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ARIZONA ADMINISTRATIVE MANDAMUS

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INTRODUCTION

Mistakes and misdeeds of administrative officials are controlled in this country principally through judicial supervision. In Arizona, laws creating agencies, in some instances, spell out the means whereby their actions might be subjected to judicial scrutiny. Typically they call for presentation of the record made before the administrative body to a court which will review it for error.[1] Sometimes review provisions stipulate that a certain extraordinary writ should be the method for appeal. Thus, the writ of certiorari is by law the device for review of industrial commission awards;[2] mandamus is the designated route for review of certain bonding cases[3] and some other types of actions.[4] Additionally there is the Administrative Review Act which is the review vehicle for certain case decisions of some state agencies.[5]

Where enactments are either silent as to review methods or else are inadequate, disappointed participants in administrative proceedings ofttimes turn to the extraordinary writs for relief. "Mandamus and certiorari are the twin pillars of the common law of judicial control"[6] of administrative agencies. Certiorari brings before the judge a record for review. Unless such a record is required by the law governing the

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[1] *E.g.*, ARIZ. REV. STAT. §§ 23-681B, 32-1665B (1956), 37-214D, E (Supp. 1966).

[2] ARIZ. REV. STAT. §§ 23-951, 23-1146 (Supp. 1966). For other instances where certiorari is specified, see ARIZ. REV. STAT. §§ 9-957C, 28-236 (1956).

[3] ARIZ. REV. STAT. §§ 30-413, 35-408, 36-1416, 36-1485, 45-1731 (1956).

[4] ARIZ. REV. STAT. §§ 11-808D, 19-122A, 23-948, 40-422A, 45-1512 (1956). Note also ARIZ. REV. STAT. §§ 3-1010B, 38-431.03 (Supp. 1966).

In a number of tax situations the statutes prevent use of mandamus, as well as other legal or equitable remedies, to prevent collection. ARIZ. REV. STAT. §§ 28-1578A, 42-1339A, 42-1421A, 43-186 (a) (1956).

[5] ARIZ. REV. STAT. §§ 12-901 - 14 (1956).

[6] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 176 (1965).

agency, certiorari will not issue.[7] Mandamus, though, can often be used in such a situation. It is a method to handle both informal action by officials — action based upon tests and inspections and upon investigations — and conduct based upon a hearing granted *ex gratia.* Use of mandamus as a means for judicial control of administrative adjudication might be referred to as "administrative mandamus."[8] In Arizona, this special proceeding for review of agency adjudicatory action has now developed to the extent that its past can be charted and its future course can be glimpsed.[9]

The classic statement of the nature and office of this extraordinary legal remedy may be found in Blackstone.

> A writ of *mandamus* is, in general, a command issued in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.[10]

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[7] *Id.* at 165. For a study of certiorari in Arizona, see C.M. Smith, *Certiorari,* in EXTRAORDINARY WRITS IN ARIZONA 49 (C.M. Smith ed. 1967).

[8] This term is borrowed from DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS (1966), an exhaustive examination of the use of mandamus as a tool used to obtain judicial review of administrative adjudicatory decisions in California.

Also there are studies of administrative mandamus in Alabama, Comment, *Use of Mandamus to Review Administrative Action in Alabama,* 11 ALA. L. REV. 289 (1959); Arkansas, R. J. Davis, *Mandamus to Review Administrative Action in Arkansas,* 11 ARK. L. REV. 351 (1957); Illinois, Sullivan, *Judicial Review in Illinois,* 1949 ILL. L.F. 304; Massachusetts, Brown, *The Use of Extraordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts,* 21 B.U.L. REV. 632 (1941), 22 B.U.L. REV. 55 (1942); Minnesota, Riesenfeld, Baumand, and Maxwell, *Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota,* 33 MINN. L. REV. 569, 575-608 (1949); New England, Note, *Mandamus in New England,* 37 B.U.L. REV. 456 (1957); New York, Note, *Use of Mandamus to Review Administrative Actions in New York,* 4 BUF. L. REV. 334 (1954); Oregon, James, *Use of Mandatory Writs in Judicial Review of Administrative Action in Oregon,* 27 ORE. L. REV. 157 (1948); South Carolina, Riggs, *Judicial Review by Mandamus in South Carolina,* 4 S.C.L. REV. 427 (1955); Washington, Larson, *Administrative Determinations and the Extraordinary Writs in the State of Washington,* 20 WASH. L. REV. 22, 81 (1945); West Virginia, R.J. Davis, *Mandamus to Review Administrative Action in West Virginia,* 60 W. VA. L. REV. 1 (1957); and Wisconsin, Comment, *The Writ of Mandamus in Wisconsin,* 1961 WIS. L. REV. 636.

For general studies of administrative mandamus, see 3 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 24.03 (1958); M. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW § 323 (1956); L. JAFFE, *supra* note 6, at 176; Sherwood, *Mandamus to Review State Administrative Action,* 45 MICH. L. REV. 123 (1946); Note, *Review of Administrative Action — Equitable Alternatives,* 10 RUT. L. REV. 673 (1956).

[9] For earlier Arizona materials concerning mandamus, see R.J. Davis, *Mandamus,* in EXTRAORDINARY WRITS IN ARIZONA 75 (C.M. Smith ed. 1967); Rehnquist, *Extraordinary Writs and Appellate Delay,* in STATE BAR OF ARIZONA: FIRST BAR JOURNAL 42 (Fields ed. 1961); WILSON, ORIGINAL WRITS IN THE SUPREME COURT OF ARIZONA 12 (1960); Lesher, *Extraordinary Writs in the Appellate Courts of Arizona,* 7 ARIZ. L. REV. 34 (1965).

The substance of this article is based upon lectures given and materials prepared by the author for the Arizona Law Institute. See R.J. Davis, *supra.*

[10] 3 BLACKSTONE *110.

In American terminology the writ is an order issued by a court of competent jurisdiction, in the name of the sovereign, directed to an inferior court, administrative agency, or person, requiring the respondent to perform some specific thing to which petitioner is entitled as a matter of legal right.[11]

The ancestors of mandamus were missives from the sovereign to subordinate officers commanding the performance of duty;[12] they were created and enforced by authority of the royal will.[13] As governmental powers became specialized, the writ, in theory, derived from the power of the king to control his functionaries through his court of king's bench; it thus was dependent upon the royal prerogative.[14] Coke, however, interpreted these actions against the king's men as stemming from a power in the judiciary to guarantee the rule of law.[15] By the time of Mansfield, the writ of mandamus was used by the judiciary as an effective check upon the executive power.[16] It was at that stage of its development that the writ was imported into America.

Colonial courts, as they gained independence from the executive and the legislature, utilized mandamus to supervise official actions.[17] During our early nationhood courts regarded the writ of mandamus as a remedy for the private person injured by government — an essential device for maintaining the rule of law.[18] It was understood as being prerogative in only a limited sense. As the Arizona court has stated: "It is rather an extraordinary and expeditious legal remedy . . . ."[19] In Arizona practice it has become "one of the forms of procedure provided for the enforcement of rights and redress of wrongs."[20]

Under the constitution of this state, the supreme court has original jurisdiction of the extraordinary writs, including mandamus, to state officers.[21] This does not include country and city officials. Thus in *Graham v. Moore*,[22] the court took jurisdiction of an action against the

[11] F. FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES § 187 (1926); J. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 1 (3d ed. 1896); MERRILL, MANDAMUS § 1 (1892); SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1363 (1901); H. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI AND QUO WARRANTO 17 (1880).

[12] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 48 (3d ed. 1922).

[13] F. FERRIS, *supra* note 11, at § 187.

[14] *Id.*

[15] Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478, 487-91 (1963).

[16] *Id.* at 489-502.

[17] For a study of mandamus in the American colonies, see Goodman, *Mandamus in the Colonies — The Rise of the Superintending Power of American Courts*, 1 AM. J. LEGAL HIST. 308 (1957), 2 AM. J. LEGAL HIST. 1 and 129 (1958).

[18] L. JAFFE, *supra* note 6, at 178-79.

[19] Campbell v. Hunt, 18 Ariz. 442, 448, 162 P. 882, 884 (1917).

[20] Arizona Corp. Comm'n v. Heralds of Liberty, 17 Ariz. 462, 467, 154 P. 202, 204 (1916).

[21] ARIZ. CONST. art. VI, § 5 (1).

[22] 56 Ariz. 106, 105 P.2d 962 (1940).

secretary of state, but refused to entertain application for an original writ against clerks of county boards of supervisors. The superior courts also have a constitutional grant of original jurisdiction to issue mandamus.[23] Because neither the constitution nor the mandamus statutes[24] limit the superior courts to considering mandamus applications just against state agencies and officials, there are more reported mandamus proceedings that have originated in the superior courts than those where the supreme court has exercised original jurisdiction.

Appellate jurisdiction from lower court mandamus cases is constitutionally vested in the supreme court.[25] Also the high court is granted the "power to issue . . . writs of mandamus . . . necessary and proper to the complete exercise of its appellate and revisory jurisdiction."[26] Similarly worded, appellate jurisdiction is by statute conferred upon the court of appeals.[27]

The exercise of this mandamus jurisdiction by Arizona courts gives rise to legal problems in three major areas: (1) prerequisites to issuance of the writ, (2) parties to mandamus proceedings, and (3) procedures that are employed in such cases.

PREREQUISITES

Courts issue mandamus to administrative boards only when certain prerequisites are present. They are derived from the mandamus statutes and from case law. A typical mandamus situation is presented when the applicant for a license is refused and seeks to compel its issuance by judicial mandate. This, and other administrative mandamus cases, present three principal types of prerequisite problems. They are:

> (a) The ministerial act-discretionary act dichotomy. (Did the agency exercise ministerial or discretionary authority in its refusal to grant the license?)
>
> (b) The plain duty rule. (Did the law impose upon the administrator a plain duty to issue the license?)
>
> (c) The inadequate remedy requirement. (Was there no other adequate remedy which the applicant could have utilized?)

Ministerial Act — Discretionary Act Dichotomy

The basic Arizona mandamus statute points out that the office of the writ is "to compel . . . performance of an act . . . ."[28] The state

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[23] ARIZ. CONST. art. VI, § 18.
[24] ARIZ. REV. STAT. §§ 12-2021-29 (1956).
[25] ARIZ. CONST. art. VI, § 5 (3).
[26] *Id. at* § 5 (4).
[27] ARIZ. REV. STAT. § 12-120.21 (Supp. 1966).
[28] ARIZ. REV. STAT. § 12-2021 (1956).

supreme court interpreted this provision in a case in which an application for an original writ to *restrain* the secretary of state from listing a certain candidate for elective office was denied. The opinion noted that:

> It has been held many times that the term "mandamus" applies only to a proceeding brought to compel the performance of an act, and not to one to restrain action; mandamus is not a substitute for a negative injunction.[29]

This view, though, should not always bar mandamus when in consequence of its issuance conduct would be restrained. Frequently the reason for seeking prevention of threatened administrative action is to make way for agency behavior desired by the petitioner. Blocking what is not wanted is the other side of the coin from getting a command requiring performance of what is sought. A little ingenuity in pleading may phrase a petition so it seeks performance of an act, even though the effect of issuing mandamus will be that of restraint.

Although the current statute is phrased merely in terms of compelling "an act," it carries with it case law which has added the word "ministerial" to the phrase. In its first reported mandamus decision the territorial supreme court noted that only "a ministerial act" would be subjected to mandamus. The court's dictum expressed the central distinction upon which grant of the writ has turned:

> The writ of *mandamus* will not be granted to control the action of any inferior court, board, or officer, wherein their acts are a judicial character, or in which they are called upon to exercise discretion; but when their acts are ministerial only, and they fail or refuse to perform any act required by law, and the party injured has no other speedy and adequate remedy, such party is entitled to this writ.[30]

This formula makes the character of the act control.[31] If it was "ministerial," "mandatory," or "required," the petitioner would prevail — providing, of course, that the other prerequisites for issuance of the writ were met.[32] Thus, in a mandamus action against a school board brought by a dismissed teacher, the writ was issued. Agency failure to comply with the statutory requirements for dismissal caused the contract of the teacher to be renewed automatically by operation of law. All that remained was the "ministerial" act of executing the

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[29] Smoker v. Bolin, 85 Ariz. 171, 173, 333 P.2d 977, 978 (1958).

[30] *In re* Woffenden, 1 Ariz. 237, 238, 25 P. 647, 648 (1875).

[31] Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803), also looks to "the nature of the thing to be done" in order to ascertain whether mandamus might be issued.

For another expression of the same approach, see Zion Evangelical Lutheran Church v. City of Detroit Lakes, 221 Minn. 55, 21 N.W.2d 203 (1945), *discussed in* Riesenfeld, Bauman, and Maxwell, *supra* note 8, at 593.

[32] Southwest Forest Industries, Inc. v. Sullivan, 100 Ariz. 336, 414 P.2d 151 (1966); Krucker v. Goddard, 99 Ariz. 227, 408 P.2d 20 (1965); Cantlay & Tanzola,

contract. Mandamus could require something of that nature.[33]

If the respondent could persuade the judiciary that the matter under consideration was "discretionary," "quasi-judicial," or "judicial" in character, he could generally defeat issuance of the writ.[34] This was shown in an action against the highway commission for its failure to establish a school zone and crosswalk at the point on a highway where school officials had requested. The supreme court characterized power to set location of school crossings as "discretionary." Because there had been no abuse of that discretion, it was determined that the superior court had possessed no jurisdiction to issue mandamus.[35]

This tradition of the ministerial act--discretionary dichotomy raises the question: How does an attorney or a judge classify an administrative action? What is ministerial? What is discretionary? We tend to think of discretion as the power to make choices among competing considerations;[36] ministerial duties are thought of as involving an absence of such power of selection. But even the broadest powers would exclude and deny legality of some elements as factors of choice.[37] Rule making authority in the field of occupational licensing would certainly not allow an agency to consider hair color as a factor in promulgation of regulations -- whether the gentlemen preferred blondes or not. On the other hand even the narrowest delegations of authority to administrators admit some elements of choice, if only as to matters of detail. Thus the school officials required to sign the teacher's contract would clearly be allowed to pick whatever color of ink they wanted to use in carrying out their duty. The short of it is that there is no clear-cut

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Inc. v. Williams, 93 Ariz. 365, 380 P.2d 1019 (1963); Anthony A. Bianco, Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959); Schwartz. v. Jordan, 82 Ariz. 252, 311 P.2d 845 (1957); Montgomery v. Crawford, 70 Ariz. 359, 220 P.2d 853 (1950); Martin v. Whiting, 65 Ariz. 391, 181 P.2d 819 (1947); Alberts v. McGirk, 51 Ariz. 510, 78 P.2d 483 (1938); Harrison v. Riddle, 44 Ariz. 331, 36 P.2d 984 (1934); Burnside v. Douglas School Dist., 33 Ariz. 1, 261 P. 629 (1927); Winsor v. Hunt, 29 Ariz. 504, 243 P. 407 (1926).

In Arizona Corp. Comm'n v. Heralds of Liberty, 17 Ariz. 462, 154 P. 202 (1916), the supreme court determined that the word "may" relating to agency license issuance should be read as "shall" once the applicant showed he was qualified. The action sought then became "ministerial" and mandamus would issue.

[33] Tempe Union High School Dist. v. Hopkins, 76 Ariz. 228, 262 P.2d 387 (1953).

[34] Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176 (1940); Industrial Comm'n v. Price, 37 Ariz. 245, 292 P. 1099 (1930); Prina v. Board of Supervisors, 16 Ariz. 252, 143 P. 567 (1914).

It is quite common when writs are sought against judicial officers to find that the act requested is "discretionary" in character. Shreve v. United States, 73 F.2d 543 (9th Cir. 1934); Johnson & Douglas v. Superior Court, 419 P.2d 730 (Ariz. 1966); Greater Ariz. Sav. & Loan Ass'n v. Tang, 97 Ariz. 325, 400 P.2d 121 (1965); State v. Phelps, 67 Ariz. 215, 193 P.2d 921 (1948); Ackerman v. Houston, 45 Ariz. 293, 43 P.2d 194 (1935); Bolen v. Quihuiz, 26 Ariz. 350, 225 P. 1110 (1924); State *ex rel.* Green v. Superior Court, 3 Ariz. App. 473, 415 P.2d 487 (1966).

[35] Arizona State Highway Comm'n v. Superior Court, 81 Ariz. 74, 299 P.2d 783 (1956).

[36] L. JAFFE, ADMINISTRATIVE LAW CASES AND MATERIALS 499 (1953).

[37] Indeed there is no such thing as "unfettered discretion." Peters v. Frye, 71 Ariz. 30, 223 P.2d 176 (1950).

formula. The Arizona appellate courts have not even attempted to provide one.[38] What will be considered ministerial or discretionary can be gauged only by specific past instances of classification — subject to a change of judicial point of view.

Assuming official acts validly can be classified as either mandatory or discretionary, it does not necessarily follow that once an act is judicially characterized the grant or denial of mandamus is automatic. The bare formula fails to take account of the variable meaning of "discretion." It may include questions of law, questions of fact, so-called mixed questions of law and fact, and questions concerning policy. These questions are not regarded the same way upon judicial review. Judges are much more likely to substitute their own judgment for that of administrators on matters of law where there are no controverted facts[39] than they are where the conduct under consideration involves fact-finding.[40]

Probably the reason why our courts have not developed a precise set of rules for classification of administrative conduct as ministerial or discretionary is because of the extensive inroads into the old rule reserving mandamus for ministerial acts. Now mandamus is often issued where the conduct in question is discretionary; petitioners who fail to convince judges that they are just asking for something ministerial do not automatically lose their suits.

Erosion of the rule begins with the proposition that administrative agencies are required to exercise their powers when a demand to do so is made upon them. When respondents will not act, mandamus will give an affirmative order to proceed.[41] In fact the writ in its inception was thought of as a remedy against more or less total refusal by royal officials to perform their duties.[42] Put in modern terms, there is a ministerial duty both to exercise ministerial authority[43] and to exercise discretionary authority.[44] Thus failure to perform a discretionary func-

[38] Lesher describes the distinction between ministerial and discretionary conduct as "always obscure" in Arizona. Lester, *supra* note 9, at 42. Another writer has noted: "[T]o delineate 'ministerial' from 'discretionary' duties is indeed a Sisyphus task, since the difference is truly but a gradual one." R. PARKER, ADMINISTRATIVE LAW 273 (1952).

[39] Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949).

[40] Peterson v. Rodgers, 51 Ariz. 502, 72 P.2d 480 (1938); Dorrington v. Board of Supervisors, 8 Ariz. 4, 68 P. 541 (1902).

For a general discussion of the scope of judicial review of administrative determinations, see L. JAFFE, *supra* note 6, at 546-653.

[41] F. FERRIS, *supra* note 11, at § 207.

[42] In early Norman days the Curia Regis would issue writs ordering sheriffs or lords to hear cases. 1 W. HOLDSWORTH, *supra* note 12, at 48.

[43] *E.g.*, Itule v. Farley, 94 Ariz. 242, 383 P.2d 127 (1963); Peters v. Berryman, 30 Ariz. 120, 245 P. 282 (1926).

[44] The supreme court stated in Maricopa County Municipal Water Conservation Dist. v. La Prade, 45 Ariz. 61, 67, 40 P.2d 94, 97 (1935), that ". . . where as a matter of law he is bound to act in some manner, even though he have discretion as to *how* he shall act, he can be compelled to act."

tion[45] or delay in acting[46] is a basis for issuance of a writ commanding the respondent to act. This was illustrated in 1964 when the industrial commission was mandamused to hold a rehearing sought by an applicant and required by statute. Its power of decision upon rehearing was a discretionary one; but it had no choice not to exercise that power.[47]

In instances where mandamus is issued to compel exercise of discretion, the supreme court does not dictate how the discretion will be exercised. It said in *Dey v. McAlister*, that:

> The writ to issue will not control the judgment of the trial court in the least degree, but its purpose will be to direct that those things required by law be done, that the court may proceed to its judgment upon the issues raised.[48]

All that mandamus does in instances of refusal to use administrative power is require that such authority be exercised.

This narrow exception to the "no mandamus for discretionary act" rule opens the way for the next exception — one which is wide enough almost to engulf the rule itself. Our courts reason that non-exercise of discretion can be remedied by mandamus requiring performance of the discretionary act; that abuse of discretion is merely a purported exercise of it and thus is tantamount to non-exercise of discretion; that, therefor, where an officer has acted arbitrarily or in abuse of discretion, mandamus can be available to require him to act properly. This "abuse of discretion" exception is a "revealing example of the capacity of the common law to infuse a well-established legal form with new concepts . . . ."[49]

The Arizona court has declared that to use this approach the petitioner must make it "clearly appear" that the agency has acted in abuse of its discretion;[50] but that "the courts are always alert to grant a review where it is sufficiently shown that a subordinate agency has abused its discretion by acting arbitrarily or capriciously."[51] It is almost as though, when the action is arbitrary, the element of discretion dis-

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[45] *E.g.*, New York Life Ins. Co. v. Phelps, 42 Ariz. 222, 23 P.2d 937 (1933); Bolen v. Superior Court, 14 Ariz. 31, 123 P. 305 (1912).

[46] *E.g.*, Eastman v. Southworth, 87 Ariz. 394, 351 P.2d 992 (1960); Pintek v. Superior Court, 84 Ariz. 279, 327 P.2d 292 (1958).

[47] Thiel v. Industrial Comm'n, 97 Ariz. 49, 396 P.2d 617 (1964).

[48] 19 Ariz. 306, 307, 169 P. 458 (1918); *see* Eastman v. Southworth, 87 Ariz. 394, 398, 351 P.2d 992, 995 (1960) (dictum from brief of appellee).

When seeking a writ to compel action all that is necessary is that an indication be made that the official failed to perform his duty. There is no requirement that a demand have been made on him to do so. Board of Supervisors v. Miners & Merchants Bank, 59 Ariz. 460, 130 P.2d 43 (1942).

[49] Weintraub, *Development of Scope of Review in Judicial Review of Administrative Action: Mandamus and Review of Discretion*, 33 FORDHAM L. REV. 359, 367 (1965).

[50] Rhodes v. Clark, 92 Ariz. 31, 35, 373 P.2d 348, 350 (1962).

[51] Peters v. Frye, 71 Ariz. 30, 36, 223 P.2d 176, 179 (1950).

appears and proper conduct becomes a ministerial act and mandamus will therefor lie.[52]

Emotionally charged words such as "arbitrary," "abuse," "unjust," and "capricious" do not require the petitioner to establish a bad motive by the administrator. Rather, the rule is satisfied and mandamus may issue if official conduct is either unreasonable[53] or ultra vires.[54] An illustration of unreasonable exercise of discretion may be found in *Brown v. City of Phoenix*.[55] There the city had discretionary authority in issuance of a rental contract. One reason for giving the contract to one applicant rather than another was a sense of loyalty because of past services of the successful bidder. This, in the face of the fact that the other applicant had made a higher bid, was deemed to render the administrative action unreasonable. The trial court was ordered to issue the peremptory writ. An example of ultra vires exercise of discretion may be seen in *State Board of Barber Examiners v. Walker*.[56] In that case the agency had denied an application for a license to operate a barber college. The denial was based upon a rule of the board which, although it was arguably quite reasonable, was one which the examiners had no power to make. Their conduct was ultra vires. That rendered refusal to grant the license arbitrary, and the supreme court affirmed issuance of mandamus by the superior court. The motive of the agency was immaterial.

There are two dangers in taking the position that mandamus is applicable to cases where administrators have abused their discretion. The first is that an act deemed by a judge to be erroneous, *i.e.*, one he would not have reached had he made the initial decision, might for that reason also be considered by him as unreasonable or ultra vires. The Arizona court has turned back efforts to use mandamus to explore the advisability of official action. Mandamus is no substitute for an appeal.[57]

The other danger is that when the agency has acted arbitrarily the writ will direct the officials to grant the petitioner the administra-

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[52] For an illustration of such language from the supreme court, see Maricopa County Municipal Water Conservation Dist. v. La Prade, 45 Ariz. 61, 68, 40 P.2d 94, 97 (1935); and from the court of appeal, see Milburn v. Burns, 1 Ariz. App. 147, 152, 400 P.2d 354, 359 (1965).

[53] *E.g.*, Buggeln v. Doe, 9 Ariz. 81, 78 P. 367 (1904); Johnson & Douglas v. Superior Court, 2 Ariz. App. 407, 409 P.2d 566, *rev'd*, 419 P.2d 730 (Ariz. 1966).

[54] *E.g.*, Blende v. Stanford, 98 Ariz. 251, 403 P.2d 807 (1965); Bailey v. Superior Court, 97 Ariz. 293, 399 P.2d 907 (1965); Cagle Bros. Trucking Serv. v. Arizona Corp. Comm'n, 96 Ariz. 270, 394 P.2d 203 (1964); McGee v. Arizona State Board of Pardons & Paroles, 92 Ariz. 317, 376 P.2d 779 (1962).

[55] 77 Ariz. 368, 272 P.2d 358 (1954).

[56] 67 Ariz. 156, 192 P.2d 723 (1948).

[57] Greater Ariz. Sav. & Loan Ass'n v. Tang, 97 Ariz. 325, 400 P.2d 121 (1965); Watterson v. Superior Court, 91 Ariz. 11, 368 P.2d 756 (1962).

tive action that he desires. According to *Osborn v. Clark*, this would not be proper.

> If the act sought for be judicial or discretionary in its character, no court by its writ of mandate can command what this action shall be, much less can it command how and what the said action shall be after he or it has fully acted upon the matter, no matter how erroneously. The writ of mandate is in no case a process for review or correction of errors.[58]

Should an agency refuse or fail to exercise discretion, or should it act arbitrarily, that is take an unreasonable or ultra vires action, the writ of mandamus will merely require the respondents to exercise their discretion and to do that in a non-arbitrary manner; the order will not extend beyond that and dictate what the result of that action should be.[59]

The difference between telling officials to act right and telling them how to act correctly is demonstrated by *State Board of Dispensing Opticians v. Carp*.[60] The board had improperly ordered an applicant for a license to take an examination. Because of such an abuse of administrative discretion the superior court properly issued a writ of mandamus. The writ, however, commanded issue of the license. This order invaded the discretionary functions delegated to the board by the legislature; it would have prevented the agency from considering qualifications to practice as a dispensing optician other than those that would be brought out by an examination. Yet it had power to do so. Consequently, the supreme court reversed the case and directed that the trial court issue a writ that would require the agency to exercise its discretion properly; that it not demand the test; that it not consider the improper factor which had led to its prior refusal to license.[61]

The ministerial act-discretionary act rule, then, would seem to boil down to this. Mandamus is the proper remedy for:

(1) Controlling ministerial acts;

(2) Requiring the exercise of discretion;

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[58] 1 Ariz. 397, 398, 25 P. 797 (1881).

[59] It should also be noted that even when conduct is classified as "ministerial," the writ will not always detail what the performance of the respondent shall be. The peremptory writ of mandamus issued by the supreme court to the highway commission in a dispute with the industrial commission over whether premiums for compensation insurance should be provided from the highway fund merely commanded inclusion of a budget item for the premiums. The obligation to include the item was ministerial, but the amount involved had to be determined before it could be mandamused. Industrial Comm'n v. Arizona State Highway Comm'n, 40 Ariz. 163, 10 P.2d 1046 (1932).

[60] 85 Ariz. 35, 330 P.2d 996 (1958).

[61] Similar sentiments are expressed in Prina v. Board of Supervisors, 16 Ariz. 252, 143 P. 567 (1914); and Territory *ex rel.* Sherman v. Board of Supervisors, 2 Ariz. 248, 12 P. 730 (1887).

(3) Correcting the abuse of discretion by unreasonable exercise of it; and

(4) Correcting the abuse of discretion by ultra vires conduct. Mandamus is not the proper remedy for requiring that discretion be exercised in a certain way.[62]

Perhaps the modern view can be even more simply stated. Upon application for mandamus against an official, the courts will attempt to ascertain whether the action complained of has been and can be reasonably attributed to an application of valid factors of choice.[63] If it has, mandamus will not lie. If it has not, mandamus will issue if the other prerequisites are met. A comparison of the Tucson and the Phoenix car rental agency cases[64] shows this approach at work. In both cities Avis and Hertz were both trying harder — harder to get exclusive rights to rental space at municipal airports. Hertz outbid Avis in terms of percentage of gross income payable as rent for the space, but Avis got both contracts. Mandamus was issued in the Phoenix case where the sense of loyalty to Avis had led to grant of the contract. That was not a valid factor of choice. Mandamus was denied in the Tucson case where the amount of the bid contained a minimum rental floor and other variable factors as well as the percentage of gross income. Those were valid factors of choice.

Plain Duty Rule

The present Arizona mandamus statute limits the writ to compelling "performance of an act which the law specifically imposes as a duty resulting from an office, trust, or station."[65] This follows the language of Blackstone who commented that the writ would direct respondents to do something "which appertains to their office and duty . . . ."[66] Thus, mandamus will not issue until a court decides there is a legal duty to act imposed upon the administrative agency. The judiciary in consideration of mandamus applications is accordingly called upon to interpret the statutes governing the respondent. The writ will not be granted if it is determined that the agency is complying with its duty,[67] has no duty under the applicable law to act in the case,[68] or would be acting illegally

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[62] 3 K. C. DAVIS, *supra* note 8, at § 24.03.
[63] L. JAFFE, *supra* note 6, at 182.
[64] Hertz Driv-Ur-Self System v. Tucson Airport Auth., 81 Ariz. 80, 299 P.2d 1071 (1956); Brown v. City of Phoenix, 77 Ariz. 368, 272 P.2d 358 (1954).
[65] ARIZ. REV. STAT. § 12-2021 (1956).
[66] 3 BLACKSTONE *110.
[67] *E.g.*, Harbel Oil Co. v. Superior Court, 86 Ariz. 303, 345 P.2d 427 (1959).
[68] *E.g.*, State v. Kostura, 98 Ariz. 186, 403 P.2d 283 (1965); Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1958); Adams v. Bolin, 77 Ariz. 316, 271 P.2d 472 (1954); Wilson v. Linville, 61 Ariz. 132, 145 P.2d 529 (1944); Graham County v. Dowell, 50 Ariz. 221, 71 P.2d 1019 (1937); Riley v. Cornwall, 48 Ariz. 10, 58 P.2d 749 (1936); Sayers v. Cox, 42 Ariz. 35, 21 P.2d 924 (1933); Maxey v. Board of

if it acquiesed in the petitioner's request.[69] Thus it was held that mandamus would not lie against the secretary of state to require him to certify recognition of a new political party; the applicable statute did not impose that duty upon him.[70] Mandamus is not to be used "as a balm to assuage disappointment or remedy grievances"[71] of persons to whom no administrative duty is owed.

Mandamus will be granted, providing the other requirements are met, when there is a legal obligation on the part of the agency to act.[72] When the judge interprets the applicable laws as imposing a mandate to act, the issuance of the writ is in order. For example, in *Carroll v. Frohmiller*,[73] it was decided that a search operation by the national guard entitled a participant to payment of his expenses out of state funds; the guard was not limited to only military activity; mandamus was granted. Where a person dealing with an agency insists that the bureaucratic interpretation of a statute is incorrect and a court agrees with the citizen and finds that the administrator has imposed illegal impediments to the action requested of it, mandamus will also be allowed.[74]

Duty to act might involve determination of constitutional questions as well as statutory interpretation. Whether unconstitutionality of a law imposing a duty upon an administrator will defeat issuance of mandamus is a question upon which the states do not agree.[75] Underlying cases permitting the defense is the notion that an unconstitutional law is not really a law at all, being null and void, and that a court should not compel an officer to do something which is required of him only by a void and invalid enactment.[76] The difficulty with this proposition is that all legislative enactments are the law until a court decides otherwise. Furthermore, it may be unwise to allow subordinate officials to supersede legislative will just because in their view the lawmakers exceeded their authority. "The business of government cannot be held in abeyance because a nonjudicial functionary doubts the validity of man-

Supervisors, 19 Ariz. 488, 172 P. 285 (1918); Territory v. Board of Supervisors, 9 Ariz. 405, 84 P. 519 (1906).

[69] *E.g.*, Earhart v. Frohmiller, 65 Ariz. 221, 178 P.2d 436 (1947); Moore v. Frohmiller, 46 Ariz. 36, 46 P.2d 652 (1935); Bank of Lowell v. Cox, 35 Ariz. 403, 279 P. 257 (1929); Le Febvre v. Callaghan, 33 Ariz. 197, 263 P. 589 (1928).

[70] Graham v. Moore, 56 Ariz. 106, 105 P.2d 962 (1940).

[71] State *ex rel.* Young v. Superior Court, 14 Ariz. 126, 132, 125 P. 707, 709 (1912).

[72] *E.g.*, Board of Supervisors v. Stanford, 70 Ariz. 277, 219 P.2d 769 (1950); Hudson v. Brooks, 62 Ariz. 505, 158 P.2d 661 (1945); Maricopa County v. Osborn, 59 Ariz. 244, 125 P.2d 703 (1942); City of Phoenix v. Powers, 57 Ariz. 262, 113 P.2d 353 (1941); Armer v. Wade, 48 Ariz. 1, 58 P.2d 525 (1936); Wiggins v. Kerby, 44 Ariz. 418, 38 P.2d 315 (1934); Campbell v. Flying V Cattle Co., 25 Ariz. 577, 220 P. 417 (1923); Boyce v. County of Pima, 24 Ariz. 259, 208 P. 419 (1922).

[73] 44 Ariz. 21, 33 P.2d 341 (1934).

[74] *E.g.*, Donaldson v. Sisk, 57 Ariz. 318, 113 P.2d 860 (1941); Kitchel v. Gadsden Hotel Co., 42 Ariz. 226, 23 P.2d 939 (1933).

[75] See discussion in R. J. Davis, *Mandamus to Review Administrative Action in West Virginia*, 60 W. VA. L. REV. 1, 20-21 (1957).

[76] *Id.*

dates given him by the duly established law-making body."[77]

Of course denial of the defense of unconstitutionality may place an agency in a dilemma. If it does not act, it will be subjected to a mandamus suit against which it cannot defend. If it does act and the statute is later held unconstitutional, agency personnel may be held personally liable for acting beyond the scope of official powers.[78] Moreover prompt determination of a constitutional question is sometimes desirable. Suppose, for example, there is some question as to the validity of a statute providing for issuance of bonds by a state agency. Until they are sold it might be difficult to find proper parties to contest the validity of the bonds; but sale will be slow when the investing public is aware of the constitutional doubts concerning them. Such doubts can be resolved by having some state official involved in issuance of the bonds refuse to perform the duty imposed upon him by statute, claiming unconstitutionality of the enabling legislation as his defense. In a mandamus action the state supreme court could decide the issue of constitutionality. If it finds the law proper, it will grant the writ, and naturally make the bonds more readily salable.[79]

Arizona accepts the defense of unconstitutionality. Thus, when an agency argues that an enactment requiring it to act violates the constitution, the petition for the writ will be dismissed if the law is found to be unconstitutional.[80] Of course, if the statute is constitutional, mandamus may issue;[81] it depends upon whether the other prerequisities are present.

The law in question may prohibit administrative action, but the petitioner nevertheless seeks performance of the act, claiming the statutory prohibition is unconstitutional. If it is constitutional, the writ will be denied. If it is unconstitutional, the writ may issue. In *Begay v. Sawtelle,* although the law denied hunting and fishing licenses to reservation Indians, the petitioner who lived on the Navajo Reservation attempted to obtain a license. His claim that the law violated the fourteenth amendment was upheld and the writ was granted.[82]

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[77] W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES & COMMENTS 399 (3d ed. 1954).

[78] See note 75 *supra.*

[79] For Arizona examples of this technique, see Board of Regents v. Sullivan, 45 Ariz. 245, 42 P.2d 619 (1935); State *ex rel.* La Prade v. Cox, 43 Ariz. 174, 30 P.2d 825 (1934).

[80] *E.g.,* Giss v. Jordan, 82 Ariz. 152, 309 P.2d 779 (1957); Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666 (1933).

It is not a defense, though, that the law is bad policy. Callaghan v. Boyce, 17 Ariz. 433, 153 P. 773 (1915).

[81] *E.g.,* Maricopa County Municipal Water Conservation Dist. v. La Prade, 45 Ariz. 61, 40 P.2d 94 (1935); Oglesby v. Poage, 45 Ariz. 23, 40 P.2d 90 (1935).

[82] 53 Ariz. 304, 88 P.2d 999 (1939). See also McMurchie v. Superior Court, 26 Ariz. 52, 221 P. 549 (1923); *cf.* Town of Wickenburg v. Sabin, 68 Ariz. 75, 200 P.2d 342 (1948).

In addition to the statutory requirement that the administrator have a duty to perform the act requested, case law has imposed the notion that such duty be "clear" or "plain." For example, during territorial days the supreme court of Arizona asserted that "*mandamus* will not lie to compel county officers to perform an act which they are not authorized or required to do by some plain provision of law . . . ."[83] This proposition conforms to older hornbook law[84] and has been restated by the court of appeal as recently as 1965.[85] It is known as the "plain duty" rule.

The "plain duty" rule seems to be a manifestation of some judicial caution in ordering executive action. It springs, in part at least, from separation of powers notions. Even before Arizona became a state our supreme court denied mandamus on the grounds of its reluctance to invade the sphere of the executive department.[86] Add to that the provision of the state constitution on distribution of powers which says:

> [E]xcept as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.[87]

When the courts issue mandamus to executive officials, they enter the domain of another branch of the government. Even though it might be wholly proper to do so, wisdom dictates caution in such action.

A trace of separation of powers ideas can be seen at work in the dispute surrounding *Marbury v. Madison* — THE Mandamus Case. Upon application by Marbury the Supreme Court granted a rule directing the secretary of state to show cause why mandamus should issue directing him to deliver Marbury his commission as a justice of the peace.[88] The resulting uproar in the Jeffersonian press would have warmed the heart of any modern unreconstructed confederate.[89] But the writ was not issued. Among other comments, Marshall noted that judges would not compel the exercise of functions which are in their nature political.[90]

Roger Taney, Marshall's successor as Chief Justice, was even more reluctant. In *Kendall v. United States ex rel. Stokes,* he dissented from issuance of the writ by the District of Columbia courts to the Postmaster

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[83] Territory v. Board of Supervisors, 9 Ariz. 405, 409, 84 P. 519, 521 (1906).
[84] H. WOOD, *supra* note 11, at 17-18.
[85] Board of Educ. v. Williams, 1 Ariz. App. 389, 392, 403 P.2d 324, 327 (1965). For cases where the supreme court has found that there was a "plain duty," *see e.g.,* State v. Board of Supervisors, 14 Ariz. 222, 127 P. 727 (1912); Utter v. Franklin, 7 Ariz. 300, 64 P. 427 (1901).
[86] Insane Asylum v. Wolfly, 3 Ariz. 132, 22 P. 383 (1889).
[87] ARIZ. CONST. art. III.
[88] 5 U.S. (1 Cranch) 137, 153 (1803).
[89] 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 204-08 (1928).
[90] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71 (1803).

General to settle an account. Taney argued that the courts of the district did not have mandamus power; they were not like king's bench in representing the royal prerogative.[91] In *Decatur v. Paulding*, Taney brought the majority of the Supreme Court around to his view. They upheld the refusal to pay a special pension to the widow of Stephen Decatur on the grounds that the Secretary of the Navy had power to expound laws and courts were not to interfere.[92] That explanation sounds like separation of powers talk.

Use of the words "plain" and "clear" neither makes it very clear nor quite plain when Arizona courts are going to brave the executive citadel and issue mandamus. Probably they infer that if the applicable rule of law is disputable (in the opinion of the judge) then the court will not make an independent determination of law upon which to base a command to an officer. This concept, as applied in the leading federal case of *Work v. United States ex rel. Rives*, means that the administrative agency is free to choose the applicable law; it has the power of interpretation.[93] But there are limits. If a court is convinced that the rule chosen by the officer is clearly contrary (in its opinion) to the statutory purpose then it will order the official to act according to its view of the law.[94] Also the "plain duty" rule would seem to infer that where there is some question as to the petitioner's right,[95] or there is some doubt as to its importance the writ will not be issued.[96]

There are instances where, even though there is a statutory duty on the part of an administrative agency to act, the courts choose not to issue mandamus. Many of these fall within the scope of the doctrine of "equitable discretion." Although mandamus originated as a judicial writ in a common law court, it has equitable overtones resulting from its character as an extraordinary writ. The chief contribution of equity to the law of mandamus is "equitable discretion." Its best known expression was in *United States ex rel. Greathouse v. Dern.* There the Supreme Court declared that mandamus "may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withold its protection of an undoubted legal right."[97] If issuance of the writ will "work a public injury or embarrassment," it is within the discretion of a judge to deny it.[98]

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[91] 37 U.S. (12 Pet.) 524, 627 (1838).
[92] 39 U.S. (14 Pet.) 497 (1938).
[93] 267 U.S. 175 (1925). The dissent in Covington v. Basich Bros. Const. Co., 72 Ariz. 280, 292, 233 P.2d 837, 845 (1951), relied on the *Rives* case. See also Chesley v. Jones, 81 Ariz. 1, 299 P.2d 179 (1956).
[94] See text at notes 65-74 *supra.*
[95] Miners & Merchants Bank v. Herron, 46 Ariz. 71, 47 P.2d 430 (1935).
[96] Territory *ex rel.* Sherman v. Board of Supervisors, 2 Ariz. 248, 12 P. 730 (1887).
[97] 289 U.S. 352, 359 (1933).
[98] *Id.* at 360.

The clearest illustration of "equitable discretion" at work in Arizona is in *Sines v. Holden,* in which the supreme court refused to order refund of retirement funds paid by a former state employee who had been convicted of conspiracy in connection with violation of the trust of his office. It was stated that:

> The writ of mandamus is a discretionary writ and even in a case where an absolute legal right is shown, it will be withheld whenever it would aid those who do not come into court with clean hands and whenever public interest would be adversely affected.[99]

Other mandamus cases from Arizona manifesting exercise of discretion to deny the writ, even though the administrator had a plain legal duty to act as requested, concern demands for action that would be futile to the petitioner and would serve him no useful purpose;[100] petitions for writs that would merely adjudicate some abstract right but would not change what the administrators would do;[101] and efforts to have judicial resolution of moot questions.[102] In *Campbell v. Hunt,* a gubernatorial election contest case, it was argued in dissent that issuance of mandamus to require a hold-over governor to relinquish possession of office and of his status of de facto governor pending outcome of the contest, should have been withheld "in the sound judicial discretion of the court . . . [since] the court may in the exercise of a wise discretion, still refuse relief."[103] The wisdom of this dissent was borne out when the actual contest proceeding determined that the hold-over chief magistrate had indeed been re-elected.[104]

Because of its nature, the judicial process does not lend itself well to handling certain situations. In such cases judges would do well not to command. Courts, especially courts of law, give specific dollars and cents, or guilty or not guilty judgments. Mandamus could create complications when it calls for supervision by the courts over a long period of time or performance of a large number of acts. Then too the judicial system is designed to answer questions either yes or no. Some mandamus petitions have requested more than that of a judge. In one California case a disappointed civil service examinee sought to have his comparative ranking altered.[105] The question was not whether he was

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[99] 89 Ariz. 207, 209, 360 P.2d 218, 220 (1961).
The petitioner's original conviction was reversed in State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960).

[100] *E.g.,* King v. Henderson, 423 P.2d 370 (Ariz. App. 1967); *cf.* Irvine v. Frohmiller, 58 Ariz. 391, 120 P.2d 404 (1941).

[101] *E.g.,* Territory *ex rel.* Sherman v. Board of Supervisors, 2 Ariz. 248, 12 P. 730 (1887).

[102] *E.g.,* Ackel v. Jones, 97 Ariz. 50, 396 P.2d 618 (1964); Mesa Mail Publishing Co. v. Board of Supervisors, 26 Ariz. 521, 227 P. 572 (1924).

[103] 18 Ariz. 442, 464, 162 P. 882, 891 (1917).

[104] Hunt v. Campbell, 19 Ariz. 254, 169 P. 596 (1917).

[105] Mitchell v. McKevitt, 128 Cal. App. 458, 17 P.2d 789 (1932).

or was not eligible, a question judges will handle, but whether he was more or less eligible than a lot of other people. Where a comparison is sought, rather than a single dispositive determination, the courts in their equitable discretion will not grant the remedy.[106]

Inadequate Remedy Requirement

Mandamus is a last ditch remedy. Our statute provides for its grant only when "there is not a plain, adequate and speedy remedy at law . . . ."[107] When other adequate remedies are available to the petitioner, the writ will not be granted.[108] This requires, first, he exhaust such adequate remedies as are provided within the administrative structure. Secondly, he must resort to any adequate judicial remedy available to him.

Exhaustion of administrative remedies is a basic proposition of administrative law. It stems from the notion that delegations of power to agencies extend to them exclusive jurisdiction to deal with the problems handed over. The legislature intends that administrative officials handle such questions. If the process is short-circuited by judicial review prior to completion of agency action, then to that extent legislative intent in granting exclusive agency jurisdiction has been violated.[109] Consequently, the petitioner for mandamus must exhaust any adequate administrative remedy before his complaint will be considered.[110] An illustration of such failure and consequent denial of mandamus may be found in *Hutchins v. Frohmiller*.[111] In that case a claimant for payment from the state did not give the state auditor and governor the required opportunity to approve or reject his claim. Instead of exhausting his administrative remedy, he attempted to obtain mandamus. His attempt failed.

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[106] For a general discussion of discretionary issuance of the writ of mandamus, see F. FERRIS, *supra* note 11, at §§ 196-205.

[107] ARIZ. REV. STAT. § 12-2021 (1956). This statute shows an affinity to Blackstone's description of mandamus. He said that it ". . . may be issued in some cases where the injured party has another more tedious method of redress . . . ." 3 BLACKSTONE *110.

[108] This was made clear by the Arizona territorial supreme court's dictum in *In re* Woffenden, 1 Ariz. 237, 238, 25 P. 647, 648 (1875);

> [T]he court would grant or deny the writ as justice might require, it always being remembered that the writ will not be granted where the party has a plain, speedy, and adequate remedy in the ordinary course of law.

[109] For discussions of exhaustion, see 3 K. C. DAVIS, *supra* note 8, at §§ 20.01 — 20.10; L. JAFFE, *supra* note 6, at 424-58; R. J. Davis, *An Administrative Procedure Act for Arizona*, 2 ARIZ. L. REV. 17, 32-33 (1960).

[110] *E.g.*, State v. Barnum, 58 Ariz. 221, 118 P.2d 1097 (1941); Furst v. Phoenix-Tempe Stone Co., 41 Ariz. 270, 17 P.2d 813 (1933). *Compare* Campbell v. Caldwell, 20 Ariz. 377, 181 P. 181 (1919), *with* Hunt v. Schilling, 27 Ariz. 1, 229 P. 99, *rehearing denied*, 27 Ariz. 235, 232 P. 554 (1925), *and* State v. Angle, 56 Ariz. 46, 104 P.2d 172 (1940).

[111] 55 Ariz. 522, 103 P.2d 956 (1940).

Two qualifications should be appended here. Remedies that are not adequate need not be exhausted. Where the administrative route would be fruitless adherence to exhaustion requirements has not always been demanded.[112] Also, appellate courts have not permitted failure to exhaust to block mandamus when objection on that ground was not raised in the trial court.[113]

Unless they are not adequate, judicial remedies other than mandamus must also be exhausted before the writ will be granted. The problem here is: What remedy is adequate? What is inadequate? Generally speaking, where there is no statutory provision for review (neither anything applicable to the specific agency nor any general review enactment), there is no adequate remedy;[114] and where there is statutory provision for review, it is considered adequate.[115]

There are exceptions to both general propositions. In *Arnett v. Smith*,[116] the supreme court intimated that even though statutory review might not be available, mandamus will not issue if some other judicial remedy can be obtained. The writ was there denied because an action for damages on an official bond could have been brought.[117] In other instances, clearly applicable statutory remedies have been considered inadequate. They do not, however, set forth any formula as to adequacy. Several factors, though, were considered as bearing on the question. Chief among them is delay that might result from resort to other remedies. Because of its privileged position on the court calendar, mandamus is a rapid remedy.[118] But other factors combine with delay in each of the cases where it is cited as a reason for allowing mandamus. Some of them are wartime conditions,[119] the need to sue the state and then get a legislative appropriation,[120] inability to use property during

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[112] Donaldson v. Sisk, 57 Ariz. 318, 113 P.2d 860 (1941).

[113] Robinson v. Lintz, 420 P.2d 923 (Ariz. 1966).
The petitioner adequately alleges exhaustion by setting forth the facts showing it; he does not need to say specifically that he has no speedy, plain and adequate remedy. Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926).

[114] *E.g.*, Harless v. Lockwood, 85 Ariz. 97, 332 P.2d 887 (1958); Dunshee v. Manning, 59 Ariz. 430, 129 P.2d 924 (1942); Christmas Copper Corp. v. Kennedy, 58 Ariz. 216, 118 P.2d 1110 (1941); Fairfield v. W. J. Corbett Hardware Co., 25 Ariz. 199, 215 P. 510 (1923).

[115] *E.g.*, Aztec Land & Cattle Co. v. Navajo Realty Co., 79 Ariz. 55, 283 P.2d 227 (1955); Zuniga v. Superior Court, 77 Ariz. 222, 269 P.2d 720 (1954); Bolen v. Quihuiz, 26 Ariz. 350, 225 P. 1110 (1924); Belknap v. Hunt, 20 Ariz. 148, 177 P. 932 (1919); State *ex rel.* Young v. Superior Court, 14 Ariz. 126, 125 P. 707 (1912); Dorrington v. Board of Supervisors, 8 Ariz. 4, 68 P. 541 (1902).

[116] 26 Ariz. 430, 226 P. 529 (1924). *But cf.* Hutchins v. Swinton, 56 Ariz. 451, 108 P.2d 580 (1940).

[117] For other illustrations of this exception, see State *ex rel.* Corbin v. Superior Court, 100 Ariz. 104, 412 P.2d 45 (1966); Taylor v. Tempe Irrigating Canal Co., 21 Ariz. 574, 193 P. 12 (1920).

[118] For a discussion of effect of ARIZ. SUP. CT. RULE 1 on the calendar position of mandamus petitions in the supreme court, see Rehnquist, *supra* note 9.

[119] Brown v. De Concini, 60 Ariz. 476, 140 P.2d 224 (1943).

[120] Covington v. Basich Bros. Const. Co., 72 Ariz. 280, 233 P.2d 837 (1951).

the wait,[121] cost by reason of delay,[122] and the public aspect of the questions considered.[123] Also existence of a de novo trial upon following the statutory route has been invoked as rendering it inadequate. The rights from the administrative decision would be re-litigated and might be ignored.[124] And finally, the unfamiliarity of the regular remedy might render it inadequate.[125]

The Arizona Administrative Review Act cases form a special category here. The statute is not applicable to county and municipal agencies but does apply to state bodies.[126] Is it an adequate method for review so that when it is available mandamus will not be issued? This question was answered "yes" in *State Board of Technical Registration v. Bauer.* There, after an applicant for an architect's license was told by the board that he had to take an examination, he sought and was denied mandamus. The court stated that to grant the writ "invalidates in part at least, the Administrative Review Act."[127] The question was answered "no" two years later in *Senner v. Bank of Douglas,*[128] a case involving administrative refusal to accept filing of an amendment to a corporate charter. The corporation commission was ordered by mandamus to accept the amendment. There was no particular discussion of restrictions on mandamus and its relationship to the Administrative Review Act; but the court did indicate that the case was of enough importance to ignore some pleadings problems. Still later another "yes" answer was given. In *Rhodes v. Clark*[129] the review act was considered adequate. There an applicant for a dry wall contractor's license sought and was denied mandamus to compel issuance of his license. The Administrative Review Act was available to him; delay alone did not render it inadequate.

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[121] McCarrell v. Lane, 76 Ariz. 67, 258 P.2d 988 (1953).

[122] *In re* Trico Elec. Cooperative, 92 Ariz. 373, 377 P.2d 309 (1962).

[123] *Id.*

[124] Moeur v. Ashfork Livestock Co., 48 Ariz. 298, 61 P.2d 395 (1936). *But cf.* State Bd. of Dispensing Opticians v. Carp, 85 Ariz. 35, 330 P.2d 996 (1958).

[125] It is instructive to compare the language of the supreme court in a 1948 case with that used in 1923 on this point.

> [To send back the case for failure to use the unfamiliar rule] . . . would be on a par with the legalistically minded judge who ordered the defendant in a drunken driving case to go at once and get himself a driver's license so the state could revoke it.

Johnson v. Superior Court, 68 Ariz. 68, 73, 199 P.2d 827, 830 (1948).

> The misunderstanding, pardonable under the circumstances, is unfortunate, and if it were possible to review the ruling of the land department on its merits, in this kind of a proceeding, we would do so.

Campbell v. Muleshoe Cattle Co., 24 Ariz. 620, 630, 212 P. 381, 384 (1923).

For a general discussion of the question of adequacy of remedies, see F. FERRIS, *supra* note 11, at §§ 213-16.

[126] ARIZ. REV. STAT. § 12-901 (1) (1956).

[127] 84 Ariz. 237, 242, 326 P.2d 358, 361 (1958).

[128] 88 Ariz. 194, 354 P.2d 48 (1960), *noted in* 15 OKLA. L. REV. 175 (1962).

[129] 92 Ariz. 31, 373 P.2d 348 (1962). There the court relied upon a case involving the availability of the writ of prohibition when the Administrative Review Act was applicable. State Bd. of Technical Registration v. McDaniel, 84 Ariz. 223, 228, 326 P.2d 348, 351 (1958).

PARTIES

At common law extraordinary writs are issued in the name of the sovereign generally to governmental officials. Yet there are many times when neither the sovereign nor its agents have any real interest in the outcome of the proceedings. It, thus, becomes necessary in this age of more frequent resort to mandamus to consider the position of:

(a) the petitioner and such other persons as have a beneficial interest in the action being sought of the administrative agency; and

(b) the respondent officer or agency and such other persons as have an interest in retaining the administrative position as it was prior to the mandamus action.

Petitioner

Judicial review is intended to afford protection of interests that in some distinctive and discriminating fashion have been specially affected by assertedly illegal action by governmental agents. Only such persons as have standing to sue may challenge administrative action in the courts.[130] Standing in mandamus cases is said to be a fairly narrow concept, one which ties in with the concept of plain duty and legal right and thus tends to merge with question of prerequisites for issuance of the writ.[131] The Arizona statute limits standing to seek mandamus to persons who are "beneficially interested."[132] Others need not apply for the writ.[133]

When the act complained of directly affects the petitioner's rights, he is "beneficially interested." Normally the person who sought to have the officer perform the act has standing.[134] In *Territory ex rel. Clark v. Gaines*[135] the central government was beneficially interested in the mandamus proceeding because it was entitled to keep a third of the taxes it was seeking. Also members of a nonprofit corporation would have an adequate interest to entitle them to petition for mandamus directed to the board of trustees of the corporation relating to its operation.[136] Such petitioners however, are not the only persons adversely affected in fact by agency conduct. There are those whose interests are indirectly affected. At times they too are said to be "beneficially interested" enough to obtain the writ. For example, lemon growers who

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[130] For a general discussion of the law of standing to sue, see 3 K. C. DAVIS, *supra* note 8, at §§ 22.01 — 22.18. The doctrine under Arizona law is discussed in R. J. Davis, *supra* note 109, at 30-32.

[131] L. JAFFE, *supra* note 6, at 503-04.

[132] ARIZ. REV. STAT. § 12-2021 (1956).

[133] For discussion of parties plaintiff in mandamus actions, see F. FERRIS, *supra* note 11, at §§ 230-33; J. HIGH, *supra* note 11, at §§ 430-39.

[134] *E.g.*, Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820 (1909).

[135] 11 Ariz. 270, 93 P. 281 (1908).

[136] Hatch v. Emery, 1 Ariz. App. 142, 400 P.2d 349 (1965).

wanted the supervisor of inspection to eliminate persons not in commercial production from the lemon grower list, were said to have standing.[137] The number of persons on such list affected the chances of getting the necessary vote to set up a prorate plan. Listing non-commercial growers had an indirect, but quite real impact on the petitioners. Also state[138] and local[139] agencies have adequate interest in seeing that claims against them are paid to give them standing to seek mandamus against officials who have the funds from which payments would be made. The importance of their credit status and business integrity makes them parties beneficially interested.

Not all persons who feel impact from administrative activity are entitled to obtain judicial review. Their interests may be considered too remote to permit them access to mandamus. In *Burmister v. City of Prescott,*[140] the petitioner had contracted to sell property to an applicant for a business license. Upon refusal of the license he tried to get a writ, but was denied it on the ground that he was not a party to the application for the license and thus was not aggrieved by its denial. The moving party had a real economic interest in the governmental action, but, nevertheless, was denied the right to challenge it.[141] No very clear statement exists as to just how close the impact must be to give rise to "beneficial interest."[142]

Petitioners have been permitted to act as representatives of a group and assert the claims for the entire class. Thus a state senator and a representative were allowed to act for their fellow state legislators,[143] and two attorneys were permitted to speak for the entire bar of Pima County.[144] Also in *Warner v. White*[145] intervenors were allowed to be substituted as new champions of the group in a representative suit in mandamus. The intervenor was an elector acting on behalf of 13,000 other voters concerning the validity of certain referendum petitions. He came close to being a so-called "private attorney general" — someone whose standing is to assert public rights.[146]

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[137] Anthony A. Bianco, Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959).
[138] *E.g.*, Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949).
[139] *E.g.*, Barry v. Phoenix Union High School, 67 Ariz. 384, 197 P.2d 533 (1948).
[140] 38 Ariz. 66, 297 P. 443 (1931).
[141] The petitioner in Bravin v. Mayor of City of Tombstone, 6 Ariz. 212, 56 P. 719 (1899), also had a financial stake in the outcome of his petition and lost his case.
[142] The usual theory, when the plaintiff does not have standing to seek review of the governmental action, is that the court lacks jurisdiction to consider its validity. *See, e.g.*, Roer v. Superior Court, 417 P.2d 559, 562 (Ariz. App. 1966), citing Mendelsohn v. Superior Court, 76 Ariz. 163, 261 P.2d 983 (1953).
[143] Giss v. Jordan, 82 Ariz. 152, 309 P.2d 779 (1957).
[144] Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176 (1940).
[145] 39 Ariz. 203, 4 P.2d 1000 (1931). Intervention in superior court proceedings in governed by ARIZ. R. CIV. P. 24.
[146] For a general discussion of the standing doctrine relative to public actions, see L. JAFFE, *supra* note 6, at 459-500.

Respondent

The official or governmental entity whose duty it is to act is the proper party respondent in mandamus proceedings.[147] Who should and who should not be sued is illustrated by a case in which a successful plaintiff in a wrongful death action against the city of Flagstaff sought payment by bringing mandamus against the city council, collector and treasurer.[148] His action was upheld as against the council and the treasurer; the council had the duty to levy such a tax and the treasurer's responsibility was to pay over its proceeds to the petitioner. But mandamus did not lie against the city's tax collector, since collection of this sort of tax was handled by the county treasurer.

Subordinate officials in bureaucracy are subject to mandamus. It is assumed that they will obey the judicial mandate irrespective of the attitude of their superiors.[149] Also replacements in government offices are proper substitute respondents for their predecessors in office. Change in agency personnel does not abate an action because the writ operates on the office rather than the individual holding that position.[150]

According to the statute, mandamus may be issued to any "person, inferior tribunal, corporation or board."[151] As well as being issued against the state itself,[152] it has been issued against a wide variety of state, county, and local officials and agencies.[153] Mandamus against the governor, a tricky question because of separation of powers theories, was at first denied in Arizona.[154] Then it was almost, but not quite, accomplished.[155]. Finally, it was permitted.[156]

While in many actions the real party defendant in interest is the official or organization sued,[157] there are proceedings where they are only nominally interested. Rule 1 of supreme court requires written notice of the informal hearing for an alternative writ to be given to "all parties in interest"[158] and stipulates that "the affidavit or petition

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[147] F. FERRIS, *supra* note 11, at § 234; J. HIGH, *supra*, note 11, §§ 440-47 (a).
[148] Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926).
[149] Hunt v. Schilling, 27 Ariz. 235, 232 P. 554 (1925); see also Donaldson v. Sisk, 57 Ariz. 318, 113 P.2d 860 (1941).
[150] Murphy v. Utter, 186 U.S. 95 (1902); City of Bisbee v. Cochise County, 50 Ariz. 360, 72 P.2d 439 (1937); City of Bisbee v. Cochise County, 44 Ariz. 233, 36 P.2d 559 (1934); Milburn v. Burns, 1 Ariz. App. 147, 400 P.2d 354 (1965).
[151] ARIZ. REV. STAT. § 12-2021 (1956).
[152] State v. Angle, 56 Ariz. 46, 104 P.2d 172 (1940).
[153] See list in R. J. Davis, *supra* note 9, at 95-97.
[154] Insane Asylum v. Wolfly, 3 Ariz. 132, 22 P. 383 (1889).
[155] Campbell v. Hunt, 18 Ariz. 442, 162 P. 882 (1917).
[156] Winsor v. Hunt, 29 Ariz. 504, 243 P. 407 (1926).
For other illustrations of mandamus against the governor of Arizona, see Krucker v. Goddard, 99 Ariz. 227, 408 P.2d 20 (1965); Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949); McBride v. Osborn, 59 Ariz. 321, 127 P.2d 134 (1942).
[157] Lesher, *supra* note 9 at 37.
[158] ARIZ. SUP. CT. RULE 1 (c).

shall . . . disclose the name or names of the real party or parties in interest . . . or parties whose interest would be directly affected by the proceedings."[159] The rule, however, asks for a formal answer only from the "respondent."[160]

The party who prevailed in the administrative proceeding would have an obvious interest in the outcome of the mandamus action. For example, successful applicants for a lease of state lands quite naturally are concerned about mandamus brought by unsuccessful ones;[161] a taxpayer who compromised a claim against it has an interest in a proceeding against the tax collector to collect the full amount of the taxes.[162] Such affected persons have been allowed to intervene.[163]

Where a large number of persons or groups are due to feel the impact of a mandamus proceeding, it is not necessary that they all be joined as respondents. Only enough need be sued to insure adequate representation for the group.[164]

PROCEDURE

Pleadings

Because of the speed with which mandamus proceedings move, the pleadings are of comparatively greater importance than they are in ordinary lawsuits.[165] Where there is an application for a writ made without accompanying notice to the respondent, it is treated as an application for an alternative writ.[166] The alternative writ must state generally the allegations of the complaint;[167] it is the pleading of the petitioner in such a case.[168] Where there is due notice of at least ten days to the respondent, the peremptory writ may be issued in the first instance.[169] The application is the petitioner's pleading.

The rules of the supreme court set forth the form for mandamus pleadings[170] and the case law governs their content. It is necessary for the petitioner to allege such facts as will demonstrate the presence of the required prerequisites and parties for mandamus. If he does not

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[159] ARIZ. SUP. CT. RULE 1 (b).
[160] ARIZ. SUP. CT. RULE 1 (d).
For a discussion of Rule 1, see Molloy, *Procedural Aspects of Extraordinary Writs*, in EXTRAORDINARY WRITS IN ARIZONA 135-36 (C. M. Smith ed. 1967).
[161] *E.g.*, Campbell v. Muleshoe Cattle Co., 24 Ariz. 620, 212 P. 381 (1923).
[162] *E.g.*, Territory *ex rel.* Clark v. Gaines, 11 Ariz. 270, 93 P. 281 (1908).
[163] *E.g.*, Alberts v. McGirk, 51 Ariz. 510, 78 P.2d 483 (1938).
[164] City of Mesa v. Killingsworth, 96 Ariz. 290, 394 P.2d 410 (1964); Anthony A. Bianco, Inc. v. Hess, 86 Ariz. 14, 339 P.2d 1038 (1959).
[165] Lesher, *supra* note 11, at 37-39.
[166] ARIZ. REV. STAT. § 12-2023A (1956).
[167] ARIZ. REV. STAT. § 12-2022B (1956).
[168] Emery v. Superior Court, 89 Ariz. 246, 360 P.2d 1025 (1961).
[169] Ariz. Rev. Stat. § 12-2023B (1956).
[170] ARIZ. SUP. CT. R. 1 (a).

do so with some degree of precision, there is old authority that the writ will not issue against the administrator.[171] Also, quite surprisingly, in *Emery v. Superior Court*,[172] the same strict view was taken in 1961. There prohibition was issued against a judge who was to consider an alternative writ of mandamus which merely had ordered performance of the acts. It did not recite the petitioner's complaint, but that could rather quickly have been ascertained. Perhaps the fact that the matter was raised on prohibition explains the strictitude of the opinion in *Emery*. In any event it is contrary to the more liberal reading of pleadings in a number of prior cases,[173] and to the practice of allowing amendments to supply deficiencies.[174]

The respondent's pleadings are made at the time of the return day of the alternative writ, or if the petitioner sought a peremptory writ, at the time set in the notice of petitioner's application for the writ.[175] Under current procedure, the respondent may file a motion to dismiss or an answer. In either event, he sets forth such additional facts as he may desire and an explanation why the writ should not issue.[176]

Trial

Because mandamus is available in many instances to challenge official actions where no record has been made by the administrative agency, it is often necessary to establish the facts in the mandamus proceeding.[177] When such action is instituted in the superior court, the judge "shall try such question, or may order the question tried before a jury."[178] If the jury is to determine the question of fact, such question "shall be distinctly stated in the order for the trial."[179]

In an original proceeding before the supreme court where there are no controverted facts, the court will undertake to make the decision on the issues of law.[180] When, however, there are fact issues, the practice is

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[171] *E.g.*, Campbell v. Caldwell, 20 Ariz. 377, 181 P. 181 (1919). *Compare* Leatherwood v. Hill, 10 Ariz. 16, 85 P. 405 (1906), *with* Leatherwood v. Hill, 10 Ariz. 243, 89 P. 521 (1906).

[172] 89 Ariz. 246, 360 P.2d 1025 (1961). This case is discussed in Molloy, *supra* note 160, at 127-28.

[173] Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942); Town of Flagstaff v. Gomez, 29 Ariz. 481, 242 P. 1003 (1926); *In re* Wall, 18 Ariz. 251, 158 P. 432 (1916).

[174] Buggeln v. Doe, 9 Ariz. 81, 78 P. 367 (1904); Buggeln v. Doe, 8 Ariz. 341, 76 P. 458 (1904).

[175] ARIZ. REV. STAT. § 12-2024 (1956).

[176] Lesher, *supra* note 9, at 39.

[177] At common law trial of the facts was not allowed in mandamus proceedings. If the respondent's answer was untrue, the petitioner had to reach it by an action for a false return. L. JAFFE, *supra* note 6, at 186.

[178] ARIZ. REV. STAT. § 12-2025A (1956).

[179] *Id.*

[180] Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949); Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942).

to remand the case to a superior court for trial of such questions.[181] According to the statute the "superior court shall thereupon try such issue to a jury as a trial in civil actions. . . ."[182] Also, cases on appeal in which necessary facts are not settled will be remanded for superior court determination.[183]

Questions of law are subject to judicial re-determination in mandamus actions.[184] Though they may be rather closely examined, complete judicial sway here is blocked by the plain duty rule which gives to the administrative agency some scope in making such decisions.[185]

CONCLUSION

Although the fog encompassing mandamus has not lifted, it has thinned enough to conclude that the writ is being freed from some of its technical shackles by the Arizona courts. They have moved toward Lord Mansfield's innovating freedom from technicality in *Rex v. Barker*. In 1762 he said of the writ:

> It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it 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.[186]

The alternative to this judicial relaxation should not be denial of mandamus on technicalities of a bye-gone time, but rather creation by legislative action of specific remedies for administrative abuses. This could be accomplished either by broadening the Administrative Review Act as to state agencies and extending its coverage to county and city ones, or by providing specific review provisions for review in every enactment delegating administrative power. In absence of such legislative activity, there is every likelihood of continued judicial liberalization of Arizona administrative mandamus.

Neither will the court of appeals remand when there are no fact issues. *Cf.* Bagwell v. Deddens, 424 P.2d 203 (Ariz. App. 1967).

[181] Crawford v. Hunt, 41 Ariz. 229, 17 P.2d 802 (1932); Industrial Comm'n v. Arizona State Highway Comm'n, 40 Ariz. 163, 10 P.2d 1046 (1932); *In re* Woffenden, 1 Ariz. 237, 25 P. 647 (1875).

[182] ARIZ. REV. STAT. § 12-2025C (1956).

[183] *E.g.*, Maloney v. Moore, 46 Ariz. 452, 52 P.2d 467 (1935).

For a general discussion of the hearing in mandamus cases, see F. FERRIS, *supra* note 11, at §§ 251-53. The Arizona law relating to trial facts in prerogative writ cases is described in, Molloy, *supra* note 160, at 142-46.

[184] ARIZ. REV. STAT. § 12-2027 (1956).

[185] For studies of the scope of judicial review of administrative action, see 3 K. C. DAVIS, *supra* note 8, at §§ 29.01 — 29.11; R. J. Davis, *supra* note 109, at 35.

[186] 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).