Other determinations are of such a discretionary nature as to render very doubtful the chances of a successful appeal. Some of these are changing the site of a school, rescinding a contract of sale of public lands, and establishing a drainage district. A board of commissioners' finding of emergency making necessary excess appropriations is to a high degree discretionary.

A common characteristic of all these matters is that they are peculiarly for the administrative body to decide. To an extent administrative bodies legislate; they make decisions affecting an entire locality as well as particular individuals. They also make determinations incidental to the carrying on of their ordinary functions. In performing these functions they must have a certain amount of discretion in determining what should be done. Much of the efficiency and effectiveness of administrative bodies would be lost if appeals were to be allowed indiscriminately. Thus, there is an undefined area in which acts of a board are "legislative," "political," "administrative," "ministerial," or "discretionary." Remedy for unsatisfactory performance of these acts is to be had in causing new officers to be elected or appointed.

Some determinations of a discretionary nature may be overturned on appeal. But the evidence must show abuse of discretion amounting to fraud or failure to exercise discretion, and the burden of proof is upon the appellant. It is interesting to note that what was once a matter of discretion may become, through legislative action, a subject of appeal and trial de novo. Before 1927, under the Workmen's Compensation Act, the superior courts could not review an award if the disability was correctly classified. Since 1927 a clause declaring...

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21 King County v. Neely, 1 Wash. Terr. 241 (1868); Lawry v. Bd. of Comm'rs of Snohomish County, 12 Wash. 446, 41 Pac. 190 (1895); Olympia Water Works v. Thurston County, 14 Wash. 268, 44 Pac. 267 (1895); Selde v. Lincoln County, 25 Wash. 196, 65 Pac. 192 (1901); State ex rel. Yeargin v. Maschke, 90 Wash. 248, 155 Pac. 1684 (1916); Adams County v. Scott, 117 Wash. 33, 200 Pac. 1112 (1921); State ex rel. Klas v. County Comm'rs, 140 Wash. 43, 248 Pac. 76 (1926); State ex rel. Republic Publishing Co. v. McPhee, 188 Wash. 543, 62 P.(2d) 1355 (1936).


23 REM. REV. STAT. § 7804; Polson v. Calvert, 38 Wash. 614, 30 Pac. 815 (1905).

24 In re Drainage Dist. No. 10, 119 Wash. 8, 204 Pac. 1050 (1922).


26 In re Chicago, Milwaukee & St. P. R. Co., 134 Wash. 182, 235 Pac. 355 (1925); In re School District No. 61, 139 Wash. 11, 245 Pac. 1118 (1926); see cases cited notes 23 and 24, supra.

27 In re Everett, 61 Wash. 483, 112 Pac. 658 (1911); In re Fifth Avenue, 66 Wash. 327, 119 Pac. 522 (1911).

28 Sinnes v. Daggett, 80 Wash. 673, 142 Pac. 5 (1914); Chalmers v. In-
that "matters resting in the discretion of the department shall not be subject to review" has been omitted from the act, and the courts have felt free to decide whether or not an award should be increased. Of course, a presumption of correctness attaches to the decision of the Department of Labor and Industries.

In general, statutory appeal is as efficacious as any of the extraordinary writs in providing relief to a person aggrieved by administrative action. A very satisfactory resort to the courts is had: questions of fact as well as of law may be retried. In many instances by statute or judicial holding, an appellant has the burden of proving the administrative board wrong. However, in probably most cases this is not true, and the burden of proof is where it was in the proceeding before the board. At any rate, under the great majority of statutes, appellant has the opportunity of presenting all the facts and evidence in court.

A successful appellant will secure a full measure of relief. The judgment may direct the administrative body to do, or to refrain from doing, certain acts. Usually the case is decided finally, but in some circumstances it may be sent back to the board for final action in accordance with the judgment.

CERTIORARI OR WRIT OF REVIEW

In Washington the writ of certiorari is known also as the writ of review. Among the statutes regulating the writ the following may be set out at length:

**Rem. Rev. Stat. § 1002.** A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

Section 1005. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ at a specified time and place, a transcript of the record and proceedings . . . that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

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Section 1010. The questions involving the merits to be determined by the court upon the hearing are:

1. Whether the body or officer had jurisdiction of the subject matter of the determination under review;
2. Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination;
3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator;
4. Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination;
5. If there was such proof, whether there was, upon all the evidence, such preponderance of proof against the existence thereof, rendered in an action in a court, triable by a jury, as would be set aside by the court as against the weight of evidence.

Several statutes provide specifically for review of administrative determinations by writ of certiorari.\(^{41}\) None of these adds anything to the general statutes governing the writ.

The common law rule in this country restricts review under the writ to an inquiry whether or not the inferior tribunal had jurisdiction and proceeded within its authority. Neither errors of law nor of fact in arriving at a determination may be reviewed. This rule is said to be based on a misconception of certain English decisions.\(^{42}\) Nevertheless, it is generally recognized as the common law rule and is rigidly adhered to by many courts. In an increasing number of states, probably a majority, the use of the writ has been extended either by decision or by legislation. Interpretation and application of law in coming to a determination are closely related to the question of authority of a tribunal to proceed as it did and have been passed upon in numerous cases. Under the writ many courts will quash the proceedings below if no substantial evidence supports a finding of fact essential to a determination. These modifications of the common law have frequently come about because of statutory enactment.

Before 1895, when the statutory writ was provided for, the superior courts issued the common law writ. The supreme court still issues the writ in the exercise of its appellate and revisory jurisdiction.\(^{43}\) Creation of the statutory writ did not enlarge or diminish the supreme court's jurisdiction.\(^{44}\) In most instances the common law writ has issued to

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\(^{44}\) Cases cited notes 47 and 48, infra.
the superior courts. In these cases the supreme court seems to have confined itself to questions of jurisdiction and legality of proceedings. Expressions and holdings in the earlier cases are convincing that these were the only questions that could be decided under the common law writ. The Washington court has taken a narrow view of the extent of review allowed.

In two comparatively recent decisions the Washington Supreme Court has manifested a willingness to undertake a more far-reaching review than is ordinarily permitted under the common law writ. In one the Department of Public Works was sustained in its action cancelling a certificate of convenience and necessity. In the other the department was reversed in issuing a certificate because the facts and evidence demonstrated that the particular area was already served by ferry transportation. In both cases unusual circumstances induced the court to assume jurisdiction and to issue the writ directly to the Department of Public Works. In neither case was the scope of review a contested question, and possibly they may be distinguished in that "legality of proceedings" was in dispute. Nevertheless, the supreme court did scrutinize the department's findings of fact and application of law, and the decisions are authority that some substantial evidence must support a finding under the common law writ of certiorari. They indicate that the Washington court is moving toward the modern view of the function of the writ.

Section 1010 makes clear that the statutory writ of certiorari is to provide a careful review of the proceedings before the inferior tribunal. It makes clear that the review is to be more thorough than that which is secured under the common law writ. In the first place, questions of law are decided. In many cases involving administrative tribunals, questions of jurisdiction, legality of proceedings, and interpretation and

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45 Taylor v. Ringer, 3 Wash. Terr. 533, 19 Pac. 147 (1888); State v. Superior Court, 6 Wash. 352, 33 Pac. 827 (1893); State v. Superior Court, 72 Wash. 144, 129 Pac. 900 (1913); State v. Superior Court, 91 Wash. 40, 157 Pac. 28 (1916); State v. Superior Court, 130 Wash. 464, 227 Pac. 849 (1924); State v. Superior Court, 168 Wash. 384, 12 P. (2d) 420 (1933); State ex rel. Turner v. Paul, 182 Wash. 261, 46 P. (2d) 1060 (1935). In some cases where the common law writ has issued, the supreme court has referred to the statutes governing the writ. State v. Superior Court, 116 Wash. 535, 199 Pac. 977 (1921); State v. Superior Court, 167 Wash. 451, 10 P. (2d) 233 (1932).

In State ex rel. Thompson v. Nichols, 29 Wash. 159, 69 Pac. 771 (1902), the writ issued to the State Board of Equalization. The proceedings of the board were sustained.

46 Wilson v. Seattle, 2 Wash. 543, 27 Pac. 474 (1891); State v. Superior Court, 6 Wash. 352, 33 Pac. 327 (1893); State ex rel. Hellbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495 (1894); State v. Superior Court, 72 Wash. 144, 129 Pac. 900 (1913); Crouch v. Ross, 93 Wash. 73, 145 Pac. 87 (1914).

47 North Bend Stage Line v. Dept. of Public Works, 170 Wash. 217, 16 P. (2d) 296 (1933).

application of law have been decided. In many cases the court has decided whether or not undisputed facts and evidence call into operation a statute or rule of law. As to all these questions the statutory writ is as effective as the common law writ.

In the second place, questions of fact are subject to review. Section 1010-4 requires the court to examine the proceedings for "any competent proof of all the facts necessary to be proved." To the extent that some substantial evidence must support the findings, the requirement is no different from that of the modern common law writ. Section 1010-5 goes a step further and directs the superior court to decide whether or not the evidence preponderates against the findings of fact. Substantial evidence is not sufficient to sustain an administrative body if on the whole the findings are against the weight of evidence. In the absence of statute, modern development of the common law writ has yet to go this far.

Numerous cases have been decided in which the evidence is held sufficient to support a determination and the court is unable to say that on the whole the evidence preponderates against it. A less number of cases have held that the evidence is insufficient to sustain a

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49 Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165 (1898); Ladd v. Gilson, 26 Wash. 79, 66 Pac. 126 (1901); Everett Water Co. v. Fleming, 26 Wash. 364, 67 Pac. 82 (1901); State v. Board of Commissioners, 72 Wash. 454, 130 Pac. 749 (1913); Gregory v. County Commissioners of Kitsap County, 110 Wash. 476, 188 Pac. 761 (1920) (void procedure); State v. Herschberger, 117 Wash. 275, 201 Pac. 2 (1921) (void proceeding because notice inadequate); Andrus v. Church, 117 Wash. 627, 201 Pac. 917 (1921); Carleton v. Bd. of Police Pension Fund Comm'rs, 115 Wash. 372, 197 Pac. 925 (1921); Public Service Comm. v. State, 118 Wash. 629, 204 Pac. 925 (1921), 207 Pac. 688 (1922).


51 Ryan v. Handley, 43 Wash. 232, 86 Pac. 398 (1906); Northern Pacific R. Co. v. Railroad Commission, 57 Wash. 134, 106 Pac. 611 (1910); Puget Sound Elec. R. v. R. R. Comm., 65 Wash. 75, 117 Pac. 739 (1911); State v. Public Service Comm., 81 Wash. 275, 142 Pac. 684 (1914); State ex rel. Tingstead v. Johnson, 109 Wash. 214, 188 Pac. 671 (1919); State v. Public Service Comm., 114 Wash. 646, 195 Pac. 1015 (1921); State v. Preston, 120 Wash. 569, 208 Pac. 47 (1922); State v. Dept. of Public Works, 141 Wash. 169, 250 Pac. 1088 (1926); State v. Dept. of Public Works, 180 Wash. 278, 39 P. (2d) 603 (1934); State v. Dept. of Public Service, 199 Wash. 24, 90 P. (2d) 238 (1939); State v. Walla Walla County, 5 Wn. (2d) 95, 104 P. (2d) 764 (1940).

The court has said that a determination will be sustained although the evidence supporting it is "meager" and "unsatisfactory." Northern Pac. R. Co. v. Railroad Commission, supra.
particular determination. One has difficulty in finding a case in which an administrative determination is reversed on the specific ground that it is contrary to the weight of evidence. The courts have preferred to base their reversals on lack of substantial evidence. The reason is fairly clear. Courts are reluctant to say that an administrative tribunal, entrusted with the determination in the first instance and having extensive training and experience, is wrong where substantial evidence supports the findings of fact.

Administrative rulings on the admission of evidence may be reviewed under the statutory writ. If incompetent evidence has been received, the court may remand, or it may examine the record for other evidence supporting the findings of fact. Because most administrative proceedings are informal and are set up to avoid technicalities, the proof probably does not have to be strictly competent under judicial rules of evidence. If evidence has been erroneously excluded, the administrative body will be instructed to receive it and to make a new determination. A complete record must be certified to the court, and if a transcript is undecipherable or a determination is based largely on evidence apart from the record, a new hearing will be ordered. Under the writ a court has no means of making findings of fact apart from the evidence in the record, and if the administrative tribunal has omitted to take evidence and make findings, the case will be remanded.

The statutory writ of certiorari, as well as the common law writ, issues only to tribunals exercising "judicial" functions. For this reason a legislative or political determination will not be reviewed under the writ. Revocation by a city council of a license to sell intoxicating liquors is a determination of the former type. In a few instances of legislative, administrative, or political controversy the writ has been granted to settle the narrow question of jurisdiction or legality of proceedings. But in all these cases the court has been of the opinion that the merits were left exclusively to the inferior tribunal. Mention should

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52 Browne v. Gear, 21 Wash. 147, 57 Pac. 359 (1899); State ex rel. G. N. R. Co. v. Railroad Comm., 60 Wash. 218, 110 Pac. 1075 (1910); Public Service Comm. v. State, 118 Wash. 629, 204 Pac. 791, 207 Pac. 688 (1922); Great Northern R. Co. v. Dept. of Public Works, 161 Wash. 29, 295 Pac. 142 (1931); State v. Dept. of Public Works, 181 Wash. 165, 42 P. (2d) 424 (1935); State v. Murray, 162 Wash. 99, 44 P. (2d) 1031 (1935).


54 Carleton v. Bd. of Police P. F. Comm'rs, 115 Wash. 572, 197 Pac. 925 (1921).

55 State ex rel. G. N. R. Co. v. Railroad Comm., 60 Wash. 218, 110 Pac. 1075 (1910); Crouch v. Ross, 83 Wash. 73, 145 Pac. 87 (1914).

56 Puget Sound Nav. Co. v. Dept. of Public Works, 152 Wash. 417, 278 Pac. 189 (1929); id., 156 Wash. 377, 287 Pac. 52 (1930).

57 State ex rel. Aberdeen v. Superior Ct., 44 Wash. 526, 87 Pac. 818 (1906); State ex rel. Puyallup v. Superior Ct., 50 Wash. 650, 97 Pac. 773 (1908); see Spelling, op. cit. supra note 42, §§ 1899a, 1954.

58 State v. Superior Court, 72 Wash. 144, 129 Pac. 900 (1913) (election contest); State ex rel. Klaas v. County Comm'mrs, 140 Wash. 43, 248 Pac. 76 (1926) (grant of toll bridge franchise).
be made that one or two Washington statutes provide for review of administrative orders, rules, and regulations by writ of certiorari. These constitute a departure from the usual function of the writ.

Civil service boards, established in a number of Washington cities, have considerable latitude in sustaining discharges of municipal employees. Usually the discharging officer must file his reason or reasons, and the employee has a limited time in which to request an investigation by the board. If he files a request, he is entitled to notice of hearing and full opportunity to present his case. Where a discharge is upheld and the employee seeks certiorari, the oft-stated rule is that if the reason was not frivolous and there was some competent evidence tending to prove it, the court will not inquire into the weight or sufficiency of evidence. The court has observed that a city could give its officers absolute power to discharge. To allow recourse to a civil service board is a pure concession which may be qualified as a city sees fit. Thus, it appears in civil service cases the statutory writ of certiorari is effective only where the proceedings below were void, or where the cause for discharge is frivolous, or where no competent evidence supports the finding of cause.

Where a large measure of discretion is vested in an administrative tribunal, its action is not easily overthrown by use of the writ. The courts commonly say that the determination must be arbitrary and capricious, having no support in the evidence, before it will be disturbed. The Department of Public Works has wide discretion in granting certificates of convenience and necessity. It has authority to decide whether or not a certificate should issue and which of two or more applicants should receive it, and in case after case the department's judgment has been sustained. The department is a tribunal having broad experience within its jurisdiction, and one would expect the courts to have confidence in its exercise of discretion.

The writ of certiorari has proved to be an unsatisfactory and inadequate remedy in tax assessment cases. Thirty years ago the writ was used in a few instances to correct errors of law leading to excessive assessment. But the rule now seems settled that the writ will not issue

60 King v. Listman, 63 Wash. 271, 115 Pac. 93 (1911); State v. City of Seattle, 65 Wash. 645, 118 Pac. 821 (1911); State v. Boyington, 110 Wash. 622, 188 Pac. 777 (1920); Ford v. City of Seattle, 117 Wash. 55, 200 Pac. 566 (1921); Ryan v. City of Everett, 121 Wash. 342, 209 Pac. 532 (1922); State v. Cotterill, 125 Wash. 533, 216 Pac. 851 (1923); Bridges v. Patterson, 135 Wash. 436, 237 Pac. 589 (1925).
61 State ex rel. E. & M. Auto F. v. Dept. of Pub. Works, 124 Wash. 234, 214 Pac. 164 (1923); State v. Dept. of Public Works, 129 Wash. 5, 223 Pac. 1043 (1924); State v. Dept. of Public Works, 144 Wash. 219, 257 Pac. 634 (1927); North Bend Stage Line v. Denney, 153 Wash. 439, 279 Pac. 752 (1929); Denman v. Dept. of Public Works, 157 Wash. 447, 289 Pac. 34, 291 Pac. 1115 (1930); North Bend Stage Line v. Dept. of Public Works, 162 Wash. 46, 297 Pac. 780 (1931); Robertson v. Dept. of Public Works, 180 Wash. 133, 39 P.(2d) 596 (1934).

62 Cases cited note 49, supra.
to correct the determination of a board of equalization. One reason is that where error of law or fact has been committed, the case must be remanded to the administrative body. If in the meantime the body has dissolved, as boards of equalization do, its action cannot be corrected. The writ can accomplish nothing and is therefore refused.63

The earlier cases have been explained in that the procedural point was not contested and the tax collecting officers were able to carry out the judgment of the court. Another reason for denial of the writ is that injunction is a more appropriate and effective remedy, if brought in time.64 In an action for injunction evidence may be presented on the issue of excessive valuation, and the court can render a final judgment on the merits. In a few early cases the writ of certiorari was employed to overthrow tax assessments made without jurisdiction,65 but even this limited use of the writ is doubtful now.66

Some comparisons may be drawn between the writ of certiorari and statutory appeal. Both provide for a direct attack upon an administrative determination. Certiorari is a remedy complementary to statutory appeal in that it issues only where the latter is inadequate or unavailable. For example, the writ has been granted to review a proceeding of a board of county commissioners where the general appeal statute was not applicable.67 Certiorari is ineffective where the tribunal sought to be reviewed has dissolved, but this deficiency does not seem to be true of statutory appeal. Certiorari and statutory appeal are equally effective in affording judicial review of legal questions: jurisdiction, manner of proceeding, interpretation and application of law. Statutory certiorari falls short of providing the extensive review of facts and evidence permitted under most appeal statutes. Under the statutory writ a court will examine the record for evidence supporting a determination, and it is authorized to decide whether or not the evidence on the whole preponderates against a finding of fact. Under the common law writ the court at the very most will search the record for evidence supporting a determination. The court is confined to the record where the statutory or common law writ issues, and this is a

63 State v. State Board of Equalization, 75 Wash. 60, 134 Pac. 695 (1913); State ex rel. Oregon-Washington R. R. & N. Co. v. Clausen, 82 Wash. 1, 143 Pac. 312 (1914); Weyerhaeuser Timber Co. v. Pierce County, 133 Wash. 355, 233 Pac. 922 (1925); State ex rel. N. P. R. R. Co. v. State Board of Equalization, 140 Wash. 243, 246 Pac. 793 (1928); see McAllister, Taxpayers Remedies—Washington Property Taxes, 13 Wash. L. Rev. 91, 107 (1938).
65 Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165 (1898); Ladd v. Gilson, 26 Wash. 79, 66 Pac. 126 (1901; Everett Water Co. v. Fleming, 26 Wash. 364, 67 Pac. 82 (1901); State ex rel. Thompson v. Nichols, 29 Wash. 159, 69 Pac. 771 (1902) (common law writ).
66 Weyerhaeuser Timber Co. v. Pierce County, 133 Wash. 355, 233 Pac. 922 (1925).
67 Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165 (1898); State ex rel. Klaas v. County Comm'trs, 140 Wash. 43, 248 Pac. 76 (1926).
point of difference from appeal procedures. Most of the appeal statutes provide for a new trial of all issues, and no restriction is placed on the introduction of evidence. In sum, a person aggrieved has a fuller opportunity under appeal procedures than under the writ of certiorari to attack an administrative determination.

**MANDAMUS**

The legislation presently governing the writ of mandamus (or writ of mandate) was enacted in 1895.69 Bearing on the scope of review of administrative determinations are the following sections:

**Rem. Rev. Stat. § 1014.** It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Section 1019. If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial. . . . The order may also direct the jury to assess any damages which the . . . (applicant) may have sustained, in case they find for him.

A few statutes provide specifically for issuance of the writ to compel a state officer to perform his duty.70

The modern writ of mandamus has been defined as a "command issuing from a common law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law."71 In substance this is an apt definition of the statutory writ in Washington. At early common law no issue of fact was tried under the writ. Defendant's return to the writ was taken as true and judgment pronounced accordingly. For false return plaintiff had to bring a separate action of trespass on the case. If the return was proved false, a peremptory writ of

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71 High, Extraordinary Legal Remedies (2d ed. 1884), § 1. Generally on the development of the writ and statutory modifications authorizing trial of fact issues, see §§ 1-10, 30c, 448-450, 457-459, 499, 547. See also Spelling, op. cit. supra note 42, §§ 1362-1366, 1642, 1675-1677, 1687, 1688; Freund, op. cit. supra note 42, pp. 255-260; Hart, op. cit. supra note 42, pp. 438-442.
mandamus could be obtained. In the eighteenth century, legislation in England provided for trial of questions of fact. This legislation has been re-enacted in many states of the Union and in many others has become a part of the common law. Thus, issues of fact may be tried under the modern writ practically everywhere.

The common law writ of mandamus, as distinguished from the statutory writ, still exists in Washington and issues from the supreme court. Article IV, Section 4, of the state constitution gives to the court "original jurisdiction in . . . mandamus as to all state officers," and the legislation of 1895 did not enlarge or diminish this jurisdiction. The English legislation mentioned apparently is a part of the constitutional writ because the supreme court in a number of cases has passed upon questions of fact. However, such issues are referred for trial to a superior court, the supreme court having no facilities to try them. At first the writ issued only to heads of executive departments named in the constitution, but now it issues to all state officers. An important restriction on its issuance is that the controversy must be one of public importance.

In most cases where mandamus is sought, no administrative determination of a judicial or quasi-judicial nature is involved. Defendant officer has no adjudicating power and is given no discretion as to the particular matter in dispute. The meaning of a statute may be in question, and suit may be brought to compel him to act according to plaintiff's interpretation. A statute may be clear in meaning, but defendant officer may assert its unconstitutionality, and suit may be brought to compel compliance with it. A question may arise whether or not plaintiff has proved facts entitling him to require defendant to act;

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73 State v. Ross, 44 Wash. 246, 87 Pac. 262 (1906); State v. Clausen, 90 Wash. 450, 156 Pac. 554 (1916); State v. Clausen, 124 Wash. 369, 214 Pac. 635 (1923).
74 State v. Schively, 63 Wash. 103, 114 Pac. 901 (1911); State v. Schively, 68 Wash. 148, 122 Pac. 1020 (1912); State v. Wash. Toll Bridge Authority, 8 Wn. (2d) 337, 112 P. (2d) 135 (1941). State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974 (1893), is overruled.
75 State v. Clausen, 124 Wash. 389, 214 Pac. 635 (1923); State v. Savidge, 132 Wash. 631, 233 Pac. 946 (1925); State ex rel. Dunbar v. State Board, 140 Wash. 433, 249 Pac. 996 (1926); State v. Martin, 4 Wn. (2d) 495, 104 P. (2d) 466 (1940).
76 State v. Headlee, 22 Wash. 126, 60 Pac. 126 (1900); State v. Jenkins, 22 Wash. 494, 61 Pac. 141 (1900); American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534 (1904); State ex rel. Gillette v. Clausen, 44 Wash. 437, 87 Pac. 498 (1904); State v. Graham, 136 Wash. 403, 240 Pac. 560 (1925); In re Seung, 150 Wash. 289, 272 Pac. 968 (1928); State v. Wiley, 176 Wash. 641, 39 P. (2d) 958 (1934); Public Utility Dist. No. 1 v. Benton County, 185 Wash. 339, 54 P. (2d) 1011 (1939); State v. Wiley, 16 Wn. (2d) 340, 133 Pd. (2d) 507 (1943).
77 State v. Mudgett, 21 Wash. 99, 57 Pac. 351 (1899); Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609 (1908); State v. Carroll, 78 Wash. 83, 138 Pac. 306 (1914); State v. City of Everett, 101 Wash. 561, 172 Pac. 752 (1918); State ex rel. Mason Logging Co. v. Wiley, 177 Wash. 65, 31 P. (2d) 539 (1934).
or whether defendant has proved facts sufficient to defeat plaintiff's action. In all these cases defendant's determination not to act has no special weight. The court hears evidence, finds the facts, and decides whether or not the law imposes upon defendant a duty to act. The writ of mandamus is a useful device for securing a judicial pronouncement on the validity, meaning and application of a statute.

In the cases just discussed neither certiorari nor statutory appeals procedure can be availed of for the reason that no judicial or quasi-judicial determination has been made. The writ of mandamus is used in the manner of a civil action to compel defendant officer to perform his "clear" duty. Frequently his duty is not clear until statutes are construed and facts found. But thereafter it is clear, and the act compelled is said to be "ministerial" as distinguished from "discretionary."

Whether or not an officer has been entrusted with discretion or with an adjudicating function depends upon the legislation prescribing his duties and authority. If he does have discretion or a judicial or quasi-judicial function, mandamus loses much of its potency as a means for compelling action. The writ is most effective where the duty to act is clear and there is no room for the exercise of discretion.

A leading principle governing the writ of mandamus is that it will not be granted to control an exercise of discretion. In numerous cases it is denied because defendant officer or board has acted within his or its discretion. In some of these cases defendant officer or board

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78 Achey v. Creech, 18 Wash. 186, 51 Pac. 363 (1897); Bacon v. Tacoma, 19 Wash. 674, 54 Pac. 609 (1899); Wilson v. City of Aberdeen, 25 Wash. 614, 66 Pac. 95 (1901); State v. Cranney, 30 Wash. 594, 71 Pac. 50 (1902); State v. McQuade, 36 Wash. 579, 79 Pac. 207 (1905); State ex rel. Reynolds v. Hill, 135 Wash. 442, 237 Pac. 1004 (1925); State v. Okanogan County, 153 Wash. 399, 280 Pac. 31 (1929).

79 State v. Bridges, 30 Wash. 268, 70 Pac. 506 (1902) (commissioner refused to re-sell school lands); State v. Schively, 63 Wash. 114, 114 Pac. 901 (1911) (insurance commissioner's choice of newspaper in which financial statements were to be published challenged); State v. Pratt, 68 Wash. 157, 122 Pac. 987 (1912) (attorney general refused to sue for accident insurance premiums); State v. City of Seattle, 74 Wash. 199, 133 Pac. 11 (1913) (city council abolished civil service position); State v. Fishback, 97 Wash. 565, 166 Pac. 799 (1917) (commissioner refused to grant license to sell fidelity and surety insurance); State v. Morgan, 117 Wash. 214, 200 Pac. 1085 (1921) (county commissioners refused to repair road); State v. Hinkle, 120 Wash. 65, 206 Pac. 942 (1922); Morris v. Favor, 134 Wash. 75, 234 Pac. 1040 (1925) (commissioners' refusal to re-district county held "political" and "legislative"); State v. Seattle, 137 Wash. 455, 242 Pac. 966 (1926) (city council's refusal to re-build burned bridge held "legislative"); Bellingham American Pub. Co. v. Bellingham Pub. Co., 145 Wash. 25, 258 Pac. 838 (1927) (city council rejected all bids for printing); State v. Eaton, 182 Wash. 7, 44 P.(2d) 803 (1935) (method of raising funds for old age pensions not controllable by mandamus); State v. Austin, 186 Wash. 577, 59 P.(2d) 379 (1936) (county commissioners reduced number of deputy sheriffs); State v. McPhee, 186 Wash. 543, 62 P.(2d) 1355 (1936) (award of printing contract "administrative and "discretionary"); State v. Bunge, 192 Wash. 245, 73 P.(2d) 516 (1937) (parole board did not follow recommendation of superintendent of penitentiary); State v. Civil Service Commission, 3 Wn.(2d) 498, 112 P.(2d) 937 (1941) (classification of employees not controllable by mandamus).
EXTRAORDINARY WRITS

exercises a judicial function in deciding claims or controversies. In others no judicial function is exercised, but discretion is vested in defendant officer or tribunal, and the power to act may be called "political," "legislative," or "administrative." In all these cases the court is satisfied that the legislative intent was that defendant’s bona fide exercise of discretion should stand.

Mandamus will not be granted to compel an officer to enforce a parking ordinance, saloon and gambling laws, or any other general code of laws. One reason is that the writ issues to compel performance of a specific duty, not to superintend a general course of conduct. Another reason is that executive officers are vested with discretion in the manner of enforcement of statutes. A court will not presume to give detailed instructions as to how this discretion should be exercised.

If an officer or tribunal is under a legal duty to exercise his or its discretion upon a matter but refuses to do so, mandamus will issue. If the officer or tribunal exercises his or its discretion in an arbitrary, capricious, or fraudulent manner, mandamus will issue. Evidence will be admitted on the question of abuse of discretion. If arbitrariness, caprice, or fraud is proved, the case is treated as if no discretion had been exercised. The officer or board will be directed to exercise his or its fair discretion, and the previous action will be nullified. Often it is said that a court will order an inferior tribunal to exercise its fair discretion but will not direct how that discretion is to be exercised. Nevertheless, where circumstances permit, a court will limit the bounds within which defendant officer or board must act. These bounds are calculated to prevent a repetition of arbitrary, capricious or fraudulent conduct.

State v. Bd. of Pilotage Commissioners is illustrative of how a failure to exercise fair discretion may be remedied. Plaintiffs alleged that the board arbitrarily refused to permit them to take the examination for a pilot’s license, although they were qualified in all respects. They alleged that some persons were given licenses without examination and that, with one exception, only union members were allowed to obtain licenses. On demurrer the court held that the board had acted arbitrarily and capriciously. The court did not attempt to specify

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80 State v. Brewer, 39 Wash. 65, 80 Pac. 1001 (1905); State v. Carroll, 78 Wash. 83, 138 Pac. 306 (1914); State v. Darwin, 81 Wash. 1, 142 Pac. 441 (1914); State v. Landes, 149 Wash. 570, 271 Pac. 829 (1928); cf. State v. Hill, 135 Wash. 442, 237 Pac. 1004 (1925) (city commissioners compelled to take measures to have gasoline pumps removed from sidewalk).

81 State v. Superior Court, 59 Wash. 670, 110 Pac. 622 (1910); State v. Maschke, 90 Wash. 249, 155 Pac. 1084 (1916); State v. Howell, 96 Wash. 163, 164 Pac. 917 (1917); State v. Fishback, 97 Wash. 565, 166 Pac. 799 (1917); State v. Board of County Comm’rs, 146 Wash. 449, 263 Pac. 735 (1928) (cf. Morris v. Favor, cited note 79, supra); State v. Bd. of Pilotage Com’rs, 198 Wash. 695, 90 P. (2d) 238 (1939).

82 State v. Bd. of Pilotage Com’rs, State v. Superior Court, cited note 81, supra.

83 198 Wash. 695, 90 P. (2d) 238 (1939).
how the board should exercise its discretion in giving and marking examinations. But it did order that licenses only be issued on the passing of a competitive examination and that plaintiffs and all other qualified persons be permitted to take the examination. Thus, the writ of mandamus is effective to remedy glaring favoritism and abuse of discretion by an administrative board.

In general, where a board has an adjudicating function—that is, hears evidence and decides cases brought before it—mandamus cannot be used to review the merits of a determination. If statutory appeal is provided for, it must be resorted to in order to correct errors of law or fact. Mandamus is an extraordinary writ which cannot be employed where there is a "plain, speedy and adequate remedy in the ordinary course of law." If no appeal procedure is provided for, certiorari is the proper remedy to secure a court review of the merits. In a number of cases it has been held that the evidence and facts supporting an administrative determination will not be reviewed in a mandamus proceeding. This is a special case of the general rule that mandamus does not lie to control an exercise of discretion. A board that weighs evidence and finds facts is entrusted with discretion and, in the absence of a clear showing of abuse, the writ will not issue.

If a board commits an error of law in making an adjudication, certiorari is the appropriate remedy, if statutory appeal is not available. The court can examine the record for legal errors and remand with instructions. Except for certain civil service cases, no decision has been found in which mandamus has issued simply to correct the law interpreted and applied by an administrative board in arriving at a determination, assuming a proper hearing has been had. Because of the exception one cannot say that mandamus will never issue to correct an error of law in an administrative determination. If the error is so serious as to make the proceeding void or to render the determination "arbitrary," "capricious," or "fraudulent," possibly mandamus will be granted. But the general rule can be stated with assurance: mandamus may not be employed to correct an error of law in ordinary cases.

In civil service disputes the writ of mandamus has been a favored remedy. With respect to the merits of discharges, the rule has been stated as follows:

84 REM. REV. STAT. § 1015; State v. Allen, 8 Wash. 168, 35 Pac. 609 (1894); State v. Hitt, 13 Wash. 547, 43 Pac. 638 (1896); State v. State Board of Medical Examiners, 61 Wash. 623, 112 Pac. 746 (1911); State v. Swridge, 108 Wash. 292, 183 Pac. 111 (1919); Russell v. Dibble, 137 Wash. 51, 231 Pac. 18 (1924); State v. Board of Trustees of State Teachers' Ret. Fund, 170 Wash. 187, 16 P. (2d) 200 (1932).

85 State v. Forrest, 8 Wash. 610, 36 Pac. 686, 1120 (1894), later proceedings, 11 Wash. 158, 39 Pac. 450 (1895); State v. Forrest, 13 Wash. 266, 43 Pac. 51 (1895); Hester v. Thompson, 35 Wash. 119, 76 Pac. 754 (1904); State v. Board of Dental Examiners, 36 Wash. 325, 80 Pac. 544 (1905).

86 See cases and text at notes 89-92, infra; see also State v. Bd. of Pilotage Com'rs, cited note 81, supra.
"When, in a case of removal from office or position within the classified civil service, it appears that the appointing power has filed with the civil service commission a written statement of the reasons for the removal, upon charges that cannot be said to be utterly frivolous, and when it further appears that the commission has awarded the party charged a full opportunity to be heard, and that competent evidence has been produced tending, in some measure at least, to prove the charges made, the court may not inquire into the weight or sufficiency of the evidence. Its power is confined to the inquiry whether the officers intrusted with the authority to effect removals and discharges have acted within the prescribed rules.

The first sentence is entirely consistent with what has been said about the unavailability of mandamus to review the merits of an administrative determination. A further reason for refusal to review the merits of discharges is that a municipality could enact that the power to dismiss should be absolute. The second sentence raises a question. It suggests that some errors of law may be corrected, but it does not necessarily say that mandamus is the proper remedial proceeding.

Apart from discharge cases, civil service boards decide what applicant or employee is entitled to a job. In making these decisions they are governed by ordinances, their own rules and regulations, and the public policy of the civil service law. The writ of mandamus has frequently been used to correct errors of law in the assignment of jobs. Among the errors corrected are: allowing seniority to a person in a classification other than that in which he is presently employed; changing the weights given certain questions on an examination after the papers were graded and identified; changing the name of a position without changing its duties in order to replace an employee; laying off an employee for lack of work and funds where his position had not been abolished by the city council. Many other cases have arisen in which

87 State v. Seattle, 189 Wash. 64, 63 P. (2d) 515, 517 (1937). Accord: State v. City of Seattle, 159 Wash. 392, 293 Pac. 459 (1930); State v. City of Seattle, 189 Wash. 64, 63 P. (2d) 515 (1937). The rule is the same where writ of certiorari is sued out. Cases cited note 60, supra.

88 See text at note 60, supra.

Mandamus has been sought, unsuccessfully, to correct the action of boards administering relief and pension funds. Such boards appear to have complete discretion as to law and facts. State v. Board of Trustees, 93 Wash. 439, 85 Pac. 29 (1906); State v. Edwards, 161 Wash. 258, 295 Pac. 1017 (1931).

89 State v. City of Seattle, 83 Wash. 91, 145 Pac. 61 (1914); State v. City of Seattle, 115 Wash. 548, 197 Pac. 762 (1921) (hearing denied); State v. Listman, 156 Wash. 966, 287 Pac. 606 (1930); Allard v. City of Tacoma, 176 Wash. 441, 29 P. (2d) 698 (1934); State v. Seattle, 177 Wash. 646, 32 P. (2d) 1065 (1934) (plaintiff allowed hearing); State v. City of Seattle, 184 Wash. 560, 52 P. (2d) 360 (1935); State v. City of Seattle, 186 Wash. 541, 55 P. (2d) 1212 (1936); State v. Mullin, 193 Wash 99, 97 P. (2d) 280 (1939) (protest but no hearing); State v. City of Seattle, 199 Wash. 563, 92 P. (2d) 249 (1939) (plaintiff allowed hearing). Other errors of law were corrected in State v. City of Seattle, 127 Wash. 581, 221 Pac. 977 (1924) (hearing apparently held); State v. City of Seattle, 171 Wash. 153, 18 P. (2d) 3 (1933); Hill v. City of Tacoma, 173 Wash. 92, 28 P. (2d) 1030 (1933).
mandamus has been employed to assert a right to a job. Where the writ has issued, the court usually finds a violation of the board's own rules and regulations and "arbitrary and capricious" conduct.

Perhaps these civil service cases should be recognized as an exception to the general rule that errors of law in an administrative determination will not be corrected in mandamus proceedings. Certainly mandamus has a special function in trying the right to a governmental position. However, some points of distinction may be made. In most of the cases no hearing with presentation of evidence and argument seems to have been had. In these cases the board can be said to have acted ministerially, not judicially. Mandamus would then be the proper remedy to compel listing of eligible applicants or an assignment of jobs consistent with the civil service law. Even where hearing was had, this explanation may be offered, although it is admittedly less satisfactory. Special note should be taken that the decisions frequently add as a reason for issuing the writ that the board was "arbitrary" and "capricious" in its action. Thus, the cases are brought within the rule that mandamus will issue to remedy abuse of discretionary power. These distinctions may be purely verbal, but they may be the explanation for a line of cases which otherwise are an exception to the general rule that mandamus may not be employed to correct errors of law.

Luellen v. City of Aberdeen is a recent decision holding that a civil service determination, void because of serious illegality in proceedings, may be corrected by writ of mandamus. Plaintiff was discharged by the chief of police because of conduct unbecoming an officer. He wrote a letter of protest to the civil service board, but it, after investigation, confirmed the discharge. Plaintiff had no notice of hearing and had no opportunity to present his case. The majority of the court in a 5-4 decision held that the lack of hearing rendered the board's determination void and granted the writ of mandate to compel reinstatement. To the argument that certiorari was the proper remedy, the court answered that under it the only relief would have been a judgment that the discharge was void. The majority recognized that mandamus could not ordinarily be used to review a discharge but allowed the writ only because the board's determination was void. The dissenting judges thought that the proper remedy for illegal proceedings was the writ of certiorari. The main dissenting opinion argued that

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90 State v. City of Seattle, 74 Wash. 199, 133 Pac. 11 (1913); State v. City of Seattle, 88 Wash. 589, 153 Pac. 336 (1915); State v. City of Seattle, 109 Wash. 629, 167 Pac. 339 (1920); State v. City of Seattle, 134 Wash. 360, 235 Pac. 969 (1925); State v. City of Spokane, 150 Wash. 542, 273 Pac. 748, 277 Pac. 909 (1929) (plaintiff allowed hearing); Allen v. City of Seattle, 186 Wash. 63, 35 P. (2d) 1008 (1934) (plaintiff allowed hearing); State v. City of Seattle, 180 Wash. 635, 41 P. (2d) 784 (1935); State v. Civil Service Comm., 8 Wn. (2d) 498, 112 P. (2d) 987 (1941). In most of these cases plaintiff was unsuccessful in his action.

91 See text at note 98, infra.

92 20 Wn. (2d) 594, 148 P. (2d) 849 (1944).
mandamus should only issue if the removal were void at law on its face and that where the board acted within its jurisdiction the merits and manner of proceeding could not be questioned. While the decision is weakened by the dissent of four judges, it is authority for the proposition that mandamus will issue to nullify an act based on an administrative determination which is void because of procedural defect. Apparently all the judges were agreed that a board order void on its face as a matter of law could be corrected in a mandamus action.

The writ of mandamus performs a function differing markedly from that of statutory appeal and certiorari. It issues to compel the doing of an act, and the act may be affirmative or negative in character. The act may or may not be one following upon a judicial or quasi-judicial determination. On the other hand, statutory appeal and certiorari are proper remedies only where the determination is judicial or quasi-judicial in nature. They are not available to review the refusal to act of an officer who has no adjudicating power. Mandamus is of limited utility where an officer is entrusted with discretion. If he refuses to exercise his discretion, the writ will be granted to compel him to do so, but not to direct him how. The writ will also be granted if proof is made that he has acted arbitrarily, capriciously, or fraudulently. Abuse of discretion is the same as a refusal to exercise discretion. Sometimes the court will limit the bounds within which an officer or board may act in order to prevent a repetition of arbitrary, capricious, or fraudulent conduct. In general, a court will not review under the writ of mandamus the merits, legal or factual, of a judicial or quasi-judicial determination. However, a possibility exists that errors of law so extreme as to render the determination void or arbitrary and capricious may be corrected by the writ.

(To Be Continued)