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CERTIORARI — REVIEW OF GOVERNOR'S DISMISSAL PROCEEDING — Proceedings were instituted against the directors of a California prison on charges of misconduct, incompetency, and neglect of duty, which resulted in their removal from office by the governor. A constitutional provision authorized the governor to appoint such directors, who were to hold office for ten years, and provided that the governor should have the power to remove the directors for misconduct, incompetency, or neglect after an opportunity to be heard upon written charges.[1] Due notice and a complete hearing were accorded to the directors as required. Plaintiff directors seek review of the removal proceedings by writ of certiorari. *Held*, certiorari may issue to review proceedings by the governor under a statute[2] providing for writ of review when an inferior tribunal, board, or officer exercising judicial functions has exceeded its jurisdiction. *O'Brien v. Olson*, (Cal. App. 1941) 109 P. (2d) 8.

While courts are reluctant to interfere with a governor's findings of unfitness of a public officer as a basis for removing him, there is ample authority for the use of the writ of certiorari for review when the governor is thereby exercising a quasi-judicial function.[3] Statutory provisions for a writ of review, such as the court was concerned with in the principal case, have repeatedly been held to be but an affirmance of the common-law jurisdiction of the court in certiorari.[4] At common law, certiorari lies only to review judicial or quasi-judicial acts, and it is peculiarly applicable to cases in which a judicial body, in pronouncing judgment in statutory proceedings, exceeds its jurisdiction and no appeal or writ of error is allowed.[5] But a mere statement of the rule in reference to a governor's exercise of an administrative quasi-judicial power is not sufficient to solve the problems in the variety of situations that are presented. The real difficulty is to determine when the governor is exercising a quasi-judicial function. Furthermore, the doctrine of separation of powers has made it dif-

[1] Cal. Const. (1879) art. X, § 1: "There shall be a state board of prison directors, to consist of five persons, to be appointed by the governor, with the advice and consent of the senate, who shall hold office for ten years. . . . The governor shall have the power to remove either of the directors for misconduct, incompetency, or neglect of duty, after an opportunity to be heard upon written charges."

[2] Cal. Code Civ. Proc. (Deering, 1937), § 1068: "A writ of review may be granted by any court, except a municipal, police, or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

[3] State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 133 N. W. 857 (1911); Harrington v. Smith, 114 Kan. 262, 217 P. 270 (1923); In re Mason, 147 Minn. 383, 181 N. W. 570 (1920). Certiorari is the appropriate proceeding to review the jurisdiction of a governor in a proceeding to remove a highway commissioner. State ex rel. Olson v. Welford, 65 N. D. 522, 260 N. W. 593 (1935).

[4] See 25 CAL. L. REV. 694 (1937), and cases therein cited.

[5] FERRIS, EXTRAORDINARY LEGAL REMEDIES 181-182 (1926); People ex rel. Republican & Journal Co. v. Wiggins, 199 N. Y. 382, 92 N. E. 789 (1910); Greenville Gas, Electric Light, Power & Fuel Co. v. Greenville, 165 Mich. 135, 130 N. W. 333 (1911). Writ of certiorari does not lie to review executive acts. Chase v. Billings, 106 Vt. 149, 170 A. 903 (1934).

ficult to justify the exercise of such a function by an administrative officer who is not part of the judicial department.[6] Various definitions have been attempted, and the majority of cases seem to indicate that a quasi-judicial function is not exercised unless (1) it is carried on in a form and manner similar to a court proceeding in that persons affected must be given notice and a hearing, and (2) it involves the exercise of judgment in the determination of rights of persons or property through the ascertainment of existing facts and the application to them of principles and standards prescribed by law.[7] Tested by these principles, it would appear clear in the principal case that the prison directors, being appointed for a definite term and subject to removal only for express causes after notice and hearing, cannot be removed by the governor at his arbitrary discretion without a review by the courts.[8] A governor should not be immune from judicial control under all circumstances merely because he is chief executive of the state, for it is apparent that in such case he might arbitrarily remove public officers for political and personal reasons only. Indeed, the President of the United States was confined to a quasi-judicial procedure by the Supreme Court in an attempted arbitrary removal of a duly appointed member of the Federal Trade Commission.[9] However, when control over subordinates by a governor is more legislative or executive in character than judicial, there can be no review by a court over such removals.[10] Courts have no power to interfere by certiorari with dismissals made without cause by the governor where the appointment is for a term at his will, pleasure, or discretion.[11] Furthermore, it may be an

[6] Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935).

[7] FERRIS, EXTRAORDINARY LEGAL REMEDIES 180, 182 (1926); 25 CAL. L. REV. 694 at 695 (1937). For example, the power of the Real Estate Brokers' Board to deny or revoke a broker's license is quasi-judicial, and hence reviewable by certiorari. State ex rel. Progreso Development Co. v. Wisconsin Real Estate Brokers Board, 202 Wis. 155, 231 N. W. 628 (1930). But certiorari is not a proper remedy to review the action of a general state-wide administrative board in suspending or revoking licenses, because such boards do not exercise judicial or quasi-judicial powers. Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal. (2d) 75, 87 P. (2d) 848 (1939).

[8] 14 C. J. S. 173 (1939); In re Mason, 147 Minn. 383, 181 N. W. 570 (1920); State ex rel. Olson v. Welford, 65 N. D. 522, 260 N. W. 593 (1935); State ex rel. Wehe v. Frazier, 47 N. D. 314, 182 N. W. 545 (1921).

[9] ". . . the fixing of a definite term [for a public officer] subject to removal for cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause." Humphrey's Executor v. United States, 295 U. S. 602 at 623, 55 S. Ct. 869 (1935).

[10] People ex rel. Schau v. McWilliams, 185 N. Y. 92, 77 N. E. 785 (1906); Chase v. Billings, 106 Vt. 149, 170 A. 903 (1934). A more extreme view is that found in Spivey v. Blackwood, 161 S. C. 521, 159 S. E. 927 (1931), where a governor's order declaring the office of sheriff vacant for misconduct was held to be executive in character, and not reviewable by certiorari.

[11] See, for example, Touart v. State ex rel. Callaghan, 173 Ala. 453, 56 So. 211 (1911). But a governor does not have the power of removal where a statute creates an office to be filled by appointment of the governor, and fixes the term, but confers on the governor no power of removal. State ex rel. Lyon v. Rhame, 92 S. C. 455, 75 S. E. 881 (1912); Bruce v. Matlock, 86 Ark. 555, 111 S. W. 990 (1908).

unconstitutional interference with the executive power of the governor for the legislature to place quasi-judicial limitations on his power of dismissal of executive subordinates.[12] The theory of such an argument is that an executive assistant is merely one of the units in the executive department, and hence subject to the exclusive and illimitable power of removal by the chief executive. Any other view would lead to consequences of manifest inconvenience, and would be an invasion of the executive branch of the government.[13] A question remains as to the scope of review under writ of certiorari. It is generally held that a court may annul a finding of an inferior judicial officer or tribunal only where there is no evidence to sustain a charge, or where there is an error of law, or where errors going to the jurisdiction have been committed.[14] It will be seen that such a review will preserve a wide latitude within which a governor may exercise his administrative discretion, since his decision on disputed questions of fact is conclusive, while at the same time it will afford the public official judicial protection against an uninformed and arbitrary dismissal.

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[12] In Myers v. United States, 272 U. S. 52, 47 S. Ct. 21 (1926), it was held that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate, as required by act of Congress. Such officer was held to be subject to the exclusive and illimitable power of removal by the Chief Executive.

[13] Degge v. Hitchcock, 229 U. S. 162, 33 S. Ct. 639 (1912); Myers v. United States, 272 U. S. 52, 47 S. Ct. 21 (1926).

[14] State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 133 N. W. 857 (1911); Cohn v. Butterfield, 89 Neb. 849, 132 N. W. 400 (1911); FERRIS, EXTRAORDINARY LEGAL REMEDIES 180, 181 (1926).