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Extraordinary Writ of Prohibition in Missouri, The (concluded)

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The Extraordinary Writ of Prohibition in Missouri

(*Concluded*)

6.

THE WRIT ALSO ISSUES TO STOP A COURT FROM EXCEEDING ITS JURISDICTION IN A CAUSE OF WHICH IT HAS JURISDICTION

The distinction has often been made between instances where the court has no jurisdiction whatsoever over the pending case and instances where the court has jurisdiction over the pending case, but is about to do some act, in the course of the trial, that it has no power to do. There is a distinction between no jurisdiction and an act in excess of jurisdiction. In either situation prohibition will issue. It may be said the writ of prohibition is used for the same purpose when it is employed to stop judicial action when no jurisdiction over the pending matter exists and where it is employed to stop an act in excess of the jurisdiction of the court. The great purpose of the writ is to prevent usurpation of judicial power. It is obvious though a court may have power to do some things in a pending case, it is wholly without power to do others. If the action about to be taken is beyond its powers prohibition will issue to stop it from being taken. The distinction referred to is thus made by Lamm, J., in *Bernero v. McQuillan*:[138] "The unbending test to be applied to determine whether a writ of prohibition should issue in a given case, is this: has the court, complained of, jurisdiction to do what it is about to do? It matters little whether it is in fault in proceeding without any jurisdiction at all, or (as put in some cases) in excess of its jurisdiction, the writ will go in either event. So, in a given case, though the court has general jurisdiction of that class of cases, if it is about to do in that case some particular important thing which it has no judicial power to do, the writ has been allowed."

The distinction has been put as follows by Kennish, J., in *State ex rel. Terminal Ry. Co. v. Tracy*:[139] "The first two grounds thus stated are recognized as settled law in the adjudged cases, and if the facts of a given case show either want of jurisdiction or excess thereof, together with an absence of an adequate remedy at law or in equity, a case is made warranting the issuance of the writ. It should be observed that, although want of jurisdiction and excess of jurisdiction are commonly referred to and considered as separate grounds for the issuance of the writ, there is in principle little distinction between them, as each means an attempt

138. (1912) 246 Mo. 517, l. c. 532, 152 S. W. 347.
139. (1911) 140 S. W. 888, l. c. 890, 237 Mo. 109, l. c. 118.

by a court or person to take judicial action without judicial power or authority for such action."

The distinction between utter lack of jurisdiction and excess of jurisdiction is much easier to make than the distinction between excess of jurisdiction and error in the exercise of jurisdiction. What is error only? What is an excess of jurisdiction? These questions are of the utmost importance. If error only is about to be committed, prohibition will not issue. Perhaps here again, the best way to determine what is excess of jurisdiction is to examine the decisions and classify them.

For example the writ was issued by the Supreme Court of Missouri stopping further action by the circuit court in a cause appealed from the probate court to the circuit court, where the latter court, though it affirmed the probate court, attempted to enforce the judgment by contempt proceedings, instead of certifying a transcript of the record back to the probate court for the probate court to enforce the judgment[140] as the law required. The circuit court had no power to make such an order though it had appellate jurisdiction.

A writ of prohibition was issued to the St. Louis Court of Criminal Correction stopping the latter court from proceeding further in a habeas corpus case because that court had no power to issue a writ of habeas corpus when the judges of the criminal court of St. Louis were present in the city.[141] It appeared that the judges of the criminal court were not absent, hence, though under some circumstances the court in question had power to issue writs of habeas corpus, it was exceeding its power in the particular case as the judges of the other court were present. Perhaps it may be said that this in reality is a case where there was no jurisdiction at all. Certainly the lower court in entertaining jurisdiction, after it was learned a judge of the other court was in the city, had no power to go on with the habeas corpus matter. So, an order of a circuit court, in an equity case, for an accounting, was held to be in excess of its jurisdiction and beyond its power, when it was made upon a foreign corporation whose books, home office, funds, and policy holders were in

140. *State ex rel. Baker v. Bird* (1913) 253 Mo. 569, 162 S. W. 119. The granting of the writ was also placed on other grounds. The action of the circuit court in citing relator for contempt was also in excess of the jurisdiction as it was taken after an appeal to the supreme court.

141. *State ex rel. Walker v. Murphy* (1895) 132 Mo. 382, 33 S. W. 36. Gantt, P. J., writing the opinion, said: "The position of defendant that he had the right to proceed and determine the application for *habeas corpus unless the applicant disclosed* that he was held in custody under a criminal charge cannot be maintained. The moment he was apprised that the prisoner was held in custody under an indictment for murder, and that either of the judges of the criminal court was in the city, it was his duty to decline all further cognizance of the case, for it then became apparent that the application should have been first made to one of the judges of the criminal court, and from that time defendant was exceeding his jurisdiction."

other states.[142] A circuit court was stopped from proceeding further in a disbarment proceeding, when it was based upon a charge of embezzlement, and when the attorney had appealed to the Supreme Court of Missouri from a judgment of conviction in a circuit court, and the appeal was then pending.[143] It was held that pending the appeal no action could be taken in the disbarment matter and that the action about to be taken was in excess of its jurisdiction, "something that it had no power to do in the given case". An interesting question, as to what is excess of jurisdiction, arose in a condemnation proceeding. A circuit court, in a proceeding to condemn land for a school building, directed the commissioner appointed to assess damages, not to allow any compensation to the owner, due to the fact that the property was a part of an addition which was restricted in its use for residence purposes.[144] It was held that the circuit court's direction was in excess of its jurisdiction, an order he had no power to make. From these decisions it would seem that if the order or ruling of the lower court is one that it has no power to make in any cause of the class to which the pending case belongs, it is an act in excess of the court's jurisdiction, which may be prevented by the writ of prohibition. It is obvious that not every erroneous order is an order the court has no power to make, hence an excess of its jurisdiction. Inferior courts of general jurisdiction and of limited jurisdiction, possess a wide

142. *State ex rel. Minnesota Ins. Co. v. Denton* (1910) 229 Mo. 187, l. c. 196, 129 S. W. 709. Valliant, J., writing the opinion, said: "In this case before the balance, if any, that is due the plaintiff could be ascertained, there must be a complete visitation of the corporation, a thorough inquiring into all of its affairs and an ascertainment not only of the condition of the account of the corporation with this plaintiff, but of the accounts of all its members who now have, or have ever had, policies on the assessment plan, no matter how numerous they may be, or through how many states they may be scattered, because this is a mutual concern and the accounts of all are involved in the account of one. Such an accounting is not beyond the jurisdiction of a court of equity that may have full jurisdiction of the corporation, but is beyond the jurisdiction of a court of equity that has only the limited or qualified jurisdiction over a foreign insurance corporation that is given by our laws to our courts."

There were other grounds for issuing the writ.

143. *State ex rel. Larew v. Sale* (1905) 188 Mo. 493, 87 S. W. 967. Valliant, J., used this language: "On the other hand, whilst the main office of the writ is to keep the court to which it is addressed within the bounds of its jurisdiction, yet, in the exercise of the discretion above referred to, the writ is sometimes used to keep a court from doing what it has no lawful authority to do in a case the general nature of which is within its jurisdiction. This court in reference to an order of a circuit court made in a contested election case per Barclay, J., said: 'If the court had no lawful authority to make it, that is to say, if the order was beyond the power of the court in the pending election contest, the writ of prohibition would undoubtedly lie, notwithstanding the court might have general jurisdiction over election contests, and hence over the subject matter of the proceeding. For it is settled law that prohibition may be used (upon a proper showing) to keep a court within the limits of its lawful authority in a given case, no less than to prevent cognizance of causes not committed by law to its jurisdiction.' (State ex rel. v. Slover, 126 Mo. 652, l. c. 655)."

range of judicial power. They have power to pass upon the question in the first instance, including the power to rule erroneously. In the field where power is given the lower court to apply the law, errors which are about to be committed in making rulings cannot be prevented by prohibition. It may truly be said that inferior courts have the power, in the first instance, to rule erroneously, if the ruling is of the general kind which the court may make in cases of that class.

What is meant is well illustrated by the quotation in the note to *Peters et al. v. Buckner*.[144] A court of general jurisdiction does not exceed its powers in giving an erroneous instruction in the trial of a cause, of which it has jurisdiction; but, in a condemnation proceeding no court has the power to direct the commissioner, authorized to assess damages, not to allow compensation for valuable easements taken, or, for part of the land taken, since the confirmation of the report and payment of the sum assessed deprives the owner of his private property rights. Perhaps the consideration of the question may now be best advanced by attempting to group the cases in which it has been determined that the proposed

144. *Peters et al. v. Buckner* (1921) (Mo.) 232 S. W. 1024, 288 Mo. 618. The following analysis of the question is taken from a concurring opinion of Graves, J., concurred in by James T. Blair, C. J., Walker, and David E. Blair, J. J., l. c. 1030: "It is urged that Judge Buckner has, at most, only erred in instructing the commissioners appointed by him to assess damages, and that mere matters of error cannot be reached by prohibition or mandamus. This we think is true. But the instruction given to commissioners for the assessment of damages in condemnation proceedings are not on the plane of mere instructions in the trial of a lawsuit. They could not be, if we keep in mind the Constitution. This branch of the proceeding is not the trial of the case, but it only furnishes the basis for the ultimate trial, should the parties feel aggrieved at the action of the commissioners, which commission is the arm of the court. Suppose I owned 40 acres of land which was wanted for public purpose. Suppose further the petition shows such ownership to be in me, and the circuit judge said to his commissioners (the arms of the court), 'You go out and see what you think Graves has been damaged by taking the east 20 acres but you must not allow him anything for the taking of the west 20 acres, although it is just as valuable.' Is such action mere error, or is it an excess of power under the Constitution, which says that Graves is entitled to have the cash for his land before it is taken? We think the latter. Such court would be going beyond the limits of his power in directing his commission to take half of the land without compensation. It is a new and intricate matter, and must be determined upon the common sense of the situation. Take the instant case. If the report of the commission is approved, and the money paid into court, then the schoolhouse can be built, the easement absolutely destroyed, and no payment into court for the damages done; in other words, the petition in the case before Judge Buckner shows that Peters has a valuable easement, and the approval of a report made under this unconstitutional direction takes the property without the deposit of the damages or the payment of damages. Judge Buckner is in fact and in law proceeding to take private property for public use without even permitting a consideration of damages. This is in excess of the power of any Missouri court under our Constitution. Whilst the question is a new one, I feel that there is more than mere error involved. I feel that the act of the court in directing (its arm) the commissioners to take private property for public use without first paying therefor is an act in excess of jurisdiction rather than mere error."

action is in excess of the court's power rather than erroneous exercise of the court's power.

(a) *MATTERS OF TRIAL PRACTICE*

There are quite a number of cases where important matters of trial practice have become the subject of sharp controversy, and one of the litigants, to prevent a ruling about to be made, has petitioned a higher court for a writ of prohibition, on the ground that the lower court proposes to exceed its jurisdiction. Prohibition, for instance, has issued by the Supreme Court of Missouri to a circuit court, stopping it from disregarding the provisions of a special jury law. The trial court, acting under a rule of its own, was about to use a jury drawn by merely taking forty names from the wheel which contained the names of persons that had already been selected by the jury commissioner for jury service. The law relating to special juries provided that the special jury should be selected by the commissioner, not from the number already selected, but required a selection by him in each case from the inhabitants of the city qualified for jury service. It was held that the rule of that court was beyond its power, in violation of the statute, and hence it was about to exceed its jurisdiction.[145] It has been held by a court of appeals that prohibition will lie to prevent a justice of the peace, in an unlawful detainer action, from awarding a jury trial over the protest of plaintiff.[146] He had no more power, it was held, to call in a jury than he had to delegate his decision to a single private individual. So, also a court of ap-

145. *State ex rel. Railway Co. v. Withrow* (1896) 133 Mo. 500, 34 S. W. 245, 36 S. W. 43. The opinion of the court by Sherwood, J., is largely devoted to a discussion of the meaning and constitutionality of the special jury law. As to the propriety of prohibition he said: "But one point remains to be considered, and that the method of relief resorted to by relators; as to which it is well settled law that such manner of redress as is prayed for by relators may be granted when the action of the lower court exhibits evidences of excess of jurisdiction, as well as when exhibiting absolutely absence of jurisdiction. Appo v. People, 20 N. Y. l. c. 541; Jac. Law Dict. tit. Prohibition; Ward v. Kelsey, 14 Abb. Pr. 106; State v. Ridgell, 2 Bailey (S. C.) 560; People ex rel. v. Supervisors, 47 Cal. 81; People ex rel. v. Whitney, Ibid. 584; 2 Spelling, Extra. Rel., sec. 1726, and cases cited; 1 Ibid., sec. 626."

146. *State ex rel. Kansas City, etc. v. Allen* (1891) 45 Mo. App. 551. Ellison, J., writing the opinion, said: "If the statute gives the relator the right which he asserts, and imposes upon the justice of the peace the duty to try the cause, he does not merely erroneously decide a question over which he has jurisdiction. He does not merely commit an error in the proceedings, but he absolutely abdicates his official functions. He has no voice or control of the result. The verdict of the jury would be absolute and beyond his control. If no jury is authorized by the law he could not more effectually exceed his powers in the cause (notwithstanding he may have jurisdiction of such cause) than if he should direct the issues to be tried before some individual, with the intention of rendering judgment on the decision of such individual."

See *Delaney v. Police Court* (1902) 167 Mo. 667, 67 S. W. 589, for a *dictum* that denial of a jury trial in a police court is error only. The court held that petitioner for

peal has held that a justice of the peace should be stopped by a writ of prohibition from instructing a jury in writing when the pending action was a suit on a promissory note.[147] So it has been held by the Supreme Court of Missouri that a circuit court will be stopped by prohibition from proceeding further in a contempt order issued against a litigant who had refused to produce books and papers in connection with his examination before a special commissioner appointed to take depositions. It was held that the applicable statute did not confer upon the court power to compel the production of books, etc., before a special commissioner.[148] A writ was issued preventing a circuit court from carrying out an order to compel a referee, that the court had duly appointed, to report when the referee had previously resigned because of admitted prejudice on his part against one of the parties to a pending suit. It was held the referee had the right to resign because of prejudice and hence the circuit court lacked power to compel him to go on with his duties.[149] The writ was issued to a circuit court in a trust estate matter pending there, stopping the court from appointing auditors to advise the court as to needed changes in business methods, etc., where the management of the property was vested in the trustees by the creator of the trust. Such an order was held to be beyond the power of the court.[150] The writ was issued preventing a circuit court from retaining control over a trust estate where the parties came into the court for the sole purpose of having the court appoint new trustees.[151]

prohibition was not entitled to a jury trial. Marshall, J., delivering the opinion, said: "Even if all the plaintiff contends for be conceded, it would amount only to error, which could only be corrected by appeal. The jurisdiction of the police court to try cases for violation of municipal police regulations, leveled at disorderly conduct and drunkenness on the streets, is exclusive. Its procedure in the exercise of its jurisdiction may or may not be erroneous, but so long as it has jurisdiction, and acts within its jurisdiction, its rulings and proceedings cannot be reviewed or corrected by means of a writ of prohibition, no matter how erroneous such rulings and proceedings may be."

This is a very liberal view of the powers of a police court. The view that denial of a jury trial, by a court of limited jurisdiction, like a police court, is an act in excess of its jurisdiction, seems preferable.

147. *State ex rel. Schonhorst v. Cline* (1900) 85 Mo. App. 628. Biggs, J., writing the opinion, said: "This was not mere error or irregularity, but a sheer usurpation of a jurisdiction not conferred upon him by law. To restrain the exercise of an excess of jurisdiction, prohibition will lie."

148. *State ex rel. Stroh v. Klene* (1918) 276 Mo. 206, 207 S. W. 496.

149. *State ex rel. Wright v. McQuillin* (1913) 252 Mo. 334, 158 S. W. 652.

150. *State ex rel. Higgins v. Rusk* (1911) 236 Mo. 201, 139 S. W. 199.

151. *State ex rel. McManus v. Muench* (1908) 217 Mo. 124, 117 S. W. 25. Lamm, J., writing the opinion said, "Those issues we have stated. Briefly, they are the appointment of a new trustee and putting that trustee in the shoes of the old one (i. e. vesting him with the title to the real estate devised in trust by the grandmother's will.) Such being the simple, sharp and only issues, the decree invoked thereby should have contented itself with deciding them, and, having set them at rest by the appointment of a new trustee and providing for his bond, and having invested him with

Prohibition will be granted when a court of equity, disregarding a statute awards a temporary injunction without requiring a bond.[152] So the writ issued to stop a circuit court from quashing a notice to take depositions when the case was rightfully transferred from one division of the court to another when a valid notice had been given while the cause was pending in the first division.[153] The writ was issued stopping a circuit court from enforcing an order made upon the court's own initiation ordering public accountants to make an audit of a corporation's books in a receivership matter. The court held no such power existed in an equity court.[154]

(b) *SUBPOENA DUCES TECUM*

The writ will also issue when a court issues a subpoena *duces tecum* that is beyond the power of the court. Hence the writ was issued stopping a circuit court from enforcing obedience to subpoena *duces tecum* which was beyond its power, in that it required members of a board of election commissioners to violate the secrecy of the ballot as protected by

title, the power of the court in the subject matter of that particular suit was exhausted and at end. This certainly is so unless we adopt the heresy that a court, *sua sponte*, may hold a trust estate in its grasp for all purposes of administration under some droll notion that once in chancery for any purpose whatsoever a trust estate is always in chancery for all purposes whatsoever."

See *State ex rel. Ponath v. Muench* (1910) 230 Mo. 236, 130 S. W. 282.

152. *State ex rel. Railway Co. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740. Gantt, J., writing the opinion, used the following instructive language: "In view of the reason of the statute exacting a bond as a condition precedent to the granting of an injunction, we are of the opinion that the requirement of it goes to the very jurisdiction of the court and that an injunction under the statute without requiring the bond and its execution and approval before the issuing of the injunction, is and would be in excess of the jurisdiction of the circuit court; that, notwithstanding its general equity powers, the statute must control and be held to modify and regulate its jurisdiction, and when the consequences to a defendant are considered, the statute is a wise and salutary one and should be enforced. On this point our opinion is that the respondent in issuing his restraining order and refusing to discontinue, set aside or annul it, exceeded his jurisdiction and should be prohibited from further maintaining said temporary injunction and ordered to set aside the same."

153. *State ex rel. Wilson v. Burney* (1915) 193 Mo. App. 327, 186 S. W. 23. Johnson, J., thus defined an act in excess of jurisdiction. "But a judicial act will be treated as extra jurisdictional when it takes on the form and character of an abuse of judicial power in an action and concerning a subject-matter belonging to a class over which the respondent court had jurisdiction."

See also *State ex rel. Methudy v. Killoren* (1921) (Mo. App.) 229 S. W. 1097, when a circuit court was stopped from entertaining jurisdiction of a bill in equity to restrain a litigant from taking depositions where the bill was based upon the ground that the petition in the suit in which the depositions were to be taken did not state a cause of action. It was held that depositions could be taken in any pending suit and hence a court of equity had no power to enjoin a litigant from taking them.

154. *State ex rel. Buckingham, etc. Co. v. Kimmel* (1916) (Mo. App.) 183 S. W. 651.

the statutes.[155] The writ has been issued preventing a circuit judge from carrying out an order requiring a stranger to a pending suit to produce books, etc., when the subpoena in no manner disclosed how the books, etc., were relevant to the suit.[156]

(c) *ORDERS IN ELECTION CONTESTS*

The writ will also issue to prevent an inferior court from enforcing an order in an election contest which is beyond its powers and will result in destroying the secrecy of the ballot as protected by the constitution or the statutes made pursuant thereto.[157]

(d) *ABUSE OF POWER BY COURTS OF EQUITY*

Though courts of equity have broad powers as to injunctions and receivers yet there is a limit beyond which they have no power. Hence prohibition has been issued stopping a circuit court from continuing a temporary receiver appointed without notice and in vacation, when the temporary receiver was to continue for as long a period as three months.[158] Also a circuit court was stopped from enforcing a temporary injunc-

155. *State ex rel. Feinstein v. Hartmann* (Mo.) (1921) 231 S. W. 982. James T. Blair, J., writing the opinion, said: "The language of the provison is plain and unambiguous. The language of the subpoena is no less so. That the command of the subpoena is violative of the prohibition of the statute seems to us to be so clear as to be indisputable. In view of this express prohibition we hold the court had no authority to enforce the subpoena it issued." See *State ex rel. Monett v. Thurman* (1916) 268 Mo. 537, 187 S. W. 1190 and *State ex rel. Von Stade v. Taylor* (1909) 220 Mo. 618, 119 S. W. 373.

156. *State ex rel. Ozark, etc. Co. v. Wurdeman* (1913) 176 Mo. App. 540, 158 S. W. 436. Nortoni, J., writing the opinion said: l. c. 546: "The petition for the subpoena *duces tecum* is obviously insufficient and it appears that the court declined to quash it on a motion to do so. Moreover, from respondent's return, it appears that no evidence was introduced at the hearing of the motion to quash the subpoena revealing a state of facts from which the court could determine the relevancy and materiality of the evidence sought to be thus brought into court. This being true, any subsequent proceeding to enforce obedience to the subpoena *duces tecum* would, of course, exceed the power of the court in that behalf, and prohibition will lie."

It is questionable whether there was an act in excess of the court's jurisdiction rather than mere error.

157. *State ex rel. McCurdy v. Slover* (1894) 126 Mo. 652, 29 S. W. 718; *State ex rel. Young v. Oliver* (1901) 163 Mo. 679, 64 S. W. 128; *State ex rel. Funkhouser v. Spencer* (1901) 166 Mo. 271, 65 S. W. 981.

158. *St. Louis, etc. Ry. Co. v. Wear* (1896) 135 Mo. 230, 36 S. W. 357, 658. Barclay, J., writing the opinion, said: "No court in Missouri may, without notice, declare a receivership (pending suit) for a longer time than is fairly and reasonably requisite to allow the defendant, whose possession is invaded, to show cause against a further continuance of the receivership. What is such reasonable time will depend on the circumstances of each case. But we have no doubt that three months is beyond (and very far beyond) any reasonable day for the showing of cause."

tion issued without notice on the last day of the term (August 31), the court immediately adjourning to October.[159]

7.

LOWER COURT DETERMINES FACTS UPON WHICH ITS JURISDICTION DEPENDS

Whether the claim is that the lower court has no jurisdiction whatsoever or that the lower court is about to do something in excess of its jurisdiction, in a case where it has jurisdiction over the parties and the subject to the action, the rule is clearly fixed that if there exists a dispute as to the facts, the lower court has power to determine the facts. A superior court will not consider conflicting evidence and decide the jurisdictional facts and then issue or withhold the writ accordingly.[160] The power to decide what are facts, upon conflicting evidence, is in the lower court. The rule as to this phase of our subject has been well stated as follows by Graves, J., in *State ex rel. Johnston v. Caulfield*,[161] a case where the Supreme Court of Missouri issued its writ of prohibition to a court of appeals stopping the latter court from going further with a preliminary writ of prohibition that it had issued to a probate court:

"The information on file in Judge Shackleford's court charged that the alleged insane person was within the jurisdiction of his court. Whether he was in such jurisdiction was a question of fact to be determined by the probate court upon a proper hearing. Prohibition will not lie to stop the judge of probate from determining the question of fact as to his jurisdiction. By their writ respondents are seeking to do this, and in so doing are exceeding their authority and powers."

159. *State ex rel. Caron v. Dearing* (1921) 291 Mo. 169, 236 S. W. 629. David E. Blair, J., writing the opinion, used this language: "We have been cited by relators to no cases where the granting of a temporary injunction has been stayed or prevented by our writ of prohibition as an excess of jurisdiction; but in a number of cases this court has announced the rule that notice should be required before the granting of such injunction unless there exists a crying need for immediate action by injunction, and that the granting of injunctions in cases where notice is required amounted to an excessive exercise of jurisdiction. Under these circumstances the conclusion is irresistible that the proceedings on the second application without such notice amounted to snap judgment against defendants, and were arbitrary and wrongful, were not had in the exercise of respondent's sound discretion, and constituted an excessive exercise of his usual and rightful jurisdiction as judge of said circuit court; that relators have no adequate remedy by appeal or otherwise save and except by our intervention."

160. *State ex rel. American, etc. Co. v. Shields* (1911) (Mo.) 141 S. W. 585. *State ex rel. Crouse v. Mills* (1910) 231 Mo. 493, 133 S. W. 22; *State ex rel. Johnston v. Caulfield* (1912) 245 Mo. 676, 150 S. W. 1047; *Coleman v. Dalton* (1897) 71 Mo. App. 14; *State ex rel. v. Seay* (1886) 23 Mo. App. 623.

161. (1912) 245 Mo. 676, 150 S. W. 1047.

8.

ISSUANCE OF THE WRIT IS DISCRETIONARY

Again it may be said that whether the writ is prayed for to stop a lower court from exceeding its powers or from acting where it has no power at all, the prevailing view is that the issuance or withholding of the writ is a matter of sound judicial discretion.[162] It is not generally regarded as a writ of right. The rule was thus tersely stated by Valliant, J., in *State ex rel. Larew v. Sale*:[163]

"And it is not every case in which the court erroneously decides that it has jurisdiction that calls for a writ of prohibition. The writ of prohibition, in spite of the frequent use to which it has in late years been put, is still an extraordinary writ and issues only when sound judicial discretion commends it; in that view it is not a writ of right."

This also is the same view that obtained in the English common law,[164] at least where the lack of jurisdiction was not patent on the record below. The Missouri cases have not emphasized a distinction between cases where the want of jurisdiction below is patent and is not patent.

162. *Thomas v. Mead* (1865) 36 Mo. 232; *State ex rel. Ry. Co. v. Seay* (1886) 23 Mo. App. 623; *State ex rel. Webster v. Johnson* (1896) 132 Mo. 105, 33 S. W. 781; *State ex rel. McCafferty v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494; *State ex rel. Pulliam v. Fort* (1904) 107 Mo. App. 328, 81 S. W. 476; *Willow Springs Co. v. Mountain Grove, etc. Co.* (1917) (Mo. App.) 197 S. W. 916.

In *State ex rel. Ellis v. Elkin* (1895) 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037, Barclay, J., states the rule as follows: "The granting of a prohibitory writ is discretionary in the sense that the court will not issue it, unless the facts exhibited appear to justify a resort to such a remedy. Where other convenient and effective modes of reaching the same result are open to the complaining party, the court may decline to award the extraordinary remedy. But it is not bound to decline because there may be some concurrent remedy. Whether other modes of relief are equally effective is a question to be determined in each particular exigency.

"And where a state of facts is presented, calling for the use of the writ according to the principles and usages of law, and where no other remedy is available, its allowance is not discretionary, but a matter of right under our constitution. (Art. 2, sec. 10.)"

163. (1905) 188 Mo. 496, 87 S. W. 976.

164. *People ex rel. Adams v. Westbrook* (1882) 89 N. Y. 152; *Farquarson v. Morgan* (1894) 1 Q. B. Div. 552; 8 Bacon's Abridgment, 209; High, Extraordinary Legal Remedies, 3rd ed., 709; 10 Laws of England, by Halsbury, pp. 141 and 147; *Smith v. Whitney* (1886) 116 U. S. 167; *In re Cooper* (1891) 143 U. S. 472; *In re Huguley Mfg. Co.* (1901) 184 U. S. 297.

The rule is thus stated by Bacon (Vol. 8, p. 209): "It is laid down in Hob. that though a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition, when it appears to them that the surmise is not true.

"Hob. 67 in the case of Aston Parish v. Castle Birmidge Chapel. This authority has been often quoted in questions of this kind, and in some cases denied to be law. But yet it seems the better opinion, and to have been so holden by the greater number of our judges, that the awarding of a prohibition is a matter discretionary, that is,

9.

PROHIBITION DOES NOT ISSUE TO PREVENT OR CORRECT ERROR

There seems to be little doubt that the rule in Missouri is that prohibition will not issue by a superior court to correct error or to prevent

that from the circumstances of the case the superior courts are at liberty to exercise a legal discretion herein, but not an abritrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted."

In *Farquarson v. Morgan* (1894) 1 Q. B. Div. 552, *supra*, the rule was thus stated by Lopes, L. J.: "The result of the authorities appears to be thus: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent upon the face of the proceedings, it is discretionary with the court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled. The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the fact of the proceedings, is explained by Lord Denham in Bodenham v. Ricketts, supra, to be for the sake of the public, lest 'the case might become a precedent if allowed to stand without impeachment,' and I would add for myself, because it is a want of jurisdiction of which the court is informed by the proceedings before it, and which the judge should have observed, and of which he should himself have taken notice."

In *Smith v. Whitney* (1886) 116 U. S. 167, *supra*, the Supreme Court of the United States held that it had appelate jurdisiction of a judgment of the Supreme Court for the District of Columbia dismissing a petition for a writ of prohibition. Discussing the nature of the writ, Mr. Justice Gray said: "It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true, where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where the court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in older authorities."

The following statement of the rule was made by Chief Justice Fuller in *In re Cooper* (1891) 143 U. S. 472: "But it is clear upon reason and authority that where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ, which even if of right is not of course, is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it."

The latter stated the rule as follows in *In re Huguley* (1901) 184 U. S. 297: "It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. In re Rice, 155 U. S. 396."

See also 26 Harvard Law Review 378; 36 Harvard Law Review 863.

error. This statement, in substance, is found in a great many opinions.[166] It appears in the very earliest case[167] and in the latest cases[168] on the purpose and scope of the writ. There is no compact and simple definition of error that when read and applied to the problem at hand will surely disclose whether the proposed action of the lower court is error only or excess of jurisdiction. To determine whether the proposed action is error, one must apply the applicable rule of substantive law and procedure. One must know the powers of the courts under the common law system as modified by the constitution and statutes of the state. In the first prohibition case, which was decided by the Missouri Supreme Court, *Morris v. Lenox*, [169] the court revised the judgment of a circuit court, that had issued prohibition to a justice court, on the ground that the justice at most had committed error only. The facts and rulings in that case have already been considered in the "Introduction" to this article. As previously stated, the opinion is brief and little light is furnished on the question of what is error as distinguished from excess of jurisdiction. The opinion leaves no doubt, however, that prohibition will not issue to prevent or correct error only. What is error, and hence not reached by prohibition, was stated as follows by Kennish, J., in *State ex rel. Graham v. Seehorn:*[170]

166. *Morris v. Lenox and Martin* (1843) 8 Mo. 253; *Werthheimer v. Mayor of Boonville, et al.* (1860) 29 Mo. 254; *Thomas v. Mead* (1865) 36 Mo. 232; *Wilson v. Berkstresser* (1870) 45 Mo. 283; *Bowman's Case* (1877) 67 Mo. 146; *State ex rel. Mason v. Laughlin* (1879) 7 Mo. App. 529 ;*State ex rel. The Missouri Pacific Railway Co. v. Seay, Judge, et al.* (1886) 23 Mo. App. 623; *State ex rel. Mermod v. Heege* (1880) 39 Mo. App. 49; *State ex rel. Union Depot Rd. Co. v. Southern Ry. Co.* (1889) 100 Mo. 59, 13 S. W. 398; *State ex rel. Johnson v. Withrow* (1891) 108 Mo. 1, 18 S. W. 41; *State ex rel. Webster v. Johnson* (1896) 132 Mo. 105, 33 S. W. 781; *Shaw v. Pollard* (1900) 84 Mo. App. 286; *Wand v. Ryan, Judge, et al.* (1902) 166 Mo. 646, 65 S. W. 1025; *Delaney v. Police Court* (1902) 167 Mo. 667, 67 S. W. 589; *Eckerle v. Wood, et al.* (1902) 95 Mo. App. 378, 69 S. W. 45; *State ex rel. Hagerman v. Taylor, et al.* (1906) 193 Mo. 654, 91 S. W. 917; *State ex rel. Mc Namee v. Stobie, et al.* (1906) 194 Mo. 14, 92 S. W. 191; *State ex rel. Meador v. Williams, et al.* (1906) 117 Mo. App. 564, 92 S. W. 151; *State ex rel. Sale v. McElhinney* (1906) 199 Mo. 67, 97 S. W. 159; *State ex rel. Kochtitzky v. Riley* (1907) 203 Mo. 175, 101 S. W. 567; *State ex rel. Kansas City v. Lucas* (1911) 236 Mo. 18, 139 S. W. 348; *State ex rel. Terminal, etc. Ry. v. Tracy* (1911) (Mo.) 140 S. W. 888; *State ex rel. Graham v. Seehorn* (1912) 246 Mo. 541, 151 S. W. 716; *State ex rel. Warde v. McQuillan* (1914) 262 Mo. 256; 171 S. W. 72; *State ex rel. Keirsey v. Calvird* (1917) 195 Mo. App. 354, 191 S. W. 1079; *State ex rel. Buckner v. Ellison* (1919) 277 Mo. 294, 210 S. W. 401; *State ex rel. Aiken v. Buckner* (1918) 203 S. W. 242 (Mo. App.); *State ex rel. Bruening Realty Co. v. Thomas* (1919) 278 Mo. 85, 211 S. W. 667; *State ex rel. Caldwell v. Cockrell* (1919) 280 Mo. 269, 217 S. W. 524; *State ex rel. Norbourne Land, etc., Co. v. Hughes* (1922) 240 S. W. 802 (Mo.); *State ex rel. Coonley v. Hall* (1922) 246 S. W. 35 (Mo.).

167. *Lenox v. Morris* (1843) 8 Mo. 253.

168. *State ex rel. Coonley v. Hall* (1922) (Mo.) 240 S. W. 35.

169. (1843) 8 Mo. 253.

170. (1912) 246 Mo. 541, 151 S. W. 716.

"These propositions being conceded, it follows that the circuit court, being possessed of the cause on appeal from the municipal court, was clothed with judicial power to determine the question whether the parties in interest were legally before the court in the manner prescribed by the charter, as well as any other question arising in the course of the trial. Such questions did not strike at the jurisdiction of the court, but at the regularity and validity of the proceedings up to that stage, and when the respondent decided or was about to decide adversely to the contention of the relators, he was acting neither without jurisdiction nor in excess of jurisdiction, but deciding such issues as arose in a cause rightfully before him and which that court alone was clothed with authority to decide. It is well settled law that so long as a court is proceeding within the sphere of its judicial authority, it is not amenable to the writ of prohibition."

The rule was thus stated by Gantt, J., in *State ex rel. Johnson v. Withrow:*[171]

"The object of this proceeding is to correct what the relators deem was an error in the circuit court in not sustaining their plea to its jurisdiction. As before said, these pleas in no sense challenged the power of the court over this class of cases, nor urged any inherent disability in the organization of the court itself, territorially, or in its grant of powers; but the matters alleged were those of extraneous character which might, or might not, affect the jurisdiction of the court. For example, in the absence of this plea, no lawyer would question the power of the circuit court to hear and determine an action on an administrator's bond. Then, this plea is one that court must hear and determine before it can decide whether it should take cognizance of the case, and it is this very right to hear, determine and decide, *whether rightfully or wrongfully*, that we denominate jurisdiction."

Perhaps the relatively recent cases of *State ex rel. Aiken v. Buckner*[172] decided by a court of appeals, and *State ex rel. Buckner v. Ellison*[173], decided by the Missouri Supreme Court on certiorari, illustrate about as well as any opinions found the distinction between error only and excess or want of jurisdiction. In those cases the facts were as follows: Prohibition was issued to a circuit court by a court of appeals preventing the circuit judge from correcting a judgment *nunc pro tunc*.

The judgment entered showed that in a certain civil suit the plaintiff first dismissed as to one defendant and the court directed a verdict as to another defendant. The judge's minutes first mentioned that the

171. (1891) 108 Mo. 1, 18 S. W. 41.
172. (1918) (Mo. App.) 203 S. W. 242.
173. (1918) 277 Mo. 294, 210 S. W. 401.

court had directed a verdict as to one defendant and then mentioned that plaintiff had dismissed as to one defendant. Except as the order of mentioning, which action was first taken, the minutes furnished no light on which action was taken first. The defendant in whose favor the verdict was directed, after it had been reversed on appeal, filed a motion to modify the judgment *nunc pro tunc* so as to make it read that plaintiff dismissed as to one defendant after the court had directed a verdict for the other defendant. Plaintiff then applied to a court of appeals for a writ of prohibition. It was held that the minutes did not authorize the trial court to amend the judgment and he should therefore be stopped by writ of prohibition.

Thereafter the Supreme Court of Missouri issued its writ of certiorari to the court of appeals and quashed the judgment rendered by the latter court. The Supreme Court held that the court of appeals did not follow controlling Supreme Court decisions in issuing its writ of prohibition, that the trial court was not exceeding its powers in correcting its own record, that it had power to decide from its minutes whether the judgment should be corrected and that an incorrect decision would be error only. Williams, J., writing the opinion for the court *en banc* disposed of the question as follows:

"The question of the sufficiency of the evidence presented upon the hearing before the circuit court was, however, not properly before the appellate court for discussion. Upon its proceeding by writ of prohibition it was concerned merely with the question of whether or not the circuit court had jurisdiction to hear and determine ,in the first instance, the matter then pending before it. The question of the sufficiency of the written evidence to support the requested order *nunc pro tunc* was not a jurisdictional question in the proper sense, but a question which would involve nothing more than the interpretation and application of a strict rule of evidence, applicable to hearings upon motions for orders *nunc pro tunc*.

"That the sufficiency or insufficiency of the minutes, in a judge's docket, to justify the court in correcting its record by an order *nunc pro tunc*, is a question of evidence rather than one of jurisdiction, is we think clearly apparent from the language employed in previous rulings of this court."[174]

174. See also *Wand v. Ryan* (1902) 166 Mo. 646, 65 S. W. 1025 *accord.* Gantt, J., writing the opinion, said: (l. c. 648-9) "The return of Judge Ryan and, plaintiff's motion for judgment notwithstanding, present the questions for our consideration. If the facts stated in the return show the circuit court had jurisdiction of the class of cases in which it was proceeding and has not exceeded that jurisdiction, even though it might have committed some reversible error, then prohibition should not be awarded."

In an early case[175] it was held that a court of common pleas erroneously issued prohibition to a mayor's court stopping the latter court from enforcing a fine of $5.00 imposed against one for buying food in the town elsewhere than in the market place. The ordinance prohibited the buying of food outside the market but excepted certain things including "wild game." The Supreme Court held the mayor's court had power to decide whether fish were wild game and an incorrect decision would be error only. This decision may be said to be rather liberal in that it held power existed in the mayor's court to interpret the ordinance.[176] No doubt there is a tendency in the cases, following the English cases, where the writ was issued by the temporal courts to the spiritual courts, to hold that as to courts of limited statutory powers that they do not acquire jurisdiction unless they correctly determine the statute law.[177]

175. *Werthheimer v. Mayer, et al.* (1860) 29 Mo. 254.

176. Scott, J., writing the opinion in the above case said: "It is hard to conceive how the question of jurisdiction can be made to depend on the fact whether the judgment was right or wrong. The mayor unquestionably had authority to decide whether the ordinance had been violated, and after he has determined it, how can it be said he had no jurisdiction? According to the argument, the court had to decide the case before its jurisdiction could be ascertained. If it was of opinion in favor of the plaintiff, it had jurisdiction; if of the opinion against him, it had none. In the multiplied number of courts of limited jurisdiction in the English system of jurisprudence, whose powers are regulated by custom and prescription, instances may possibly be found which would warrant the application of the refinement indulged in by the plaintiff in the case before us; but none can be found, where the superintending court has interfered, where there was a clear intimation of an act of parliament that the judgment of the inferior should be final."

177. The holdings of the English cases were thus stated by Holmes, J., in *Thomas v. Mead* (1865) 36 Mo. 232: "In general, the authorities seem to show that, in order to justify a prohibition on the sole ground of misconstruction of statutes, the statute must be pleaded, or the fact stated in such a manner as to bring the statute directly in question, and it must distinctly appear that the court below is proceeding upon such misconstruction. It is unnecessary for the decision of this case that we should determine this point here; but if it did sufficiently appear, a prohibition would go on that ground also. It belongs peculiarly to the Supreme Court to put a final construction upon the Constitution and the statute laws of the State, and indeed upon the common law also recognized in this State. In like manner, the superior courts of law in England assumed the determination of the construction of the act of Parliament; and they prohibit all inferior courts from proceeding upon any construction different from that which is put upon them by superior courts. If an inferior court misinterprets a statute that is held to be a proceeding contrary to the statute; and when courts of peculiar jurisdiction, as the Ecclesiastical or Admiralty courts, which proceed in general according to the civil law, bring in question the statutes or common law of the realm, they are required to interpret, construe, and expound them, as they are expounded by the superior courts of common law, or as those courts shall say they ought to be expounded, when brought before them in prohibition. (Home v. Carnden, 2 H. Bl. 533). For the law is not to be interpreted and decided in two different ways under the same government. If this were to be allowed, or if there were no power in the Supreme Court to interfere by prohibition in the exercise of its original jurisdiction, and that superintending control, which is given by the Constitution, the

In an early case,[178] which has previously been considered, (137f) prohibition was denied when asked for to stop a circuit court from proceeding further in a mandamus proceeding against a county court. It was held that mandamus should not have been issued but that since the circuit court had jurisdiction of the parties, and the power generally to issue writs of mandamus to county courts, prohibition should not issue, as there was error only on the part of the circuit court in issuing the writ of mandamus.

Prohibition was denied to prevent a circuit court from carrying out an order disbarring an attorney where one of the grounds for the writ was that the disbarment proceedings should have been begun in the name of the state rather than by M and others, members of the St. Louis Bar Association.[179] It was held, at most, there was error in the proceedings not proper to be reached by prohibition. So, the writ was denied by the Supreme Court of Missouri when applied for to stop a circuit court from proceeding to judgment in a condemnation case brought by one railroad company against another to compel the latter company to permit the former to use its tracks.[180] The decision was based upon the proposition that the court had jurisdiction of the subject matter and the parties, and an incorrect ruling was not an act in excess of its juris-

inferior courts might be brought into unseemly conflicts with one another or with this court, and we might have to witness the disorderly and disgraceful spectacle of the officers of different courts, armed with contradictory process, meeting in direct collision in the public streets, and inaugurating riot and civil disturbance, while purporting to be acting in the name of one and the same executive authority. Certainly such things can never be permitted in any well ordered government. It was held in Gould v. Gapper (5 East 345), in an elaborate decision by Lord Ellenbrough, that the court of King's Bench would prohibit the spiritual courts, or any inferior court, from proceeding upon a construction of an act of Parliament different from that which was put upon it by that court, notwithstanding there was a remedy by appeal or writ of error; not that the inferior court might not have jurisdiction to construe it, but 'that the mischiefs of misconstruction were to be prevented by prohibition' and there can be little doubt that this court has like power and jurisdiction in similar cases."

178. *Wilson v. Bertstresser* (1870) 45 Mo. 283. As previously stated in the paragraph "(n)", "Other Extraordinary Writs," this opinion seems contrary to the other Missouri cases, where a narrower view seems to prevail, viz., that the improper issuance by a lower court of an extraordinary writ is not mere error but that it is beyond the court's jurisdiction.

179. *Bowman's Case* (1877) 67 Mo. 146.

180. *State ex rel. Union Depot etc. Co. v. Southern Ry. Co.* (1889) 100 Mo. 59, 13 S. W. 398. Barclay, J., writing the opinion, said: "Whether the particular facts on which the court proceeds in that regard are, or are not, sufficient to justify its exercise of jurisdiction, is a question of law, the solution of which either way cannot impair the court's right to apply its judicial power in the premises according to its view of the law and of the facts before it."

It may be added that the opinion also stated that appeal or writ of error was deemed adequate by the court. Further, it was not held that the trial court had committed error.

diction. The writ was also denied where the petition for it was based upon the ground that defendant had filed an answer alleging that there was another suit pending between the same parties for the same thing,[181] and the trial court had denied the plea. It was held this defense was one the trial court had full power to pass upon. The improper appointment by a circuit court of a referee without first giving the litigants the privilege, as the statute provided, of agreeing upon one was held error and not an act in excess of its jurisdiction, and hence not to be reached by prohibition.[182]

So prohibition will not lie to prevent a justice of the peace court from entertaining jurisdiction of suits on accounts where the claim is that the account is a single account much larger than the maximum of the jurisdiction of the court and that it has been split into three parts and three suits brought.[183] It was held that if a creditor splits an account, recovery on a part of it bars further action or actions for the balance. It would seem true that usually whether the proper parties are joined in civil actions does not go to the jurisdiction of the court and that improper rulings as to misjoinder and non-joinder are error only.[184] So, prohibition will not issue to prevent a trial court from proceeding further with an application for change of venue where a change can be taken,

181. *State ex rel. Johnson v. Withrow* (1891) 108 Mo. 1, 18 S. W. 41. Gantt, P. J., writing the opinion, said: "As before said, these pleas in no sense challenged the power of the court over this class of cases, nor urged any inherent disability in the organization of the court itself, territorially, or in its grant of powers; but the matters alleged were those of extraneous character which might, or might not, affect the jurisdiction of the court. For example, in the absence of this plea, no lawyer would question the power of the circuit court to hear and determine an action on an administrator's bond. Then, this plea is one that court must hear and determine before it can decide whether it should take cognizance of the case, and it is this very right to hear, determine and decide, *whether rightfully or wrongfully*, that we denominate jurisdiction."

But see "5. (e) Where Jurisdiction of The Case Has Previously Been Assumed by Another Court in The Judicial System," *supra.*

182. *State ex rel. Webster v. Johnson* (1896) 132 Mo. 105, 33 S. W. 781. Gantt, P. J., said: "But does it follow that the writ of prohibition should issue notwithstanding that error? The court possessed the power to appoint the referee. The conditions precedent to the appointment after the court determined the necessity, were simply steps of procedure, however salutary and conducive to the rights of the parties, and the failure to observe the forms prescribed by the statutes are at most only irregularities or errors which the parties may waive."

The opinion then pointed out that there was no exception taken to the erroneous appointment of the referee and for that reason "the action of the court must stand."

183. *Shaw v. Pollord* (1900) 84 Mo. App. 286. The opinion is also based upon the proposition that an appeal to the circuit court where there is a trial *de novo* is adequate.

184. *Eckerle v. Wood* (1902) 95 Mo. App. 378, 69 S. W. 45; *State ex rel. Sale v. McElhinney* (1906) 199 Mo. 67, 97 S. W. 159.

and the only question is as to the correctness of the application for the change.[185]

The writ was denied to prevent a circuit court from proceeding further in an equity case brought by several employees of a city to restrain a civil service board from wrongfully dismissing them, where they contended they could not be summarily dismissed because of the provision of a valid city ordinance and the board claimed the ordinance had been repealed.[186] It was held the circuit court had full power to determine whether the ordinance was in effect and its meaning. The writ was denied where it was asked for to stop a police court from entertaining jurisdiction of some two hundred cases filed against relator for violating an ordinance against placing objects in the city streets.[187] The relator claimed the ordinance did not cover acts done by it, viz., running trains, but, applied to placing objects at rest in the streets. It was held the police court had power to determine the meaning of the ordinance. So, the writ was denied when prayed for to stop a circuit court from proceeding further in an election contest where it was asserted the contestant had not filed a proper statement of his election expenses as it was sworn to before an Indiana notary public, etc.[188] Whether the statement was in the proper form was held a matter for the determination of the trial court and an incorrect ruling would be error only. The manner and form of making record entries of the proceedings of a circuit court was held to be within the power of the court in the first instance and hence not to be reached by prohibition.[189] So, the merits and sufficiency of a

185. *State ex rel. Kochtitzky* (1907) 203 Mo. 175, 101 S. W. 567.

186. *State ex rel. Kansas City v. Lucas* (1911) 236 Mo. 18, 139 S. W. 348. Valliant, C. J., writing the opinion, said: "The proposition that a court of equity has no jurisdiction to deprive the relators of their power to remove the plaintiffs from their positions in many manner and for any cause is based on the assumption that the defendants have that authority. Of course if they have such authority a court of equity cannot deprive them of it; but if they have it not, yet assume it and attempt to exercise it to the injury of the plaintiffs, a court of equity, may forbid them doing so. This court cannot assume that the relators have, or that they have not, the power claimed; the trial court must try that issue, and if it finds that the relators have that power it will dismiss the plaintiff's bill, but if it should find that they have not that power lawfully, it will forbid them attempting to exercise it. If the trial court should err in its conclusions on this question the relators have an adequate remedy by appeal."

187. *State ex rel. Terminal Ry Co. v. Tracy* (1911) 237 Mo. 109, 140 S. W. 888.

188. *State ex rel. Hagerman v. Taylor* (1906) 193 Mo. 654, 91 S. W. 917.

189. *State ex rel. Caldwell v. Cockrell* (1919) 280 Mo. 269, 217 S. W. 524. Goode, J., writing the opinion, said (l. c. 289-290): "It sometimes happens that courts, through mistakes of judgment, give decisions contrary to statutes, but if it has ever happened that a writ issued to *prevent* the mistake, we do not know that case."

The question arose in a contempt proceeding against the clerk who refused to carry out the judge's orders as to the record entries. It was held that the judge had power to compel the clerk to make the entries, though erroneous, and the clerk was in contempt for not obeying the judge's orders.

bill in equity will not be decided by prohibition when the parties are in court and the court has jurisdiction of the subject matter of the action.[190] So, the writ was denied when prayed for to stop a circuit court from carrying out the mandate of a court of appeals where it was held that the question decided by the court of appeals, viz., the sufficiency of an order of publication, was within its jurisdiction and not decided contrary to a controlling supreme court decision.[191] The writ has been denied in condemnation proceedings where its real object was to reach errors in law which it was claimed a trial court was about to commit.[192] So, the writ was denied to prevent a justice of the peace court from proceeding further in a misdemeanor case where the writ was applied for on the ground that the act of the defendant, in the prosecution in the justice court, was legal, as he was a member of the police force of the City of St. Louis, acting under legal orders of the Governor of the State of Missouri.[193] It was held that the Governor had no authority over the

190. *State ex rel. Warde v. McQuillan* (1914) 262 Mo. 256, 171 S. W. 72. Lamm, C. J., said (l. c. 270): "The questions learnedly discussed by counsel *pro* and *con* not only on the merits but on the sufficiency of the bill were all for disposition below in the first instance, and not for disposition here by a side stroke on prohibition. We have purposely avoided discussing them, so that we may not put the trial chancellor in leading strings when on some interlocutory step or on final hearing when all the facts are in, he comes to decide this or that one of them."

191. *State ex rel. Coonley v. Hall* (1922) (Mo.) 246 S. W. 35. Elder, J., writing the opinion, said: "From the view we take of this proceeding there is a primary question before us which is decisive of the case and that is—did the Kansas City Court of Appeals have jurisdiction to decide the questions involved in the appeal taken from the order overruling the motion to vacate the judgment of divorce and re-instate the cause? If so, then upon a proceeding by prohibition we are bound by the opinion of the Court of Appeals, whether correct or not, and the writ will not lie. If not, then we can exercise the superintending control lodged in this court by the Constitution and intervene."

192. *State ex rel. Bruening Realty Co. v. Thomas* (1919) 278 Mo. 85, 211 S. W. 667; *State ex rel. Graham v. Seehorn* (1912) 246 Mo. 541, 151 S. W. 716. In the latter case the contention was that certain ordinances authorizing the proceedings were not passed in conformity with the requirements of the city charter. Kennish, J., writing the opinion, said as to this contention (l. c. 558-9): "These propositions being conceded, it follows that the circuit court, being possessed of the cause on appeal from the municipal court, was clothed with judicial power to determine the validity of the ordinance or ordinances upon which the condemnation proceedings rested; to determine the question whether the parties in interest were legally before the court in the manner prescribed by the charter, as well as any other question arising in the course of the trial. Such questions did not strike at the jurisdiction of the court, but at the regularity and validity of the proceedings up to that stage, and when the respondent decided or was about to decide adversely to the contention of the relators, he was acting neither without jurisdiction nor in excess of jurisdiction, but deciding such issues as arose in a cause rightfully before him and which that court alone was clothed with authority to decide. It is well-settled law that so long as a court is proceeding within the sphere of its judicial authority, it is not amenable to the writ of prohibition."

193. *State ex rel. Mc Namee v. Stobie* (1906) 194 Mo. 14, 91 S. W. 917.

city police and that the steps required by law had been taken to give the justice jurisdiction.

It has also been held that prohibition would not issue to prevent a circuit court from trying one for gambling where it was claimed by the prisoner that he had previously been put in jeopardy.[194] It was held whether the prisoner had been in jeopardy was for the trial court's decision in the first instance. The writ was denied by a court of appeals where it was applied for to prevent a circuit court from entertaining jurisdiction of an appeal from a justice of the peace court, the claim being that notice of appeal was insufficient.[195] It was held that the circuit court had power to determine the sufficiency of the notice of appeal.

10

PROHIBITION WILL NOT ISSUE WHERE APPEAL OR WRIT OF ERROR IS ADEQUATE

Want of jurisdiction, or a ruling or order of a court in excess of its jurisdiction, may be corrected by appeal or writ of error in many instances in our judicial system. It is not the purpose of this article to consider the question when appeal or error lies and what court or courts have appellate jurisdiction over other courts. It is sufficient for the present purposes to point out that want of jurisdiction, or excess of jurisdiction, may be, and often is, corrected by the usual methods of appeal, or, writ of error. Evidently superior courts of this state frequently have been urged, by petitioners for prohibition, to hold that in any case where there is want or excess of jurisdiction prohibition will issue. Our courts, however, properly, have not been persuaded to adopt this point of view. On the contrary the cases hold with consistency that where appeal or writ of error exists and furnishes an adequate remedy for the litigant they must be employed though there is want or excess of jurisdiction in

194. *State ex rel. Meador v. Williams* (1906) 117 Mo. App. 564, 92 S. W. 151. Goode, J., writing the opinion, said: "But the principle that prohibition only lies to restrain action by a court beyond its jurisdiction, has always been recognized as sound. The former jeopardy of these relators is a good plea in bar to the further prosecution of the case against them; and indeed, as said, they were entitled to their discharge on the motion filed. If a new conviction ensues, they have a remedy by appeal or writ of error; though doubtless they might be subjected to some injustice before their case could be heard by a court of last resort. But that result is incident to every erroneous judgment. The rule is that the remedy for error in overruling a plea of former adjudication is by appeal and not by prohibition. (State ex rel. v. Withrow, 108 Mo. 1; State ex rel. v. Lubke, 29 Mo. App. 555.)"

195. *State ex rel. Kiersey v. Calvird* (1917) 195 Mo. App. 354, 191 S. W. 1079.

the lower court.[196] What constitutes adequacy of remedy seems in most cases to be a practical question. It is not ordinarily a question of the kind of judgment that may be given on appeal or writ of error or in prohibition, but largely a question of the necessity of stopping at once all further action or not stopping it immediately but waiting until an upper court reaches the case in due course of time. And it may be said that mere delay in reaching the case that may result after an appeal is taken, or writ of error has been granted, though it is inconvenient and undesirable, will not warrant the issuance of a writ of prohibition.[197] Perhaps an example or two of this question of adequacy of the usual methods of review may serve to make clearer what has been stated abstractly. One was prosecuted in a city police court for an alleged violation of an ordinance prohibiting smoke stacks less than fifty feet in height. It was contended that the ordinance was invalid because unreasonable, in a petition for prohibition filed in a circuit court. The St. Louis Court of Appeals affirmed the judgment of the circuit court, denying the writ, holding that though the ordinance might be void, there was no reason shown why the appeal that existed from the police court to the circuit court was not adequate.[198]

196. *Bowman's Case* (1877) 67 Mo. 146; *State ex rel. Brainard v. Thayer* (1883) 80 Mo. 436; *Mastin v. Sloan* (1889) 98 Mo. 252, 11 S. W. 558; *Shaw v. Pollard* (1900) 84 Mo. App. 286; *State ex rel. Daugherty v. Hickman* (1900) 85 Mo. App. 198; *Chicago, etc. Ry. Co. v. Woodson* (1905) 110 Mo. App. 208, 85 S. W. 105; *State ex rel. Hainsworth v. Shannon* (1908) 130 Mo. App. 90, 108 S. W. 1097; *State ex rel. Connors v. Shelton* (1911) 238 Mo. 281, 142 S. W. 417; *State ex rel. Elam v. Henson* (1919) 217 S. W. 11.

197. *State ex rel. Connors v. Shelton* (1911) 238 Mo. 281, 142 S. W. 417. In this case Lamm, J., writing the opinion for the court en banc, thus stated the rule: "So, in our Bill of Rights it is ordained that courts of justice shall be open to every person, that certain remedy shall be afforded, etc., 'and that right and justice shall be administered without sale, denial or *delay*'. (Art. 2, sec. 10, Const.) But none of those generalities are sufficient legal grounds for the extraordinary writ of prohibition. If mere delay, or mere inadequacy or remedy arising from mere delay, could be made the sole basis for writs of prohibition, then a new and anxious situation would spring; for thereby a litigant would be invited to leave the beaten way, to discard relief by appeal, *certiorari* or error, and seek prohibition as an end-all and cure-all. We could not very well announce a doctrine of that sort. Certainly the doctrine of the books does not run that way; nor has this court ever so held. In jurisprudence the maxim is: We must have recourse to the extraordinary, when what is ordinary fails. (*Recurrendum est ad., etc.*) Delay, inadequacy of remedy and hardships springing from the use of other remedies, when present, fill a subsidiary office in prohibition. But mark, their office is not to furnish a *ground* for the writ. It is merely to persuade the court to exercise its discretion to issue one in a case where grounds exist, but where peradventure our discretion might incline us to decline the writ because of the existence of some ordinary remedy."

198. *State ex rel. Hainsworth v. Shannon* (1908) 130 Mo. App. 90, 108 S. W. 1097. Goode, J., writing the opinion, said: "And again it has been said that prohibition will not be granted where the usual modes of review will furnish an adequate remedy, but only when these modes are inadequate to the situation. (St. Louis, Kennett & So. R. R. v. Wear, 135 Mo. 230, 36 S. W. 357, 658.)"

In a case decided by the Supreme Court of Missouri one M was a surety on an injunction bond given by one N in a suit by him in the circuit court, as administrator, against one J. The injunction was dissolved and J filed the usual motion to assess damages on the bond. During the proceedings the circuit court make an order substituting B as administrator instead of N. M contending such an order was beyond the power of the circuit court, applied for a writ of prohibition. The writ was denied on the ground that there were no features of the case which made appeal inadequate.[199]

11

PROHIBITION WILL ISSUE, A PROPER CASE BEING PRESENTED, WHERE APPEAL OR WRIT OF ERROR IS INADEQUATE

As stated in the preceding sub-division of this article, want or excess of jurisdiction, by an inferior court, may ordinarily be reached by appeal or writ of error.[200] It often is the case that though this type of judicial mistake can be thus reached, to require the litigant to employ the usual methods of reaching it, as a practical matter, will work unusual hardship. So, it seems well settled that though appeal or writ of error lies, if appeal or writ of error is not adequate and all the elements are present which justify prohibition, this writ will not be withheld.[201]

The writ was issued, though appeal was available, where a circuit court had issued an alternative writ of mandamus ordering a probate judge to show cause why an administratrix of a decedent's estate should not be permitted to appeal without bond to the circuit court from an adverse decision against her on a large claim she, personally, had filed against the estate. It was said that appeal from the order of the circuit court was not adequate as the relator in the prohibition proceeding had for years been prevented from collecting a just claim against the

199. *Mastin v. Sloan* (1889) 98 Mo. 252, 11 S. W. 558. The opinion written by Barclay, J., states the rule as follows: "Any error that court may make in determining the proper limits of its jurisdiction in the premises can be effectively corrected by any of the usual modes of reviewing judgment. The writ of prohibition should issue only in circumstances where the ordinary remedies are inadequate to the ends of justice. Where, as here, an appeal or writ of error furnishes a complete and effective remedy for any error of the court below, prejudicial to the rights of a party, this extraordinary remedy should be denied."

200. *Mastin v. Sloan* (1889) 98 Mo. 252, 11 S. W. 558.

201. *State ex rel. Kansas City, etc. v. Allen* (1891) 415 Mo. App. 551; *State ex rel. Ellis v. Elkin* (1895) 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *Carter, Petitioner v. Bolster* (1906) 122 Mo. App. 135, 98 S. W. 105; *State ex rel. v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494; *State ex rel. v. Eby* (1902) 170 Mo. 497, 71 S. W. 52; *State ex rel. Knisely v. Jones* (1918) 274 Mo. 374, 202 S. W. 1117; *State ex rel. Caron v. Deering* (1921) 291 Mo. 169, 236 S. W. 629; *State ex rel. Tune v. Falkenhainer* (1921) 288 Mo. 20, 231 S. W. 257.

estate and had been compelled twice before to petition the supreme court for extraordinary legal remedies.

So appeal was held inadequate where a suit for possession of a theatre building was begun before a justice of the peace. The petition filed in the justice court alleged that over $400.00 rent was due, though no money judgment was asked. The justice awarded a jury trial over the protest of plaintiff. Plaintiff filed a petition for prohibition in the Kansas City Court of Appeals. It was held the writ should issue though an appeal would lie from the justice court to the circuit court where there existed a trial *de novo*. It was held appeal was inadequate as it did not in reality afford plaintiff a summary trial that he was given by express language of the statute.[202]

12

MUST THERE BE AN OBJECTION IN THE LOWER COURT BEFORE PROHIBITION WILL ISSUE?

Many cases discuss the question of the necessity for some sort of objection in the lower court on the ground of no jurisdiction before one

202. *State ex rel. Knisely v. Jones* (1918) 274 Mo. 374, 202 S. W. 1117. Graves, C. J., writing the opinion, disposed of the argument that because appeal existed prohibition would not issue in the following manner:

"Under the peculiar facts of this case we do not think that an appeal or other remedy would afford relatrix an adequate, prompt and efficient remedy. The facts pleaded and admitted show the uncalled for dilatory efforts to defeat a judgment directed by this court. They further show that the circuit judge is threatening to compel the probate court do to an act in the very face of an express statute, for to compel the granting of an appeal to Mrs. Leathe, under the admitted facts, would be in direct violation of an express statute.

"To compel an appeal, and thus keep open the Knisely estate for two or three years longer in view of the time elapsed, since this court directed the judgment in Knisely v. Leathe, and in view of the further fact that the granting of appeal to Mrs. Leathe (by the writ of mandamus, which our writ is sought to prohibit) would be to compel the probate court not only to violate the statutes of the State, but to set aside its discretionary judgment theretofore entered, would not be an adequate remedy. Our discretionary writ of prohibition should be measured by the circumstance of the case, and when so measured and a wise discretion exercised, we think the permanent writ should go."

The rule is well stated in *State ex rel. v. Eby* (1902) 170 Mo. l. c. 526, 71 S. W. 52, by Sherwood, J.: "It has, however, been urged by counsel for respondent that inasmuch as relators have a remedy by appeal, etc., in consequence of this, prohibition cannot be granted. But this is an erroneous view, because in a case like this, where relators, if they could not have the relief prayed, would be compelled to go to trial in *twelve hundred and three* cases; then, if defeated, would have to give bond in each case, take an appeal in each case, pay for a transcript in each case, pay a docket fee in each case of ten dollars, such fees amounting in the aggregate to *twelve thousand and thirty dollars*, as well as counsel fees in each court, consequently, it must be conspicuously obvious that such appeals, although available, would be 'inadequate to meet the emergencies of the case, or afford the redress to which the injured party is entitled. (2 Spelling Inj. and Extr. Rem. (2 Ed.), sec. 1725, and cas. cit.)"

may apply to a higher court for a writ of prohibition.[203] It can no longer be laid down as an inflexible rule that in all cases an objection below is a condition precedent to an application for prohibition.[204] The more flexible rule provides that whether the objection below should first have been made is a matter for the sound discretion of the superior court. Certainly this is the rule in those cases where the want of jurisdiction is apparent upon the face of the record.[205]

Some of the cases seem to hold that if there is no objection below and the error is not apparent upon the face of the record that the writ will be denied solely because there was no objection below.[206] Whether

203. *State ex rel. Kansas City etc. v. Allen* (1891) 45 Mo. App. 551. In this opinion, written by Ellison, J., the following observations were made: "While it is true that special provision is made in the landlord and tenant act for an appeal, the trial on such an appeal is a trial *de novo*, and affords no redress of the wrong done relator. It is true that he may obtain, ultimately, the object of his suit, but if he has a right to have his cause tried by the justice and the justice determines not to try the cause himself but, instead, to submit it to a jury, relator is quite effectively deprived of such right, and so completely is he deprived that he cannot have the wrong thus committed redressed; for in no event can the result of the appeal restore him to the right to his *summary remedy* at the hands of the *justice of the peace*. The law gives the landlord a quick remedy, and if, in its wisdom, it has declared that such remedy shall be had by trial before a justice, and not a jury, and this is denied, an appeal does not obtain it, and the redress must lie in the extraordinary process of the courts."

204. *State ex rel. Brncic v. Huck* (1922) (Mo.) 246 S. W. 303; *State ex rel. Warde v. McQuillin* (1914) 262 Mo. 256, 171 S. W. 72; *State ex rel. McEntee v. Bright* (1909) 224 Mo. 514, 123 S. W. 1057; *State ex rel. Mo. Pac. etc. R. R. v. Williams* (1909) 221 Mo. 227, 120 S. W. 740; *State ex rel. Fenn v. Riley* (1907) 127 Mo. App. 469, 105 S. W. 696; *State ex rel. Am. Lead Co. v. Dearing* (1904) 184 Mo. 647, 84 S. W. 21; *State ex rel. Anheuser etc. Co. v. Eby* (1902) 170 Mo. 497, 71 S. W. 52; *State ex rel. McCaffery v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494; *Forsee v. Gates* (1901) 89 Mo. App. 577; *State ex rel. Att'y Gen'l v. Gill* (1897) 137 Mo. 681, 39 S. W. 276; *State ex rel. The St. Louis Etc. Rd. v. Hirzel* (1897) 137 Mo. 435, 38 S. W. 961; *State ex rel. v. Laughlin* (1881) 9 Mo. App. 486; *Barnes v. Gottschalk* (1876) 3 Mo. App. 111.

205. *Barnes v. Gottschalk* (1876) 3 Mo. App. 111; *State ex rel. v. Laughlin* (1881) 9 Mo. App. 486. These cases seem to hold that in every case there must be an objection below.

206. *State ex rel. v. Aloe* (1899) 152 Mo. 466, 54 S. W. 494; *State ex rel. v. Eby* (1902) 170 Mo. 497, 71 S. W. 52; *State ex rel. v. Williams* (1902) 221 Mo. 227, 120 S. W. 740; *State ex rel. v. Bright* (1909) 224 Mo. 514, 123 S. W. 1057.

An excellent statement of this view is to be found in *State ex rel. v. Eby* (1902) 170 Mo. l. c. 518, 71 S. W. 53. Sherwood, J., writing the opinion states the rule thus: "But this is not the law if it is to be taken as invariably true; true without variation or shadow of turning. In fact there are so many exceptions to the hackneyed rule, that the doctrine it announces is now received with many degrees of allowance, and, as will presently appear, is not an absolute touchstone of jurisdiction. In short, the fact of having pleaded lack of jurisdiction in the lower court is not by any means a *sine qua non* of jurisdiction in the supervising court to issue the provisional rule."

The rule is stated thus by Graves, J., in *State ex rel. v. Bright* (1909) 224 Mo. l. c. 525-6, 123 S. W. 1060: "Considering both instruments, one of the points made is that the relator's petition here fails to aver, and therefore the admitted facts fail to show, that relators, then respondents, in the circuit court of Jasper County made objection to the jurisdiction of that court prior to the application for a writ of pro-

the writ will ever be granted where there is no objection below and the want of jurisdiction does not appear upon the face of the record, seems not clear.[207] It would seem that in nearly every case, where the want of jurisdiction does not appear upon the face of the record, that objection to the jurisdiction of the lower court proceeding should first be made.[208] Perhaps cases may arise where the objection need not be made below and the want of jurisdiction does not appear upon the face of the record.[208a]

13

PLEADING IN PROHIBITION

The initial pleading is a petition, or written suggestion, for the writ filed in the superior court that is authorized to issue the writ to the inferior court.[209]

hibition here. It has never been a hard and fast rule in this State that the jurisdiction of the lower court must first be challenged therein before a provisional writ can issue from this court."

In *State ex rel. v. Aloe* (1899) 152 Mo. l. c. 478, 54 S. W. 494, the rule is thus stated by Valliant, J.: "The real and only purpose of the suit in the circuit court was to bar the entrance to the office of board of election commissioners by injunction, and to obtain a decree of a chancery court declaring relators' title to the office invalid. That is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons who have rights of that nature which have been violated, and ample means are afforded to those courts for the vindication of such rights and the redress of their wrongs. (High on Inj., sec. 312; In re Sawyer, 124 U. S. 200; Hunter v. Chandler, 45 Mo. 452; State ex rel. v. Vail, 53 Mo. 97; State ex rel. v. May, 106 Mo. 488.)"

207. *State ex rel. Brncic v. Huck* (1922) 246 S. W. 303. There the rule is thus stated by Higbee, J.: "The general rule is that an application for a writ of prohibition will not be considered unless a plea to the jurisdiction has been filed and overruled in the lower court, or the inferior court has been asked in some form, without avail, to refrain from further proceeding or to dismiss the same. 32 Cyc. 624. This was not done in this case. An exception to this rule is recognized where a want or excess of jurisdiction is apparent on the face of the record. State v. Dearing, 184 Mo. 647, 84 S. W. 21. From an examination of the record, it will be seen that this case falls within the general rule."

State ex rel. v. Gill (1897) 137 Mo. 681, 39 S. W. 276.

208. *State ex rel. v. Riley* (1907) 127 Mo. App. 469, 105 S. W. 696. Goode, J., writing the opinion, said the rule is as follows: "The effect of those, and perhaps of other recent decisions, is that the refusal to grant prohibition until the lower court has overruled the plea to its jurisdiction, is rather a discretionary matter of practice in the supervising court, than a condition precedent to the issuance of the writ; and hence, where want of jurisdiction is palpable, the failure to raise the question below does not necessarily hinder the superior court to interfere though it may refrain from doing so until an appeal is made to the lower court."

208a. 10 Halsbury's Laws of England 147.

209. Secs. 2059-2060 R. S. Mo. 1919. *State ex rel. Spickerman v. Fox* (1884) 85 Mo. 61.

The defendant may demur to the petition.[210] It seems that defendant also may raise the question of the sufficiency of this petition by motion to quash the writ.[211]

If defendant does not demur or move to quash, defendant must file a return to the preliminary order.[212]

Plaintiff should reply to the return or question its sufficiency in law in some appropriate way.[213] There seems to be several ways by which the sufficiency in law of the return may be raised. It may be raised by demurrer to the return[214] which is perhaps the most appropriate way. The sufficiency, in law, of the return also may be raised by a motion to quash the return[215] or motion for judgment on the pleadings.[216] The court may, it seems, "as an act of grace" treat an insufficient reply as a demurrer to the return or a motion for judgment on the pleadings.[217] So *ex gratia* an insufficient return has been treated as a demurrer to the petition for the writ.[218] The general rule, however, is that pleadings in prohibition should raise an issue of law or fact.[219] It is improper to raise an issue of fact by the pleadings and submit the cause to the court without agreeing upon the facts or having them determined by proof.[220] If

210. Sec. 2061 R. S. Mo. 1919. *State ex rel. Henson v. Sheppard* (1905) 192 Mo. 497. As to the effect of a demurrer, Lamm, J., in the preceding case, said (l. c. 505): "The controversy, in the shape the pleadings assume, resolves itself into a question of law, for the demurrer admits every allegation of the petition well pleaded."

211. *State ex rel. Powers v. Rassieur* (1916) (Mo.) 184 S. W. 116. Here Faris, J., stated the rule as follows: (l. c. 118): "Both a demurrer to the petition and a motion to quash the writ are attacks upon the petition, and admit all of the facts therein which are well pleaded."

212. Sec. 2061 R. S. Mo. 1919. *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713.

213. Sec. 2061 R. S. Mo. 1919. *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713; *State ex rel. Connors v. Shelton* (1911) 238 Mo. 281, 142 S. W. 417.

214. *State ex rel. Powers v. Rassieur* (1916) (Mo.) 184 S. W. 116; *Vitt v. Owens* (1868) 42 Mo. 512.

215. *State ex rel. Ellis v. Elkin* (1895) 130 Mo. 90, 31 S. W. 1037; *State ex rel. Powers v. Rassieur* (1916) 184 S. W. 116.

216. *State ex rel. Powers v. Rassieur* (1916) (Mo.) 184 S. W. 116; *State ex rel. American etc. Co. v. Shields* (1911) 237 Mo. 329, 141 S. W. 585; *Wand v. Ryan* (1901) 166 Mo. 646, 65 S. W. 1025; *State ex rel. v. Sheppard* (1905) 192 Mo. 497, 91 S. W. 477.

217. *State ex rel. v. Shelton* (1911) 238 Mo. 281, 142 S. W. 417; *State ex rel. v. Guthrie* (1912) 245 Mo. 144, 149 S. W. 305.

218. *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713.

219. *State ex rel. Fenn v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713; *State ex rel. Boyer v. Houck* (1914) 260 Mo. 140, 168 S. W. 762; *State ex rel. v. Laughlin* (1881) 9 Mo. App. 486; *State ex rel. Powers v. Rassieur* (1916) (Mo.) 184 S. W. 116.

220. *State ex rel. v. Rassieur* (1916) 184 S. W. 116. In this case Faris, J., made the following observations: "But here the sole relief asked for, and the sole ground on which the prayer for relief is bottomed, is that Judge Rassieur was attempting to put his judgment in force pending a motion for a new trial. Judge Rassieur denies this specifically. No evidence *pro* or *con* is offered; no agreed facts are before us. We do not know and cannot find out from this record whether Judge Rassieur was or was

this is not done the preliminary rule will be discharged. Obviously the manner of pleading prevailing in civil actions must be complied with.[221]

As appears from the cases cited in the footnotes, nearly all the petitions for prohibition are begun in the name of the state at the relation of some individual or corporation. This is no doubt accounted for because in English law the writ was issued in the name of the crown.[222] The Supreme Court of Missouri, however, has said that the petition or application for the writ should not be in the name of the state.[223]

not doing the acts complained of. So the matter of whether, if Judge Rassieur *were doing* the things he is charged with doing, *he would have a right or not in law to do them*, becomes a bald moot question. We can render no judgment on such a record."

State ex rel. v. Houck (1914) 260 Mo. 140, 168 S.W. 762; Sec. 2062, R.S. Mo. 1919.

221. *State ex rel. v. McQuillin* (1914) 256 Mo. 693, 165 S. W. 713; *State ex rel. v. Bright* (1909) 224 Mo. 514, 135 S. W. 552; *State ex rel. v. Guthrie* (1912) 245 Mo. 144; *State ex rel. v. Shelton* (1911) 238 Mo. 281, 142 S. W. 417. In *State ex rel. v. McQuillin* (1914) 256 Mo. 693, l. c. 709, 165 S. W. 713, Faris, J., made the following strong and pertinent statements: "Unless such an exhibit to a petition for prohibition becomes a part of the petition in the same manner as an exhibit is made an integral part of a pleading in an ordinary suit, we will not regard it as a part thereof here for the purpose of aider against demurrer. There is no reason why, when we have regard to the fact that the number of original writs we issue and consider is increasing by leaps and bounds, we should step aside from the well-known beaten paths of practice to make, in a prohibition case, an unnecessary exception to the general rule, which exception so far from expediting business will but impede, delay and hinder. If we spend weeks trying to pick out the issues from a commingled mass of void and formless matter which has gathered volume as it rolled up to us, we are thereby delaying others, who by diligence have earned a speedy hearing."

222. High on Extraordinary Legal Remedies (3rd ed.) 733.

223. *State ex rel. v. Hirzel* (1897) 137 Mo. 435, 38 S. W. 961. There Barclay, J., used the following language (l. c. 449): "The plaintiffs have entitled their suit 'The State of Missouri *at the relation*,' etc., as appears at the opening of the report of this case. We have followed that caption, as no question is raised concerning it. But we would remind our brethren of the bar that the statute regulating procedure in prohibition contemplates a simple form of action between the actual parties concerned as plaintiffs and defendants, and applies the general provisions of the code of practice to such cases as far as it is properly applicable. Laws 1895, p. 95, sec. 3."

See *State ex rel. v. Eby* (1902) 170 Mo. 497, l. c. 527, 71 S. W. 52, where it was held not improper to institute the proceedings for prohibition in the name of the state, and, also, that the laws of 1895 (now Art. 12, Chap. 13, R. S. Mo. 1919) are not applicable to original proceedings in the supreme court. Sherwood, J., for the court, said: "The final point is insisted on that this proceeding should have been instituted by relators in their own names, as plaintiffs, and not on the relation of the State of Missouri, and section 4450, Revised Statutes 1899, is cited in support of this position. But that section is only applicable in the *circuit* courts, and not to this court when original proceedings are instituted here. Proceedings of this sort which originate in this court, are governed not by the code, but by the general law on the subject. (Ib., sec. 4456; State ex inf. v. Beechner, 160 Mo. loc. cit. 86)."

See section 2059, R. S. Mo. 1919, providing that this remedy "Shall be a civil action, in which the moving party is plaintiff and the adverse party defendant." See also *Ostmann v. Frey* (1910) 148 Mo. App. 271, 128 S. W. 253, for a discussion of the Act of 1895.

Ordinarily the petition for the writ is instituted by one who is interested in the litigation sought to be stopped in the lower court. However, the rule in Missouri, following the English common law, is to the effect that anyone, even a stranger, may be a petitioner for the writ.[224]

The only necessary party defendant is the judge of the court whose action is sought to be prevented.[225] Obviously the return of an individual who has been made a party defendant together with the judge will be disregarded if in conflict with the return of the judge.[226]

14

PRACTICE IN PROHIBITION

Though the practice in prohibition is not difficult or complicated it has seemed advisable to point out its salient features.

Upon the filing of a petition, which states facts constituting grounds for the issuance of prohibition, the court, if it thinks that the writ probably will be granted, issues a preliminary rule in prohibition.[227]

This preliminary writ is a judicial writ issuable only by the judge

224. *Trainor, Presiding Justice, etc., v. Porter* (1870) 45 Mo. 336; *Thomas v. Mead* (1865) 36 Mo. 232. In the latter case, Holmes, J., said: "It is granted at the instance of any one of the parties to the suit below, plaintiff or defendant, and even by a stranger (2 Inst. 602; 6 Com. Dig. 105); and because they deal in that which does not appertain to the jurisdiction of the court. (2 Inst. 607.) Indeed, the authorities are endless, and place the subject beyond all dispute. (2 Sel. 308; 6 Com. Dig. 105, 140; 6 Bac. Abr. 579, 600; Full v. Hutchins, Cowp. 424; Buggin v. Bennett, 4 Burr. 2035)."

See also *State ex rel. v. Calhoun* (1920) (Mo. App.) 226 S. W. 329; s. c. 233 S. W. 483; Shortt, Mandamus and Prohibition, 1st Am. Ed. by Heard, 542; 10 Halsbury's Laws of England 144.

225. *State ex rel. Stroh v. Klene* (1918) 276 Mo. 206, 207 S. W. 496; *State ex rel. v. Bright* (1909) 224 Mo. 514, 135 S. W. 552; *State ex rel. v. Rassieur* (1916) (Mo.) 184 S. W. 116. In the case last cited, it was said a party litigant where a case is affected is a "permissible party" defendant.

See *State ex rel v. Roach* (1911) 234 Mo. 338, 137 S. W. 595 as to joinder of parties defendant.

226. *State ex rel. v. Rassieur* (1916) 184 S. W. 116.

227. *State ex rel. Macklin v. Rombauer* (1891) 104 Mo. 619, 16 S. W. 502; *State ex rel. v. Ryan* (1904) 180 Mo. 32, 79 S. W. 429; sec. 2060, R. S. Mo. 1919; *State ex rel. v. Dearing* (1904) 184 Mo. 647, 84 S. W. 21. See rule of supreme court 22 (294 Mo. p. 11), requiring applicant, normally, to give five days notice to adverse party.

This is the prevailing practice. Prohibition, 32 Cyc. 627. High, Extraordinary Legal Remedies, 3rd Ed. p. 755.

of the court and not the clerk.[228] It may be issued by a single judge of a court in vacation where the court consists of several judges.[229]

It is the duty of the lower court when the preliminary rule is issued to take no further steps in the pending case.[230]

In order for a rule in prohibition to issue there must be a pending case in the lower court or the action sought to be prohibited must be before such court.[231] So, the preliminary writ will be quashed where,

228. *Casby v. Thompson* (1868) 42 Mo. 133. In that case, Holmes, J., said: "It is beyond all question that the clerk of the Circuit Court in vacation had no power or authority to issue a writ of prohibition. It seems to have been supposed that 'the remedy by writ of injunction or prohibition,' which is spoken of in the act concerning injunctions (Genl. Stat. 1865, ch. 167, sec. 24), refers to a prohibition of this nature. This is evidently a misconception. The word is there used in the general sense of a restraint by injunction, and not in the technical sense of a writ of prohibition. The clerk had no more authority to issue an injunction than a prohibition."

229. *State ex rel. v. Dearing* (1904) 184 Mo. 647, 84 S. W. 21; *State ex rel. Macklin v. Rombauer* (1891) 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; *State ex rel. Rogers v. Rombauer* (1891) 105 Mo. 103, 16 S. W. 695; section 2060, R. S. Mo. 1919.

The following extract is taken from *State ex rel. Macklin v. Rombauer* (1891) 104 Mo. 619, l. c. 631: "Bearing in mind the purpose of the writ of prohibition, its history and the existing condition of the law here, should we suppose that the constitution of our state designed to limit the scope or diminish the occasions of its usefulness as recognized in the English law? It would seem not. Yet if it be held that no judge of the court during its vacation has authority, according to the 'principles and usages of law,' to make a rule upon a defendant to show cause in such a case, it would follow as a necessary consequence that, during the greater part of the year, no step whatever could be taken toward utilizing this useful writ, however great the urgency for its interposition."

230. *State ex rel. Knisely v. Board etc.* (1916) 268 Mo. 163, 186 S. W. 680; *State ex rel. v. Rassieur* (1916) 190 S. W. 915.

231. *State ex rel. Haughey v. Ryan* (1904) 180 Mo. 32, 79 S. W. 429. Here an application had been filed in the circuit court that relator be cited for contempt. The citation had neither been issued or served. Holding that the petition for prohibition was premature, Fox, J., said: "The question first to be settled in this proceeding is narrowed down simply to this: under the facts alleged in the petition, is there a cause pending before Judge Ryan, of which he has assumed jurisdiction, when, under the Constitution and laws of the State, he has none? It will be observed, upon examination of the petition, that it expressly alleges that in this contempt proceeding no citation has been issued to the relators, and it will be further noted that there is an absence of any allegation that Judge Ryan will proceed to dispose of the cause unless he is prohibited from so doing. Before this extraordinary writ will be issued, to prohibit a court of general jurisdiction from disposing of a cause, it should clearly appear that the court has assumed jurisdiction of it, and will proceed to dispose of it unless prohibited from doing so. In other words, there must be a cause pending before the court upon which the writ can operate. The assumption of jurisdiction, in order to authorize the issuance of the writ sought in this cause, contemplates not only an assumption of jurisdiction over the subject-matter, but also over the person." assumption over the subject-matter but also over the person."

State ex rel. Rudolph v. Witthoeft (1906) 117 Mo. App. 625, 93 S. W. 284; *State ex rel. Mueller etc. Co. v. Buckner* (1921) 207 Mo. App. 48, 229 S. W. 392.

after it has been issued, the suit below has been dismissed,[232] though there remains the question of liability for court costs. When the question in the pending case is a "moot" question the writ will not issue.[233] Nor will the writ issue when nothing remains to be done in the case in the lower court.[234] For instance, it was held by the Supreme Court of Missouri that it was too late to issue a writ of prohibition to a court of appeals where the latter court had decided the case on appeal, overruled a motion for rehearing and transmitted its mandate to the lower court.[235] Prohibition is essentially a preventive remedy and not a corrective remedy.[236]

It follows from what has been said as to the nature of the writ, viz., that it is a preventive remedy, if anything remains unexecuted in the pending case that prohibition will issue.[237]

Originally an appeal from an order of a circuit court denying a writ of prohibition would not lie to any appellate court in the state.[238] The

232. *State ex rel. Fischer v. Thomas* (1913) 249 Mo. 103, 155 S. W. 401. In that case Lamm, C. J., for the court, said: "We do not sit as a moot court to determine speculative questions for the benefit of some other case in judgment at some other time. Mark the actual situation. If we prohibited the circuit court from proceeding—*cui bono?* It has effectually done that by itself. The receivership suit is dead, and henceforth is of no use (except to point a moral). If we held the circuit court had jurisdiction to proceed with that suit—wherefore? It has effectually tied its own hands and could not lift a finger in proceeding to adjudge the merits. Yet if we proceeded to judgment on the merits we would have to do one or the other of those two things and in either event our judgment would amount to the same thing, viz., *nothing.* Shall a court that is (and has been invited to be) about the serious business of settling a grave question of jurisdiction, turn aside to emit a mere squeak on costs as the be-all and end-all of the matter? We do not sit in the comedy of 'Much Ado About Nothing', if we know it in advance."

See also *United States v. Hoffman* (1866) 4 Wall. 158.

233. *State ex rel. Ashton v. Imel* (1912) 243 Mo. 178, 147 S. W. 994; *Kalbfell v. Wood* (1906) 193 Mo. 675, 92 S. W. 230.

234. *State ex rel. Strother v. Broaddus* (1911) 234 Mo. 358, 137 S. W. 268; *State ex rel. Crouse v. Mills* (1910) 231 Mo. 493, 133 S.W. 22; *Klingelhoefer v. Smith* (1903) 171 Mo. 455, 71 S. W. 1008; *State ex rel. Morse v. Burckhartt* (1895) 87 Mo. 533.

235. *State ex rel. Strother v. Broaddus* (1911) 234 Mo. 358.

236. The matter is stated as follows by Valliant, J., in *Klingelhoefer v. Smith* (1903) 171 Mo. 455 (l. c. 462): "That court was not therefore doing or indicating an intention to do, anything in the matter; the case was no longer in the court. A writ of prohibition will have the effect to undo what has already been done in a case where the court against which the writ goes has begun to take action, but has not finished. But when the court has exhausted its force, rendered its final judgment and nothing is left undone, there is nothing to prohibit."

237. *State ex rel. Rogers v. Ronbauer* (1891) 105 Mo. 103, 16 S. W. 695; *State ex rel. Wilson v. Burney* (1915) 193 Mo. App. 326, 186 S. W. 23; *State ex rel. Ellis v. Elkin* (1895 130 Mo. 90, 31 S. W. 1037; *St. Louis etc. Rd. Co. v. Wear* (1896) 135 Mo. 230, 36 S) W. 658.

238. *State ex rel. Smith v. Levens* (1888) 32 Mo. App. 520; *State ex rel. Griffith v. Bowerman* (1890) 40 Mo. App. 576; *Kalbfell v. Wood* (1906) 193 Mo. 675, 92 S. W. 230.

writ was a discretionary writ at common law and there was no writ of error from a refusal to grant the writ and there was no statute in Missouri authorizing an appeal where the writ had been refused. The applicant's only remedy was to make further application to a higher court.[239] By statute passed in 1915 an appeal was granted, it has been held, from a circuit court to the appropriate appellate court where the circuit court makes an order refusing to grant the writ.[240] Since the appeal was given by statute, as above stated, it has been held by a court of appeals that a judgment of a circuit court denying the writ is *res adjudicata* and will prevent another application to a higher court.[241] This decision seems open to question. The statute authorizing an appeal seems not to provide that the litigant must appeal if he wants the question again considered by a higher court in the judicial system but merely gives him the privilege of appealing without eliminating the privilege that he already had of applying to a higher court for the writ. Such a construction of the statute seems not consistent with the fact that the supreme court, and courts of appeals, are granted original jurisdiction to issue prohibition by the constitution and also given superintending control of lower courts. It might be said that a statute providing that an appeal must be taken from an order of a circuit court denying the writ, otherwise the writ shall not issue by a higher court, would amount to a limitation upon the original jurisdiction of the higher courts conferred by the constitution, and hence void. No doubt substantial curtailment of the original jurisdiction of the appellate courts by legislative enactment will not be upheld.

The very earliest decisions in this state established the rule that a writ of error or appeal will lie from a judgment of a circuit court awarding a final writ of prohibition.[242]

239. The common-law rule was thus stated by Thompson, J., in *State ex rel. Griffith v. Bowerman* (1890) 40 Mo. App. 576 (l. c. 577): "It was held by the House of Lords in the case of the *Bishop of St. David's v. Lucy*, 1 Ld. Raym. 545, that a writ of error does not lie to the King's Bench to reverse a judgment of that court denying a writ of prohibition. It was held in *Free v. Burgoyne*, 5 Barn. & Cres. 765, that a writ of error in such a case would not lie in the Court of Exchequer Chamber, such a remedy not having been given by statute. On the contrary, the recognized remedy in England, where a writ of prohibition is denied, seems always to have been to apply to another court having power to issue it. In *Lindo v. Rodney*, 1 Doug. 620, note, Lord Mansfield said that the relator could in such a case renew his application in every court in Westminster Hall."

240. *Ostmann v. Frey* (1910) 148 Mo. App. 271, 128 S. W. 253.

241. *Coleman v. Dalton* (1897) 71 Mo. App. 14.

242. *Morris v. Lenox & Martin* (1843) 8 Mo. 253; *Wertheimer v. Mayor, et al.* (1860) 29 Mo. 254; *Howard v. Pierce* (1866) 38 Mo. 296; Prohibition, 32 Cyc. 631; High, Extraordinary Legal Remedies, 3rd ed. 2418.

Without doubt the judgment awarded in prohibition is negative in its nature. It commands the inferior court to stop all action or particular action in the pending matter. Where an affirmative order is the main thing sought prohibition is not the appropriate extraordinary legal remedy. It will only issue, in a proper case, where the object in view is to prevent further exercise of jurisdictional power not possessed by the inferior judicial tribunal. The judgment is therefore negative.[243] No attempt is made in a prohibition proceeding to adjudicate the merits of the controversy except so far as that is necessary to determine the question of jurisdiction or no jurisdiction. Hence, a judgment stopping one court from taking further action in a pending suit does not prevent the litigant from instituting the same suit before another tribunal.[244] Nice questions sometimes arise as to the scope of the command in the writ of prohibition. It seems that only those things are prohibited that are fairly within the terms of the order or judgment.[245] While prohibition is in its nature negative, it seems true that the court issuing the writ incidental to its negative command may also make necessary affirmative

243. *State ex rel. Carter v. Bollinger* (1909) 219 Mo. 204, 117 S. W. 1132. In that case the writ was denied, for one reason, because the purpose of it was to compel a county court to make certain apportionment of county funds. Woodson, J., for the court, said: "Conceding the position of counsel for relators in that regard to be correct, without deciding it, yet it must also be conceded that prohibition is not the proper remedy by which the judges of the county court could be compelled to perform their duty in that particular. The office of the writ of prohibition is to prevent action on the part of an officer when he threatens to act outside of or beyond his jurisdiction, and not for the purpose of compelling action upon his part within his jurisdiction. The performance of the latter duty is secured by a writ of mandamus. (State ex rel v. Patterson, 207 Mo. 129.)"

State ex rel. Merriam v. Ross (1896) 136 Mo. 259, 41 S. W. 1041.

244. *State ex rel. Merriam v. Ross* (1896) 136 Mo. 259, 41 S. W. 1041. This was a contempt proceeding. Certain persons had been commanded by writ of prohibition to take no further steps in an action pending in the Cape Girardeau court of common pleas. Later they commenced an action in the circuit court of Cape Girardeau County for the same thing. It was held there was no disobedience of the writ and hence no contempt. Gantt, C. J., said: "The office of a writ of prohibition is to suspend all action and prevent any further proceeding in the prohibition direction.

"In the principal case all that was sought at the hands of this court was to prohibit the Cape Girardeau court of common pleas from further exercise of the power it had assumed it possessed, under the act creating it, of hearing and determining the cause, then pending therein, and likewise the several parties to said proceeding from taking *further steps in that action.*

"It was clearly within the jurisdiction of this court to hear and determine the question whether said court was in that case exceeding the jurisdiction prescribed for it by the law of this state, but it would be an unusual exercise of our own jurisdiction to extend that extraordinary writ, issued for that purpose alone, so as to prohibit actions in other courts which were not open to criticism either as to their form or the subject-matter thereof and clearly within the jurisdiction of such other courts."

245. *State ex rel. Powers v. Rassieur* (1916) (Mo.) 190 S. W. 915; Prohibition, 32 Cyc. 631.

orders.[246] The command or judgment issues to the lower court (sometimes the party litigant in the pending case is included) but not to the ministerial officers of the lower court,[247] or the party litigant only.[248]

Citation and punishment for contempt of court is the usual and approved method of enforcing a writ of prohibition.[249]

Costs of the proceeding are usually taxed against the relator even though the writ is issued.[250]

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246. *State ex rel. Campbell v. St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874. In this case the writ was issued by the supreme court to a court of appeals stopping the latter court from exercising appellate jurisdiction over a case which was within the appellate jurisdiction of the supreme court. The supreme court also ordered the cause transferred to the supreme court. *State ex rel. Rogers v. Rombauer* (1891) 105 Mo. 103, 16 S. W. 695.

See *State ex rel. Bixman v. Denton* (1908) 128 Mo. App. 304, 107 S. W. 446, where a writ of prohibition was sought to stop a court from granting a change of venue. It was held the court had jurisdiction to award the change of venue and hence the writ was denied but the court went further and made an affirmative command to the lower court to grant the change of venue.

247. *Ostmann v. Frey* (1910) 148 Mo. App. 271, 128 S. W. 253; 10 Halsbury's Laws of England 153.

248. High, Extraordinary Legal Remedies, 3rd. ed., p. 706; Prohibition, 32 Cyc. 631; *Ex Parte Williams* (1842) 4 Ark. 537, 38 Am. Dec. 46; *St. Louis etc., Ry. Co. v. Wear* (1896) 135 Mo. 230, 36 S. W. 658. See *State ex rel. Powers v. Rassieur* (1916) (Mo.) 190 S. W. 915, for a writ where the judge of the circuit court and the party to the suit below were both commanded not to do certain things; 10 Halsbury's Laws of England, 153.

249. *Howard v. Pierce* (1866) 38 Mo. 296; *State ex rel. Ellis v. Elkin* (1895) 130 Mo. 90, 31 S. W. 1037; *State ex rel. Merriam v. Ross* (1896) 136 Mo. 259, 41 S. W. 1041; Prohibition, 32 Cyc. 631; High, Extraordinary Legal Remedies, 3rd ed., 756; 8 Bacon's Abridgment, 244. The rule as stated by the author last cited is as follows: "The disobeying of a prohibition is a contempt to the superior court that awards it, and punishable by attachment, which issues against the judge and party (a) for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the discretion of the superior court."

250. *State ex rel. Federal Lead Co. v. Reynolds* (1912) 245 Mo. 698, 151 S. W. 85. There Lamm, J., stated the rule, and the reason for it, as follows: "Let the writ go —at relator's costs, however. Judges should not be mulcted in costs or other damages for errors of judgment in judicial matters."

State ex rel. Heddens v. Rusk (1911) 236 Mo. 201, 139 S. W. 199.