

## NOTES

### CERTIORARI TO ADMINISTRATIVE TRIBUNALS IN MISSOURI

Certiorari is a prerogative writ issued by a superior to an inferior tribunal possessing limited jurisdiction, requiring the certification and return to the former of the record in a cause before the latter.<sup>1</sup> The writ is of ancient origin,<sup>2</sup> and since the *Cardiff Bridge* case,<sup>3</sup> decided in King's Bench in 1700, its availability to review allegedly illegal orders of administrative tribunals has been established.<sup>4</sup> The writ will lie only if no other remedies are available.<sup>5</sup> In addition, it is limited to the review of judicial, or quasi-judicial acts.<sup>6</sup> In consequence, a good deal of confusion has arisen in the American law, since what is or is

1. See 1 Bouvier, *Law Dictionary* (Rawle's 3rd ed. 1914) 443. Comment is made regarding the lack of precise judicial definition of the public bodies and proceedings to which certiorari is applicable. For previous discussions of the writ of certiorari in Missouri, in general, see Finkelnburg and Williams, *Missouri Appellate Practice* (2nd ed. 1906) 221; McBaine, *The Writ of Certiorari in Missouri* (1915) 6 Law Ser. Mo. Bull. 3. 4 Houts, *Missouri Pleading and Practice* (1937) c. 36, 663 et seq. For discussion of the writ directed to the courts of appeal, see Atwood, *Certiorari in Missouri* (1934) 2 Kan. City L. Rev. 35; McBaine, *Certiorari from the Missouri Supreme Court to the Courts of Appeals* (1916) 13 Law Ser. Mo. Bull. 30; Graves, *Certiorari as Used by the Supreme Court in the Interest of Harmony of Opinion and Uniformity of the Law* (1922) 24 Law Ser. Mo. Bull. 3. For the statutory writ of certiorari to justices of the peace in unlawful detainer suits see R. S. Mo. (1939) §§2869-2873, 2894-2907.

2. 1 Bouvier, *Law Dictionary* (Rawle's 3rd ed. 1914) 443; Dickinson, *Administrative Justice and the Supremacy of Law* (1927) 62, n. 79; Ferris, *Extraordinary Legal Remedies* (1926) 177; Goodnow, *The Writ of Certiorari* (1891) 6 Pol. Sci. Q. 493.

3. *Rex v. Inhabitants in Glamorganshire* (K. B. 1700) 1 Ld. Raym. 580, 91 Eng. Rep. 1287.

4. See Freund, *Administrative Powers over Persons and Property* (1928) 255; Goodnow, *supra* note 2, at 516-517.

5. *State ex rel. Mo. Pac. Ry. v. Edwards* (1891) 104 Mo. 125, 16 S. W. 117; *State ex rel. Kansas & Texas Coal Ry. v. Shelton* (1900) 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798. In the latter case Marshall, J., dissented, upon the ground, *inter alia*, that certiorari lies in the discretion of the court where an appeal or writ of error does not afford an *adequate remedy*. This dissent became the rule in *State ex rel. Hamilton v. Guinotte* (1900) 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787. Statements continue to be made, however, that where the tribunal has jurisdiction and its action can be reviewed by appeal or writ of error, certiorari will not lie. See, e. g., *State ex rel. Palmer v. Elliff* (1933) 332 Mo. 229, 235, 53 S. W. (2d) 283, 286, and cases cited. See also Finkelnburg and Williams, *op. cit. supra*, note 1, at 223.

6. See Goodnow, *supra* note 2, at 506; Note (1937) 25 Calif. L. Rev. 694; Note (1931) 17 Cornell L. Q. 103; Note (1936) 31 Ill. L. Rev. 230, 239; Note (1934) 19 Ia. L. Rev. 609.

not judicial has been determined according to varying theories in each jurisdiction.<sup>7</sup>

In determining what is or is not a judicial act, the court may consider either the nature of the act itself or the character of the tribunal whose action is sought to be reviewed. The great majority of American jurisdictions, however, have been rather liberal in allowing the writ even where the act was performed by a body not strictly judicial, if the act was an exercise of judicial, as distinguished from executive or legislative power.<sup>8</sup> Doctrines vary from a strict rule in California, where the grant of the writ depends upon the character of the tribunal, and hence is denied as respects all administrative decisions,<sup>9</sup> to a very liberal one in New Jersey, where a wide range of acts may be reviewed, whether or not they are judicial, because of the general principle that the courts have power on certiorari to remedy wrongs inflicted on individuals, where there is no other adequate remedy.<sup>10</sup> In Missouri, the nature of the act, rather than the character of the tribunal is determinative of whether certiorari will be granted.<sup>11</sup> Although the decisions are not clear,<sup>12</sup> they generally

7. See Goodnow, *supra* note 2, at 506-511; Note (1937) 25 Calif. L. Rev. 694; Note (1931) 17 Cornell L. Q. 103; Note (1936) 31 Ill. L. Rev. 230, 239; Note (1934) 19 Ia. L. Rev. 609. The concepts of "judicial" and "quasi-judicial" are exceedingly vague. See Brown, *Administrative Commissions and the Judicial Power* (1935) 19 Minn. L. Rev. 261; Finkelman, *Separation of Powers: A Study in Administrative Law* (1936) 1 U. of Toronto L. J. 313, 324-332; Fuchs, *Concepts and Policies in Anglo-American Administrative Law Theory* (1938) 47 Yale L. J. 533, 551 et seq.

8. See Goodnow, *supra* note 2, at 506. The act is often labelled "quasi-judicial" and therefore reviewable. See, e. g., *Batty v. Arizona State Dental Board* (Ariz. 1941) 112 P. (2d) 870; *Citizens' Club v. Welling* (1933) 83 Utah 81, 27 P. (2d) 23; *Borgnis v. Falk Co.* (1911) 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

9. *Standard Oil Co. of California v. State Board of Equalization* (1936) 6 Cal. (2d) 557, 59 P. (2d) 119; Note (1937) 25 Calif. L. Rev. 694. In the *Standard Oil* case it was held that certiorari would lie only to review the exercise of judicial functions and that, since the legislature was without power to confer judicial functions upon a state-wide administrative agency of the character of the State Board of Equalization, the functions of that body could not be judicial.

10. This proposition is upheld by a line of cases from *Treasurer v. Mulford* (1857) 26 N. J. L. 49 to *Roselle v. Borough of Verona* (1936) 14 N. J. Misc. 649, 186 Atl. 590 (certiorari to review a resolution of the borough providing for advertising for bids for the borough's scavenger contract). See Goodnow, *supra* note 2, at 511. See also 11 C. J. 121, n. 52, §67; 14 C. J. S. 143, §17. In North Dakota the remedy of certiorari extends to every case where inferior courts, officers, boards, or tribunals have exceeded their authority and there is no adequate remedy otherwise. *State ex rel. Olson v. Welford* (1935) 65 N. D. 522, 260 N. W. 593.

11. See *State ex rel. Davidson v. Caldwell* (1925) 310 Mo. 397, 276 S. W. 631.

12. As early as 1891, Goodnow, *supra* note 2, at 511, thought that Missouri courts, apparently without full consciousness of what was happening, had adopted the New Jersey rule that review could be had by certiorari

state that only judicial acts will be reviewed.<sup>13</sup> How the Missouri courts have decided that a particular act is judicial is not, however, easy to determine; and it must be realized that an act may sometimes be called "non-judicial" when found in a particular context at a particular point of time and be called "judicial" if review is sought in a different situation or at a different point of time.<sup>14</sup>

Since its inception, certiorari has been a means of appealing only questions of law.<sup>15</sup> It was most frequently used in England to correct excesses of jurisdiction of justices of the peace.<sup>16</sup> Divergencies arose in this country because of the belief that the office of the writ was to review only errors of jurisdiction,<sup>17</sup> and that is its principal use in many courts at the present time.<sup>18</sup> A few states have gone beyond this use for certain purposes, making the writ similar to an appeal or writ of error to bring up all errors of law, including erroneous application of law to the findings, lack of basis in the evidence for the findings, or improper admission or exclusion of evidence.<sup>19</sup> Changes have at times been made by statute. For example, in Illinois, under the Workmen's Compensation Act, the courts review the weight of the evidence in all proceedings by certiorari.<sup>20</sup> In Missouri, the

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because of the general principle that the writ could be used to remedy wrongs inflicted on individuals, regardless of whether or not the act was judicial.

13. There are frequent statements to that effect in the cases. See, e. g., *In re Saline Co. Subscription* (1869) 45 Mo. 52; *State ex rel. Attorney General v. Harrison* (1897) 141 Mo. 12, 41 S. W. 971; *State ex rel. Powell v. Shocklee* (1911) 237 Mo. 460, 141 S. W. 614; *State ex rel. Manion v. Dawson* (1920) 234 Mo. 490, 225 S. W. 97; *State ex rel. Turner v. Penman* (1926) 220 Mo. App. 193, 232 S. W. 498.

14. For example, rate making may be called legislative at one point and judicial at another, so that judicial review will be allowed. See note 68, *infra*. See also the discussion of drainage district cases, text at notes 44 to 48, *infra*.

15. Goodnow, *supra* note 2, at 516.

16. *Ibid*.

17. Freund, *op. cit. supra*, note 4, at 261.

18. See 14 C. J. S. §23, 160 et seq., where it is said that this is the primary, and in some jurisdictions, the sole office of the writ.

19. See Comment (1927) 36 Yale L. J. 1017, 1018; Comment (1934) 1 U. Chi. L. Rev. 801. One specialized use of the writ in Missouri is to harmonize opinions of lower courts with prior decisions of the supreme court. See material cited *supra* note 1.

20. Freund, *op. cit. supra*, note 4, at 262, n. 9, and 263. Note (1936) 31 Ill. L. Rev. 230, 239; Comment (1915) 9 Ill. L. Rev. 591; Comment (1934) 1 U. Chi. L. Rev. 801. In New York the law governing certiorari has been altered by statute. Writs of certiorari, mandamus, and prohibition have been expressly abolished. N. Y. Civil Practice Act §1283 (Thompson's Laws of New York 1939). In their place, a single, simplified procedure is provided (§§1284-1306).

writ has led a double life. On the one hand, there is the common law writ with its various incidents, including a rather conservative view of the scope of review; on the other, there are statutory writs provided by the legislature for reviewing the actions of a number of administrative agencies.

#### WHAT WILL BE REVIEWED

##### *Common Law Certiorari*

Numerous statements can be found in the reported cases to the effect that in Missouri certiorari is the writ as it was at common law, without statutory modification,<sup>21</sup> and these statements are true except insofar as statutes dealing with particular agencies, such as the Public Service Commission and State Board of Health, provide for a special certiorari, or "writ of review." However, to determine what, in the eyes of Missouri courts, is the scope of the common law writ of certiorari is not a simple task.

##### *The County Court*

The reported cases indicate that one of the most frequent uses of the writ has been to review the actions of the county courts. In Missouri, the county court is a tribunal of limited jurisdiction<sup>22</sup> which performs both administrative and judicial functions.<sup>23</sup> It has often been said that certiorari will lie only to review judicial functions.<sup>24</sup> However, many varieties of acts of the county court have been reviewed by certiorari, and it has not always been clear how the appellate court determined that they were judicial. In many cases, certiorari has been granted without a discussion of whether or not the act was judicial,<sup>25</sup>

21. See, e. g., *Hannibal & St. Joseph R. R. Co. v. Morton* (1858) 27 Mo. 317; *In re Saline Co. Subscription* (1869) 45 Mo. 52; *State ex rel. Brennan v. Walbridge* (1895) 62 Mo. App. 162; *State ex rel. Summerson v. Goodrich* (1914) 257 Mo. 40, 165 S. W. 707; *State ex rel. Lunsford v. Landon* (1924) 304 Mo. 654, 265 S. W. 529; 14 C. J. S. 134. See also *McBaine, The Writ of Certiorari in Missouri* (1915) 16 Law Ser. Mo. Bull. 3. See also Mo. Const. (1875) Art. VI, §§3, 12, 23, and Amend. (1884) Art. VI, §§4, 8. Certiorari to justices of the peace is provided for in R. S. Mo. (1939) §§2869-2878, 2894-2907.

22. Mo. Const. (1875) Art. VI, §36.

23. For example, the county courts are authorized to issue auctioneer licenses, R. S. Mo. (1939) §14915; issue courthouse and jail bonds, R. S. Mo. (1939) §§3292-3300; make bounty payments for wolves and predatory animals, R. S. Mo. (1939) §14559, etc.

24. See, e. g., *State ex rel. Powell v. Shocklee* (1911) 237 Mo. 460, 141 S. W. 614. See also note 13, *supra*.

25. See, e. g., *State ex rel. Sanks v. Johnson* (1909) 138 Mo. App. 306, 121 S. W. 780 (county court contracted for employment of prisoner confined in the county jail); *State ex rel. Major v. Patterson* (1910) 229 Mo. 364, 129 S. W. 894 (proceedings to divide a township into justice of the peace districts).

or has been granted after the court has stated that the act was judicial, without assigning reasons.<sup>26</sup> There are numerous reported cases granting certiorari to review the action of the county court in the granting or revocation of dramshop licenses,<sup>27</sup> the establishment of drainage districts,<sup>28</sup> the establishment of new roads,<sup>29</sup> and proceedings with respect to local option elections.<sup>30</sup> Certiorari has also been granted to review the court's action in excluding land from village limits,<sup>31</sup> in dividing a township into Justice of the Peace districts,<sup>32</sup> in examining the accounts of the collector,<sup>33</sup> and in contracting for the employment of a prisoner confined in the county jail.<sup>34</sup>

In one case the appellate court laid down a doctrine which would apparently allow review in almost any situation. *State ex rel. Arnold v. Lichta*<sup>35</sup> was a proceeding to revoke a dramshop license. There the St. Louis Court of Appeals admitted that the county court in revoking the license was not exercising a judicial function, but it granted certiorari on the ground that in determining whether or not the charges against relator brought the case within its jurisdiction to revoke his license, the county court

26. See, e. g., *Owens v. Andrew County Court* (1872) 49 Mo. 372 (examining accounts of collector a judicial act).

27. *State ex rel. Harrah v. Cauthorn* (1890) 40 Mo. App. 94; *State ex rel. Reider v. The Moniteau County Ct.* (1891) 45 Mo. App. 387; *State v. Schneider* (1892) 47 Mo. App. 669; *State ex rel. Hill v. Moore* (1900) 84 Mo. App. 11; *State ex rel. Moore v. McDavid* (1900) 84 Mo. App. 47; *State ex rel. Sager v. Mulvihill* (1905) 113 Mo. App. 324, 88 S. W. 773; *State ex rel. Arnold v. Lichta* (1908) 130 Mo. App. 284, 109 S. W. 825; *State ex inf. Keller v. Buchanan County Ct.* (1909) 135 Mo. App. 143, 116 S. W. 14; *State ex rel. Farris v. Amick* (1912) 161 Mo. App. 13, 142 S. W. 1104; *State ex rel. Smith v. Dykeman* (1911) 153 Mo. App. 416, 134 S. W. 120; *State ex rel. Gloyd v. Gilbert* (1912) 164 Mo. App. 139, 148 S. W. 125; *State ex rel. Carman v. Ross* (1914) 177 Mo. App. 223, 162 S. W. 702.

28. *State ex rel. Applegate v. Taylor* (1909) 224 Mo. 393, 123 S. W. 892; *State ex rel. Ruppel v. Wiethaupt* (1914) 254 Mo. 319, 162 S. W. 163; *State ex rel. Turner v. Penman* (1926) 220 Mo. App. 193, 282 S. W. 498.

29. *State ex rel. Chicago, B. & Q. R. R. v. City of Kansas* (1886) 89 Mo. 34, 14 S. W. 515; *Chicago, R. I. & P. Ry. v. Young* (1888) 96 Mo. 39, 8 S. W. 776.

30. *State ex rel. Martin v. Wilson* (1908) 129 Mo. App. 242, 108 S. W. 128; *State ex rel. Kelley v. Wooten* (1909) 139 Mo. App. 231, 122 S. W. 1103; *State ex rel. Rippee v. Forest* (1914) 177 Mo. App. 245, 162 S. W. 706; *State ex rel. Brines v. Franklin* (1926) 220 Mo. App. 232, 283 S. W. 712.

31. *In re Village of Grandview v. McElroy* (1928) 222 Mo. App. 787, 9 S. W. (2d) 829.

32. *State ex rel. Major v. Patterson* (1910) 229 Mo. 364, 129 S. W. 894.

33. *Owens v. Andrew County Court* (1872) 49 Mo. 372.

34. *State ex rel. Sanks v. Johnson* (1909) 138 Mo. App. 306, 121 S. W. 780.

35. (1908) 130 Mo. App. 284, 109 S. W. 825, 827.

exercised judicial power.<sup>36</sup> Upon this basis, it would seem that any administrative action could be reviewed under guise of reviewing the tribunal's determination that it had jurisdiction. In other cases, the courts have granted certiorari to the county court to review the revocation of dramshop licenses without discussing the nature of the action, upon the basis that it is proper to give relief to an injured party on certiorari when the tribunal has proceeded without jurisdiction or in excess of its jurisdiction.<sup>37</sup> That the decisions were not, however, influenced primarily by the fact that the county court appears to be a judicial tribunal is indicated by the fact that the jurisdiction of the excise commissioner<sup>38</sup> and of the mayor and board of aldermen<sup>39</sup> to grant dramshop licenses has also been reviewed.

The doctrine of the *Lichta* case does not seem to have been adopted by the Missouri Supreme Court. As a matter of fact, an early Missouri case, *In the Matter of the Saline County Subscription*, gave a definition of "judicial action" which seems much narrower:<sup>40</sup>

Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered. It implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand—for the tribunal must decide according to law and the rights of the parties—or with dictation on the other.

In the *Saline County Subscription* case, certiorari was quashed on the ground that the action of the county court in subscribing to railroad stock and issuing bonds for payment thereof was discretionary, not judicial. Other examples of acts of the county court held to be non-judicial are the auditing of a demand against the county and entry of rejection of a claim,<sup>41</sup> and an order removing the county seat.<sup>42</sup> In the latter case, two questions were involved; namely, the court's action in providing an office for the recorder of deeds according to statute, and its action in removing

36. See also *State ex rel. Carman v. Ross* (1914) 177 Mo. App. 223, 162 S. W. 702.

37. See, e. g., *State ex rel. Smith v. Dykeman* (1911) 153 Mo. App. 416, 134 S. W. 120.

38. *State ex rel. Sager v. Mulvihill* (1905) 113 Mo. App. 324, 88 S. W. 773; *State ex rel. Spencer v. Anderson* (Mo. App. 1937) 101 S. W. (2d) 530.

39. *State ex rel. Robinson v. Neosho* (1894) 57 Mo. App. 192.

40. (1869) 45 Mo. 52, 53.

41. *Phelps County v. Bishop* (1870) 46 Mo. 68.

42. *State ex rel. Powell v. Shocklee* (1911) 237 Mo. 460, 141 S. W. 614.

the county seat, which the supreme court said was without authority, statutory or otherwise. In both instances, the action was called administrative or ministerial.<sup>43</sup>

Proceedings to establish drainage districts have presented some difficulty. In *State ex rel. Ruppel v. Wiethaupt*,<sup>44</sup> which involved a question of insufficient notice, it was said that certiorari was the proper remedy, because a provision in the statute authorizing an appeal to court, which specified the questions to be considered, omitted the sufficiency of notice and thereby denied a remedy by appeal upon this point. Proper notice was held to be a jurisdictional prerequisite which certiorari would reach, and the court did not consider whether the board's action otherwise was judicial. Six years later, in *State ex rel. Manion v. Dawson*<sup>45</sup> the supreme court, *en banc*, without citing the *Wiethaupt* case, and not being bothered by a question of notice, held that the act of the circuit court in extending the boundary lines of a drainage district so as to incorporate additional territory was a legislative act not reviewable by certiorari. The court said:<sup>46</sup>

\* \* \* it is clear that the method of fixing such boundaries, whether by an original decree of incorporation or by extension proceedings, is wholly immaterial. In either event it is a legislative act, and therefore not subject to review by our writ of certiorari.

Certainly the two cases above are reconcilable on the basis that notice is a jurisdictional prerequisite which may be reviewed by certiorari. The court of appeals, however, in *State ex rel. Turner v. Penman*,<sup>47</sup> confronted, *inter alia* by a question of sufficiency of notice, determined that the *Wiethaupt* case was not overruled by the *Dawson* case, and, going further than seems justified by either of the above cases, allowed certiorari in addition to review the merits of proceedings with regard to the organization and incorporation of a drainage district.<sup>48</sup>

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43. That the supreme court probably would not recognize the test in the *Lichta* case (text at note 35, *supra*) is indicated by the fact that it might have been, and was not, applied in the *Shocklee* case.

44. (1914) 254 Mo. 319, 162 S. W. 163.

45. (1920) 284 Mo. 490, 225 S. W. 97.

46. *State ex rel. Manion v. Dawson* (1920) 284 Mo. 490, 507, 225 S. W. 97, 100.

47. (1926) 220 Mo. App. 193, 282 S. W. 498.

48. These drainage district cases furnish an indication that, perhaps, after all, the courts, in granting certiorari, are often concerned primarily with underlying considerations and merely label an act "judicial" after they have arrived at their conclusion on other grounds. Insufficiency or lack of notice is a serious defect in any type of proceeding, and where other review is precluded, a court is apt to stretch legal concepts in order to arrive at a just result.

Proceedings of the county courts with regard to local option elections<sup>49</sup> have in general been reviewed by certiorari without discussion of the nature of the act of the lower tribunal. The reviewing courts, however, have merely inquired whether the county court had satisfied the jurisdictional prerequisites, such as notice and proof of publication. This has been true, also, where certiorari has been granted to review proceedings to open roads.<sup>50</sup>

### *Taxation*

Another type of action of the county court reviewed by certiorari has been its review of the assessment of taxes.<sup>51</sup> This sort of action has been reviewed more frequently, however, by certiorari directed to the assessor, the various boards of equalization, and the State Tax Commission. Action of taxing officials has in general appeared to be rather clearly judicial, so that courts have spent little effort in explaining why it is so, and certiorari has been granted without question.

The court in *State ex rel. Mount Mora Cemetery Ass'n v. Carey*,<sup>52</sup> after citation of authorities from other states, held that in assessing personal property, the assessor was acting judicially, since he had to determine its value. In cases involving boards of equalization, the court has generally been content with the bald statement that the action was judicial.<sup>53</sup>

49. *State ex rel. Martin v. Wilson* (1908) 129 Mo. App. 242, 108 S. W. 128 (record quashed because not a majority of votes in favor of the law); *State ex rel. Kelley v. Wooten* (1909) 139 Mo. App. 231, 122 S. W. 1103 (statutory requisites for jurisdiction present); *State ex rel. Rippee v. Forest* (1914) 177 Mo. App. 245, 162 S. W. 706 (record quashed for failure to show court's jurisdiction); *State ex rel. Brines v. Franklin* (1926) 220 Mo. App. 232, 283 S. W. 712 (jurisdiction shown in record).

50. *State ex rel. Chicago, B. & Q. R. R. v. City of Kansas* (1886) 89 Mo. 34, 14 S. W. 515 (record showed compliance with statutory requisites); *Chicago, R. I. & P. Ry. v. Young* (1888) 96 Mo. 39, 8 S. W. 776 (jurisdictional requisites did not affirmatively appear); *State ex rel. Combs v. Staten* (1916) 268 Mo. 288, 137 S. W. 42 (court examined the record and said county court had jurisdiction, but since relator had adequate remedy by appeal, he could not resort to certiorari).

51. *State on petition of Taylor v. St. Louis Co. Ct.* (1871) 47 Mo. 594 (action "clearly judicial").

52. (1908) 210 Mo. 235, 109 S. W. 1.

53. Such statements have been made in cases involving county, city, and state boards of equalization, from *State ex rel. Halpin v. Powers* (1878) 68 Mo. 320 to *State ex rel. St. Louis County v. Evans* (Mo. 1940) 139 S. W. (2d) 967. Typical statements are found in *State ex rel. Stone v. Christian County Bank* (1911) 234 Mo. 194, 197, 136 S. W. 335, 336: "In making the order raising the valuation of the property for taxation, \* \* \* the county board of equalization was acting in a judicial capacity"; and in *State ex rel. Van Raalte v. Board of Equalization* (1914) 256 Mo. 455, 461, 165 S. W. 1047, 1048: "The functions of the board of equalization in judging the assessments of property are judicial \* \* \*." In *State ex rel.*

### *School Districts*

A Missouri statute<sup>54</sup> provides that in proceedings involving two or more school districts, to form new school districts or change the boundaries of old ones, if the result of the election shows disagreement among the districts affected, the superintendent of schools shall appoint a board of arbitrators to consider the necessity for the change and render a final decision thereon. Certiorari has been used frequently to test the validity of proceedings before the board, without question of the judicial nature of the action,<sup>55</sup> the reviewing court considering only whether the board had jurisdiction.

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*Davis v. Walden* (1933) 332 Mo. 680, 685, 60 S. W. (2d) 24, 26, it was said: "The county board of equalization is a tribunal of limited powers and jurisdiction. In performing its functions its acts are judicial in character \* \* \*." In *State ex rel. Lathrop v. Dowling* (1872) 50 Mo. 134, 136, the respondent was a board of appeals from the assessment of taxes by the assessor of the city of Hannibal. The court said merely: "The action of the board of appeals is judicial in its nature \* \* \*."

It has been held, however, that although the State Board of Equalization acts judicially, it is not a tribunal within the meaning of Mo. Const. (1875) Art. VI, §23, which gives the circuit court superintending control over "all inferior tribunals." *State ex rel. Gardner v. Hall* (1920) 282 Mo. 425, 221 S. W. 708. See also *State ex rel. Wyatt v. Vaile* (1894) 122 Mo. 33, 47, 26 S. W. 672; *Bank of Carthage v. Thomas* (1932) 330 Mo. 19, 26, 48 S. W. (2d) 930. It seems that the question whether the state board acts legislatively, in equalizing among counties, whereas county and city boards act judicially in dealing with individuals, has not been considered in Missouri. However, the city and county boards must give notice to the taxpayer, whereas the state board need not, which might be some indication. *Columbia Terminals Co. v. Koeln* (1928) 319 Mo. 445, 3 S. W. (2d) 1021. Cf. *Bi-Metallic Co. v. Colorado* (1915) 239 U. S. 441, wherein the implication was that a state board of equalization acted legislatively; and *Standard Oil Co. of California v. State Board of Equalization* (1936) 6 Cal. (2d) 557, 59 P. (2d) 119, where it was held that the legislature was without power to confer judicial functions upon a statewide administrative agency of the character of the state board of equalization. In Missouri it has been held that the circuit court of the proper venue has jurisdiction in certiorari over a local board of equalization. *State ex rel. Gardner v. Hall* (1920) 282 Mo. 425, 221 S. W. 708.

54. R. S. Mo. (1939) §10410.

55. *State ex rel. School District v. Williams* (1897) 70 Mo. App. 238 (no final order, so certiorari quashed); *School District v. Pace* (1905) 113 Mo. App. 134, 87 S. W. 580 (record quashed for failure to show jurisdiction); *State ex rel. School District v. Andrae* (1909) 216 Mo. 617, 116 S. W. 561 (record showed jurisdiction); *State ex rel. School District v. Sexton* (1910) 151 Mo. App. 517, 132 S. W. 11 (record showed jurisdiction); *School Districts v. Yates* (1912) 161 Mo. App. 107, 142 S. W. 791 (record showed jurisdiction, and official acts of superintendent thereafter assumed to be regular); *State ex rel. King v. Moreland* (Mo. App. 1916) 189 S. W. 602 (jurisdictional requirements lacking); *State ex rel. Morrison v. Sims* (Mo. App. 1917) 201 S. W. 910 (record sufficient to show jurisdiction); *State ex rel. Consolidated School Dist. v. Ingram* (Mo. App. 1928) 2 S. W. (2d) 113 (record showed lack of jurisdiction); *State ex rel. School Dist. v. Begeman* (1928) 221 Mo. App. 257, 2 S. W. (2d) 110 (presumption that

*Appointment to and Removal from Office*

Proceedings involving appointment to or removal from office have provided a fruitful field for review by certiorari. The cases seem to be in accord, to the effect that removal from office is a judicial act.<sup>56</sup> Consequently, certiorari has issued to review the action of a township board,<sup>57</sup> the board of railroad and warehouse commissioners,<sup>58</sup> a circuit judge,<sup>59</sup> the board of police commissioners,<sup>60</sup> the mayor<sup>61</sup> and city council,<sup>62</sup> and the county court.<sup>63</sup> An early case, however, held that certiorari was not available to review proceedings of the county court with regard to the appointment of members of the county institute board. It was said that whereas certiorari was appropriate to review action in removal of an officer for cause, because in such case a trial and judicial determination were necessary, it would not lie to review an appointment, since an appointment is an administrative, not a judicial act.<sup>64</sup>

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preliminary steps complied with, otherwise jurisdiction shown, so certiorari quashed).

56. In *State ex rel. Davidson v. Caldwell* (1925) 310 Mo. 397, 276 S. W. 631 it was said that the exercise of judicial functions is to determine what the law and the rights of the parties are in regard to the matter in controversy. Other cases have merely said that the proceeding was judicial or quasi-judicial in nature. *State ex rel. Tilley v. Slover* (1892) 113 Mo. 202, 20 S. W. 788; *State ex rel. Heimbürger v. Wells* (1908) 210 Mo. 601, 109 S. W. 758; *State ex rel. Knox v. Selby* (1908) 133 Mo. App. 552, 113 S. W. 682 ("tantamount to a judgment of not guilty"); *State ex rel. Flowers v. Morehead* (1914) 256 Mo. 683, 165 S. W. 746.

57. *State ex rel. Davidson v. Caldwell* (1925) 310 Mo. 397, 276 S. W. 631.

58. *State ex rel. Tedford v. Knott* (1907) 207 Mo. 167, 105 S. W. 1040 (action arbitrary and void because in excess of jurisdiction).

59. *State ex rel. Tilley v. Slover* (1892) 113 Mo. 202, 20 S. W. 788.

60. *State ex rel. Campbell v. Police Comm'rs* (1883) 14 Mo. App. 297, aff'd (1885) 88 Mo. 144 (removal not shown to be for cause); *State ex rel. Kennedy v. Remmers* (1936) 340 Mo. 126, 101 S. W. (2d) 70 (rule violated by relator was unreasonable and void, so no jurisdiction to remove).

61. *State ex rel. Brennan v. Walbridge* (1895) 62 Mo. App. 162 (jurisdiction shown); *State ex rel. Bristol v. Walbridge* (1897) 69 Mo. App. 657 (removal for cause); *State ex rel. Heimbürger v. Wells* (1908) 210 Mo. 601, 109 S. W. 758.

62. *State ex rel. Denison v. City of St. Louis* (1886) 90 Mo. 19, 1 S. W. 757 (charges, notice, and hearing insufficient); *State ex rel. Knox v. Selby* (1908) 133 Mo. App. 552, 113 S. W. 682 (proceedings had been begun and then dropped, so certiorari would not lie).

63. *State ex rel. Flowers v. Morehead* (1914) 256 Mo. 683, 165 S. W. 746 (removal beyond the court's jurisdiction); *State ex rel. Jones v. Smiley* (1927) 317 Mo. 1283, 300 S. W. 459.

64. *State ex rel. Attorney General v. Harrison* (1897) 141 Mo. 12, 41 S. W. 971.

The instances in which the writ of certiorari has issued out of the St. Louis Circuit Court are listed in a recent pamphlet prepared by the Clerk of that court. Priest, *Circuit Court Procedures No. 13* (St. Louis,

### *Statutory Certiorari*

The use of the term, "certiorari," in statutes which have provided for review of the actions of various tribunals seems to have been largely a result of chance. These statutes furnish further indications of the maze in which the courts find themselves when they speak in terms of "legislative," "judicial," "quasi-judicial," "ministerial," and "administrative" acts. Here again it is necessary to remember that for a particular purpose or at a particular stage in a proceeding, action may be called "judicial," yet when seemingly the same action is sought to be reviewed in another setting, or at a different stage in the proceedings, it may be called "non-judicial." Thus, for purposes of denying a writ of prohibition, the supreme court has said that the action of the State Board of Health in revoking a license to practice medicine is ministerial, not judicial.<sup>65</sup> We find, however, that the statute providing for certiorari to review the action of the board in revoking licenses<sup>66</sup> has been invoked frequently.<sup>67</sup> In addition, for some purposes, and at certain stages of the proceedings, rate-making may be called legislative; but review is provided by certiorari of the rate-making as well as of the other activities of the Public Service Commission.<sup>68</sup>

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Mo.). The list includes certiorari to the board of election commissioners. In at least one instance, however, the supreme court quashed a writ of certiorari brought to review a determination of the person nominated in a primary election, on the ground that the acts performed were ministerial and administrative. *State ex rel. Bentley v. Reynolds* (1905) 190 Mo. 573, 89 S. W. 877.

65. *State ex rel. McAnally v. Goodier* (1906) 195 Mo. 551, 93 S. W. 928. For purposes of mandamus, it was said that in passing on the right of an applicant to a license, the board acts ministerially, not judicially. *State ex rel. McCleary v. Adcock* (1907) 206 Mo. 550, 105 S. W. 270, 121 Am. St. Rep. 681. That the proceeding in certiorari is a "case" within the meaning of Mo. Const. (1875) Art. VI, §12, see *State ex rel. Horton v. Clark* (1928) 320 Mo. 1190, 9 S. W. (2d) 635.

66. R. S. Mo. (1939) §9990.

67. See, e. g., *State ex rel. Conway v. Hiller* (1915) 266 Mo. 242, 130 S. W. 538; *State ex rel. Ball v. State Board of Health* (1930) 325 Mo. 41, 26 S. W. (2d) 773; *State ex rel. Kerr v. Landwehr* (Mo. 1930) 32 S. W. (2d) 83; *State ex rel. Baepler v. State Board of Health* (1932) 330 Mo. 1200, 52 S. W. (2d) 743.

The common law writ of certiorari has on occasion issued to a city's board of health to review its determination of a nuisance. *State ex rel. Parker-Washington Co. v. City of St. Louis* (1907) 207 Mo. 354, 105 S. W. 743, 123 Am. St. Rep. 376.

68. This position is well illustrated in *San Diego Land and Town Co. v. National City* (1899) 174 U. S. 739. At page 750-751, the court quoted from *Spring Valley Water Works v. Bryant* (1887) 52 Cal. 132, as follows: "This court has held that the fixing of water rates is a legislative act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of con-

Other statutes provide for certiorari to the State Board of Health to review the revocation or refusal of certificates to cosmetologists, hairdressers, and manicurists;<sup>69</sup> to the Board of Medical Examiners to review the refusal to recognize a medical school;<sup>70</sup> and to the Board of Chiropractic Examiners to review its determinations.<sup>71</sup> Two other provisions for statutory certiorari have recently been adopted. One provides for certiorari to the County Board of Zoning Adjustment;<sup>72</sup> the other provides for review by certiorari of questions of law and fact determined by the auditor in administering the sales tax.<sup>73</sup>

By analogy to federal decisions under the separation of powers doctrine, it would seem that whether or not the action to be reviewed was judicial might depend upon the scope of review

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trolling *judicial* action. \* \* \* There are other cases holding the act to be legislative, but whether it is judicial, legislative or administrative is immaterial. Let it be which it may, it is not above the control of the courts in proper cases."

It should be noted that the Missouri statute provides for certiorari to the Public Service Commission "for the purpose of having the reasonableness and lawfulness" of the decision or order determined. (R. S. Mo. (1939) §5690). It might be said, therefore, that the use of the term, "certiorari," in this instance was fortuitous, and that in reality the legislature was simply granting an appeal sufficient to meet the requirements of due process indicated in *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418 (Minnesota act providing that rates established by commission should be final and conclusive as to reasonableness, without judicial inquiry, held violation of due process, since question of reasonableness of rates is essentially judicial). Cf. *United Fuel Gas Co. v. P. S. C.* (1914) 73 W. Va. 571, 80 S. E. 931 (statute providing for appeal from order of commission to supreme court of appeals, which should decide the matter "as may seem to be just and right" held unconstitutional as conferring non-judicial functions upon the court, in violation of separation of powers). See also Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers* (1938) 44 W. Va. L. Q. 270, 284-286.

In some situations in Missouri, rate-making has been called legislative. *State ex rel. Missouri Southern R. R. v. P. S. C.* (1914) 259 Mo. 704, 168 S. W. 1156 was a proceeding in mandamus to determine whether the commission had power under the 1913 statute to allow a rate in excess of that prescribed by elder statutes. It was said that the commission had the power to exercise the legislative function delegated to it to fix railroad rates. *State ex rel. Rhodes v. P. S. C.* (1917) 270 Mo. 547, 194 S. W. 287 approved the delegation by the legislature of its rate-making function. In *State ex rel. Waterworth v. Harty* (1919) 278 Mo. 685, 213 S. W. 443, a proceeding to require the State Superintendent of Insurance to permit a 10% increase in fire insurance rates, it was said: "The establishment of a rate is a making of a rule for the future, and, therefore, is an act legislative, not judicial in kind."

69. R. S. Mo. (1939) §9824.

70. R. S. Mo. (1939) §9934.

71. R. S. Mo. (1939) §10059.

72. Mo. Laws of 1939, 622, §13. The board is appointed in the first instance by a county court, when the latter has adopted a zoning plan.

73. R. S. Mo. (1939) §11445.

afforded. Thus in the federal courts it has been said that in reviewing the determination of an administrative body, if the court reviews both law and facts, it is called upon to act merely as a revising administrative agency and must refuse to do so.<sup>74</sup> Where the court is required to consider only questions of law, however, its function is purely judicial and it may take jurisdiction no matter what the character of the proceedings below.<sup>75</sup> This distinction does not seem to have been made in Missouri, although the question has never been directly decided,<sup>76</sup> but it will be noted that Missouri statutes providing for review of administrative action by certiorari call for review of both law and facts, for trial *de novo*, or for trial as in equity.<sup>77</sup>

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74. *Federal Radio Comm. v. General Elec. Co.* (1930) 281 U. S. 464. In the leading case of *Prentis v. Atlantic Coast Line Co.* (1908) 211 U. S. 210, it was said that the Virginia Supreme Court of Appeals in reviewing rates fixed by the corporation commission acted legislatively, because it could enter such an order as in its opinion the commission should have made. That it was a judicial function to set aside unreasonable or confiscatory rates, but that the reviewing court should have no power to revise or change, was indicated in the early case of *Reagan v. Farmers' Loan and Trust Co.* (1894) 154 U. S. 362. See also *Keller v. Potomac Elec. Co.* (1923) 261 U. S. 428. In *International Business Mach. Corp. v. Lewis & Clark Co.* (Mont. 1941) 112 P. (2d) 477, plaintiff appealed from a decision of the state board of equalization. It was held that if the state board acted within the law, its action was not reviewable, otherwise there would be a violation of the doctrine of separation of powers, and that a statute providing for appeal to the district court from a decision of the state board was invalid to the extent that it purported to authorize the district court to act as an assessing tribunal. Some state courts, however, have gone rather far in assuming what seem to be non-judicial functions. Thus, in *Hill v. Martin* (1935) 296 U. S. 393, it was held that the Supreme Court of New Jersey's review of the administrative act of assessing was a judicial action, under the New Jersey law, in spite of the court's power to consider evidence and "reverse or affirm, in whole or in part" the proceedings begun before the State Tax Commissioner. Consequently, such an appeal within the state could not be enjoined by a federal court. See also *Davis*, supra note 68, at 356, 357, and *Donley, The Hodges Case and Beyond* (1939) 45 W. Va. L. Q. 291, which discusses the West Virginia judiciary's assumption and refusal to assume non-judicial functions.

75. In *Federal Radio Comm. v. Nelson Bros. Bond & Mtg. Co.* (1933) 289 U. S. 266, the Supreme Court held that the decisions of the Court of Appeals of the District of Columbia were judicial and reviewable on certiorari where the lower court's review of the proceedings of the Federal Radio Commission was limited to questions of law. In the previous case of *Federal Radio Comm. v. General Elec. Co.* (1930) 281 U. S. 464, it had been held that where the court of appeals acted merely as a superior and revising agency, its decisions were not reviewable on certiorari.

76. But see *State ex rel. Spencer v. Anderson* (Mo. App. 1937) 101 S. W. (2d) 530, which held invalid an ordinance providing for review as upon trial *de novo* in the circuit court of determinations of the excise commissioner.

77. E. g., *R. S. Mo.* (1939) §11445 provides for review of questions of law and fact determined by the auditor. There is a trial *de novo* of a refusal to grant a license to a medical school, *R. S. Mo.* (1939) §9984; a

## SCOPE OF REVIEW

*Common Law Certiorari*

In certiorari proceedings in Missouri, the courts have been concerned primarily with two questions, *viz.*, what record the writ brings up for review, and what questions are to be considered upon review.

In Missouri, as at common law, the writ brings up only the record proper. The decisions are not clear, however, as to what are the contents of the record proper. Perhaps the simplest record is that of the board of arbitrators in proceedings for the change of boundaries of school districts. It has been said that the record of their award is the only legal record to be certified up.<sup>78</sup> The content of the record proper seems to differ with each agency. Formerly, the parties were sometimes allowed to stipulate as to the contents;<sup>79</sup> this procedure was disapproved, however, in *State ex rel. St. Louis Union Trust Co. v. Neaf*.<sup>80</sup>

Whether or not the evidence should be a part of the record proper has been a much debated question. There are numerous statements to the effect that it is not,<sup>81</sup> and that additional evidence cannot be taken.<sup>82</sup> In the recent case of *State ex rel. Spencer v. Anderson*,<sup>83</sup> an ordinance which provided that the circuit court should, on certiorari, consider the evidence heard before the excise commissioner and determine for itself the merits of the question of revocation of a tavern license as upon a trial *de novo* was held invalid. The court said that the writ would issue as at common law, and that the court's review was limited to questions of jurisdiction, the evidence before the excise commissioner not being a part of the record, and extrinsic evidence being inadmissible in the circuit court.

trial as in equity of orders of the Public Service Commission, R. S. Mo. (1939) §5690.

78. *State ex rel. School Dist. v. Sexton* (1910) 151 Mo. App. 517, 132 S. W. 11; *School Dist. v. Yates* (1912) 161 Mo. App. 107, 142 S. W. 791.

79. *State ex rel. Union Electric Light & Power Co. v. Gehner* (1926) 315 Mo. 666, 286 S. W. 117; *State ex rel. Y. M. C. A. v. Gehner* (1928) 320 Mo. 1172, 11 S. W. (2d) 30.

80. (Mo. 1940) 139 S. W. (2d) 958; Comment (1940) 26 WASHINGTON U. LAW QUARTERLY 129.

81. See, e. g., *House v. Clinton County Ct.* (1878) 67 Mo. 522; *State ex rel. Brennan v. Walbridge* (1895) 62 Mo. App. 162; *State ex rel. Bentley v. Reynolds* (1905) 190 Mo. 578, 89 S. W. 877; *State ex rel. City of St. Louis v. Caulfield* (1933) 333 Mo. 270, 62 S. W. (2d) 818.

82. *State ex rel. Robinson v. Neosho* (1894) 57 Mo. App. 192; *State ex rel. McCune v. Carter* (1919) 279 Mo. 304, 214 S. W. 180 (court cannot go beyond face of the record); *State ex rel. Davis v. Walden* (1933) 332 Mo. 680, 60 S. W. (2d) 24.

83. (Mo. App. 1937) 101 S. W. (2d) 530.

This might make it appear that evidence is never considered by the superior tribunal. The Missouri courts have not always been so strict, however, and they seem at times to have entirely forgotten their rule. Thus, in an early case,<sup>84</sup> the court, on certiorari to the board of equalization, examined an annual assessment in spite of its not being in the record and decided that it was valid. It is sometimes difficult to determine whether the court has considered the evidence, or how much it has been influenced by it,—if, for instance, the evidence is set out in the opinion, but the appellate court says it declines to consider it.<sup>85</sup>

In *State ex rel. American Automobile Insurance Co. v. Gehner*,<sup>86</sup> a proceeding in certiorari to quash an assessment of the Board of Equalization of the City of St. Louis, the supreme court seems to have considered a good deal of the evidence.<sup>87</sup> It said:<sup>88</sup>

Whatever counsel may say as to the conclusiveness of any finding of facts by the Board of Equalization, it cannot claim that the board's conclusion of law is binding upon this court; for that matter, neither is its finding of fact where it is contrary to the figures presented.

It is often possible for the courts to consider evidence, even though they state that their review is confined to questions of jurisdiction,<sup>89</sup> since jurisdiction is an elastic concept.<sup>90</sup> In the

84. *State ex rel. Halpin v. Powers* (1878) 68 Mo. 320.

85. See *State ex rel. Mount Mora Cemetery Ass'n v. Casey* (1908) 210 Mo. 235, 109 S. W. 1.

86. (1928) 320 Mo. 702, 8 S. W. (2d) 1057, 59 A. L. R. 1026.

87. For example, at one point the court said: "One important fact obtrudes itself upon our attention, if relator is sustained. This company pays no taxes either in this State or any other, as we shall presently show. No matter how prosperous it is, no matter how great dividends it may pay to its stockholders, it contrived a statement which would prevent it paying any taxes anywhere of any kind or character." *State ex rel. American Automobile Ins. Co. v. Gehner* (1928) 320 Mo. 702, 709, 8 S. W. (2d) 1057, 1058, 59 A. L. R. 1026.

88. *State ex rel. American Automobile Ins. Co. v. Gehner* (1928) 320 Mo. 702, 711, 8 S. W. (2d) 1057, 1059, 59 A. L. R. 1026.

89. There is a line of cases from *Hannibal & St. Joseph R. R. v. Morton* (1858) 27 Mo. 317, to *State ex rel. St. Louis County v. Evans* (Mo. 1940) 139 S. W. (2d) 967 that the reviewing court will consider only questions of jurisdiction. The jurisdiction of the inferior tribunal must appear affirmatively in the record. *Chicago, R. I. & P. Ry. v. Young* (1888) 96 Mo. 39, 8 S. W. 776; *State ex rel. Rippee v. Forest* (1914) 177 Mo. App. 245, 162 S. W. 706. But once the higher court determines that the inferior tribunal had jurisdiction, it will not interfere. *State ex inf. Keller v. Buchanan County Ct.* (1909) 135 Mo. App. 143, 116 S. W. 14; *State ex rel. Gloyd v. Gilbert* (1912) 164 Mo. App. 139, 148 S. W. 125.

90. See, e. g., *Crowell v. Benson* (1932) 285 U. S. 22 (existence of employer-employee relationship under Longshoremen's and Harbor Workers' Act and occurrence of injuries on navigable waters of United States "juris-

early case of *State v. Schneider*, which involved the trial of the county judges for contempt in a matter concerning applications to the county court for dramshop licenses, it was said:<sup>91</sup>

The writ of *certiorari* \* \* \* is in the nature of a writ of error with this difference, that it brings up only the record of the inferior tribunal for inspection, and the trial upon it is a trial of questions jurisdictional in their nature, and not a trial *de novo* except of matters affecting the jurisdiction of the court. (Italics supplied.)

On a trial *de novo* of matters affecting jurisdiction, it would be very easy for a court to consider evidence on the merits. In a later case concerning a dramshop license,<sup>92</sup> the reviewing court considered the evidence and found that as a matter of law a dramshop keeper who on one occasion furnished liquor to two minors was not guilty of "not at all times keeping an orderly house." Consequently, it was held that the county court was "without jurisdiction" to revoke the dramshop license, and its record was quashed.

In its most limited sense, the question of jurisdiction is merely whether the agency has complied with statutory requisites.<sup>93</sup> Thus, the absence of notice required by statute is a jurisdictional defect, and, taking a step further, the court will also consider whether the notice given was sufficient.<sup>94</sup> The sufficiency of notice may be a jurisdictional question even in the absence of a statutory requirement of notice.<sup>95</sup>

Agencies have been held to have acted in excess of their jurisdiction if their action was arbitrary. Thus in one case involving removal from office, the Board of Railroad and Warehouse Commissioners was reversed for its refusal to postpone its hearing

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dictional facts" reviewable *de novo*). But cf. *South Chicago Coal & Dock Co. v. Bassett* (C. C. A. 7, 1939) 104 F. (2d) 522, aff'd (1940) 309 U. S. 251 (worker concededly an employee, but dispute whether employee of character protected; held not a "jurisdictional" matter requiring judicial retrial).

91. (1892) 47 Mo. App. 669, 675.

92. *State ex rel. Arnold v. Lichta* (1908) 130 Mo. App. 284, 109 S. W. 825.

93. See, e. g., *State ex rel. Reider v. Moniteau County Ct.* (1891) 45 Mo. App. 387; *State ex rel. Rippee v. Forest* (1914) 177 Mo. App. 245, 162 S. W. 706; *State ex rel. American Central Ins. Co. v. Gehner* (1926) 315 Mo. 1126, 280 S. W. 416.

94. *State ex rel. Ruppel v. Wiethaupt* (1914) 254 Mo. 319, 162 S. W. 163.

95. *State ex rel. Harrison County Bank v. Springer* (1896) 134 Mo. 212, 35 S. W. 589 (notice by publication of increased tax assessment sufficient); *State ex rel. McLeod Lumber Co. v. Baker* (1902) 170 Mo. 194, 70 S. W. 470 (notice waived); *State ex rel. Davidson v. Caldwell* (1925) 310 Mo. 397, 276 S. W. 631 (insufficient notice).

to give the relator time to prepare an answer,<sup>96</sup> and in another, the police commissioners were held to have acted arbitrarily in removing the Chief of Police without having heard any evidence. It was said that there must have been as much legal evidence as would justify a court in submitting the issue to a jury.<sup>97</sup>

In a later case, *State ex rel. Kennedy v. Remmers*,<sup>98</sup> which also involved removal from office, the court refused to consider the sufficiency of the evidence at all and said:<sup>99</sup>

Under the common-law rule the scope of the review by certiorari is never extended to the merits. The action of the inferior body is final and conclusive on every question except jurisdiction or power. The only questions presented are questions of law on the record. \* \* \* "This writ, \* \* \* only brings up the record, and can only reach errors or defects which appear on the face of the record of the tribunal to which it is issued, and which are jurisdictional in their nature."

This case was distinguished in *State ex rel. Woodmansee v. Ridge*,<sup>100</sup> in which it was said that the line of cases holding that certiorari was a proper remedy to review other than jurisdictional questions, if there was no remedy by appeal or writ of error, still stood. Thus, where the tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, had exceeded its legitimate powers, its record was quashed on certiorari. The *Woodmansee* case and the line of cases referred to involved certiorari to the circuit or probate courts, rather than to an administrative body; however, there would seem to be no reason to distinguish between the two types of tribunals.

#### *Statutory Certiorari*

When we turn to the statutes providing for review by certiorari of the proceedings of certain agencies, we find little uniformity in their provisions as to the scope of review, and except for the Public Service Commission and State Board of Health, there are no decisions to guide us.

It is probable that common law certiorari was intended in the

96. *State ex rel. Tedford v. Knott* (1907) 207 Mo. 167, 105 S. W. 1040.

97. *State ex rel. Campbell v. Police Commissioners* (1883) 14 Mo. App. 297, aff'd (1885) 88 Mo. 144.

98. (1936) 340 Mo. 126, 101 S. W. (2d) 70.

99. *State ex rel. Kennedy v. Remmers* (1936) 340 Mo. 126, 131, 101 S. W. (2d) 70, 71.

100. (1938) 343 Mo. 702, 123 S. W. (2d) 20. For a very recent case involving certiorari to the board of equalization, in which it was said that questions of law arising on the face of the record would be considered, see *State ex rel. Lane v. Corneli* (Mo. 1941) 149 S. W. (2d) 815.

statute providing for review of the action of the State Board of Chiropractic Examiners,<sup>101</sup> since the legislature has not indicated otherwise. Other statutes providing for review by certiorari, however, have gone considerably beyond the common law. The most recent statute which calls for review by certiorari is of the hybrid variety.<sup>102</sup> It provides that a county court which has adopted a zoning plan shall appoint a county board of zoning adjustment. Persons aggrieved by a decision of this board may petition the circuit court which "may allow a writ of certiorari directed to the board for review of the data and records acted upon or it may appoint a referee to take additional evidence in the case. The court may reverse or affirm or may modify the decision brought up for review." This differs from the traditional certiorari not only in the scope of the review and the consideration of additional evidence, but also in the disposition made of the case by the court.

Common law certiorari is not the certiorari indicated in another recent statute, which concerns determinations of the State Auditor in administering the provisions of the sales tax.<sup>103</sup> There it is provided that the circuit court may review by certiorari "all questions of law and fact determined by the auditor."

In the statute providing for review of decisions of the Public Service Commission,<sup>104</sup> it is said that suits in the circuit court and in the supreme court on appeal shall be tried as suits in equity. Varied interpretations have been made of this provision,<sup>105</sup> together with the provisions of the statutes providing that orders of the commission are *prima facie* lawful and reasonable<sup>106</sup> and that the burden of proof is upon the party adverse to the commission to show by clear and satisfactory evidence that the order is unreasonable or unlawful.<sup>107</sup>

To be reasonable and lawful, the commission's order must be supported by substantial evidence, but the commission will not be reversed merely because it has received incompetent evidence; and the former view that the court could weigh the evidence<sup>108</sup>

101. R. S. Mo. (1939) §10059.

102. Mo. Laws of 1939, 622, §13.

103. R. S. Mo. (1939) §11445.

104. R. S. Mo. (1939) §5690.

105. See, e. g., State ex rel. Wabash R. R. v. P. S. C. (1917) 271 Mo. 155, 196 S. W. 369; State ex rel. M. K. & T. Ry. v. P. S. C. (1919) 277 Mo. 175, 210 S. W. 386; State ex rel. Ozark Power & W. Co. v. P. S. C. (1921) 287 Mo. 522, 531, 229 S. W. 782.

106. R. S. Mo. (1939) §5702.

107. R. S. Mo. (1939) §5703.

108. State ex rel. Capital City Water Co. v. P. S. C. (1923) 298 Mo. 524, 252 S. W. 446.

has been discredited.<sup>109</sup> Thus the trial in the circuit court is not *de novo*. The court cannot make a finding of facts except to determine whether an order is reasonable and lawful; it cannot modify the findings of the commission or make findings of its own.<sup>110</sup>

There are two statutes providing for review of action of the State Board of Health. Its proceedings in revoking a license to practice medicine<sup>111</sup> or in revoking the certificates of cosmetologists, hairdressers, and manicurists<sup>112</sup> may be reviewed by a special certiorari which includes a review of all the evidence. A related statute provides that the question of whether a medical school is one entitled to recognition by the State Board of Medical Examiners is a question of fact which may be reviewed on certiorari by a trial of the question *de novo*.<sup>113</sup>

The extent of judicial review under these enlarged writs of certiorari is clearly greater than that which is usually allowed under the common law writ, since the court is not limited to jurisdictional questions,<sup>114</sup> or even to questions of law on the record. Jurisdictional questions do appear, however, as for example, that of sufficiency of notice.<sup>115</sup> The board was at one time limited, and judicial review was correspondingly broadened by the court's strict construction of the statute as penal.<sup>116</sup> This interpretation was later liberalized, and the board is allowed the exercise of a reasonable discretion.<sup>117</sup> There has been some difficulty, however, in determining what evidence can be received by the board. Since the investigation is not a lawsuit, the technical rules of procedure applicable to a judicial trial are not manda-

109. State ex rel. City of St. Louis v. P. S. C. (1932) 329 Mo. 918, 47 S. W. (2d) 102 (*en banc*).

110. State ex rel. and to use of Chicago, G. W. R. R. v. P. S. C. (1932) 380 Mo. 729, 51 S. W. (2d) 73 (certiorari denied on question of due process (1932) 287 U. S. 641). There was doubt as to this position for some time, since the court *en banc* in Chicago, B. & Q. R. R. v. P. S. C. (1915) 266 Mo. 333, 341, 181 S. W. 61 had said that trial in the supreme court was practically *de novo*, and after due consideration, the court would accept, modify, or reject findings of the circuit court and make such findings as the law and evidence warranted.

111. R. S. Mo. (1939) §9990.

112. R. S. Mo. (1939) §9824.

113. R. S. Mo. (1939) §9984.

114. State ex rel. Horton v. Clark (1928) 320 Mo. 1190, 9 S. W. (2d) 685.

115. See State ex rel. Kerr v. Landwehr (Mo. 1930) 32 S. W. (2d) 83; State ex rel. Baeppler v. State Board of Health (1932) 330 Mo. 1200, 52 S. W. (2d) 743.

116. State ex rel. Spriggs v. Robinson (1913) 253 Mo. 271, 161 S. W. 1169 (action of board quashed because of insufficient evidence).

117. State ex rel. Horton v. Clark (1928) 320 Mo. 1190, 9 S. W. (2d) 685; State ex rel. Lentine v. State Board of Health (1933) 334 Mo. 220, 65 S. W. (2d) 943.

tory.<sup>118</sup> The board has been reversed, however, for having allowed hearsay testimony.<sup>119</sup>

The statute relative to the licensing of medical schools is unique in providing for a trial *de novo*. This provision, in itself, is a considerable departure from traditional certiorari. In the only case which invoked the statute,<sup>120</sup> certiorari was granted without notice of the fact that the court was trying *de novo* a proceeding which, under the Missouri decisions, would seem to be non-judicial. Since the proceeding is *de novo*, what happened in the inferior tribunal is of little importance in the higher court.

### CONCLUSION

A review of the cases has shown that the concept of "judicial function" is very elusive. Perhaps it can be argued that the confusion is not regrettable, since it would seem to allow a court to review each function separately, with emphasis on the court's "hunch for justice" in the particular instance. If, as would seem to be the case in at least some instances, a particular function is held to be judicial or non-judicial quite capriciously, or merely because a previous judge has said so, the time for re-examination has clearly come. A more consistent logic, to mitigate the law's present uncertainties, seems a minimum requirement and one which it is not unreasonable to ask the courts to supply. Careful legislative clarification would be helpful, but a slipshod enactment would probably do more harm than good.

The state of the Missouri law with regard to the scope of review by certiorari is slightly more satisfactory, although here, too, confusion is evident. Recent decisions indicate a liberalization of the old rule, itself not uniformly applied, that only questions of jurisdiction would be reviewed, so that review under common law certiorari probably now extends to all questions of law; and there is a possibility that the substantiality of supporting evidence may be considered. Under statutory certiorari, of course, great departures have been made from the doctrines of common law certiorari. Here the approach naturally is pragmatic, but accidents of legislative draftsmanship have evidently played their part in producing regrettable inconsistencies. The use of the term, "certiorari," in statutory review provisions has itself been fortuitous; simple appeals serve equally well and are free of historical legalisms.

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118. State ex rel. Ball v. State Board of Health (1930) 325 Mo. 41, 26 S. W. (2d) 773.

119. State ex rel. Johnson v. Clark (1921) 288 Mo. 659, 232 S. W. 1031.

120. State ex rel. Kansas City University v. North (1927) 316 Mo. 1050, 294 S. W. 1012.

A legislative approach which abolishes common law terminology and provides broadly for review proceedings having a specified scope has been adopted in other jurisdictions,<sup>121</sup> and it is probable that legislative clarification of this phase of certiorari could be more effective and less dangerous than enactment concerning the nature of a judicial function. In constructing any such system, however, the legislature would have to bear in mind the question whether it has the power to confer upon the courts the authority to review matters which those courts have previously declared to be "non-judicial." In Missouri, the question of the legislature's power to require a complete consideration by the courts of actions previously said to be "non-judicial" remains unanswered.

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121. See Art. 78, N. Y. Civil Practice Act §§1283-1306 (Thompson's Laws of New York (1939) 1786-1789). No change was made in the substantive law as to right of relief, but a uniform procedure for obtaining such relief was established. See also the proposed Uniform Administrative Procedure Act, National Conference of Commissioners on Uniform State Laws and Proceedings, *Handbook* (1940) 384. The draft was adopted by the National Conference of Commissioners on Uniform State Laws at the Philadelphia meeting in 1940 and recommended to the American Bar Association. Meanwhile the Attorney General's Committee on Administrative Procedure, *Final Report* (1941) was published, and the bar association remanded the act to the commissioners for further study. In any legislation of this kind, the draftsmen are met with numerous problems, such as the difficulty of definition and the danger of too much uniformity.