NOTES

THE WRIT OF PROHIBITION IN MISSOURI

This note is the first in a series which examines the use of extraordinary writs in Missouri. Notes on quo warranto and mandamus will appear in the Fall issue, and certiorari and habeas corpus will be discussed in subsequent issues of the Law Quarterly.

I. INTRODUCTION

Prohibition is an extraordinary remedy whereby a court or official about to commit an act judicial in nature is ordered not to do so, on the ground that such court or official is acting without or in excess of jurisdiction. The history of the use of prohibition in the common law extends back to the twelfth century.[1] Missouri courts applied the writ at common law, relying upon treatises, foreign cases and eventually their own precedent to characterize prohibition,[2] but in 1895 the Missouri legislature enacted a statute dealing with prohibition and the procedure for its issuance.[3] Although the fundamental aspects of prohibition were codified, the statute, virtually unchanged in subsequent codifications, is essentially a reflection of the common law doctrines.[4]

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1. Accounts of the history of prohibition, of varying length and detail, are included in F. FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES (1926); J. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES (1896); W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1923); Hughes & Brown, *The Writ of Prohibition*, 26 GEO. L.J. 831 (1938).

2. In Thomas v. Mead, 36 Mo. 232, 246-51 (1865), which the court believed to be the first time prohibition had been petitioned in Missouri, Blackstone and English cases were cited to indicate the nature of the writ and its applicability to the facts at hand. The court then used other American cases to indicate that prohibition could lie in United States courts as well as English ones.

3. MO. LAWS 95 (1895).

4. MO. REV. STAT. §§ 530.010 to 530.090 (1969). There are two other statutory provisions which mention prohibition. MO. REV. STAT. § 536.150 (1969) provides for prohibition against certain decisions of administrative agencies. According to Casby v. Thompson, 42 Mo. 133 (1868), the word "prohibition" used in GEN. STAT. 1865, ch. 167, § 24 (1866), now MO. REV. STAT. § 526.030 (1969), does not refer to the writ of prohibition, but to the general character of injunction.

When dealing with prohibition, the attorney should keep in mind two theories on the use of the writ.[5] The traditional line of thought emphasizes the extraordinary nature of prohibition, stressing that the writ is intended for use only in extreme cases when there is clearly no other adequate remedy for the relator.[6] The second theory relies upon the preventive character of the writ: prohibition should be liberally allowed in order to avoid useless suits, to minimize inconvenience, and to grant relief at the earliest possible moment in the course of litigation. This approach appears to be on the ascendency in some states.[7]

Missouri courts have uniformly embraced the view that prohibition is extraordinary.[8] In the long history of the use of the writ in Missouri, the state's courts have exercised restraint in defining the scope of use of prohibition, and have rejected any suggestion that the writ should be a panacea for a multitude of legal woes suffered by litigants. Thus, opinions emphasize that prohibition is not intended to substitute for error or appeal,[9] although a few courts have allowed the writ when appeal was available but less effective.[10] The preventive nature

5. F. FERRIS, *supra* note 1, at 417.

6. *Id.* at 429. A sampling of the grounds for refusing to grant prohibition: 1) absence of jurisdiction is doubtful or the relator has failed to carry the burden of proving non-existence of jurisdiction; 2) an adequate remedy exists at law; 3) relator failed to object to the lower court about the lack of jurisdiction; 4) the action of the court below is already complete; 5) prohibition would be ineffectual, as when the act of the court below is clearly void and unenforceable; 6) the petition for the writ is premature; 7) the act below is ministerial or administrative.

7. See Boone, *Prohibition: Use of the Writ of Restraint in California*, 15 HASTINGS L.J. 161 (1963) for a discussion on the expansion of the writ's use in California. *See* Goldberg, *The Extraordinary Writs and the Review of Inferior Court Judgments*, 36 CALIF. L. REV. 558 (1948). The Washington legislature long ago expanded the applicability of prohibition in that state, WASH. REV. CODE ANN. § 7.16.290 (1961).

8. *See, e.g.*, State *ex rel.* Ross Const. Co. v. Skinker, 341 Mo. 28, 106 S.W.2d 409 (1937); State *ex rel.* Elam v. Henson, 217 S.W. 17 (Mo. 1919); State *ex rel.* Larew v. Sale, 188 Mo. 493, 87 S.W. 967 (1905); State *ex rel.* Dudley v. Lasky, 451 S.W.2d 352 (Mo. App. 1970); State *ex rel.* Derring Millikin, Inc. v. Meyer, 449 S.W.2d 870 (Mo. App. 1970).

9. *See, e.g.*, State *ex rel.* Berbiglia, Inc. v. Randall, 423 S.W.2d 765 (Mo. 1968); State *ex rel.* Burns v. Shain, 297 Mo. 369, 248 S.W. 591 (1923); State *ex rel.* Schoenbacker v. Kelly, 408 S.W.2d 383 (Mo. App. 1966); State *ex rel.* City of Mansfield v. Crain, 301 S.W.2d 415 (Mo. App. 1957).

10. The strongest assertions that prohibition may lie if another remedy is less convenient or efficient are found in State *ex rel.* Brewen-Clark Syrup Co. v. Workmen's Compensation Comm'n, 320 Mo. 893, 8 S.W.2d 897 (1928); State *ex rel.* Ellis v. Elkin, 130 Mo. 90, 30 S.W. 333 (1895); State *ex rel.* Mack v. Scott, 241 Mo. App. 674, 235 S.W.2d 106 (1950). *But see* note 9 *supra* and accompanying text. Mo. SUP. CT. R. 84.22 states that: "No original remedial writ, except habeas corpus,

of prohibition is strictly construed; the writ will not lie if the lower court's action is already completed, since appeal is then an adequate remedy.[11] This note will illustrate that, while court decisions and legislative enactments have expanded certain aspects of prohibition in Missouri, the traditional views on the nature of the writ continue to have considerable influence in the state courts.

II. PROCEDURE

The proceeding leading to the issuance or denial of the absolute prohibition is a civil action, as it was at common law.[12] The relator, an individual petitioning for the writ, need not be a party to the judicial action sought to be prohibited,[13] but if he is a stranger to the inferior

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will be issued by the court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court." Nevertheless, courts have held that this rule is not absolute, State *ex rel.* Dietz v. Carter, 319 S.W.2d 56 (Mo. App. 1958); *cf.* Stemmler v. Einstein, 297 S.W.2d 467 (Mo. 1957).

11. State *ex rel.* Strother v. Broaddus, 234 Mo. 358, 137 S.W. 268 (1911). When an action is complete is difficult to define: Although an injunction has already been issued, a superior court may prohibit its enforcement, State *ex rel.* Taylor v. Nangle, 360 Mo. 122, 227 S.W.2d 655 (1950); it appears that when any aspect of a court order is unexecuted, prohibition may be used to intervene and even undo what already has been done, State *ex rel.* St. Louis, K. & S. Ry. v. Wear, 135 Mo. 230, 36 S.W. 357 (1896).

12. Blackstone provides a description of the procedure at common law:

> The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint . . . upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon the motion: and then, for a more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition, or fiction, that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of the opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then . . . the inferior court shall be prohibited from proceeding further.

3 W. BLACKSTONE, COMMENTARIES * 113-14. The procedure was changed considerably by statute, 1 Will. IV, c. 21 (1831).

13. State *ex rel.* Smith v. Joynt, 344 Mo. 686, 127 S.W.2d 708 (1939); State *ex rel.* Drainage Dist. No. 8 v. Duncan, 334 Mo. 733, 68 S.W.2d 679 (1934) (dictum); State *ex rel.* Darst v. Wurdeman, 304 Mo. 583, 264 S.W. 402 (1924); State *ex rel.* Priest v. Calhoun, 207 Mo. App. 149, 226 S.W. 329 (1920). A stranger also could petition for the writ at common law in Missouri, Thomas v. Mead, 36 Mo. 233, 247 (1865). The Attorney General may petition for the writ, although a stranger to the inferior action, State *ex rel.* Eagleton v. Hall, 389 S.W.2d 798 (Mo. 1965).

proceedings, he must demonstrate some interest in the outcome of the litigation.[14] The respondent in a prohibition hearing is always the official who allegedly has exceeded his jurisdiction.[15] The adverse party in the inferior proceeding is not joined in the prohibition action, although his attorney often represents the respondent before the superior court.[16]

The relator petitions a superior court to hear and decide whether the lower court or official has jurisdiction to pursue the lower court action.[17] The merits of the inferior action are not placed in issue. In response to the petition, the superior court issues a preliminary writ of prohibition to the lower court or official to show cause why the writ should not be made permanent. In conjunction with the preliminary order, the superior court also may order the lower court to desist immediately and completely from its prosecution of the case, with any steps taken in disregard of such an order being void.[18] The function of prohibition at common law was supervisory, a purpose reflected today by the statutory requirement that the court or official against whom the writ is issued be "within the jurisdiction" of the restraining court.[19]

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14. State *ex rel.* Helm v. Duncan, 225 Mo. App. 393, 397, 36 S.W.2d 679, 681 (1931):

> Upon the same principle [of discretion] it [prohibition] should never issue when its operation would not in any way affect the rights of a party asking for it.

See also Bash v. Truman, 335 Mo. 1077, 75 S.W.2d 840 (1934); State *ex rel.* Terry v. Holtkamp, 330 Mo. 608, 51 S.W.2d 13 (1932).

15. State *ex rel.* Siegel v. Strother, 365 Mo. 861, 289 S.W.2d 73 (1956); State *ex rel.* Stroh v. Klene, 276 Mo. 206, 207 S.W. 496 (1918).

16. *See* note 38 *infra* and accompanying text.

17. Suggested forms for the various pleadings in prohibition can be found in MoBarCLE, Missouri Appellate Practice & Procedure and Extraordinary Remedies (1963); M. Volz, 2 Missouri Practice §§ 2111, 2121 (1961); C. Wheaton, 10 Missouri Practice R. 97.01 to 97.05 (1962). The petition for prohibition should contain the following: 1) an identification of the inferior action and the judge or official sought to be restrained; 2) an averment that the relator petitioned the lower court for a dismissal of the pending action and that the motion was denied; 3) a statement of the grounds for the motion for dismissal to the lower court; 4) an assertion that the judge or official still has no jurisdiction and that he will proceed in the lower action unless prohibited; 5) a specific assertion that the relator has no other adequate and timely remedy, providing reasons why this is so; 6) a prayer for the issuance of the writ.

18. Mo. Rev. Stat. § 530.040 (1969); *see* State *ex rel.* St. Louis Pub. Serv. Co. v. McMillan, 351 S.W.2d 22 (Mo. 1961); State *ex rel.* Pettibone v. Malloy, 330 Mo. 1084, 52 S.W.2d 402 (1932); State *ex rel.* Knisely v. Board of Trustees, 268 Mo. 163, 186 S.W. 680 (1916).

19. Mo. Rev. Stat. § 530.020 (1969). *See, e.g.,* State *ex rel.* Ghan v. Gideon, 119 S.W.2d 89 (Mo. App. 1938); State *ex rel.* Penfield v. Mosman, 130 Mo. App. 124,

The essential aspects of the petition for the writ[20] and the nature of the subsequent proceedings are outlined in the Missouri statute and supreme court rules.[21] The prohibition proceeding is initiated by the relator filing his petition with the superior court, but he first must provide written notice to the respondent five days prior to the filing, although this notice requirement may be waived in exceptional cases.[22] Ordinarily the relator also notifies the adverse party in the inferior action, since his attorney often represents the respondent in the prohibition proceeding. Having met the notice requirements, the relator may file his petition, which must state facts requisite for the issuance of a preliminary writ, since the right to that initial order is determined from the face of the petition.[23] Nevertheless, the respondent may file suggestions opposing the preliminary prohibition, although there is no oral argument before the petitioned court.[24] Despite a Missouri rule that there will be no motions to reconsider a denial of the preliminary writ, it has been held that a petitioned court has the discretion to reconsider the denial on such a motion.[25]

If the superior court issues the preliminary writ, the respondent usually files a return to the order to show cause, or he may simply move to dismiss or quash. Any allegations of the petition not denied in the return will be taken as confessed,[26] and all allegations of the petition

115 S.W. 1041 (1909). The Supreme Court of Missouri may issue prohibition to any inferior court since it has general superintendence over all state courts, State *ex rel.* Siegel v. Strother, 365 Mo. 861, 289 S.W.2d 73 (1956). A court of appeal may issue a writ to circuit courts within its area even though there is no jurisdiction by appeal because of an excessive jurisdictional amount in dispute. State *ex rel.* City of Creve Coeur v. Weinstein, 329 S.W.2d 399 (1959); State *ex rel.* City of Mansfield v. Crain, 301 S.W.2d 415 (Mo. App. 1957).

20. *See* note 17 *supra.*

21. Mo. REV. STAT. §§ 530.030 *et seq.* (1969); Mo. SUP. CT. R. 84.22 *et seq.* and 97.01 *et seq.*

22. Mo. SUP. CT. R. 84.24.

23. *See* State *ex rel.* Brncic v. Huck, 296 Mo. 374, 246 S.W. 303 (1922); State *ex rel.* Haughey v. Ryan, 180 Mo. 32, 79 S.W. 429 (1904).

24. Mo. SUP. CT. R. 84.24.

25. The court in State *ex rel.* Coffman v. Crain, 308 S.W.2d 451 (Mo. App. 1958) indicated that Mo. SUP. CT. R. 84.24 is not an absolute bar to reconsideration of the petition.

26. State *ex rel.* Allison v. Barton, 355 Mo. 690, 197 S.W.2d 667 (1946); State *ex rel.* Cytron v. Kirkwood, 340 Mo. 185, 100 S.W.2d 450 (1936); State *ex rel.* Isbell v. Kelso, 442 S.W.2d 163 (Mo. App. 1969). In addition, assertions of the return not denied in a reply will be taken as true, State *ex rel.* Reeves v. Brady, 303 S.W.2d 22 (Mo. 1957); State *ex rel.* May Dept. Stores v. Weinstein, 395 S.W.2d 525 (Mo. App. 1965).

will be considered uncontroverted if a motion to quash is filed.[27] The relator may file a reply after the return is filed or move for judgment on the pleadings. Following the respondent's return to the show cause order, a hearing on the prohibition petition is held to determine if the writ should be made absolute. Although it is a denial of due process to make the writ permanent without notifying the respondent of the prohibition proceeding,[28] neither due process nor the prohibition statute require a formal hearing and extended oral argument after the pleadings are submitted. In response to the need for an immediate decision, at least once the Supreme Court of Missouri has conducted an abbreviated and informal hearing on whether to make the writ absolute.[29] Moreover, several cases have issued the writ absolutely without a hearing when the facts were admitted on the pleadings and only a question of law remained at issue.[30] When the superior court considers whether to make the writ absolute, a presumption that the lower court had proper jurisdiction must be overcome by the relator.[31] Before making its decision on pleadings and argument, the superior court can refer a specific controversy of fact to a circuit court, judge, or referee.[32]

Issuance of the initial order does not require that the petitioned court make the writ absolute, for if the court decides that there is no ground to issue absolute prohibition, the preliminary order will be quashed.[33] The Missouri prohibition statute allows the court to grant relief in accordance with the "principles of law" when making the prohibition

27. State *ex rel.* Campbell v. James, 263 S.W.2d 402 (Mo. 1953); State *ex rel.* Hopkins v. Stemmons, 302 S.W.2d 51 (Mo. App. 1957).

28. For a general discussion of notice in prohibition proceedings, see State *ex rel.* Siegel v. Strother, 365 Mo. 861, 289 S.W.2d 73 (1956).

29. *See* Mansur v. Morris, 355 Mo. 424, 196 S.W.2d 287 (1946). Relator filed prohibition petition in the supreme court only a few days before an election. At issue was the county court clerk's authority to remove a candidate's name from the ballot. The court held two informal hearings in order to determine if prohibition should lie.

30. The most extensive discussion of the procedure is found in State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S.W.2d 810 (1938). *See also* State *ex rel.* National Outdoor Advertising Co. v. Seehorn, 354 Mo. 170, 188 S.W.2d 657 (1945); State *ex rel.* Isbell v. Kelso, 442 S.W.2d 163 (Mo. App. 1969); State *ex rel.* Houser v. Goodman, 406 S.W.2d 121 (Mo. App. 1966).

31. State *ex rel.* Elam v. Henson, 217 S.W. 17 (Mo. 1919).

32. Mo. REV. STAT. § 530.060 (1969). State *ex rel.* McAllister v. Slate, 278 Mo. 570, 214 S.W. 85 (1919) held that the conclusions as to law or facts by a commissioner who had heard evidence in a prohibition proceeding referred to him were not binding, although persuasive.

33. State *ex rel.* Robertson v. Sevier, 342 Mo. 346, 115 S.W.2d 810 (1938).

permanent.[34] Since the statute does not attempt to prescribe the remedy to be granted, courts may do more than simply decree that prohibition will lie. One court granting full relief argued that not only could it make prohibition absolute, but it also could issue a writ of restitution to restore to the relator what he had lost by the erroneous judgment below.[35] Other courts also have done more than merely order an absolute prohibition.[36]

In addition, the court hearing a prohibition proceeding may make a judgment for costs. Earlier cases held that costs were to be assessed against the relator even if the respondent was restrained by an absolute decree, since the courts were unwilling to subject either the respondent, who was a governmental official, or the adverse party in the action below, who was not involved in the prohibition proceeding, to the burden of paying costs.[37] By process of elimination such reasoning left the relator as the only source of costs, which he was required to pay even if he prevailed in the prohibition hearing. This outcome was rejected in *State ex rel. Burtrum v. Smith*,[38] in which the Missouri Supreme Court found it to be "common knowledge" that the respondent judge or official was represented before the upper court by the counsel for the ad-

34. MO. REV. STAT. § 530.070 (1969). Such statutory language has allowed the courts to employ common law and Missouri case law dating from before the statute was enacted.

35. State *ex rel.* Rogers v. Rombauer, 105 Mo. 103, 108, 16 S.W. 695, 697 (1891):

> In chancery it has been universally recognized that, when the court obtained jurisdiction of a controversy, it would proceed to do complete justice therein, though part of the remedy afforded might be of such a nature (for example the adjustment of damages) as ordinarily would require a hearing in a court of law.
>
> So, in appellate practice to-day, a writ of restitution to restore appellant to what he may have lost by reason of an erroneous judgment is properly issuable as a part of the mandate to a trial court.

36. *See, e.g.*, School Dist. v. Nomile, 431 S.W.2d 118 (Mo. 1968) (circuit judge ordered to enter order setting aside injunction); Traveller's Indem. Co. v. Swink, 440 S.W.2d 152 (Mo. App. 1969) (circuit judge ordered to dismiss void appeal and to remand to probate court). In State *ex rel.* McCaffery v. Aloe, 152 Mo. 466, 54 S.W. 494 (1899) the Supreme Court of Missouri ordered the dissolution of an injunction upon the issuance of the *preliminary* writ of prohibition.

37. *See* State *ex rel.* Kurn v. Wright, 349 Mo. 1182, 164 S.W.2d 300 (1942); State *ex rel.* Federal Lead Co. v. Reynolds, 245 Mo. 698, 706, 151 S.W. 85, 87 (1912); State *ex rel.* Heddens v. Rusk, 236 Mo. 201, 218, 139 S.W. 199, 204 (1911). *But see* Ramsey v. Green, 17 S.W.2d 629, 636 (Mo. App. 1929), a case decided well before State *ex rel.* Burtrum v. Smith, 357 Mo. 134, 206 S.W.2d 558 (1947) which anticipated its ruling that costs may be assessed against the adverse party below.

38. 357 Mo. 134, 206 S.W.2d 558 (1947).

verse party in the action below. The court held that this lower court adversary may be charged with costs if the relator prevails in the prohibition action, for it is the adversary who is most concerned that jurisdiction be upheld.[39]

At common law there was no appeal when a petitioned court declined to make prohibition absolute—one had to petition for the writ again. Early Missouri cases ruled likewise, holding that since the denial of the writ was discretionary, there would be no appeal.[40] Since the enactment of the 1895 prohibition statute, however, a relator whose petition has been rejected may either move for a new trial or appeal.[41] If a respondent disobeys an absolute rule of prohibition, the order may be enforced by contempt proceedings.[42]

III. DEVELOPMENT OF THE WRIT IN MISSOURI

Although prohibition has been used for centuries, several issues surrounding the application of the writ and its scope have remained unresolved. Because prohibition was developed originally to protect the interest of the sovereign and was used only in extreme cases, the common law generally held that granting prohibition was within the discretion of the petitioned court.[43] Today, discretion allows courts to insist that other remedies be pursued when they provide adequate relief, disregarding whether judicial acts were committed in excess of jurisdiction.[44] One decision to the contrary has spoken of the writ as a matter

39. *Id.* at 143, 206 S.W.2d at 563. It must be emphasized that the awarding of costs is a discretionary matter for the court.

40. State *ex rel.* Griffith v. Bowerman, 40 Mo. App. 576 (1890); State *ex rel.* Smith v. Levens, 32 Mo. App. 520 (1888).

41. MO. REV. STAT. § 530.080 (1969).

42. Howard v. Pierce, 38 Mo. 296 (1866).

43. Nevertheless, there were some differences of opinion among common law judges over the discretionary nature of prohibition. *Compare* Clay v. Snelgrave, 91 Eng. Rep. 1285 (K.B. 1701); Good v. Good, 124 Eng. Rep. 66 (C.P. 1625); Parish of Aston v. Castle-Birmidge Chapel, 80 Eng. Rep. 215 (K.B. 1615), *with* Ford v. Weldon, 83 Eng. Rep. 50 (K.B. 1664); Woodward v. Bonithan, 83 Eng. Rep. 2 (K.B. 1661):

> But all the Judges agreed, that the granting of prohibition is not a discretionary act of the Court, but are grantable *ex debito justitiae*, and they denied my Lord Hobart's opinion in his Reports 67, which Roll Chief Justice they said had frequently done before.

44. Prohibition is not writ of right: State *ex rel.* Taylor v. Nangle, 360 Mo. 122, 227 S.W.2d 655 (1950); State *ex rel.* Hettrick Mfg. Co. v. Lyon, 321 Mo. 825, 12 S.W.2d 447 (1928); State *ex rel.* Goodson v. Hall, 228 Mo. App. 766, 72 S.W.2d 499 (1934).

of right when the inferior court clearly has no jurisdiction and the relator is not a stranger to the proceedings.[45] The statement was dictum and was offered without citing any Missouri cases, but it may have been what the rendering court considered a contemporary matter of fact if not correct legal theory. Since the granting of prohibition is within the discretion of the court, the only true guidelines for the judges are justice and the equities of the case at hand. In such a situation the court is probably most sensitive to the suggestion of the relator that there is no other adequate relief, for the rejection of the plea without a reasonable justification could be condemned as arbitrary. In our legal system based upon due process, discretion is not unlimited discretion.[46]

Missouri opinions have evinced some uncertainty whether the relator must make an initial protest to the lower court on the issue of jurisdiction as a condition precedent to the grant of the writ of prohibition by the upper court.[47] The problem can be acute for the attorney who has neglected to object to the inferior court. The earlier cases stated the "inflexible rule" that failure to protest the lack of jurisdiction below would result in the denial of prohibition in the court above.[48] The rationale for such inflexibility was the desire to discourage the wasteful consumption of the superior court's time on an issue of jurisdiction which possibly could be resolved below. Nevertheless, exceptions to the preliminary objection rule have been developed. Obviously no policy of judicial efficiency was being furthered when a superior court denied prohibition against a judge or official who asserted in his return that he always had had jurisdiction: if he still believes he has jur-

45. State *ex rel.* Cone v. Bruce, 227 Mo. App. 631, 55 S.W.2d 733 (1932). No other Missouri opinion has cited the case for this proposition.

46. *See* State *ex rel.* Priest v. Calhoun, 207 Mo. App. 149, 160, 226 S.W. 329, 333 (1920):

> While we are mindful of the fact that the awarding of a writ of prohibition is a matter within the sound discretion of the court, yet such discretion is not an arbitrary one, and . . . we cannot, in the instant case, upon the sole ground of discretion in this court, refuse the relief sought for by the relator, when it appears that relator is materially affected by the action of a court, which action, in our view, under the facts and circumstances of this case, is clearly beyond its jurisdiction.

47. For a brief general discussion of the need to object in the lower court, see Comment, *Necessity of Pleas to Jurisdiction in Lower Court,* 42 COLUM. L. REV. 295 (1942).

48. Forsee v. Bates, 89 Mo. App. 577, 583 (1901); State *ex rel.* Jones v. Laughlin, 9 Mo. App. 486, 488 (1881).

isdiction, it would have been useless to have brought it to his attention.[49] A second exception to the rule that an initial lower court objection must be made was allowed when the lack of jurisdiction was clearly on the face of the record.[50] In one opinion, however, the supreme court managed to reduce the general rule, with or without exceptions, to little more than a rule of thumb. After stating that it agreed with the preliminary objection requirement, the court in *State ex rel. McCaffery v. Aloe*[51] did not apply the condition precedent to the case before it. The court asserted that, since the writ is discretionary, it could ignore the lack of an initial objection in reaching the proper decision.[52] Since other cases subsequent to *McCaffery* have cited its language,[53] the opinion's strong emphasis on discretion probably is not significantly diluted by other later decisions which seem to recognize the rule or use exceptions to circumvent it.

The two most uncertain and dynamic aspects of the writ of prohibition are the concepts of jurisdiction and judicial act. As explained in the first sentence of this note, prohibition lies against judicial acts done in excess of the jurisdiction of the court or official. Missouri courts thus have had to clarify the character of a judicial act, which essentially has involved defining the extent to which prohibition extends to governmental bodies outside the judiciary department. Establishing what is an excess of jurisdiction has been the more uncertain task for the courts. For the most part, there has been no difficulty defining the term when jurisdiction over the person or subject matter is lacking. Problems have arisen, however, in characterizing excess of jurisdiction

49. State *ex rel.* Henderson v. Cook, 353 Mo. 272, 183 S.W.2d 292 (1944); State *ex rel.* Government Employees Ins. Co. v. Lasky, 454 S.W.2d 942, 945 (Mo. App. 1970); State *ex rel.* Ramsey v. Green, 17 S.W.2d 629 (Mo. App. 1929).

50. State *ex rel.* American Lead and Baryta Co. v. Dearing, 184 Mo. 647, 84 S.W. 21 (1904); State *ex rel.* Young v. Oliver, 163 Mo. 679, 64 S.W. 128 (1901); State *ex rel.* Saint Louis & K. Ry. v. Hirzel, 134 Mo. 435, 37 S.W. 921 (1896); State *ex rel.* Kansas City Exch. Co. v. Harris, 229 Mo. App. 721, 81 S.W.2d 632 (1935).

51. 152 Mo. 466, 54 S.W. 494 (1899).

52. *Id.* at 498. *See also* State *ex rel.* Fenn v. Riley, 127 Mo. App. 469, 479, 105 S.W. 696, 699 (1907):

> The effect of those and perhaps of other recent decisions is that the refusal to grant prohibition until the lower court has overruled the plea to its jurisdiction is rather a discretionary matter of practice in the supervising court, than a condition precedent to the issuance of the writ . . . .

53. Other cases using broad discretion: State *ex rel.* Moberly v. Sevier, 337 Mo. 1174, 88 S.W.2d 154 (1935); State *ex rel.* Missouri Pac. Ry. v. Williams, 221 Mo. 227, 120 S.W. 740 (1909); State *ex rel.* City of Mansfield v. Crain, 301 S.W.2d 415 (Mo. App. 1957).

when both personal and subject matter jurisdiction are present, but the judge or official nevertheless has committed an act apparently beyond his authority. The significant changes in the nature of prohibition which have occurred have centered in these two areas, and from all indications, important future developments in the law of prohibition will probably involve the redefinition of these two terms.

In Missouri prohibition can be enforced against a judge or official who has failed to gain jurisdiction over the person or does not have jurisdiction over the subject matter. Thus the relator can use the writ to test jurisdiction when there has been a defective service of process,[54] no service at all,[55] or attempted service of a party immune to process.[56] Similarly, prohibition is used to question the venue of an action.[57] Although Missouri courts have had no difficulty allowing prohibition to restrain courts prosecuting an action without proper venue, they have differed on whether the writ lies to attack a court order denying or granting a request for change of venue.[58]

Prohibition cannot be issued against a lower court on the basis of an erroneous factual conclusion made during the determination that the court had jurisdiction or proper venue.[59] The writ is intended to ques-

54. State *ex rel.* Lesliy v. Aronson, 362 S.W.2d 61 (Mo. App. 1962) (service on Missouri resident by the Missouri long arm statute); Burke v. McClure, 211 Mo. App. 446, 245 S.W. 62 (1922) (interested party serving process).

55. State *ex rel.* Bowling Green Trust Co. v. Barnett, 245 Mo. 99, 149 S.W. 311 (1912); State *ex rel.* Keller v. Porterfield, 283 S.W. 59 (Mo. App. 1926).

56. State *ex rel.* Stipec v. Owen, 271 S.W.2d 864 (Mo. App. 1954).

57. State *ex rel.* Toberman v. Cook, 365 Mo. 274, 281 S.W.2d 777 (1955); State *ex rel.* O'Keefe v. Brown, 361 Mo. 618, 235 S.W.2d 304 (1951); State *ex rel.* Atkinson Paving Co. v. Aronson, 345 Mo. 937, 138 S.W.2d 1 (1940); State *ex rel.* Cummins Diesel Sales Corp. v. Eversole, 332 S.W.2d 53 (Mo. App. 1960); State *ex rel.* Finch v. Duncan, 195 Mo. App. 541, 193 S.W. 950 (1917).

58. The petition for the writ in such cases is predicated upon the theory that the judge has exceeded his jurisdictional powers in granting or denying the request. For cases granting prohibition, *see, e.g.*, State *ex rel.* Highway Comm'n v. Curtis, 365 Mo. 447, 283 S.W.2d 458 (1955); State *ex rel.* Massachusetts Bonding and Ins. Co. v. Bridgeman, 350 Mo. 1021, 169 S.W.2d 697 (1943); State *ex rel.* Bixman v. Denton, 128 Mo. App. 304, 107 S.W. 446 (1908). *But see* State *ex rel.* Kochtitzky v. Riley, 203 Mo. 175, 101 S.W. 567 (1907); State *ex rel.* Hart v. Mazuch, 68 S.W.2d 923 (Mo. App. 1934); note 62 *infra.*

59. State *ex rel.* Fabrico v. Johnson, 293 Mo. 302, 311, 239 S.W. 844, 847 (1922):

> It is a general rule, admitting of no exception that we are aware of, that, where a court has jurisdiction of the subject matter of an action, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its ruling that it has jurisdiction, if wrong, is simply error, for which prohibition is not the proper remedy.

tion a court's jurisdiction as a matter of law rather than to examine the correctness of the inferior court's factual determination upon which legal jurisdiction is based. In such a situation the resolution of the factual controversy must be tested by appeal.

The concept of jurisdiction in the law of prohibition involves more than merely deciding if the lower court has jurisdiction over the subject matter and person:

> Lack of jurisdiction in its most fundamental sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. But in ordinary usage lack of jurisdiction is not limited to fundamental situations. For the purpose of determining the right to restrain by prohibition, a much broader meaning is given. In such proceedings, lack of jurisdiction may be applied to a case where, although the court has jurisdiction over the subject matter and parties in the fundamental sense, it had no "jurisdiction" or power to act except in a particular manner or to give certain kinds of relief or to act without the occurrence of certain procedural requirements.[60]

Simply stated, it is possible for a court to commit an act which may be prohibited by a superior court even though the lower court has jurisdiction over the subject matter and the parties.[61] The superior court may characterize the act of the lower court as being "in excess of its jurisdiction," but the act could perhaps be more accurately described as an error by the lower court for which appeal is an inadequate remedy. For example, a judge should not hear a case in which he has a personal interest; consequently, prohibition will lie to prevent him from hearing such a case.[62] Similarly, a judge who is transferred from a court district

60. Boone, *supra* note 7, at 163.

61. *See* State *ex rel.* Warde v. McQuillin, 262 Mo. 256, 266, 171 S.W. 72, 74 (1914):

> [L]ack of jurisdiction may exist with reference to subject matter generally (*e.g.* the class to which the case belongs) or it may exist with reference to the parties to the suit, or it may exist with reference to excess of jurisdiction in the concrete case itself.

62. The bias may be legislatively determined, *see, e.g.*, State *ex rel.* Renfro v. Wear, 129 Mo. 619, 31 S.W. 608 (1895); or on the strength of evidence, State *ex rel.* McAllister v. Slate, 278 Mo. 570, 214 S.W. 85 (1919). Note that some cases have held that prohibition will not lie when a judge refuses a request to order a change of venue upon the assertion of personal bias. The writ may be denied on the rationale that the judge's decision concerning his bias is a matter of discretion to be reviewed as error on appeal: State *ex rel.* Ford v. Hogan, 324 Mo. 1130, 27 S.W.2d 21 (1930); State *ex rel.* Ward v. Lubke, 29 Mo. App. 555 (1888). Or the writ may be denied

may be prohibited from committing further judicial acts within that district.[63]

The Missouri courts have rendered numerous decisions in the process of defining what acts are "in excess of jurisdiction" when fundamental jurisdiction exists. Some judicial acts are so excessive as a matter of law that prohibition lies as a matter of course. Thus action by a court with continuing jurisdiction in a child custody case, but without providing notice to the parties, will be restrained by prohibition.[64] On the other hand, courts initially refused to issue prohibition against a court hearing an action based on an allegedly defective complaint, provided fundamental jurisdiction was present:

> Where jurisdiction over the parties and the subject of the cause is, as in this case, clear, any error of the trial court in ruling on the sufficiency of the pleading forming the basis of the suit cannot be corrected by resort to the writ of prohibition.[65]

Eventually the Missouri Supreme Court narrowed this broad language by using prohibition to intervene when the lower court was proceeding on a complaint which clearly could not state a cause of action.[66] Although such an application of the writ may be justified as a device to correct obvious errors of an inferior court, it nevertheless implies, at least to some degree, a review of the discretionary decision of the re-

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because appeal is an adequate remedy: State *ex rel.* Brady v. Evans, 184 Mo. 632, 83 S.W. 447 (1904). *But see* State *ex rel.* Interstate Motor Freight System, Inc. v. Hall, 409 S.W.2d 678 (Mo. 1966) (distinguishing *Brady*). *See also* note 58 *supra.*

63. State *ex rel.* Bickford v. Porterfield, 222 Mo. App. 843, 6 S.W.2d 47 (1928).

64. *See, e.g., In re* Lipschitz, 466 S.W.2d 183 (Mo. App. 1971) (dictum); State *ex rel.* Tatum v. Ramey, 134 Mo. App. 722, 115 S.W. 458 (1909).

65. State *ex rel.* Hoffmann v. Scarritt, 128 Mo. 331, 340, 30 S.W. 1026, 1028 (1895). *Accord,* State *ex rel.* Leake v. Harris, 334 Mo. 713, 67 S.W.2d 981 (1934); State *ex rel.* Terminal Ry. Ass'n v. Tracy, 237 Mo. 109, 140 S.W. 888 (1911); State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 92 S.W. 191 (1906).

66. State *ex rel.* Randolph County v. Walden, 357 Mo. 167, 179, 206 S.W.2d 979, 987 (1947):

> Courts recognize the fundamental difference between a situation in which a court having jurisdiction of the subject matter, has also the further power to pass upon a mere insufficiency of allegations in a petition before it to state a cause of action, and the same court, having jurisdiction of the subject matter, has before it a petition which is insufficient to initiate and call into being the exercise of jurisdiction such court possesses.

Accord, State *ex rel.* National Ref. Co. v. Seehorn, 344 Mo. 547, 127 S.W.2d 418 (1939); State *ex rel.* Johnson v. Sevier, 339 Mo. 483, 98 S.W.2d 677 (1936). The significance of *Johnson,* the first of these cases, was noted in Atkinson, *The Work of the Missouri Supreme Court—1936, Appellate Practice,* 2 Mo. L. Rev. 413, 420 (1937).

spondent that a good cause of action was stated. Theoretically prohibition is not available to question an exercise of discretion,[67] but courts appear to have allowed the writ to lie in order to afford the relator immediate relief from a patently erroneous decision. Upper courts have applied prohibition in other situations where it could be argued that the lower court's action should only be reviewed by appeal: to advise an inferior court that a complaint did not state a justiciable action;[68] and to declare a court's joinder of actions improper.[69] The respondent in the latter case urged that he had used his discretion in joining the actions, but the court of appeals in a somewhat circular argument stated that the respondent had no discretion to try improperly joined cases.[70]

Nowhere has the willingness to intervene with prohibition been so evident as in discovery proceedings, despite the presence of fundamental jurisdiction and an exercise of discretion by the lower court.[71] Such a use of prohibition is justified on the ground that an order for discovery not within the bounds of the Missouri discovery rules is an abuse of discretion and therefore in excess of jurisdiction.[72] The writ has developed into a device whereby many decisions of a lower court in discovery proceedings not historically subject to prohibition nevertheless can be reviewed: to determine if evidence was privileged and therefore to be protected from discovery;[73] to determine if documents requested in an interrogatory were suitable for discovery;[74] to establish if the requested information was available to the relators and thus subject to discovery;[75] and even to decide if a requested interrogatory was moot.[76]

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67. State *ex rel.* Drainage Dist. No. 8 v. Duncan, 334 Mo. 733, 68 S.W.2d 679 (1934); State *ex rel.* Hog Haven Farms v. Pearcy, 328 Mo. 560, 41 S.W.2d 403 (1931); State *ex rel.* Clark v. Klene, 201 Mo. App. 408, 212 S.W. 55 (1919).

68. State *ex rel.* Highway Comm'n v. Elliott, 326 S.W.2d 745 (Mo. 1959).

69. State *ex rel.* Gulf Oil Corp. v. Weinstein, 379 S.W.2d 172 (Mo. App. 1964).

70. *Id.* at 175.

71. *See* Comment, *Prohibition to Prevent Discovery Proceedings*, 35 Mo. L. REV. 533 (1970).

72. *See, e.g.*, State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (1949); State *ex rel.* Mueller v. Dixon, 456 S.W.2d 594 (Mo. App. 1970).

73. State *ex rel.* Terminal Ry. Ass'n v. Flynn, 363 Mo. 1065, 257 S.W.2d 69 (1953).

74. State *ex rel.* Bush v. Elliott, 363 S.W.2d 631 (Mo. 1963); State *ex rel.* Woods v. Kirkwood, 426 S.W.2d 690 (Mo. App. 1968).

75. State *ex rel.* Mid-America Pipeline Co. v. Rooney, 399 S.W.2d 225 (Mo. App. 1965).

76. State *ex rel.* H.K. Porter Co. v. Nangle, 405 S.W.2d 501 (Mo. App. 1966).

Concerned with the increasing use of prohibition to review discovery proceedings, the Missouri Supreme Court recently attempted to narrow the scope of the writ's use to question discovery orders.[77] The court employed a "reasonable argument" test in defining those errors of discretion which are so severe that they are in excess of authority and thereby subject to prohibitory restraint:

> Under these circumstances, we cannot say respondent abused his judicial discretion by deciding the way he did when there is a reasonable basis shown for his doing so, even if we assume that had he sustained the objections, there was also a reasonable basis for doing that.[78]

With such language the supreme court has reduced the scope of the application of the writ, but without precisely defining the limits of that scope of review allowed by prohibition. Probably it is impossible to abstractly define the distinction between an abuse of discretion and an act in excess of jurisdiction since the particular circumstances of the case before the court appear to be determinative of whether prohibition will be made absolute.[79]

As outlined above, the Missouri courts have insisted that there must be an excess of jurisdiction before prohibition will lie against a court or official with fundamental jurisdiction, but it is clear that the courts have had little success distinguishing excess of jurisdiction from mere error to be reviewed on appeal. Indeed, a reading of the cases suggests that a more pragmatic test is being used by the judges of petitioned courts to determine if prohibition should be made absolute, with the finding of an act in excess of jurisdiction a mere fiction to reconcile the opinion with prior case law and traditional doctrines on

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77. State *ex rel.* Norfolk & W. Ry. v. Dowd, 448 S.W.2d 1, 4 (Mo. 1969): "It is therefore to be expected that only in unusual circumstances will a circuit judge be found to have abused his discretion in this field to the point where he should be prohibited." To justify the narrowing of the scope of prohibition, the court asserted that the appellate courts could not hear the great number of reviews by prohibition, emphasized the broad discretion of trial courts, and pointed out the supposed added advantage which the trial court has in determining the propriety of an interrogatory. For a description of the reaction in the courts of other states to the use of prohibition in discovery proceedings, see Annot., 95 A.L.R.2d 1229 (1964).

78. State *ex rel.* Norfolk & W. Ry. v. Dowd, 448 S.W.2d 1, 3 (Mo. 1969).

79. The *Dowd* mandate has been cited with approval in subsequent cases, State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889 (Mo. 1970); State *ex rel.* St Louis Land Clearance Auth. v. Godfrey, 471 S.W.2d 939 (Mo. App. 1971); State *ex rel.* Mueller v. Dixon, 456 S.W.2d 594 (Mo. App. 1970), but it is clear by *Godfrey* and *Mueller* that prohibition still lies to restrain some discovery orders.

the writ. When it appears that the relator will be irreparably injured unless he is allowed an immediate review of the lower court's conduct, upper courts have been willing to issue prohibition, even if the concept of excess of jurisdiction must be strained or even distorted. A similar process apparently is used in election cases, in which theory requires a finding that an election official or clerk has committed a judicial act.[80] In practice, although not in theory, Missouri courts have drifted away from the "excess of jurisdiction" test toward a criterion that allows prohibition if no other adequate remedy exists.

The scope of prohibition to review judicial error is not clear from the Missouri opinions. One solution to the confusion is to recognize that it is probably impossible to differentiate adequately between error and abuse of discretion, and to establish guidelines for the use of the writ based upon whether other adequate remedies for the relator do or do not exist. The discovery and procedure cases discussed above, and the election cases reviewed below, indicate that the courts have already begun to adopt this solution, although not publicly.

In Missouri and in most other jurisdictions, not only must the court or official be acting in excess of jurisdiction, but also the offending conduct must be judicial in nature before prohibition will lie. "Judicial act" has been subject to varying interpretations, but it is now accepted by Missouri courts that the term refers to the character of the act itself and not to the duties or office of the court or official so acting. Thus prohibition will not lie to restrain a court's nonjudicial acts such as effecting the removal of the county seat to another community after county residents had voted for the move.[81] On the same principle, Missouri courts have long held that bodies outside the judicial department can be reached by the writ.[82] Despite the clear pronouncements of these early decisions, subsequent cases deciding whether to apply prohibition outside the judiciary branch present a confusing pattern, apparently because the courts blurred and eventually forgot the distinction between a judicial act and an act by a judicial officer.

Some of the confusion may have been due to the constitutional doctrine of separation of powers, as illustrated by the cases involving the

80. *See* note 94 *infra* and accompanying text.

81. State *ex rel.* West v. Clark County, 41 Mo. 44, 50 (1867). Similar language is found in State *ex rel.* Wulfing v. Mooney, 362 Mo. 1128, 247 S.W.2d 722 (1952) (dictum); Hockaway v. Newsom, 48 Mo. 196 (1868).

82. *See, e.g.*, School Dist. No. 6 v. Barris, 84 Mo. App. 654 (1900) (applied against board of arbitrators).

State Board of Health. In an early case concerning the newly created board, the Supreme Court of Missouri pointed out that the actions of the health board were "quasi-judicial in their character."[83] The court later had to deal with that statement in *State v. Hathaway*,[84] when the plaintiff attacked the statute creating the board on the ground that there had been an unconstitutional delegation of judicial power to the board. In rejecting the argument, the court described the board's duties as ministerial and specifically denied that the body had any judicial powers.[85]

The *Hathaway* court did not emphasize the distinction between an act judicial in nature and a judicial function vis-à-vis the constitutional structure of government. This had its natural consequences in a later case concerning whether prohibition would lie against the Board of Health's power to revoke a license. In *State ex rel. McAnally v. Goodier*,[86] prohibition against the board's investigation of the petitioner was denied because:

> The duties of the board are of an administrative or ministerial character and therefore as long as it acts within the scope of the exercise of a reasonable discretion it is free to act. . . . The writ of prohibition does not go against such a body. It goes only against a court or tribunal exercising judicial functions.[87]

Here the court failed to keep in mind that language of the earlier *Hathaway* case[88] was in the context of a constitutional issue rather than in regard to prohibition. The court apparently failed to see that an act could be sufficiently judicial in nature for prohibition to lie, yet not be an act constitutionally reserved for the judiciary. An even more pronounced failure to see that the judicial act concept of prohibition was not limited to court decisions came soon thereafter in another supreme court opinion:

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83. State *ex rel.* Hathaway v. State Bd. of Health, 103 Mo. 22, 28, 15 S.W. 322, 323 (1891). *See also* State *ex rel.* Granville v. Gregory, 83 Mo. 123 (1884).

84. 115 Mo. 36, 21 S.W. 1081 (1893).

85. *Id.* at 49, 21 S.W. at 1084: "A judicial duty within the meaning of the constitution is such a duty as legitimately pertains to an officer in the department designated by the constitution as judicial."

86. 195 Mo. 551, 93 S.W. 928 (1906).

87. *Id.* at 560, 93 S.W. at 930. *See also* Higgins v. Talty, 157 Mo. 280, 57 S.W. 724 (1900).

88. Note 83 *supra* and accompanying text.

> If it is part of the judiciary of the state, designated and authorized by the constitution, then the writ of prohibition can be directed to it upon proper ground and when proper application, but if it is not part of the judicial system authorized by the constitution, and is a mere administrative or executive board of a municipal corporation, then such writ cannot be directed to it.[89]

Despite these strong assertions of the law, the court only a decade later in *State ex rel. U.S. Fidelity and Guaranty Co. v. Harty*[90] clearly directed its attention to the nature of the act to be restrained and applied prohibition outside the judiciary:

> The right threatened by respondent to be affected was one acquired and enjoyed in conformity with the law, and its abrogation required not only a hearing upon the facts, but the exercise of discretion and judgment on the part of the respondent in its determination. Clothed with these characteristics, the proposed act must, therefore, be construed as judicial in nature.[91]

Although three of the six justices refused to concur with these sentiments expressed in the court's opinion to *Harty*, Missouri courts today would have no trouble applying prohibition outside the judicial department.[92] Possibly the Missouri Supreme Court in the earlier cases was uneasy about extending prohibition to administrative bodies. Since their exact nature had not yet been clearly defined in relation to the various branches of government, such a step would have suggested that the agencies had judicial powers.

Some relators have attempted to argue that an official, by obeying a legislative mandate, is committing a judicial act; namely, deciding that the statute authorizing his conduct is constitutional. This argument has been roundly rejected by the courts, since an official is bound by the duties of his office to comply with the statute.[93] An official obeying a statute is therefore making no decision concerning the statute's

89. State *ex rel.* McEntee v. Bright, 224 Mo. 514, 528, 123 S.W. 1057, 1060 (1909).

90. 276 Mo. 583, 208 S.W. 835 (1919).

91. *Id.* at 598, 208 S.W. at 839.

92. *See* State *ex rel.* Brewen-Clark Syrup Co. v. Workmen's Compensation Comm'n, 320 Mo. 893, 8 S.W.2d 897 (1928); State *ex rel.* Atkins v. State Bd. of Acc'tancy, 351 S.W.2d 483 (Mo. App. 1961). *But see* State *ex rel.* Davis v. Peters, 94 S.W.2d 930 (Mo. App. 1936).

93. State *ex rel.* Wulfing v. Mooney, 362 Mo. 1128, 247 S.W.2d 722 (1952) (dictum); State *ex rel.* Missouri & N. Ark. Ry. v. Johnston, 234 Mo. 338, 137 S.W. 595 (1911); Kalbfell v. Wood, 193 Mo. 675, 92 S.W. 230 (1906).

constitutionality, and prohibition does not lie against his mere ministerial conduct of obedience.

Apparently in an attempt to provide timely relief when no other remedy was easily available, Missouri courts have enforced prohibition in numerous election controversies, usually involving the presence or absence of a name on a ballot. There is seldom a discussion of whether the respondent's act is judicial in nature,[94] and it is uncertain that the courts are requiring the judicial act limitation to be met in these cases. Several of the opinions which have made prohibition absolute against election commissioners and officials have emphasized the consequences if prohibition does not lie: the government's funds may be wasted upon a void election, or, if the election is not void, those who voted for the ineligible candidate will have been disfranchised.[95] The severity of the consequences may be outweighing the need for a clearly defined judicial act.

Clearly the term "judicial act" has been extended by the courts beyond the judiciary, but it is uncertain exactly what the concept does entail. The definition is not so broad to include all determinations of fact by governmental officers or every decision or exercise of discretion by a court or official, yet it is not so narrow to include only decisions in judicial litigation. An early court of appeals opinion applied a somewhat circular definition of a judicial act: "All acts based upon a decision, judicial in nature, and affecting either a public or private right . . . ."[96] The *Harty* court spoke of, "the power conferred upon

94. *See, e.g.*, State *ex rel.* Danforth v. Alford, 467 S.W.2d 55 (Mo. 1971); State *ex rel.* Bates v. Remmers, 325 Mo. 1175, 30 S.W.2d 609 (1930); State *ex rel.* Goldman v. Hiller, 278 S.W. 708 (Mo. 1926). *But see* Mansur v. Morris, 355 Mo. 424, 196 S.W.2d 287 (1946), in which the court explained that the county clerk's power to correct errors and omissions on ballots was "not purely ministerial." In State *ex rel.* Sommer v. Calcaterra, 362 Mo. 1143, 247 S.W.2d 728 (1952), the court suggested that the prohibited judicial act in most election cases involved conduct based upon the respondent's own incorrect ("judicial") interpretation of a state election statute or the compliance with it by a candidate, citing Mansur v. Morris, *supra*; State *ex rel.* Stone v. Thomas, 349 Mo. 22, 159 S.W.2d 600 (1942) (concerning election officials' interpretation of their power to discharge precinct officers); Bates v. Remmers, *supra*. In a recent case, State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70 (Mo. 1972), the Supreme Court of Missouri once again applied its novel definition of judicial acts by election officials. The ultimate effect of cases such as *Gralike* and *Alford* is to allow the relator to question the eligibility of a candidate to run for office by using prohibition proceedings to resolve factual controversies concerning the candidate's eligibility.

95. *See* State *ex rel.* Danforth v. Alford, 467 S.W.2d 55 (Mo. 1971); Mansur v. Morris, 355 Mo. 424, 196 S.W.2d 287 (1946).

96. School Dist. No. 6 v. Barris, 84 Mo. App. 654, 666 (1900).

a public officer involving the exercise of judgment and discretion in the determination of questions of right affecting the interests of person or property."[97] The Missouri legislature did not explicitly use the judicial act concept in establishing the acts of administrative agencies for which prohibition will lie: "A decision which . . . determines the legal rights, duties, or privileges of any person, including the denial or revocation of a license . . . ."[98] This statutory language, part of Missouri's Administrative Procedure Act, is determinative, of course, only in cases involving administrative bodies, but it is indicative of a willingness to avoid being caught in the semantics of "judicial act" and to respond to the interests of parties when no other relief is available. Likewise, the Missouri courts probably were responding to the increasing importance of administrative agencies and the need to provide immediate review of some agency conduct when they construed the concepts of judicial act and excess of jurisdiction to include official acts outside the judiciary.

Considering the treatment of the term "judicial act" by the courts and legislature, it is obvious that the definition of the term is molded as much by the needs of the judicial system for an adequate remedy in certain situations as by the traditional common law concept of judicial act. Possibly the need for adequate relief should be the sole criterion for determining if prohibition should lie against a particular official act. In any case, "judicial act" is now defined broadly enough by the courts to include nearly any weighing and resolving of a factual or legal controversy against which the court may wish to intervene.

IV. THE ROLE OF PROHIBITION TODAY

By definition prohibition is an extraordinary remedy, but it can nevertheless be a valuable tool in litigation. One aspect of the philosophy underlying the writ might be expressed as follows: when all other remedies fail to offer adequate relief, the writ of prohibition should be

97. State *ex rel.* United States Fid. & Guar. Co. v. Harty, 276 Mo. 583, 598, 208 S.W. 835, 839 (1919).

98. MO. REV. STAT. § 536.150 (1969):

> When any administrative officer or body existing under the constitution or by statute or municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action . . . .

used as a ground for intervention.[99] Thus, there is an ad hoc character to prohibition which renders meaningless any attempt to catalog the various instances in which the writ is available; a unique situation may arise at any time warranting the utilization of prohibition to achieve a just resolution of a controversy. The ability to use prohibition in an innovative manner has allowed courts to go beyond the definitional limits for the writ's use established at common law.

The *raison d'être* of prohibition is to provide an extemporaneous remedy when the normal legal channels for relief are insufficient.[100] It is submitted that such a spirit of "relief when it is needed" should govern the rules concerning the issuance of the writ. Yet countless Missouri opinions have attempted to establish various conditions precedent which must exist before the preliminary order will be made absolute, conditions which are divorced from the philosophy of extemporaneous relief and are founded in the possibly irrelevant common law history of the writ.

It is obvious, however, that on other occasions the state's courts have often responded to the need for immediate and adequate relief and have reaffirmed the extemporaneous character of prohibition, even when the circumstances required a disregard of one of the several traditional prerequisites for issuance of the writ.[101] Over the past three decades the application of prohibition to circumstances foreign to common law usage has become more frequent. To eliminate the confusion about the scope of the writ's use, it may be appropriate for both the courts and the legislature to reassess what should be the character of prohibition in Missouri.

It is unlikely that either of these branches of government would wish to reassert the traditional common law limits on the use of the writ, for prohibition has been too valuable a device in providing relief in Missouri courts. Rather, it more likely that the scope of prohibition would be broadened judicially or legislatively. Several alternatives exist for expanding the use of this remedy.

One method is to redefine "usurpation" or "excess" of jurisdiction.[102] The concept of jurisdiction is sufficiently vague to allow the

99. *Cf.* State *ex rel.* Anheuser-Busch Brewing Ass'n v. Eby, 170 Mo. 497, 71 S.W. 52 (1902).

100. *See* text accompanying note 103 *infra.*

101. *See* text accompanying notes 65-80 and 84-95 *supra.*

102. Mo. Rev. Stat. § 530.010 (1969) describes the purpose of prohibition as to

courts considerable opportunity to redefine the term. As one author has remarked concerning the use of prohibition in California:

> Thus the only conclusions that one can draw from prohibition cases are . . . that as new uses for the remedy have been shown, the concept of jurisdiction has expanded to meet the new uses so that any error which the reviewing court deems so gross as to warrant its interference is called "jurisdictional."[103]

A similar process has occurred in Missouri, where the courts have revised the concept of excess of jurisdiction to justify intervention in discovery proceedings.[104] This technique of redefinition, however, fails to directly confront the issue of whether the scope of prohibition should be extended beyond the common law limits. The natural consequence of attempting to maintain the fiction that one has never parted from the traditional concepts is confusing and conflicting court opinions.

Another device is to abrogate the judicial act limitation, and have prohibition lie against the extrajurisdictional acts of a governmental official regardless of the judicial or ministerial nature of his conduct. The judicial redefinition of the concept of jurisdiction entails an appreciable degree of subtlety, while this latter method is an overt departure from the common law. Consequently, courts possibly would leave such a deviation to legislative enactment,[105] although the Missouri prohibition statute does not specify that the writ will lie only against judicial acts and is sufficiently broad in language to allow judicial interpretation.[106] Moreover, the courts have already been active

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"prevent the usurpation of judicial power," terminology which has not been given special significance by the courts.

103. Goldberg, note 7 *supra*, at 576.

104. *See* notes 71-80 *supra* and accompanying text.

105. *Cf.* People *ex rel.* Duchenan v. House, 4 Utah 369, 10 P. 780 (1901) (court held that territorial legislature had power to provide for prohibition against ministerial acts).

106. MO. REV. STAT. § 530.010 (1969):

> The remedy afforded by the writ of prohibition shall be granted to prevent usurpation of judicial power, and in all cases where the same is now applicable according to the principles of law.

Although the first phrase seems to impose a "judicial act" limitation, the latter phrase appears to indicate an intent by the framers of the prohibition statute to allow a reinterpretation or elimination of this requirement when the case law so dictates. It is doubtful that the term "now applicable" was intended to inhibit the development of general principles of prohibition law after the enactment of the statute in 1895. Since the entire chapter establishes only very general guidelines for the use of the writ,

in innovating new uses for the writ. Nevertheless, if any legislature, or a court for that matter, acts to eliminate the condition, due regard must be given the state constitution.[107] The Missouri legislature has already acted to change the scope of prohibition to some degree: The Administrative Procedure Act allows prohibition to lie against certain acts of administrative agencies without mention of the judicial act limitation.[108]

Finally, the courts can continue the expansion of "judicial act" to include official conduct even more unrelated to the nature of the formal judicial process.[109] As with the judicial revision of the concept of jurisdiction, there is a danger of opinions which fail to establish definite guidelines for the further development of the writ's use.

Prohibition is still extensively used in the courts of Missouri. The primary reason for this vitality of a writ hundreds of years old is the willingness of the courts to redefine fundamental concepts of prohibition in response to contemporary demands for relief in situations which did not exist at common law. Possibly the writ would be even more efficiently utilized if prohibition's character of ad hoc relief was emphasized and the historical terminology of "jurisdiction" and "judicial act" were eliminated. To take such a step would clearly result in a departure from the established usage of the writ at common law, but not a deviation from the historical purpose of prohibition to provide a ground for intervention when no other relief exists. In assessing what should be the contemporary scope of prohibition, one must keep in mind that our legal system is vastly different from the courts which first created the extraordinary writs.

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the drafters obviously expected the courts to provide extensive interstitial elaboration. *See also* MO. REV. STAT. § 530.090 (1969), which states that the proceedings in prohibition are to "be governed in accordance with the existing rules of general law upon the subject . . . ."

107. *Compare* Winsor v. Bridges, 24 Wash. 540, 64 P. 780 (1901) (statute allowing prohibition to lie against ministerial acts declared in conformity with state constitution), *with* State *ex rel.* Lee v. Montana Livestock Sanitary Bd., 339 P.2d 487 (Mont. 1959) (similar statute declared invalid by constitution).

108. *See* note 98 *supra.*

109. *See* notes 94-95 *supra* and accompanying text.