

EXHIBIT 10 - continued

St. John's Law Review
Issue 1, Volume 39, December 1964, Number 1
Page 3 of 3

244

ST. JOHN'S LAW REVIEW

[Vol. 39

As a result of *Policemen's Benevolent Ass'n*, the law is, at least in the second department, that an unaggrieved citizen-taxpayer has standing to challenge the validity of a local village law, as well as the action of a county board of supervisors, since the *Ahern* case involved such action by a county board, and was expressly overruled by the instant case insofar as the question of standing is concerned. As to an unaggrieved citizen-taxpayer attacking the validity of a state law, the court of appeals case of *St. Clair* is controlling, and the petitioner will be deemed to lack standing to challenge its validity.

Mandamus unavailable to prevent judge X from referring matter to Judge Y.

In *Kahn v. Backer*,²⁹⁴ the question presented was whether an Article 78 proceeding was properly brought against a justice of the supreme court. The proceeding was instituted in the appellate division,²⁹⁷ first department, in order to compel the respondent to render a decision on a motion to dismiss a cause of action.²⁹⁸ The case was on the general jury reserve calendar when the motion was made. Respondent disposed of the motion by referring it to the trial justice. The appellate division held that the respondent had in fact exercised his discretion and that the disposition of the motion in the above manner was the equivalent of a denial of the motion. Proper procedure was to enter an order thereon and to appeal the order.

The court pointed out that an Article 78 proceeding could not be used to challenge a determination made in a civil action, unless it was an order summarily punishing a contempt committed while in the court's presence.²⁹⁹ The court also held that the disposition of the petitioner's motion, even if erroneous, could not be indirectly reviewed in a proceeding in the nature of mandamus, since the only proper avenue by which one may challenge such a determination is by appeal.³⁰⁰

The proceeding in the *Kahn* case was one in the nature of mandamus, which has always been a discretionary remedy. The court points out, relying on well-established case law,³⁰¹ that it will

945 (4th Dep't 1957). The court made a blanket statement in this case that injunctive relief is not appropriate in a proceeding under Article 78, Civil Practice Act.

²⁹⁴ 21 App. Div. 2d 171, 249 N.Y.S.2d 572 (1st Dep't 1964).

²⁹⁷ CPLR 506(b)(1).

²⁹⁸ A motion to dismiss a cause of action is made pursuant to CPLR 3211.

²⁹⁹ CPLR 7801(2).

³⁰⁰ CPLR 7801(1).

³⁰¹ See, e.g., *Walker v. Reidy*, 31 Misc. 2d 915, 221 N.Y.S.2d 564 (Sup. Ct. 1961); *Lindner v. Frisina*, 194 N.Y.S. 2d 843 (Sup. Ct. 1959).