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## Cover Page Footnote

This paper is a revised part of a study entitled Development of Judicial Review of Administrative Action in New York, submitted in partial satisfaction of the requirements for the degree of Doctor of Juridical Science at New York University School of Law. The guidance of Professor Bernard Schwartz is gratefully acknowledged. Other chapters of the study have been published: Statutory Procedures Governing Judicial Review of Administrative Action, in 38 St. John's L. Rev. 86 (1963), and English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, in 9 N.Y.L.F. 478 (1963). * Member of the New York Bar.

# MANDAMUS AND CERTIORARI IN NEW YORK FROM THE REVOLUTION TO 1880: A CHAPTER IN LEGAL HISTORY†

*HAROLD WEINTRAUB**

THE first constitution of the State of New York, adopted on April 20, 1777, continued the common law and the statute law of England as the law of the State, together with the laws enacted by the legislature of the colony.[1] It was a hastily drawn document, drafted by a handful of men in the midst of war, while New York itself was largely occupied by the enemy. This first organic document was short and it wisely continued the laws and practices familiar to the people. It sufficed for the needs of the new State until 1821.[2]

The highest court of the State was designated as the court for the trial of impeachments and the correction of errors. It consisted of the chancellor, the judges of the supreme court, the president of the senate and the senators, subsequently comprising more than thirty judges.[3] Such numbers were obviously unwieldy for the almost insuperable task of molding and establishing law for the newly created state; a task of similar difficult proportions was handled with consummate skill by John Marshall and his brethren in the federal sphere. The composition of the court of errors was also unsuitable because the senators, drawn from varying vocations, were unequipped with legal knowledge and training to cope with the problems presented and provide cohesive judicial leadership in the task of formulating decisions on appeal from the obviously more competent supreme court. The court of errors was continued in the 1821 constitution[4] but abolished in the 1846 constitution.[5] Only a handful of decisions were issued in the first years of its existence and there was no greater anachronism in the separation of powers concept adopted by

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1. N.Y. Const. art. XXV (1777).
2. 1 Lincoln, The Constitutional History of New York 471, 590 (1906).
3. N.Y. Const. art. XXXII (1777).
4. N.Y. Const. art. V, § 1 (1821).
5. N.Y. Const. art. VI, § 1 (1846).

the American states and the federal government than the New York Court for the Trial of Impeachments and the Correction of Errors.

This left the state supreme court, consisting at first of three judges,[6] whose members also rode circuit throughout the state, to carry almost the entire burden of disposing of major litigation and settling fine points of law and practice via its original and appellate jurisdiction, which the 1777 constitution continued without elaboration at all.[7] The court had been established first as the Supreme Court of Judicature for the New York Colony in 1691 and was given a jurisdiction corresponding to that exercised by the courts of King's Bench, Common Pleas and Exchequer in England. It had express power to remove "by warrant, writ of error or certiorari of judgments, indictments or informations from common pleas or sessions there had or depending, and . . . to correct errors in judgment or to reverse the same."[8] The first New York State courts were perforce formed in the image of the courts in England, most of which had been in operation here in actual name or counterpart, *e.g.*, common pleas, oyer and terminer, quarter sessions, special sessions, chancery, justices of the peace.[9]

The first constitution having continued all of these courts, *sub silentio*, the supreme court inherited the broad jurisdiction of the chief English courts to supervise the lower courts of the state. However, the beginnings in New York were somewhat like the uncertain start experienced by the United States Supreme Court. There were no opinions published by Chief Justice Jay, Chancellor Livingston or Chancellor Lansing. An official reporter to collect and publish decisions was not authorized to act until 1804 when William Johnson commenced reporting the decisions of the supreme court, mainly those of James Kent.

It was Kent who noted that the progress of jurisprudence in the new State prior to 1798 was negligible. The very law of the State was not generally known or established because there were no native precedents for the guidance of the judges.[10] The English texts and decisions were slavishly followed insofar as they could be adapted to local conditions. Kent, by dint of his close study of the English law reports and treatises, became the leading jurist of the New York bar.[11] In time this led to his

6. Increased to four in 1791 and to five in 1794. By the 1821 constitution, it was reduced to three again. N.Y. Const. art. V, § 4 (1821).

7. 1 Lincoln, op. cit. supra note 2, at 462.

8. Goebel, Jr., The Courts and the Law in Colonial New York, in 3 History of the State of New York 22 (Flick ed. 1933).

9. 1 Lincoln, op. cit. supra note 2, at 674; Pound, Organization of Courts 91 (1940).

10. Dillon, Chancellor Kent, 111 American Law. 109, 110 (1903).

11. W. Kent, Memoirs and Letters of James Kent 58, 112, 117, 290 (1898). See also Horton, James Kent, A Study in Conservatism 35, 47, 147-54 (1939).

elevation as justice of the supreme court, chief justice of the supreme court, and finally to chancellor.[12] By virtue of his extended, eminent judicial services to the State in its infancy, Kent left the strong impress of his legal conceptions upon the judicature of New York. It tended, in the main, to be logical, learned but conservative.

## PART ONE: MANDAMUS

### I. BEGINNINGS

At the virtual beginning of recorded decisions in the state, 1799, Supreme Court Justice Kent, in *People v. Sessions of Chenango*,[13] laid down the broad sweep of power which his court would exercise in maintaining traditional supervision of the lesser courts and tribunals:

> All courts within the several counties have, from the first foundation of our judicial system, been regarded by law and by practice as inferior courts; they can be compelled to duty by *mandamus*; they can be restrained from usurpation by *prohibition*. The causes and pleas before them, can be arrested and removed by *habeas corpus* or *certiorari* . . . .[14]

Justice Kent was obviously a close student of the alterations effected in the English prerogative law of the eighteenth century, for it was during that period that the Court of King's Bench arrogated to itself the responsibility for supervising the inferior jurisdictions of England. Kent's pronouncement provided an admirable starting point for this increasingly important function of his court.[15] Although Kent's decision spoke specifically of lower court determinations rather than those of an administrative body or officer, it was ultimately to be applied to both equally, interchangeably and indiscriminately. This was a unique and distinctive feature of New York law for a considerable period; nonjudicial bodies and officials were placed on the same footing as the courts insofar as the application of mandamus and certiorari was concerned. The broad jurisdiction staked out in *Sessions of Chenango* was far more important than the nature of the facts in that particular case. Justice Kent provided a viable concept of law to govern an increasingly important area of activity where none had existed before.

For the time being, however, mandamus was confined to less illustrious duties in the new State. It served as an auxiliary judicial mandate mainly to provide interlocutory assistance in a judicial establishment which functioned with very little statutory assistance. In its inauspicious beginnings, mandamus was utilized to compel a court to render a judg-

12. W. Kent, op. cit. supra note 11, at 157.
13. 2 Cai. Cas. 319 (N.Y. Sup. Ct. 1799) (per curiam).
14. Ibid.
15. See also Sikes v. Ranson, 6 Johns. R. 279 (N.Y. Sup. Ct. 1810).

ment,[16] to require judges to seal a bill of exceptions,[17] and the like, all purely ministerial actions held to be incumbent upon lower courts which were not otherwise amenable to any other control.

In one early case, *People v. Justices of the Delaware Common Pleas*,[18] the supreme court considered the propriety of the removal of an attorney from practice in the court of common pleas. Acting in its supervisory capacity the court asserted its common-law powers and overruled the action of common pleas because "the ground of removal was too slight for a punishment so severe."[19] This last pronouncement would seem to have come straight out of recent experience which led to a significant amendment to Article 78 of the Civil Practice Act.[20] The supreme court may have been more sympathetic here than legalistic in dealing with this mandamus application because an attorney was being deprived of the privilege to follow his calling. The result was a legal decision which is somewhat less than satisfactory because of the court's interference with the discretion of the lower tribunal. At this stage in New York jurisprudence, little visitorial power was given the supreme court to review discretion exercised by an inferior tribunal, making the *Delaware Common Pleas* decision a less than auspicious start in the uses of mandamus. Where matters ministerial were concerned, no doubt existed that the supreme court could mandate the action to be taken below or overrule action already taken. But the power exerted by means of mandamus in *Delaware Common Pleas* clearly exceeded the bounds of the court's authority because it substituted its own judgment for that of the lower court in a matter calling for the exercise of discretion.

The problem of discretion, the perennial battleground of administrative law, emerged early in a mandamus taken out by a constable against adverse action by a board of supervisors in the case of *People ex rel. Wilson v. Supervisors of Albany*,[21] in 1815. The constable had removed paupers to various towns and then presented a bill in the sum of $102 for audit and payment as required by law. The board allowed him only twenty-eight dollars and he brought the mandamus to compel them to allow his account as submitted. The court, falling back upon Bacon's *Abridge-*

16. People v. Judges of Cayuga, 2 Johns. Cas. 68 (N.Y. Sup. Ct. 1800); Haight v. Turner, 2 Johns. R. 371 (N.Y. Sup. Ct. 1807). See also Fish v. Weatherwax, 2 Johns. Cas. 215 (N.Y. Sup. Ct. 1801), where the reporter provides, in addition, an excellent compendium of New York mandamus law to about 1840.

17. People ex rel. Allaire v. Judges of West Chester, 2 Johns. Cas. 118 (N.Y. Sup. Ct. 1800).

18. 1 Johns. Cas. 181 (N.Y. Sup. Ct. 1799) (per curiam).

19. Id. at 182.

20. N.Y. Sess. Laws 1955, ch. 661.

21. 12 Johns. R. 414 (N.Y. Sup. Ct. 1815).

*ment*,[22] the most widely quoted text on prerogative law, and Blackstone,[23] the legal bible of early American courts and lawyers,[24] resorted to the narrow, standard definition of the function of mandamus. Actually there was small choice in the scant legal authorities available and the paucity of guidelines necessarily shaped the nature of the answer provided by the court. The court stated that if a party has a legal right and no other specific legal remedy, mandamus will be issued "to require the person or persons to whom it is directed to do some particular thing therein specified, which appertains to their office and duty, and which the Court issuing it has previously determined, or, at least, supposes to be consonant to right and justice."[25] The court then ruled that the constable had no right to a specific sum but must wait upon the board to receive such amount as the supervisors in their discretion should award him. This seemingly unjust result was justified, however, by the plausible argument that if the court interposed its own views regarding the quantum of the allowance, the court

> would be taking upon ourselves a discretion which the legislature have vested in the supervisors; we could only command them to examine the applicant's accounts, and in the words of the statute, allow him, for his services, such sum as they shall judge he reasonably deserves to have; and this has been already done.[26]

Constrained by the historical limitations of mandamus, the supreme court was brought to enunciate a rule of absolute discretion which is vested in inferior tribunals and administrative officers as follows: "Wherever a discretionary power is vested in officers, and they have exercised that discretion, this Court ought not to interfere, because they cannot control, and ought not to coerce that discretion."[27]

By present standards, this view would appear to cede a considerable area of independence to such tribunals and officers without placing corresponding safeguards about the exercise of such unrestricted power. Although this concept was fashioned early in New York judicial history and persisted for more than a century, it is difficult to acquiesce in such a broad grant of unrestricted power except to note that it closely followed the English rules for the application of mandamus, received uncritically from the mother country and applied almost mechanically here. It occurred at a time when judicial tribunals, exercising their own discretion-

22. 3 Bacon, Abridgement of the Law: Mandamus (6th ed. 1793).

23. 3 Blackstone, Commentaries *110.

24. Plucknett, A Concise History of the Common Law 287 (5th ed. 1956); Pound, The Formative Era of American Law 9, 92, 104 (1938); Walker, American Law 3 (3d ed. 1855).

25. People ex rel. Wilson v. Supervisors of Albany, 12 Johns. R. 414, 415 (N.Y. Sup. Ct. 1815).

26. Id. at 416.

27. Ibid.

ary powers, were equally the object of mandamus proceedings and therefore jealous of preserving those powers.

In the *Wilson* case, the court was content that the constable had been allowed to submit his account to the supervisors. It ruled that he had no "precise" legal right to anything more even though the allowance granted by the supervisors might, in the light of the insignificant sum awarded, be the equivalent of no allowance. Of greatest importance, however, was the failure to insist upon some explanation or justification for the reduction of the amount claimed. As a result, this amounts to unbridled discretion and is certainly no credit to the "right and justice"[28] to which Judge Spencer paid tribute in the opening lines of his decision. The lofty purposes of mandamus somehow became lost amid the rigid technicalities of a transplanted jurisprudence which was content to accept the guidance of antiquated English precedents. The *Wilson* decision accordingly meant that the supreme court would not look at nor weigh the facts on mandamus, and discretion, once exercised, became invulnerable to judicial scrutiny.

The rationale of the *Wilson* case was soon established as the governing rule for disposition of mandamus applications where the inferior tribunal, usually a judicial body, had exercised a discretion. Varying reasons were cited in subsequent cases, but they all added up to an adamant refusal to open discretion up to further examination in a mandamus action, apparently the only form of review available at that time. Writ of error could be brought only against a final judgment of a court of record; certiorari was narrowly confined to examining the existence of jurisdiction, but not the exercise of discretion.

Where a thirty-dollar medical bill for an operation performed upon a pauper was thrice rejected by a board of supervisors, a doctor in 1821 brought mandamus in *Hull v. Supervisors of County of Oneida*,[29] after the board finally relented and allowed him five dollars. Again, the decision was placed squarely upon the ground that the supreme court was "not to control their discretion, in judging what is a reasonable compensation for such services. . . ."[30] The court viewed its role as the rather narrow and functional one of setting the board in motion to act upon the doctor's claim; once it had acted, however unreasonably, there was no revisory power left in the court. The result was no different shortly afterwards where a constable, who had made a claim for service of subpoenas, was aggrieved at the very small allowance given him by the supervisors.[31] The charge for the service of subpoenas was not specified

28. Ibid.

29. 19 Johns. R. 259 (N.Y. Sup. Ct. 1821).

30. Id. at 263.

31. Ex parte Farrington, 2 Cow. 407 (N.Y. Sup. Ct. 1823).

by statute whereas it was stated for a summons and for warrants. The court would not disturb the exercise of the board's discretion in awarding the constable a much lesser sum than that paid for a summons or warrant, saying: "They have not refused to act; and the amount being a matter of discretion, it is a subject, over which the Court has no control."[32] Mandamus was being thrust into an uneasy and untenable role because its exemplary function had been one of compelling action patently required by law, a concept diametrically opposed to that of probing the exercise of discretion.

Mandamus and discretion were again aligned against each other in a suit for slander where the plantiff's motion for a new trial was denied by common pleas and he brought mandamus to review the denial.[33] To the supreme court, "discretion" dealt with the adjustment of rights undefined by law. To allow an appeal or a review of these interstitial matters, here a motion for a new trial, "would result in an endless conflict of opinion upon questions which must from their very nature be finally determined by the Court below, because they cannot be reached by the rules of law. . . ."[34] This shows that by 1824, the supreme court had already rationalized refusal to review discretionary action of inferior bodies, though it appears to be remiss in performing an essential obligation of a higher court, *viz.*, to clarify and establish the law for the lesser courts. Actually, the decision is correct in strict principle, although the language is somewhat inept because lower courts must needs resolve the myriad questions which are brought to them for their judgment. That is the function of a tribunal and that is what the supreme court has here pleaded in avoidance. But the right to at least one appellate review of lower court decisions had not yet become established in the new State. Consequently, many matters which impinged upon the merits of a suit were denied higher court review by virtue of the simple proposition that they involved matters of "discretion" which in their nature should be resolved by the lower court. In addition, the form of remedy employed, mandamus, was wholly unsuited to the task set for it because its special function was solely to procure action plainly prescribed by law, *i.e.*, action of a ministerial nature.

But as a result of these direct challenges to the immunities enjoyed by "discretion," mandamus law was slowly launched in the direction of placing "discretion" under some legal restraint. A small dent in the facade came about on the strength of a rather questionable decision by

32. Id. at 408. The court rejected the opportunity to reason analogously from the rules prescribed by statute for the payment for service of a warrant or a summons. They were different in type but not in kind.

33. Ex parte Baily, 2 Cow. 479 (N.Y. Sup. Ct. 1824).

34. Id. at 483.

which a common pleas court had set aside a report of referees which had turned on the credibility of a witness. The supreme court bluntly acknowledged that common pleas had erred in its action.[35] The court, nevertheless, again fell back upon the meaningless formula that "wherever an inferior jurisdiction, having a discretion, have [*sic*] exercised it, this Court does not interfere by mandamus."[36] The extreme action of the lower court here, however, invited some remedy against future transgressions where such patent error might arise. The court accordingly added this warning in its decision, by way of a dictum: "We do not mean to say, that we would not grant a mandamus in a plain case, where the evidence is all one way, and there is nothing contradictory; where the case is so palpable as to leave no room for discretion in the Court below."[37] The supreme court, in this momentous language, partly redeemed its refusal to act upon the obvious error in this particular case. The stranglehold of absolute discretion was loosened somewhat and the portentous dictum held promise of an alteration in the treatment of mandamus applications involving discretion.[38]

Meanwhile, other developments were simultaneously shaping the law of mandamus in the first decades of the nineteenth century. Mandamus had become a Jack-of-all-trades writ, widely employed either to secure appellate review directly or in conjunction with pending review by writ of error or bill of exceptions. Thus, in a case where common pleas had set aside a judgment for insufficiency in the complaint, the aggrieved party resorted to mandamus for restoration of the judgment originally awarded.[39] The supreme court rejected the application on the ground that the action of common pleas was reviewable by writ of error after judgment was formally entered. The basic requirement of mandamus that no other specific legal remedy be available before it will issue in behalf of a party was here invoked against the plaintiff.

Closely related to availability of another legal remedy is the rule that the supreme court will exercise its own discretion before granting a mandamus which, unlike a writ of error, is not a writ of right. Thus, although the supreme court in this period, the 1820's, allowed a mandamus to issue in one early case,[40] it warned that discretion would guide

35. Ex parte Bassett, 2 Cow. 458 (N.Y. Sup. Ct. 1824).

36. Id. at 459. (Emphasis omitted.)

37. Ibid.

38. See People ex rel. Oebricks v. Superior Court of City of New-York, 5 Wend. 114 (N.Y. Sup. Ct. 1830), and text accompanying notes 64-69 infra.

39. Ex parte Bostwick, 1 Cow. 143 (N.Y. Sup. Ct. 1823). See also Boyce v. Russell, 2 Cow. 444 (N.Y. Sup. Ct. 1824); Jansen v. Davison, 2 Johns. Cas. 72 (N.Y. Sup. Ct. 1800); People ex rel. Wilson v. Supervisors of Albany, 12 Johns. R. 414 (N.Y. Sup. Ct. 1815), and text accompanying notes 21-28 supra.

40. Van Rensselaer v. Sheriff of Albany, 1 Cow. 501, 512 (N.Y. Sup. Ct. 1823).

its decision in granting or withholding the prerogative remedy, citing Bacon's *Abridgement* as its authority. The court indicated that a case of hardship attending the issuance of the writ would strongly influence its decision in deciding whether to issue the writ. Mandamus was intended to correct injustice and should not have the opposite effect of creating an equal or serious injustice by reason of its issuance.

The traditional function of mandamus to compel action by a public official in regard to a duty imposed by law became more clearly defined as greater legal knowledge and experience were acquired in the new State. Where a loss of land had been occasioned by diversion of water for the newly constructed Erie Canal, the canal commissioners had refused to act in regard to relators' claim for an appraisal of damages. The court, in *Ex parte Jennings*,[41] in 1826, found that the relators had demonstrated "an interest which entitles them to an appraisal; and it is for the appraisers to determine its extent, on the hearing before them."[42] No valid reason had been offered to excuse their failure to act.[43] Even though the appraisers had answered that they were without jurisdiction because the claim pertained to water rights and not land damages *per se*, the court nonetheless ordered a decision to be made on the claim.[44] In another case involving the refusal of canal commissioners to pay a claim, the amount of which had already been fixed by appraisal, the court termed them a judicial body "appointed by law to act in a matter of public concern, in the decision of controversies, or causes of a certain character between individuals and the state."[45] Although one member of the tripartite board had refused to participate in the decision, the court found that the facts were not disputed, and a valid appraisal having been made, the commissioners were accordingly ordered to pay the damages assessed.[46]

Inextricably related to the duty of a public official to act as mandated by law is the necessary existence of a clear legal right in the person requesting the action to be performed. This requirement differs in quality and quantum of proof both from the standard of "preponderance of evidence" which prevails in civil cases and from the "beyond a reason-

41. 6 Cow. 518 (N.Y. Sup. Ct. 1826).

42. Id. at 528.

43. Ibid.

44. Peremptory mandamus issued sub nom. People ex rel. Jennings v. Seymour, 6 Cow. 579 (N.Y. Sup. Ct. 1827).

45. Ex parte Rogers, 7 Cow. 526, 529 (N.Y. Sup. Ct. 1827).

46. See also People ex rel. Ainsworth v. Comptroller of State of New-York, 1 Wend. 301 (N.Y. Sup. Ct. 1828); People ex rel. Overseers of the Poor v. Supervisors of County of Oswego, 2 Wend. 291 (N.Y. Sup. Ct. 1829); People ex rel. Dobbs v. Dean, 3 Wend. 438 (N.Y. Sup. Ct. 1830); Harrington v. Trustees of Village of Rochester, 10 Wend. 547 (N.Y. Sup. Ct. 1833).

able doubt" requirement necessary for conviction of a crime. The difference, it would appear, is that the mandamus requirement is more stringent than either and denotes an absolute quality. The "clear legal right" requirement was first laid down in specific terms in *People v. Supervisors of County of Columbia.*[47] Although this doctrine would appear to be correlative to the duty of a public official to act in certain premises, it more frequently was cited in conjunction with judicial utterances that no other legal remedy exist before a mandamus will issue.[48] There is no organic relationship between the two requirements and their joint association must be attributed to mere judicial happenstance. The first intimation of the "clear legal right" rule showed, however, no dependency upon the "absence of another legal remedy" requirement.[49] That requirement was clarified about this time to mean that having recourse to equity or criminal proceedings did not constitute the full and sufficient remedy which the law contemplated as a legal remedy to oust mandamus.[50]

Earlier the supreme court, having grown impatient with the heavy demands placed upon its time by the trivial and interlocutory matters brought to it by mandamus,[51] issued notice that such liberties would be tolerated no longer.[52] The flow of inconsequential motions in the guise of writs of mandamus did not abate sufficiently with the first warning because the supreme court was again required to put up a halting hand.[53]

The prevailing wide use of the writ was a testimonial of its value and utility and it was soon deemed important enough to warrant extended consideration by the highest court of the state, the court of errors, in *Commercial Bank v. Canal Comm'rs.*[54] The decision by Chancellor Walworth is a useful guide to the mandamus practice of the period. It

47. 10 Wend. 363 (N.Y. Sup. Ct. 1833).

48. Id. at 367; People ex rel. Dikeman v. President of Village of Brooklyn, 1 Wend. 318 (N.Y. Sup. Ct 1828).

49. Commercial Bank v. Canal Comm'rs, 10 Wend. 25, 33 (N.Y. Ct. Err. 1832).

50. People ex rel. Moulton v. Mayor of New York, 10 Wend. 393 (N.Y. Sup. Ct. 1833).

51. See, e.g., Ex parte Kellogg, 3 Cow. 372 (N.Y. Sup. Ct. 1824); Ex parte Clarke, 3 Cow. 379 (N.Y. Sup. Ct. 1824); Ex parte Stone, 3 Cow. 380 (N.Y. Sup. Ct. 1824); Ex parte Chambrelain, 4 Cow. 49 (N.Y. Sup. Ct. 1825); Ex parte Shethar, 4 Cow. 540 (N.Y. Sup. Ct. 1825); Ex parte Sanders, 4 Cow. 544 (N.Y. Sup. Ct. 1825); People ex rel. McCall v. Irving, 1 Wend. 20 (N.Y. Sup. Ct. 1828); People ex rel. Fay v. Judges of Oneida Common Pleas, 1 Wend. 28 (N.Y. Sup. Ct. 1828); People ex rel. Spencer v. Judges of Monroe Common Pleas, 1 Wend. 29 (N.Y. Sup. Ct. 1828).

52. Ex parte Coster, 7 Cow. 523 (N.Y. Sup. Ct. 1827).

53. Anon., 9 Wend. 472 (N.Y. Sup. Ct. 1833)

54. 10 Wend. 25 (N.Y. Ct. Err. 1832).

was later largely codified into the Code of Civil Procedure of 1880.[55] The purpose of proceeding by alternative mandamus to elicit the full facts of a case was clarified; a defendant could move against a defective writ without the necessity of first making a return; the regular rules of pleading were noted as being applicable to a mandamus action. This simple, concise summary of mandamus practice made clear the function it was primarily intended to serve at this point in New York legal history, *viz.*, solely to direct the performance of ministerial action. It showed also that although widely employed, the full extent of mandamus practice was not then sufficiently understood and needed the careful explanation which was elaborated in the *Commercial Bank* opinion.

## II. Review of Discretion

Although some small steps had been taken to mitigate the rigors of unlimited discretion, albeit only in respect to an inferior judicial tribunal,[56] that citadel of immunity from judicial review remained largely untouched by the forward progress achieved in other branches of mandamus law. The venerable legal technique of distinguishing and thereby cutting off areas from the application of the rule of absolute discretion proved to be the only method whereby this entrenched principle was constricted, year by year.

For example, the Common Council of the City of Albany had appropriated certain sums for specific purposes for the ensuing year and by law the Board of Supervisors of Albany County was required to assess and cause to be raised by taxes the sums so appropriated. The supervisors demurred, claiming to have a discretion in the matter and adding that an unused balance from the prior year was available, whereupon the council went to the supreme court for a mandamus against the board. In *Ex parte Common Council of Albany*,[57] in 1824, the court had the delicate task of balancing the clear power of the council to appropriate the funds against the claimed discretion of the supervisors to lay and collect taxes according to their own dictates. Although the latter body acted largely in a legislative capacity, which would normally be immune from judicial interdiction, the court found that the law in this case confided no choice to the supervisors. "The statute is imperative upon the supervisors."[58] It thereby extracted all discretion from the exercise of their power in acting upon the appropriation made by the council. The court, without stating so specifically, perceived that the

55. N.Y. Sess. Laws 1880, ch. 178, Code of Civil Procedure, ch. 16, tit. 2, art. 4 (Mandamus).

56. Ex parte Bassett, 2 Cow. 458 (N.Y. Sup. Ct. 1824).

57. 3 Cow. 358 (N.Y. Sup. Ct. 1824).

58. Id. at 365.

supervisors functioned in several roles and that in regard to the appropriation made by the council they served only in a ministerial capacity, leaving no room for the exercise of discretion. The case is not unlike recent litigation involving the City of New York where it was held that the City retained no discretion but to appropriate funds for salaries fixed for employees of state courts situated within the city.[59] *The Common Council of Albany* case did not reject the rule of discretion in the proper place and under the proper circumstances. It merely put the rule aside as inapplicable to the facts of that case, which nonetheless placed another question mark upon the banner of absolute discretion.

In another case where the rule of discretion was theoretically upheld, its omnipotence was further downgraded by the supreme court in an unusual manner.[60] Common pleas had set aside a default in an action and the relators now moved to vacate that order. The supreme court, alluding to the broad rule of discretion which applied to such a situation, repeated the dictum of an earlier case that the exercise of power to vacate is not governed by fixed principles—doubtlessly meaning that the discretion of common pleas must be left unfettered in order to deal with the illimitable combinations of circumstances which could arise in particular cases. However, a small warning signal was raised in this free-wheeling area of discretion, the court noting that "no positive rule of law has been violated by the court below,"[61] thereby placing another damper upon the unrestricted exercise of so-called discretion. It could be deduced that such discretion was about to be measured by legality and that the mere power to exercise discretion would not always sweep all before it. The relators were defeated here, but the shape of merely ministerial mandamus gained a new dimension in the caveat dropped by the court.

Two years later, in 1828, a mandamus case touching the exercise of discretion again resulted in a setback for the relators but it also brought such discretion nearer to judicial supervision. Common pleas, on a motion for a new trial, had refused to consider affidavits from jurors impeaching their own verdict. The supreme court, in *People ex rel. Hosmer v. Columbia Common Pleas*,[62] stated the general rule that it would not coerce or control the discretion of a subordinate tribunal by mandamus. However, where such tribunals "have erred in the application of legal principles to the cases before them, the court will apply the proper remedy."[63] This edict is but a different way of saying that the discretion

59. Wingate v. McGoldrick, 279 N.Y. 246, 18 N.E.2d 143 (1938).
60. Ex parte Bacon, 6 Cow. 392 (N.Y. Sup. Ct. 1826).
61. Id. at 393.
62. 1 Wend. 297 (N.Y. Sup. Ct. 1828).
63. Id. at 299.

to be exercised by subordinate tribunals is, in contemplation of law, a discretion governed by legal principles. Although the quoted language was but a dictum and the decision to affirm the action of common pleas and deny the mandamus rested on other grounds, their purport reached the mark because the dictum shortly became the rule.

The actual change was engineered in another mandamus-type appeal from a lower court decision which again turned on established legal principles. In *People ex rel. Oebricks v. Superior Court of City of New York*,[64] in 1830, the lower court had granted defendant's motion for a new trial and plaintiff brought mandamus against the lower tribunal to vacate the rule granting a new trial. The supreme court enumerated all the requirements for granting a new trial, much as they exist now. It plainly appeared that there had been an insufficient basis for granting the motion and that defendant court had fallen back upon its power of discretion in deciding motions for new trials. The supreme court proceeded to pay great deference to the discretion confided to inferior tribunals, especially where the problem "cannot be governed by any fixed principles or rules."[65] It even cited those cases where the exercise of discretion by administrative bodies had been upheld. The court recognized that "it is their judgment and discretion, and not ours to which the legislature have left the decision of that matter."[66] This remark reaches to the very heart of the problem.

The court noted, however, that the powers of these tribunals and officials were legal powers derived from law. It implied that they were therefore subject to the scrutiny of a higher court which must determine whether those powers had been exercised pursuant to law. The issue of discretion is thus squarely presented within a framework of power subject ultimately to law. The respective spheres of law, power and discretion are divided and allocated, but without mathematical precision because we know that the subject does not lend itself to such precision. Although the determination under consideration had been made by a judicial tribunal, the supreme court used examples of discretion by administrative bodies, officials and judicial tribunals interchangeably without differentiation. This treatment makes it evident that much of the law which governs mandamus in regard to administrative bodies emanated primarily, as the foregoing cases demonstrate, from experience originating with inferior judicial tribunals. Consequently, the prior tendency of the supreme court to follow a hands-off policy is fully understandable, even if debatable, because it failed to distinguish the respec-

64. 5 Wend. 114 (N.Y. Sup. Ct. 1830).
65. Id. at 125.
66. Ibid.

tive responsibilities, traditions and powers of a court from those of an official or an official body.

However, the supreme court did not leave off with the bare generalization that in the course of the exercise of powers by inferior bodies and officials questions of law which arise were to be ultimately decided by the supreme court. The development of law from a particular case to a general rule was carefully traced by the court, and once a rule for a certain set of facts was established, the body, judicial or administrative, "would have parted with their discretion, and substituted in its place a clear and well defined rule . . . ."[67] The rule of discretion, by an accretion of experience and precedent, in time becomes the rule of law. Although it is difficult to define a standard for the weighing of conflicting evidence, the court in this case saw that there was no problem "where the evidence is all upon one side, and clear and satisfactory, [in which case] it ceases to be a matter of discretion."[68] Therefore, when we speak of the court's discretion in regard to such a situation, it is a "sound legal discretion," of which it cannot be said that it is "arbitrary."[69]

In one fell swoop, the supreme court discarded the tottering rule of absolute discretion which had theretofore controlled its decisions on mandamus to inferior tribunals and officials. Thereafter, if the decision just made was followed, the legal discretion test would be applied so that the area of undefined discretion would be progressively narrowed by establishment and application of prior experience and precedents under the liberal principles enunciated by the court.[70] In a later decision, upon granting a peremptory mandamus in this case, the court repeated its precept that the discretion to be exercised must be a legal and not an arbitrary discretion, making such action henceforth subject to review by the supreme court.[71]

The movement to place some control upon the theretofore unbridled discretion of inferior tribunals and officials by means of mandamus was, however, short-lived. The court of errors, stepping into the picture at the first opportunity, completely nullified the *Superior Court of City of New York* decision in the case of *Judges of Oneida Common Pleas v. People*,[72] in 1837. In common pleas there had been a recovery for less than fifty dollars but the court awarded full costs on the ground that title to land had been brought into question. Upon mandamus to the

67. Id. at 126; cf. Larkin Co. v. Schwab, 242 N.Y. 330, 336, 151 N.E. 637, 639 (1926).

68. 5 Wend. 114, 126 (N.Y. Sup. Ct. 1830).

69. Ibid.

70. Id. at 128.

71. People ex rel. Oebricks v. Superior Court of City of New York, 10 Wend. 285, 298 (N.Y. Sup. Ct. 1833).

72. 18 Wend. 79 (N.Y. Ct. Err. 1837).

supreme court the order for full costs was vacated, that court ruling that title to land was not litigated. The case for mere costs now reached the highest court of the state by writ of error on the question of the power of the supreme court to revise the decision of a lower court by mandamus on a question of discretion, namely, award of costs.

Chancellor Walworth, speaking for reversal of the supreme court which carried unanimously, put the issue succinctly: "[T]he mode of proceeding by mandamus, under the present statutory provisions on the subject, is a very inappropriate remedy to correct mere errors of judgment, either as to law or fact, in courts of general common law jurisdiction."[73] In point of fact the Chancellor was partially correct, but also partially in error because the statutory provisions to which he alluded consisted of a mere parcel of seven procedural sections,[74] none of which was dispositive of the questions presented either in the court of errors or in the courts below. He was partially correct in alluding to the mistake of using mandamus to correct errors of fact committed in courts of general common-law jurisdiction; such was not the proper function of mandamus. By growing custom and practice those questions were nevertheless diverted to the supreme court by means of the writ because of the lack of adequate statutory provisions for appeal on intermediate matters in the judicial establishment. In other words, mandamus had been called upon to fill a hiatus in the legal system and was used in lieu of a writ of error or what would now be called an appeal.

On questions of law not touching issues of fact, the supreme court had met a great need by using the mandamus as an omnibus writ to exercise a sort of appellate jurisdiction over interstitial matters not reachable by writ of error or bill of exceptions. Chancellor Walworth ignored these developments of everyday court life in New York of the 1820's and 1830's. He chose, instead, to enunciate and follow English law written well over a century earlier, rather than acknowledge and deal with widespread practices followed in the courts of his own time.

Senator Tracy delivered the other opinion of the court and he, too, looked backwards to the earlier English cases and text writers for safe but archaic authorities.[75] He quoted a definition derived from Coke and Mansfield, that mandamus is concerned with "breach of the peace, disobedience of a law, or neglect of official duty"[76] to indicate its proper role as a writ. The Senator completely overlooked the genius of the common law, which in the case of mandamus had moved far beyond an arid

73. Id. at 88.

74. 2 N.Y. Rev. Stat. 586-87, §§ 54-60 (1829).

75. 18 Wend. 79, 91-92 (N.Y. Ct. Err. 1837).

76. Id. at 91. See Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 9 N.Y.L.F. 478, 489, 499 (1963).

definition derived from times long past; a common law which had prospered its development by filling its writs with enlarged meaning derived from contemporary needs while retaining the familiar legal forms to enable the bench and the bar to continue to use them with understanding and ease.

He took up the decision in *Superior Court of City of New York*[77] and stated that the supreme court there had improperly asserted jurisdiction by mandamus over the judicial acts of an inferior court. His strongest attack was directed against the concept that discretion is such a palpable thing that it can be weighed and evaluated in objective terms. He contended that discretion means,

> when applied to public functionaries, a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. But what is to be understood by a discretion that is governed by fixed legal principles is, I must be allowed to say, something that I have not found satisfactorily explained, and what it is not easy for me to comprehend.[78]

As far as it goes, this is an admirable statement of the purposes and conditions under which discretion should operate, and of the problems encountered in attempting to place it within the bounds of an all-embracing definition. Senator Tracy also laid bare some of the problems inherent in formulating rules to control discretion by judicial review, but he would not recognize that questions of fact can take on the coloration of questions of law by reason of weight or absence of evidence. He invoked the subjective concept of "conscience" which is personal and absolute to preclude the use of any objective standards for evaluating the exercise of discretion. Senator Tracy finally betrayed his real concern in the matter by stating that if the *Superior Court of City of New York* decision were not overruled, "we should be perpetually appealed to for the adjustment of rights undefined by law."[79] The court of errors would be "flooded with paltry questions of common pleas practice . . . ."[80] Sitting both as legislator and judge, he had somehow forgotten the first purpose of a court of justice. He apparently believed that a party should have but one adjudication and no further right to appeal "from all decisions of fact, as well as law, that are made in the inferior tribunals of the state."[81] He rather overstated the proposition regarding the narrow scope of review on questions of fact by insisting that questions of fact cannot be better evaluated by an appellate court at one remove from the

77. 5 Wend. 114 (N.Y. Sup. Ct. 1830).
78. 18 Wend. 79, 99 (N.Y. Ct. Err. 1837).
79. Id. at 103.
80. Id. at 104.
81. Id. at 103.

testimony given at trial by witnesses,[82] which actually begs the question at issue.

In his careful opinion, Senator Tracy delivered several powerful blows in the interest of confiding broad discretion to inferior tribunals, primarily those judicial, and not trammelling their determinations with second-guessing. What had apparently escaped his exhaustive study of the problem was the paucity of appellate review then available in matters of practice and on intermediate appellate questions. This was the need ministered to by the expanded scope of mandamus. The remedial purposes of that writ, designed generally to correct a failure of justice, had been enlisted in the service of meeting new legal problems, such as providing review for arbitrary exercise of discretion. A serious drawback was that in a period of rapid change the writ functioned within the framework of a relatively static judicial system which largely followed the English forms and practices of a century earlier. The courts could take their choice of legal precedent from any century they pleased and they frequently opted for the safe certainty of the eighteenth. Although the common-law system of jurisprudence had always sought to retain the best of the past and meet the needs of the present by careful innovation, early prerogative law in New York seemed unable to cope with changed conditions. The courts looked increasingly backwards for guidance to meet the problems of the present. The citations relied upon in mandamus and certiorari cases, up to about a century after independence was gained from the mother country, invariably invoked English precedents of an earlier and different age and political society. It is interesting to note that federal precedent attracted little or no attention of the New York judges.[83]

Irrespective of whether Senator Tracy was right or wrong in his animadversions on the proper limits of judicial review in the *Oneida Common Pleas* decision, the inviolability of lower tribunal discretion was thenceforth rendered immune from revision by mandamus. Discretion was again enthroned and any action bearing the label "judicial," *i.e.*, discretionary, whether by judicial tribunal or administrative body, was thereby rendered safe from review, revision or interference in a mandamus proceeding. For example, in the same year as the *Oneida Common Pleas* decision, 1837, the supreme court was asked to award a mandamus against town highway commissioners who refused to work

82. Id. at 104-05. See Frank, Courts on Trial (1949), for a similar thesis advanced by Judge Jerome Frank a century later.

83. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), was more concerned with constitutional principles than prerogative law. Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), failed to measure up to the English decisions and text writers as an authoritative guide.

and open a road laid out by state commissioners.[84] The defendant town commissioners claimed that the legislative directions in regard to the location of the road had not been followed and therefore they were absolved from further action. The court was inclined to agree with this criticism, calling the route "strikingly injudicious." However, it found the duty of the state commissioners to be judicial, and the injudicious was thereby spared further scrutiny and review; the town highway commissioners were directed to work and open the road. By modern standards, laying out a road would hardly qualify as a judicial act, but such a description was often resorted to in the last century in order to obviate review by the supreme court.

The foregoing *Collins* case is particularly notable for its description of the problem of defining discretion, the opinion stating that

> there can be in the nature of things no rule by which discretion is to be precisely measured . . . . Matter of discretion is but another name for matter of judgment, which always makes a part of the merits in every controversy. The very act of creating a board for determining controversies and settling rights, implies that the legislature cannot themselves determine and settle.[85]

The most instructive part of this quotation explains that the exercise of discretion is imbedded in the very act of deciding the merits and is so inseparable from it that it is futile to try to isolate the one from the other. That view may not be as valid today because findings are now increasingly required of administrative bodies so that the intermediate exercise of discretion in respect to relevant phases of a controversy can be extracted and judged independently, and ultimately all must be consistent with the final determination.

The quotation from the *Collins* case is also important for indicating early appreciation by the legislature of the detailed responsibilities which could be confided to administrative boards in "determining controversies and settling rights," in those situations where the legislature believed that traditional judicial methods could not fully cope with the nature of the problems faced. The increased legislative reliance upon administrative bodies facilitated ultimate judicial acceptance of such modes of procedure.

Another penetrating decision on the subject of discretion was handed down in 1837, the same year as the two preceding cases. This involved a judicial tribunal which had refused to enter a judgment against a relator which he required to enable him to bring his writ of error for review of the merits of the case.[86] On the surface, this is precisely the type of

84. People ex rel. Case v. Collins, 19 Wend. 56 (N.Y. Sup. Ct. 1837).

85. Id. at 60.

86. People ex rel. Robinson v. Superior Court of City of New York, 19 Wend. 68 (N.Y. Sup. Ct. 1837).

ministerial action for which mandamus had been employed to put inferior bodies into motion. However, it was found upon review that the affidavits showed that there was a conflict in the facts. The court said in regard to this: "On motion for a mandamus, if there appears to be a fair, indeed I may say a plausible opening for an opposite conclusion, there is no rule of law upon which I can say to the court below that they shall not adopt it."[87] This viewpoint almost parallels the position adopted by courts today in testing the validity of administrative action involving the exercise of discretion.[88] It bears repetition to note that contemporary treatment of administrative discretion on judicial review emanated from experience drawing upon mandamus applications brought largely against judicial and not administrative tribunals, resulting in a more narrow and less stringent supervision by judicial review.

The argument against using mandamus to review discretion exercised by judicial bodies was best stated in the foregoing *Superior Court of City of New York* decision. Where that sphere of action is involved:

> That they have acted against a strong balance of testimony is not enough. The case should be conclusive against them in point of fact; and come to us upon a mere point of law. . . . By what rule of law am I to estimate the force or weight of circumstances falling on the mind? The law knows no standard in such cases beyond the mind which it has selected to weigh them. . . . [M]en must proceed without scales to affix a weight by the exercise of their reason. A mandamus cannot direct the line of thought. Where the law leaves that open it is never done. . . . With what propriety, then, shall the law go into the region of metaphysics, and demand that men shall agree in certain prescribed conclusions from premises demanding the exercise of human judgment? . . . [A] mandamus deals in matter of law, as exclusively as a writ of error or certiorari.[89]

In this treatment of a difficult question which came up on review from a judicial tribunal, but was equally applicable to the exercise of administrative discretion, there is little escape from a logic which viewed the power to exercise discretion as irrefragable. This was especially true where the instrumentality chosen to challenge that exercise of discretion was the ancient writ of mandamus, which moved bodies to patent action prescribed by law but always had held itself aloof from prescribing the direction (*i.e.*, discretion) which the action must take where a choice was presented. There was abundant merit in the arguments expressed by the court and its viewpoint is today largely followed in judicial review of administrative determinations of fact.

The views expressed in the foregoing quotation regarding nonreviewability of judicial discretion by mandamus were later reinforced in the

87. Id. at 70.
88. Stracquadanio v. Department of Health, 285 N.Y. 93, 96, 32 N.E.2d 806, 808 (1941).
89. 19 Wend. 68, 70-72 (N.Y. Sup. Ct. 1837).

case of an appeal taken to common pleas from the justice court. Common pleas had quashed the appeal because the appeal bond had misnamed the date of the judgment, an apparently harmless mistake. Relator thereupon moved by mandamus in the supreme court to have the quashing order vacated.[90] It must be reiterated that throughout this period, in the absence of other legal remedial machinery, mandamus had been extensively used to correct errors in procedural and appellate practice, errors which did not reach the merits of the case. But the judicial die was now cast and discretion was again held invulnerable to attack, the court ruling that

> the writ of mandamus cannot be awarded for the correction of judicial errors. . . . Their errors, if corrected at all, must be reached by some other process than the writ of mandamus.
>
> It is not to be denied that there had been a gradual departure in this state from the old law on this subject . . . . But we stand corrected by the decision of the court of last resort in the case of *The Judges of Oneida v. The People* . . . . [W]e have no jurisdiction by mandamus to review the decisions of a subordinate court in a matter of which it had judicial cognizance.[91]

Thus ended a chapter of mandamus history in New York.

In fact, the pendulum now swung to the other extreme and Judge Cowen, in subsequently commenting on the rule laid down in *The Judges of Oneida* case, stated:

> [W]here discretionary or judicial power has been exercised upon a matter within the jurisdiction of the inferior court or magistrate, although in making the decision the tribunal has mistaken either the law or the fact, or both, . . . this court cannot compel a change of determination by mandamus.[92]

Mandamus, having served the early judicial establishment as an all-purpose writ in the absence of other statutory or judicial devices, was now relegated to its narrow, traditional function of simply requiring that action clearly mandated by law be followed. However, the vice of the *Fuller* opinion was that lower determinations of questions of fact and questions of law were lumped together indiscriminately under the single heading of exercise of discretion. Accordingly, the supreme court applied a narrow rule of review, *i.e.*, as upon the facts, to another area, question of law, where the full competence of a court of law should have been exerted.

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90. People ex rel. Doughty v. Judges of Dutchess Common Pleas, 20 Wend. 658 (N.Y. Sup. Ct. 1839).

91. Id. at 659-60.

92. People ex rel. Fuller v. Judges of Oneida Common Pleas, 21 Wend. 20, 24 (N.Y. Sup. Ct. 1839). See also Ex parte Hutchinson v. Commissioners of Canal Fund, 25 Wend. 692 (N.Y. Sup. Ct. 1841); Ex parte Koon, 1 Denio 644 (N.Y. Sup. Ct. 1845); Ex parte Ostrander, 1 Denio 679 (N.Y. Sup. Ct. 1845).

Despite the apparent inflexibility of the rule, the plea of exercise of discretion did not always oust the supreme court from awarding mandamus where it considered the law to be clear or the case worthy of its intercession. Such a case occurred when the Mayor of Albany refused to issue a license to relator to engage in the business of booking passage for emigrants. A law had been enacted to mitigate the abuses practiced in that activity and applicants were thenceforth required to keep a public office, submit a satisfactory bond and tender the requisite license fee, all of which relator showed that he had done. The mayor replied that he nevertheless retained a discretion to grant or deny the license. The court, in *People ex rel. Osterhout v. Perry*,[93] observed that the legislature had attached no further conditions to this "innovation upon the common law" right to pursue a vocation; that a discretion in the mayor, if intended, could easily have been expressed in the statute. The court compared this case with the matter of issuing tavern licenses where the law stipulated that applicants must be of good moral character, but it noted that cartmen are licensed without such a restriction.[94] It determined that in the exercise of the power thus conferred by law upon him, the mayor had an official duty to perform if all the conditions laid down by the legislature were met, thereby exhausting any small discretion he may have had so far as the bond or the public office requirements were concerned.[95] However, the court did speculate that perhaps it would have been better if the legislature had vested the mayor with a discretion in the matter, because of the abuses practiced upon the "unwary foreigner," and no doubt the mayor was actuated by honest motives in withholding the license. "But it is my duty, as well as his, to administer the law as it is, and not as we may think it *ought to be*."[96]

The last statement may well serve as a standing admonition to all public officials, judges and administrators alike, that law loses the efficacy to promote its objectives if private views or foreign considerations are permitted to intrude. It is useful to reflect upon the quoted language because the *Osterhout* situation has recurred time and again.[97]

The *Osterhout* opinion was notable also for the extended consideration it gave to differences in contemporary licensing practices reflecting the fact that the legislature had perceived and provided for varying conditions by prescribing different requirements for each of them. Most

93. 13 Barb. 206 (N.Y. Sup. Ct. 1852).

94. Id. at 207-08.

95. Cf. People ex rel. First Nat'l Bank v. Board of Supervisors, 56 Barb. 452 (N.Y. Sup. Ct. 1867).

96. 13 Barb. at 209. (Emphasis in original.)

97. Cf. Bologno v. O'Connell, 7 N.Y.2d 155, 164 N.E.2d 389, 196 N.Y.S.2d 90 (1959); Picone v. Commissioner of Licenses, 241 N.Y. 157, 149 N.E. 336 (1925).

important, the court, although sympathetic to the administrator's problems, emphasized that the right to engage in an occupation cannot be thwarted under the guise of exercising a discretion conferred by statute where all the requirements of law have been met. In that case, the proper occasion for placing mandamus at the service of the applicant for the license had been clearly presented, whereas the reasons for withholding the writ were less than persuasive.

In one important decision dealing with several branches of administrative law, it was ruled that with regard to the exercise of discretion by an administrative body, the court will not inquire into their motives or mental processes.[98] This principle has been reaffirmed recently in leading cases decided by the United States Supreme Court[99] and the New York Court of Appeals.[100]

In the small number of instances where the court desired to award relief upon an application for mandamus although discretion was involved, it merely affixed an appropriate label to the action involved in order to reach the conclusion that it wished. Thus, where relator had entered a request to have his name stricken from a list of jurors, it was denied by the defendant jury commissioner. Special term denied relator's mandamus application but general term reversed. It ruled that the commissioner of jurors is a ministerial officer and that:

> There are many questions requiring the decision of ministerial officers which involve, to some extent, the exercise of legal discrimination in their solution, but which are not regarded as judicial questions, and consequently the decision of them is not conclusive in collateral proceedings.[101]

The only real question decided by the court was that a mandamus would lie for the purpose of challenging the jury commissioner's "legal discrimination," *i.e.*, discretion, because he was a "ministerial officer."

Notwithstanding *Taylor*, subsequent decisions did not depart from the now well-established principle that discretion would not be regulated by the courts on an application for mandamus.[102] Small inroads were made now and then upon this redoubt by intermittent decisions which would eventually allow the courts to pronounce a rule of reasonableness to guide the exercise of discretion where administrative action is involved. So, although a mandamus was refused against certain land office commission-

98. People ex rel. Thompson v. Board of Supervisors, 35 Barb. 408, 412 (N.Y. Sup. Ct. 1861).

99. Morgan v. United States, 304 U.S. 1, 18 (1937).

100. Taub v. Pirnie, 3 N.Y.2d 188, 193-94, 144 N.E.2d 3, 5, 165 N.Y.S.2d 1, 4 (1957).

101. People ex rel. Livingston v. Taylor, 45 Barb. 129, 135-36 (N.Y. Sup. Ct. 1865).

102. People ex rel. Board of Supervisors v. Commissioners of Prospect Park, 58 Barb. 638, 642 (N.Y. Sup. Ct. 1870); People ex rel. Bullard v. Contracting Bd., 33 N.Y. 382 (1865); People ex rel. Belden v. Contracting Bd., 27 N.Y. 378 (1863).

ers in regard to the funds and affairs of the New York State Inebriate Asylum because their power was "*quasi* judicial," the court nevertheless cautioned that "palpable abuse" of such power could conceivably render it amenable to "judicial control."[103]

The so-called judicial discretion of a board of supervisors was placed under attack where relator, a town highway commissioner, having submitted his bill for serving twenty-seven days at two dollars per day, was paid only thirty-four dollars without further explanation. In affirming the issuance of mandamus against the board, general term repeated that the exercise of such judicial discretion cannot be controlled by mandamus. Nevertheless, a proper and legal audit required the board to "detail and allow or disallow the various items."[104] An additional requisite was now perforce added to the conditions for the valid exercise of so-called judicial discretion by a basically administrative body, *viz.*, the body must make specific findings just as judicial tribunals do. It would be fair to assume that this duty of specification was ordered to enable a court to decide later whether the board had exercised its discretion reasonably.

As the period under consideration, 1777-1880, drew to a close, such narrow and restrictive limitations were ascribed to the function of mandamus by the courts as to make it appear that the earliest case of mandamus[105] was more liberal and remedial than the most recent. A statute had authorized the City of Troy to place its advertising in four newspapers having the largest circulation. When this was done, a fifth newspaper claiming the top circulation brought mandamus, in *People ex rel. Francis v. Common Council*,[106] citing circulation figures in support of its plaint and it was awarded the writ in the lower courts. However, upon appeal, the high court stated that the provision for highest circulation was not enacted for the benefit of the newspapers but was in the public interest, leading the court to rule that it was questionable whether the relator had "standing in court, to compel the municipal body to employ them."[107] The traditional function of mandamus "to compel the performance of mere ministerial acts" was noted and the converse rule was invoked that where the duty "is in its nature

103. People ex rel. New York Inebriate Asylum v. Osborn, 57 Barb. 663, 670 (N.Y. Sup. Ct. 1870). See also People ex rel. Otsego County Bank v. Board of Supervisors, 51 N.Y. 401, 408-09 (1873); People ex rel. Vanderlinden v. Martin, 58 Barb. 286, 288 (N.Y. Sup. Ct. 1870).

104. People ex rel. Thurston v. Board of Town Auditors, 20 Hun 150, 152 (N.Y. Sup. Ct.), aff'd, 82 N.Y. 80 (1880).

105. People v. Justices of Delaware Common Pleas, 1 Johns. Cas. 181 (1799) (per curiam), supra notes 18-20 and accompanying text.

106. 78 N.Y. 33 (1879).

107. Id. at 38-39.

judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body,"[108] mandamus will not go. A subordinate body cannot be directed to act in a particular way in exercising its judgment, the court ruled. It is the character of the duty and not the nature of the body or officer, contrary to the *Taylor* holding, that determines whether mandamus will lie.

> Where a subordinate body is vested with power to determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be.[109]

*People ex rel. Francis v. Common Council* provided an accurate, authoritative statement of the existing law and that which was to prevail for the next thirty years. The major objection to the opinion is that it characterized a determination of fact as one which was immune from any review by a higher tribunal despite a serious challenge to the probity of the facts in the record. The court foreclosed further inquiry by holding that any official person or body became judicialized by reason of having to determine a fact, which in turn freed it from any surveillance by a superior tribunal. The court of appeals concluded that it was not the province of the lower courts, *viz.*, special and general terms, "to determine the question of fact in the first instance, and direct what particular paper or papers should be designated."[110] Here, again, is a correct statement of the proper function of the courts because the power of decision in the first instance had been given to a specific body clothed with jurisdiction to determine the same. However, patently unfair or improper compliance with the requirements of law by disregard of the facts should not be condoned or ignored which is what the highest court wound up doing here. It noted that the four chosen newspapers were not parties to the proceeding, which contradicted its earlier argument that the public interest was the sole criterion in the enactment of the statute for advertising in the papers with the highest circulation; it noted further that they had already embarked on their services and that an additional expense might be imposed upon the city if the mandamus were granted. The court of appeals should have stated the proper governing principles in a firm manner to guide and impress future action of such bodies in the exercise of their judgment; it should not have allowed them to believe that consummation would carry the day no matter how wrong and illegal the action.[111] General and special terms were reversed.

108. Id. at 39.

109. Ibid.

110. Id. at 40.

111. Cf. People ex rel. Johnson v. Board of Supervisors, 45 N.Y. 196, 206 (1871); People ex rel. Stephens v. Halsey, 37 N.Y. 344, 346 (1867).

*People ex rel. Francis v. Common Council* shows that after a century of development of the New York legal system, the term "judicial" continued to be used freely and interchangeably with "discretion" to strike down applications for mandamus; some voices, however, were beginning to be raised against this loose practice.[112] The widespread tendency to equate discretion with judicial action, thereby immunizing such action from judicial review and control, was an ingenious device, but in the long run the use of the term "judicial" to block off examination of administrative discretion delayed the formulation of more realistic rules for judicial review by many decades.

## III. Statutory Provisions

The earliest New York statutory enactment on the subject of mandamus, in 1788, wisely re-enacted a statute adopted in England almost a century earlier.[113] The New York statute[114] essentially provided that after a return and reply were made in mandamus, the party suing out the writ, if he should prevail, would also have the remedy of damages as if he had prosecuted an action on the case for a false return. This early statute also authorized the supreme court to fix rules for periods of time required to plead in such proceedings as it "shall deem just and reasonable." The provision allowing damages, as in an action on a false return, was an effort to avoid needless circuity of action where it was claimed that false matter in the return precluded a proper determination on the merits, the return having always been regarded as conclusive of the facts pleaded therein.[115] Actually, this enactment was unnecessary because the 1777 constitution provided for the continued application of English statute law until changed by the state legislature.[116] The provision for awarding damages, although somewhat altered in purpose and effect, is still part of article 78 proceedings.[117] The authority given to the supreme court in regard to fixing the time for the service of pleadings shows that from 1777 to 1788, at least, the English practice was fully followed in all respects. The New York courts continued to be governed by English mandamus precedents in practice matters and in many other respects until well past the middle of the nineteenth century.[118]

112. People ex rel. Hotchkiss v. Board of Supervisors, 65 N.Y. 222, 226-27 (1875).

113. Act of 1710, 9 Anne, c.20.

114. N.Y. Sess. Laws 1788, ch. 11, ¶¶ 2, 3, 6.

115. See People ex rel. Aspinwall v. Supervisors of Richmond, 28 N.Y. 112 (1863); People ex rel. Shaut v. Champion, 16 Johns. R. 61 (N.Y. Sup. Ct. 1819).

116. N.Y. Const. art. XXXV (1777). Cf. 1 N.Y. Rev. Laws 526 (1813).

117. N.Y. Civ. Prac. Law & R. § 7806; see also N.Y. Civ. Prac. Act § 1300.

118. See, e.g., People ex rel. Aspinwall v. Supervisors of Richmond, 28 N.Y. 112, 114 (1863).

Although mandamus actions were in wide use by the time the wholesale consolidation of the adjective and substantive law was effected by the Revised Statutes in 1829, a mere handful of procedural provisions, taken mainly from the 1788 enactment, were carried over into the codification.[119] They were deemed so negligible as to be combined into a single article with the provisions for the writ of prohibition. Included were the most elementary rules of pleading, venue, verdict and damages, res judicata, time for pleading and for contempt action for disobeying the order of mandamus. These few provisions evidently exhausted all of the apparent need for a mandamus procedure at that time. The session laws of the subsequent years show that no essential change was effected, thereby leaving to the common-law courts the full power and responsibility to work out necessary accommodations to changing conditions.

Indeed, existing statutory provisions for mandamus were so highly esteemed that the Code of Procedure of 1848, as amended, specifically excepted mandamus from any alteration.[120] It is entirely possible that the legislators of the mid-nineteenth century considered that the complex problem of adapting the ancient prerogative writs to a wholly different system of government in a new land required the free play of the pragmatic genius of the common law. This was sound theory because the prerogative writs were the handiwork of the common-law courts of an earlier and different political society. Unfortunately, judicial preconceptions of tradition and blind adherence to precedent were permitted to stifle the viable development in New York of some areas of mandamus law. Until the Code of Civil Procedure went into effect in September 1880, the provisions of the 1788 enactment, with but minor additions and alterations, remained the sole statutory contribution to the subject.[121] This is a remarkably meager record of legislation for a remedy so extensively employed in the courts during a period of far-reaching change. The legislative self-abnegation in this area is all the more remarkable because other branches of adjective law had been made subject to detailed rules of procedure in the Revised Statutes, the 1848 Code of Procedure and in subsequent legislation.

## IV. Duty To Act

The fundamental concept of mandamus was based upon the root principle that there was a duty incumbent upon a public body or official to

119. 2 N.Y. Rev. Stat. 591-92, §§ 54-60 (1829).

120. N.Y. Sess. Laws 1848, ch. 379, § 390; N.Y. Sess. Laws 1849, ch. 438, § 471; N.Y. Sess. Laws 1852, ch. 392, § 471.

121. See, e.g., N.Y. Sess. Laws 1854, ch. 270; N. Y. Sess. Laws 1873, ch. 70. See also Weintraub, Statutory Procedures Governing Judicial Review of Administrative Action, 38 St. John's L. Rev. 86 (1963), for the period from 1880 to the present.

act in a prescribed manner in regard to a matter in which the relator had a vested interest. It was a concept diametrically opposed to that of discretion because the element of choice was not present, the duty and the function usually being classified as merely ministerial. Some of the early litigation arose out of genuine doubt by an official of his power to act in certain circumstances, and such hesitation is understandable where civil and criminal sanctions may ensue upon the wrong choice of action by an official.[122] For example, the state canal commissioners were reluctant to act upon a claim founded on the diversion of waters incident to the construction of the Erie Canal. Mandamus was brought to compel them to enter an appraisal of damages for this aspect of damage and the court upheld the application.[123] The court determined, as a matter of law, that relators presented an interest which entitled them to an appraisal although the extent of the damages was a matter ultimately reserved for the discretion of the commissioners.

Again, where the canal commissioners were uncertain as to whether the abstention of one dissenting commissioner from voting upon an award agreed to by the other two commissioners invalidated the action, the court found that the facts being undisputed and a valid appraisal having been made, the commissioners were duty-bound to pay the amount of damages fixed in the award.[124] The court used the occasion to note that "every officer is presumed to have done his duty." Not all such applications are granted, however, because where a right to specified official action is claimed, the statutory conditions for putting that action into motion must be fully met. So, in a case where relator's land had been taken for default in payment of quit-rents, the application for redemption was rightfully refused by the state comptroller because relator had omitted to serve the notice required by statute.[125]

Nor was a landowner entitled to a mandamus against a municipal body which, having caused estimates of the cost of an acquisition to be made by commissioners for a public improvement, declined to take further action because the estimates ran too high.[126] The court defined the office of mandamus as being applicable, "in general, in all cases where the injured party has a right to any thing done, and no other specific means of compelling its performance." But "until the proceedings have progressed

122. Weaver v. Devendorf, 3 Denio 117, 120 (N.Y. Sup. Ct. 1846).

123. Ex parte Jennings, 6 Cow. 518 (N.Y. Sup. Ct. 1826), peremptory mandamus granted sub nom. People ex rel. Jennings v. Seymour, 6 Cow. 579 (N.Y. Sup. Ct. 1827).

124. Ex parte Rogers, 7 Cow. 526 (N.Y. Sup. Ct. 1827).

125. People ex rel. Ainsworth v. Comptroller of State of N.Y., 1 Wend. 301 (N.Y. Sup. Ct. 1828).

126. People ex rel. Dikeman v. President of Village of Brooklyn, 1 Wend. 318, 325 (N.Y. Sup. Ct. 1828).

so far as to give mutual rights to the parties, the trustees have a discretion, and may refuse to proceed; but after rights become vested, by virtue of these proceedings, they cannot refuse, with impunity, to proceed."[127]

Where mere ministerial acts were involved, the courts would not allow the ministerial officer to go afield into collateral matters not confided to him under the guise of exercising discretion. Thus, upon application by a minor already authorized to be appointed a commissioner of deeds, the clerk of common pleas who was delegated to administer the oath of office refused to act because a minor cannot hold a civil office in the state.[128] The court held that upon the production of the commission the clerk was required to administer the oath. His was only a ministerial function, excluding any element of choice or discretion.

## V. No Other Specific Legal Remedy

In the words of an English authority often cited in mandamus decisions during the first century of New York's statehood, the writ "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."[129] However, it is to be "regarded as an auxiliary, to be called into action when the regular forces prove unequal to the emergency, and supplements some defects in the administration of justice."[130] The "regular forces," the common-law remedies, were not equipped to deal with the constant changes and developments in government, in society and in the evolution of individual rights and interests where they touched the citizen's relation to his government, so mandamus went out to meet these new demands in the interests of justice.[131]

General term of the supreme court found much to criticize, however, in the increased practice of settling complicated questions in summary fashion solely on the basis of affidavits in mandamus actions. It held that the public interest involved in the payment of considerable sums of money was ill-served by a summary disposition depending upon such self-serving documentation.[132] The court was of the firm opinion that con-

127. Id. at 324-25. Cf. People ex rel. Fountain v. Board of Supervisors, 4 Barb. 64 (N.Y. Sup. Ct. 1848); People ex rel. Fiske v. Common Council of City of Brooklyn, 22 Barb. 404 (N.Y. Sup. Ct. 1856).

128. People ex rel. Dobbs v. Dean, 3 Wend. 438 (N.Y. Sup. Ct. 1830).

129. Introduction to 3 Bacon, Abridgement of the Law: Mandamus 535 (6th ed. 1793).

130. People ex rel. Johnson v. Martin, 62 Barb. 570, 575 (N.Y. Sup. Ct. 1872).

131. People v. Supervisors of County of Columbia, 10 Wend. 363, 367 (N.Y. Sup. Ct. 1833); People ex rel. Dikeman v. President of Village of Brooklyn, 1 Wend. 318 (N.Y. Sup. Ct. 1828); Ex parte Bostwick, 1 Cow. 143 (N.Y. Sup. Ct. 1823).

132. People ex rel. Bagley v. Green, 1 Hun 1 (N.Y. Sup. Ct. 1874). Cf. People ex rel. Taylor v. Brennan, 39 Barb. 522, 547 (N.Y. Sup. Ct. 1863) (dissenting opinion).

flicting issues of fact should be decided by a jury according to the course of the common law.[133] That viewpoint ultimately found its way into the code provisions governing procedure for state writs.[134] In the *Bagley* case, the mandamus was denied because a complete remedy by legal action was deemed to be available.

The courts, meanwhile, continued to wrestle with the question of whether availability of a suit at law against a public official would preclude recourse to mandamus. Relator had been awarded a peremptory mandamus by general term which directed the defendant supervisor and railroad commissioners of a town to pay interest on certain bonds held by him. In the court of appeals it was argued that relator could bring an action on the case against defendants. However, such a suit would not be for the amount of interest but for unliquidated damages by reason of the wrongful action of defendants in refusing to pay over money owed to relator.[135] This was plainly an inadequate legal remedy and if it were accepted to stave off mandamus, it would result in the rejection of many mandamus actions of like nature. It was ruled that "where a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus."[136] The order of the lower court was reversed, however, upon other grounds. With utmost cogency, the court indicated that a particular mode of action prescribed by law could always be enforced by mandamus in the interest of an individual claiming the benefit thereof, especially where existing common-law remedies provided less than full satisfaction. According to the *Mead* case, the existence of a legal remedy which is less than perfect would not bar a claim for mandamus relief which was otherwise meritorious.

## VI. Clear Legal Right

It would appear self-evident that before an extraordinary legal remedy such as mandamus could be invoked, the claimant should be able to show a clear legal right to the relief requested. The phrase, "clear legal right," was first used in a case which was largely concerned with another requirement of the mandamus writ, *viz.*, the lack of any legal remedy. The court there categorically announced that "the party asking for a mandamus must have a clear legal right," else it will be denied.[137]

133. See also People ex rel. Tenth Nat'l Bank v. Board of Apportionment, 3 Hun 11 (N.Y. Sup. Ct. 1874), aff'd per curiam, 64 N.Y. 627 (1876).

134. N.Y. Code Civ. P. §§ 2083, 2084 (1880).

135. People ex rel. Fiedler v. Mead, 24 N.Y. 114, 119-20 (1861).

136. Id. at 123; see also People ex rel. Ryan v. Green, 58 N.Y. 295, 306 (1874).

137. People v. Supervisors of County of Columbia, 10 Wend. 363, 366 (N.Y. Sup.

A fairly frequent function for mandamus, albeit largely unsuccessful at first, was its use by disappointed low bidders on public contracts. In a particularly interesting case in 1852, one Yates had been low bidder on certain canal work and he was given the job. He insisted, however, that the board adopt a formal resolution awarding the contract work to him; the board refused and he brought mandamus. The court could find no precedent for requiring the board to execute a contract with relator. The decision specified that " 'the party asking for a mandamus must have a *clear legal right* . . . ;' " which the court decided did not exist there.[138] Whether a contract should be awarded to relator was, according to the court, a question of public right and relator, as a citizen, had no right to the mandamus he requested.[139] The court further stated that relator had no individual, private interest in being awarded the contract and that only the public weal should govern whether such a contract was to be awarded. In this the court plainly erred because it is quite obvious that relator did acquire an individual interest in having the work formally awarded to him, for he had been instructed to proceed, and the detail of securing suitable protection by means of a resolution was merely ancillary to that fact. What probably troubled the court was that low bidders on public contracts had not acquired full legal status at that early date and the court was uncertain whether it should create such a legal right in the low bidder.

The rule laid down in the *Yates* case was soon reinforced in another low bidder's application for mandamus where his bid had been rejected because of a minor defect in the verification of the bid papers. The court reiterated that an applicant for the writ must have a clear legal right, and a low bidder's public works proposal created no legal right until a contract was made.[140] It adverted to several reasons why a low bid may be rejected without even touching the merits of the bidder's proposals. In a lucid analysis of the reasons for taking bids on public works contracts, the court skillfully analyzed away any legal right in the low bidder to be awarded the contract, stating: "Besides, these various laws were made, not to give a right to the lowest bidder to have a contract made with him; they were not made for his benefit, but for the benefit of the public alone,

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Ct. 1833). See also People ex rel. Perkins v. Hawkins, 46 N.Y. 9, 10 (1871); People ex rel. Mygatt v. Supervisors of Chenango, 11 N.Y. 563, 574 (1854); People ex rel. Dikeman v. President of Village of Brooklyn, 1 Wend. 318, 324-25 (N.Y. Sup. Ct. 1828).

138. People ex rel. Yates v. Canal Bd., 13 Barb. 432, 443 (N.Y. Sup. Ct. 1852).

139. Id. at 448.

140. People ex rel. Dinsmore v. Croton Aqueduct Bd., 26 Barb. 240 (N.Y. Sup. Ct. 1857).

and that the public might have the work done at the lowest price."[141] This remains the law in the federal field.[142]

Towards the end of the period under study, it became established beyond cavil that mandamus would not issue in cases of doubtful right.[143] In this respect, the attitude of the courts approached that of the courts of equity when application was made for an injunction, that relief would only be granted where a clear right was infringed or in danger of being damaged. In addition, the requirement would appear to be both logical and reasonable in view of the fact that the method of proof varies from the course of the common law, and government machinery is being placed into motion at the instance of, and usually for the sole benefit of, an individual requesting action against the government itself.

## VII. Judicial Discretion in Granting Mandamus

A vital condition annexed to the issuance of mandamus, and frequently found in close concert with availability of another legal remedy and clear legal right, is the power of the supreme court to issue or to deny the writ in its discretion. The discretionary character of mandamus patently derived from its prerogative origins; the public interest was paramount and always governed the conditions under which the writ would issue.

This rule evolved relatively early in the development of mandamus. It was cited in a case where a doctor was refused admission to the Orange County Medical Society on the ground that he did not follow accepted medical methods and had slandered the society, whereupon the doctor brought mandamus.[144] The court sided with the medical society, describing relator as a "quack" who would be expelled soon after being admitted to the society. In its "discretion," therefore, the court denied the application for mandamus to admit relator. This was a decision of doubtful validity because petitioner had complied with all requirements for his admission and, in addition, if his eventual expulsion was a serious prospect, he was entitled by law to a hearing before the county judges. It was much like a decision by Lord Mansfield where the Chief Justice of King's Bench refused to restore a person to public office on the ground that the official body could legally remove him as soon as he was restored.[145]

A more discriminating use of the court's discretion to issue or withhold a mandamus arose in a conflict between two opposing court orders.

141. Id. at 252.

142. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

143. People ex rel. Duff v. Booth, 49 Barb. 31 (N.Y. Sup. Ct. 1867); People ex rel. Hackley v. Croton Aqueduct Bd., 49 Barb. 259 (N.Y. Sup. Ct. 1867); People ex rel. Dennis v. Brennan, 45 Barb. 457 (N.Y. Sup. Ct. 1866).

144. Ex parte Paine, 1 Hill 665, 668 (N.Y. Sup. Ct. 1841).

145. Rex v. Mayor of Axbridge, 2 Cowp. 523, 98 Eng. Rep. 1220 (K.B. 1777).

A common pleas judge had issued an order for the imprisonment of a debtor, but a United States court enjoined enforcement of the order. Upon an application for mandamus to compel common pleas to go through with the imprisonment, the supreme court fell back upon its prerogative and remarked that "it would be very indiscreet to place the judge between two fires, as we should do by granting this motion."[146] The court wisely denied the application despite the fact that there was a clear legal right to enforcement of the order and no other specific legal remedy was available.

Sometimes what a court likes to call its discretion in granting or withholding the writ is really the result of the court's evaluation and resolution of interior legal questions. Thus, where a low bidder on a public contract lost out to the next higher bidder who had already commenced work on the public improvement, the court of appeals reversed general term and denied mandamus.[147] The court, in discussing its discretion, noted that no property of relator had been taken and that his claim rested "upon the interests of the State to have its work done by the lowest bidder, and not upon a legal right on his part."[148] These are legal questions which did not directly involve the discretion of the court. However, the court did advert to the inconvenient fact that the other contractor was already engaged in the work and it saw no way in which the denial to relator could be undone; nor would it have the state, although wrong in this case, pay compensation to two contractors to vindicate a mere principle.

The court's discretion is, therefore, a constant and vital element in the ultimate right to the issuance of any mandamus. This is understandable for the additional reason that the court is ofttimes dealing with the powers of another coordinate arm of the government. Also, the balance of advantage between public and private interests, where those interests conflict, must always be carefully weighed and the greater must give way to the lesser. By the mandamus writ, the state tells itself to do a certain thing in the interest of individual or group justice, except when the greater interest of the state intervenes. As the court of appeals said in the *Belden* case: "The courts cannot correct all the evils incident to the administration of government . . . ."[149] Designed to achieve remedial justice, mandamus must never be allowed to become a device for perpetrating a greater injustice than the one it was called upon to suppress; nor should

146. Ex parte Fleming, 4 Hill 581, 584 (N.Y. Sup. Ct. 1843).

147. People ex rel. Belden v. Contracting Bd., 27 N.Y. 378 (1863); accord, Cestone Bros. v. Solowinski, 276 App. Div. 970, 95 N.Y.S.2d 170 (2d Dep't 1950) (memorandum decision).

148. 27 N.Y. at 382.

149. Ibid.

it be allowed to issue where a patently larger public interest will thereby become subordinated to a lesser private interest.

## VIII. Limits on the Power of the Supreme Court

Although the supreme court is the tribunal of general, original jurisdiction over legal matters in the State,[150] it nonetheless cannot entertain every controversy which seeks to enlist the aid of its powers of mandamus. But one early effort to restrict its broad power to award mandamus relief, on the ground that the court lacked jurisdiction to act, in *Ex parte Heath*,[151] was not crowned with success. Relators claimed to have been elected to various offices in the City of New York where the results were in close dispute, and they requested mandamus requiring the mayor to administer the oath of office to them. It was argued that the common council, as in the case of other legislative bodies, is the sole judge of the election of its members, thereby ousting the supreme court of jurisdiction. The court, however, fell back upon English cases which held that only express words will take away jurisdiction, and awarded the mandamus requested.

In another case, at about the same time, 1842, where the statutory language provided that the actions of the canal commissioners were "final and conclusive," the court was compelled to concede, on the other hand, that it was without power to examine the case.[152] Likewise, where replacement of relator as a brigadier general in the state militia was challenged by mandamus, the court acknowledged that the constitution and the laws of the State vested the Governor with definitive discretion in such matters, leaving no more power in the supreme court than it would have to "review his acts in granting pardons or nominating to office."[153] The court perhaps goes a little further than necessary in according blanket authority and power to the Governor, for there may arise that case where the exercise of his powers in regard to the militia is attended by clear and specific statutory conditions which should then be a justiciable matter if called into question.

In another instance where a species of executive discretion was involved, the court ruled that the attorney general of the State could not be "mandamused" to "bring *quo warranto* proceedings to litigate the validity of a disputed election."[154] The court said of the attorney general: "His

150. Matter of Steinway, 159 N.Y. 250, 258, 53 N.E. 1103, 1105 (1899).

151. 3 Hill 42, 50-53 (N.Y. Sup. Ct. 1842), aff'd Ct. Err., June, 1842.

152. People ex rel. Durham v. Commissioners of the Canal Fund, 3 Hill 599, 604 (N.Y. Sup. Ct. 1842). Cf. Lawton v. Commissioners of Highways, 2 Cai. R. 179 (N.Y. Sup. Ct. 1804), in regard to certiorari.

153. People ex rel. Lockwood v. Scrugham, 25 Barb. 216, 234 (N.Y. Sup. Ct. 1857).

154. People ex rel. Peabody v. Attorney Gen., 22 Barb. 114, 116-17 (N.Y. Sup. Ct. 1856).

office is a public trust. It is a legal presumption that he will do his duty; that he will act with strict impartiality. . . . The exercise of such discretion is, in its nature, a judicial act, from which there is no appeal, and over which the courts have no control."[155] On the contrary, if he instituted a *quo warranto* proceeding, the attorney general would not be exercising a judicial function, but it was a commonplace of this period to describe nonreviewable discretion or judgment as judicial in order to preclude court review of the action. The decision was otherwise a valid one in denying mandamus which sought to compel an officer of the executive department to exercise his discretion in the particular mode desired by relator.

In like manner, the legislative department of government has been placed beyond the reach of mandamus, although this was not the rule in the early days of New York jurisprudence.[156] The immunity of legislative bodies from mandamus received only passing notice in a case conspicuous for other features. The Board of Supervisors of Schenectady County had adopted a resolution establishing and apportioning county-wide values for tax purposes, but then reconsidered and reapportioned them on the following day, whereupon relief was sought by mandamus to retain the original valuations.[157] The multiple functions of such a body, exercising judicial, executive and legislative powers, were properly noted.[158] The court said that the board did not function legislatively in respect to the setting and apportioning of values because "it is to act under a law already made."[159] This comment is a valuable contribution to the clarification of a problem which still vexes the courts in reviewing the action of similar bodies performing several functions of government. In that particular case, it was held that the power exercised was judicial and under traditional judicial practice, once exercised could not thereafter be recalled.

Using a concept announced in the foregoing case, general term directed the Common Council of the City of New York, pursuant to state law, to issue stock for the purchase of an area to be used as a public market.[160] The court viewed the action to be taken as ministerial rather than strictly legislative, ruling: "They have no discretion in the matter as in the ordinary cases of municipal legislation; they must obey the supreme legisla-

155. Id. at 118.

156. People v. Supervisors of County of Columbia, 10 Wend. 363 (N.Y. Sup. Ct. 1833).

157. People ex rel. Thomson v. Board of Supervisors, 35 Barb. 408 (N.Y. Sup. Ct. 1861).

158. Id. at 415.

159. Id. at 413.

160. People ex rel. Commissioners v. Common Council of City of New York, 45 Barb. 473 (N.Y. Sup. Ct. 1866).

tion."[161] This occurred in a day when general statutes were uncommon and directory legislation from Albany pertaining to every type of local problem issued in a steady stream.

The usual type of legislation, however, was not subject to judicial review or direction by mandamus. This was established early, in *People ex rel. Lynch v. Mayor of City of New York.*[162] The salary issue involved in the *Lynch* case would appear to have been more ministerial than legislative in nature, however, and therefore amenable to mandamus.

## IX. STANDING

Although the cases referred to the necessity for an individual or personal interest in the matter for which a mandamus is sought, the rule was sometimes bypassed by the court's adverting to the larger public interest which enables any citizen to secure the writ in the interests of justice and good government.[163] It must be remembered that a taxpayer action was unknown at this time so that mandamus was one of the few measures available to the public-spirited citizen interested in arresting public fraud, chicanery and corruption which were quite rife in this period. Consequently, a personal or individual interest in the matter complained of was not strictly enforced where mandamus was sought.[164] The rule was otherwise where one brought an ordinary action in law or equity in the general capacity of a citizen.[165]

## X. MANDAMUS—SUMMARY

The writ of mandamus first entered upon its responsibilities in an atmosphere clouded by colonial hostility to English laws and institutions. Notwithstanding this obstacle, James Kent and his brethren of the New York Supreme Court of Judicature had small choice but to enlist the aid of English legal authorities such as Coke, Blackstone, Bacon, Viner, Comyns and Hawkins, and the judicial precedents of Holt and Mansfield in order to cope with the diverse problems of the infant legal system. The first constitution had also signified recognition of a need for following the established body of English law. Although detailed answers to many questions springing from native conditions could not be directly

161. Id. at 474-75.

162. 25 Wend. 680 (N.Y. Sup. Ct. 1841).

163. People ex rel. Case v. Collins, 19 Wend. 56, 64-65 (N.Y. Sup. Ct. 1837). See also People ex rel. Blacksmith v. Tracy, 1 Denio 617 (N.Y. Sup. Ct. 1845); Commercial Bank v. Canal Comm'rs, 10 Wend. 25 (N.Y. Sup. Ct. 1832).

164. People ex rel. Stephens v. Halsey, 37 N.Y. 344, 346-47 (1867).

165. Roosevelt v. Draper, 23 N.Y. 318, 323 (1861); Doolittle v. Supervisors of Broome County, 18 N.Y. 155 (1858). Cf. Christopher v. Mayor of City of New York, 13 Barb. 567, 571 (N.Y. Sup. Ct. 1852).

supplied by English legal authorities, they did provide a *corpus juris*, a starting point for reasoned solutions which ultimately were transformed into local law.

Mandamus played a prominent part in the development of New York law by answering a serious procedural deficiency in the early, fragmentary law of the State. It acquired immediate popularity as a procedural device to facilitate judicial review of intermediate matters not otherwise subject to certiorari or writ of error review. Under normal circumstances such a function should have been performed by certiorari. The urgent need for this type of appellate device conspired, however, to place early mandamus within the narrow compass of a mechanical, workhorse writ. Confined to shuttling minor appeals between courts, the traditional function of mandamus as an original writ of justice to require compliance with the law was completely overshadowed.

Owing to the paucity of indigenous law and the slow, patchwork process of adapting English law to local conditions, there could hardly be any meaningful symmetry or consistency in the formative period of our law. In addition, the exigencies of particular cases, the lack of a native legal tradition, the sparse legal authorities and precedents available, and the limited learning of the judges all combined to shape the emergence of mandamus along narrow, simplified lines. Nevertheless, principles fundamental to the operation of the writ of mandamus were fashioned early in our legal history under the impetus of a spreading need for and reliance upon that ancient remedy.

For example, in spite of the widespread mechanical use of mandamus as an auxiliary writ of review, tentative efforts appeared early in the nineteenth century to explore its relationship to the complex problem of controlling arbitrary exercise of discretion. The greatest impulse to this trend arose out of the absence of an appellate procedure to bring up intermediate matters involving the exercise of discretion by inferior judicial tribunals. However, the dichotomy between the traditional use of mandamus to require performance of a ministerial act (lacking any element of choice) and the simultaneous effort to develop the writ to review consummated, arbitrary exercise of discretion (exemplifying the very essence of choice) presented an apparent contradiction and resulted in confusion. Out of the confusing and conflicting mandamus decisions which wrestled with the dual objectives of the writ, the courts somehow managed to hammer out enduring insights regarding the nature and quality of discretion. The effort to control exercise of arbitrary discretion came to an early end because judicial bodies were primarily the object of attack and the and the overtaxed reviewing courts, reluctant to lay restraints upon the lower judiciary, invoked century-old English precedents to doom the

effort. The reach of the rule of nonreviewability was indiscriminately extended to include legislative and administrative bodies exercising discretionary functions which thereby immunized a wide range of activities from the scrutiny of judicial review by mandamus.

In assessing this period we should not lose sight of the achievement accomplished by the reviewing courts in forging a complete arsenal of working rules for mandamus out of their everyday confrontation with practical problems. Legislative inaction in this area of the law allowed the courts to engage in a species of legislative activity to fill large gaps in procedural law, and in the end to formulate a species of substantive law. It enabled the courts to utilize a wider range of choice from the competing considerations in each case, and later the most desirable results were codified into the Code of Civil Procedure.

It is also notable that there was complete acceptance by the courts of the role and reliability of administrative bodies in discharging important functions of government. These bodies were accorded a wide latitude of action because they exercised a combination of legislative, administrative, judicial and executive functions, but the lines of distinction between these functions were not clearly perceived in the early decades of the nineteenth century. The so-called judicial nature of some of their functions had led to their becoming relatively free from judicial interference or control by mandamus, as witness the protective label "judicial" affixed to much administrative action when court review was denied on that specific ground.

Although the hold of absolute discretion was not appreciably altered by means of mandamus review, it must be emphasized that the writ was in active and extensive use throughout the first century of New York legal history for many purposes previously unknown to the law. Many acts of government, other than the purely legislative and judicial, were brought into closer conformity with the requirements of law, to the ultimate advantage of both citizen and government.

## PART TWO: COMMON-LAW CERTIORARI

### I. BEGINNINGS

In contrast to the comparative lack of early statutory provisions governing the use of mandamus in the State of New York, certiorari was widely employed in the very first years for bringing up decisions of inferior tribunals for appellate review by the supreme court and common pleas. Its greatest use was sanctioned by a statute of 1801,[166] which provided for review of certain justice court judgments, orders and pro-

166. N.Y. Sess. Laws 1801, ch. 165, § 19. See Nicoll v. Dunlap, 2 Johns. R. 195 (N.Y. Sup. Ct. 1807).

ceedings upon certiorari issuing from the supreme court. Review of criminal indictments and presentments by means of certiorari was also authorized in that same year,[167] so that even before our formal law reports were issued in 1804,[168] certiorari was already in constant use as a statutory writ of review. Consequently, the employment of certiorari in non-statutory situations was more quickly grasped and refinements in practice and procedure were achieved much earlier than in mandamus. Rules applicable to statutory certiorari were unhesitatingly carried over to common-law certiorari, in the absence of an adequate body of law in that area.

The common-law writ of certiorari, as received by the new State, issued out of the supreme court, commanding tribunals and officers exercising powers affecting the property or rights of citizens, to return the record of their proceedings to that court for examination.[169] It was intended to perform the same function as an appeal in the absence of a specific procedure for court review of the action of inferior tribunals and magistrates.

As noted in the study of mandamus, early law reports were scarce and there was heavy reliance upon English practice, precedents and text authorities. In a highway case[170] which is typical of the controversies which engaged the attention of New York courts in their infant years in this area of law, a landowner brought his dispute with a turnpike company into the supreme court by common-law certiorari upon allegations that the statutory procedure for acquiring his property had not been followed. The court, after citing several leading English cases, expressed zealous concern for the protection of property rights and stated that where laws interfere with those rights they must be strictly adhered to. It determined that because a disagreement as to the terms of the acquisition did not actually exist, and because of the omission of other facts showing jurisdiction to act, there was no legal basis for the appointment of commissioners of arbitration. The court granted the application to set aside the inquisition under which the arbitrators were to act. Common-law certiorari had been set upon the right path in its infancy here.

The leading case for over fifty years of certiorari law came quite early in New York history in a decision rendered by the supreme court in *Lawton v. Commissioners of Highways*.[171] Plaintiff claimed that a road which had been laid out by defendant highway commissioners, and affirmed on appeal by common pleas, was not of the width required by statute and had not been requested as necessary by twelve freeholders.

167. N.Y. Sess. Laws 1801, ch. 13.
168. Preface, 1 Johns. Cas.
169. Dunlap, The New York Justice 61 (1815).
170. Gilbert v. Columbia Turnpike Co., 3 Johns. Cas. 107 (N.Y. Sup. Ct. 1802).
171. 2 Cai. R. 179 (N.Y. Sup. Ct. 1804).

Defendant commissioners argued that the statute made the decision of common pleas conclusive and therefore the supreme court was precluded from reviewing it by certiorari, thus raising a complex issue for resolution by the fledgling tribunal. The court replied that where the property or rights of a citizen are involved, even if the statute makes the action final, the supreme court retained jurisdiction to review because inferior jurisdictions must be subject to the corrective action of higher courts.[172] Although the return did not show that the width of the road complied with the statute nor that twelve freeholders had requested the road as necessary, the court indicated that it would presume that these requirements had been met. The judgment of the lower court was affirmed, but inferior tribunals were now placed on notice that their proceedings were subject to examination by the supreme court for conformity to legal requirements notwithstanding the existence of a statutory provision stamping their action as conclusive.

Although extensively cited for decades afterwards, the *Lawton* case constitutes a weak decision because instead of requiring the lower tribunal to show that it acquired jurisdiction to act by virtue of the two statutory conditions, the court merely attached a label of presumptive regularity to the actions of the highway commissioners. In form, Judge Spencer said that the supreme court will review, but in substance, the opinion glossed over the issues of jurisdictional fact governing the power and authority of the highway commissioners to act. Despite its sound pronouncements and the high standing of the jurist who wrote the opinion, later cases would require affirmative proof in the return that the facts relating to jurisdiction were presented to the inferior tribunal, and mere reliance upon a presumption of regularity would not suffice. What emerges as the lasting grace of the decision is the strong stand taken that lower tribunals and officers are subject to the supervisory review of the supreme court and will therefore be required to stand such examination upon common-law certiorari, notwithstanding preclusionary language emanating from the legislature.

Citing the *Lawton* case as authority, another early case, *Wildy v. Washburn*,[173] announced that "wherever the rights of an individual are infringed by the acts of persons clothed with authority to act, and who exercise that authority illegally, and to the injury of an individual, the person injured may have redress by certiorari . . . ."[174] A rather broad

172. Id. at 182. An earlier case, Jones v. Reed, 1 Johns. Cas. 20 (N.Y. Sup. Ct. 1799), had required the return to show express proof of power to act; nothing was to be assumed by implication. See also Yates v. Lansing, 9 Johns. R. 395, 437 (N.Y. 1811).

173. 16 Johns. R. 49 (N.Y. Sup. Ct. 1819).

174. Ibid.

jurisdiction was thereby asserted which ignored the nature of the initial action brought up for review in that case—a disputed election—and the type of tribunal there involved—justices of the peace filling a vacancy in public office pursuant to statute. This action was not in the nature of a judicial act, the essential basis of certiorari jurisdiction to review. But in view of the large powers given to highway commissioners, turnpike companies,[175] and others, some general assurance that protection against abuse of official power was available seemed to have become necessary. Although the *Wildy* case had been in certiorari, the scope of official action referred to could have encompassed areas of mandamus jurisdiction under the language cited above. At this point in our legal development, however, the lines between certiorari and mandamus were somewhat blurred because the courts had not reached the point of defining "judicial" action (reviewable by certiorari) and "ministerial" action (reviewable by mandamus) adequately, if at all. In fact, the basic problem was not resolved procedurally until the finely spun distinctions between certiorari and mandamus were wiped out by the adoption of article 78 in 1937.[176]

"The necessity of a superintending power *to revise the proceedings and correct the irregularities* committed by inferior officers, cannot be questioned . . ." held an important case, *Lynde v. Noble*,[177] in 1822, where the court was considering a motion to quash a certiorari taken out to review eviction proceedings pending in a lower court. The motion to quash was granted, but not before the court had noted its authority over inferior courts and persons "invested by the Legislature with power to decide on the property or rights of the citizens, even in cases where they are authorized by Statute finally to hear and determine; and this power can only be taken away by express words."[178] The court cited *Lawton* and English precedents in support of its position. At this stage the supreme court had not reached the point where it seriously distinguished between certiorari authorized by statute and common-law certiorari. *Lynde v. Noble* was in the former class and the quoted language was unnecessary *dicta* because the statute specifically provided for review by certiorari.

In addition to reasserting the power to review determinations affecting property and rights which would otherwise go unreviewed, the supreme court enunciated an important principle which is still operative in administrative law. It ruled, adversely to the party bringing the certiorari, that a proceeding then pending would not be removed until the lesser tribunal had reached a decision, else the supreme court would be acting as a court

175. Bradhurst v. Southwestern Turnpike Co., 16 Johns. R. 8 (N.Y. Sup. Ct. 1819). See also People v. Runkel, 6 Johns. R. 334 (N.Y. Sup. Ct. 1810) (per curiam).

176. N.Y. Sess. Laws 1937, ch. 526, §§ 1283-1306.

177. 20 Johns. R. 80, 83 (N.Y. Sup. Ct. 1822).

178. Id. at 82.

of original jurisdiction in the matter, and the purpose of certiorari in vesting the court with revisory powers would be lost. Thus there was established at an early date the rule requiring a final administrative determination before a party can secure judicial review. In *Lynde v. Noble*, the applicant's error was understandable because certiorari had long been utilized to remove criminal proceedings for review by a superior body before their conclusion. This decision made it quite clear that the rule applicable to criminal certiorari would not be extended to civil litigation.

## II. Scope of Review

The early decisions of the supreme court had accomplished little more than to pre-empt the general areas for intercession by common-law certiorari. The primary objective of confining inferior tribunals and officers within their legal authority and jurisdiction having been achieved by certiorari review, the court then faced the infinitely more difficult problem of working out the nature and scope of that review. Before it could get fairly started upon formulating the broad outlines of an approach, the court was confronted with a perplexing problem which remains relatively unsolved to this day.

Sewers had been installed in Canal Street, New York City, and plaintiff complained of the small number of property owners, like himself, who were assessed for the cost of the improvement despite the fact that a much larger number of owners in the area would derive a benefit from the installation. Plaintiff argued, in *LeRoy v. Mayor of New York*,[179] in 1823, that defendants must exercise a legal discretion in fixing the area to be assessed for the cost of the sewer. Defendants rejoined that according to New York and English precedents, the reviewing court does not examine into the merits but only determines whether "the inferior tribunal has exceeded its jurisdiction."[180] This was an accurate statement of the law of that time. But the court replied as follows:

> Who are to be comprehended in an assessment, depends on the principle on which it is made; that must be determined by a sound construction of the law, applied to the facts. It does not rest in the discretion of those who are to execute the law. The superintending power of this court is competent to establish the principle, and compel the inferior authority to be governed by it; leaving to its discretion the manner of levying, and the amount of contribution, to be exacted from each individual.[181]

Although the statute was silent on the extent and scope of the benefit assessment to be levied, the court itself adopted the corollary principle

179. 20 Johns. R. 430 (N.Y. Sup. Ct. 1823).
180. Id. at 437.
181. Id. at 439-40.

that all who benefit to a degree, which it never clearly specified, must share the burden of the cost of the sewer, and it vacated the assessment previously made. Most important, the rule was postulated that ascertainment of legislative intention from statutory language was solely a judicial function. "It does not rest in the discretion of those who are to execute the law."

The decision raises as many questions as it answers. Despite a discretion confided to defendants by the general terms of the enabling statute, the court nevertheless arrogated to itself the power of passing upon the discretion exercised in the distribution of the financial burden to be imposed upon the area. Until that time, the major test in certiorari review was whether there was the power to do the act; once jurisdiction was established, there was no other basis for interference by the court. But the legal principle engrafted by the court upon the exercise of discretion here was not susceptible to uniform, objective application. Questions of degree of benefit invariably arise upon such assessments and are peculiarly suited for the administration, not for the judiciary; the latter was only required to test the exercise of power on the bare question of jurisdiction. The cases had held that within their jurisdiction, inferior bodies, like the courts, could make poor decisions without being overturned if a positive rule of law or statutory requirement was not abridged.[182] The court may have detected a serious injustice in this case, but it again proved the axiom that "hard cases make bad law." *LeRoy v. Mayor of New York* quickly acquired status as authority for examining such assessment proceedings by means of certiorari, but it was narrowly construed to authorize an inquiry only into the principles of the assessment, not the amount.[183] But the question specifically raised in *LeRoy v. Mayor of New York* has presented a thorny problem to the courts for more than three centuries and it has not yet been laid to rest.[184]

The law of certiorari was restored to its normal channel of operation, strictly speaking, in *Starr v. Trustees of Rochester*,[185] where a building of the value of $800 was removed from a street which was being altered. Statute law prohibited the alteration of a street where the value of a building to be removed exceeded one hundred dollars, and plaintiff tax-

182. Woolsey v. Tompkins, 23 Wend. 324, 327 (N.Y. Sup. Ct. 1840); Birdsall v. Phillips, 17 Wend. 464 (N.Y. Sup. Ct. 1837).

183. Baldwin v. Calkins, 10 Wend. 167, 181 (N.Y. Sup. Ct. 1833); Bouton v. President of Brooklyn, 2 Wend. 395, 398 (N.Y. Sup. Ct. 1829).

184. See Pinkus v. Incorporated Village of Hempstead, 16 App. Div. 2d 931, 230 N.Y.S.2d 670 (2d Dep't 1962) (memorandum decision); Rooke's Case, 5 Co. Rep. 99b, 77 Eng. Rep. 209 (C.P. 1598), treated in Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 9 N.Y.L.F. 478, 505 (1963).

185. 6 Wend. 564 (N.Y. Sup. Ct. 1831).

payers brought certiorari. The court acknowledged the limits on its powers by stating that its review was

> confined to an examination of the jurisdiction of such inferior tribunals, and to questions of law arising out of their proceedings; not to an examination of their decisions upon questions of fact. . . . It may be, and indeed is necessary for them in their returns, to state such facts as are necessary to show their jurisdiction.[186]

The court added that it would not review decisions on such questions of fact. The certiorari was refused upon a technicality.

The *Starr* decision is valuable for its specificity as opposed to the ambiguity of *LeRoy v. Mayor of New York*, which it in effect overruled. In addition to re-establishing the prior rule that certiorari actions are confined to a review of jurisdiction, it is notable for the introduction of language which would ultimately lead to broader review upon questions of jurisdictional fact. This would not come to pass for several decades, but the basis for such inquiry was established by the reference made to reviewing all "questions of law" and the necessity for the return "to state such facts as are necessary to show their jurisdiction."[187] The court evinced full awareness of the dichotomy between question of fact and question of law, searching to evolve a rule to bring the latter question under greater judicial control. In time the purely mechanical, judicial review which ignored administrative action touching legal questions would be supplanted by a form of appellate treatment in certiorari actions.

A rather bold decision was the first contribution from the highest court, the court of errors, on a point of certiorari law in *President of Brooklyn v. Patchen*.[188] Property had been taken for a street in Brooklyn and one owner had requested an adjournment of the valuation proceedings to enable his expert witness on property values to be present, but was refused. The supreme court sustained certiorari in the owner's favor, and in the high court Chancellor Walworth, in affirming, laid it down as a rule that "where palpable injustice has been done by an inferior jurisdiction in the exercise of a discretionary power,"[189] it may be corrected by certiorari or mandamus. This is a rather long step in the general direction laid down by the *Starr* case, but the court appears to have overextended itself in treating of an adjournment, a matter usually confided to the broad discretion of the lower body. Although the reversal was secured in this case by means of certiorari, it must be remembered that the court of errors was dealing with and overruling a lesser judicial tribunal. At this

186. Id. at 566. See also Tallman v. Bigelow, 10 Wend. 420 (N.Y. Sup. Ct. 1833).

187. 6 Wend. at 566.

188. 8 Wend. 47 (N.Y. Ct. Err. 1831). Cf. Nichols v. Williams, 8 Cow. 13 (N.Y. Sup. Ct. 1827).

189. 8 Wend. at 64.

time all determinations which were recorded under the head of certiorari, both from regular judicial tribunals and from administrative bodies, became part of a small reservoir of case citations. This was later drawn upon indiscriminately, irrespective of whether the particular case to which it was applied involved a judicial or an administrative determination. Like treatment was also accorded to statutory certiorari and common-law certiorari, where the cases applied a rule laid down in earlier decisions without distinction between statutory and common-law certiorari situations. Nonetheless, *Patchen* is a notable contribution to certiorari law in extending judicial review to questions of fairness and regularity in the procedures followed by tribunals of the first instance.

With *LeRoy* and *Patchen* opening wider areas for judicial review upon certiorari, the supreme court was asked in 1837, in *Birdsall v. Phillips*,[190] to review a verdict entered for a landlord in a summary eviction proceeding. It was noted that the court below had jurisdiction and had proceeded regularly, leaving only the question of the merits for consideration on this review by statutory certiorari. The decision reverted to the narrow interpretation of certiorari review, as the court ruled in regard to the action of the lower court that: "If they go wrong on the evidence, it is the misfortune of the parties. The object of the law is to give them a final power over the merits upon the light class of litigation which it confides to them."[191] The court then proceeded to meet the central issue squarely, saying, "[T]he question upon the conclusive effect of the trial of a jurisdictional fact involved in an issue joined"[192] is for the lower court and not for the supreme court, which otherwise might as well try the suit in the first place.

Judge Cowen's interpretation of jurisdictional fact is not to be confused with contemporary usage because he intended, citing *Starr*, that all the facts confided to the jurisdiction of the inferior tribunal should become conclusive once decided by it, whereas today that phrase refers to those mixed questions of law and fact under which the administrative body acquires jurisdiction to act in the premises.[193] Although a statutory certiorari, the tenor of *Birdsall v. Phillips* left a strong impact upon succeeding decisions in the direction of narrowing the scope of review in common-law certiorari.

One of the leading certiorari cases of this period, *Ex parte Mayor of Albany*,[194] in 1840, cut across many facets of administrative law, past

190. 17 Wend. 464 (N.Y. Sup. Ct. 1837). See also Simpson v. Rhinelanders, 20 Wend 103 (N.Y. Sup. Ct. 1838).

191. 17 Wend. at 468.

192. Ibid.

193. Schwartz, An Introduction to American Administrative Law 213-17 (2d ed. 1962).

194. 23 Wend. 277 (N.Y. Sup. Ct. 1840).

and present, in rejecting a challenge to an assessment levied to defray the cost of repairing a street in Albany. For one, the writ claimed that the bylaws of the corporation, *i.e.*, City of Albany, had been violated in connection with the assessment and tax levy. The court answered that so long as the state law was followed, it was immaterial that its own bylaws were infringed, although the court did seek to mitigate this view by finding that the bylaws were in conflict with superior state law.

Another objection was founded upon the allegation that the local commissioners had exceeded their authority in regard to the type of expenses for which they could assess, the localities to be assessed, and the rate of assessment applied to various types of property. Holding contrary to and distinguishing *LeRoy v. Mayor of New York*, the court answered that so long as they "acted upon persons and a subject-matter within their jurisdiction, the proceeding is, in its nature, incapable of correction by *certiorari*."[195] The century-long concept of certiorari was here again clearly expressed, *viz.*, having acted upon certain matters over which the body was given jurisdiction, further judicial review was foreclosed and there was no further recourse from the decision of that body.

The cases, both English and New York, were reviewed by the court as it concluded that "we will not, in any case, on a common law certiorari, go beyond the question of power, which is another word for jurisdiction . . . ."[196] Such is the classic definition of the function of certiorari for that period. In addition, the court seemed anxious to dispose of all possible uncertainty in matters of certiorari, and it commended defendants for omitting evidence from their returns because: "We cannot look into testimony on the merits, even where the return comes from a tribunal bound to act upon the general law of evidence,"[197] thereby issuing a warning that prospective relators should harbor no illusion as to what can be accomplished upon common-law certiorari review. It is not the function of certiorari to meddle with matters of discretion or questions of fact, but only to keep lesser bodies and officials within the jurisdiction assigned to them.

Apparently the time was not yet ripe for more than perfunctory, threshold review by common-law certiorari of the actions of lesser tribunals. It is possible that the degree of understanding necessary to cope with all the strands of legal theory in certiorari had not been sufficiently developed, or perhaps, there was a conscious and positive disinclination to extend the reach and scope of judicial review because it would lay too heavy a restraining hand upon the initiative of inferior bodies. The

195. Id. at 281.
196. Id. at 287.
197. Id. at 288.

supreme court, groping for a rule of review, had oscillated between the liberal review of *LeRoy v. Mayor of New York* and the extreme hands-off position of *Ex parte Mayor of Albany*, both of which involved similar questions on the scope of judicial review in regard to the exercise of discretion in fixing assessments. Assessments for improvements was an important area of controversy at that time because of the tremendous growth taking place throughout the state. From a long-range standpoint, the law benefited because both viewpoints were placed into the arena of judicial evaluation and decision. The most serviceable technique, judged by the needs and aspirations of the community, would ultimately emerge as the ruling principle. At times, mere legal precedent did not loom as important as the interests of justice and the supreme court did not hesitate to enter areas previously unknown to common-law certiorari. In those instances, *e.g.*, *LeRoy v. Mayor of New York* and *Patchen*, judicial review was expanded and certiorari gained additional stature and substance.

With these cross-currents in the air, and in the same year as *Ex parte Mayor of Albany*, 1840, another case testing the inclination of the supreme court to review substantial questions of law upon certiorari arose. This involved a highway which a jury of twelve had voted as necessary. The commissioners of highways had refused to lay it out, and on appeal to the judges of common pleas, the decision of the commissioners was reversed. By common-law certiorari the question was brought to the supreme court in *People ex rel. Seward v. Judges of Dutchess*.[198] The major issue was whether the proposed road ran through an orchard, which the law prohibited. Evidence on the existence of the orchard had been excluded in the court below. The supreme court found nothing wrong in the exclusion of the evidence because it "did not go to the jurisdiction of the judges," presenting a perfect example of jurisdictional fact which the court here eschewed examining. The language of the decision followed the traditional rote that the court's supervisory power "only extends to questions touching the jurisdiction of the subordinate tribunal, and the regularity of its proceedings."[199] The power, authority and jurisdiction of common pleas to act (in an appellate administrative capacity) were directly drawn into question by the issue of whether the highway ran through an orchard, and this central issue should have been examined and settled by the supreme court. Even under the most narrow concept of reviewability at that time, the power of common pleas to act was legally inhibited until the orchard issue was disposed of. It seems that even where a case squarely presented the issue of jurisdiction to act, the

198. 23 Wend. 360 (N.Y. Sup. Ct. 1840).

199. Id. at 362.

supposed province of judicial review, the supreme court sometimes turned the question aside, falling back upon formula language to cloak its omission. The plain desirability of opening the road must have overridden the niceties of legality, because this was *Lawton v. Commissioners of Cambridge*[200] revisited.

It remained for the court of errors to put at rest some of the uncertainty by reverting to an expanded version of the orthodox rule for review by common-law certiorari. In a suit, *Stone v. Mayor of New York*,[201] brought up from the supreme court by the plaintiffs, it was alleged that they were owners of personal property in buildings which had been ordered destroyed by the Mayor of the City of New York in the great fire of 1835 in order to arrest the spread of the conflagration. A statute had provided for the payment of compensation to owners of buildings so ordered destroyed, and plaintiffs' claim for the loss of goods in one such building was sustained in common pleas but reversed in the supreme court.

In a lengthy dissertation tracing the development of the law of certiorari, Senator Paige concluded that at present the writ possessed all the characteristics of a writ of error. Therefore it only brought up the bare record for review and did not reach the merits, the evidence at the trial, nor the rulings of the judge. The court ruled that in the absence of a statute prescribing the scope of review, the reviewing court "must restrict itself to questions relating to the jurisdiction of the inferior tribunal, the regularity of its proceedings, and to questions of law which may arise on the face of the record . . . ."[202] The court found that common pleas had acted in excess of its jurisdiction in allowing damages against the city on subject matter not within the contemplation of the statute. The court ruled that it was such an exercise of excess jurisdiction as would appear on the face of the record coming up for review. The supreme court was therefore held to have been correct in reversing the lower court. Thus, within the space of a few years, the issue of jurisdiction became a hotly contested question to which the courts were now compelled to give greater consideration, even though cases like the *Judges of Dutchess* and *Ex parte Mayor of Albany* did not wholly measure up to the new trend appearing in the opinions of the supreme court. The trend, it should be noted, was not always clear nor was it uniform, but under *Stone v. Mayor of New York*, in addition to jurisdiction, regularity and questions of law became the proper objects of judicial scrutiny by certiorari.

In another case where the law of certiorari was exhaustively examined,

200. 2 Cai. R. 179 (N.Y. Sup. Ct. 1804).
201. 25 Wend. 157 (N.Y. Ct. Err. 1840).
202. Id. at 170.

*Niblo v. Post's Adm'rs*,[203] also in 1840, this time by Wendell, the official state reporter who appeared for the plaintiff, the court of errors was again called upon to explicate the practical application of the writ. The opinion is notable not for the decision ultimately reached by the court but for the pains taken by Wendell in reviewing all of the principal cases on the subject of statutory and common-law certiorari. Wendell's exegesis is most important because he placed on record the wide extent to which "the exercise of judicial powers affecting the interests of the citizen in matters of utmost consequence" were then proceeding in a mode unknown to the common law, a cry echoed in our own generation.

Wendell conceded that lately the supreme court had not acted to review errors of law and of fact arising in proceedings from such inferior tribunals and he urged that the error of every tribunal ought to be the subject of review and correction at some other place at least once. Although he acknowledged the need for these inferior tribunals which bring speedy and inexpensive justice to the citizen, he pleaded that rights should not be adjudicated without evidence, against evidence, or contrary to law. He argued against a blind adherence to legal precedent and insisted that a review of the history of the writ clearly showed the need for a revision of the practices theretofore followed.[204]

It should be recognized that the evidence was considered in the *Niblo* case, not by reason of Wendell's erudite showing, but because it was a statutory certiorari on a summary proceeding to recover possession of property. Years later, the fact that examination of the evidence was undertaken in the case because it was authorized in such a statutory certiorari would become blurred by the passage of time, and the *Niblo* case came to be cited for the simple proposition that evidence could be examined by the supreme court upon review by certiorari.

Confusion was soon again added to the problem of judicial review by certiorari because of assessment litigation in *People ex rel. Agnew v. Mayor of New York*[205] and *In the Matter of Mount Morris Square*,[206] which questioned local improvement proceedings undertaken by municipal bodies exercising executive, legislative, ministerial and judicial powers. Attack by certiorari seems to have been frequently employed as a method of challenging an assessment for a public improvement. The court in the *Agnew* case doubted whether such assessments should be removed into the supreme court at all because certiorari review would only examine the record to see whether the body "has kept within the limits of its

203. 25 Wend. 280 (N.Y. Ct. Err. 1840). See also Anderson v. Prindle, 23 Wend. 616, 618 (N.Y. Ct. Err. 1840).

204. 25 Wend. at 285-87 (argument of counsel).

205. 2 Hill 9 (N.Y. Sup. Ct. 1841).

206. 2 Hill 14 (N.Y. Sup. Ct. 1841).

jurisdiction; but we cannot look beyond it for the purpose of a review on the merits."[207] This completes the cycle running through *Starr* and *Ex parte Mayor of Albany*, and constitutes a complete reversal of *LeRoy v. Mayor of New York*. The court indicated impatience with the efforts of taxpayers who seek to impede or to halt needed public improvements by invoking the alleged omission of some technical requirement of the law. Consequently, a rather dim view of reviewability on certiorari was taken in these two important cases and this attitude left a lasting impression on the course of certiorari law during the next several decades.

Under the new constitution which went into effect on July 1, 1847, a major judicial change was the replacement of the ineffectual, unwieldy court of errors by the court of appeals, allowing a compact body of experienced judges to formulate definitive rules of law.

A new wind was now blowing and all at once, in two cases, the long-time rule of *Lawton* that the jurisdiction of inferior tribunals and officers would be presumed was swept aside by the supreme court.[208] The new court of appeals also embarked upon taking a fresh look at the problem of scope of review in certiorari, albeit obliquely, at first. In the frequently recurring summary proceeding situation, it seized the opportunity to push the door open wider on judicial examination of the evidence relating to the jurisdiction of the tribunal to act in matters presented to it.[209] This was upon statutory certiorari and there was respectable authority in the recent cases for taking a more liberal position.

A major step in dispelling the clouds of doubt which hung over common-law certiorari review was taken in *People ex rel. Bodine v. Goodwin*,[210] where referees appointed by the county court had overruled commissioners of highways, and ordered that a certain road be laid out and opened. This determination was taken to the supreme court by certiorari and was there reversed, the referees appealing to the court of appeals. At the outset, the court of appeals noted that the pertinent statute prohibited the laying out of a road through any building without the consent of the owner. In the present case, unless the owner's consent had been obtained in regard to a barn which lay athwart the proposed road the "proceedings were void for want of jurisdiction."[211] This was a

207. 2 Hill at 11.

208. Harrington v. People, 6 Barb. 607 (N.Y. Sup. Ct. 1849); Prosser v. Secor, 5 Barb. 607 (N.Y. Sup. Ct. 1849). See also People ex rel. Akin v. Morgan, 55 N.Y. 587, 590 (1874).

209. Benjamin v. Benjamin, 5 N.Y. 383, 387 (1851). Compare Morewood v. Hollister, 6 N.Y. 309 (1852), with People ex rel. Griffin v. Mayor of Brooklyn, 4 N.Y. 419, 441 (1851).

210. 5 N.Y. 568 (1851). See Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 964-66 (1957).

211. 5 N.Y. at 572.

plain reversal of the *Judges of Dutchess* case.[212] The court then laid it down as a rule for inferior bodies that the return made by them

> must shew affirmatively that they had authority to act; and where, as in the present case, their authority and jurisdiction depends upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact be established.[213]

Where prior decisions of the old supreme court had barely inched along the road toward taking cognizance of jurisdictional fact, by analogies drawn from statutory certiorari under which review on the merits was often authorized, the new court of appeals now took the more advanced position that proof of jurisdictional fact was essential to enable the inferior body to exercise its power at all. The court noted, however, that "the decision of the magistrate in relation to all other facts is final and conclusive, and will not be reviewed on a common law certiorari."[214] Although this was a common-law certiorari, the proceedings complained of, those of the referees, were of a judicial body and the more liberal rules applicable to judicial bodies, allowing wide latitude on decisions of fact, were here applied.

In this case it was determined that the evidence pertaining to the consent of the owner of the barn was properly included in the return and was examinable by the reviewing court. A valid consent not having been shown, the judgment of the supreme court was affirmed. Apparently Wendell's scholarly demonstration in *Niblo* had not been without effect. New concepts in common-law certiorari review could henceforth be forged now that the shackles of nominal review on jurisdiction and regularity were beginning to buckle under the pressure of a more realistic understanding of the important activities carried on by the lesser tribunals, and of the fact that substance had been sacrificed to form in confining judicial review to formal questions of jurisdiction and regularity alone.

In the meantime, the supreme court, through its newly created general term, comprising three judges, continued to grapple with the day-to-day intricacies of certiorari. A notable decision involving a question of alleged bastardy held that, despite the inability of the court to review erroneous decisions made by an inferior body in receiving or rejecting evidence, if there was "no evidence legally tending to establish the main facts which could alone authorize the judgment," the court would set it aside.[215] Although this occurred upon certiorari review of a

212. 23 Wend. 360 (N.Y. Sup. Ct. 1840).

213. 5 N.Y. at 572.

214. Ibid.

215. People ex rel. Crandall v. Overseers of the Poor, 15 Barb. 286, 293 (N.Y. Sup.

lower judicial tribunal, it was nevertheless another long step away from the narrow constraints of the old jurisdiction rule. It resulted primarily from the mother's testimony that her husband was out of the State for two years prior to the birth of the child which the relator was alleged to have fathered. Relying upon *People ex rel. Bodine v. Goodwin*,[216] the court ruled that it "does not deliberate upon the weight and just force of evidence, but determines merely whether there is any evidence whatever."[217] The mother's hearsay evidence regarding the husband's whereabouts was ruled to be the equivalent of no evidence, and the order of filiation was reversed. This decision confirmed that the scope of review was now enlarged beyond the confines of mere jurisdiction, and was the forerunner of the rule that in a quasi-judicial proceeding there must be competent proof of the facts upon which the determination is based.[218]

However, the back-and-forth process was resumed again with a decision of general term where an assessment for a public improvement was challenged on the ground that a majority of the owners involved had not filed the required petition.[219] The court said it would accord a presumption of regularity to the acts of the city council, treating them as conclusive; also, common-law certiorari did not "review erroneous *legal* decisions of inferior tribunals,"[220] and " 'only where there is a *total want of evidence* upon some essential point' "[221] or "an entire and palpable absence of *all evidence* tending to confer jurisdiction"[222] will the supreme court act. If the action of the council had not been stamped conclusive, and had the entire tone of the opinion not evinced a purely formal review, there would have been some saving grace in the last two quoted portions of the opinion which were properly concerned with the problems of evidence and of jurisdiction. The prior recent cases were supported in theory but in actuality the proceedings taken by the council were entirely confirmed. Most likely this was on the unarticulated

Ct. 1853). See People ex rel. Shipman v. Overseers of the Poor, 6 How. Pr. 25 (N.Y. Sup. Ct. 1851), to the effect that rulings on receipt or rejection of evidence will not be considered on common-law certiorari.

216. 5 N.Y. 568 (1851).

217. 15 Barb. at 293.

218. See People ex rel. Haines v. Smith, 45 N.Y. 772, 777 (1871) and the early statutory certiorari case of Nicoll v. Dunlap, 2 Johns. R. 195 (N.Y. Sup. Ct. 1807) (per curiam), to the same effect.

219. People ex rel. Porter v. City of Rochester, 21 Barb. 656 (N.Y. Sup. Ct. 1856). See also People ex rel. Huntting v. Commissioners of Highways, 30 N.Y. 72, 76 (1864); Roach v. Cosine, 9 Wend. 227 (N.Y. Sup. Ct. 1832).

220. 21 Barb. at 670.

221. Id. at 671.

222. Id. at 672.

ground of the superior public interest involved, eschewing inquiry into the very matters which the court itself said should be examined.

The tortuous road pursued by common-law certiorari from *Lawton* in 1804 to 1860 is traced with great care and skill in a case of common-law certiorari, *People ex rel. Van Rensselaer v. Van Alstyne*,[223] brought to review a reversal of the refusal of highway commissioners to lay out a road. Judge Hogeboom exhaustively cited all of the leading cases and reviewed their holdings. He then noted the current rule that

> the *facts* bearing on the question of jurisdiction are open to review . . . . [T]heir decision is not conclusive. Otherwise they may exercise arbitrary power, decide judicially that the case is within their jurisdiction, and bid defiance to the superior court. . . . Hence the evidence touching those facts must be returned [to allow the supreme court to determine] . . . whether it came to a right conclusion upon the facts which gave it the power to act.[224]

All the facts which would tend to show whether the proposed highway would become a public road by reason of its prior use, whether it was closed at one end or not, "and generally how and in what manner it has been laid out and used, must be regarded as legitimate evidence before the referees, upon a jurisdictional question, and probably reviewable on certiorari."[225] Questions of discretion, such as the benefit or utility of the road, the extent of possible use, and the like, involved the merits which were not reviewable. But for the first time, a court required that a "right conclusion" by an administrative body means that a factual basis must exist in the record which a reviewing court can legally accept. Accordingly, a further return by the referees in regard to the jurisdictional facts referred to was ordered by the court. This opinion is notable also for its casebook manner of tracing the evolution of certiorari and laying down its currently accepted principles in the simplest possible terms. Matters of discretion are not taken away from the inferior body by review upon certiorari, but questions of law will be examined, and questions of fact which impinge upon the body's power to act must be shown in the return to enable the court to determine whether the evidence legally supported the action taken below.

The landmark opinion bringing to a culmination the recent cases which had successively expanded the scope of review on certiorari is *People ex rel. Cook v. Board of Police*.[226] There Judge Woodruff undertook a canvass of the legal authorities on certiorari which is the equal of Wendell in *Niblo* and of Justice Hogeboom in the *Van Alstyne* case, in an

223. 32 Barb. 131 (N.Y. Sup. Ct. 1860), aff'd, 3 Key. (42* N.Y.) 35 (1866).

224. 32 Barb. at 135.

225. Id. at 137.

226. 39 N.Y. 506 (1868). See also People ex rel. Citizens' Gas-Light Co. v. Board of Assessors, 39 N.Y. 81, 88 (1868); Mullins v. People, 24 N.Y. 399, 403 (1862).

effort to bring order out of the welter of cases exhibiting diverse doctrine. The *Cook* case involved a member of the police force in the New York metropolitan area who was fined for being absent without leave. The absence consisted of that period of time during which he was under dismissal by the Board of Police and engaged in litigation with them, ultimately securing a decision in his favor. General term had affirmed an order of special term which annulled the police board's decision fining relator for the period he remained away from duty pursuant to the police board's very own order.

At the outset, the court clearly recognized and aptly stated the proposition which had to be resolved: "[M]ay the court, on a common law *certiorari*, go beyond the inquiry, whether the inferior tribunal had jurisdiction, and was the proceeding and judgment within that jurisdiction?"[227] Defendants contended: "[J]urisdiction appearing, and the judgment being within that jurisdiction, the judgment is to be deemed, on this *certiorari*, conclusive."[228] Defendants also contended that only the record of the proceeding below was brought up and not the evidence, so that the circumstances of a particular case and the evidence thereon "does not enlarge the field of review, or bring any other than jurisdictional questions under examination."[229]

The court itself then embarked upon an examination of the leading cases, noting that the earlier decisions expressed strong views in favor of narrow judicial review, even to the extent that acknowledged errors by inferior tribunals were ruled to be outside the scope of judicial review. Wendell's diligent effort in *Niblo* was duly noted, together with the holding of the court of errors there that under both common-law and statutory certiorari, all errors of law and questions on the merits were correctable on judicial review by certiorari.

The court conceded that "in all the cases it is clear that the decision of a mere question of fact upon the weight of the evidence, cannot be reviewed."[230] The court examined the ambivalent line of certiorari decisions in search of a rule for resolving the problems of the case at hand. It was forced to conclude that "it would be idle to attempt to harmonize the various decisions and dicta above referred to."[231] However, it readily acknowledged that a more liberal view of the office of common-law certiorari has appeared in the "later cases,"[232] a portent of the direction which the decision would take.

227. 39 N.Y. at 508.
228. Id. at 509.
229. Ibid.
230. Id. at 512.
231. Id. at 516.
232. Ibid.

Consequently the court of appeals was constrained to reach into new territory if it was to administer justice properly as the supervising tribunal in regard to "powers . . . which affect valuable rights both of person and property . . . ."[233] It feared that once such inferior determinations were given the stamp of finality without restraint, "there is danger that much of injustice and wrong may happen without possibility of redress."[234] This century-old passage has a ring of contemporary urgency.

Judge Woodruff wisely recognized that it was not simple nor easy to lay down a formula which would reconcile the rival interests of the citizen and the government in such cases. To the government—the police board here—his opinion accordingly yields finality for

> conclusions of fact upon conflicting evidence and matters of mere detail, in the order or mode of proceeding, not violating any rule of law to the prejudice of the party, and matters which are clearly submitted to the judgment or discretion of the inferior tribunal, where the evidence presents a case for its exercise . . . .[235]

From the standpoint of the citizen, and of this relator in particular, the court would determine by an examination of "the case upon the whole of the evidence, to see whether, as a matter of law, there was any proof which could warrant a conviction of the relator,"[236] and "if the case was such at the close of the trial that it would have been erroneous to submit the question to the jury . . . then the error is an error in law, and the conviction was illegal; it rests upon no finding of facts upon evidence tending to sustain such finding . . . ."[237]

Having thus afforded himself full access to the facts of the case, Judge Woodruff, for the court, decided that the conduct of relator in remaining away from his job as policeman for a period of 439 days at the very request and order of defendants, pending outcome of the litigation on the validity of his ouster, did not constitute such neglect of duty within a "sensible" meaning of the charge.

Although the court made a valiant effort, which ultimately succeeded, to set the house of certiorari in order, the most valuable parts of the opinion were *dicta* because the grounds of the decision were matters recited in the application and return, requiring no evaluation of the nature or weight of the evidence to achieve the result announced. It was a pure question of law, *viz.*, that relator's absence having been required by de-

233. Id. at 517.

234. Ibid.

235. Ibid. See People ex rel. Clapp v. Board of Police, 72 N.Y. 415, 417 (1878), where the court also determined that the evidence had no relevance to and did not support the charge against relator.

236. 39 N.Y. at 518.

237. Ibid.

fendants themselves, the absence could not constitute a proper legal basis for the charge of neglect of duty. It seems that the court decided that the time had finally come to stabilize the law of certiorari in terms of realistic review, and seized this occasion to spell out the ground rules in detail. There was, from the standpoint of present perspective, an unbelievable fortuity in the intermittent backward and forward movement of this phase of certiorari law which ultimately allowed the court to make the best choice by weighing the practices, procedures, rules and policies enunciated over several generations. The legislature, too, deserves praise for refraining from interference by statutory correctives during this extended "shakedown" period.

It was now established that the mode of the common law was to be followed as a general guideline for the conduct of judicial-type proceedings by inferior tribunals and officials, but the methods of common-law trial practice need not be slavishly imitated.

At least two standards pronounced in the *Board of Police* case were later imported into the practice codes, *viz.*, where a rule of law is violated to the prejudice of a party[238] and the test for weighing evidence—as, for example, the quantum of proof which, in a jury case, would require setting aside a verdict.[239] The judicial analogy was derived from the circumstance that many certiorari actions were in review of inferior judicial tribunals not of record so that the practice of assimilating other judicial requirements to such proceedings came easily to mind and they were therefore quite readily made applicable. Although the decision was an authoritative break with the past in several respects, the basis for the adoption of the principles enunciated in the case had been set forth in court decisions beginning with *LeRoy v. Mayor of New York* in 1823. A large measure of certainty and stability had now been brought to the law of certiorari in the area of scope of review. The new standard for judging the validity of administrative action of a judicial nature was soon incorporated into the certiorari article of the 1880 Code of Civil Procedure. This constituted the first codification of certiorari law after a period of one hundred years of common-law practice drawn largely, especially in the first decades, from scattered early English precedents. The rules which are followed today were first firmly established a century ago after conflicting concepts of judicial review had been rigorously tested out in the general terms of the supreme court and in the court of appeals.

### III. Judicial Discretion in Granting Certiorari

In the first days of certiorari, when an alternative writ was initially issued to require defendant to make a return of the matters complained of,

238. N.Y. Code Civ. P. § 2140(3) (1880).
239. N.Y. Code Civ. P. § 2140(5) (1880).

it was not uncommon for the court to refuse to issue the alternative writ altogether. It was reasoned in one of the leading cases on this subject, *People ex rel. Church v. Supervisors of the County of Allegany*,[240] in 1836, that the official bodies or persons whose acts were under attack had exercised "powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings."[241] This was a new and important distinction borrowed in part from mandamus law where the court also exercised a discretion in its issuance. It holds that official acts of a general nature and application usually will not be inhibited by certiorari unless specific individual damage could be shown. In the *Allegany* case, assessment rates and taxes were requested to be returned upon relator's claim that the supervisors erred in auditing certain charges against the county. The court called this a "trifle," indicating that mere error alone is not sufficient because "the public interest and inconveience [*sic*] may be taken into the account in guiding the discretion of the court,"[242] and thereupon quashed the writ. This was the forerunner of the basic rule later made applicable to taxpayer actions.

Property interests which are personal to a citizen and which involve his particular situation alone are on a far different footing from those which he shares as a taxpayer in common with all other taxpayers. In the former case, judicial discretion would most likely be exercised favorably to the relator, in the latter case it usually would not. Later cases, recognizing that individual grievances can arise from assessment proceedings, did modify the broad restriction imposed by *Allegany* in order to provide relief in individual tax assessment matters, treating the determination made in regard to the amount and the validity of such tax as a judicial matter subject to certiorari review.[243]

In one of the leading cases, *People ex rel. Agnew v. Mayor of New York*,[244] exemplifying the negative judicial attitude towards issuing certiorari where matters of great public concern were involved, the supreme court said:

> The allowance of the writ rests in the sound discretion of the court, and it has often been denied where the power to issue it was unquestionable, and where there was apparent error in the proceedings to be reviewed.[245]

240. 15 Wend. 198 (N.Y. Sup. Ct. 1836).

241. Id. at 206.

242. Id. at 209.

243. E.g., Weaver v. Devendorf, 3 Denio 117, 119 (N.Y. Sup. Ct. 1846); People ex rel. Western R.R. v. Board of Assessors, 40 N.Y. 154 (1869).

244. 2 Hill 9 (N.Y. Sup. Ct. 1841), in regard to an assessment for a new sewer.

245. Id. at 12.

This is an extraordinary concession that the law will not reach out via certiorari to correct any and all errors committed by lesser official bodies. But full examination of the circumstances in the *Agnew* case reveals that trifling errors had been seized upon by meddlesome taxpayers in an effort to bring a halt to much needed public improvements. The court expressed doubt that assessments for city improvements should be removed into the supreme court by certiorari because the public inconvenience may "greatly outweigh the importance of correcting some legal, though, perhaps, not very grievous error in the proceedings."[246]

The assessment for the opening of Mount Morris Square in New York City presented some of the same questions as the last previous case, and the court again did not mince its language in indicating that certiorari will not be allowed to issue "where assessments of taxes or awards of damages are in question, which affect any considerable number of persons."[247] Of additional importance in the denial of the writ was the court's view that the action complained of was not judicial and therefore certiorari would not lie to review it.

In a later case which discussed the principles set forth in these two important cases, the further rule was laid down that certiorari must be "essential to prevent some substantial injury to the applicant"[248] and should not at the same time be an excessive burden to the public interest in regard to some mere technical objection.[249] The court seemed to be seeking to preserve a proper balance between private right and public interest in exercising its discretion in such cases.

## IV. Finality and Nonreviewable Action

The *Lawton* case, the grandfather decision of New York certiorari jurisprudence, promulgated several fundamental principles in this branch of the law, some of which have already been noted. In the face of a statutory provision which stated that upon an appeal to the judges of common pleas from decisions of highway commissioners, the judges' decision should be conclusive in the premises,[250] Judge Spencer pro-

246. Id. at 13.

247. In the Matter of Mount Morris Square, 2 Hill 14, 28 (N.Y. Sup. Ct. 1841). See also People ex rel. Porter v. City of Rochester, 21 Barb. 656 (N.Y. Sup. Ct. 1856); Elmendorf v. Mayor of City of New York, 25 Wend. 693 (N.Y. Sup. Ct. 1841).

248. People ex rel. Moore v. Mayor of City of New York, 5 Barb. 43, 49 (N.Y. Sup. Ct. 1848).

249. Ibid.

250. Lawton v. Commissioners of Cambridge, 2 Cai. R. 179, 181-82 (N.Y. Sup. Ct. 1804). Compare Baldwin v. City of Buffalo, 35 N.Y. 375, 381-82 (1866), with People ex rel. Schuylerville & U.H.R.R. v. Betts, 55 N.Y. 600, 603 (1874).

nounced the rule which, with some variations, has remained to this day. Where the property or rights of a citizen are involved, even though the statute makes the action final, the supreme court will nevertheless exercise its common-law jurisdiction to supervise and review the actions of inferior tribunals in regard to jurisdiction and regularity. At a time when great uncertainty prevailed in the law because it was new and untried under native conditions, and notwithstanding the stamp of finality placed upon the administrative action of common pleas by the legislature, Judge Spencer clearly perceived the need to lay some measure of restraint upon these lesser bodies and he did not hesitate to act in imposing it.

Invoking certiorari to review various aspects of governmental action had apparently become widespread towards the middle nineteenth century, because the supreme court was compelled to emphasize that certiorari only extended to "inferior courts and officers who exercise judicial powers."[251] This was the first definitive expression that unless the matter sought to be reviewed was of a judicial nature, certiorari would not be allowed. These suits involved public work improvements which taxpayers were seeking to block by raising a host of technicalities. The questions raised were not adjudicated by the court, which ruled that matters "legislative, executive or ministerial," were not the proper objects of certiorari review and refused to award any relief to the plaintiffs.

A more precise definition of the functions of a municipal corporation had to be formulated where certiorari was again resorted to in regard to the construction of a public sewer. Relators complained that certain procedural matters mandated by a statute had not been followed by the City of New York in regard to the award of the contract for the work.[252] Defendants naturally cited the ruling in the *Mount Morris Square* case in order to have the certiorari quashed on the ground of nonreviewable action. The court distinguished the action of defendants in adopting the ordinance and awarding the construction contract as involving "a question of expediency, solely for their consideration, and which cannot be reviewed here,"[253] from the action taken to confirm the assessment, which was deemed judicial because it decided "on the property or rights of the

251. People ex rel. Agnew v. Mayor of New York, 2 Hill 9, 11 (N.Y. Sup. Ct. 1841). See also In the Matter of Mount Morris Square, 2 Hill 14, 20-22 (N.Y. Sup. Ct. 1841); Pearsall v. Commissioners of Highways, 17 Wend. 15, 18 (N.Y. Sup. Ct. 1837); Pugsley v. Anderson, 3 Wend. 468, 470 (N.Y. Sup. Ct. 1830).

252. People ex rel. Moore v. Mayor of City of New York, 5 Barb. 43 (N.Y. Sup. Ct. 1848).

253. Id. at 45.

citizen."[254] In the latter instance, where action was found to be "substantially erroneous," it could be vacated by the court. Therefore, where a specific, individual injustice arose affecting the property or rights of a citizen, the court would entertain certiorari. Cases such as the *Moore* decision represent the small steps taken towards defining the nature of judicial action which is, properly speaking, the only action subject to review by certiorari.

It remained for a later case,[255] in which bonuses to Civil War enlistees were challenged, to mark out in the plainest terms the limits of certiorari jurisdiction. General term stated:

> The office of the writ of certiorari is to bring up for review in the superior court the record of an inferior court or of a tribunal exercising judicial functions. It is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. Courts are instituted to decide judicial questions, and superior courts review the record and proceedings of inferior courts, or of officers or tribunals acting in a judicial capacity, and in no other.[256]
>
> To sustain the writ, there has been quite a tendency to enlarge the sphere of judicial acts, and to regard almost every kind of official act requiring or involving the exercise of judgment or discretion as a judicial act. But this, I think, is a mistake. There is scarcely an act of any public officer or body, or of persons clothed with special powers by or under the authority of law, that does not require and involve more or less discretion. It is simply absurd to call all such acts *judicial*, and apply to them the principles which govern the review of the proceedings of *courts* and of judicial officers.[257]

This decision represents a long-overdue criticism of the tendency of some mid-nineteenth century courts to label many activities of officers and tribunals as judicial in order to bring them within the ambit of certiorari review. Although the court made it clear that only judicial acts were to be reviewed upon certiorari, which was now being returned to its more traditional function, the nature of a "judicial act" was nevertheless left unanswered in the opinion, and in the years following very little was added to clarify the nature of judicial action in this regard. Perhaps it was best left indefinite and therefore in a flexible state to respond to new and unforeseen needs. In any event, the quaint complaint of another general term panel that "we have been called upon on repeated occasions to take from the common council of Rochester the powers and duties im-

254. Ibid.

255. People ex rel. Dickinson v. Board of Supervisors, 43 Barb. 232 (N.Y. Sup. Ct. 1864), aff'd, 34 N.Y. 516 (1866).

256. 43 Barb. at 234.

257. Id. at 237. See generally Goodnow, The Writ of Certiorari, 6 Pol. Sci. Q. 493, 506-14 (1891).

posed upon them by the city charter and assume them ourselves"[258] would arise less frequently thereafter upon certiorari to review.

## V. Final Determination and Reviewability

Closely involved with "nonreviewable action" is the rule that the action sought to be reviewed must be in a final form before the judicial department is asked to act upon it. The reason for this requirement was clearly set forth in an early case where defendant sought to have eviction proceedings removed from common pleas to the supreme court by certiorari. The court said that if the case were removed before there had been an order, judgment or trial in the lower court, "the superior tribunal would assume an original jurisdiction, instead of a power to review and correct."[259] The argument for requiring a final determination could not have been stated more plainly. Consequently, it soon became established as a firm rule of certiorari law, leaving only the details to be worked out in the later cases.[260]

## VI. Exhaustion of Administrative Remedies

It is interesting to discover how many basic principles of certiorari law were postulated quite early in our legal history. One early system of appellate administrative review, which is at present functioning extensively, came up for consideration in a suit brought against school district trustees. Certiorari was sought in order to have the tax lists and assessment rolls returned upon the ground that the requirements of a statute governing school construction had not been followed.[261] The court ruled that a party aggrieved by the action of the school trustees must, according to the statute, first appeal to the commissioner of common schools of the town, and it accordingly quashed the certiorari.

A somewhat similar statutory provision, which allowed an aggrieved party to seek a rehearing after an adverse decision, was likewise the basis for denying certiorari review in another case. There relator, a harbor pilot, had been suspended by the commissioners of pilots and his applica-

258. People ex rel. Butts v. Common Council of City of Rochester, 5 Lans. 142, 144 (N.Y. Sup. Ct. 1871). See also People ex rel. Corwin v. Walter, 68 N.Y. 403, 410 (1877); People ex rel. Savage v. Board of Health, 20 How. Pr. 458, 460 (N.Y. Sup. Ct. 1861).

259. Lynde v. Noble, 20 Johns. R. 80, 83 (N.Y. Sup. Ct. 1822).

260. People ex rel. Gilmore v. Donohue, 22 Hun 470 (N.Y. Sup. Ct. 1880); People ex rel. Nichols v. Cooper, 21 Hun 517 (N.Y. Sup. Ct. 1880).

261. Storm v. Odell, 2 Wend. 287 (N.Y. Sup. Ct. 1829). See also People ex rel. Tompkins v. Landreth, 1 Hun 544 (N.Y. Sup. Ct. 1874); Finch v. Cleveland, 10 Barb. 290 (N.Y. Sup. Ct. 1851); Ex parte Mayor of Albany, 23 Wend. 277, 283 (N.Y. Sup. Ct. 1840).

tion for certiorari was denied because of his failure to pursue the administrative remedy prescribed by statute.[262] These rulings later found their way into the statutory codification of the writ of certiorari.[263]

## VII. STANDING

This area of prerogative law has proven troublesome through the years and the first decisions reflect an inability to lay out the limits of personal interest with sufficient clarity for guidance as to when certiorari is to be allowed. In a leading case referred to earlier in connection with scope of review,[264] the court adopted a lenient attitude toward a taxpayer who questioned the validity of a public improvement because the statute was infringed. However, a party without a separate, individual interest in a matter was not permitted to sue out certiorari in most early cases. Although the cases of *People ex rel. Agnew v. Mayor of New York* and *In the Matter of Mount Morris Square* support this proposition in the strongest possible terms, the opinions were clothed in generalities and did not specifically rest the decision to deny certiorari on the absence of standing.[265]

The rationale for denying certiorari to many would-be keepers of the public weal was expressed most clearly in the *Supervisors of Allegany* case where the court said: "The reason is, that these bodies exercise powers in which the people at large are concerned, and great public detriment or inconvenience might result from interfering with their proceedings."[266] The court thereby touched upon a factor of great importance in all litigation against government bodies, involving as it does the interests of the public, which may often militate against allowing the writ to issue even in a proper case. The writ will then be denied in the exercise of the court's discretion.

This line of thought, however, was rejected by general term on an appeal taken by a taxpayer from an order at special term which had superseded his writ of certiorari.[267] He sought to review and set aside certain items of tax claimed to have been illegally included in the tax

262. People ex rel. Noble v. Board of Comm'rs, 37 Barb. 126 (N.Y. Sup. Ct. 1862).

263. N.Y. Code Civ. P. § 2122 (1880).

264. Starr v. Trustees of the Village of Rochester, 6 Wend. 564, 566 (N.Y. Sup. Ct. 1831).

265. See also People ex rel. Lawrence v. Schell, 5 Lans. 352 (N.Y. Sup. Ct. 1872); Starkweather v. Seeley, 45 Barb. 164 (N.Y. Sup. Ct. 1865); People ex rel. Finch v. Overseers of the Poor, 44 Barb. 467 (N.Y. Sup. Ct. 1865); Colden v. Botts, 12 Wend. 234 (N.Y. Sup. Ct. 1834). But see People ex rel. Lord v. Robertson, 26 How. Pr. 90, 93 (N.Y. Sup. Ct. 1863).

266. 15 Wend. 198, 206 (N.Y. Sup. Ct. 1836).

267. People ex rel. Haskin v. Board of Supervisors, 57 Barb. 377 (N.Y. Sup. Ct. 1870).

levied for the town of West Farms. In the lower court, the certiorari was quashed on the ground that a mere taxpayer had no standing to raise such nonpersonal questions in a certiorari suit. General term considered several adverse court of appeals decisions and concluded that the result in those cases had hinged upon the fact that the suits were in equity and there had been no showing that some branch of equity jurisprudence was involved. Here, the prerogative suit was brought in behalf of the community, and relator was acting for the benefit of the inhabitants of a political subdivision in a matter where all had a common interest. Because the people were actually plaintiffs, "it is not of vital importance who the relator should be . . . . If the people's writ of *certiorari* can be brought in requisition to correct an error, where the interest of one individual is injuriously affected, there can be no sound reason why it cannot be invoked when the rights of a community are invaded."[268] These observations completely overlooked the origin and purpose of the prerogative writ of certiorari, which always related to the interest of an individual and was only brought in the name of the people because the forms and practices of the English writ, brought in the name of the king, were fully carried over into New York practice.

Consequently, by means of a verbal technique which used a clever syllogism whereby the people became parties in interest, the court was able to modify the rule as to standing. This position was substantially supported in a later taxpayer action in the court of appeals,[269] although a contrary view had been earlier expressed on the point.[270] Ultimately, the need for this type of action became generally evident and a taxpayer proceeding became sanctioned by statute.[271]

## VIII. Notice and Hearing

The basic requirement that a party is entitled to notice and hearing in a cause which affects his property or rights was likewise pronounced early. An adverse determination of commissioners of highways was appealed to common pleas and there reversed. On certiorari, the supreme court ruled that the failure to notify the commissioners of the appeal and afford them an opportunity to be heard was indispensable to any judicial action, and the determination was accordingly reversed.[272]

268. Id. at 379-80.

269. People ex rel. Akin v. Morgan, 55 N.Y. 587, 591 (1874), reversing 65 Barb. 473, 480 (N.Y. Sup. Ct. 1873).

270. People ex rel. Dickinson v. Board of Supervisors, 34 N.Y. 516, 517 (1866); cf. People ex rel. Sheridan v. Andrews, 52 N.Y. 445 (1873).

271. N.Y. Sess. Laws 1881, ch. 531; N.Y. Sess. Laws 1872, ch. 161. See Ayers v. Lawrence, 59 N.Y. 192 (1874), for an early statutory taxpayer's suit.

272. Commissioners of Highways v. Claw, 15 Johns. R. 537, 538 (N.Y. Sup. Ct. 1818).

Ultimately, in a case which generated a considerable amount of interest, the requirements of law in regard to notice and hearing at the administrative level were spelled out in fine detail. It was the case of a police commissioner removed by the Mayor of the City of New York on charges of incompetence, and relator's complaint that he had been denied notice and hearing had been sustained by the general term on the opinion delivered at special term.[273] In this instance, the court noted that there was no specific statement of charges, aid of counsel was denied, proofs against relator were received while he was not present, nor was he informed of the nature thereof; no opportunity to produce witnesses was given, except to appear and to disprove the charges brought against him. In explaining why the removal action was defective for lack of proper notice and hearing, the court said:

> "[O]pportunity to be heard" . . . involves . . . a definite and specific statement of the charge, a reasonable time to answer it, the right to hear and examine the evidence by which it is attempted to be sustained, to produce testimony to show its falsity, and the aid and advice of counsel in the conduct of the examination.[274]

The conduct of an administrative hearing affecting the property or rights of a citizen would thenceforth be closely assimilated to the procedures followed in a court of law in regard to proper notice and fair hearing.

## IX. De Novo Proof

Judicial analogies were also utilized in another case to reject the receipt of additional evidence by a reviewing body where the lower body had acted in a judicial capacity. The decision established that judicial review of the action of an inferior body pursuant to certiorari is not to be a rehash trial of the issues, but is in the nature of an appellate proceeding to correct errors which have occurred below.[275] As explained by a later court, "It is not the policy of the law to allow a party to participate in such a proceeding, omit to take proper objections or raise legal questions and seek redress by certiorari."[276] In other words, just as was established

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See also Fonda v. Canal Appraisers, 1 Wend. 288 (N.Y. Sup. Ct. 1828). Common pleas, in this type of case, functioned as a body of administrative appeal and not in its common-law capacity.

273. People ex rel. Nichols v. Mayor of City of New York, 19 Hun 441 (N.Y. Sup. Ct. 1879).

274. Id. at 449-50.

275. Sweet v. Overseers of the Poor, 3 Johns. R. 23 (N.Y. Sup. Ct. 1808). See also People ex rel. Corwin v. Walter, 68 N.Y. 403, 408 (1877); In the Matter of Dover St., 1 Cow. 74 (N.Y. Sup. Ct. 1823) (per curiam).

276. People v. Carrington, 2 Lans. 368, 369 (N.Y. Sup. Ct. 1869).

in mandamus procedure, a party, by design or otherwise, cannot gamble on the determination of an inferior body in omitting proof or not raising timely legal questions and then, if the determination is adverse, seek to turn the scales by an additional submission.

## X. Findings; Incompetent Evidence

In an early statutory certiorari, the court of errors, in remarking upon several errors committed in common pleas upon an appeal from the justice court, also noted that it was an error of law to reverse the lower court without giving any reasons.[277] This was not strongly emphasized at that time, but there was a tentative indication that judicial action subject to review by certiorari would require a statement of the reason for the action taken.

In another matter governed by statute and again involving certiorari, the state canal board, in reversing or modifying an award, was required to state the ground for the reversal or modification. Where it failed to do so, general term set the action aside, ruling it an essential attribute of the exercise of its jurisdiction.[278]

Where a justice court admitted certain incompetent testimony, the county court reversed on appeal. On certiorari to the supreme court, it was observed that under statutory certiorari the reviewing court has a broader function to perform than in common-law certiorari, *i.e.*, to "give judgment as the right of the case may appear, without regarding technical [omissions, imperfections or] defects . . . which do not affect the merits."[279] The court noted that these meliorative provisions had been largely overlooked in the past, but commented that "when substantial justice had been done, not only the statute but the best interests of the community require that their judgment should not be reversed for defects purely technical." The court found other competent evidence to support the action of the justice court and accordingly reversed the county court. This case, and the statute it interpreted and applied so liberally, achieved a worthy milestone in the progress of our law by means of certiorari. It was the basis for the later rule allowing an administrative determination to stand notwithstanding the receipt of incompetent evidence.

## XI. Certiorari As Exclusive Vehicle of Review

The office of certiorari as the special vehicle for challenging governmental action of a judicial nature was early established in an outstanding

277. Noyes v. Hewitt, 18 Wend. 141, 145 (N.Y. Ct. Err. 1837).

278. People ex rel. Seymour v. Canal Bd., 7 Lans. 220, 221 (N.Y. Sup. Ct. 1872).

279. Bort v. Smith, 5 Barb. 283, 285 (N.Y. Sup. Ct. 1849). See also People ex rel. Mitchell v. Lawrence, 54 Barb. 589, 615 (N.Y. Sup. Ct. 1869).

opinion, *Mooers v. Smedley*,[280] rendered by James Kent in 1822 in his capacity as Chancellor. A county board of supervisors had voted to pay a bounty of twenty dollars for each wolf killed. This was annulled at a later special town meeting but defendant supervisors nevertheless prepared to pay the bounty, which plaintiff claimed was an injury to him by way of increasing his tax liability. He thereupon sought an injunction in Chancery. Chancellor Kent, despite English precedents cited in Bacon and Comyns to the contrary, ruled that "the review and correction of all errors, mistakes, and abuses . . . in the official acts of public officers, belongs to the Supreme Court."[281] This laid down a rule of exclusive certiorari jurisdiction over certain official action cognizable only in the supreme court.

The rationale of *Mooers v. Smedley* was followed, though it was not specifically cited, in an action for trespass brought against a turnpike company for the taking of plaintiff's lands by irregular proceedings.[282] Plaintiff contended that only two appraisers had acted where three were specified in the statute. The court replied that such a matter could not be questioned collaterally and if the wrong procedure had been followed, "it might have been set aside on *certiorari*."[283] This ruling represented a considerable break with long established English precedent which, prior to the emergence of the prerogative writs, had found in the trespass action a convenient method of securing review and recompense resulting from questionable official action.

The rule set forth in *Mooers v. Smedley* received further clarification and definition in a suit brought to recover a sum conceded to have been illegally taxed against plaintiff.[284] The court laid it down for a principle that " 'when a magistrate or officer has jurisdiction of the subject-matter, and errs only in the execution of his power, his acts are not void, but voidable, and the only remedy is by *certiorari*, or writ of error,' "[285] and the question would not be allowed to be opened in a collateral suit. This was a categorical pronouncement, arrogating to certiorari exclusive jurisdiction for providing judicial review of administrative action of a judicial nature.

The foregoing edict was fortified in a subsequent suit for an injunction

280. 6 Johns. Ch. R. 28 (N.Y. 1822).

281. Id. at 31.

282. Van Steenbergh v. Bigelow, 3 Wend. 42 (N.Y. Sup. Ct. 1829). See also Van Wormer v. Mayor of Albany, 15 Wend. 262, 264 (N.Y. Sup. Ct. 1836), aff'd, 18 Wend. 169 (N.Y. Ct. Err. 1837).

283. 3 Wend. at 48.

284. Swift v. City of Poughkeepsie, 37 N.Y. 511 (1868).

285. Id. at 513.

decided by the court of appeals shortly afterwards, involving highway commissioners who had held a hearing and decided that plaintiff's fence encroached upon a highway.[286] The lower courts had sustained defendants' demurrer that the court had no jurisdiction in equity over the action. The court of appeals affirmed, ruling that:

> This very matter has been once tried by a tribunal created by statute for the express purpose of trying and determining the matter; and the only redress, in such a proceeding for errors in law, is by a common law certiorari. The determination of this statute tribunal is conclusive upon the facts, and the only review is upon a common law certiorari, which will require the courts to examine into the proceedings . . . . The object of the law is to give such tribunals final powers over the merits, upon this light class of litigation, which is confided to them.[287]

In ruling out resort to other remedies, the court reinforced prior holdings that the avenue of reviewing official action of a judicial nature, not otherwise prescribed by statute, was now exclusively by certiorari, in order "to give such tribunals final powers over the merits . . . ." The revitalized writ had been transformed, over the period of a century, from a mechanical device into a meaningful, efficacious arm of justice, which entitled certiorari to take its place as an equal partner with other established branches of the law.

## XII. Certiorari—Summary

At the very beginning of New York State law the raw material of English case precedents and legal authorities treating certiorari as a royal prerogative writ had to be mastered and then accommodated to the delegation of government power to newly created official bodies such as turnpike companies, highway commissioners, canal boards, school trustees and local government units not otherwise controlled by law. These new bodies were engaged in making important decisions affecting the property and rights of individual citizens and, in default of any other legal remedy, it fell to common-law certiorari to bring these otherwise uncontrolled activities within the orbit of legality under the checkrein of the courts.

Although common-law certiorari was intended, in the absence of any statutory provisions, to perform the same functions as an appeal does at present, there was little established law to guide the courts in determining the scope and basis of such judicial review. In the earliest stage of its New York State history the writ issued to examine only the bare question of jurisdiction, and the courts tended to treat the underlying issues of jurisdiction in a most perfunctory manner at first. As precedents

286. Hyatt v. Bates, 40 N.Y. 164 (1869).

287. Id. at 166-67. But see Kennedy v. City of Troy, 77 N.Y. 493 (1879) (per curiam).

multiplied from increased and varied litigation and jurists gained broader perspective from the expanded demands placed upon the writ, formal review of jurisdiction was successively extended to embrace inquiry into the existence of facts deemed requisite by statute, to questions of law, to questions of fairness and regularity in the procedure, and to review of the evidence for competence and sufficiency. These liberalizing developments were largely indebted to the practices pursued in regard to statutory certiorari, especially to justice court certiorari where the evidence below was considered as part of the record on appeal in order to enable the reviewing court to determine whether the lower tribunal had erred on the merits.

Tremendous growth in population and commerce marked this period and brought into existence a number of government enterprises and public works projects which impinged upon individual rights and property. To afford some measure of judicial review by certiorari in regard to these new conditions, the courts developed a tendency to generously label some administrative actions as "judicial." Paradoxically, a similar tendency in mandamus actions closed the avenue to judicial review because judicial action was there equated with discretion which had been ruled impervious to judicial inquiry by mandamus. The difficulties which the courts encountered in establishing the nature, function and scope of common-law certiorari to meet native conditions are illustrated by the consistent citation of eighteenth-century English landmark decisions during the entire century covered by this study. The general uncertainty in certiorari law was also manifested by intermittent fluctuation of decisional law whereby contradictory opinions issued from the courts, each supported by respectable precedent. The confusion in the law explains why many of the leading cases of the mid-nineteenth century traversed the entire history of New York certiorari; only by tracing the progress of the law could the court ascertain and apply the prevailing rule, or formulate a modification.

It is noteworthy that the greatest strides in broadening the application of common-law certiorari were accomplished in those cases where the most exhaustive examination of prior case law was essayed. It stands to the credit of the courts that they increasingly viewed the office of certiorari in terms of expansive concepts. But this was surprisingly accomplished without the aid of constitutional principles or concepts of due process. For example, at the very beginning of recorded legal history in New York, the supreme court rejected legislative proscription of judicial review by disregarding the label of conclusiveness placed upon the administrative action of common pleas by the legislature.

Just as mandamus gained substance and dimension in its ultimate

development from having been applied extensively to the actions of judicial tribunals, common-law certiorari was able to progress rapidly towards maturity because several statutory procedures for appellate review by certiorari, in operation from earliest times, provided guidance for establishing common-law certiorari as a mechanism for review of administrative determinations. In the process, judicial procedures were ultimately absorbed into the methodology of the writ of certiorari to the extent that the Code of Civil Procedure in 1880 codified certiorari practice as a form of appellate review.