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Writ of Certiorari in Missouri, The

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THE WRIT OF CERTIORARI IN MISSOURI

I

INTRODUCTION

Due to the fact that the Supreme Court of Missouri has recently decided several cases involving questions as to the use of the extraordinary legal remedy of the writ of certiorari,[1] and to the further fact that this ancient remedy is governed by common law principles,[2] this study of the Missouri decisions pertaining to certiorari has been undertaken. Use of the writ in Missouri is increasing, and since the law relating to the writ is not governed by our code of pleading and practice, or by a special code as are mandamus,[3] prohibition,[4] habeas corpus[5] and quo warranto,[6] the other extraordinary legal remedies, it seems especially desirable to consider the law on this subject as found in the decisions of our appellate courts.

II

THE NATURE OF THE WRIT

The writ of certiorari has been thus defined in Bacon's Abridgment: "Certiorari is an original writ issuing out of

1. *State ex rel. Mersereau* v. *Ellison* (Mo., 1914) 168 S. W. 744; *State ex rel. United Railways Co.* v. *Reynolds* (Mo., 1914) 165 S. W. 729; *State ex rel. Summerson* v. *Goodrich* (Mo., 1914) 165 S. W. 707; *State ex rel. Van Raalte* v. *Board of Equalization* (1914) 256 Mo. 455; *State ex rel. Flowers* v. *Morehead* (1914) 256 Mo. 683; *State ex rel. Iba* v. *Ellison* (1914) 256 Mo. 644; *State ex rel. Ruppel* v. *Wiethaupt* (1914) 254 Mo. 319; *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561.
2. *State ex rel. Summerson* v. *Goodrich* (Mo., 1914) 165 S. W. 707; *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561; *State ex rel. Harrison County Bank* v. *Springer* (1896) 134 Mo. 212; *Hannibal & St. Joseph Railroad Co.* v. *Morton* (1855) 27 Mo. 317; *Rector* v. *Price* (1822) 1 Mo. 198.
3. Revised Statutes 1909, c. 22, Art. 9.
4. Revised Statutes 1909, c. 22, Art. 12.
5. Revised Statutes 1909, c. 22, Art. 6.
6. Revised Statutes 1909, c. 22, Art. 13.

Chancery, or the King's Bench, directed in the King's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."[7]

It is thus defined in Fitzherbert's Natura Brevium: "The writ of *certiorari* is an original writ, and issueth sometimes out of the Chancery, and sometimes out of the King's Bench, and lieth where the king would be certified of any record which is in the treasury, or in the Common Pleas, or in any other court of record which is in the treasury, or before the sheriff and coroners, or of a record before commissioners, or before the escheator; then the king may send that writ to any of the said courts or offices, to certify such record before him *in banco*, or in the Chancery, or before other justices, where the king pleaseth to have the same certified. And he or they to whom or who the certiorari is directed, ought to send the same record according to the tenor of the writ, and as the writ doth command him; and if he or they fail so to do, then an alias shall be awarded and afterwards a *pluries*, *vel causam nobis significes*, and afterwards an attachment, if a good cause be not returned upon the *pluries*, wherefore they do not send the record."[8]

The writ served at least three different purposes at common law, and it is believed that some confusion in statement and application has resulted from not bearing this fact in mind.

(1) It was generally used at common law as a writ in the nature of a writ of error to bring the record of the proceedings of an inferior tribunal before a superior court for trial upon the record, to determine from the record whether the inferior tribunal had acted legally and within its power or jurisdiction.[9] Depending upon the nature of the inferior tribunal, and the

7. "Certiorari," 1 Bacon's Abridgment (5th ed.) 559. This definition has met with approval in several Missouri cases. *Saline County Subscription Cases* (1869) 45 Mo. 52; *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524.

8. Fitzherbert, Natura Brevium (9th ed.) 554.

9. *State ex rel. Missouri Pacific Ry. Co.* v. *Edwards* (1891) 104 Mo. 125; *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524.

action there taken, the writ sometimes so operated as to quash the record of the action taken by the inferior tribunal and sometimes operated as a writ of error.

(2) It was also frequently used at common law to remove a case from an inferior court to a superior court for trial upon the merits.[10]

(3) It was also used as an ancillary remedy and as an aid to a writ of error and statutory appeal where the record appears to be insufficient.[11]

III

CERTIORARI IN THE NATURE OF A WRIT OF ERROR

The writ of certiorari has been frequently issued in this state by a superior court to an inferior court or tribunal to quash the proceedings in the inferior court or tribunal where it has proceeded illegally or beyond its jurisdiction. It reaches not only cases where the inferior court or tribunal is proceeding beyond its jurisdiction but also cases where the record shows that though there is not an entire want of jurisdiction, yet the inferior court or tribunal has made an order that is illegal and beyond its power.[12]

In prohibition the tendency of the decisions is to limit the writ to those cases where the inferior tribunal is proceeding in a matter over which it has no jurisdiction, but certiorari is more liberal in its scope including cases where the inferior court or tribunal proceeded in a matter in which it had jurisdiction but proceeded illegally or without authority.

10. 1 Bacon's Abridgment (5th ed.) 559-560; "Certiorari," 10 Halsbury, Laws of England p. 157; *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524; *Rector* v. *Price* (1822) 1 Mo. 198.

11. *Smith* v. *St. L. Iron Mt. & S. Ry. Co.* (1886) 91 Mo. 58; *Callier* v. *Chester, Perryville, etc. Ry. Co.* (1911) 158 Mo. App. 249.

12. *State ex rel. Iba* v. *Ellison* (1914) 256 Mo. 645; *State ex rel. Curtis* v. *Broaddus* (1911) 238 Mo. 189; *State ex rel. McEntee* v. *Bright* (1909) 224 Mo. 514; *State ex rel. Scott* v. *Smith* (1903) 176 Mo. 90; *State ex rel. Ballew* v. *Woodson* (1901) 161 Mo. 444; *Hannibal & St. Joseph Ry. Co.* v. *Morton* (1858) 27 Mo. 317; *State ex rel. Reider* v. *Moniteau County Court* (1891) 45 Mo. App. 387. See *Houser et al.* v. *State of Wisconsin* (1873) 33 Wis. 678, where the court fails to notice that the power to decide erroneously though a valid objection to prohibition, is not to certiorari where certiorari is used in the nature of a writ of error.

For example the Supreme Court issued the writ of certiorari to a Court of Appeals and quashed a judgment rendered by that Court disbarring the relator in a case where the charges against the relator were filed in a circu t court and upon an appeal by the relator from a judgment of the circuit court disbarring him, the Court of Appeals tried the case *de novo* and did not exercise its appellate jurisdiction. The Court of Appeals had both original and appellate jurisdiction in disbarment proceedings but it had no power to proceed with the trial *de novo* where the charges had not been filed in that court but had been filed in the circuit court.[13]

Only The Record Proper Examined

The decisions in Missouri are clear to the effect that only matters appearing on the face of the record are reached by certiorari and that mere irregularities in the proceedings below cannot be brought to the attention of the superior court by this writ.[14] For example, it has been held in a case where the writ was used to review the action of the mayor of St. Louis in removing a health commissioner, that the evidence taken would not be considered though inc uded with the return to the writ.[15] It has also been held that the ev'dence adduced before a board of equalization, though the members of the board allowed what was called a bill o' exceptions, which contained the evidence, wou'd not be considered by the superior

13. *State ex rel. Scott* v. *Smith* (1903) 176 Mo. 90. Fox, J., in this case stated the rule thus: "This writ may be resorted to, not only in cases where it is alleged that the lower court is absolutely without any jurisdiction whatever, but it also may reach and afford a remedy in cases where such court has jurisdiction, but undertakes to exercise unauthorized powers."

14. *State ex rel. Summerson* v. *Goodrich* (1914) 165 S. W. 707; *State ex rel. Armour Packing Co.* v. *Stephens* (1898) 146 Mo. 662; *State ex rel. Mollineaux* v. *Madison County Court* (1896) 136 Mo. 323; *Ward* v. *Board of Equalization* (1896) 135 Mo. 309; *State ex rel. Baublits* v. *County Court of Nodaway Co.* (1883) 80 Mo. 500; *State ex rel. Lathrop* v. *Dowling* (1872) 50 Mo. 134; *State ex rel. Kelley* v. *Wooten* (1909) 139 Mo. App. 231; *State ex rel. Brennan* v. *Walbridge* (1895) 62 Mo. App. 162; *State ex rel. Harrah* v. *Cauthorn* (1890) 40 Mo. App. 94; *Moore* v. *Bailey* (1879) 8 Mo. App. 156; 1 Bacon's Abridgment (5th ed.) 572.

15. *State ex rel. Brennan* v. *Walbridge* (1895) 62 Mo. App. 162.

court upon a writ issued to the board of equalization.[16] Likewise, it was held by the Supreme Court in reviewing the action of the State Board of Equalization in assessing the relator's refrigerator cars that the court could not look beyond the record sent up by the Board to determine whether the *situs* of relator's property was outside the limits of the State.[17]

The Writ Does Not Issue To Review Administrative Action

The rule in certiorari is that it only issues to review the action of an inferior tribunal exercising judicial or quasi-judicial functions.[18] It will not be issued to review the action of a public officer or public bodies, boards, or tribunals that are not performing judicial functions but are performing executive or administrative functions.[19] No great difficulty arises where the action sought to be reviewed is truly judicial action, where there "is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims a decision or judgment is rendered."[20]

Some difficulty though is encountered in determining what is quasi-judicial action as distinguished from executive and administrative action involving discretion.[21] The dividing

16. *Ward* v. *Board of Equalization* (1896) 135 Mo. 309. In this case Burgess, J., said: "Nor did the fact that petitioner was permitted to read in evidence without objection from what he called a bill of exceptions, signed by the members of said board, purporting to contain the evidence adduced by him before that body, and its action thereupon, make it part of the record, as no provision is made by law either common or statutory for any such procedure before such a tribunal."

17. *State ex rel. Armour Packing Co.* v. *Stephens* (1898) 146 Mo. 662.

18. 10 Halsbury, Laws of England 171. *Owens* v. *Andrew County Court* (1872) 49 Mo. 372.

19. *State ex rel. Bentley* v. *Reynolds* (1905) 190 Mo. 579; *State ex rel. Crow, Atty. Gen.* v. *Harrison* (1897) 141 Mo. 12; *Phelps Co.* v. *Bishop* (1870) 46 Mo. 68; *Marion Co.* v. *Phillips* (1869) 45 Mo. 75; *Saline Co. Subscription Cases* (1869) 45 Mo. 52.

20. *Saline County Subscription Cases* (1869) 45 Mo. 52; *State ex rel. West* v. *County Court of Clark Co.* (1867) 41 Mo. 44; *Sinking Fund Cases* (1878) 99 U. S. 700.

21. *State ex rel. Crow* v. *Harrison* (1897) 141 Mo. 12. In this case the court said: "It is difficult, if not impossible, to deduce from the authorities any rule by which to determine what are and what are not judicial acts."

line, as is apparent from the very statement of the rule, is difficult to determine. The question of how nearly like judicial action the action of the inferior body or tribunal must be, in order to be regarded as quasi-judicial, is one of judgment and for that reason no hard and fast lines can be drawn. There are, however, distinct groups of cases where the action of the inferior tribunal has been held to be judicial or like judicial action and properly reviewed by writ of certiorari.

Opening, Widening or Changing Public Roads and Streets

The writ has been frequently issued to county courts and other bodies in proceedings to open, widen or change public roads and streets.[22] This seems quite a proper use of the writ as such proceedings directly affect the interest of individuals in real property. In fact, prohibition, which is confined strictly to judicial action, has frequently been issued to stop such action when the tribunal acting in a proceeding of this nature is acting beyond its jurisdiction.[23]

Removal From Office

Certiorari has been frequently issued in this state to review the legality of the action of a public body or tribunal that has removed a person from office.[24] This class of cases, involving the right to office, seems sufficiently like judicial action to properly come within the scope of this writ, though such action

22. *Snoddy et al.* v. *County of Pettis* (1870) 45 Mo. 361; *Moore* v. *Bailey* (1879) 8 Mo. App. 156; *State ex rel. C. B. & Q. Ry. Co.* v. *City of Kansas* (1886) 89 Mo. 34; *Chicago, R. I. & Pac. Ry. Co.* v. *Young* (1888) 96 Mo. 39; *State ex rel. Summerson* v. *Goodrich* (1914) 165 S. W. 707; 1 Bacon's Abridgment (5th ed.) 569.

23. *State Commissioner of Roads* (1817) 1 Mills (S. C.) 55, 12 Am. Dec. 596.

24. *State ex rel. Campbell* v. *Police Commissioners* (1883) 14 Mo. App. 297, affirmed 88 Mo. 144; *State ex rel. Tilley* v. *Slover* (1892) 113 Mo. 702; *State ex rel. Brennan* v. *Walbridge* (1895) 62 Mo. App. 162; *State ex rel. Tedford* v. *Knott* (1907) 207 Mo. 167; *State ex rel. Heimburger* v. *Wells* (1908) 210 Mo. 601; *State ex rel. Knox* v. *Selby* (1908) 133 Mo. App. 552; *State ex rel. McEntee* v. *Bright* (1909) 224 Mo. 514; *State ex rel. Flowers* v. *Morehead* (1914) 256 Mo. 683.

is not strictly judicial action and would not be stopped by prohibition.[25]

It has been held for example that the validity of the action of a county court in removing a member of a county highway board,[26] a city council in removing a city marshall,[27] a mayor in removing the building commissioner of a city,[28] the Railroad and Warehouse Commission in removing the chief grain inspector,[29] could be examined and determined upon the record sent up to the superior court in obedience to the writ of certiorari.

Equalization of Assessments and Levy of Taxes

The writ has also been very frequently issued to review the validity of the action of various boards of equalization and officers empowered by law to levy taxes.[30] There are probably more cases of this type in this state than of any other single group.

For example, the writ has been issued to review the validity of the action of a board of equalization in increasing the assessable value of relator's property[31], and to review the validity of the action of the State Board of Equalization in assessing refrigerator cars belonging to the relator,[32] and to determine the validity of the action of the judge of a probate court in assessing on a legacy the collateral inheritance tax.[33]

25. *State ex rel. McEntee* v. *Bright* (1909) 224 Mo. 514.
26. *State ex rel. Flowers* v. *Morehead* (1914) 256 Mo. 683.
27. *State ex rel. McEntee* v. *Bright* (1909) 224 Mo. 514.
28. *State ex rel. Heimburger* v. *Wells* (1908) 210 Mo. 601.
29. *State ex rel. Tedford* v. *Knott* (1907) 207 Mo. 167.
30. *State ex rel. Van Raalte* v. *Board of Equalization of St. Louis* (1914) 256 Mo. 455; *Fath* v. *Henderson* (1901) 160 Mo. 190; *State ex rel. Armour Packing Co.* v. *Stephens* (1898) 146 Mo. 662; *State ex rel. Garth* v. *Switzler* (1898) 143 Mo. 287; *Hannibal & St. Joseph R. R. Co.* v. *State Board of Equalization* (1876) 64 Mo. 294; *State ex rel. Lathrop* v. *Dowling* (1872) 50 Mo. 134; *State ex rel. Taylor* v. *St. Louis County Court* (1871) 47 Mo. 594.
31. *State ex rel. Van Raalte* v. *Board of Equalization* (1914) 256 Mo. 455.
32. *State ex rel. Armour Packing Co.* v. *Stephens* (1898) 146 Mo. 662.
33. *State ex rel. Garth* v. *Switzler* (1898) 143 Mo. 287; *Fath* v. *Henderson* (1901) 160 Mo. 190. In *State ex rel. Garth* v. *Switzler*, the collateral inheritance act was held unconstitutional and the assessment void. No question was raised as to the propriety of the remedy. In *Fath* v. *Henderson*, the amended collateral inheritance tax law was held constitutional. The use of the remedy was not questioned.

The rule to the effect that only defects or errors that go to the validity of the record will be considered, is strictly applied in this class of cases.[34]

Granting and Revoking Dram-Shop Licenses

The writ has often been used in Missouri to determine the validity of the action of public officers and tribunals in granting[35] and revoking[36] a license to conduct a dram-shop. It is true of course that in this class of cases the merits of the matter and mistakes of facts and law are not inquired into, but only the record is examined to determine whether the tribunal or officer has exceeded its or his powers.[37]

Our courts have also held that prohibition will not lie to prohibit the excise commissioner of St. Louis from revoking a dram-shop license on the ground that in proceeding to do so the excise commissioner "was not acting judicially."[38]

Action of Inferior Tribunals in Forming Quasi-Public Corporations, Changing Their Boundaries, etc.

In this state the writ has been issued to determine whether the essential steps have been taken to bring into existence certain quasi-public corporations invested with the power to tax for certain purposes, as for example drainage districts.[39] It has also been issued to determine the validity of statutory proceedings to change the boundaries of a school district.[40] The propriety of the writ in the school district case seems not

34. *State ex rel. Lathrop* v. *Dowling* (1872) 50 Mo. 134; *Hannibal & St. Joseph R. R. Co.* v. *State Board of Equalization* (1876) 64 Mo. 294.

35. *State ex rel. Reider* v. *Moniteau County Court* (1891) 45 Mo. App. 387; *State ex rel. Hill* v. *Moore* (1900) 84 Mo. App. 11; *State ex rel. Sager* v. *Mulvihill* (1905) 113 Mo. App. 324; *State ex rel. Smith* v. *Dykeman* (1910) 153 Mo. App. 416; *State ex rel. Farris* v. *Amick* (1912) 161 Mo. App. 13.

36. *State ex rel. Arnold* v. *Lichta* (1908) 130 Mo. App. 284; *State ex rel. Smith* v. *Dykeman* (1910) 153 Mo. App. 416.

37. *State ex rel. Reider* v. *Moniteau County Court* (1891) 45 Mo. App. 387; *State ex rel. Smith* v. *Dykeman* (1910) 153 Mo. App. 416.

38. *Higgins* v. *Talty* (1900) 157 Mo. 280.

39. *State ex rel. Applegate* v. *Taylor* (1909) 224 Mo. 393.

40. *School Districts* v. *Yates* (1912) 161 Mo. App. 107; *State ex rel. School District* v. *Sexton* (1910) 151 Mo. App. 517.

to have been questioned. In an earlier case, certiorari was held not the proper remedy to test the question whether the statutory board of arbitrators had from four contiguous districts constituted a new school district.[41] Quo warranto was held to be the proper remedy in that case. In that case the court said the record was not void.

The writ has also been issued to determine whether the necessary steps have been taken, as shown by the record of the county court, to adopt the law requiring the restraining of animals from running at large.[42] The propriety of the remedy in these cases apparently was not questioned. There seems here to be an extension of the remedy further than in any other instances in this state that have been found.

At the instance of the Attorney General of the state the writ has been issued to determine the validity of the proceedings of a county court in dividing the county into legislative districts[43] and justice of the peace districts.[44] When applied for by the Attorney General, the writ issues as a matter of course,[45] and no practicable objection exists to the issuance of the writ for such a purpose at the instance of the chief law officer of the state.

Other Instances of Quasi-Judicial Action

The Supreme Court has held that the record of the board of health of St. Louis could be examined upon certiorari issued by the circuit court, where the board of health had declared a certain manufacturing plant in St. Louis a nusiance.[46]

41. *School District* v. *Pace* (1905) 113 Mo. App. 134. In this case it was suggested by the court that certiorari would be the proper remedy "where the action of the Board of Arbitrators sought to be reviewed is for changing the boundary line of a district and where the existence or life of a corporation is not brought in question."

42. *State ex rel. Martin* v. *Wilson* (1908) 129 Mo. App. 242; *State ex rel. Rippee* v. *Forest* (1914) 177 Mo. App. 245.

43. *State ex rel. Major* v. *Patterson* (1910) 229 Mo. 373.

44. *State ex rel. Major* v. *Patterson* (1910) 229 Mo. 364.

45. *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561.

46. *State ex rel. Parker-Washington Co.* v. *St. Louis* (1907) 207 Mo. 354.

The Springfield Court of Appeals held certiorari to be the proper remedy to determine the legality of the action of the county court in hiring out a prisoner who was convicted of a felony and was serving a sentence therefor in the county jail.[47]

The Supreme Court held certiorari to be the proper remedy to determine whether the assessor had legal authority to assess certain property belonging to a cemetery association.[48]

Instances of Action Held Not Quasi-Judicial

The Supreme Court has held that the circuit court erred in issuing the writ of certiorari to determine who had received a party primary nomination for a city office;[49] and that court also held that upon certiorari the validity of the action of the county court in appointing a member of a teachers' institute board would not be determined, because the proceeding was purely an administrative matter.[50] The action of the county court in rejecting a claim against the county was held to be not like judicial action, though a petition and answer were filed in the county court and a record made in the form of a judgment.[51]

In a leading case in this state the Supreme Court held that the proceedings of the county court in subscribing to railroad stock would not be reviewed on certiorari.[52] And in

47. *State ex rel. Sanks* v. *Johnson* (1909) 138 Mo. App. 306.

48. *State ex rel. Mount Mora Cemetery Assn.* v. *Casey* (1908) 210 Mo. 235. In this case Burgess, J., said: "As a rule the writ only lies against judicial or quasi-judicial bodies, that is, bodies performing judicial functions, but the authorities are not agreed as to what actions are judicial. As touching the nature and character of an assessor's duties, whether judicial or ministerial, there have been but few adjudications; but in New York, Massachusetts and Minnesota it has been held that in fixing the value of the property assessed the assessor acts quasi-judicially, and that for the purpose of reviewing his acts as such assessor certiorari will lie. (*Weaver* v. *Devendort*, 3 Denio, 117; *Barhyte v. Shepherd*, 35 N. Y. 238; *Railroad* v. *Nolan*, 48 N. Y. 513; *Baker* v. *Allen*, 20 Pick. 382; *Stewart* v. *Case*, 53 Minn. 62.)"

49. *State ex rel. Bentley* v. *Reynolds* (1905) 190 Mo. 579.

50. *State ex rel. Crow* v. *Harrison* (1897) 141 Mo. 12.

51. *Phelps County* v. *Bishop* (1870) 46 Mo. 68.

52. *Saline County Subscription Cases* (1869) 45 Mo. 52. There Bliss, J., said: "Still, had we the jurisdiction, the matter of convenience to the people and bondholders of Saline, suggested by counsel, would be a proper matter of consideration, as this is a discretionary writ, and not a

a recent case the Supreme Court held that the order of the county court in providing a place other than the county seat for the temporary office of the recorder of deeds is not judicial but administrative action, and that the power of the court to make the order would not be determined on certiorari.[53]

Legislative Action

The writ will not lie to review the validity of legislative action.[54]

Certiorari from the Supreme Court to Courts of Appeals

The writ of certiorari will issue from the Supreme Court to the several Courts of Appeals in this state to quash the judgment of a Court of Appeals when it has failed to follow the last controlling decision of the Supreme Court;[55] or when a Court of Appeals has exceeded its power, as for example in issuing a writ of mandamus to compel a sheriff to execute a notarial commitment issued against a witness who had refused to answer a question, where there was pending in the circuit court a writ of habeas corpus issued at the instance of the witness against the sheriff who had arrested him in obedience to the notarial commitment.[56] The judgment of a Court of Appeals was also quashed upon certiorari where that court attempted upon appeal from the circuit court to try *de novo* disbarment proceedings begun in the circuit court.[57]

Mandamus from the Supreme Court to the Court of Appeals to compel a transfer of a case seems to be an appropriate

writ of right; but as it is, ultimate confusion, rather than convenience, would follow such a breaking down of the landmarks of the law."

53. *State ex rel. Powell* v. *County Court* (1911) 237 Mo. 460.

54. "Certiorari," 6 Cyc. 753; *Pine Bluff Water & Light Co.* v. *Pine Bluff* (1896) 62 Ark. 196, 35 S. W. 227; *Quinchard* v. *Board of Trustees of Alameda* (1896) 113 Cal. 664, 45 Pac. 856.

55. *State ex rel. Curtis* v. *Broaddus* (1911) 238 Mo. 189; *State ex rel. Mersereau* v. *Ellison* (Mo., 1914) 168 S. W. 744; *State ex rel. United Rys. Co.* v. *Reynolds* (Mo., 1914) 165 S. W. 729; *State ex rel. Iba* v. *Ellison* (1914) 256 Mo. 644. See 2 Law Series, Missouri Bulletin, p. 28, for a note upon "Superintending Power of Missouri Supreme Court over Courts of Appeals."

56. *State ex rel. Evans* v. *Broaddus* (1912) 245 Mo. 123.

57. *State ex rel. Scott* v. *Smith* (1903) 176 Mo. 90.

remedy where the Court of Appeals is exercising appellate or original jurisdiction in a case that is exclusively within the jurisdiction of the Supreme Court.[58] Certiorari no doubt would also be an appropriate remedy to remove a cause from the Court of Appeals to the Supreme Court for appellate review. Prohibition to stop the Court of Appeals may also issue.[59]

Originally the Supreme Court held that certiorari would not be issued to a Court of Appeals where that court had not followed the last controlling decision of the Supreme Court.[60] The first decision of the Supreme Court awarding the writ was in a case where there had been a former adjudication of the case in the Supreme Court and the Court of Appeals had failed to follow the judgment of the Supreme Court, when the case after a retrial came before the Court of Appeals.[61] Shortly thereafter, the Supreme Court issued the writ in several cases where the question had not been formerly adjudicated by the Supreme Court but where the Court of Appeals had merely failed to follow the last controlling decision of the Supreme Court on the questions involved.[62]

By the Constitution the Supreme Court is given "general superintending control over all inferior courts,"[63] and "superintending control over the Courts of Appeals by mandamus, prohibition and certiorari."[64] The Constitution also provides that "the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said Court of Appeals."[65]

58. *State ex rel. Smith* v. *Smith* (1903) 152 Mo. 444.

59. *State ex rel. Sale* v. *Nortoni* (1906) 201 Mo. 1.

60. *Britton* v. *Steber* (1876) 62 Mo. 370; *State ex rel. Teasdale* v. *Smith* (1890) 101 Mo. 174; *State ex rel. Attorney General* v. *Gill* (1897) 137 Mo. 627; *State ex rel. Wabash R. R. Co.* v. *Bland* (1902) 168 Mo. 1; *State ex rel. Hobart* v. *Smith* (1903) 173 Mo. 398.

61. *State ex rel. Curtis* v. *Broaddus* (1911) 238 Mo. 189.

62. *State ex rel. Mersereau* v. *Ellison* (1914) 168 S. W. 744; *State ex rel. United Rys. Co.* v. *Reynolds* (1914) 165 S. W. 729; *State ex rel. Iba* v. *Ellison* (1914) 256 Mo. 645.

63. Constitution of 1875, Article VI, § 3.

64. Constitution of 1875, Amendment of 1884, § 8.

65. Constitution of 1875, Amendment of 1884, § 6. See *State ex rel. Curtis* v. *Broaddus* (1911) 238 Mo. 189.

Certiorari Issued Only After Final Judgment

Where the writ is issued for the purpose of quashing the record of an inferior tribunal the better view is that there must have been a final determination of the proceeding in the inferior tribunal. It does not issue to quash a preliminary or interlocutory order.[66] For example it has very recently been held by the Supreme Court that an interlocutory order—"which, if erroneous, may be corrected pending the proceeding"—viz., an order of the circuit court appointing commissioners to assess damages of owners of property abutting upon a street in Kansas City, made in a proceeding under the city charter to change the street grade, "will not suffice to authorize the issuance of a writ of certiorari."[67] Where the writ is issued to remove a cause for trial upon the merits, it must be issued before a final determination of the proceeding in the inferior tribunal.[68] The different uses of the writ have not always been kept in mind in stating the rule as to when the writ will be issued.

It has also been held in this state that certiorari is the proper remedy to review the order of a state circuit court transferring a case to a federal court for trial.[69] There is no appeal provided by law to an appellate court of the state or the United States from such an order, and such an order so far as the state court is concerned—an order which "puts the plaintiff out of that court"—is a final determination of the right of the plaintiff to have his cause tried in the state court. Certiorari therefore is properly issued in this class of cases.

There is another class of cases that may seem not in accord with the rule above stated, but it is believed they do not violate the rule. In two instances at least the writ has been issued by the Supreme Court to quash the record in habeas corpus proceedings pending in an inferior court before

66. *State ex rel. Missouri Pac. Ry. Co.* v. *Edwards* (1891) 104 Mo. 125; *State* v. *Schnieder* (1892) 47 Mo. App. 669; *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524; *State ex rel. Goodman Co.* v. *Circuit Court* (1912) 168 Mo. App. 29; *State ex rel. Summerson v. Goodrich* (1914) 165 S. W. 707.

67. *State ex rel. Summerson* v. *Goodrich* (1914) 165 S. W. 707.

68. "Certiorari," 10 Halsbury, Laws of England, 185-186.

69. *State ex rel. Iba* v. *Mosman* (1910) 231 Mo. 474.

the habeas corpus proceedings had there terminated.[70] In both instances the writ was applied for by the Attorney General. No doubt the Supreme Court under the constitutional provisions giving it general superintending control over all inferior courts has authority to issue certiorari where habeas corpus proceedings are pending in an inferior tribunal, because the issuance of the preliminary writ of habeas corpus is an indication that the inferior court is considering restoring one to his liberty and the probability of such a result may well warrant action by the Supreme Court. It may be said also that as the Supreme Court has original jurisdiction under the Constitution to issue writs of habeas corpus,[71] it may by certiorari withdraw the case from the inferior court for the purpose of passing upon the right of the petitioner to the writ of habeas corpus, the most important of the extraordinary legal remedies.

Absence or Inadequacy of Appeal or Writ of Error

Certiorari to review the proceedings of an inferior tribunal for the purpose of quashing such proceedings will only issue where there is no appeal or writ of error provided for by law,[72] or where appeal of error is not an adequate remedy.[73]

It is in no sense a substitute for appeal or writ of error, but is a method of reviewing judicial or quasi-judicial proceedings—proceedings "within the general scope of the common law"[74]— in an inferior tribunal where appeal or error

70. *State ex rel. Walker* v. *Dobson* (1896) 135 Mo. 1; *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561.

71. Constitution of 1875, Article VI, § 3.

72. *City of St. Charles* v. *Stewart* (1871) 49 Mo. 132; *State ex rel. Kansas & Texas Coal Ry. Co.* v. *Shelton* (1900) 154 Mo. 670; *Fry* v. *Armstrong* (1904) 109 Mo. App. 482; *State ex rel. Fairbanks Morse Co.* v. *Ayers* (1906) 116 Mo. App. 90; *State ex rel. Tedford* v. *Knott* (1907) 207 Mo. 167; *State ex rel. Iba* v. *Mosman* (1910) 231 Mo. 474; *State ex rel. Goodman Co.* v. *Circuit Court* (1912) 168 Mo. App. 29; *State ex rel. Summerson* v. *Goodrich* (1914) 165 S. W. 707; *State ex rel. Ruppel* v. *Wiethaupt* (1914) 254 Mo. 319.

73. *State ex rel. Hamilton* v. *Guinotte* (1900) 156 Mo. 513; *State ex rel Ruppel* v. *Wiethaupt* (1914) 254 Mo. 319.

74. 10 Halsbury, Laws of England, 161; *Boren* v. *Welty* (1835) 4 Mo. 250; *State ex rel. City of St. Louis* v. *Raum* (1877) 3 Mo. App. 589; *State ex rel. Stackhouse* v. *City of St. Louis* (1877) 4 Mo. App. 577.

either does not exist, or if either does exist it is inadequate. By way of illustration of the foregoing statements, it has been held that as the abutting property owners might appeal from an order of the circuit court overruling exceptions to an appraisement of damages caused by the city in changing the grade of a street, certiorari should not issue from the Supreme Court to quash the proceedings in the circuit court,[75] and that certiorari would issue for the purpose of quashing an order of the circuit court transferring a case to the federal court where no ground for the removal exists and there is no appeal to the State or federal superior court.[76] It has also been held that the writ will issue to quash the order of a county court in establishing a drainage district where an appeal to the circuit court existed only as to specified questions in the proceeding, and the sufficiency of the notice to the land owners required by the statute to be given was not included in the things specified that could be reviewed by the circuit court upon appeal.[77]

Too, it has been held one cannot have the benefit of certiorari who has permitted the time for error or appeal to elapse.[78]

Whether certiorari will issue when there is an appeal but where because of the time necessary to get a hearing some injustice may result, seems not definitely determined.[79] There seems much reason in the opinion of Sherwood, J., that "the statement that certiorari will not issue where either appeal or error goes, though frequently met with in text writers, and in some reports, is neither strictly true nor accurate; there are marked exceptions. Thus where the exigencies of the case are such that the ordinary methods of appeal or error may not prove adequate either in point of promptness or completeness so that a partial or total failure of justice may result, then certiorari may issue."[80]

75. *State ex rel. Summerson* v. *Goodrich* (1914) 165 S. W. 707.
76. *State ex rel. Iba* v. *Mosman* (1910) 231 Mo. 474.
77. *State ex rel. Ruppel* v. *Wiethaupt* (1914) 254 Mo. 319.
78. *Boren* v. *Welty* (1835) 4 Mo. 250; *State ex rel. Stackhouse* v. *City of St. Louis* (1877) 4 Mo. App. 577; *State ex rel. City of St. Louis* v. *Raum* (1877) 3 Mo. App. 589.
79. *State ex rel. Hamilton* v. *Guinotte* (1900) 156 Mo. 513; *State ex rel. Kansas & Texas Coal Ry. Co.* v. *Shelton* (1900) 154 Mo. 670.
80. *State ex rel. Hamilton* v. *Guinotte* (1900) 156 Mo. 513.

IV

Removal for Trial upon the Merits by Certiorari

In England the writ was frequently issued by a superior court to an inferior court to remove a case for trial upon the merits in the superior court.[81] There were instances where there existed at common law a right to have a case removed, where the removal was accomplished by certiorari, but in most of the cases where the writ was so used there was no absolute right of removal but the opinion of the high court was that it was desirable that the trial should be in the high court.[82] Due to our system of courts and the jurisdictions thereof this use of the writ is rare in this state and the other states in this country. The use of the writ to remove a case for trial upon the merits to a circuit court from a justice of the peace court is allowed by statute in this state in suits for forcible entry or unlawful detainer begun in the justice of the peace court.[83] In fact in the first certiorari case to be found in the Missouri reports, the writ was used to remove a case for trial upon the merits from a chancellor to the Supreme Court. The legislature had passed an act requiring the chancellor to certify cases to the Supreme Court for trial where he was interested in any manner. The chancellor, though interested, had refused to certify a case to the Supreme Court. The Supreme Court held, that upon certiorari the cause would be removed for trial upon the merits.[84]

As previously stated the Supreme Court in reality on two occasions has removed for trial habeas corpus proceedings pending in an inferior court.[85]

81. 10 Halsbury, Laws of England, 157-158; *Commonwealth* v. *Balph* (1886) 111 Pa. St. 365, 3 Atl. 220.

82. *Commonwealth* v. *Balph* (1886) 111 Pa. St. 365, 3 Atl. 220.

83. Revised Statutes 1909, § 7693.

84. *Rector* v. *Price* (1822) 1 Mo. 198.

85. *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561; *State ex rel. Walker* v. *Dobson* (1896) 135 Mo. 1. *Vide ante*, p. 15.

V

CERTIORARI AS AN ANCILLARY REMEDY OR TO BRING UP A COMPLETE RECORD

Certiorari issues frequently in aid of or as an auxiliary to error or appeal to bring up the true record where the record appears in the appellate court to be insufficient.[86] This use of the writ is well known in the practice in this state, and is frequently resorted to when a diminution of the records is suggested.[87] It also frequently issues in aid of habeas corpus proceedings.[88]

VI

CERTIORARI AS GIVEN BY STATUTE

In the United States there are many state statutes giving the remedy of certiorari in specified instances. In Missouri the remedy is given by statute to a physician to review the action of the State Board of Health where that board has revoked the physician's license;[89] and also to any one affected to review "the reasonableness or lawfulness" of an order of the Public Service Commission of Missouri;[90] and further, as has been pointed out in another connection, it is also given to remove a suit for forcible entry or unlawful detainer to the circuit court where such a suit is begun in a justice of the peace court.[91]

86. 10 Halsbury, Laws of England, 166; *Smith* v. *St. Louis Iron Mt. Ry. Co.* (1886) 91 Mo. 58; *Beck* v. *Dowell* (1892) 111 Mo. 506; *Callier* v. *Chester & Perryville etc. Ry. Co.* (1911) 158 Mo. App. 249.

87. *Finkelnburg & Williams*, Missouri Appellate Practice (2d ed.) 227.

88. *In re Breck* (1913) 252 Mo. 302.

89. Revised Statutes 1909, § 8317.

90. Public Service Commission Act, §§ 111-113, Laws of 1913, p. 641.

91. Revised Statutes 1909, § 7693. *Vide ante*, p. 18.

VII

THE PRACTICE

The Supreme Court,[92] the Courts of Appeal[93] and the circuit courts[94] have authority, exercising original jurisdiction, to issue the writ of certiorari. The writ only issues from a superior court to an inferior court. As the circuit court has the power to issue the writ the application should be made to that court in those cases where it is the superior court, as the Supreme Court and several Courts of Appeal will not exercise their original jurisdiction in cases of ordinary importance.[95]

The practice is to present a written petition for the writ.[96] If the petitioner by the petition shows that he is entitled to the writ it usually issues, though it is a discretionary writ and does not issue *ex debito justitiae*.[97] It does issue, however, as a matter of course when applied for by the Attorney General of the state.[98] The allowance of the writ operates as a *supersedeas* to the inferior court or tribunal.[99]

At one time though it was held that the discretionary stage had passed after the writ was issued and the record returned, the later view taken by the Supreme Court is to the contrary.[100] Anyone legally affected by the record may be a petitioner for the writ.[101] The right of the particular relator to have

92. Constitution of 1875, Art. VI, § 3.
93. Constitution of 1875, Art. VI, § 12; Constitution of 1875, Amendment of 1884, § 4; Revised Statutes 1909, § 3863.
94. Constitution of 1875, Art. VI, §. 23. Revised Statutes 1909, § 3863.
95. *In re Breck* (1913) 252 Mo. 302; *State ex rel. Brennan* v. *Walbridge* (1893) 116 Mo. 656.
96. *Finkelnburg & Williams*, Missouri Appellate Practice (2d ed.) 224.
97. *State ex rel. Brennan* v. *Walbridge* (1893) 116 Mo. 656; *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524; *State ex rel. Hill* v. *Moore* (1900) 84 Mo. App. 11; *Inhabitants of Cushing* v. *Gay* (1843) 23 Me. 9; *Summerrow* v. *Johnson* (1892) 56 Ark. 85, 19 S. W. 114.
98. *State ex rel. Barker* v. *Wurdeman* (1914) 254 Mo. 561.
99. *State* v. *Schneider* (1892) 47 Mo. App. 669; 10 Halsbury, Laws of England, 202; 1 Bacon's Abridgment (5th ed.) 570.
100. *State ex rel. Hamilton* v. *Guinotte* (1900) 156 Mo. 513; *State ex rel. Powell* v. *County Court of Montgomery County* (1911) 237 Mo. 460.
101. *State ex rel. Hill* v. *Moore* (1900) 84 Mo. App. 11; *State ex rel. Powell* v. *County Court of Montgomery County* (1911) 237 Mo. 460.

the writ will not be considered after the return has been made. This question should be raised by motion before the return.[102] The writ may be attacked because on its face it appears that it should not have issued, by motion to quash, though no return has been made.[103] There is no return to the writ as in mandamus and some of the other extraordinary legal remedies. The return to the writ is the production of the record called for in the writ.[104] The petition for the writ is regarded as an assignment of errors upon the record sought to be reviewed.[105]

The writ should not be directed to an ex-official who has parted with the record, but should be directed to the tribunal holding the record.[106]

In truth, as stated by our Supreme Court, certiorari is a most useful writ "and intended to fill a useful place in our system."[107] Originally a true prerogative writ, now a discretionary writ, the purposes for which it may issue are not limited and the growth of this common law remedy should not be regarded as having been completed. It was the peculiar business of the King to do justice through his judges under the English common law system, and today it is the business of the state to do justice through the agency of the courts. While we have changed the writ from a prerogative to a discretionary writ so as to conform to the proper conception of the sovereign power in our republican form of government, yet its nature remains very much the same. Its great object now is the same as when Bacon wrote, viz., to compel inferior tribunals to return "the records of a cause depending before them, to the end the party may have the more sure and speedy justice."[108]

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102. *State ex rel. Powell* v. *County Court of Montgomery County* (1911) 237 Mo. 460.

103. *State ex rel. Walbridge* v. *Valliant* (1894) 123 Mo. 524; *State ex rel. Underwood* v. *Fraker* (1902) 168 Mo. 445.

104. *In re Breck* (1913) 252 Mo. 302; *State ex rel. Halpin* v. *Powers* (1878) 68 Mo. 320; *State ex rel. Lathrop* v. *Dowling* (1872) 50 Mo. 134.

105. *State ex rel. Halpin* v. *Powers* (1878) 68 Mo. 320.

106. *State ex rel. Clark* v. *Souders* (1897) 69 Mo. App. 472; 1 Bacon's Abridgment (5th ed.) 570.

107. *State ex rel. Harrison County Bank* v. *Springer* (1896) 134 Mo. 212.

108. 1 Bacon's Abridgment (5th ed.) 559.