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Role of the Secretary of State under the South Carolina Business Corporation Act of 1962

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ROLE OF THE SECRETARY OF STATE UNDER THE SOUTH CAROLINA BUSINESS CORPORATION ACT OF 1962

I. SCOPE OF NOTE

The purpose of this article is to consider the duties and powers of the Secretary of State under the South Carolina Business Corporation Act of 1962,[1] hereinafter referred to as the "1962 Act." Included is a review of any significant changes made in the Secretary's responsibilities, as well as a discussion of the available methods of judicial review open to those who feel themselves aggrieved by his enforcement of this act. It should be noted at the outset that throughout this article, duties of the Secretary of State will be classified either as ministerial or discretionary. Those duties which require only a check for mechanical compliance with specific sections are categorized as "ministerial"; in connection with these responsibilities, the Secretary is not called upon to use any discretion or to make any policy decisions. Most of these duties are in connection with filing of corporate documents, which either do or do not conform to statutory requirements as a matter of mechanical comparison. Duties are "discretionary" if the Secretary is allowed some latitude within the 1962 Act in deciding whether, under a given set of circumstances, he will or will not perform a statutory function. This discretion is found in but few sections and is clearly delimited. No general broad, or ill-defined discretion is settled on the Secretary under the 1962 act and, indeed, such is alien to the very goals of clarity and simplicity which are objectives of both the 1962 Act and of the Model Act upon which, in this respect, the 1962 Act is largely based.

II. MINISTERIAL DUTIES

Chief among the ministerial duties of the Secretary is the filing of documents relating to the organization, change, or termination of corporate existence. The basic filing section[2] sets forth a mechanical process not unlike that existing under the South Carolina Recording Act.[3] Upon delivery of the

1. Act No. 847 of 1962.
2. S. C. CODE §12-11.6 (Supp. 1962).
3. S. C. CODE §60-101 (1962).

document ". . . and required fees and taxes . . ." the Secretary clocks the instrument, placing thereon a "filing date" of the hour, day, month and year, much the same as is currently done by the registers of mesne conveyances in the several counties. Under this general filing section, the role of the Secretary is that of a mere repository, with no discretion to refuse filing of the documents so long as the prerequisites of form and fees are complied with.[4]

Most of the sections concerning documents to be filed hearken back to the basic recording section, but the 1962 Act specifically spells out the determinations to be made by the Secretary before filing the articles of incorporation.[5] These are mostly mechanical checks for statutory compliance, with one exception,[6] and when the Secretary finds that these few requirements have been satisfied, he "*shall* file the articles of incorporation."[7] (Emphasis added)

All other sections dealing with filing of instruments[8] simply provide that they "shall be executed, verified and delivered for filing as provided by sections 12-11.4—12-11.6; that is, in accordance with the provisions made generally applicable to all documents required by the act. No individual attention is required.

Another ministerial function of the Secretary is the keeping of a current alphabetical list of corporations active in South Carolina.[9] This is a *sine qua non* for his determination of whether or not a given name is available for corporate use. Although not expressly provided for under the current South

4. See Reporter's Notes to §1.6, DRAFT VERSION, S. C. BUS. CORP. ACT OF 1962.

5. S. C. CODE §12-14.4 (Supp. 1962):

> . . . he [the Secretary of State] shall, before filing them, determine that the Articles (a) comply with the requirements of Sections 1.4-1.6 (Execution, Verification, and Delivery of Documents For Filing);
> (b) set forth the information required by Section 4.3 (Contents of Articles of Incorporation);
> (c) do not adopt as the name of the corporation a name which is in violation of Section 3.1 (Corporate Name); and
> (d) are accompanied by the attorney's certificate required by subsection (d) of Section 4.3 (Contents of Articles of Incorporation.
> Upon making such determinations, the Secretary of State shall file the articles of incorporation.

6. Sub-section (c), note 5 *supra*.

7. Note 5 *supra*.

8. Too numerous to be listed here, but found in Appendix 5 of the Draft Version, p. 265.

9. S. C. CODE §12-13.1(f) (Supp. 1962).

Carolina law, without such a list it would have been impossible to ascertain whether a proposed name is "different from the name of any previously chartered corporation," as provided in section 12-58(2).[10] Section 12-13.1(f) is therefore a change only in the sense that it provides an explicit statutory foundation for a useful practice. A similar section provides for other alphabetical lists, arranged by corporate name, of each corporation's registered office and of the name and address of each registered agent.[11] This section, which has no counterpart in either existing South Carolina practice or the Model Act, is a reflection of the ingenuity of the joint drafting committee. Shareholders who have lost contact, process servers, and even prospective business associates will be able to determine by a telephone call the whereabouts of any given corporation.

Another of the Secretary's duties greatly facilitates the service of process on corporations doing business within this State. The Secretary is statutorily appointed agent for service of process in virtually all suitable situations. Thus if a registered agent of a domestic corporation has not been appointed or cannot be found, the corporation is deemed to have appointed the Secretary as agent for service purposes.[12] This is also the case if the registered agent of an authorized foreign corporation is for some reason unavailable,[13] or if the authority to do business in this State has been revoked.[14] Service may likewise be had on the Secretary of State as agent of any non-authorized foreign corporation,[15] and as agent for any corporation whose authority has been revoked in the jurisdiction of its incorporation.[16] Non-resident directors may be served in the same manner.[17] These methods expressly do not impair the right to serve process on corporations "in any other manner now or hereafter provided by law,"[18] but rather provide a complete answer to the age-old problem of locating the defendant. These provisions are not new in con-

10. S. C. CODE (1962).
11. S. C. CODE §12-13.4(b) (Supp. 1962).
12. S. C. CODE §12-13.6(b) (Supp. 1962).
13. S. C. CODE §12-23.13(b) (Supp. 1962).
14. S. C. CODE §12-23.13(b) (Supp. 1962).
15. S. C. CODE §12-23.14(a) (Supp. 1962).
16. S. C. CODE §12-23.10(c) (Supp. 1962).
17. S. C. CODE §12-13.7(a) and (b) (Supp. 1962). Note that subsection (e) requires the Secretary of State to keep a current list of all such directors, arranged alphabetically by corporate name.
18. S. C. CODE §12-13.6(d) (Supp. 1962).

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cept, but merely round out the statutory service provisions of the present law, and codify the results reached in the cases. The Secretary of State transforms the constructive notice given to him as "agent" into actual notice by mailing a copy of the process to the corporation at its registered office in this State,[19] or at its principal office in the state of incorporation.[20]

Section 12-24.1 of the 1962 Act provides that each corporation doing business in South Carolina shall deliver to the Secretary of State a copy of an annual report containing specified information. The Secretary "shall file the report if he finds that it conforms to the requirements of the act."[21] Section 12-24.2 provides, in addition to other penalties imposed on the corporation that fails to file a report or submits an incorrect one, that the "Secretary *shall* also proceed as provided in section 12-22.11 (Dissolution of Corporation by Forfeiture), and in Section 12-23.11 (Revocation of a Foreign Corporation's Authority to Do Business in This State)."[22] These two sections provide a speedy administrative sanction against domestic and foreign corporations respectively, for failure to follow basic procedures which are substantially the same in each case. The wording in these sections, however, is somewhat puzzling. Under section 12-22.11, if a domestic corporation fails to file its annual report, pay its fees, or appoint and maintain a registered agent and office, the Secretary "*shall* send to the corporation . . . notice of its impending dissolution . . ." and, if the defect is not repaired, ". . . the Secretary of State *shall* prepare a declaration of dissolution . . . and *shall* file the declaration in this office . . ." (Emphasis added). But under section 12-23.11, if a foreign corporation fails to make its report, etc. "(its) authority . . . to do business in this State *may* be revoked by the Secretary of State . . ." (Emphasis added). The difference between "shall" (in section 12-22.11) and "may" (in section 12-23.11) would appear to be the difference between a mandatory duty and an optional power. The situation is even further complicated by section 12-24.2, which provides that if a corporation fails to

19. Note 12 *supra*.
20. Note 13 *supra*.
21. S. C. CODE §12-24.1 (Supp. 1962).
22. Although section 12-23.11 will presently be characterized as giving the Secretary a *discretionary* power, it was felt that discussion under the sub-head "Ministerial Duties" was not inappropriate, because of that section's unusual comparison with section 12-22.11.

file its report, "the Secretary of State *shall* also proceed as provided by section 12-22.11 . . . and in section 12-23.11 . . ." It is hardly possible that the Legislature intended to be more severe with domestic than with foreign corporations, but the above construction is at least a possible one.[23]

Administrative suspension of authority to do business is also provided in section 12-23.5(d), and in this section there would not appear to be the slightest vestige of discretion, the statute stating plainly that "the corporation's authority *shall* be suspended . . ." (Emphasis added).

Judicial dissolution of a corporation is included under another section.[24] The intention of the drafting committee, as expressed in the Reporter's Notes,[25] seems to have been to make the courts the forum for any discretionary dissolution. The swift and sure sanction of automatic dissolution will be a strong incentive to comply with statutory requirements. The generous grace period[26] combined with a relatively uncomplicated reinstatement provision[27] tempers the rigor of the administrative procedure, probably without sacrifice of deterrent effect. Upon the above considerations, it is submitted that the proper construction of those sections giving the Secretary authority to cancel the right to do business—whether the section says "shall" or "may"—is that if the default occurs, it shall be the duty (not the prerogative) of the Secretary to revoke the charter, or in the case of a foreign corporation, to revoke the authority to do business. In summation, it would appear that revocation by the State may be (1) the result of a court procedure instituted by the Attorney General concerning matters which present an arguable issue, e.g., the abuse of corporate power, fraud, etc.; or (2) the automatic result of a failure to file, report, or comply with other mechanical features of this act. It seems wise to retain this distinction, which is found in the new codes of other jurisdictions, as well as in existing South Carolina law.

23. An alternative construction would be that "shall" in section 12.11 is only directory and not mandatory, giving it the same effect as "may." If this is indeed the intention, *query:* whether or not amendment is in order to make the wording identical in the two sections?

24. S. C. CODE §12-22.13 (Supp. 1962).

25. See Reporter's Notes to §§12.11-12.13, Draft Version, S. C. BUS. CORP. ACT OF 1962.

26. Ninety days in sub-section (b) of section 12-22.11; sixty days in sub-section (b) of section 12-23.11.

27. S. C. CODE §12-22.12 (Supp. 1962).

III. DISCRETIONARY POWERS

Appropriate to the discussion of the Secretary's discretionary powers is a consideration of the "necessary and proper" section, which confers "the power and authority reasonably necessary to enable him (the Secretary) to administer this Act efficiently and to perform the duties therein imposed upon him."[28] Though authorities on this point are scarce, it would seem that provisions of this type add little or nothing to the powers already either expressly or impliedly stated in other sections of the act.

The only discretionary function of major importance under the 1962 Act is an enlargement on the power currently held by the Secretary of State concerning selection of a corporate name. Under present South Carolina law, the Secretary can require that "the name of a proposed corporation . . . be different from the name of any previously chartered corporation,"[29] and that specific words associated with national organizations be not used without authority.[30] How different the name must be under section 12-58(2) of the 1962 Code has not been the subject of judicial pronouncement in this state, but in actual practice almost any variation satisfies this requirement. A name approved by the Secretary of State is not, however, necessarily free from attack by other corporations under the law of trademark or unfair competition.[31]

The 1962 Act substantially broadens the Secretary's responsibilities in supervising the selection of a corporate name. Section 12-13.1 prescribes in detail what the proposed name of the corporation shall and shall not include.[32] A determination that there has been strict compliance with this section is required of the Secretary in sub-section (b), and such determination must be made before the articles will be accepted for filing, or in the case of a foreign corporation, before the authority to do business will be granted.

Of particular importance is section 12-13.1(a)(3), which provides that the corporate name "shall not be the same as

28. S. C. CODE §12-24.3 (Supp. 1962).
29. S. C. CODE §12-58(2) (1962).
30. See S. C. CODE §§12-58.1,12-58.3, and 16-542 (1952).
31. For a full discussion of the problems associated with corporate name, see article by D. Y. Monteith in this same issue.
32. Of especial importance to the practitioner is the requirement in sub-section (a)(1) that each corporate name must contain the word "corporation," "incorporated," or "limited," or an abbreviation of one of such words. Sub-section (d)(1) of the same section requires modification to include the prescribed words in all but a few corporations.

or deceptively similar to" the name of any corporation doing business with authority in this State, or any name reserved or registered under this act. The requirement that a proposed name may not be even "deceptively similar to" that of any other corporation seems to give the Secretary more latitude to refuse names likely to confuse the public than he previously enjoyed under Title 12. The decision as to whether a name qualifies under this sub-section will be wholly a matter of discretion, for the abuse of which the courts must provide appropriate relief.[33]

The Secretary must make other determinations under this section, which are of less importance. The name may not suggest a purpose not stated in the articles; the name must not wrongfully imply that the corporation has power to transact any business which is regulated by other officers or commissions of the State; and the name may not incorrectly imply connection with fraternal, veterans', service, and religious organizations. Enforcement of these provisions should generate little friction, as they represent no substantial departure from South Carolina law and practice.

Section 12-13.3 allows a foreign corporation to register its name in this State, provided it is not the same as or deceptively similar to that of any corporation doing business in South Carolina, or registered or reserved. This registration may be accomplished by filing an application with the Secretary of State, who will then have to ascertain that the name is available for corporate use under section 12-13.1. A name may likewise be reserved for exclusive use by a "future" corporation, a corporation planning to change its name, or a foreign corporation prior to its branching into this State.[34] An application of the same type as that made under the registration section must be made to the Secretary, who must determine that the proposed name meets the specifications of section 12-13.1. The additional element of good faith is required for reservation and the Secretary is given power to revoke the reservation, if, "after hearing," he finds that the application was not made in good faith. Such a judicial determination is subject to review by the courts.

33. Methods of judicial review will be treated under the sub-head "Remedies," *post*.
34. S. C. CODE §12-13.2 (Supp. 1962).

IV. REMEDIES

This portion of the article is devoted to a consideration of the various avenues of judicial review available to a party aggrieved in the enforcement of this act. Few cases concerning review of administrative action deal specifically with the Secretary of State, and none lay down landmark principles. The cases dealing generally with this area of administrative law are, however, suitable for discussion in this context. Mandamus, certiorari, prohibition, injunction and declaratory judgment are the judicial proceedings through which administrative acts may be reviewed. Mandamus will receive primary attention because of its exclusive application to most of the Secretary's actions. Certiorari, injunction, and declaratory relief are of lesser importance, while prohibition is largely irrelevant in the present context. Not to be considered herein is the enormous amount of law which applies between corporations under the 1962 Act, or that which applies between corporations in the areas of trademark and unfair competition.[35]

A. *MANDAMUS*

Mandamus is the common law writ used to coerce the performance of an official duty where the official charged with the performance of such duty has refused or failed to perform the same.[36] This was originally one of the common law prerogative writs issuing from the sovereign himself, at his utter discretion, and it dates at least as far back as Edward III.[37] It is now generally thought of as nothing more than an ordinary action at law, governed by equitable principles, in which performance of a specific duty is sought to be enforced as a matter of right.[38] This liberal position, once espoused in this State,[39] has freed the proceeding from many of its common law shackles. Unfortunately, recent South Carolina cases[40] show a reversion to the narrower application of the early

35. See article mentioned in note 31 *supra*.
36. 34 AM. JUR. *Mandamus* §2 n.2 (1941). Also see generally Lake v. Mercer, 214 S. C. 189, 51 S. E. 2d 742 (1949); Federal Land Bank v. State Highway Dep't, 172 S. C. 207, 173 S. E. 635 (1933).
37. Blake v. The N. E. Railroad Co., 9 Rich. (43 S. C. L.) 247 (1866).
38. 34 AM. JUR. *Mandamus* §5 (1941).
39. State *ex rel.* Watts v. Cain, 78 S. C. 348, 349; 58 S. E. 937, 938 (1907).
40. Linton v. Gaillard, 203 S. C. 19, 25 S. E. 2d 896 (1943); State *ex rel.* M'Invaille v. Rouse, 86 S. C. 344, 68 S. E. 629 (1910).

common law. The basic theory of mandamus is that it is the "proper remedy for controlling ministerial acts, for requiring the exercise of discretion and for preventing the abuse of discretion, but not for controlling the manner in which discretion is exercised."[41]

In *Federal Land Bank v. State Highway Dep't.*,[42] the Court characterized the writ as

> . . . a hybrid proceeding. It is not a suit in tort, nor is it in contract; it is not strictly a law case, nor is it one in equity. It is based upon the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal.[43]

Sometimes spoken of as the highest judicial writ known to the law,[44] mandamus is surrounded by a maze of conditions, created by centuries of careful use, precedent to its issue.

First and foremost, mandamus is the proper writ to compel a ministerial, as opposed to a discretionary or judicial, act.[45] What is and is not a ministerial function is frequently a bone of some contention.[46] "A ministerial act is one which a person performs in obedience to a mandate of legal authority, without regard to the exercise of his own judgment of the propriety of the act to be done."[47] The duty is "absolute, certain and imperative,"[48] and must be "described and defined by law."[49] The definition varies only slightly from authority to authority and from case to case, but its application can be unusual indeed. Mandamus can be used to force the exercise of discretion, or prevent its abuse, but never to control its operation.[50]

41. 3 DAVIS, ADMINISTRATIVE LAW TREATISE 402-403 (1958).
42. 172 S. C. 207, 173 S. E. 635 (1933).
43. *Ibid.* at 210, S. E. at 637.
44. 34 AM. JUR. *Mandamus* §4 (1941).
45. 34 AM. JUR. *Mandamus* §4 (1941). This statement appears as a basic premise in virtually all cases in this area. See, e. g., Parker v. Brown, 195 S. C. 35, 10 S. E. 2d 625 (1940); Draughton v. Colbert, 171 S. C. 22, 171 S. E. 445 (1933); Breedin v. Town of Manning, 168 S. C. 69, 167 S. E. 2 (1932).
46. For a specialized coverage see Riggs, *Reviewing Administrative Action by Writ of Mandamus in South Carolina*, 7 S. C. L. Q. 427 (1955).
47. BLACK'S LAW DICT., p. 1190 (p. 1148 in 1951 ed.), cited with approval in Chesterfield County v. State Highway Dep't, 181 S. C. 323, 327; 187 S. E. 548, 549 (1936).
48. Parker v. Brown, 195 S. C. 35, 57, 10 S. E. 2d 625, 634 (1940).
49. *Ibid.*
50. See note 6 *supra*. Also Atlantic Coast Line R. Co. v. Caughman, 89 S. C. 472, 72 S. E. 18 (1911), and City of Columbia v. Pearman, 180 S. C. 296, 185 S. E. 747 (1936), for cases where the exercise of discretion

Because of its operation primarily on non-discretionary functions, mandamus is the most suitable of the common law writs as a remedy against the Secretary of State, since an overwhelming majority of the Secretary's duties under the 1962 Act are ministerial. Though there are other hurdles to leap, the question of ministerial versus discretionary functions is the most problematical, and the most litigated, point in this field. Clearly there can be little doubt that the Secretary's duties under the 1962 Act are non-discretionary, with the exception of those discussed above under the sub-head "Discretionary Duties."

The petitioner must show also that the board or officer has a legal duty to perform the ministerial act. This is not frequently in issue, since the duties are usually specified by statute, as in the 1962 Act.

The court must also be shown that the petitioner has sufficient interest in the subject of the performance.[51] The right to have the duty performed, as well as the duty to perform, must be clear and certain.[52] Sufficient interest will normally be shown if the party seeking the writ can show a special or peculiar injury, different from that which the public generally is suffering. Note that this condition can readily be fulfilled since, for example, the corporation will have an interest in the filing of its own documents. If the injury is not distinguishable from that resulting to the public, the petition will be dismissed, as in the *Gruenther* case, wherein the Court stated that indictment was the appropriate remedy.[53]

The cases also frequently recite, as a condition which must be proved, the general interest of the public in the performance of the duty.[54] This requirement does not exclude enforcement of a private right (as discussed above), and, though frequently mentioned it is seldom actually required.[55]

was compelled. See State *ex rel.* Mauldin v. Matthews, 81 S. C. 414, 62 S. E. 695 (1908), and State *ex rel.* Smith v. Matthews, 77 S. C. 357, 57 S. E. 1099 (1907), for cases where abuse of discretion was reviewed.

51. Gruenther v. Charleston Light and Water Co., 68 S. C. 540, 47 S. E. 979 (1904); Garrison v. City of Laurens, 54 S. C. 449, 32 S. E. 696 (1899).

52. 34 AM. JUR. *Mandamus* §122 (1941); Gardner v. Blackwell, 167 S. C. 313, 166 S. E. 338 (1932).

53. Gruenther v. Water Co., note 51 *supra.*

54. Parker v. Brown, 145 S. C. 35, 10 S. E. 2d 625 (1940); State v. Cain, 78 S. C. 348, 349, 58 S. E. 937, 938 (1907).

55. *Quaere* whether or not performance of a duty "absolute, certain and imperative" isn't *always* fraught with public interest?

The one notable South Carolina case[56] in which the writ was refused for this reason demonstrates how ridiculous the common law technicalities can be. The petitioner (a tax collector) sought a writ of mandamus requiring the county treasurer to issue executions for delinquent taxes as provided by law. Petitioner's salary was a commission on the amount of taxes collected. But tax collectors are an unpopular lot, and petitioner's crass motive defeated his right. Pecuniary interest is not of itself sufficient to merit the writ. Yet the Court went on to say

> that if a tax collector, as any other citizen, should bring a proper petition for mandamus . . . it being shown that the public interest demanded that the writ be granted, . . . the fact that the tax collector would receive fees and commissions from the executions in such case, of which he might be deprived otherwise, would not affect the action of this Court, as compensation is a mere incident to his office, the main function of which is to faithfully perform his duties in the interest of the public.[57]

This would seem to be a rather legalistic distinction.

The common law prerogative writs were extraordinary and frequently mutually exclusive. Thus mandamus will not lie unless there is "no other adequate remedy available."[58] In theory this means absolutely no other remedy—legal, equitable, or extraordinary. Some courts have denied the relief sought because injunction was adequate, thereby reversing a maxim of the common law.[59] The requirement is ameliorated by the qualification that the remedy must not only be adequate, but also free from any doubt or uncertainty if it would exclude mandamus.[60] Thus, where a right of appeal from decisions by the court of ordinary was provided by statute, it was determined a "doubtful" right, and not one which would destroy "a plain common law right,"[61] referring presumably to mandamus though this was never considered a right at common law. But if an appeal is actually pending, mandamus

56. Parker v. Brown, 195 S. C. 35, 10 S. E. 2d 625 (1940).
57. *Id.* at 58-59, 10 S. E. 2d at 685.
58. Chesterfield v. Highway Dep't, 181 S. C. 323, 187 S. E. 548 (1936); Rouse v. Benton, 100 S. C. 150, 84 S. E. 533 (1915).
59. 3 DAVIS, ADMINISTRATIVE LAW TREATISE 409 (1958).
60. State *ex rel.* Townsend v. McIver, 2 S. C. 25 (1870); State *ex rel.* Simmons v. Watson, 2 Speers' (29 S. C. L.) 97 (1843).
61. State *ex rel.* Simmons v. Watson, *supra* note 60.

definitely will not lie[62] even if such would have been an appropriate remedy originally.[63]

Though the action was, and still is, a *law* action, the judges frequently apply various equitable principles and considerations to their decisions. Thus it is that "mandamus will not compel a futile, nugatory, or unavailing act,"[64] nor will the writ issue if the act would be violative of law or of legislative intent.[65]

The pitfalls of mandamus should be obvious, yet this writ is the only remedy available to review most of the Secretary's acts under the 1962 Act. Not only must the petitioner prove that the act was ministerial, and that there is no other adequate remedy, but non-compliance with any one of the technical requirements discussed above can be fatal to the writ, depending upon the equities of the situation at hand.

B. *CERTIORARI*

A modern definition of certiorari is that it is a writ which issues from a superior court to an inferior court, board, or officer exercising judicial functions to review judicial or quasi-judicial acts where a question of jurisdiction of the inferior tribunal or irregularity in the proceedings is raised.[66] For an administrative decision to be reviewable by certiorari, it must be shown to have been judicial or quasi-judicial, as this writ, like that of mandamus, never operates to control discretion.[67] In addition, certiorari will not lie to review legislative[68] or executive[69] acts. Application to administrative law is therefore limited, and the courts seem to feel that categorizing an administrative act "judicial" is fitting a round peg into a square hole. If, however, there has been a hearing—evidence offered, both sides heard, and a decision based upon the proceedings—the courts are less loath to use the term

62. White v. Barbery, 103 S. C. 223, 88 S. E. 132 (1916).
63. Banks v. County Comm'rs of Edgefield, 92 S. C. 436, 75 S. E. 791 (1912).
64. Blalock v. Johnston, 180 S. C. 40, 185 S. E. 51 (1936). See also Paslay v. Brooks, 198 S. C. 345, 17 S. E. 2d 865 (1942).
65. Fooshe v. McDonald, 82 S. C. 22, 63 S. E. 3 (1908); Moore v. Napier, 64 S. C. 564, 42 S. E. 997 (1902).
66. 10 AM. JUR. *Certiorari* §2 (1941).
67. State *ex rel.* Rawlinson v. Ansel, 76 S. C. 395, 414, 57 S. E. 185, 192 (1906).
68. 14 C. J. S. *Certiorari* §18(b) (1939).
69. Spivey v. Blackwood, 161 S. C. 521, 159 S. E. 927 (1931).

judicial.[70] Other courts apply the so-called "property test." Under this test, if the decision affects an interest in property, the action will receive the necessary classification.[71]

South Carolina law in this field is too sparse to permit any generalization, but it is probably that certiorari would not lie to review the Secretary's actions under the 1962 Act, except in one instance.[72] One out-of-state case[73] has held that the revocation of a charter by the Secretary of State was reviewable by certiorori, but in this case a hearing had been held as provided by local law. Another[74] held that certiorari would not lie to review the Secretary's action in issuing a charter to a corporation, the name of which was deceptively similar to that of another corporation. It is therefore submitted that certiorari would not lie under the 1962 Act except in the instance discussed in footnote 72.

C. *PROHIBITION*

Prohibition is a process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising a jurisdiction with which they have not been vested by law.[75] This writ, like certiorari, lies only to review judicial or quasi-judicial acts, and suffers from the same limitations discussed above. In addition, prohibition is peculiarly applicable only to questions of jurisdiction.[76] As long as the Secretary stays within the jurisdiction granted by the 1962 Act, and acts without clear abuse, it is difficult to see how this writ can be of any use.

D. *INJUNCTION*

The equitable action of injunction is a possible proceeding for judicial review, though there is no case history of its ap-

70. DAVIS, *op. cit. supra* note 59 at 393.
71. In Pue v. Hood, 222 N. C. 310, 22 S. E. 2d 896 (1942), the court held that denial of a certificate of incorpration was not reviewable by *certiorari* as "no property interest of theirs was involved" (p. 900).
72. In S. C. CODE §12-13.2 (Supp. 1962) (Reserved Name), the act provides:

> (d) The Secretary may revoke any reservation if, *after hearing*, he finds that the application therefor or any transfer thereof was not made in good faith. (Emphasis added)

It would appear that under the "hearing test," this revocation would be classified as a judicial act.
73. Citizens' Club v. Welling, 83 Utah 81, 27 P. 2d 23 (1933).
74. People *ex rel.* Columbia Chem. Co. v. O'Brien, 101 App. Div. 296, 91 N. Y. Supp. 649, 66 A. L. R. 1026 (1905).
75. 73 C. J. S. *Prohibition* §1 (1951).
76. State Board of Bank Control v. Sease, 188 S. C. 133, 198 S. E 602 (1938).

plication in administrative law in South Carolina. Generally, injunction may operate to halt acts which are beyond authority, outside jurisdiction, unlawful, or which constitutes a violation of official duty, whenever the execution of the acts in question would cause irreparable injury to the complainant, for prevention of which he has "no adequate remedy at law."[77] The authorities vary as to what types of duties may be controlled by equity. Some hold that a ministerial act will not be enjoined;[78] others take the position that such an act may be compelled at the suit of one who has no other adequate remedy.[79] Equity, it is frequently said, will not substitute its discretion for that of the public officer or body to which the discretion statutorily belongs, but may prevent the unlawful exercise of that discretion.[80] Irreparable injury is a standard requirement.[81]

Due to the traditional latitude exercised by equity judges, some courts have re-made the injunction into a catch-all remedy, sometimes coupled with declaratory judgment.[82] Such courts have cast off many of the common law technicalities; a step so large is equally unlikely. In a small group of cases, declaratory judgment alone has been found a sufficient remedy against public officials.

V. CONCLUSIONS

In no one area of the common law is reform so drastically needed, and in none could reform be so easily accomplished. The evil of the old remedies lies basically in their plurality. Courts not illuminated by the lamp of Reform frequently feel constrained to deny relief because of over-technical requirements, or because the single "appropriate" remedy was not pleaded. In the words of a leading text-writer:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordi-

77. 28 AM. JUR. *Inj.* §177 (1959), *accord:* 73 C. J. S. *Pub. Admin.* §172 (1951).
78. 73 C. J. S. *Pub. Admin.* §172 (1951).
79. 28 AM. JUR. *Inj.* §181 (1959).
80. DAVIS, *op. cit. supra* note 59 at p. 425. See also 28 AM. JUR. *Inj.* §177 (1959).
81. United Fuel Gas Co. v. Railroad Comm'n, 278 U. S. 300, 73 L. Ed. 390 (1928).
82. For general discussion see DAVIS, *op. cit. supra* note 59 at pp. 420-425.

nary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decisions of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, lines between remedies would be complex and shifting, the principal concepts confusing, boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities, and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system.[83]

The cure for this anachronistic guessing-game is patently the abolition of the extraordinary remedies and their replacement by a single action. In this new action, the fine distinctions between such conceptualistic terms as ministerial, judicial, and executive would no longer be relevant. With form subordinate to right, then only will relief be guaranteed to a deserving suitor. It is suggested that a provision such as the following would eliminate the problem:

Appeal from the Secretary of State

If the Secretary of State shall fail to approve any articles of incorporation, amendment, merger, consolidation or dissolution, or any other document required by this act to be approved by the Secretary of State before the same shall be filed in his office, he shall, within ten days after the delivery thereof to him, give written notice of his disapproval to the person or corporation, domestic or foreign, delivering the same, specifying the reasons therefor. From such disapproval such person or corporation may appeal to the . . . court of the county in which the registered office of such corporation is, or is proposed to be, situated by filing with the clerk of such court a petition setting forth a copy of the articles or other document sought to be filed and a copy of the written disapproval thereof by the Secretary of State; whereupon the matter shall be tried *de novo* by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.

83. *Ibid.* at 388.

> If the Secretary of State shall revoke a certificate of authority to transact business in this State of any foreign corporation, pursuant to the provisions of this act, such foreign corporation may likewise appeal to the . . . court of the county where the registered office of such corporation in this State is situated, by filing with the clerk of such court a petition setting forth a copy of its certificate of authority to transact business in this State and a copy of the notice of revocation given by the Secretary of State; whereupon the matter shall be tried *de novo* by the court, and the court shall either sustain the action of the Secretary of State or direct him to take such action as the court may deem proper.
>
> Appeals from all final judgments entered by the . . . court under this section in review of any ruling or decision of the Secretary of State may be taken as in other civil actions.[84]

It is fully recognized by this writer that the type reformation above suggested is needed not only in the area of corporation law, but also generally in administrative procedure. Reality forces the conclusion that a total renovation of the review procedure in administrative law can come only after a more detailed study. It is, however, felt that the statutory action suggested above would solve many old problems in corporation law, and many new ones before they arise.

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84. MOD. BUS. CORP. ANN. §133 (1960).