

Fall 1975

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Recommended Citation

Dennis J. Tuchler, *Discretionary Interlocutory Review in Missouri: Judicial Abuse of the Writ*, 40 Mo. L. REV. (1975)

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MISSOURI LAW REVIEW



Volume 40

Fall 1975

Number 4

DISCRETIONARY INTERLOCUTORY REVIEW IN MISSOURI: JUDICIAL ABUSE OF THE WRIT?*

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INTRODUCTION

Missouri's constitution distinguishes between appellate jurisdiction, which is subject to legislative regulation, and superintending control, which is not. Limited appeals are provided by statutes which have been construed narrowly by Missouri's courts. Superintending control includes authority to issue original remedial writs (*e.g.*, mandamus, certiorari, prohibition, habeas corpus, etc.) in a theoretically limited class of cases, but in no event is there authority to use the writs as substitutes for appeal. When a claim of trial court error is made in a petition for a writ, however, the temptation is always present to use superintending control to hear the claim and correct the error, regardless of whether the error can be raised effectively on appeal. As a result, and especially in cases where no appeal is available, writ-issuing authority has been used by Missouri's appellate courts to provide interlocutory review of attractive claims of error.

The constitutional limits on judicial authority to effect appellate jurisdiction are violated by over-generous use of the writ. The costs involved in extensive interlocutory review deserve recognition and may outweigh any benefits derived from early review of claims of trial error. This article generally opposes the use of writs to allow interlocutory review of trial court error and proposes a narrower

* My thanks to my colleagues, Professors Dunne and Dunsford, to my former colleague, Judge Simeone, and to a former student, Harry Wilson, who read the original manuscript and offered comments and criticism. No doubt it will be apparent that I should have paid more heed to their criticism.

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scope for superintending control. First, however, a quick look will be taken at the function and utility of appellate review, followed by an examination of the supposed bases for issuing writs to correct trial court error.

I. SOMETHING ABOUT APPEALS

Everything a judicial system may do for the parties to an action is done in a court of original jurisdiction. Completeness of disposition is limited only by the court's legal competence and the participants' capabilities. Once a full and fair opportunity to be heard on all relevant issues has been afforded, and once all disputed issues are decided in a manner respectful of law, nothing more is required. Due process of law does not demand a correct decision or error-free results.¹

Nevertheless, it is generally felt that appeal from a final order and from some interlocutory orders is necessary. Advocates of extensive appellate review or of review as a matter of right may be underestimating its costs and overestimating its utility. To the parties, the justice of a result may be as much the function of efficiency as of correctness.² To the state's citizens, increased appellate workload may force choices between deteriorating quality in the judicial product, or increased expenditures for judicial personnel, buildings, and research and clerical facilities. In part, this is because increased opportunity for review would probably result in decreased judicial time per case, unless there are more judges. If an appellate court is to act collegially, there is a limit to the number of judges that sit on that court. Hence, an increase in the number of appellate judges must lead to an increase in the total number of appellate courts. The alternative of making appeals discretionary would be of little help, if each petition for review is to receive adequate attention.

Assurance of a fair trial by appellate review is limited by the way decisional responsibility is allocated in a judicial system. Appellate courts may make and enforce rules and standards for a fair trial, but trial fairness also depends upon essentially unreviewable factors. For example, if alternative inferences or conclusions are supportable in the evidence, the trier of fact may make its choice

1. *McKane v. Durston*, 153 U.S. 684 (1894). The rules of *res judicata* suggest this is true. *See also Ross v. Moffit*, 417 U.S. 600 (1973), indicating that appeal is not a requirement of "due process of law."

2. In a way "efficiency" begs the question, because it depends upon the value one places on authoritative, "correct" decision.

not only out of wisdom, but also out of prejudice, "common knowledge," or whim. Such a choice will normally withstand review.³ When a trial judge has discretion in the administration of procedural rules, the exercise of discretion may be the result of the most improper motives and have nothing to do with his attitude concerning the proper conduct of trial, but this decision normally stands if it is of a type generally considered within the range of allowable discretion.⁴ This is not to say that appeals should be expanded because courts are imperfect or that appeals should be dispensed with because they are often useless. It is only to suggest that appellate review does not function to assure fair trial and untainted results in most cases, except by the formal application of procedural rules and standards, and by attempts at the correction of obvious injustices.

If appellate courts correct "error," the extent to which appellate review should be available may depend in part on what "error" means. A rough distinction may be helpful: it is often possible that for a given dispute more than one decision or outcome is defensible. More than one rule, or no currently available rule, may be applicable. An applicable rule may be applied in varying ways depending on how it is interpreted or limited.⁵ Any such decision may be called *lawful*. The range of *lawful* decision with respect to any legal issue may broaden or narrow, depending on higher authority. If there is only one *lawful* decision, it may be called *correct*. Notice that a

3. Broad factual review may result in as many "wrong" as "right" decisions with no way of telling which is which. Disputable fact decisions can be examined for arbitrariness and, with less assurance, for compliance with requirements as to the quantum of proof. But what catches the eye of the trial judge or jury may differ from what attracts an appellate judge, according to the predispositions of each. Who can say that the set of one or the other will be more likely to produce a proper assessment of evidentiary weight? In rare cases, an appellate court may be so convinced that injustice was done that it will find facts without regard to the apparent foundation for the trial court's findings. See *Cox v. Louisiana*, 379 U.S. 536 (1965).

4. In the federal system, a combination of the "harmless error" limitation on review and reluctance to review exercise of discretion have given the district courts effective control over the development of the law in the area of discovery and other pretrial procedure.

5. Why this is true has been the subject of several articles and books. The case may be "hard" for the application of a standard rule; the applicable rule may be of doubtful vitality or it may be changing in form; or changes in the law have not yet filled out sufficiently to limit the range of possible solutions to the problems supposedly covered by such changes. See B.N. CARDOZO, *The Nature of the Judicial Process*, reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 107 (M.E. Hall ed. 1947), especially Lecture III at 148. See also Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 630-61, 669 (1958).

lawful decision may be held *incorrect* (no longer *lawful*) on appeal. The loser by a *lawful* decision who cannot appeal may feel unjustly treated if an identical decision in another case is later found not correct by an appellate court. Yet he is in no different position than the person whose loss is affirmed on appeal by a rule that is later changed to one by which he would have won. Justice does not require that a victorious party lose his gain in such cases.

An *unlawful*—clearly wrong—decision imposes considerable cost on the parties in terms of injustice, especially if it is not effectively reviewable. But it is impossible to provide interlocutory review *only* of such *unlawful* decisions, and it is difficult to design an efficient, useful judicial system around a high expectation of judicial failure at the trial level. Such failure should be rare, even in the case of minimally competent trial judges, when the judge is aided by competent counsel. In some cases, the risk of *unlawful* decision may be shared by the parties, as in the requirement that a bond be filed before an interlocutory injunction is granted. But this does not eliminate the costs and it may result in forcing a person to pay for an interlocutory remedy to which he is clearly entitled anyway. The decision as to how to deal with this problem is probably best left to the agency charged by Missouri's constitution with the regulation of appellate jurisdiction, the General Assembly.

Appeal, as a continuation of trial, came to England from Rome by way of chancery and the ecclesiastical courts. Proceedings were usually based on written evidence, and review was *de novo*. At law, claims of error were on a petition for a writ—where the trial court was of record, a writ of error—to Common Pleas or King's Bench. Any error on the face of the record or on a bill of exceptions would force a new trial.⁶ In those days, law was deemed antecedent to the cause and superior to the king and court—to be discovered, not made. The emphasis has since changed. Centralized judicial systems are now admittedly sources of law, and review has shifted from a focus on error-freedom (a somewhat circular notion if courts may make law) to one on probable legal supportability of result.⁷ Appellate review is limited by the concept of "harmless error" and by limitations on the scope and availability of review. When an appellate court affirms or reverses for "error," it may be doing more than

6. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 89-92 (King's Bench), 77-78 (Common Pleas) (1903).

7. Grounds for reversal have increased in number. See F. JAMES, CIVIL PROCEDURE §§ 11.2-11.4 at 519-32 (1965).

one thing, depending on its place in the judicial system⁸ and its authority to make summary disposition. If a trial court's judgment is reversed, it may be because of an *unlawful* decision, or it may be because the trial judge's decision is no longer *lawful*. In the latter case, the appellate court may be abandoning or altering a formerly *correct* rule or application. In both cases reversal is for "error."⁹

There are better arguments for interlocutory review in some cases than those based on assurance of fair trial and error-free results. For example, if interlocutory appeals are bad because they protract trial, they may be much less obnoxious if they are limited to matters which are sufficiently separate from the rest of the case to be appealable without interrupting trial of the remaining issues. The federal "final judgment" rule has been construed to allow appeals from such judgments. A consequence of this, however, is that the person aggrieved by such a judgment may lose his right to appeal on that issue if he waits until the entire case is ready for review.¹⁰ If appeal from final judgments is always justified, it should also be justifiable from any judgment which settles matters in a way which is not reversible after final judgment, such as an interlocutory injunction against a continuing activity. Many states have provided

8. An intermediate appellate court may be limited constitutionally in its lawmaking authority. This limitation is itself limited in a practical sense by the improbability of review of its decisions. In Missouri, a case may be transferred to the supreme court from a district of the court of appeals before or after judgment, by order of the supreme court. MO. CONST. art. V, § 10.

9. In *Novak v. Kansas City Transit, Inc.*, 365 S.W.2d 539 (Mo. En Banc 1963), the trial court had held that a wife had no cause of action for loss of her husband's consortium. The trial judge's decision was firmly founded on precedent—*Bernhardt v. Perry*, 276 Mo. 612, 208 S.W. 462 (En Banc 1918). *Novak* held *Bernhardt* "clearly erroneous." 365 S.W.2d at 545. The dissent posed the problem very nicely and made the interesting point that the "error" of *Bernhardt* could be seen as cutting the other way, too; instead of giving a cause of action to the wife, the court might as easily have held the end of *Bernhardt* was the end of any claim to relief for loss of consortium.

10. See 28 U.S.C. §§ 2101, 2107 (1970).

11. Where the statute or rule allows interlocutory appeal in specific cases, the most common orders from which such appeal is allowed are orders granting, denying, modifying, continuing or refusing to grant, modify or continue a temporary injunction; orders appointing, discharging, or modifying the authority of receivers; and orders requiring the transfer of some property interest. Only Georgia provides for interlocutory appeals from orders granting, denying, or modifying temporary restraining orders. GA. CODE ANN. § 6-701 (Supp. 1971). In some states, broad provisions for interlocutory appeals allow such appeals in any case where the orders are "practically" final or where they threaten some change of position which may obviate the value of an appeal at some later stage. See, e.g., ALASKA SUP. CT. (CIV.) R. 23 (Supp. Sept. 1966); LA. CODE CIV. PRO. ANN. § 21-2-1(5) (1953); N.M. SUP. CT. R. 5(1) (1953); N.C. GEN. STAT. § 7A-27 (1969); N.D. CENT. CODE § 28-27-02 (1974); ORE. REV. STAT. § 19.010 (1973); S.C. CODE ANN. § 15-123 (1963); WYO. SUP. CT. (CIV.) R. 72 (1953).

appeals from practically final¹¹ or separable¹² decisions, but Missouri has not.

A much less impressive argument for interlocutory review asserts that early settlement of important questions before the end of trial will often shorten litigation by avoiding the need for appeal and retrial. A provision for interlocutory appeal that responds to this argument is 28 U.S.C. § 1292(b). If a trial judge certifies that his unappealable order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "that immediate appeal . . . may materially advance the ultimate termination of the litigation," the court of appeals, in its discretion, may permit an appeal from that order. Various states have adopted similar provisions.¹³ In *Katz v. Carte Blanche Corp.*¹⁴ the Court of Appeals for the Third Circuit interpreted section 1292(b) to allow appeals from any matter which, if decided wrongly, could possibly produce a ground for reversal on an appeal from final judgment. In addition, when an appeal has been filed pursuant to section 1292(b), trial may be stopped either by the trial judge or by the court of appeals. It is quite possible that the claim of error on an allegedly pivotal issue need never have been corrected, because the person complaining of the error may win at trial, or because what seemed pivotal at the time may be of minor significance when trial is over.¹⁵ Hence, interlocutory review under section 1292(b) may actually consume more time than it saves. One may wonder why Congress and the states that adopted similar statutes did not merely provide for general, discretionary interlocutory appeal.¹⁶

12. Under Louisiana's "final judgment" rule, an appeal may be taken from any part of a case which is decided "on the merits." LA. CODE CIV. PRO. ANN. art. 1841, 2083 (West 1961). See also N.Y. CIV. PRAC. § 5701 (McKinney 1963).

13. See ILL. REV. STAT. ch. 110A, § 308 (1969); K.S.A. § 60-212 (1963); 12 OKLA. STAT. ANN. tit. 12, § 952 (Supp. 1974); PA. STAT. ANN. tit. 17 § 211-501 (Supp. 1975); TENN. CODE ANN. § 27-305 (Supp. 1974); VT. R. APP. PRO. 5(b) (1958). With these compare HAWAII REV. STAT. § 641-1 (Supp. 1974); ME. R. CIV. P. 72(c) (Supp. 1971); VT. R. APP. PRO. 5(a) (1974). Only the appellate court has discretion in Alaska, Idaho, and Utah. ALASKA SUP. CT. (Civ.) R. 23 (Supp. Sept. 1966); IOWA R.C.P. 332 (1975); UTAH CODE ANN. § 78-2-2 (1953). Trial court certification is enough if the issue can be decided without regard to any other issue in the case in Florida. FLA. APP. R. 4.6(b) (1975). If the issue is "important" or so central as to justify speedy authoritative decision, that is enough under the law of Hawaii, *supra*, Maine, *supra*, and under DEL. SUP. CT. (Civ.) R. 20(2) (1972).

14. 496 F.2d 747 (3d Cir. 1974).

15. See Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199 (1959).

16. See, e.g., MICH. GEN. CT. R. 806.

II. SUPERINTENDENCE AND APPEAL IN MISSOURI

The Supreme Court of Missouri, the districts of the Missouri Court of Appeals, and the circuit courts are given appellate jurisdiction by the state's constitution, to the extent that the General Assembly confers it.¹⁷ A different section of the judicial article gives these courts "superintending control over all inferior courts and tribunals in their jurisdiction" and authority "to issue and determine original remedial writs."¹⁸ Because the superintending authority is theoretically separate from appellate jurisdiction, and hence free from all limitations on the latter, restrictions on authority to hear appeals may be evaded by way of a writ.¹⁹

17. Mo. CONST. art. V, §§ 3, 10, 13, 14 (as amended); ch. 512, RSMo (1973 Supp.). Appellate jurisdiction is divided between the court of appeals and the supreme court in two ways. Exclusive appellate jurisdiction is given the supreme court in specific cases listed in article V, section 3: (1) cases involving the construction of the United States or Missouri constitutions, the validity of a federal statute, treaty, or authority exercised under the law of the United States; (2) cases involving construction of Missouri tax laws; (3) cases involving title to Missouri state office; (4) appeals from convictions of an offense punishable by death or life imprisonment; and (5) cases established by rule, subject to the constitution and statute. All remaining initial appellate jurisdiction is given the districts of the court of appeals and, when the appeal is from a court inferior to it, each circuit court. The supreme court has secondary appellate (transfer) jurisdiction in cases in the initial appellate jurisdiction of the court of appeals. The supreme court may take the case from the court of appeals before or after decision in the latter court, and it may be required to take the case from the court of appeals if the district in which the case is properly filed certifies it to the supreme court, or if, after decision, a dissenting opinion states that the decision conflicts with other appellate decisions. The authority of the supreme court to transfer before opinion has been held to include the authority to allow appeals directly to the supreme court even though they are in the initial appellate jurisdiction of the court of appeals. *In re M.K.R.*, 515 S.W.2d 467 (Mo. En Banc 1974).

18. Mo. CONST. art. V, § 4. *See also* Mo. CONST. art. V (1820).

19. Issues within the "exclusive" jurisdiction of the supreme court may be heard and decided by the court of appeals when a writ is sought. In *State ex rel. City of Mansfield v. Crain*, 301 S.W.2d 415 (Spr. Mo. App. 1957), prohibition was issued to prevent a circuit court from granting an injunction. The case raised issues that would have placed an appeal from such an injunction in the exclusive jurisdiction of the supreme court. The explanation for this apparent anomaly was:

The issuance of original remedial writs is not an appellate process, hence limitations solely on the appellate jurisdiction, as such, do not in themselves affect the supervisory process, which represents the application of judicial policy.

Id. at 418. Had the circuit court dismissed the petition for an injunction for failure to state a cause of action (i.e., want of "equity jurisdiction"), resting its dismissal on state or federal constitutional grounds, the plaintiff could have either sought mandamus from the court of appeals to prevent dismissal, or appealed the dismissal to the supreme court. *Cf. State ex rel. Smith v. Greene*, 494 S.W.2d 55 (Mo. En Banc 1973).

Superintending authority has also been exercised to review orders that are unreviewable by statute. In *Stroder v. State*, 522 S.W.2d 77 (Mo. App., D. St. L. 1975), an appeal from a revocation of parole was denied because of the absolute bar of section 549.141, RSMo 1969.

According to *State ex rel. Auto Finance Co. v. Landwehr*,²⁰ "the power of supervisory or superintending control . . . has its origin in the power exercised by King's Bench in England."²¹ But history offers little explanation or justification for the modern issuance of writs to review trial court decisions. In the England to which the *Landwehr* court referred, there were competing systems of law and competing sources of judicial authority. Prohibition, the writ normally associated with the control of jurisdiction, was used by the central common law courts²² to extend royal judicial power at the expense of non-royal authority,²³ and to prevent encroachment by equity²⁴ and the law merchant²⁵ on the domain of the common law. The latter use of the writ has been rendered obsolete by the unification of all judicial authority in a single judicial system. In the United States, the closest thing to a conflict between legal systems is that between state and federal courts. Neither prohibition nor mandamus is used by the courts of either system to limit or prevent the exercise of jurisdiction over a case by a court of the other system;²⁶ appeal and collateral attack suffice.

When Missouri entered the Union, review of judicial decisions at law was by writ of error on the record of the trial court or on a bill of exceptions. The writ issued of course²⁷ from the supreme court to circuit courts, and from circuit to county and justice of the peace courts. Appeals were allowed by statute to the supreme court and

However, the court stated that "review in such cases is available but must be by writ of prohibition or habeas corpus." *Id.* at 82.

Granting a writ of habeas corpus may or may not be reviewable. Compare *State ex rel. Taylor v. Blair*, 357 Mo. 586, 210 S.W.2d 1 (En Banc 1948), with *State ex rel. Heitt v. Simmons*, 112 Mo. App. 535, 87 S.W. 35 (St. L. Ct. App. 1905).

Mandamus has been used to circumvent the very narrow provision for appeal by the state from dismissal of a criminal case. *State ex rel. Harris v. Laughlin*, 75 Mo. 358 (1892); *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (St. L. Mo. App. 1968).

20. 229 Mo. App. 1221, 71 S.W. 144 (St. L. Ct. App. 1934). The case dealt with the superintending authority of a circuit court.

21. *Id.* at 1244, 71 S.W.2d at 145.

22. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 74-78, 87-95 (1903).

23. See Adams, *The Writ of Prohibition to Courts Christian*, 20 MINN. L. REV. 272 (1936).

24. See 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 203-11 (1903).

25. See 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 129-48 (1924).

26. Although the Supreme Court of the United States has exercised superintending control of a sort over state courts with respect to criminal procedure, the pretext was not jurisdictional. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961). It is doubtful that state courts may issue any coercive orders with respect to federal proceedings. See *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871).

27. Practice in Supreme Court, §§ 1, 3, RSMo 1835.

the circuit courts in a limited number of cases.²⁸ In 1891, appellate jurisdiction of the supreme court was expanded to include all final judgments,²⁹ and the writ of error became merely an alternative appellate route to be taken after time for appeal had run.³⁰ Still, the writ of error was held to be an original writ, and the formal distinction was kept alive³¹ until 1943, when it was abolished by statute in civil cases.³² In 1947 it was held that the constitutional authority to issue "original writs" did not allow the courts to issue a writ of error.³³

Interlocutory appellate review was first allowed in 1891.³⁴ The statute allowed appeals from (1) final judgments and orders after final judgment, (2) orders granting a new trial, (3) orders in arrest of judgment, (4) orders dissolving an injunction, and (5) interlocutory judgments in actions of partition which determine the rights of the parties. The list was enlarged in 1895 to include orders refusing to revoke or modify an interlocutory order appointing a receiver.³⁵ Orders in arrest of judgment ceased to be a ground for interlocutory review in 1943,³⁶ but otherwise the provision for interlocutory relief has not changed since 1895.³⁷ No interlocutory appeal is allowed from the grant, denial, or modification of interlocutory injunctions or temporary restraining orders.

The final judgment rule has been construed quite narrowly in Missouri. A judgment is not final unless it is a complete disposition of all matters before the court, regardless of whether the matters to be disposed of are purely formal or whether the non-final order effectively settles all matters in dispute.³⁸ A "non-final" decision

28. Appeals to the supreme court were allowed in equity cases, criminal cases, and suits to declare the plaintiff not a slave. Practice in Chancery, Art. VI § 11, RSMo 1835; Practice and Proceedings in Criminal Cases, Art. VIII § 1, RSMo 1835; Freedom, § 15, RSMo 1835. Other statutes provided for appeals to circuit courts.

29. Mo. Laws 1891, at 70.

30. *Id.*

31. See *Fidelity Trust Co. v. Mexico S.F. & P. Traction Co.*, 170 Mo. 487, 194 S.W. 52, 54 (1917), citing *St. Louis v. Butler*, 201 Mo. 396, 99 S.W. 1092 (1907), for the proposition that a petition for a writ of error was, unlike appeal, an original civil suit.

32. Mo. Laws 1943, at 353, § 125.

33. *State ex rel. McPike v. Hughes*, 355 Mo. 1022, 199 S.W.2d 405 (En Banc 1947).

34. Mo. Laws 1891, at 70.

35. Mo. Laws 1895, at 91.

36. Mo. Laws 1943, at 353, § 126.

37. § 512.020, RSMo 1969.

38. *Proctor v. Jacobs*, 472 S.W.2d 609 (Mo. 1971); *Brown Supply Co. v. J.C. Penney Co.*, 505 S.W.2d 463 (Mo. App., D. St. L. 1974); *Seiter v. Tinsley*, 479 S.W.2d 217 (Mo. App., D. St. L. 1972).

may end the matter completely, have preclusive effect, and still be unappealable, as when a case is dismissed for want of personal jurisdiction—whether for purely formal reasons, or because of more serious limitations on service of process.³⁹ Such a decision is nevertheless *res judicata* on the issue of personal jurisdiction.⁴⁰

There is no appeal if it is not provided by statute.⁴¹ The Missouri constitution also prohibits the judiciary from making rules which may “change . . . the law relating to . . . the right of appeal.”⁴² This ought to indicate that the courts may also not narrow or expand that right through the use of original writs.

III. SUPERINTENDING CONTROL BY PRODAMUS (OR IS IT MANDHIBITION?)

The writs commonly associated with superintending control in Missouri are certiorari, mandamus, and prohibition. These writs may issue, in the court’s discretion, on original petitions to stop, prevent, or force certain action by judges. Certiorari is normally used after proceedings to be reviewed are completed, in order to provide judicial review where none is allowed by statute. It is not normally an interlocutory review device and will not be considered here.

Mandamus and prohibition are formally separate and distinct remedies, each treated by a separate Supreme Court Rule.⁴³ In theory, mandamus compels an affirmative duty,⁴⁴ and prohibition

39. *Continent Foods Corp. v. National-Northwood, Inc.*, 470 S.W.2d 315 (Spr. Mo. App. 1971); *Color Process Co. v. Northwest Screenprint Co.*, 417 S.W.2d 934 (Mo. 1967). Cf. *Frank v. Sinclair Refining Co.*, 363 Mo. 1054, 256 S.W.2d 793 (1953). *Frank*, a venue case, has been cited for the proposition that dismissal for want of jurisdiction is not appealable because it does not adjudicate the merits. See *Heard v. Estate of Frye*, 336 S.W.2d 729, 730 (Spr. Mo. App. 1960); *State ex rel. Anonymous v. Murphy*, 354 S.W.2d 42, 43 (K.C. Mo. App. 1962).

40. *Healy v. Atchison, Topeka & Santa Fe R.R.*, 287 S.W.2d 813, 815 (Mo. 1956) (which treated all jurisdictional issues as equivalent for the purposes of preclusion).

41. *Kansas City Power and Light Co. v. Kansas City*, 426 S.W.2d 105, 107 (Mo. 1968).

42. Mo. CONST. art. V, § 5. Nonetheless, Supreme Court Rule 81.06 has expanded the availability of appeal to cases in which there are multiple claims where there is a decision as to one but not all of them. The rule gives finality to judgments on verdicts where one of several claims is tried separately to a jury, and on judgments in the case of separate trial before a judge on one of several claims, where the judge certifies the judgment as final. The Federal Rules of Civil Procedure contain a similar apparent violation of the “final judgment” rule in Rule 54(b). But the more practically oriented interpretation of the federal “final judgment” limitation on appeals makes it easier to accept the federal rule. See C.A. WRIGHT, *LAW OF FEDERAL COURTS* 452-58 (2d ed. 1970).

43. Mo. SUP. CT. R. 84.22-.25 (apply to all original writs); Mo. SUP. CT. R. 94 (mandamus); Mo. SUP. CT. R. 97 (prohibition).

44. J.L. HIGH, *A TREATISE ON EXTRAORDINARY LEGAL REMEDIES* 138-42 (2d ed. 1884).

prevents judicial action.⁴⁵ High's treatise states that mandamus will be used to set an inferior court in motion when action has been refused or delayed, but that it will not direct the way in which the inferior court is to act.⁴⁶ If the inferior court acts without or "in excess of" jurisdiction,⁴⁷ the proper remedy is prohibition.⁴⁸ This clear distinction between positive and negative remedies has the same utility as that between mandatory and prohibitory injunctions. As a result, the writs have become functionally interchangeable in Missouri. Both prohibition and mandamus have issued to prevent the striking of a claim.⁴⁹ Prohibition has issued to prevent the denial of a motion⁵⁰ and to prevent taking action other than that specified in the writ.⁵¹ Given their interchangeable use, it may be more sensible to call them both by one name—writ of supervision, or prodamus, or mandhibition—and treat both in the same procedural rule.

The procedure for obtaining a writ is outlined elsewhere⁵² and will be given short treatment here. Although the practices are not uniform throughout the Missouri courts, all four appellate courts⁵³ summarily dismiss most petitions within a few days of their filing. The supreme court hears argument for permanent or peremptory relief en banc, whereas the districts of the court of appeals hear and decide by panel. After the petition is filed, accompanied by written "suggestions" (*i.e.*, a brief) and exhibits, and if the petition seems in order and appears to raise a substantial issue, the supreme court will send a letter to the respondent judge, informing him that if he

45. *Id.* at 603-60.

46. *Id.* at 138-42.

47. High's examples of "excess of authority" include: granting a new trial in a criminal case where judgment was entered in a previous term of court, and no statute authorizes the grant; unauthorized exercise of appellate jurisdiction at the instigation of nonparties; enforcement of a money judgment or writ pending appeal; imposition of the death penalty in a non-capital case; or gross violation of legal limits in a criminal case "involving a question of life and death." *Id.* at 624-25, 632.

48. *Id.* at 623-24.

49. See *State ex rel. Wells v. Mayfield*, 365 Mo. 238, 281 S.W.2d 9 (En Banc 1955); *State ex rel. Smith v. Greene*, 494 S.W.2d 55 (Mo. En Banc 1973). Mandamus has also issued to compel a court to dismiss a cause and to dissolve or vacate an injunction. *Ruddy v. Corning*, 501 S.W.2d 537 (Mo. App., D. St. L. 1973); *State ex rel. National Junior College Athletic Ass'n v. Luten*, 492 S.W.2d 404 (Mo. App., D. St. L. 1973); *State ex rel. House v. White*, 429 S.W.2d 277 (K.C. Mo. App. 1968).

50. *State ex rel. Laclede Gas Co. v. Godfrey*, 468 S.W.2d 693 (St. L. Mo. App. 1971).

51. *State ex rel. Johnson v. Green*, 452 S.W.2d 814 (Mo. En Banc 1970); *State ex rel. Schwarz v. Buder*, 315 S.W.2d 867 (St. L. Mo. App. 1958).

52. Mo. Bar C.L.E., *Appellate Practice and Extraordinary Remedies* (2d ed. 1974).

53. The Supreme Court of Missouri and the districts of the Missouri Court of Appeals.

does not comply with the prayer in the petition, a preliminary or alternative writ (depending on the formal relief sought) will issue. A preliminary writ is the equivalent of an order to show cause why final relief ought not to be granted. If the St. Louis district of the court of appeals has not denied the petition summarily, an informal hearing is held before the panel, which then decides whether the petition should be denied or a preliminary writ should issue. Before that, the respondent judge has been told (usually by telephone) to stop all proceedings pending the decision on the petition. Issuance of a preliminary writ is a decision that the petition raises a substantial matter and that the court is ready to exercise its discretion in more than a summarily negative way.

The parties to these proceedings are nominally the relator (*i.e.*, the petitioner) and the respondent judge whose acts are called into question. The respondent usually is represented by counsel of the real opponent of the writ, the party who benefited by the complained-of act.⁵⁴ The preliminary and final writs are addressed to the nominal respondent.⁵⁵

54. In some cases, the respondent judge is the real party opponent, and he may have to hire counsel because the prosecuting or circuit attorney will not represent him. This was the case in *State ex rel. Lucas v. Schaaf*, No. 35,651 (1974) filed in the St. Louis district, Missouri Court of Appeals, on October 30, 1973. The petition was denied after argument and submission (without opinion) on September 10, 1974. The relator had been committed to the Missouri State Hospital in Fulton, Missouri, by orders of the circuit court for St. Louis County as a sexual psychopath under § 202.700, RSMo 1969. Thereafter, his status was changed to that of an outpatient without approval of the circuit court that had ordered his commitment. The circuit judge threatened to order his return to inpatient status, and the relator sought and was denied prohibition against the entry of that order.

55. The exercise of superintending control and the decision of an appeal both often result in an order to the trial judge—by writ, if superintending control is exercised, and by mandate, if it is not. The best and clearest description of the distinction between superintending control and appellate jurisdiction was given by the Supreme Court of Missouri in *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76 (Mo. En Banc 1974). T.J.H. was a juvenile offender charged with the possession of marijuana. The juvenile court had waived jurisdiction over the juvenile and had thereby subjected him to regular criminal process. The reason for the waiver was not stated in the waiver order. T.J.H. appealed, but the appeal was denied because the waiver order was not a final judgment. His appeal would lie from his conviction in the circuit court. *In re T.J.H.*, 479 S.W.2d 433 (Mo. En Banc 1972). The juvenile then sought prohibition to prevent the magistrate from holding a preliminary hearing and from binding him over for trial in the circuit court. Prohibition was granted by the Kansas City district of the Missouri Court of Appeals, 495 S.W.2d 722 (1973), but the case was transferred to the supreme court. Over two years from the failure of the first appeal, T.J.H. won his point in *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76 (Mo. En Banc 1974). Of course, the supreme court had to distinguish its earlier refusal of appellate jurisdiction:

The issuance of a writ of prohibition is not an appellate process. A proceeding in prohibition is distinct and independent of the original action. It is substantially a proceeding between two judicial authorities, a superior and an inferior, and is a

The issuance of preliminary relief produces a new round of often repetitive pleadings, briefs, and motions. Argument over the final writ is, to a large extent, a polished rehash of everything that has gone before, subject to any changes which the court's reaction to the petition may have occasioned. Final judgment produces a writ which may grant petitioner's request, or provide less or much more than the petitioner sought.⁵⁶ Normally only the issuance or denial of a final writ (as opposed to a preliminary writ) is accompanied by a written opinion.⁵⁷

IV. LIMITATIONS ON WRIT-ISSUING AUTHORITY

There are, at least in theory, two doctrinal limitations on writ-issuing authority. First, a writ will not issue if there is an adequate alternative remedy. Second, a writ will issue only to cure certain specific types of "error." However, because of judicial willingness to review attractive claims of error by writ, these limitations have been distorted to the point where they no longer constitute serious barriers to the use of writs as an appellate device.

A. *Adequacy of Alternative Remedies*

Superintending control is limited to cases in which there is no

means by which the superior judicial authority exercises its superintendence over the inferior authority to keep it within the bounds of its lawful jurisdiction. . . . There is no danger, as respondent fears, that our holding that a writ of prohibition is available to relator in this cause will nullify our decision in *In re T.J.H.*, supra, by making available through use of the extraordinary writs appeal which we there foreclosed. In the case at hand a writ of prohibition is available because relator has shown that the magistrate court is without jurisdiction to proceed further in the case. The juvenile court's order relinquishing jurisdiction did not set forth findings stating the basis of its decision and consequently was not sufficient to transfer jurisdiction to the magistrate court. The writ of prohibition goes to the sufficiency of the order to transfer, not to its correctness.

504 S.W.2d at 78-79.

The "sufficiency" as opposed to the "correctness" of the order was judged according to the requirements of *Kent v. U.S.*, 383 U.S. 541 (1965), hardly a decision on Missouri juvenile court jurisdiction. The juvenile court order was insufficient for formal reasons. If there were a jurisdiction requirement, it was in the making of findings under § 211.071, RSMo 1969, not their statement on a waiver order. 504 S.W.2d at 79-82. See Judge Pritchard's dissent to the court of appeals decision, 495 S.W.2d at 734, for a clearer look at the problem.

56. See, e.g., *State ex rel. Boll v. Weinstein*, 365 Mo. 1179, 295 S.W.2d 62 (En Banc 1956).

57. It is at least arguable that Mo. CONST. art. V, § 12 (as amended), and § 477.030, RSMo 1969, require that at least in the grant of preliminary and final writs an opinion be published. Final relief has been granted without opinion. See *General Motors Corp. v. Nangle*, No. 34,600 (Mo. App., D. St. L. 1972).

adequate alternative remedy.⁵⁸ One such remedy, of course, is appeal from an adverse judgment. Another might be a motion before the allegedly erring court to set aside or reconsider the court's alleged error.⁵⁹ It would be proper to require exhaustion of remedies in the trial court before alternative remedies are deemed "inadequate," but no such rule of exhaustion exists.⁶⁰

Appeal may be "inadequate" for a variety of reasons. An appeal may not be available until too late to cure the effect of an erroneous order or judgment. Appeal may be slow and expensive. Moreover, only an "aggrieved" party may appeal.⁶¹ The appellant may be required to post a bond to stay or interrupt execution of the judgment. Because of the relative speed and inexpensiveness of superintending control, an appeal may always be inadequate where the alleged error is in the issuance of an interlocutory order, especially if the error renders the remaining proceedings useless to either party.⁶² If, on the other hand, subsequent events at trial may cure the alleged error—*e.g.*, the aggrieved party's ultimate victory at trial, then review by writ may result in needless delay. In addition, if the normal superiority of review by writ renders any slower, more expensive mode of review inadequate, then all appeals would be presumptively inadequate, and this limitation on the exercise of superintending control would be effectively destroyed.

Because neither the state nor the federal constitution requires that judicial decisions be appealable,⁶³ the inadequacy of an appellate remedy is not, by itself, a sufficient justification for using superintending control to review error. At least, no one has suggested that a proper function of superintending control is to fill lacunae in legis-

58. Mo. Sup. Ct. R. 84.22.

59. If the alleged error is in the appointment of a receiver, the aggrieved party may move to modify or rescind the order. Refusal of such a motion is appealable. § 512.020, RSMo 1969.

60. In *State ex rel. Siegel v. Strother*, 365 Mo. 861, 289 S.W.2d 73 (En Banc 1956), the error was misjoinder of issues, which could have been attacked by a motion to sever rather than to dismiss. No such motion was required, nor was the question of the possible utility of such a motion considered.

61. The appellant must have a "pecuniary interest" in reversal. This rule is particularly hard on a defendant in a multiple-defendant case, when another defendant escapes by way of dismissal. The remaining defendant is not "aggrieved" by the dismissal. *White v. Kuhnert*, 207 S.W.2d 839 (K.C. Mo. App. 1948). Could he have sought prohibition against the dismissal?

62. As, for example, when the alleged error is in refusal, at the outset, to dismiss for want of jurisdiction of the subject matter. Such lack of jurisdiction is usually not waivable and may be raised by either party on appeal.

63. See authorities cited notes 1 and 41, *supra*.

lative provision for appeals.

Early Missouri cases indicate that the inadequate remedy limitation was once taken seriously,⁶⁴ but by 1907 it appeared that appeal would be inadequate whenever the claim of error was sufficiently attractive.⁶⁵ In *Dahlberg v. Fisse*⁶⁶ the supreme court held that the necessity of going through trial and complying with an order for accounting was too burdensome, rendering the appellate remedy inadequate. In *State ex rel. Uthoff v. Russell*⁶⁷ the "expense, vexation and annoyance" of going through trial justified issuing a writ. Appeal has been held inadequate because the appellant would have to file a supersedeas bond!⁶⁸ That is, superintending control is a means of evading the protection given the appellee by the bond during a stay of execution. In *State ex rel. Associated Transport Corp. v. Godfrey*⁶⁹ prohibition was granted to prevent the circuit court from proceeding with a garnishment in aid of execution. Appeal was available from the judgment of execution on the garnishment, but that was irrelevant because "it has been consistently held that prohibition is the proper remedy to prevent a court from making an order which it has no jurisdiction to make."⁷⁰ Finally, in *State ex rel. Pruitt v. Adams*⁷¹ prohibition issued to prevent entry of an appealable judgment.

64. See *Bowman's Case*, 67 Mo. 146 (En Banc 1872); *State ex rel. Morse v. Burkhardt*, 87 Mo. 533 (1885). On the other hand, the court did hear and decide one of the claims of error in *Bowman's Case* on the merits—against the petitioner.

65. In *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 107 S.W. 487 (En Banc 1907), for example, both appeal and supersedeas were available.

66. 328 Mo. 213, 40 S.W.2d 606 (1931). Prohibition was sought to prevent enforcement of a referee's award of an accounting and damages. The matter was still to be litigated to conclusion before the trial judge.

67. 210 S.W.2d 1017 (St. L. Mo. App. 1948).

68. *State ex rel. Templeton v. Seehorn*, 208 S.W.2d 789 (K.C. Mo. App. 1947). Prohibition was sought to prevent modification of a judgment which required the relator to deposit money into court. The court indicated that appeal would have taken longer than review by writ. *Id.* at 794.

69. 464 S.W.2d 776 (St. L. Mo. App. 1971).

70. *Id.* at 779.

71. 500 S.W.2d 742 (Mo. App., D. St. L. 1973). The requirement of an inadequate appellate remedy vanishes completely when the issue presented by the petition is of "public importance." For a dubious application of this exception, see *State ex rel. Lucas v. Moss*, 498 S.W.2d 289 (Mo. En Banc 1973), where the issue was whether videotaped depositions could be used as evidence. In *Giacopelli v. Clymer*, 521 S.W.2d 196 (Mo. App., D.K.C. 1975), prohibition was sought to determine whether the trial judge could prohibit the performance of a "ministerial duty," the administration of an oath of office. The "public importance" of a claim to public office justified the exercise of superintending control even though, had the trial judge entered his order prohibiting administration of the oath, an appeal could have been taken.

It may be worthwhile to turn the question of inadequacy around and look at the utility to the parties of review by writ. A good place to start is *Broglin v. St. Louis Southwestern Ry.*,⁷² in which a widow sued a railroad for the wrongful death of her husband, who was killed when his truck collided with defendant's train. Because Missouri placed an upper limit on wrongful death recovery of \$50,000, Mrs. Broglin sued under the law of Texas, where the collision occurred. Other choice-of-law issues that could have arisen included the existence and effect of the husband's contributory negligence and the distribution of any recovery among the decedent's relatives. Suit was filed on December 12, 1970, and defendant's motion to strike reference to Texas' wrongful death law was granted on May 22, 1972. It was in the plaintiff's interest to prosecute or settle the case in order to avoid substantial devaluation of any potential recovery by the current inflation. Despite this, she sought mandamus from the court of appeals to compel vacation of the order granting the motion to strike. An alternative writ issued August 3, 1972, which was made permanent on July 10, 1973.⁷³ A motion for rehearing was filed and denied, but a dissent from the denial of rehearing caused the case to be transferred to the supreme court on August 8, 1973. Argument was heard by the supreme court en banc, and the issuance of the writ was affirmed by opinion on June 24, 1974.⁷⁴ The case thus proceeded to trial, but only after 25 months had passed since the motion to strike was granted. What makes this case appealing for the purpose of this part of the discussion is that the writ served no purpose other than to increase the supreme court's and the court of appeals' workload and to produce a possibly unnecessary choice-of-law decision. Had the order to strike remained in effect, and had the case gone to trial, the choice-of-law issue regarding limitation of damages would not have been a basis for appeal had the jury returned with a defendant's verdict or a verdict of less than \$50,000. In that event, the choice-of-law issue would be relevant only if the case were to be sent back for trial on the issue of damages for reasons that had nothing to do with choice-of-law. The plaintiff could have asked the trial court to allow the jury to make a special finding of actual damages, so that if the jury found damages in excess of \$50,000, the appellate court could decide the

72. No. 20,087F (Cir. Ct. St. L. 1970).

73. No. 34,871 (Mo. App., D. St. L. 1973).

74. State *ex rel.* Broglin v. Nangle, 510 S.W.2d 699 (Mo. En Banc 1974).

choice-of-law issue without sending the case back for retrial. Given the amounts involved, whatever the verdict, appeal from final judgment was highly likely.

In *State ex rel. Pulliam v. Swink*⁷⁵ a defendant sought prohibition to prevent a circuit judge from striking an affirmative defense. The motion to strike was granted because the defendant had refused to answer interrogatories on the ground of possible self-incrimination. The petition, filed August 18, 1972, was granted temporarily by the court of appeals on September 20, 1972, and permanently on May 7, 1973. A motion to transfer to the supreme court was granted on December 10, 1973, and the court of appeals' decision was affirmed September 9, 1974,⁷⁶ two years after the defendant first sought the writ. Had the writ not issued and the motion to strike stood, the defendant might have won, rendering the issue moot unless the plaintiff won his appeal. Now that the writ issued, the plaintiff might still win, again rendering the writ irrelevant. Had the writ not issued and the defendant lost, the order striking his defense may or may not have been the only ground for appeal; and it may have required retrial, unless the evidence was such as to warrant the appellate court's entry of judgment for the defendant. In any case, it is not clear that other grounds for appeal would not arise despite the granting of the writ. Issuing the writ could not have saved much time and may have wasted it.

Although there are instances where interlocutory review by writ can be quite helpful to a party, even if the relief sought is denied,⁷⁷ there are significant, but often overlooked, costs to both the parties and the judicial system itself. If a petition for review by writ is to be granted or denied with opinion, for example, the petitioner can assume a wait of from six months to a year. The delay does not work hardship on the parties alone. Deciding petitions for writs can take at least as long as deciding any other appeal. If writs are given expedited treatment, then decision in other cases must be delayed.

75. 514 S.W.2d 559 (Mo. En Banc 1974).

76. *Id.*

77. The most notable examples are petitions for mandamus to compel a trial judge to proceed with a motion for post-conviction relief pursuant to Supreme Court Rule 27.26. *See, e.g.,* Boyer v. Moss, No. 34,993 (Mo. App., D. St. L. 1973); Neal v. Ruddy, No. 35,183 (Mo. App., D. St. L. 1973); Hunt v. Circuit Court of St. Louis, No. 35,312 (Mo. App., D. St. L. 1973). The usual procedure in the St. Louis district of the court of appeals is to communicate directly with the respondent trial judge to determine the status of the petition. Often this generates a written explanation by the trial judge of the reason for the delay, or a promise to proceed with the motion appears in the appellate file, dated on the same day as the denial of the petition.

B. *Error that Invites the Writ*

The second limitation on the exercise of superintending control is the nature of error that the writ is to cure. The claim of error must involve failure to perform a ministerial duty, want of jurisdiction, or "excess of jurisdiction." Stated negatively, there is a class of error that is not curable by writ, regardless of whether an appellate remedy is adequate.⁷⁸

None of this helps to determine the proper limits to place on these categories. The cases and treatises explain and justify the issuance of writs by practice in the common law courts of England before Jamestown was settled. Ordinary error is distinguished from "excess of jurisdiction" and "failure to perform a ministerial duty" as if these terms were self-defined and clearly separable. The problem remains: what is there about some claims of error that makes them proper subjects for special interlocutory review despite the absence of appeal?

A functional distinction between legislative and judicial (superintending) regulation of review of claims of error may be helped by distinguishing between reasons for providing such review and between classes of error. Where the primary concern is with the development and administration of rules for the settlement of disputes, and with the fair and proper settlement of a specific dispute submitted to the judicial system, it is reasonable for the legislature to determine the degree to which appellate courts should control the development of doctrine, as well as the number of courts a person should have available to him for the protection of his interests. Claims of error may, however, relate less to fairness and propriety of decision than to the operation and organization of the judicial system, or to the relations between the members of that system and nonjudicial organs of government. Where this administrative concern is primary, it is reasonable to allocate control over the way administrative authority is exercised to the superintending court. Such a distinction relegates the requirement that there be no ade-

78. In *State ex rel. Howe v. Hughes*, 343 Mo. 827, 123 S.W.2d 105 (En Banc 1938), a writ was held not a proper remedy to prevent partial distribution of an estate by an unbonded executor where the respondent judge did not require a refund bond. In *State ex rel. Kansas City v. Harris*, 357 Mo. 1166, 212 S.W.2d 733 (1948), refusal to dismiss on the ground of the plaintiff's election of remedies was held not the kind of error curable by writ. *State ex rel. Deering Milliken, Inc. v. Meyer*, 449 S.W.2d 870 (St. L. Mo. App. 1970), and *State ex rel. Henry v. Cracraft*, 237 Mo. App. 194, 168 S.W.2d 953 (1943), held *res judicata* to be a matter of defense, and not of jurisdiction or ministerial duty. *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383 (St. L. Mo. App. 1966), held the same as to want of "equity jurisdiction."

quate alternative remedy to a subsidiary role—that of assuring both legislative supremacy in the regulation of appellate jurisdiction, and economical utilization of appellate court time.

1. Ministerial Duty

Ministerial duty can be thought of as something as to which there is neither judgment nor discretion.⁷⁹ The only permissible decision is a correct one. Some duty is seen easily to be ministerial, even though the person obliged to do it must be given some leeway in interpreting his instructions. Once a judgment is rendered or a writ is ordered, it must be docketed. Once an appeal is taken or venue is changed, papers must be gathered, verified, and transferred. On the other hand, when the person obliged to perform a specified duty is a judge, who is given judgment with respect to the existence, proper invocation, and proper performance of that duty, it is hard to distinguish such a failure to perform a duty from any other legal error.

Historically, the judicial duty to proceed with a case was enforced by mandamus, or by the equitable writ, *procedendo ad iudicium*.⁸⁰ This expands easily to justify superintending control over any refusal to proceed even if that refusal is based on an erroneous judgment of a kind that a trial judge is authorized to make—*e.g.*, dismissal for want of personal jurisdiction. One way out may be to argue that any legal decision with respect to the existence, invocation, or proper performance of a duty is “preliminary” to the duty itself. Since every judicial act entails some ministerial duty to execute formal evidence of that act (such as signing a judgment or order), this could bring almost all claims of error within the category of “ministerial duty” and the reach of superintending control.⁸¹ One need not go that far to prevent unreasonable delay with respect to motions or other claims to relief. The distinction drawn *supra*, be-

79. Moving from and to be executed by purely ministerial officers, it demands neither that discretion or discrimination required to be exercised by a court, but simply an intelligent compliance with the statute, such as will serve the end of its enactment and no more.

State *ex rel.* Phillips v. Barton, 300 Mo. 76, 87, 254 S.W. 85, 88 (En Banc 1923).

80. See 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109-11 (8th ed. 1778).

81. In State *ex rel.* Smith v. Greene, 494 S.W.2d 55 (Mo. En Banc 1973), prohibition issued to prevent the striking of a claim for punitive damages. The court seems to have associated this kind of error with “abuse of discretion,” because in the opinion it stated: “The trial court has no discretion to rule contrary to the law. . . .” *Id.* at 60. See pt. IV B § (2)(c) of this article, *infra*.

tween appellate and superintending functions, would certainly justify exercise of the latter when delay in granting relief is so unreasonable as to amount to a refusal to act at all. Not only is there no appealable order, but the refusal to act implicates the very operation of the judicial system as a functioning agency for dispute processing. On the other hand, erroneous denial or grant of a motion or a claim is not such a failure of function—it is just the opposite; and superintending intervention is not justified.

An “abuse of discretion” has been held either to be a failure to perform a ministerial duty, or an excess of jurisdiction.⁸² If discretion is “the power to choose between two or more courses of action, each of which is thought permissible,”⁸³ then abuse of discretion is no more than error with respect to the existence of that power, or with respect to the principles or standards that limit its exercise. The erring judge’s “abuse” in acting or refusing to act resembles very closely any other error with respect to the grant or denial of relief.

2. Jurisdiction

a. Of the Subject Matter

Like “property,” “jurisdiction” is a term that has been used for many purposes and has carried many different meanings. Both terms have been used to limit the availability of judicial remedies, and each has become distorted and lost function and definition.⁸⁴

82. If a judge refuses to exercise discretion because he believes he has no authority to do so (no discretion), a writ may be granted because the trial judge violated a ministerial duty—to exercise discretion. If he exercises discretion wrongly, a writ will issue because he has “abused his discretion” and has either violated a ministerial duty or acted in excess of jurisdiction. *Compare State ex rel. Lucas v. Moss*, 498 S.W.2d 289 (Mo. En Banc 1973), *with State ex rel. Mo. Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532 (Mo. En Banc 1968).

In *State ex rel. Musser v. Dahms*, 458 S.W.2d 865 (K.C. Mo. App. 1970), a probate judge refused to approve an affidavit for appeal to the circuit court from a decision on a guardianship, because the appellant lacked standing. The court of appeals held that the submission of the affidavit “ousted” the probate judge of jurisdiction, and that the standing issue would be heard in the circuit court. So, why submit the affidavit to the probate judge with a motion to allow the appeal? Why, so the judge can sign it, of course!

83. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 162 (1958 tentative ed.).

84. For example, when injunctions were limited to the protection of rights to property, the term expanded to include almost any claim for such relief. *Compare Gee v. Pritchard*, 2 Swanston 402 (1818), *with Dixon v. Holden*, L.R. 7 Eq. Cas. 488 (1869). When habeas corpus was limited to testing the legality of detention, going no further than the authority of the jailer and, later, the “jurisdiction” of the committing official, the term “jurisdiction” came to include, at least for federal courts, almost any reversible error. *See Kaufman v. United States*,

If jurisdictional error is important enough to warrant special, superintending regulation, the class of jurisdictional matters that receive such treatment should be limited by the reason for that importance. The significance of "jurisdiction" is partly historical, the term having been used as a weapon in interjudicial and intergovernmental wars.⁸⁵ But the exercise of superintending control in a centralized judicial system can hardly rest on the history of writs in pre-Cromwellian England. The narrowest and most easily justified use of the term "jurisdiction" ties it to the authority of a court to deal with a class of cases, usually defined in terms of issues, parties, amounts in controversy, or justiciability. Another use of the term might include the determination of persons who may be bound by a court's judgment and geographical limitations on the area from which cases may come to a specific court. These are dealt with in the next subpart.

Subject matter jurisdiction is distributed and limited for many different reasons. An agency or specialized court may be given exclusive jurisdiction over a matter in order to provide initial expert treatment of certain kinds of disputes.⁸⁶ Government convenience and institutional harmony within government may require that certain disputes be left to a designated court,⁸⁷ or that they be excluded from courts initially⁸⁸ or altogether.⁸⁹ Relations within a federal sys-

394 U.S. 217 (1969); *Brown v. Allen*, 344 U.S. 443 (1953). Missouri has gone in a similar direction. *See In re F.C.*, 484 S.W.2d 21 (Mo. App., D.K.C. 1972); *Osborn v. Owsley*, 259 S.W.2d 129 (K.C. Mo. App. 1953).

85. *See* notes 21-28, *supra*.

86. For example, the reservation of exclusive authority with respect to juvenile offenders to the juvenile court, or the restriction of certain workmen's claims to a workmen's compensation tribunal.

87. As in the designation of a specific court of claims for suits against the state, or the imposition of a non-waivable venue limitation on suits against public officials.

88. Primary jurisdiction and a requirement of exhaustion of administrative remedies may be jurisdictional in this sense. *See State ex rel. Cirese v. Ridge*, 345 Mo. 1096, 138 S.W.2d 1012 (En Banc 1940).

89. A matter may be withdrawn from the courts because it is unsuited to judicial treatment, or because judicial treatment may interfere with the authority or operation of other agencies of government. An example of either may be the unreviewability of the exercise of prosecutorial discretion. A matter may be partially withdrawn by restrictions on standing or by special rules concerning proper plaintiffs, in order to reduce the occasion for judicial lawmaking or intervention. Examples are: the restriction of plaintiffs in suits to abate public nuisances to prosecuting attorneys or attorneys general and the requirement that quo warranto suits be brought, or at least approved, by the attorney general. It is doubtful that a decision in violation of limitations such as these or those suggested in note 88 *supra*, would be subject to collateral attack by a party. *But see State ex rel. Dalton v. Mattingly*, 275 S.W.2d 34 (Spr. Mo. App. 1955).

tem may produce exclusive control over certain kinds of cases by a specific judiciary.⁹⁰ None of these functions, however, relates at all to fairness to the parties, or to the wisdom, lawfulness, or justice of the result.⁹¹ It is easy to argue that reasons for drawing jurisdictional lines are often hard to find (and if found, hard to justify), but that is of no concern here. More relevant is the question whether extraordinary, superintending protection of these lines is necessary—or even helpful.

Jurisdictional lines already receive ample protection. A party may raise error as to subject matter jurisdiction at any time during the processing of the case, and even collaterally,⁹² regardless of whether he originally invoked jurisdiction. If a party does not raise want of subject matter jurisdiction, the judge must. These should be sufficient deterrents to prevent a plaintiff from taking jurisdictional lines lightly or to prevent him from colluding with the defendant in choice of courts. A superintending writ does not give additional protection to jurisdiction lines; rather, it merely protects a party from suffering totally useless litigation—regardless of whether he prevails on the merits. If the jurisdictional defect is such as to subject the outcome to collateral attack, the writ will be unavailable in the very case where such attack is most likely—where neither party nor the judge raises the issue at trial. Once the issue is raised and decided in favor of jurisdiction, the danger of collateral attack is gone.⁹³ If no writ were available, the only added burden on the

90. For example, the exclusive jurisdiction of federal courts over certain kinds of cases raising issues under the federal copyright and patent laws, 28 U.S.C. § 1338(a), and the supposedly “jurisdictional” prerequisite of domicile in divorce cases. As to divorce jurisdiction see *Alton v. Alton*, 207 F.2d 667, 684-85 (3d Cir. 1953) (Hastie, J., dissenting).

91. A convinced conceptualist might argue that, if due process requires judicial process, it is denied if the cause is *coram non judice*. Note, however, that knowing submission to a court without jurisdiction over the subject matter does not cure the defect, although it should avoid any due process objections. Also, a court can, in effect, confer subject matter jurisdiction on itself, subject to reversal on appeal, by rendering an erroneous judgment. Such judgments are foreclosed from collateral attack as is any other erroneous judgment. *Healy v. Atchison, Topeka & Santa Fe R.R.*, 287 S.W.2d 813 (Mo. 1956). Missouri has not gone as far as have the federal courts, which have foreclosed a jurisdictional issue that was not raised or decided in a former proceeding, even to objection by persons not party to that former proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

92. Collateral attack is a decreasingly important or available remedy. See *Healy v. Atchison, Topeka & Santa Fe R.R.*, 287 S.W.2d 813 (Mo. 1956). See also *Dobbs, Beyond Bootstrap: Foreclosing the Issue of Subject Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

93. See cases cited note 92 *supra*.

parties that differs from one that results from any other error is the possibility that the victorious party will lose his victory by a late, successful objection to jurisdiction. The plaintiff who may lose his victory without hope for retrial is not the one who will seek the writ, as he is the proponent of jurisdiction—unless he loses on the merits. It may be quite reasonable to argue that the plaintiff should look out for himself. Nonetheless, objection to jurisdiction can waste much judicial effort, whoever wins. If the jurisdictional error is not waivable, it may be worth the cost to provide interlocutory review by way of superintending control in such cases.

Where the problem is one of traffic control and conflict avoidance between courts or between courts and administrative agencies, superintending control can be justified without recourse to a “jurisdiction” label. These are always a matter of concern to a superintending court, because they relate to the operation of the judicial system as such. Moreover, such cases can be quickly handled, and they normally arise only once. Conflict between circuit and appellate courts usually involves post-conviction orders which are appealable. If, however, a circuit court insists on execution despite superseedeas, a writ to stop execution is easily justified and quickly issued. If conflict is between trial courts, or between a court and an administrative agency, the writ is likely the only way to avoid confusion and wasted effort (and an undue burden on the litigants). The writ has issued to avoid imposition of inconsistent obligations on a party by orders from two courts,⁹⁴ to prevent multiple litigation of the same issues, or to force litigation of related issues in the same proceedings.⁹⁵

b. Quasijurisdiction: Service of Process, Venue, and Local Actions

In Missouri, want of jurisdiction to adjudicate as to the defendant (or, stated more concisely if less accurately, want of “personal jurisdiction”) and improper venue (other than in some local actions) are waivable by the aggrieved party. Both are grounds for invoking superintending control. As to venue, exercise of superintending con-

94. *State ex rel. O’Connel v. Nangle*, 365 Mo. 198, 280 S.W.2d 96 (En Banc 1955); *State ex rel. Kaiser v. Miller*, 316 Mo. 372, 289 S.W. 898 (1926).

95. *State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391 (Mo. En Banc 1975), changing the rule of *State ex rel. Dunphy v. Eversole*, 399 S.W.2d 506 (St. L. Mo. App. 1960), because of an amendment to the supreme court rules; *State ex rel. Catholic Charities of St. Louis v. Hoester*, 494 S.W.2d 70 (Mo. En Banc 1973); *State ex rel. Dzurian v. Hoester*, 494 S.W.2d 67 (Mo. En Banc 1973). For a case in which the jurisdictional language may have misled a court, see *Cutten v. Latshaw*, 344 S.W.2d 257 (K.C. Mo. App. 1961).

trol may have come in part from the careless equation of "jurisdiction" with "venue" in early cases.⁹⁶ But it is easier (if still quite difficult) to justify enforcement of venue rules by writ through the interrelationship between venue and service of process, which was established in *Yates v. Casteel*⁹⁷ and carried to an extreme in *State ex rel. Rhine v. Montgomery*.⁹⁸ In *Yates* the trial court's venue was conceded, but it was held that the court could not obtain personal jurisdiction by service of process in a county other than the one in which the issuing court sat. The holding was based on a reading of the venue statute as implying a territorial limit on the service of process. *Rhine*, on the other hand, held that a defect in venue was a defect in service.⁹⁹ As a result, improper venue, like want of personal jurisdiction, became a ground for collateral attack on default judgments after the period of limitations had run.

Sufficiency of service is a prerequisite to assertion of personal jurisdiction, and personal jurisdiction is jurisdiction for all purposes, including superintending control. Or so goes the reasoning. Once, courts bound only those who submitted to their judgments, and the efficacy of those judgments often depended upon the authority of officers of the court, or of the town or lord who held the court, to seize the defendant or his goods.¹⁰⁰ Such authority to seize or arrest was conferred by a writ of summons and was territorially limited. Hence, it made some sense to speak of the territorial limits on a court's personal jurisdiction and of the necessity of service of process to assert such jurisdiction. Today, the connection between authority to bind by judgments and authority to arrest or seize is gone, but the formality of service of process as a kind of symbolic arrest remains, along with the concept of territorially limited personal jurisdiction. Now, however, process is served by persons who have no authority to seize or arrest, and is authorized by state law

96. See, e.g., *Lindell Real Estate Co. v. Lindell*, 133 Mo. 386 (1895).

97. 329 Mo. 401, 49 S.W.2d 68 (1932).

98. 422 S.W.2d 661 (Spr. Mo. App. 1967).

99. *Id.*

100. The forms of writs are set out in H. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING CIVIL ACTIONS § 51 (1894). A writ took one of two forms, both of which were addressed to the sheriff. The person served could be ordered to set things right (as set out in the writ) or show cause why he would not, or he could be ordered to appear at a specified place and time to answer the complaint set out in the writ. Where the writ was returned and the defendant did not appear, he could be arrested by authority of the writ, *capias ad respondendum*. Often the *capias* was the only writ issued to save time. *Id.* at 98.

with respect to persons who are beyond the reach of that state's coercive power. As between nations or parts of a federal system, constitutions, treaties, and conventions, as well as local laws, limit the extent to which a court will call a person to attend or suffer judgment.¹⁰¹ Insistence on giving proper formal service jurisdictional significance may be explained as either an anachronism, or as a means by which certainty is assured with respect to giving notice. It is likely a little of both.

If personal jurisdiction may be conferred by consent, it begins to look more like privilege against judgment that arises from the defendant's relationship to the forum, rather than the regulation of intercourt or intergovernmental relationships. No greater international or interstate issue is raised by personal jurisdiction than by interstate or international taxation or by choice-of-law. Clearly, however, these are not matters of jurisdiction, even though, like notice, they may affect enforcement of a judgment. Within a state, the connection between service of process and a court's personal jurisdiction serves only a notice assurance function; it makes little sense to tie service to enforcement of venue restrictions, and thus to treat counties or circuits like sovereign states. In any case, defects in service and want of personal jurisdiction are hard to distinguish from other waivable defenses in terms of justifying the exercise of superintending authority. There is no special need for superintending control over these errors.

If venue is not jurisdictional, it is even less attractive as a subject for protection by writ. Venue does generally assure that the forum will not be inconvenient to the defendant.¹⁰² Where a forum with proper venue is inconvenient, the defendant may seek another—*e.g.*, by a motion to dismiss, grounded on *forum non conveniens*. In both cases of inconvenience, the defendant must look

101. The effect of a court's acts is limited by locally effective rules of law which limit a court's assertion of authority, including accepted international and interstate custom, and by the practices of courts in other states or countries respecting recognition and enforcement of judgments. Normally, in the United States, local validity and compulsory recognition of judgments ("full faith and credit") are usually co-extensive, but there are areas—*e.g.*, injunctions, where a judgment or decree is valid in the rendering state but is not entitled to full compulsory recognition.

102. Jurisdiction to adjudicate with respect to a given defendant is far less concerned with the assurance of a convenient forum to the defendant. The balance in determining whether there is such jurisdiction is between the plaintiff's convenience and the unreasonableness of a state's serving that convenience. *See International Shoe v. Washington*, 326 U.S. 310 (1945); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

out for himself or lose his objection. Again, it is hard to see why such protection, which does not affect the operation of the judicial system or state government, should be a matter of special, superintending concern. But some venue is a bit more serious than other venue in Missouri. In some local actions, venue is not waivable, even though it is also not a matter of jurisdiction. This legal solecism is the product of the decision in *Howell v. Reynolds*.¹⁰³

In the earliest days of jury trials all suits were "local," because jurors, who were also witnesses, were drawn from the place where the cause of action "arose." Once selected, the jury could be taken elsewhere for trial.¹⁰⁴ A result of this practice is the so-called "local action rule," which limited suits concerning title to or possession of realty to the state or county where the land lies.¹⁰⁵ In 1909, this rule produced an exception to the requirement of full faith and credit to judgments, when the Supreme Court held in *Fall v. Eastin*¹⁰⁶ that a state court had no "jurisdiction" to render a decree with respect to title to land in another state. Despite the jurisdictional language in that case, state courts have rendered and enforced decrees with respect to land in other states.¹⁰⁷

Missouri's present special venue statute for local suits provides:

Suits for the possession of real estate, or whereby the title thereto may be affected, or for the enforcement of the lien of any special tax bill thereon, shall be brought in the county where such real estate, or some part thereof, is situated.¹⁰⁸

This statute had its origin in a statute that related only to suits in equity.¹⁰⁹ The first portion of the present statute appeared in the 1866 Revised Statutes and was a minor revision of the 1856 version which spoke of suits "concerning real estate."¹¹⁰ The second portion

103. 249 S.W.2d 381 (Mo. 1952).

104. See A.T. VONMEHREN, *THE LAW OF MULTISTATE PROBLEMS*, 779-80 (1965).

105. *Livingston v. Jefferson*, 15 F. Cas. 660 (No. 8411) (C.C. Va. 1811).

106. 215 U.S. 1 (1909). For a discussion of this case, see B. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

107. See, e.g., *Rozan v. Rozan*, 49 Cal.2d 322, 317 P.2d 11 (1957); *McElreath v. McElreath*, 162 Tex. 190, 345 S.W.2d 722 (1961).

108. § 508.030, RSMo 1969.

109. Suits in equity concerning real estate or whereby the same may be affected, shall be brought in the county within which the defendants or a majority of them, if inhabitants of the state, reside; or if all the defendants are not residents, then in any county.

Ch. 128 § 2, RSMo 1835.

110. Ch. 128, RSMo 1856; Ch. 163, § 4 G.S. 1866.

of the present statute was added in 1909.¹¹¹ *Coleman v. Lucksinger*¹¹² held that this venue provision was a modification of the old "local action rule," and that suits which affect title "indirectly" are excluded from that local venue requirement. But cases before and after *Coleman* interpreted the statute in a way which made local venue as waivable as any other venue.¹¹³ In *Rice v. Griffith*¹¹⁴ damages were sought in a suit in Jackson County for breach of a contract for the sale of land in Clay County—not a local action.¹¹⁵ The defendant-buyer counterclaimed for specific performance, clearly within the special venue statute, but no objection to the venue was made until after the plaintiff appealed the defendant's victory on the counterclaim. The supreme court held that because "circuit courts are courts of general . . . jurisdiction . . . the plaintiff first presenting this point in her motion for rehearing in the Kansas City Court of Appeals, waived any issue with respect to venue."¹¹⁶ That should have settled matters, but it did not. In *Howell v. Reynolds*¹¹⁷ suit was brought in the City of St. Louis for damages for fraud in the procurement of a note and deed of trust on land in St. Louis County and for a decree to cancel the deed of trust. Venue would have been proper were the action not local—and it once was not.¹¹⁸ The venue issue was not raised until appeal, which should have foreclosed it, after *Rice*. But *Rice* was "distinguished" and limited to counterclaims. Venue under section 508.030 was held not waivable.¹¹⁹ After carelessly saying that "the trial court was without jurisdiction to decree cancellation of the deed of trust," this court conceded that no venue, not even local venue, was jurisdictional.¹²⁰ Otherwise local counterclaims would be included in the statute, and *Howell* stated that they were not.¹²¹ This was not a case where

111. § 1753, RSMo 1909.

112. 224 Mo. 1, 123 S.W. 441 (En Banc 1909).

113. See *Ulrici v. Papin*, 11 Mo. 43 (1847); *Lindell Real Estate Co. v. Lindell*, 133 Mo. 386, 33 S.W. 466 (1895); *Rice v. Griffith*, 349 Mo. 373, 161 S.W.2d 220 (1942).

114. 349 Mo. 373, 161 S.W.2d 220 (1942).

115. Were the seller seeking specific performance or damages equal to the price, however, it would be local. *Sisk v. Molinaro*, 376 S.W.2d 175 (Mo. 1964). But see *Bladdick v. Ozark Ore Co.*, 381 S.W.2d 760 (Mo. 1964).

116. 349 Mo. at 380, 161 S.W.2d at 223.

117. 249 S.W.2d 381 (Mo. 1952).

118. *Briscoe v. Longmire*, 148 Mo. App. 594, 128 S.W. 521 (St. L. Ct. App. 1910), overruled *sub silentio*, *Marston v. Catterlin*, 290 Mo. 185, 234 S.W. 816 (1921).

119. 249 S.W.2d 381, 383-84 (Mo. 1952).

120. *Id.*

121. *Id.*

achieving a desired result required making bad law. The appellees received what they wanted despite the court's venue decision. The supreme court ordered the trial court to amend its judgment to include an injunction against enforcement of the note, which rendered the deed of trust worthless. Nor was this decision required in order to further a policy of keeping actions at home; no such policy seems to exist, given the statement in *Howell* about counterclaims, and the statutory provisions for transfer of cases after they are filed.¹²² Neither the cases cited by the court in *Howell*¹²³ nor the language or history of the venue statutes¹²⁴ support the nonjurisdictional nonwaivable venue decision. *Howell* accomplished only two things: it makes difficult agreement by the parties to a local lawsuit to try the suit in the most convenient forum, and it threatens the stability of judgments, unless it is limited to late, direct attack.¹²⁵ All this might not be so serious were it fairly easy to determine what is and what is not within the reach of section 503.080. But it is not.¹²⁶

122. §§ 503.080, .090, RSMo 1969.

123. The court said that "the statute is mandatory as to venue . . . and this court has consistently held it to be; and its provisions cannot be waived." 249 S.W.2d at 383. The following cases were cited: *Castleman v. Castleman*, 184 Mo. 432, 83 S.W. 757 (1904); *State ex rel. Gavin v. Muench*, 325 Mo. 210, 124 S.W. 1124 (En Banc 1910); *Alluvial Realty Co. v. Himmelberger-Harrison Lumber Co.*, 287 Mo. 299, 229 S.W. 757 (1921); *Marston v. Catterlin*, 290 Mo. 185, 234 S.W. 816 (1921); *State ex rel. Minihan v. Aronson*, 350 Mo. 309, 165 S.W.2d 404 (1942). In *Castleman*, venue was held proper; in *Gavin* want of proper venue was raised both at trial and in a petition for a writ of prohibition; in *Alluvial Realty*, it was held that a plea in abatement as to venue was properly made. In none of these cases could the issue of waiver, much less waivability, have come up. *Marston* held that the trial court improperly refused to hear an action for accounting with respect to land in another county. As the objection was made, waivability was irrelevant. The strongest and most direct support for *Howell* is *Minihan*, which had nothing whatever to do with venue under section 503.030. But *Minihan* did contain random dicta at the end of the opinion which suggested the rule in *Howell*.

124. The venue statutes all provide that the action "shall be brought" where the statute indicates it should. The language of section 503.030, RSMo 1969, is no more mandatory than is that in section 503.010 or section 503.020, relating to suits commenced by summons or by attachment.

125. Unwaivable, nonjurisdictional venue in *Howell* may be so unwaivable as to allow objection to venue to survive the lawsuit and be raised by the losing defendant by way of collateral attack.

126. Unless the effect of a judgment on the right to possession or the title is "direct"—e.g., by ordering conveyance or removing a cloud from title, it should not be within the local venue statute. See *State ex rel. South Missouri Lumber Co. v. Deary*, 180 Mo. 53, 79 S.W. 454 (En Banc 1903); *Bladdick v. Ozark Ore Co.*, 381 S.W.2d 760 (Mo. 1964). But see *State ex rel. City of Kirkwood v. Reynolds*, 265 Mo. 88, 175 S.W. 575 (En Banc 1915). Compare the statement in *Howell* that a counterclaim will not affect venue, 249 S.W.2d at 383-84, with *State ex rel. Gavin v. Muench*, 225 Mo. 210, 124 S.W. 1124 (En Banc 1910), which held that an affirmative defense made that suit local.

The *Howell* supervenue may at first appear to be an attractive ground for superintending control, but it is not. The consequences of erroneous venue are only more extreme than other reversible error when objection is not made before appeal. Once made, the ruling is *res judicata*, unless reversed on appeal. The issue remains a source of reversal and retrial only if the person aggrieved by that error loses at trial, or if the person aggrieved wins at trial but must counter a successful appeal by the plaintiff. Because *Howell* stated that local venue has nothing to do with jurisdiction, even the most formalistic approach to the issuance of writs should exclude such venue as a ground for superintending control. Moreover, there is no greater reason for special intervention to cure error with respect to venue or local venue than with respect to any other potential ground for reversal that might be raised by a defendant.

c. Jurisdiction to Render the Particular Judgment

A superintending writ will issue to cure erroneous refusal to dismiss for failure to state a cause of action. This writ will issue only if the petition cannot be amended to state a claim to relief,¹²⁷ but that is no limitation on review. If a written opinion accompanies denial of a writ, the exercise of superintending authority is no different from any other appeal. Use of the writ is justified by saying that erroneous refusal to dismiss is “in excess of” jurisdiction or “without” jurisdiction. The latter characterization implies that a trial

127. An attempted rationale was set out in *State ex rel. City of Mansfield v. Crain*, 301 S.W.2d 415 (Spr. Mo. App. 1957):

A greater difficulty is in locating and defining the line of demarcation between those cases where the court has jurisdiction of the subject matter, yet undertakes by some act to exceed such jurisdiction so obtained and is therefore subject to prohibition, and those where the court has jurisdiction and is simply acting erroneously within such jurisdiction.

. . . .

Many cases give as the reasons for issuance of the writ that the plaintiff has not stated and his petition *cannot be amended to state* a cause of action. . . . Although a rule welded from such statements may not follow strict theory, in that it makes the inability to act without error synonymous with lack of jurisdiction to commit the error, it does furnish a practical guide to distinguish between error within jurisdiction and excess of jurisdiction.

Id. at 420-21. Notice that if there is no demurrer, the court may well grant relief where no cause of action “exists,” regardless of whether the petition is amendable to state a cause of action. Moreover, if a superintending court will not *hear* and decide a petition where it finds that a cause of action may be stated by amendment, the trial will proceed on the unamended petition. If it does hear and decide such a petition, the distinction drawn here serves no function.

court has no jurisdiction not to be *correct*, but that position was rejected by the supreme court long ago. In *State ex rel. Union Depot Railroad Co. v. Valliant*¹²⁸ a writ of prohibition was denied because failure to state a cause of action does not raise a jurisdictional issue.

The strongest Missouri authority for the "jurisdictional" nature of the claim to relief is in two supreme court cases, *Charles v. White*¹²⁹ and *American Constitution Fire Assurance Co. v. O'Malley*.¹³⁰ In *Charles* the supreme court held that a judgment could not have preclusive effect with respect to issues not raised by the lawsuit. The court stated that there was no "jurisdiction" to decide issues not properly before the court.¹³¹ Sole authority for this jurisdictional language was a New Jersey case¹³² in which "jurisdiction" in this context was explained in terms of notice and opportunity to defend, and not of the authority of a court to render judgment.¹³³ *Charles* was followed in *State ex rel. Eichorn v. Luten*.¹³⁴ In that case a trustee had informed the remaindermen of a trust that he intended to terminate the trust in favor of the life beneficiary, claiming authority to do this under a specific provision in the trust instrument. One of the remaindermen brought suit to prevent distribution. The other remaindermen were joined as defendants, and, because they agreed with the plaintiff's action, defaulted. After judgment was entered on the default, the remainderman-plaintiff and the trustee entered into a settlement whereby most of the trust assets would be distributed to the life beneficiary, and the rest would go to the plaintiff. The defendant remaindermen's motion to set aside their default was denied. Instead, the court ordered specific performance of the settlement. The remaindermen petitioned the court of appeals for a writ of prohibition and won. As this was a writ case rather than an appeal, the appellate court couched the grant of the writ in jurisdictional terms:

In order that a court have jurisdiction to adjudicate, there must be jurisdiction of the person and of the subject matter, and in addition the court must have jurisdiction to render the particular judgment in the particular case before it. *Chuning v. Calvert*, 452

128. 100 Mo. 59, 13 S.W. 398 (1890).

129. 214 Mo. 187, 112 S.W. 545 (1908).

130. 113 S.W.2d 795 (Mo. 1937).

131. 214 Mo. 187, 211, 112 S.W. 545, 548 (1908).

132. *Munday v. Vail*, 34 N.J.L. 418 (1871).

133. *Id.* at 423.

134. 515 S.W.2d 857 (Mo. App., D. St. L. 1974).

S.W.2d 580 (Mo. App. 1970); *State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172 (Mo. App. 1964). Furthermore, the jurisdiction to decide particular issues in a particular case is limited to those issues raised by the pleadings. *State ex rel. Houser v. Goodman*, 406 S.W.2d 121 (Mo. App. 1966).¹³⁵

The last sentence, which finds no support in the cited case, is clearly wrong if it means that a court may not decide or foreclose by decision an issue not raised in the pleadings.¹³⁶ In any case, both *Eichorn* and *Charles*, especially when read in light of *Union Depot Railroad Co.*, are more easily understood as standing for the well-known constitutional principle that no person may be bound by a judgment as to which he had no adequate notice or opportunity to defend. Inadequate notice and opportunity to defend are grounds for avoidance of a judgment, but they have nothing whatever to do with jurisdiction.¹³⁷ Moreover, in *Eichorn* there was no special need for superintending relief—even from the point of view of the remaindermen. It is doubtful that the trustee would have distributed any assets before it was clear that the remaindermen had no way to attack the distribution. Had the remaindermen appealed the denial of their motion to set aside their defaults, had they sued for an injunction to prevent distribution, or had they waited and then sued to charge the trustee for improper distribution of the assets, the trustee's authority to distribute would have been an issue.¹³⁸ Since the remaindermen were neither parties to nor represented in any sense by parties to the settlement, they could not be bound by it, so any distribution to the plaintiff-remainderman could subject the trustee to surcharge. Prohibition was, however, probably the quickest way to determine the issues and to save the trustee a great deal of trouble.

*American Constitution Fire Assurance Co. v. O'Malley*¹³⁹ repre-

135. *Id.* at 859.

136. For example, merger and bar will preclude parties on matters not raised by them if they should have been raised in that proceeding. Also, a plaintiff is not bound by his *ad damnun* from receiving a higher damage award in a contested case.

137. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

138. Had the appeal from the order refusing to set aside the defaults been refused or lost, it would have been because the remaindermen defendants were not aggrieved by the settlement and order—they were not bound by it. Had the appeal been successful, of course, they would have amended their pleadings and attacked the settlement in the trial court and on appeal. Appeal was probably not necessary anyway, since the remaindermen were not bound, and the trouble they could have caused the trustee may have led to a more generally acceptable settlement with respect to distribution of assets.

139. 113 S.W.2d 795 (Mo. 1937).

sents another use of "jurisdiction to render the particular judgment." Suit was brought to reverse the refusal of the Superintendent of the Department of Insurance to allow a rate increase under a statute whereby such decisions were reviewable *de novo* in circuit court. The Superintendent based his decision on individual experience data, but the insurers, joined as plaintiffs in the suit to reverse that decision, insisted on basing their claim on aggregate data. The circuit court dismissed and the supreme court affirmed, apparently on the ground that the circuit court did not have jurisdiction to hear a claim based on aggregate data. The supreme court also said, however, that jurisdiction of a circuit court does not depend on the statement of a cause of action.¹⁴⁰ At most, this rather opaque decision can be interpreted as support for the proposition that jurisdiction to review an administrative decision, when based on statute, is limited to the scope allowed by statute. The decision has nothing to do with claims to relief, whether common law or statutory, outside the area of administrative law.¹⁴¹

All the loose talk about jurisdiction and indiscriminating use of case authority in the writ cases resulted in *Chuning v. Calvert*.¹⁴² In this case, the supreme court's holding in *Union Depot Railroad Co.* was neither cited nor followed, and the court of appeals presented the first square holding that a court has no jurisdiction if the plaintiff does not state a claim on which relief may be granted. Kansas City had been allowed to intervene in a suit by a Kansas City fireman for personal injuries. Kansas City had paid the fireman for his injuries and sought to recover this amount from the defendant. Missouri prohibits assignment of, or subrogation to, personal injury claims, so the intervenor could not have stated a cause of action on which relief could be granted. But no one objected until after the jury returned with a verdict for Kansas City and none for the fireman. The fireman appealed, arguing that Kansas City stated

140. *Id.* at 802.

141. See *State ex rel. State Highway Comm'n v. Elliot*, 326 S.W.2d 745 (Mo. En Banc 1959), as to the scope of review in condemnation cases. Appeal was fully adequate, but the jurisdiction point was not completely without merit. See also *State ex rel. Tucker v. Mattingly*, 275 S.W.2d 34 (Spr. Mo. App. 1955), which held that a quo warranto proceeding was not barred by a dismissal on the merits of a similar suit by private citizens. As the attorney general is a real party in the quo warranto proceeding, there was no problem in holding that he was not bound by the dismissal in the first suit—and that is what the court held. Alternatively, the court held that the circuit court had no jurisdiction in the first suit on issues that may only be raised by quo warranto. See notes 88 and 89, *supra*.

142. 452 S.W.2d 580 (K.C. Mo. App. 1970).

no cause of action, and hence should not have been allowed to intervene. In Missouri, failure to state a cause of action may be raised for the first time on appeal.¹⁴³ Moreover, error relating to the allowance of subrogation to personal injury claims is probably plain error.¹⁴⁴ But for some unfathomable reason, the court of appeals ignored these open doors, and held that the intervenor's failure to state a claim deprived the circuit court of jurisdiction to render judgment. The court cited no case that gave substantial support for its analysis.

If *Chuning* were the law, the implications for review by writ would be great, but no greater than its implications for the stability of judgments. Consider the position of a wife who sued for loss of her husband's consortium and won before the supreme court decided, in another case, that such a cause of action exists. Is her judgment subject to collateral attack? *Chuning* might also be authority for holding that a third party complaint may not be brought because it could not be filed as a plaintiff's claim. After all, the Missouri Rules do not affect jurisdiction,¹⁴⁵ and a suit for damages states no cause of action unless actual loss is alleged. Other equally silly speculation might be appropriate if *Chuning* were good law in Missouri.

Where the cause of action is statutory, the problem is the same. The association between statutory remedies and jurisdiction first arose in divorce cases, but the decisions in which the issue is discussed were all on direct appeal. Other authority for the jurisdictional nature of a claim under a statutory right to relief comes from election cases. In *State ex rel. Bonzan v. Weinstein*¹⁴⁶ prohibition was sought to prevent the entry of an injunction ordering a new primary election. Had the parties waited a day, appeal would have been available, and it could have been given expeditious treatment by the court of appeals. The election law required that there be a recount before any other remedy was sought, but a recount here would have been futile because the election was by voting machine, and no one was contesting the actual count. On the other hand, a new primary election for only one party could have produced serious problems. Prohibition was granted, and the court of appeals justified it by talking about jurisdiction:

143. Mo. SUP. CT. R. 55.27.

144. See Mo. SUP. CT. R. 79.04.

145. Mo. SUP. CT. R. 51.01.

146. 514 S.W.2d 357 (Mo. App., D. St. L. 1974).

Since election contests are statutory actions . . . the jurisdiction of the circuit court is defined by the election statutes and "the letter of the law is the limit of its power."¹⁴⁷

To support this proposition, the court cited *State ex rel. Phillips v. Barton*.¹⁴⁸ A close reading of *Phillips*, however, suggests that the "limit of its power" language has little relevance to jurisdiction. The court in *Phillips* was more concerned with the correctness of decision. If *Bonzan* is taken seriously, then futility is no longer an exception to the requirement that administrative remedies be exhausted, if those remedies are set forth in a statute. More than that, *Bonzan* suggests that any error in the application of a statutory remedy not merely declaratory of common law—*e.g.*, damages provisions of the Uniform Commercial Code, is open to attack as void for want of jurisdiction. But *Bonzan* may be merely another example of the forced use of "jurisdiction" to justify the issuance of a writ.

Interlocutory review of claims of error in these cases is justifiable only if it will save judicial time or avoid injustice. The only way in which review of refusals to dismiss or to strike will save total judicial time by shortcircuiting bad claims is if it is more likely than not that such refusals are erroneous. And even if they were more often than not erroneous, the possibility of the plaintiff nevertheless losing on the merits should serve to limit the value of such shortcircuiting. Refusal of interlocutory review not only saves appellate court time, but also avoids premature lawmaking with respect to what remedies the law will allow. The argument that suffering trial and judgment on a bad claim is reason to grant a writ is not only probably wrong, but also irrelevant, especially if an interlocutory order of a court is unreviewable because it takes irreversible effect before final judgment.¹⁴⁹ The argument for interlocutory review then becomes identical to an argument for review of final judgments on

147. *Id.* at 362. The court could have justified the issuance of a writ by the need for expedition on a matter of public importance. See note 71 *supra*; *State ex rel. McGaughey v. Grayston*, 349 Mo. 700, 163 S.W.2d 335 (En Banc 1942). See also *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4 (Mo. En Banc 1975), in which the public importance of the issue overcame all the possible objections to the issuance of a writ, including the requirement under Supreme Court Rule 84.22 that the case first go to the court of appeals. A quick look at the cases indicates that appeal was more than adequate in this case to get the issues directly to the supreme court. See *In re M.K.R.*, 515 S.W.2d 467 (Mo. En Banc 1975).

148. 300 Mo. 76, 254 S.W.2d 85 (En Banc 1923).

149. See, *e.g.*, *State ex rel. Missouri State High School Activities Ass'n v. Schoenlaub*, 507 S.W.2d 354 (Mo. En Banc 1974). The court spoke in jurisdictional terms but a quick translation shows the problem to be failure to state a ground for judicial relief.

appeal. If superintending control is exercisable to prevent error in such a case, then inadequacy of appeal would be enough in itself to trigger superintending authority. This is at least theoretically incorrect and is flatly inconsistent with legislative control of access to appellate review.

3. Excess of Jurisdiction

a. Generally

(1). Necessity of the Category

If superintending control is confined to the administration of the judicial system, it must include concern for what are not strictly matters of ministerial duty or of jurisdiction. But to call error of that sort "excess of jurisdiction" is a bit dramatic. Two kinds of claims of error that do not relate to jurisdiction or ministerial duty have already been suggested as properly reviewable by the exercise of superintending control: where the matter arises because of conflict between courts in the exercise of authority or because of threatened duplication of judicial effort,¹⁵⁰ and where the matter arises because of a judge's failure to act at all within a reasonable time as to a matter properly before him.¹⁵¹ In the latter case, the concern is with the functioning of the system at all, rather than with the maintenance of jurisdictional lines, the performance of duty as a ministerial officer of the system, or fairness to the parties. If a judge is obligated to act in a fair, rational, and informed way in the performance of his duties, failure so to act may be seen as the equivalent of a refusal to act at all, since that also goes to the failure of the system to function at all, rather than merely to malfunction. If a writ is a proper method to compel decision, it may also be a proper method to prevent error which is so clearly and obviously *unlawful* that it cannot be justified as the product of rational, informed, fairly exercised judgment. Fortunately, system failure of either kind is rare and can be dealt with easily. The major problem in such a case is whether the judge actually did what he is accused of doing in the petition for a writ.

As a category of claims of error that invite superintending intervention, "excess of jurisdiction" has come to include much more than matters that implicate the proper operation of the judicial system.¹⁵² The pressure to do justice, to correct error, to prevent

150. See notes 94, 95 *supra*.

151. See text after note 81 *supra*.

152. See, e.g., note 47 *supra*.

apparently improper imposition upon parties, and perhaps to settle legal questions—to make law—*now*, have given this category the quality of a rubber sack into which is tossed nearly every kind of error that the imagination of counsel or court cannot force into any other ground for a writ.

(2). Enforcement of the Mandate of an Appellate Court

When a case is remanded by an appellate court for further proceedings or the entry of an order, it is accompanied by the appellate court's mandate. If that mandate is not followed, the appellate court will enforce it by writ.¹⁵³ It is not difficult to justify a writ in such cases, because failure to obey the direct order of a superior tribunal, framed for the specific case, jeopardizes the maintenance of authority relationships within the system. This is significantly different from the erroneous application of controlling authority. The problem is that, from the standpoint of efficient judicial operation, the difference is really not all that clear. A mandate may be unclear in its requirements. This may be because the appellate court gave insufficient guidance in its opinion, or because it purported to deal with more than was presented to it or was necessary to disposition. The appellate court may also have left unclear or untreated the appropriate response by the trial judge to matters which may arise after remand, and with which that judge must deal.

Whether disobedience of the mandate comes from excusable mistake or from defiant refusal to obey, a writ may be inappropriate in terms of judicial economy. The mandate may issue because of reversal of an order dismissing a petition or granting summary judgment, or it may require a new trial. In such cases, the person aggrieved by the trial court's disobedience may either win his case or have other grounds for reversal as well. In *Wells v. Henry W. Kuhs Realty Co.*¹⁵⁴ a plaintiff's child was injured on defendant's junk pile and later died of those injuries. Suit for wrongful death was brought on two theories: negligence per se, because the junk pile was in violation of city ordinances, and maintaining an attractive nuisance. The trial court dismissed the case, but the supreme court reversed, saying that either ground for recovery stated a proper

153. If the issuing court is the supreme court, then that court will also enforce its mandate. The petitioner for the writ need not comply with the requirements of Supreme Court Rule 84.22, which makes good sense if the mandate needs clarification in order to be enforced.

154. 269 S.W.2d 761 (Mo. 1954).

cause of action. Nevertheless, after remand, the trial court struck the negligence per se claim. The plaintiff sought a writ, and the supreme court ordered the claim reinstated.¹⁵⁵ Had the plaintiff gone to trial he might have won on the attractive nuisance claim, obviating any need to enforce the mandate in that case. On the other hand, there was so little justification for the trial court's action that the issuance of the writ required relatively little effort on the part of the supreme court.

If the failure to obey the mandate effectively deprives a party of its benefit, a writ may be more justified, as it was in *State ex rel. Stites v. Goodman*.¹⁵⁶ A school district had sued for possession of a nearly completed building and demanded damages from the contractor for nonperformance. The contractor counterclaimed for 90 percent of the contract price for substantial completion and for damages arising from delays for which the plaintiff was allegedly responsible. The school district was put into possession of the building, and later damages were awarded to both sides. The supreme court reversed¹⁵⁷ in order to allow the trial judge to use more accurate figures. The supreme court stated that the school district was entitled to a completed building, and its mandate ordered the trial court to set off against the contractor's claim any money that "has in fact been expended to finally complete the building."¹⁵⁸ The trial court read the opinion as allowing the school board to set off expenditures made in fact, and not merely owed or estimated, in the actual completion of the building. But the school district, in possession since early in the litigation, had no plans for completing the building. Nonetheless, the trial judge ordered that the entry of judgment for the contractor be stayed until such plans were made and money was expended. Mandamus was sought to order entry of judgment and thereby to limit the amount that the school district could set off against the contractor's claim. The supreme court, which seemed unjustifiably exasperated with the trial judge's misreading of its mandate, granted the writ.¹⁵⁹

b. Discovery

Missouri's rules of civil procedure governing discovery¹⁶⁰ rely

155. *State ex rel. Wells v. Mayfield*, 281 S.W.2d 9 (Mo. En Banc 1955).

156. 351 S.W.2d 763 (Mo. En Banc 1961).

157. *Bloomfield Reorganized School Dist. No. R-14 v. Stites*, 336 S.W.2d 95 (Mo. 1960).

158. *Id.* at 102.

159. 351 S.W.2d 763, 767 (Mo. En Banc 1961).

160. Mo. SUP. CT. R. 56-62. These rules were amended effective January 1, 1975. The

heavily on trial court discretion for their application. As a result, lawmaking in this area is shifted generally to the trial court level, and a greater than normal variation in interpretation and application must be tolerated. The appellate court's role in this area is diminished because appellate review of error in the administration of discovery, if it comes at all, should come after final judgment, and should be limited to error that is not "harmless."¹⁶¹ Therefore, it should be surprising that Missouri's appellate courts have insinuated themselves in the administration and interpretation of discovery rules to the extent that they have. No matter what the discovery error, appellate intervention by writ is possible. If a court abuses its discretion, it acts "in excess of," or, despite the language of Rule 51.01,¹⁶² "without" jurisdiction. If the judge refuses to grant a motion to compel or deny discovery, or to issue a protective order because he believed he had no authority to do so, he is charged with refusal to perform a ministerial duty.¹⁶³

Consequences of erroneous discovery decisions may be serious and may deserve interlocutory relief. However, it does not follow that the decision to grant such relief is a matter for superintending control. If the proponent of discovery is denied access to information, and he has no other way of skinning his discovery cat, his cause may be so burdened as to be lost at trial. The best he could hope for is reversal and retrial. The opponent of discovery is in both a more difficult and a less difficult position with respect to an erroneous request or order for discovery. To be sure, an arguably correct discovery order may compel a party to divulge possibly privileged, often damaging, information because disobedience may result in serious sanctions,¹⁶⁴ which could cause him to lose his case.

cases in this part deal with the rules before amendment.

161. Improper denial of discovery has been held reversible error. *Norkunas v. Norkunas*, 480 S.W.2d 92 (Mo. App., D. St. L. 1972).

162. Rule 51.01 states:

These Rules shall not be construed to extend or limit the jurisdiction of the courts of Missouri, or the venue of civil actions therein.

163. *State ex rel. Williams v. Buzard*, 354 Mo. 719, 190 S.W.2d 907 (En Banc 1945); *State ex rel. St. Louis Pub. Serv. Co. v. McMullan*, 297 S.W.2d 431 (Mo. En Banc 1957). Federal practice is precisely the opposite. See 4 J. MOORE, FEDERAL PRACTICE ¶26.83 [9.-3] (2d ed. 1975). Nonetheless, a writ was issued to protect privileged information in *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972). In addition, the Supreme Court of the United States reviewed the application of FED. R. CIV. P. 35 by way of an extraordinary writ in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Discovery orders may also be appealable under 28 U.S.C. § 1292(b). See text accompanying note 13 *supra*. Of course, federal trial decisions are reported in *Federal Rules Decisions* and the *Federal Supplement*, and federal trial judges have occasion to exchange ideas and to participate significantly in rulemaking and rule revision.

164. See Mo. Sup. Ct. R. 61.01 before and after amendment.

Even if discovery orders are more clearly wrong, noncompliance may result in injury which is irremediable, either because any remedy is too late, or because the error was "harmless." On the other hand, the opponent may seek protective orders¹⁶⁵ which may limit the use of discovered material, and at the same time not deprive him of his objection to the discovery order or request.

The availability of interlocutory relief will help the opponent of a discovery request out of his dilemma by settling the correctness of the order. But it will also encourage opposition to discovery requests as a trial tactic. The trial judge may be discouraged from attempting to settle disputes with respect to requests for information, and the parties may be made more than normally unwilling to compromise or to seek clarification or compromise of demands for discovery, if the possibility of delay, and perhaps even an interlocutory decision holding the demand or order invalid, is possible. The availability of a writ in this area has also tended to bring appellate courts down on the side of limited discovery, and has increased the likelihood that trial judges will deny enforcement to debatable discovery requests.

The least attractive, but not the least used, ground for interlocutory review and relief in this area is the claim that interrogatories or requests for admission are vague, ambiguous, irrelevant, or burdensome in number. It is not hard to suspect that often such objections are made for delay and to avoid legitimate discovery. The English language is not a precision tool, and vagueness and ambiguity can be cleared up by counsel through informal contacts. Refusal of aid by interrogating or requesting counsel is certainly a ground for resisting objections to good faith efforts at compliance with the discovery request. Similarly, burdensomeness, whether in requests for information or inspection of documents or evidence, or in the number of interrogatories or requests for admissions, is properly a matter of negotiation between counsel, rather than a ground for resisting discovery. But the availability of interlocutory review does not encourage such communication between counsel, especially when the appellate courts readily find sufficient "uncertainty" or "vagueness" to protect the opponent of discovery. In *State ex rel. Gamble Const. Co. v. Carroll*¹⁶⁶ the supreme court prohibited a trial judge from requiring information concerning materials and labor on

165. See Mo. Sup. Ct. R. 56.01(c).

166. 408 S.W.2d 34 (Mo. En Banc 1966).

a specific job. One of the interrogatories was vague and uncertain because it sought "itemization" and "analysis."¹⁶⁷ If objecting counsel were really puzzled, a telephone call may have helped; but he has no incentive to aid the discovery process when he can delay it and possibly even avoid it by writ.

The divisions of the court of appeals have been enthusiastic in their protection of parties against interrogatories. In Springfield, answers may not be sought if they would not tend to prove anything and if they may call for inadmissible statements.¹⁶⁸ In St. Louis, interrogatories were prohibited because they were "obscure" and "unclear" and really did not help the interrogator.¹⁶⁹ In Kansas City, it was held that interrogatories could not be required if they "could conceivably constitute an unwarranted invasion of . . . privacy."¹⁷⁰ No issue of privilege was raised in that case.

A halfhearted and later ignored attempt to limit the use of the writ to control discovery practice is the decision of the supreme court in *State ex rel. Norfolk and Western Ry. Co. v. Dowd*.¹⁷¹ The plaintiff sued the relator, a railroad, for wrongful death arising from a collision between a railroad train and an automobile. The relator was given a list of 105 interrogatories which required 227 answers, some of them duplicative. The relator objected that the list was burdensome, and made specific objections to individual interrogatories. The court had two choices. It could have held that the writ was no longer available to cure discovery error, either from the supreme court or the court of appeals. The second choice was to decide the case on the merits, and either issue the writ because the interrogatories were bad, or deny it because the order was proper. The court tried to do both. It held the interrogatories proper and then stated:

Parties also should realize the fact that a writ is denied does not mean that the trial court is error-free. It means only that the trial court has not exceeded its jurisdiction to the point where the writ will lie. The alleged erroneous action of the court can still be preserved and presented on appeal from final judgment in the regular course of the litigation. . . .¹⁷²

167. *Id.* at 37.

168. *State ex rel. Kroger v. Craig*, 329 S.W.2d 804 (Spr. Mo. App. 1959). The proponent of discovery was seeking information from employees of the defendant, so the case is not completely on all fours with the discussion of interrogatories. The chief value of the decision in this case is its praise of dogs. *Id.* at 808-09.

169. *State ex rel. Premier Panels, Inc. v. Swink*, 400 S.W.2d 639 (St. L. Mo. App. 1966).

170. *State ex rel. Williams v. Vardeman*, 422 S.W.2d 400, 409 (K.C. Mo. App. 1967).

171. 448 S.W.2d 1 (Mo. En Banc 1969).

172. *Id.* at 4-5.

Most generously, this can be read to mean that there are grounds for reversal that are not reviewable by way of superintending control. But the line may be the same as that already drawn ad hoc between petitions that do, and those that do not receive summary treatment.

Dowd has been ignored as a ground for denying a writ. It has been cited in cases in which a writ has been denied, but only on the merits of the claim of error.¹⁷³ It was cited in what is probably still the most accurate statement concerning superintending control with respect to discovery:

We reaffirm the rule that the writ may not be utilized to infringe upon or direct a trial court's discretion. . . . *State ex rel. Norfolk and Western Railway v. Dowd*. . . . A presumption of right action is afforded respondent, and relator has the burden of establishing that respondent acted improperly. . . . *Notwithstanding the foregoing principles*, prohibition is the proper remedy where a trial court has ordered discovery and such order "exceeds its jurisdiction" . . . or is an abuse of discretion. . . .¹⁷⁴

When a discovery order provides access to evidence or information which is prohibited by the rules, or at least is not permitted by them, desirability of interlocutory relief increases. This is illustrated by *State ex rel. State Farm Mutual Automobile Insurance Co. v. Rickhoff*¹⁷⁵ and *State ex rel. Benoit v. Randall*.¹⁷⁶ In *State Farm* the Ford Motor Company was sued for damages resulting from an automobile collision allegedly caused by a defective Ford carburetor. The defendant sought and obtained an order allowing the defendant to inspect and test the carburetor—in Dearborn, Michigan. Ford did not offer, and the court did not impose, any safeguards against tampering with the carburetor. If the plaintiff could make out a

173. The supreme court has cited *Dowd* in a case in which it reviewed objections to interrogatories on the merits. *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889, 894 (Mo. En Banc 1970). The treatment of *Dowd* by the court of appeals is also instructive. In *State ex rel. St. Louis Land Clearance for Redevelopment Authority v. Godfrey*, 471 S.W.2d 938, 939 (St. L. Mo. App. 1971), *Dowd* was cited to support the issuance of a writ to prohibit the imposition of an oppressive number of interrogatories. In *State ex rel. Danforth v. Riley*, 499 S.W.2d 40, 42 (Mo. App., D.K.C. 1973), *Dowd* was cited as authority to support review of orders compelling answers to interrogatories. See also note 174, *infra*.

174. *State ex rel. Thomasville Wood Products, Inc. v. Buford*, 512 S.W.2d 220, 221-22 (Mo. App., D. Spr. 1974) (emphasis added). The petition was to review a trial judge's order to produce documents. The court issued the writ, because in its opinion, the documents would not "tend to prove an issue as engendered by presently filed pleadings." *Id.* at 223.

175. 509 S.W.2d 485 (Mo. App., D. St. L. 1974).

176. 431 S.W.2d 107 (Mo. En Banc 1968).

submissible case, of course, the finder of fact would have reason to discount any result of the carburetor test in Michigan that favored Ford, so the removal of the carburetor by the defendant from the protective custody of the plaintiff was not as serious as it may have appeared. A more serious problem arose in *Benoit*, where a physician was suing other physicians for slander and conspiracy to reduce the plaintiff's hospital staff privileges. He sought to inspect "all official hospital charts, including x-ray pictures, of all patients admitted to Research Hospital" over a period of several years. The trial court's grant of this request raised the issue of the physician-patient privilege rather acutely. In neither case was any protective order sought or issued. In both cases, the writ issued, and the court of appeals suggested that a protective order might be sufficient to withstand any subsequent objection to similar discovery orders. Similar problems arise with respect to trade secrets, physical examinations, or membership lists. But, again, examination and use of such information may be limited by a proper protective order, which is itself subject to review.

Where prohibition of discovery involves only relative advantage as between the parties, rather than privileged information or the security of evidence, the importance of preventing unwarranted discovery is marginal. In the case of "work product," which by definition is not protected by the attorney-client privilege, the rules have been amended to make such material discoverable on a showing that the proponent "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."¹⁷⁷ The rule also requires that the use of such materials be limited by protective orders. This change indicates a greater area for discovery and for the use of trial judge discretion. Past performance of the appellate courts, however, indicates that the new rules may actually increase the occasion for appellate court interference. Now, not only may the issue whether something is "work product" be reviewed, but so may the adequacy of the showing of "substantial need," the availability of a "substantial equivalent," and the protective order!

Error in a discovery order that compels divulging privileged information or endangers the security of evidence is hard to dismiss as simply undeserving of interlocutory review. Such error is the

177. Mo. Sup. Ct. R. 56.01(b)(3).

same as any committed in the judicial imposition of a disadvantage which is not effectively reviewable after final judgment—*e.g.*, interlocutory injunctions. The error was, however, committed in a manner which is presumably formally fair—*i.e.*, where each opponent has been afforded an adequate opportunity to be heard, for otherwise it may be so seriously wrong as to be within that class of decisions which cannot be justified as the product of informed, rational, and fairly exercised judgment. In such cases, of course, a writ is appropriate. If many arbitrary, erroneous decisions come from a court, more direct action with respect to the issuer is called for, to call attention to what is required of a judge. But where error in issuing the discovery order is simply a matter of incorrectness, then although provision for interlocutory appeal is justifiable, review by writ is not.

The writ is even less justifiable when the discovery order arguably trenches on “work product” or where interrogatories may be “vague” or “burdensome.” In such cases it is not hard to resolve doubts in favor of the trial judge’s order, whether it grants or denies discovery. The morals of the bar and the integrity of the attorney-client relationship are not compromised by erroneous decision here, nor is the burden imposed by “burdensome” or “vague” interrogatories sufficient to justify the delay and expense of exercising superintending control.

c. Irreversible Error

Some trial court error may alter a party’s position in a way which authorized appeal cannot correct. Usually this is because the error is in an interlocutory order which is not subject to appellate review. Sometimes, however, effective review is unavailable because it is potentially more harmful and expensive than is the trouble caused by the alleged error. For example, if error in the denial or dismissal of impleader were the basis for reversal, a plaintiff may be required to retry a case he has already fairly won, for reasons that relate solely to the claim by the defendant against a third person. Superintending control will provide interlocutory review of such error.¹⁷⁸ By being denied an opportunity to implead, the defendant has lost two advantages, neither of which is crucial to his remedy against the third party.¹⁷⁹ He has lost the convenience of a single

178. State *ex rel.* Laclede Gas Co. v. Godfrey, 468 S.W.2d 693 (St. L. Mo. App. 1971).

179. Impleader is not always a matter of right, and a perfectly good, unobjectionable impleader may be refused in some cases. See Mo. Sup. Ct. R. 52.11.

proceeding for the resolution of interrelated liability questions, and he has lost the assurance that the issue of damage will be decided consistently as between plaintiff, defendant, and the third party who may be liable to that defendant. It is no serious problem to refuse to review most such error, unless it is assumed that without the threat of interlocutory review trial judges will tend to err with respect to the limits of third party practice.

In states that provide for interlocutory appeals, there usually is review of interlocutory coercive orders, such as injunctions, restraining orders, and receiverships.¹⁸⁰ In Missouri, no such review of interlocutory injunctions and temporary restraining orders is available. However, error in the issuance of coercive interlocutory orders is often subject to collateral attack by prohibition, mandamus, or habeas corpus.¹⁸¹ Of course, the availability of collateral attack on the enforcement of interlocutory coercive orders tends to make violation of those orders a less serious matter. This weakens the court's authority and can provide an argument, albeit circular, for interlocutory review by the exercise of superintending control to preserve that authority. But the availability of such interlocutory review is a reason for the denial of habeas corpus relief, because the opponent-violator has a chance to test the legality of the order. But a cutback in habeas corpus would weaken the argument for the need for superintending control. This gets us back to the main point: the problem here is one of effective review, and nothing else. If this is so, then the problem is properly referred to the agency in charge of providing such review—the legislature.

Very few writs have issued to prevent enforcement of interlocutory injunctions or temporary restraining orders. The usual ground for a writ has been the trial judge's failure to exact a bond as a condition of granting interlocutory relief. A bond has been required as a condition to interlocutory injunctions and temporary restraining orders since Missouri began to legislate for itself.¹⁸² The modern provision is slightly expanded, and excepts "suits instituted by the state in its own behalf."¹⁸³ The exaction of a bond was first called "jurisdictional" (at least to justify the issuance of a writ of prohibition) in *State ex rel. Missouri Pac. Ry. Co. v. Williams*.¹⁸⁴ A circuit

180. See note 11 *supra*.

181. *State ex rel. George v. Mitchell*, 230 S.W.2d 116 (Spr. Mo. App. 1950).

182. Injunctions § 11, at 314, RSMo 1835.

183. § 526.070, RSMo 1969. The exemption for suits by the state first appeared in 1870.

Ch. 110, art. VII, § 11, RSMo 1872.

184. 221 Mo. 227, 120 S.W. 740 (En Banc 1909).

attorney sued some railroads to prevent them from charging more than a specified rate. The confiscatory nature of that rate was then before a federal court in a suit by the railroads against the State of Missouri. The railroads sought prohibition against further proceedings in the circuit court pending the outcome of the federal case, and against enforcement of a preliminary injunction without the requirement of a bond. Both prayers for prohibition were granted. The authority for the "jurisdictional" nature of the bond requirement was *City of St. Louis v. St. Louis Gaslight Co.*,¹⁸⁵ in which the court held that the opponent of a dissolved injunction could not recover damages for injuries resulting from that injunction because no bond had been filed. The only "jurisdictional" issue in the case was the authority to award damages to the opponent of the injunction where the proponent had not filed a bond. The court discussed the origin of the requirement of the bond in chancery practice to show the necessity of a bond to the opponent's claim for damages, not to the proponent's claim for an interlocutory injunction. However, it stated most *obiter*, a bond was now required by statute, and the court cited the statute's mandatory language.

Subsequent appellate decisions included unnecessary statements concerning the jurisdictional nature of the bond requirement.¹⁸⁶ In one case,¹⁸⁷ the court became unusually careless in its citations to authority, and cited section 1429 of *High on Injunctions* which gave the proposition even less support than did *St. Louis Gaslight Co.*:

[U]pon proceedings for contempt a defendant cannot escape liability for his disregard of the injunction upon the ground that the

185. 82 Mo. 349 (1884).

186. *Akin v. Rice*, 137 Mo. App. 147, 117 S.W. 655 (St. L. Ct. App. 1909); *State ex rel. Thrash v. Lamb*, 237 Mo. 437, 141 S.W. 665 (En Banc 1911); *State ex rel. Am. Bankers Assurance Co. v. McQuillin*, 260 Mo. 164, 168 S.W. 924 (En Banc 1914); *Ex parte Gounis*, 304 Mo. 428, 263 S.W. 988 (En Banc 1924); *State ex rel. Becker v. Westhues*, 286 S.W. 882 (Mo. En Banc 1926), which relied on *Gounis*; *State ex rel. St. Ferdinand Sewer Dist. of St. Louis County v. McElhinney*, 330 Mo. 1063, 52 S.W.2d 400 (En Banc 1932), which relied on *Becker* and on *State ex rel. Missouri Pacific Ry. v. Williams*, 221 Mo. 227, 120 S.W. 740 (En Banc 1909). *Gounis* was the closest to the gate. There, the failure to require a bond was treated as a ground for habeas corpus relief from contempt of a preliminary injunction. There was no indication in the record as to whether a bond had been required, however, so the court presumed that it had been, and rejected the ground. Reading the cases after *Gounis* is very much like reading in the second edition of a textbook a statement the sole support for which is a case which cites the same statement in the first edition of the textbook (for which there was no real authority).

187. *State ex rel. Am. Bankers Assurance Co. v. McQuillin*, 260 Mo. 164, 174, 168 S.W. 924, 926 (En Banc 1914).

court may have granted it without requiring a bond.¹⁸⁸

Steady repetition of the "jurisdiction" language made it so entrenched that insufficiency of a bond became a ground for collateral attack on a temporary injunction. In *Ex parte Dillon*¹⁸⁹ suit had been brought to determine title to land, and the defendants counter-claimed. The defendants demanded that the land be put into receivership, and that the plaintiffs and those claiming as tenants under them be prevented from claiming the right to possession of the land against the receiver. The receivership was established and a preliminary injunction issued as prayed by the defendants, but the bond exacted from them did not name the tenants. The tenants refused to move and were cited for contempt. Their commitment was attacked by habeas corpus on the ground that they were not protected by a bond. The court held that the injunction was "void" and that the trial court had no "jurisdiction" to issue the injunction without requiring the bond.¹⁹⁰

This is probably a case of overkill. The opponent of a temporary injunction is certainly not precluded from waiving the bond requirement, although he might be if the requirement were a matter of "jurisdiction." Moreover, the protection granted by the bond to the opponent of a temporary restraining order or preliminary injunction is not deemed a matter of fundamental fairness in Missouri, because it is not required in suits brought by the state on its own behalf.¹⁹¹ The decision to grant a writ of habeas corpus may have been limited at one time to cases in which the holding or committing authority had no "jurisdiction." But now, "jurisdiction" is merely a screen behind which a court may wish to hide its lack of publishable reasons for denying habeas corpus.¹⁹² So the "jurisdictional" nature of

188. 2 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS § 1439 (1905).

189. 225 Mo. App. 280, 96 S.W.2d 1095 (K.C. Ct. App. 1936).

190. Cf. *Curtis v. Tozer*, 374 S.W.2d 557 (St. L. Mo. App. 1964). Demonstrators against racially discriminatory hiring policies at a St. Louis bank were disrupting that bank's activities. A temporary restraining order naming specific persons and a group of persons was issued and a bond was filed naming only the specific persons. Members of the group not named were apparently not covered by the bond, but the court of appeals held this an inadequate ground of objection to citation for contempt. *Dillon* was distinguished.

191. § 526.070, RSMo 1969. Inadequacy of the bond may be as serious a defect in the protection of the opponent of the interlocutory injunction as is the absence of a bond. So far, the writ has not gone to correct such inadequacy. Apparently, the discretion of the trial judge with respect to the amount of the bond is extremely broad and effectively insulated from review. See *Crackerneck Country Club, Inc. v. Sprinkle*, 485 S.W.2d 652 (Mo. App., D.K.C. 1972).

192. *Osborn v. Owsley*, 259 S.W.2d 129 (K.C. Mo. App. 1953). In *In re F.C.*, 484 S.W.2d

the bond was probably unnecessary to the court's decision to grant habeas corpus. All this points to the similarity between error with respect to the bond requirement and any other error with respect to the grant or denial of interlocutory relief. Each is simply a matter for whatever appellate review is available. The only difference between such error and any other error is the inadequacy of appellate review—traditionally insufficient to support either mandamus or prohibition.

d. Will Any Error Do?

Thus far, no claim of error which has been committed during trial has been remedied by writ. The major reason for this is probably that none has yet been sought to correct such error. Otherwise, almost any error will do, even if it is or amounts to a final judgment. Denial of intervention, whether of right or permissive, is a final judgment, reviewable by appeal.¹⁹³ It has also been reviewed by superintending control.¹⁹⁴ Nearly all error that is effectively reviewable on appeal is curable by writ as well. Denial of a motion to dismiss impleader,¹⁹⁵ like denial of a motion to dismiss a petition for failure to state a cause of action, has been given immediate superintending attention. So has joinder or refusal to join parties and claims.¹⁹⁶ In all these cases, of course, the issue would come up and be curable in the normal course of appellate review if the movant loses at trial, and otherwise the likelihood is that no review is needed.

21 (Mo. App., D.K.C. 1972), it was conceded that the defect that was the ground for habeas corpus was not jurisdictional, although it was so called to justify the writ.

193. *Ratermann v. Ratermann Realty & Inv. Co.*, 341 S.W.2d 280 (St. L. Mo. App. 1960), limited appeals from denials of permissive intervention to cases of plain abuse of discretion. That combines grounds for appeal with grounds for reversal. See *City of St. Louis v. Silk*, 239 Mo. App. 757, 199 S.W.2d 23 (St. L. Ct. App. 1947); *State ex rel. State Highway Comm'n v. Hudspeth*, 303 S.W.2d 703 (St. L. Mo. App. 1957).

194. *State ex rel. Imperial Utility Corp. v. Hess*, 514 S.W.2d 645 (Mo. App., D. St. L. 1974).

195. *State ex rel. Junior College Dist. of St. Louis v. Godfrey*, 465 S.W.2d 1 (St. L. Mo. App. 1971).

196. *State ex rel. Siegel v. Strother*, 365 Mo. 861, 289 S.W.2d 73 (En Banc 1956); *State ex rel. Knight Oil Co. v. Vardeman*, 409 S.W.2d 672 (Mo. En Banc 1966); *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. En Banc 1975); *State ex rel. Safeco Ins. Co. of America v. Scott*, 521 S.W.2d 448 (Mo. En Banc 1975); *State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172 (St. L. Mo. App. 1964). In *State ex rel. Keeling v. Randall*, 386 S.W.2d 67 (Mo. En Banc 1964), the trial court ordered two cases consolidated, and then allowed the plaintiff in one of them to dismiss. Conceding his authority to sever the cases, the supreme court nevertheless said he could not allow the dismissal.

Substantive defenses have also been matters for superintending control. An order dismissing or refusing to dismiss all or part of a case can be subject to superintending control.¹⁹⁷ So can an order striking an affirmative defense,¹⁹⁸ a claim for punitive damages,¹⁹⁹ an excessive claim for damages,²⁰⁰ or a cross claim.²⁰¹ Error may be in the application of local law,²⁰² or in choice-of-law.²⁰³

197. For some reason, the defense of *res judicata* has not been sufficiently "jurisdictional" to join other defenses as ground for a writ, *State ex rel. Green v. Kimberlin*, 517 S.W.2d 124 (Mo. En Banc 1974), unless it was wrongly applied to deny a cross claim, *State ex rel. Ward v. Stubbs*, 374 S.W.2d 40 (Mo. En Banc 1964). The court in *Green* made the statement, somewhat odd in light of the following cases, that:

The decision of issues arising on the merits is peculiarly within the jurisdiction and power of the inferior court. It may decide the issues erroneously if it will. To say that the inferior court has jurisdiction to decide an issue and has no jurisdiction to decide it erroneously is a paradox.

517 S.W.2d at 129. As to paradoxes, the following defenses have been given special treatment by writ: (1) Failure to state a cause of action. *See* note 127 *supra*. (2) Want of "equity jurisdiction," which is much the same thing. *State ex rel. Cervantes v. Bloom*, 485 S.W.2d 446 (Mo. App., D. St. L. 1972) (failure to state grounds for injunction); *State ex rel. Phillips v. Yeaman*, 451 S.W.2d 115 (Mo. En Banc 1970) (adequacy of legal remedy). (3) Want of standing and improper cause of action. *State ex rel. Cooper v. Cloyd*, 461 S.W.2d 833 (Mo. En Banc 1971) (standing to contest a will); *State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman*, 272 S.W.2d 289 (Mo. En Banc 1954) (want of standing to bring quo warranto). (4) Immunity of the defendant. *State ex rel. Eagleton v. Hall*, 389 S.W.2d 798 (Mo. En Banc 1965) (where a phantom problem effectively blocked any contest as to a bequest to the state). (5) Unconstitutionality of the statute under which the claim arises. *State ex rel. Rogers v. Kirtley*, 372 S.W.2d 86 (Mo. En Banc 1963) (federal Constitution); *State ex rel. Public Water Supply Dist. No. 7 v. James*, 237 S.W.2d 113 (Mo. En Banc 1951) (state constitution). (6) Statute of limitations. *State ex rel. Lumbermen's Casualty Co. v. Stubbs*, 471 S.W.2d 268 (Mo. En Banc 1971). (7) Statute of Frauds. *State ex rel. Uthoff v. Russell*, 210 S.W.2d 1017 (St. L. Mo. App. 1948). (8) Election of remedies, considered insufficient to justify such review by the supreme court in *State ex rel. Kansas City v. Harris*, 212 S.W.2d 733 (Mo. En Banc 1948), was perfectly sufficient for a court of appeals in *State ex rel. Hilleary and Partners, Ltd. v. Kelly*, 448 S.W.2d 926 (St. L. Mo. App. 1969). (9) Want of notice under a statute which provides the cause of action. *State ex rel. Goodenough v. Turpin*, 487 S.W.2d 876 (Mo. App., D. St. L. 1972) (even if it is a matter committed by that statute to the trial judge's discretion); *State ex rel. Schoenfelder v. Owen*, 347 Mo. 1131, 152 S.W.2d 60 (1941).

198. *State ex rel. Pulliam v. Swink*, 514 S.W.2d 559 (Mo. En Banc 1974).

199. *State ex rel. Smith v. Greene*, 494 S.W.2d 55 (Mo. En Banc 1973).

200. *State ex rel. Ellis v. Stussie*, 515 S.W.2d 411 (Mo. En Banc 1974); *State ex rel. St. Louis-San Francisco Ry. v. Buder*, 515 S.W.2d 409 (Mo. En Banc 1974).

201. *State ex rel. Ward v. Stubbs*, 374 S.W.2d 40 (Mo. En Banc 1964).

202. In *State ex rel. Reis v. Nangle*, 349 S.W.2d 508 (St. L. Mo. App. 1961), a court refused to hear and decide claims which, it held, were not properly before it. The court of appeals granted a writ because, no matter who won, the case would be appealed and sent back for another trial and perhaps another appeal. This means that the striking of a claim for relief, or an affirmative defense, or an item of damage, or the grant of partial summary judgment ought to be subject to treatment by writ, too.

203. *See State ex rel. Broglin v. Nangle*, 510 S.W.2d 699 (Mo. En Banc 1974); *State ex rel. McCubbin v. McMillian*, 349 S.W.2d 453 (St. L. Mo. App. 1961).

What is left? The cases seem to suggest that there are only two differences between the exercise of superintending control and appellate jurisdiction: a purely formal distinction in terms of the nominal respondent and the form of relief,²⁰⁴ and the discretionary nature of superintending control. If that is all, refusal to exercise appellate jurisdiction because of the limitations placed on the court's authority by the final judgment rule is at best incompletely explained, and at worst somewhat hypocritical.

V. CONCLUSION

Inadequacy of statistics with respect to the annual workload of Missouri appellate courts makes it impossible to state with any certainty the degree to which current practice in the exercise of superintending control contributes to that workload. The total burden of the appellate courts is increasing. The St. Louis district of the court of appeals is literally bursting at the seams. The regular appellate workload is uncontrollable, because appeal is of right and disposition must be by opinion.²⁰⁵ The contribution of superintending control to the appellate court's burden is controllable. Most petitions for the exercise of superintending control are summarily denied shortly after submission, but only after considerable judicial time has been consumed in evaluating them. Many petitions are denied after substantial argument by brief and motion, and others are mooted by changed circumstances, including compliance by the respondent judge with the relator's demand. In a very small number of cases, a published opinion accompanies the grant or denial of final relief. The substantial number of opinions in this area, then, should suggest that the contribution of the current exercise of superintending authority has a considerable impact on the workload of the appellate courts.

Is the writ business worth the cost? One way to answer this question is to look at the kind of error that writs have issued to cure. The lack of statistics leaves much to impression, but whether the frame of reference is the last five, fifty, or one hundred years, the proportion seems to be about the same: by far the largest number of writs issued to cure error that was curable by subsequent events at trial or by appeal. Rarely was it clear whether cure by writ would

204. See note 55 *supra*.

205. The "transfer" jurisdiction of the supreme court is also uncontrollable, in part. See Mo. CONST. art. V, § 10.

obviate appeal or retrial. A very small portion of all writs went to cure error that was effectively insulated from appellate review—interlocutory coercive orders, dismissals for want of jurisdiction over the person, etc. A miniscule portion of all writs related to truly jurisdictional matters as to which the appellate remedy was arguably inadequate.

It is easy to wonder why appellate courts have allowed superintending control to become a relatively unlimited, discretionary appellate device. In part, the answer may lie in dissatisfaction with present appellate opportunities available to the parties. But the constitutional role of the judiciary is not to provide appellate review where the legislature has provided none. If the fault lies in the interpretation of statutes governing appeal, the cure is in the judiciary, unless the fiction of “legislative acquiescence by silence” is sufficient to deter the cure. A different question would arise if state or federal constitutional requirements included a requirement that appeal be available. But there is no such requirement. Nor does tradition provide any authority for justifying the exercise of superintending control because of an inadequate appellate remedy. Perhaps part of the reason for current practice with regard to writs is the laudable desire that justice be done *now*. But implicit in this is an assumption that an incorrect decision is always an unjust one.

If a solution is desired, it might be found in the functional distinction between appellate and superintending functions, which broadly limits the latter to the administration of the judicial system. That is, superintending control relates to the proper operation of the system as a dispute-settling, justice-dispensing system, to the relationship between the parts of that system, and to the relationship between the judiciary and other organs of government. The correctness of decision-making, whether with regard to the rights of the parties, the authority of a court to grant or deny access, or a remedy, would be excluded except insofar as it implicated the limits imposed on the judicial system with respect to other organs of government, or the limits imposed on parts of the judicial system with respect to other parts of that system. A superintending court which desires to take such a view might adopt a set of criteria which are based upon old formulae concerning the issuance of writs. For example: No writ will issue to correct trial court error unless there is clearly no adequate remedy by appeal or by procedures in the trial court, *and* unless the error is either (1) transgression of jurisdictional lines between courts or between courts and other government or-

gans, or (2) a matter concerning the administration of the judicial system relating to the operation of a court or the prevention of conflict between courts. An exception may be made by the supreme court where the issue raised by the petition is of great public importance, and is especially needy of quick judicial settlement.

These criteria could be adopted by the supreme court for the whole judicial system (as an exercise of superintending control) or they could be adopted by each district of the court of appeals. In the latter case, of course, the exception for cases of great public importance could be retained by a standard practice of summary denial of such writs, which would immediately direct the petitioner to the supreme court.

It could be objected that the adoption of such criteria amounts to a refusal in advance to perform a ministerial duty—to-wit: individual exercise of discretion with respect to each petition for a writ. However, the limitation and definition of judicial discretion is normally a judicial function. Such limitation is usually a matter of choice, not of compulsion by clear constitutional or statutory mandate. Classes of cases have been excluded from the courts by judicial decree because, as a matter of policy, such cases raise issues that are better raised in another form, or that ought rather to be decided by other organs of government (or by no organ of government). It should not be hard to justify limitation of superintending control by criteria that are drawn from traditional formulae governing the issuance of mandamus and prohibition, and which are based on deference to the constitutional role of the General Assembly in the regulation of appellate jurisdiction. Moreover, it is normally conceded that concern for appellate workload, without anything else, will justify summary denial of a meritorious petition for superintending relief. Surely a general concern for the workload of the superintending courts would justify a general rule that limits the writ to only the easiest cases for such relief.

There is one innovation in the proposed criteria—the requirement that remedies in the trial court be exhausted before superintending relief is sought. The support for such a requirement comes from rules that limit the grant of extraordinary relief to cases where other relief is not realistically available, and rules that give the trial court one last chance to correct its own error before the error is reviewable by an appellate court. There is no strong reason for a superintending court to involve itself in time-consuming and expensive interlocutory review when the petitioner has not made a good

faith effort to obtain relief from the trial court.

Early decisions support the statement that appeal is always adequate unless the claimed error has substantial effect which is immune from appellate reversal. If the effect of error may be vitiated by subsequent events at trial or on appeal, there is no inadequacy of appellate or other remedy. Perhaps if the error will vitiate trial, no matter who wins, appeal is inadequate. But even then, the party raising the issue by writ will have raised it in the trial court and the decision upholding jurisdiction usually will be protected by *res judicata* if there is no appeal.

Although it is not necessary to repeat the kinds of error that ought to invite the writ under the proposed criteria, it may be useful to note that such error is not limited to "jurisdictional" or "ministerial" matters in the narrow sense, and that it does not include all error with respect to judicial authority. Clear grounds for reversal and retrial are not, themselves, grounds for the exercise of superintending control unless the error is so gross and easily spotted as to amount to a refusal by the judge to act—to act in a fair, rational, and informed manner. The public urgency exception is designed for the hasty counsel who could have had an appeal had he waited a day, but applied for a writ instead. There should be extremely few gross error and public urgency cases—probably no more than one or two per year. More than that should indicate laxity in the enforcement of the criteria.

No matter what the ground, a writ should not issue if it will interrupt trial. The costs in time are simply too great, and the time for appeal is probably close enough.

These criteria insulate some trial court error from appellate review. Interlocutory coercive orders with immediate effect—*e.g.*, preliminary injunctions and some discovery orders, remain in the hands of the trial judge unless the General Assembly is willing to increase the work of the appellate courts (and, one hopes, provide the resources to handle the work). Of course, in the extremely rare case of gross error described above, such error can be reviewed by writ, where there is no effective appellate review.

Adoption and enforcement of the criteria will not prevent counsel from seeking to circumvent them or from causing delay by frivolous application for superintending control. There will still be petitions that allege that a trial court has no jurisdiction to commit error—*e.g.*, in overruling a motion to dismiss for failure to state a claim, or striking a claim or defense, or ordering or refusing to order

answers to “vague” or “burdensome” interrogatories. The petitioner will normally assert that appeal is inadequate because it comes after trial, or because it takes too much time, or because a supersedeas bond must be filed for the protection of the appellee—that is, if the petitioner loses the case at trial. In such cases, at least the true opponent of the writ should be protected from the cost and vexation imposed by opposing the petition. There are two ways this protection might be afforded. First, the denial of the writ might be accompanied by directions to the trial judge that counsel fees and other costs allocable to opposition to the petition for a writ be awarded at the end of trial. The award of counsel fees is disfavored in the law, but there is some authority, which might be stretched just a little to fit this case, that where the result of wrongful conduct “is to involve the wronged party in collateral litigation, reasonable attorneys’ fees necessarily and in good faith incurred in protecting himself from the injurious consequences thereof are proper items of damages.”²⁰⁶ The second possibility, in line with old chancery practice which protected the opponent of coercive orders, is to require that the petitioner file a bond with his petition to assure the real opponent (and perhaps the appellate court) compensation for time and expense if the petition is not within the criteria or is substantively frivolous. Ultimately, it is up to the self-control of the appellate judges themselves if the waste of judicial resources occasioned by current superintending practice is to be halted.

206. *Johnson v. Mercantile Trust Co. Nat'l Ass'n*, 510 S.W.2d 33, 40 (Mo. 1974). The counsel fees awarded were incurred in a separate lawsuit. The plaintiff had to litigate as a result of the wrong of the defendant in this case. *See also State ex rel. Moore v. Morant*, 266 S.W.2d 723 (St. L. Mo. App. 1954).