Interlocutory Appellate Review Via Extraordinary Writ

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The delays inherent in appellate review long have been a source of discomfort to the profession. As a result, resourceful counsel have developed all manner of practices over the years to reduce appellate delay. Among these has been the utilization of the extraordinary writ as a means of interlocutory appellate review.

That such is not the normal function of the extraordinary writ either historically or logically is beyond dispute. Nevertheless, further resort to writ practice is inevitable and imminent. As the backlog in the state supreme court increases each term, the problem of delay becomes more acute, and lawyers are faced with mounting pressures to obtain reasonably speedy appellate review.

Regrettably, the decisional law is in a chaotic state. The confusion lies not with determination of the merits of each controversy for the substantive law remains constant. The more than bothersome problem is whether the act of the trial court is such that it should be examined by the appellate court by means of an extraordinary writ rather than in the normal course by appeal (or certiorari).

The extraordinary writs to be examined are certiorari, mandamus, and prohibition. In general, the writs will not lie unless an official has acted without or in excess of his jurisdiction and there is no plain, speedy and adequate remedy at law.\(^1\)

Although such writs properly may be directed against nonjudicial officers, this article is limited to discussion of writs directed against

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*Member of the bars of the District of Columbia (1958) and the State of Washington (1959).

trial judges since the latter result as a practical matter in a review of a determination made during the course of (or immediately prior to) a trial. In making a realistic appraisal of these cases one must recognize that a form of appellate review is being evaluated, and the validity of the holdings must be measured by the criterion of their contribution to efficient appellate practice.

Also excluded are those cases in which the use of certiorari is specially authorized by statute or by the court, and those cases in which certiorari is granted on the ground that the law provides no right of appeal at all, even at the conclusion of the entire proceeding. The former cases are excluded because the special authorization amounts to a policy determination that in such cases an interlocutory appellate review is desirable. The latter cases are excluded because such use of the writ is a mere matter of form differing not at all from appeal of a final judgment.

In this article no significance is attached to the type of writ requested or granted because the supreme court has wisely adopted the practice of treating applications for extraordinary writs interchangeably, granting the writ to which the applicant may be entitled without regard to how the application is characterized.

It has already been stated that a writ will not lie unless (1) the trial court acts without or in excess of its jurisdiction, and (2) the remedy at law is inadequate. This article deals with the application of these two requirements. For convenience of presentation they will be considered in reverse order.

Adequacy Of The Remedy At Law

In some of the significant cases to be analyzed, the holdings seem to be that in certain circumstances (to be discussed at length below) the remedy by appeal is per se inadequate. In these cases it is difficult to infer from the language whether it was being held that in such circumstances the writ will issue without consideration of the adequacy of the remedy by appeal, or whether the remedy by appeal was in fact considered, but found wanting. In some cases the language of

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3 In re a Minor, 39 Wn.2d 744, 238 P.2d 914 (1951) (review of juvenile court proceedings).
the opinion lends support to both positions. It is deemed necessary to make this distinction for purposes of analysis in discovering the circumstances that make the remedy by appeal inadequate, and whether indeed it is necessary in all cases that the remedy at law be inadequate. Accordingly, the language in the cases bearing on each question will be segregated and discussed in the appropriate section. The unavoidable consequence is that the reader interested in a named case, rather than an issue, may be required to look in more than one section for a complete discussion of the case.

**What Constitutes an Adequate Remedy by Appeal?**

The statutes and the common law require as a condition precedent to the issuance of an extraordinary writ that the remedy by appeal be inadequate. The question of adequacy of the remedy by appeal is not dependent upon any general rule, but upon the facts of each particular case, and its determination rests in the sound discretion of the court. However, as might be expected, from the cases have emerged certain guidelines to aid the lawyer deciding whether to seek relief by writ, and to aid the court in the sound exercise of its judicial discretion.

In general the delays, expenses and annoyances incident to an appeal do not affect the adequacy thereof. There must be something in the nature of the action as a consequence of which the fruits of the litigation or some manifest right would be lost by awaiting the result of an appeal. Typical examples are the disbursement of estate funds by an administrator during the pendency of the litigation, and expiration of a contract right before an appeal could be determined.

The reasons underlying the judicial preference for review by appeal

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6 State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac. 256 (1920); State ex rel. LaFarge v. Superior Court, 47 Wash. 154, 91 Pac. 639 (1907); State ex rel. Young v. Denny, 34 Wash. 56, 74 Pac. 1021 (1904); State ex rel. Carrau v. Superior Court, 30 Wash. 700, 71 Pac. 648 (1903).
7 State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865 (1919); State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877 (1905); State ex rel. City of West Seattle v. Superior Court, 36 Wash. 566, 79 Pac. 29 (1905); State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385 (1901); State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29 (1899). Compare two cases taking seemingly opposing views on whether dispossession pending appeal is such a loss of a manifest right: State ex rel. Mower v. Superior Court, 43 Wn.2d 123, 260 P.2d 355 (1953) (yes); State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493 (1917) (no).
8 In re Guye's Estate, 54 Wash. 264, 103 Pac. 25 (1909); State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942 (1907); In re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945 (1904). But cf., State ex rel. Kempf v. Superior Court, 151 Wash. 289, 275 Pac. 694 (1929); State ex rel. Warren v. Ayer, 17 Wash. 127, 49 Pac. 226 (1897); State ex rel. McLaughlin v. Leichtenberg, 4 Wash. 231, 29 Pac. 999 (1892).
are two: (1) The orderly and efficient administration of justice demands no interference in the ordinary course of litigation, and a single appeal rather than multiple piecemeal appeals; and (2) when causes are regularly appealed, they are presented to the court by formal briefs, which are more carefully prepared by the attorneys, and which the court has an opportunity to examine with more deliberation than is the case with writs.

A survey of the application of these sound and presumably well established judicial policies reveals an appalling lack of consistency among cases with common fact patterns. These cases will be discussed below under appropriate topic headings immediately following the section dealing with two important cases on delay and expense in general.

Delay and Expense — In General. It has already been stated that the delay and expense incident to an appeal do not affect the adequacy thereof. The soundness of this rule is hardly open to question. The reason for the rule was succinctly enunciated in an early case as follows: "[A]ll litigation is fraught with vexatious delay and incidental expenses, and if this alone were sufficient to justify extraordinary writs of this character, the effective method of appeal would soon grow into disuse."

Notwithstanding the sound basis supporting the rule, in a number of cases the delay or expense arising in the ordinary course of litigation appears to have been a controlling or contributing factor in the granting of a writ. No good purpose would be served by an analysis of those decisions which do not include much discussion of the propriety of considering delay and expense as factors affecting the adequacy of the remedy. Two cases however do deserve special attention.

In State ex rel. Martin v. Superior Court a writ of prohibition was granted to restrain a superior court from hearing a cause after that court had refused a change of venue to the county of defendants' resi-

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11 State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877 (1905); State ex rel. Light Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933 (1899).
12 State ex rel. City of West Seattle v. Superior Court, 36 Wash. 566, 570, 79 Pac. 29, 30 (1905).
14 97 Wash. 358, 166 Pac. 630 (1917).
dence. For present purposes we are interested in the portions of the opinion supporting the holding that the remedy by appeal was inadequate.

The terms "speedy and adequate," when applied to remedies, mean, or ought to mean, a remedy adequate and timely to review the particular error relied on, and not merely a remedy which depends upon a proper determination of the issues as defined by the pleadings, and such questions of practice and procedure as may arise in bringing the case to issue, and trying out the facts.

Wherefore it may be said, where there is a right to a trial in a particular place, which right is independent of the issue as tendered by the complaint, an adequate remedy means a trial in the first instance by a court having jurisdiction to hear and determine the merits.

To rule otherwise would bring us to a holding that, although the right to a change depended in no way upon a controverted fact of residence, the defendant would have to meet the delay and expense of a trial, and possibly suffer a judgment (if he have clever counsel he would stand mute and make no defense to the merits), which we would be willing to sustain if we were free to do so. Before we could even consider the merit of the case, we would have to decide the question of venue, or the question of jurisdiction, and do that which ought to have been done in the first place, remand, with directions to change the venue and retry the case; and for the reason that the court did not have jurisdiction. If we would have to so hold on appeal, why should we not say so now, the record being before us in the same form as it would come on appeal?

It requires no argument to convince the writer that such a situation would be intolerable, and such as the law has sought to avoid by providing a means whereby the appellate court can keep the stream of justice flowing between its proper banks. By this proceeding, we may presume that one appeal will settle the merits of the case whatever the judgment of the court below may be. If we deny the writ, we may assume that in a fair proportion of the cases, two appeals, one abortive and the other to the merit, will be necessary. This has always been the rule where the court below has ordered the venue of a case to another country.\(^\text{15}\)

The opinion makes two significant arguments. First, it is said that the remedy must be speedy and adequate to review the particular error relied upon, not merely to review the entire proceedings. Second, it is asked why a holding that the court did not have jurisdiction should be deferred until the cause arrives by appeal when a probable result of such deferral would be an abortive trial and two appeals.\(^\text{16}\)

\(^{15}\) Id. at 362-63, 166 Pac. at 631-32.

\(^{16}\) See also State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946); State ex rel. Waterman v. Superior Court, 127 Wash. 37, 220 Pac. 5 (1923).
Is it true that the remedy must be speedy and adequate to review the particular error relied upon? Clearly, no. If it were so, appeal would seldom be adequate to remedy alleged errors occurring during pretrial, or in the early stages of the trial. Following this line of thought further, adequacy of the remedy by appeal would also become dependent upon the probable length of the trial, and the backlog in the dockets of the trial and appellate courts. But these are delays and expenses incident to the normal course of litigation. They are inconveniences outweighed by the judicial policies in favor of uninterrupted proceedings at the trial level, and a single appellate review of the cause. The first argument in the Martin case would seem to be invalid.

Why should the appellate court defer a holding that the trial court had no jurisdiction when to do so would result in an abortive trial and two appeals? This rhetorical question demands our consideration for it is often posed in arguments in support of granting extraordinary relief. And even more important, it is suspected that this position forms the inarticulated basis for decisions granting a writ when the reasons stated in the opinion are patently without support in logic or case law.

The short answer to the oft-posed question is that the state statutes and the common law say so. In fact, the question was answered thusly by the supreme court many years before it was asked. In State ex rel. Reed v. Jones\textsuperscript{17} appears the following:

It was suggested on the argument by the learned counsel for the petitioners that an appeal would be futile in this case, because the same questions would be presented on appeal that the court is now called upon to determine. But the fact that the same questions can be so presented is a sufficient reason for withholding the writ, as the above authorities and many others that might be cited abundantly show.\textsuperscript{18}

To hold that the appellate court should step in immediately whenever the trial court is proceeding without jurisdiction is to ignore the fact that the law requires as a requisite for the issuance of a writ not only that the trial court be acting without or in excess of its jurisdiction, but also that the remedy at law be inadequate. If the remedy at law is always inadequate when the court is acting without jurisdiction, then the inadequacy-of-the-remedy requirement is reduced to mere surplusage.

Furthermore, wholly aside from the statutory mandate, the "why

\textsuperscript{17} 2 Wash. 662, 27 Pac. 452 (1891).
\textsuperscript{18} Id. at 666, 27 Pac. at 454.
not say it now" argument fails because it is based upon the dubious premise that the trial judge is always, or at least usually, in error. Any interlocutory appellate review can be sustained if it be assumed that the trial court was in error. Why must the relator endure the delay and expense of an abortive trial and an extra appeal when the trial court has erroneously determined that the service of process was sufficient, or has erroneously admitted certain evidence during trial? Of course, the answer is that the question whether a writ is the proper mode of review must be decided before a decision on the merits is reached.

A more reasonable premise is that the trial court has probably ruled correctly. Then, all other things being equal, in a majority of the cases the only result of granting extraordinary relief would be an interruption of the trial proceedings, and an added burden upon the appellate court. Therein lies the real evil of the holding in the Martin case. Trial counsel in other causes, likewise convinced that the trial court erred, are encouraged to seek relief by writ. The benefit resulting from correction of a trial judge prior to trial in the case under consideration is obvious, but it cannot justify the resultant overburdening of the appellate court with numerous applications for writs in other causes by other counsel who have erroneously concluded that the trial court is in error in these other causes. Taking the long-range view, the occasional burden upon a litigant of enduring the delay and expense of an abortive trial is far outweighed by considerations of orderly and efficient administration of justice at the appellate level by discouraging piecemeal appeals.

The other case deserving of special attention is State ex rel. Wilson v. Kay. There the trial judge orally stated at the conclusion of the case that he would find for the plaintiff in the sum of $250. However, he died before the formal findings were submitted. His successor entered appropriate findings of fact and conclusions of law, and signed a judgment. The defendant applied for a writ of certiorari on the ground that a judge who has not heard the case has no power to so act. It was held, that the writ would lie because the remedy at law was inadequate. In order to reach this conclusion it was necessary for the court to distinguish several cases. Most of those cases are not distinguishable on the grounds assigned, or indeed on any grounds. To analyze and discuss the errors made by the court in the efforts to distinguish each case individually would not be particularly helpful,

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19 164 Wash. 685, 4 P.2d 498 (1931).
and in most cases the error is patent to the knowledgeable reader. Of greater interest is the rationale presented to sustain the holding of the inadequacy of the remedy by appeal.

The court begins with a recognition of the evil flowing from permitting review other than by the regular procedure, and then, as if aware that it is about to contribute to the perpetuation of that evil, the holding is specifically limited to writs of certiorari.

While not so drastic in character as prohibition or mandamus, still certiorari is an extraordinary remedy, and its issuance, while discretionary to a considerable extent (more so perhaps than either prohibition or mandamus), must be guarded from abuse, otherwise the regular procedure of review by appeal will be encroached upon to the confusion of the practice and practitioners and to the overwhelming of this court. . . .

As we have already observed, prohibition and mandamus are in their nature much more drastic than is certiorari, and for that reason they are that much less discretionary writs. While heretofore we seem to have failed to discriminate, yet we now feel that a discrimination should be made, and nothing which follows should be taken to be authority for the issuance of either the writ of prohibition or the writ of mandamus.

By this writ, we are not asked to imperatively stay the hand of the superior court, or, just as imperatively, to compel that court to do an act which it has refused to perform; but only to review the record and correct the errors which the statute provides may be so corrected. 20

The validity of making such a distinction between the writs is open to serious question. It may be concluded from the above quotation that the adequacy of the remedy at law to protect the fruits of the litigation depends not only upon the fact of the particular case but also upon the nature of the writ sought. It is not easy to sustain such a position. But even assuming that adequacy of the remedy by appeal may vary with the writ which is sought, it would seem more reasonable to take the view converse to that of the Wilson case. The opinion seizes upon the fact that certiorari is more discretionary than the other writs, and concludes therefrom that certiorari will lie in cases where other writs may not lie. This reasoning is fallacious. Relief is afforded a litigant either in the discretion of the court (as in certiorari), or as a matter of right (as in the other writs perhaps or on appeal). In the latter instance the court has no choice but to hear the matter if the party complies with the procedural prerequisites, while in the

20 Id. at 687-89, 4 P.2d at 499-500.
former the court may in the exercise of its discretion deem it inad-
visable to grant the writ.\textsuperscript{21} Therefore, the discretion referred to is the discretion to \emph{deny} the writ where otherwise it would be incumbent upon the court to grant it.

All of this, however, is collateral to the subject of delay and expense in the ordinary course of litigation as factors in the granting of extra-
ordinary relief. Here again the \textit{Wilson} case pays lip service to the sound policy against piecemeal appeals while in the course of violating that very policy.

Much of what has heretofore been said on this subject has arisen from a desire to avoid reviewing cases piecemeal, and that must still be the rule. On appeal from a final judgment, we can usually review the whole record and lay down the law of the case. When that can be done, all questions arising in the case should, so far as possible, be re-
served until, by one hearing and one decision, we can dispose of the whole case. But here, if relator's complaint be well-founded, we have a judgment which is voidable because based upon no facts found to be the facts of the case by any trier of facts who heard the testimony. On appeal from the final judgment, we could but reverse and vacate that judgment, and could in no way review trial errors, settle the law of the case or pass upon any of the merits of the controversy. The de-
lay, the additional expense and the additional burden upon this court caused by postponing the decision of the present questions until the case is brought here upon appeal from the final judgment, would be wholly useless.

Moreover, the relator, during the pendency of an appeal, would have to suffer the burden of the lien on his real property cast by the judgment and the injury to his credit arising from the same source.

The delay caused by following the regular course of review by appeal, in and of itself, would be no reason to grant the extraordinary writ; but such delay, when added to other reasons, may have consid-
erable weight. Here, assuming relator's position to be correct, we would, after an appeal, be obliged to hold that there had been a mis-
trial, and that the case must be tried \emph{de novo}. In the interim, wit-
nesses might have died or scattered and a miscarriage of justice might result. It is always the policy of the law to award a speedy trial on the merits, and anything which unnecessarily delays such a trial is not to be encouraged.\textsuperscript{22}

It is immediately apparent that the court has fallen into the same error as the \textit{Martin} case of operating on the questionable premise that the trial court is in error. As has previously been observed, any inter-

\textsuperscript{21}See 4 \textit{Bancroft, Code Practice and Remedies} § 2792 (1928); Annot., 50 L.R.A. 787 (1901).
\textsuperscript{22}164 Wash. 685, 689-90, 4 P.2d 498, 500.
locutory review is thus defensible if one first assumes the error of the trial court. All that has been said on this subject in the discussion of the Martin case is equally applicable here.

It would be difficult to underestimate the number of judicial man-hours wasted in disposing of applications for writs of certiorari brought by counsel legitimately relying upon the Wilson case. To construct a factual situation less demanding of extraordinary relief would be no mean task. Note that the findings and conclusions had been entered, and the final judgment signed. Nothing further remained to be done at the trial level. The case was ripe for appeal. The only delay would be that suffered by any litigant in the ordinary course of appeal. The opinion makes much of the injury to the credit of the relator from the judgment against him. But, is this not an annoyance endured by many appellants?

There is no good reason why the bar and judiciary must live with the Wilson case. In the interests of the orderly and efficient administration of justice, and to remove a source of confusion to the practitioner, it should be specifically overruled at the earliest opportunity.

Review of Proceedings in Prior Trial. The problem of adequacy of the remedy at law to review proceedings at a prior trial has arisen in two ways. One is the situation presented when the court in which the suit is instituted grants a change of venue to the superior court of another county. The question is whether upon appeal from the judgment at the conclusion of the trial in the second county the supreme court may review the order in the first county granting the change of venue.

The other situation arises when the trial court orders a mistrial, grants a voluntary nonsuit, etc., and the action is retried. In certain circumstances it may be relevant to have appellate review of a ruling in the prior proceedings. The question is whether the prior proceedings may be reviewed upon appeal of the retrial.

The first problem is exemplified by State ex rel. Scougale v. Superior Court\textsuperscript{23} where the superior court in county $A$ ordered a change of venue to county $B$. Mandamus was sought to compel the court in county $A$ to proceed with the trial. It was held that the remedy by appeal was inadequate for, even assuming that the court in county $B$ would take jurisdiction, on appeal from that court the supreme court could not direct the court in county $A$ to proceed with the trial. The

\textsuperscript{23}55 Wash. 328, 104 Pac. 607 (1909).
court cited *State ex rel. Wyman, Partridge & Co. v. Superior Court*\(^\text{24}\) to sustain its position.

In the *Wyman* case it was held that the writ would not lie because the trial court acted within its jurisdiction in granting a change of venue for the convenience of witnesses in a garnishment proceeding. Therefore, the following quotation from the case on the subject of adequacy of the remedy is dictum.

> At the threshold of the proceeding the respondent raises the objection that the relator has an adequate remedy by appeal, and that mandamus will not lie. If the contention of the relator is correct, viz., that the superior court of Spokane county had exclusive jurisdiction to hear and determine the garnishment proceedings without power or discretion to order a change of venue, mandamus is the proper remedy. The mere fact that the superior court of Kittitas county, to which the proceedings have been transferred, may erroneously assume jurisdiction and that the proceedings may in that way eventually reach this court by appeal, is not, in our opinion, an adequate remedy.\(^\text{25}\)

This dictum is open to a number of differing interpretations. Happily, the court had immediate occasion in another case\(^\text{26}\) to explain that language.

> In *State ex rel. Wyman etc. Co. v. Superior Court* ... just decided, this court entertained jurisdiction of an application for a writ of mandamus to compel the court to proceed with a garnishment proceeding in which it had granted a change of venue. But in that case we could not presume that the court to which the proceeding was transferred would take jurisdiction, if in fact it had none, and furthermore, the error there complained of could never be corrected by an appeal from the court in which the error was committed. We therefore held that there was no adequate remedy by appeal.\(^\text{27}\)

On the basis of these cases it would have appeared settled that the granting of a change of venue could be reviewed by extraordinary writ because on appeal from the judgment in county B the supreme court would be unable to review the granting of a change of venue by county A. However, without recognition of these prior cases it was held on similar facts in *State ex rel. Furth v. Superior Court*,\(^\text{28}\) that the remedy at law was adequate because on appeal the whole record

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\(^{24}\) 40 Wash. 443, 82 Pac. 875 (1905).
\(^{25}\) *Id.* at 445, 82 Pac. at 875.
\(^{26}\) *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 877 (1905).
\(^{27}\) *Id.* at 558, 82 Pac. at 878.
\(^{28}\) 71 Wash. 147, 127 Pac. 1107 (1912).
could be reviewed no matter in what county or how many counties the proceedings occurred.29

It cannot be said that any of these cases is "wrong." If the granting of the change of venue by county A can be reviewed on appeal of the judgment of county B, then the remedy at law is adequate; otherwise not. Each of these holdings correctly follows from the premise adopted. But which premise is correct? The answer to this question involves no great policy considerations. Perhaps, in such a situation as this the scope of review is nothing more nor less than what the supreme court says it is. The present rule is anybody's guess. On the one hand, it may be argued that more cases have held that the ruling by county A may not be reviewed on appeal of the judgment of county B; while on the other hand it may be contended that the more recent case to the contrary overrules sub silentio the prior conflicting holdings.

Under the second fact pattern described at the beginning of this section the cases have reached the conclusion that the remedy at law was inadequate because the record at the former trial could not be brought up on appeal of the second trial. In State ex rel. Stone v. Superior Court30 the action originally had been brought against two defendants for conspiracy to slander. At the end of the plaintiff's case, defendant B successfully challenged the sufficiency of the evidence against her. The trial then continued against defendant M, and during this subsequent period certain misconduct of a juror occurred. The trial judge ordered a mistrial, but refused to enter a judgment of dismissal in favor of defendant B because he was of the opinion that the mistrial necessitated a retrial against both defendants. Held, that the remedy by appeal was inadequate because upon retrial the evidence against defendant B might be sufficient, and on appeal she could not bring up the record of the former trial.

To the same effect is State ex rel. Western Stevedore Co. v. Jones31 involving the granting of a voluntary nonsuit after the erroneous denial of defendant's motion for dismissal on the merits.

The rationale of these decisions holding the remedy at law inadequate is sound if the prior proceedings are in fact not reviewable upon appeal of the second trial. It must be noted however that some instances may arise in which such prior proceedings are material to the issues in the subsequent trial, e.g., to support a defense of res judicata.

29 See also State ex rel. Moore v. Superior Court, 70 Wash. 362, 126 Pac. 926 (1912).
30 97 Wash. 172, 166 Pac. 69 (1917).
31 145 Wash. 258, 259 Pac. 718 (1927).
In such case counsel is bound to offer the prior proceedings into evidence, and whether or not the trial court admits them, they become a part of the record of the subsequent trial, and may be reviewed on appeal. In such a situation it would be erroneous to permit review by extraordinary writ.

**Contempt Proceedings Pending Appeal.** The question here considered is the propriety of a writ of prohibition to restrain a superior court from enforcing a contempt order during the pendency of the appeal of the final judgment in the contempt proceedings.

In *State ex rel. Peterson v. Superior Court*\(^32\) the trial court entered a show cause order in a contempt proceeding against a witness who resided outside the county and declined to attend the trial. The supreme court permitted the writ of prohibition to issue on the ground that the show cause order was not appealable because interlocutory, and that although adequacy of the remedy by appeal is not affected by delay and expense, an appeal from the final judgment of contempt would not be adequate because fine and imprisonment might be imposed by the trial court.

The error in the *Peterson* case was quickly brought to light in *State ex rel. Board of Comm'rs v. Superior Court*\(^33\) where it was held that appeal from a final judgment of contempt was an adequate remedy because relator had a right to a stay of execution pending appeal. The *Peterson* case should have thereupon been overruled. Unfortunately, the court sought to distinguish *Peterson* on the ground that in that case an interlocutory show cause order was reviewed by prohibition while in the instant case a final judgment of contempt had already been entered. The fallacy in this distinction becomes apparent when it is noted that review of the interlocutory order by appeal was deemed inadequate in *Peterson* only because of the claimed inadequacy of an appeal to review the final judgment.

Still further confusion was injected by *State ex rel. Mangaoang v. Superior Court*\(^34\) where the defendants had appealed from an order holding them in contempt for refusal to produce certain documents. After the filing of the notice of appeal the superior court threatened to hold defendants in contempt again for refusal to produce the documents. It was held that the trial court lost jurisdiction upon the filing of the notice of appeal, and that appeal from the subsequent order

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\(^{32}\) 67 Wash. 370, 121 Pac. 836 (1912).

\(^{33}\) 73 Wash. 296, 131 Pac. 816 (1913).

\(^{34}\) 30 Wn.2d 692, 193 P.2d 318 (1948).
of contempt was inadequate. The opinion does not indicate why the remedy by appeal was inadequate, but it may be surmised that otherwise there would be an infinite number of contempt orders and appeals.

Some of the difficulty in this area may be the result of failure to discriminate between an extraordinary writ directed to a superior court and a stay of proceedings pending appeal. The supreme court has inherent power to grant a stay of proceedings pending appeal in aid of its appellate jurisdiction to preserve the status quo or to preserve the fruits of the litigation. Exercise of that power would have done complete justice in the above cases. The supreme court should not circumscribe this inherent power with limitations imposed upon exercise of its original jurisdiction by extraordinary writ. The effect of operating under this self-imposed limitation is the unwarranted distortion of the rules pertaining to the extraordinary writs in order to do justice in a particular case where a stay of proceedings would have accomplished the desired end.

Vacation of Judgment. The general rule is that, if an order vacating a judgment is or may be followed by further proceedings in the cause and the entry of a final judgment therein, such order is not itself appealable, but may be reviewed on appeal from the final judgment. However, in State ex rel. Pacific Loan & Inv. Co. Ltd. v. Superior Court prohibition was granted to prevent the signing of an order vacating a judgment entered more than a year before. The remedy by appeal was held to be inadequate because upon appeal of the subsequent trial the validity of the vacation order could not be raised. The opposite conclusion was reached under essentially the same fact pattern in State ex rel. Prentice v. Superior Court. The Pacific Loan Co. case was distinguished on the ground that review there had been invoked by writ of certiorari which had been requested as an alternative. The distinction fails for two reasons. First, although it is true that in the Pacific Loan Co. case a writ of certiorari was requested as an alternative, it is manifest from the discussion and holding that the court granted a writ of prohibition. Second, even if it were so, there is no reason why the court in the Prentice case could not have treated

35 Shamley v. City of Olympia, 47 Wn.2d 124, 286 P.2d 702 (1955); Northwest Improvement Co. v. McNeil, 98 Wash. 1, 167 Pac. 115 (1917). Yet, in two very early cases prohibition was utilized for this purpose. State v. Superior Court, 6 Wash. 112, 32 Pac. 1072 (1893); State ex rel. Schloss v. Superior Court, 3 Wash. 696, 29 Pac. 202 (1892).
36 Bishop v. Illman, 9 Wn.2d 360, 115 P.2d 151 (1941), and cases cited therein.
37 84 Wash. 392, 146 Pac. 834 (1915).
38 86 Wash. 90, 149 Pac. 321 (1915).
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the writ of prohibition as certiorari and have granted substantial relief.

Relief by writ of certiorari was granted in State ex rel. Plumb v. Superior Court to invalidate a vacation of judgment and sentence in a criminal case, but the opinion does not discuss why the remedy by appeal was considered inadequate.

The conclusion to be drawn from the cases analyzed above is that certiorari is available to review an order vacating a judgment. It is difficult to justify this rule in light of the holdings that such an order may be reviewed upon appeal after the retrial. The fact that it is not immediately reviewable is not a valid justification for utilization of an extraordinary writ so long as the court adheres to the position that adequacy of the remedy is not affected by delay and expense incurred in the ordinary course of litigation.

Public Affairs and Public Officers. Our state supreme court has been particularly responsive in providing speedy determination of questions of public importance or public concern. Thus, judicial review by extraordinary writ has been permitted based upon recognition of a serious power shortage in the Pacific Northwest, and upon recognition of local crime conditions. Also, in State ex rel. Mills v. Superior Court the supreme court granted a writ of prohibition to restrain a superior court from considering certain irregularities in a primary election. The opinion does not state why the remedy at law is inadequate, but it may be surmised that the matter would have become moot unless determined prior to the general election.

The status of litigation involving public officers in their official capacities is not so clear. An early case applies to public officers in their official acts the same rules that apply to other litigants. However, a different view was adopted in State ex rel. Skaggs v. Smith. In that case the director of a state penal institution declined to accept a convicted offender because the legislature had made no appropriation for the institution for the current biennium, and as a consequence it was necessary to close the institution to the reception of inmates to

39 24 Wn.2d 510, 166 P.2d 188 (1946).
40 State ex rel. P.U.D. Dist. No. 1 v. Schwab, 40 Wn.2d 814, 246 P.2d 1081 (1952) (construction of the Box Canyon Dam).
41 State ex rel. Hodde v. Superior Court, 40 Wn.2d 502, 244 P.2d 668 (1952) (removal of injunction against legislative investigating committee).
42 149 Wash. 473, 271 Pac. 333 (1928).
43 But cf. State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29 (1899), where it was held that the delay incident to appeal did not make the remedy inadequate even though it was desirable and of importance to Whatcom County to obtain a construction of the law in question prior to the adjournment of the legislature.
44 State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452 (1891).
45 116 Wash. 572, 200 Pac. 92 (1921).
avoid spending more money than was available. A superior court issued an order to show cause why the director should not be held in contempt. Relator then applied for a writ of prohibition to restrain the proceedings in the superior court. The supreme court disposed of the contention that there was an adequate remedy by appeal, as follows:

The relator is a state officer. His duties are arduous and cover a wide field in state affairs. The charge against him here is in its effect malfeasance of official duty, and a defense to the charge will necessarily take him from the discharge of his official duties for a considerable period of time. Plainly, before the state should be thus deprived of his services, it ought to be clear that the court proceeding against him has jurisdiction to so proceed.46

The same question was raised in State ex rel. Ernst v. Superior Court47 in which a superior court was proceeding to review certain administrative functions of the social security department. The court reverted to the earlier rule, and attempted to distinguish the Skaggs case with the following language:

It cannot be conceded that the questions presented by the pleadings will absorb the attention of the trial court or compel the attendance of relators for any considerable extended period of time. To hold that state officers, as such, are to be allowed exemptions from the rule applied to other litigants, would not be in keeping with the provisions of the statute.48

It is difficult to defend the distinction presented by the Ernst case. The issues involved in Skaggs were of a purely legal nature. The physical presence of the director of the institution at the hearing would not have been required except perhaps briefly for testimony. Counsel for the department of institutions could have relieved the director of most of the burdens imposed by defense of that lawsuit. If indeed state officers are to be allowed no special exemptions from the rules of court, the result of the failure to overrule the Skaggs case is to mislead counsel for state officers into seeking review by extraordinary writ, and thereby needlessly adding to the litigation presented to the supreme court.

Bail and Trial by Jury. The conflict in the case law that has developed in other areas is also manifest in the criminal area.49

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46 Id. at 579, 200 Pac. at 94.
47 198 Wash. 133, 87 P.2d 294 (1939).
48 Id. at 138-39, 87 P.2d at 296.
49 See Annot., 141 A.L.R. 1262 (1942).
In *State ex rel. Belt v. Kennan* the supreme court sustained the granting of a writ of prohibition to prevent a police court from proceeding in a criminal action in which the police judge refused to call a jury. It was stated that the remedy by appeal “may be doubtful.” Yet, in *State ex rel. Potter v. Superior Court* the court invalidated a writ of prohibition directed against a justice of the peace who allegedly intended to select a jury panel in an unconstitutional or erroneous manner. It was held that the remedy by trial de novo in the superior court would be adequate. No mention was made of the *Belt* case.

The development of the case law on the question of bail has been similar. In an early case, *State ex rel. Jones v. Gay*, it was held that the remedy by appeal would be inadequate where the relator was charged with a felony, and financially unable to furnish bail or prosecute an appeal. A contrary view was adopted in *State ex rel. Stevens v. Paul*.

Relator urges that he has no adequate remedy by appeal because, being insane, he is not permitted to be at liberty on bail pending such appeal, and that this distinguishes our previous decisions. But we think this is a distinction that is apparent rather than real. One charged with murder in the first degree, where the statute does not permit the giving of bail, one charged with a lesser offense and unable to give bail, and one charged with insanity whose condition makes it dangerous for him to be at large, and who is therefore not permitted to furnish bail, all have an adequate remedy by appeal, and it has never been held that delay, expense or incarceration prevented appeal from being an adequate remedy.

Here also the court apparently was unaware of a prior holding in conflict with its position. (On the question of adequacy of the remedy at law the *Stevens* opinion distinguishes *State ex rel. Garber v. Savidge* on the ground that the latter involved the constitutionality of a statute of public importance while the instant case merely involved important private rights. This statement is a tantalizing invitation to discuss the relative importance of private rights and public rights under the American system of jurisprudence. Regrettably, the subject is far beyond the scope of this article.)

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50 25 Wash. 621, 66 Pac. 62 (1901).
51 The court relied upon Callan v. Wilson, 127 U.S. 540 (1888) to support the holding. The question of the propriety of a writ was not involved in that case.
52 135 Wash. 344, 237 Pac. 717 (1925).
53 65 Wash. 629, 118 Pac. 830 (1911).
54 134 Wash. 415, 235 Pac. 960 (1925); see also *State ex rel. Sibbald v. Huntington*, 1 Wn.2d 413, 96 P.2d 446 (1939).
55 134 Wash. 415, 416-17, 235 Pac. 960, 961 (1925).
56 132 Wash. 631, 233 Pac. 946 (1925).
In both of these areas the sounder view is the one stated in the later case. If the earlier cases were to be followed, the remedy by appeal in criminal cases would shortly fall into disuse, and the orderly administration of justice be impeded. Hence, it should be argued that the earlier cases have been overruled sub silentio, and it is to be hoped that the supreme court will take that position at its earliest opportunity.

Mandamus To Compel the Assertion of Jurisdiction. Cases dealing with mandamus to compel the assertion of jurisdiction by an inferior court are also discussed in other sections in so far as they bear on the propositions there under examination. They are grouped together here because they stand in a singular position as regards the adequacy of the remedy by appeal. It is readily apparent that in this class of cases the delay and expense incurred prior to appeal is minimal. The refusal of the trial court to hear the cause terminates the proceedings for all practical purposes, and appeal is immediately available.\(^5\) Therefore, as a matter of reason it would seem that the remedy at law is quite adequate, and a writ of mandamus should not be available. However, the courts of this and other jurisdictions have unnecessarily complicated the matter by resort to narrow legalistic reasoning. The Washington cases will be examined rather briefly for many of them are included in a series of early annotations which adequately describe the development of the law on this point.\(^6\) Suffice it to say that in this state there have developed more or less independently two lines of cases taking opposing positions on whether the remedy by appeal is adequate to review the refusal by a trial court to assert jurisdiction.

The leading case in support of the view that the remedy by appeal is adequate is *State ex rel. Light Co. v. Superior Court*.\(^7\) There the defendant had refused to obey the judgment of the trial court, but had given no bond for security or to stay proceedings pending appeal. The trial court declined to entertain a contempt proceeding, believing that it had lost jurisdiction upon the filing of the notice of appeal.

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\(^5\) Cases involving the granting of a change of venue, and others where further proceedings are contemplated, are not considered here for the obvious reason that the action at the trial level has not been exhausted by the refusal to assert jurisdiction. See, e.g., *State ex rel. Stone v. Superior Court*, 97 Wash. 172, 166 Pac. 69 (1917); *State ex rel. Furth v. Superior Court*, 71 Wash. 147, 127 Pac. 1107 (1912); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607 (1909); *State ex rel. Wyman, Partridge & Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875 (1905).


\(^7\) 20 Wash. 502, 55 Pac. 933 (1899).
The opinion of the supreme court directed itself to writ practice in general, not merely to mandamus. Prior cases to the contrary were not discussed other than by the general recognition that the practice had developed of issuing writs without regard to the adequacy of the remedy at law. The opinion then announced that such practice was no longer to be tolerated because appealed cases are as a rule more carefully prepared by the attorneys and more carefully considered by the court.

The rule in the *Light Co.* case was adhered to in several subsequent mandamus cases.60

Also of note is *State ex rel. Piper v. Superior Court*,61 in which the trial court declined to take jurisdiction of an annulment proceeding because service had been by publication instead of by personal service. The court reasoned as follows:

Neither the application of the relator nor the transcript which accompanies the application shows that the court was asked to, or refused to, enter a judgment of dismissal of the action. If such judgment of dismissal had been made, an appeal would have lain from such judgment to this court, and such appeal would have been an adequate remedy. The petition and the accompanying record failing to show that the court refused to do any act the omission of which would deprive the relator of her right to appeal, the writ cannot be allowed, and is therefore denied.62

It must be recognized that the portion of the above statement regarding adequacy of the remedy by appeal is dictum. The narrow holding is that such a case is not ripe for any review at all until the trial court has been requested to, and has acted upon a motion to dismiss.63

Leading the line of cases holding that mandamus is the proper form of review is the early decision of *State ex rel. Shannon v. Hunter*.64 There the superior court declined to take jurisdiction under the erroneous belief that it should not hear cases where the sum sued for was

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61 45 Wash. 196, 87 Pac. 1120 (1906).

62 Id. at 197, 87 Pac. at 1120.

63 Of course, if the trial court is requested, but refuses, to act at all on the matter, mandamus lies to compel the court to make some disposition so that the appellate court would have something to review by appeal. *State ex rel. Murphy v. Superior Court*, 73 Wash. 507, 131 Pac. 1136 (1913).

64 3 Wash. 92, 27 Pac. 1076 (1891).
less than $100. The supreme court demonstrated a clear understanding of the question, and issued a definitive opinion:

The superior court, then, erroneously dismissed the case, and the remaining question above suggested is as to the proper remedy. The position taken by the respondent is that such judgment of dismissal is a final judgment, and determines the cause as fully as would a judgment on the merits; that in rendering the same the court acts judicially, and its discretion in so doing cannot be controlled by mandamus. There is much force in this position, and, if the question were a new one, unaffected by authority, we might come to the conclusion that the proper remedy in such a case was by appeal, and not by mandamus; but the authorities seem to have established the other doctrine, and to have decided that from judgments of dismissal for want of jurisdiction no appeal will lie, but that the only remedy is by mandamus. [discussing U.S. cases]65

The court also alluded to the opinion of a judge in a Nevada case:

He says that the discretion of the lower court is not controlled by such writ; that the question as to whether or not such court has jurisdiction in the particular matter is a preliminary one; and that the appellate court, in granting the writ, decides that question for the lower court, and does not compel it to decide it at all; and at great length elaborates and ably maintains the position contended for by the petitioner in this proceeding. In view of these authorities, we feel bound to hold that the proper remedy, where a cause has been erroneously dismissed for want of jurisdiction, is mandamus.66

The same rule was adopted in some later cases without citation to case authority.67

The conflicting lines of cases converged in State ex rel. Martin v. Superior Court,68 in which mandamus was sought to compel the trial court to assume jurisdiction on a petition concerning an insane person. It was held that the writ would lie because a dismissal for lack of jurisdiction is not a “judicial or discretionary act” properly to be reviewed by appeal. A half-hearted effort was made to distinguish the Light Co. case and to explain the Piper case. The shortcomings of these efforts are explored at greater length in another context in the next section.

65 Id. at 94-95, 27 Pac. at 1077.
66 Id. at 96, 27 Pac. at 1077.
67 State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35 (1899); State ex rel. Smith v. McClinton, 17 Wash. 45, 48 Pac. 740 (1897); State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113 (1895); State ex rel. Maltby v. Superior Court, 7 Wash. 223, 34 Pac. 922 (1893); State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990 (1906) (dictum).
68 101 Wash. 81, 172 Pac. 257 (1918).
Martin has been followed by the more recent cases, and consequently is probably the better practice before the supreme court. So long as the practitioner is apprised of the form of review to follow, it makes little difference which is finally adopted by the court. The strongest argument against extended writ practice—elimination of multiple, piecemeal appeals—has no application to the instant situation where the matter has been concluded in the trial court and is ripe for appellate review in one way or another. Moreover, the delays and expenses involved in reviewing such a dismissal either by appeal or by writ of mandamus are about equal. Under present supreme court practice the writ of mandamus could perhaps be heard somewhat sooner because writs may be set for hearing on a motion day on rather short notice, while appeals must be ready well in advance of the term in order to be docketed.

MUST THE REMEDY AT LAW BE INADEQUATE?

The statutes unequivocally state that the writs will not lie unless the court is acting without or in excess of its jurisdiction and the remedy at law is inadequate. Nothing could be more clear. Yet, in order to reach the merits in certain cases our supreme court has indulged itself in games of semantics and judicial gymnastics to carve out exceptions to this rule. The resulting body of case law is incomprehensible and a source of wonder to the practitioner. It is not the purpose of this article to attempt to rationalize the irrational, but rather to be of some aid to the lawyer who would otherwise find himself in the maze of conflicting and unintelligible rules. To that end the historical or chronological treatment of the cases is the most profitable approach.

In the first case of note, State ex rel. Reed v. Jones, a very narrow and relatively innocuous exception to the general rule was recognized:

And in Ex parte Roundtree,... the court says:

"If the court is one of established jurisdiction, a plea that the subject-matter of a particular suit lies without its jurisdiction, or that the party is not amenable to its cognizance, will ordinarily afford full relief. But when the question involves the legal existence and construction of a court—a denial of all jurisdiction, and not of the particular jurisdiction proposed to be exercised,—a prohibition, it seems to us, is the only adequate remedy."

This, it appears to us, is a clear and explicit statement of the law, and

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69 State ex rel. Pryor v. Paul, 5 Wn.2d 90, 104 P.2d 745 (1940); State ex rel. Pacific Coast Adjustment Co. v. Taggart, 159 Wash. 201, 292 Pac. 741 (1930); State ex rel. S. & R.V.Ry. v. Superior Court, 123 Wash. 116, 212 Pac. 259 (1923).

70 2 Wash. 662, 27 Pac. 452 (1891).
the language is peculiarly applicable to the case at bar. We are all of the opinion that the relators have a complete remedy by appeal from any final judgment that may be rendered by the superior court, and that there is therefore no necessity for resorting to the extraordinary remedy by prohibition. [citing cases from other jurisdictions] 71

No case has been found in which it was sought to invoke a writ in order to challenge the legal existence or construction of our courts. Nevertheless, the judicial practice soon developed of considering writs without questioning whether the remedy at law was adequate, 72 until in State ex rel. Light Co. v. Superior Court 73 the court decided to return to the original practice. Great reliance was placed upon the Reed case, and the following significant statements were made:

Since that time, however, many cases have been decided where the writ of prohibition issued where the court was proceeding to act without jurisdiction, and a writ of mandamus has issued where the court refused to take jurisdiction which rightfully belonged to it, without regard to whether an adequate remedy existed by appeal or otherwise. We have become satisfied, however, that this practice is not in consonance with the best authority, and is not conducive to a careful and close investigation of causes by this court. . . . We think that the better authority, as well as the better practice, precludes the issuance of these writs when the law furnishes an adequate remedy. . . . 74

We feel at liberty to establish a rule at variance with some of the decisions of this court, for the reason that this is simply a law of procedure and practice, and no vested rights can have grown up under the former decisions of the court, and no hardship will follow in this case from the change of the rule, for the reason that a majority of the court is opposed to the issuance of the writ on the merits. But, in addition, it plainly appearing that there is an adequate remedy by appeal, we take this opportunity of announcing the law of this state to be that extraordinary writs of this character will not be allowed to issue when there is an adequate remedy at law. 75

That should have been sufficient to put the matter at rest. The members of the bar apparently were not so easily convinced for within the year the court felt it necessary to call attention to the Light Co. case stating:

71 Id. at 666, 27 Pac. at 453.
72 State ex rel. Alladio v. Superior Court, 17 Wash. 54, 48 Pac. 733 (1897); State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395 (1896); State ex rel. Rucker v. Stalecup, 11 Wash. 713, 40 Pac. 341 (1895); State ex rel. Allen v. Superior Court, 9 Wash. 668, 38 Pac. 206 (1894); State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103 (1893); State ex rel. Cummings v. Superior Court, 5 Wash. 518, 32 Pac. 457 (1893); City of North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1055 (1892).
73 Id. at 502, 55 Pac. 933 (1899).
74 Id. at 504-05, 55 Pac. at 933-34.
75 Id. at 508, 55 Pac. at 935.
[W]e sought to point out the distinction between the cases where the writ was properly and where it was improperly issued, and attempted to get back to the correct procedure. If we may judge from the fact that applications for these writs are still being made to this court in cases falling squarely within that case, the principle sought to be announced therein cannot have been generally understood, and it may be well to restate the rule here.\textsuperscript{76}

The rule was once again stated to be that prohibition will lie without regard to adequacy of the remedy by appeal only where there is a denial of jurisdiction involving the legal existence of a court,\textsuperscript{77} and not where the question is the jurisdiction over the particular parties or subject matter.\textsuperscript{77}

An attempt to deal a final death blow to improper writ practice before the supreme court was made in \textit{State ex rel. Miller v. Superior Court}.\textsuperscript{78} Prohibition was there requested to restrain further proceedings after the denial of a motion for a change of venue to defendant's county of residence. The court held, that even though the filing of such a motion ousts the superior court of jurisdiction, the writ will not lie because there is an adequate remedy by appeal.\textsuperscript{79} The opinion cites many, many cases, and relies particularly upon the \textit{Light Co.} case. It was stated that the \textit{Light Co.} case in effect overruled certain named prior cases,\textsuperscript{80} which cases were thereupon expressly overruled.

The seed of future deviation from the established rule was sown by what must have been the inadvertent failure to expressly overrule \textit{State ex rel. Alladio v. Superior Court}.\textsuperscript{81} The holding in the \textit{Alladio} case, that the only question that need be considered is that of lack of jurisdiction,\textsuperscript{82} is clearly contrary to the \textit{Light Co.} and \textit{Miller} cases.

\begin{footnotes}
\item[76] \textit{State ex rel. Vincent v. Benson}, 21 Wash. 571, 573, 58 Pac. 1066 (1899).
\item[77] This rule was followed in: \textit{State ex rel. Investment Co. v. Superior Court}, 31 Wash. 410, 71 Pac. 1100 (1903); \textit{State ex rel. Hubbard v. Superior Court}, 24 Wash. 438, 64 Pac. 727 (1901); \textit{State ex rel. Improvement Co. v. Moore}, 21 Wash. 629, 59 Pac. 505 (1899).
\item[80] \textit{State ex rel. Stockmen v. Superior Court}, 17 Wash. 54, 48 Pac. 733 (1897).
\item[81] Id. at 55, 48 Pac. at 733: "The next objection is that this court has no authority to issue the writ in such a case as this, but we think this point has been settled by the numerous decisions of this court contrary to the contentions of the respondent, and that there is nothing in this case to call for any further discussion of the question, and the only question to be considered is, was the notice sufficient to confer jurisdiction of the cause upon the superior court."
It would have been a reasonable assumption that it had been overruled sub silentio but for the fact that it has been subsequently cited to sustain further departure from the established rule.

In *State ex rel. Wood v. Superior Court*\(^8\) prohibition was sought to restrain the court from proceeding in a will contest not brought within one year. Held, that where the court is proceeding without first having acquired jurisdiction, the remedy is by prohibition without regard to the adequacy of the remedy by appeal. To support this holding the court cited the *Alladio* case.\(^8\)

The thread of error was extended in *State ex rel. Hopman v. Superior Court*,\(^8\) which cited the *Wood* case to sustain prohibition of proceedings instituted upon irregular service of process.\(^8\)

This erroneous line of cases met head on with the established rule in a most marvelous appellate opinion, *State ex rel. Martin v. Superior Court*.\(^8\) The factual situation was identical to that in the *Miller* case, *i.e.*, prohibition to restrain further proceedings after denial of a motion for a change of venue to defendant's county of residence. It was held that where a statute grants a right independent of the merits of the cause, and the facts are undisputed with no element of discretion involved, the writ will lie. The court reached this result by (1) reliance upon the *Wood* and *Hopman* cases, (2) by reliance upon certain mandamus and certiorari cases, and (3) by an incomprehensible circumvention of a directly contrary holding in the *Miller* case.

The invalidity of the *Wood* and *Hopman* cases has been discussed above, and will not be reiterated here.

The *Martin* opinion cited several mandamus\(^8\) and certiorari\(^8\) cases concerned with venue in which relief had been granted. The argument then proceeded thusly:

If prohibition be the counterpart of mandamus, it should follow that the one might be employed to compel, and the other to prohibit upon the same state of facts, depending upon whether plaintiff or defendant,

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\(^8\) 76 Wash. 27, 135 Pac. 494 (1913).
\(^8\) Also cited is *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207 (1907). The *Mackintosh* case lends no support whatever. It merely held that prohibition would *not* lie to prevent action within the inherent power of the court.
\(^8\) 88 Wash. 612, 153 Pac. 315 (1915).
\(^8\) The court also cited *State ex rel. Fidelity & Deposit Co. v. Superior Court*, 87 Wash. 498, 151 Pac. 1094 (1915), which has no discussion at all on the propriety of the writ.
\(^8\) 97 Wash. 358, 166 Pac. 630 (1917).
\(^8\) *State ex rel. Nash v. Superior Court*, 82 Wash. 614, 144 Pac. 898 (1914); *State ex rel. Scougale v. Superior Court*, 55 Wash. 328, 104 Pac. 607 (1909); *State ex rel. Wymann, Partridge & Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875 (1905).
\(^8\) *State ex rel. Griffith v. Superior Court*, 96 Wash. 41, 164 Pac. 516 (1917); *State ex rel. Schwabacher v. Superior Court*, 61 Wash. 681, 112 Pac. 927 (1911).
invokes the writ. To say that mandamus will lie, if the court to which a case is ordered sent does not have jurisdiction, and may refuse to take jurisdiction or delay the case pending a trial, and to deny that prohibition will lie to prevent a court without jurisdiction from trying a case that ought to be sent to another county, is drawing the sights so fine that the "judicial mind" has been put to some extremity to mark the line of cleavage.90

As a matter of abstract logic it would be a simple task indeed to demonstrate that a rule applicable to a given situation is not necessarily applicable to the converse situation. However, it is not necessary to delve into the abstract; the cases have explained it in the specific.

All but one91 of the cases cited in the opinion are dependent upon State ex rel. Wyman, Partridge & Co. v. Superior Court92 for their validity. In that case by dictum it was stated that an appeal would not be an adequate remedy to review the granting of a change of venue. This is the converse of the Miller and Martin cases in which the court had denied a change of venue. The significance of this difference was clearly spelled out in the Miller case:

In State ex rel. Wyman etc. Co. v. Superior Court, . . ., just decided, this court entertained jurisdiction of an application for a writ of mandamus to compel the court to proceed with a garnishment proceeding in which it had granted a change of venue. But in that case we could not presume that the court to which the proceeding was transferred would take jurisdiction, if in fact it had none, and furthermore, the error there complained of could never be corrected by an appeal from the court in which the error was committed. We therefore held that there was no adequate remedy by appeal.93

To paraphrase, the remedy by appeal was deemed inadequate to review the granting of the change of venue because (1) if the court to which the cause was transferred also declined to accept jurisdiction, the action would never be heard, and obviously could never be considered on appeal; and (2) even if the cause were accepted by the second county, on appeal the supreme court could not review an error committed in the first county.

Clearly, these reasons do not apply to the denial of a change of venue. The court which enters the denial is the court which will hear the cause, and the court from which the appeal will be taken. There-

90 97 Wash. 358, 364, 166 Pac. 630, 632 (1917).
91 State ex rel. Griffith v. Superior Court, 96 Wash. 41, 164 Pac. 516 (1917) has no discussion of the matter.
92 40 Wash. 443, 82 Pac. 875 (1905).
93 40 Wash. at 558, 82 Pac. at 878.
fore, the remedy by appeal would be adequate to review the denial of a change of venue, but not to review the granting of a change of venue.

It has already been noted that the Martin and Miller cases came to the opposite result on identical facts. But by a most breathtaking exercise of judicial legerdemain the Miller case is "distinguished."

Whether this court will anticipate and review errors of the trial court upon such questions as inhere in the record which may be heard on appeal, is one that has sorely perplexed the judicial mind and much confusion has crept into our cases. But it would seem that the doctrine of State ex rel. Miller v. Superior Court... is still unimpeached and unimpaired. The real question is whether it was properly applied in that case. The rule as stated does not deny that the writ will lie where the remedy by appeal is inadequate. It is said, "The adequacy of the remedy by appeal or in the ordinary course of law, is there declared (State ex rel. Townsend Gas & Elec. L. Co. v. Superior Court...) to be the true test in all cases, and not the mere question of jurisdiction or lack of jurisdiction." Hence the inquiry whether the remedy by appeal is adequate or whether that question, when coupled with a question of jurisdiction is enough to sustain the writ, is not foreclosed.94

Now, how is that again? The Miller case held that the remedy by appeal was adequate to review the denial of a change of venue. Why that did not foreclose the identical question in the Martin case requires more sophisticated reasoning than can be mustered by mere mortals.

Further, near the conclusion of the opinion in the Martin case it is said: "The question why we do not overrule the Miller case may occur." (A masterpiece of understatement.) It is then explained that Miller was rightly decided because one of the three defendants did not join in the motion for a change of venue, and on that ground it was correctly denied. This is patently false. The Miller case was not decided on that ground. The rules of law and application of those rules to the factual pattern in the Miller case are in direct contradiction to the Martin case. The fortuitous circumstance that the result in a case happens to be supportable on an entirely different ground does not make that case "good law." It is the rule of law and its application that are either affirmed or overruled, not the incidental outcome. It is submitted that the Miller and Martin cases are directly in conflict, and that one must be overruled. It is further submitted that only the Miller case can be supported by reason and by the law.

Before leaving the Martin case one more observation is in order. The following is stated as the rule being promulgated in the case:

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94 97 Wash. at 359-60, 166 Pac. at 630-31.
It would seem, if the statute grants a right that does not depend upon the merit of the case, but is independent of the merit of the case, that a litigant should not be put to the hazard, delay, and expense of the trial upon the merits as a prerequisite to the assertion of the right. In such cases, the court is called upon to deal with something more than "simply a law of procedure and practice," as was held by Judge Dunbar, and properly so, considering the record in the case of \textit{State ex rel. Townsend Gas & El. L. Co. v. Superior Court}. ... It is a right made equivalent to the right to fix the venue of a local action under the statute, and when asserted should not be thrust aside as an incident or an error to be heard upon an appeal from a judgment on the merits.\footnote{Id., at 361-62, 166 Pac. at 631.}

Near the beginning of this section we had occasion to quote the paragraph in the \textit{Light Co.} case in which is included the statement that this is "simply a law of procedure and practice." The point being made in that paragraph was that the court had no qualms about changing the rule because it was not the type of rule of law upon which litigants and lawyers might rely to their detriment. \textit{Martin} seizes upon this phrase, quotes it out of context, and claims to find support for a holding contrary to that of the \textit{Light Co.} case.

One would have thought that the court had injected sufficient confusion to becloud the most reasoning mind. But, alas, there was still more to come. The next judicial effort was an entirely unrelated \textit{Martin} case.\footnote{\textit{State ex rel. Martin v. Superior Court}, 101 Wash. 81, 172 Pac. 257 (1918).} This was a mandamus action to compel the superior court to take jurisdiction on a petition concerning an insane person. It was held (3-2) that the writ would lie. The majority opinion relied heavily upon treatises, text-writers, and cases from other jurisdictions. Numerous local cases were discussed, the majority coming to the conclusion that authority could be found on either side. Among those quoted in support of the majority view was the fallacious \textit{Wood} case which has already been discussed. The following comments on two other key cases are noteworthy.

Coming now to our own decisions in \textit{State ex rel. Martin v. Superior Court}... we endeavored to show that, in most of the cases where a writ had been denied, it was because of the holding that appeal was an adequate remedy. And we think in all of them the jurisdiction of the court over the subject-matter was not questioned. It may be said that the genesis of all the subsequent confusion and conflict, or apparent conflict, in our own decisions is in the case of \textit{State ex rel. Townsend Gas & Elec. L. Co. v. Superior Court}... We have had to resort to the original briefs, and can say, in addition to what we said of it in the
Martin case, that the question put by counsel to the court was not whether a court would compel an inferior court to take jurisdiction of a case where jurisdiction had been disclaimed, but whether the court would compel the satisfaction of a judgment through the process of a contempt proceeding pending an appeal upon the merits. The court was exercising an acknowledged jurisdiction; it had passed on the merits. Its judgment, if ill-founded, rested in error, and the writ was properly denied. There is certainly nothing in the decision when read with the record in mind that makes it an authority against our holding.97

At the outset it must be recognized that the holding of a court is not necessarily limited by the briefs of the parties, and to so interpret a case after "resort to the original briefs" is of dubious value. Moreover, as our early quotation from the Light Co. case shows, the court was well aware that the writ should be denied on the merits, but took the opportunity to make the broad and sound statement that writs should not issue unless the remedy by appeal were inadequate. So understood, the Light Co. case is authority against this holding.

The quoted comment, that in the cases cited in the first Martin case "jurisdiction of the court over the subject-matter was not questioned," defies comprehension. Does this mean that the question of jurisdiction was never raised or was admitted or was denied? And in any event, so what? The meaning of the statement, if any, is lost.

But all of this is less important than the stated reasons for the decision. Two main arguments are presented. First:

It is fundamental that a higher court will not control the judicial acts of an inferior court. It will not invade the realm. Its prime function is to review for error. The first consideration, then, must be to determine the character of the act of the inferior court. Is a judgment of dismissal based upon a denial of jurisdiction over a subject-matter a judicial act in the sense that it is a judgment which ought to be reviewed on appeal?

A dismissal under the mistaken belief that the court has no jurisdiction is in no sense a judicial act for it rests upon a disclaimer of the judicial function. The court has neither heard nor determined. Neither the law nor the facts are affected in the slightest degree, and appeals being for the correction of judicial errors, errors of discretion or of the judicial mind, it follows that one entitled should have resort to some method by which the court can be set in motion. The court has done nothing which is either judicial or discretionary. It has refused to do either. Its judgment is nullius filius, a void thing, binding no one, a legal nonentity.98

97 Id. at 89, 172 Pac. at 259.
98 Id. at 85-86, 172 Pac. at 258.
This seems to be a hypertechnical argument without support in reality. It is merely semantical to say that a court does not exercise a judicial function in deciding that it has no jurisdiction. Such a determination is made upon study of the case and statute law as in other judicial matters. It is difficult to see the difference in judicial function between a holding that the court lacks jurisdiction, and a holding, for example, that a statute upon which an action is premised, is unconstitutional. Moreover, if the statement that appeals are for the correction of judicial errors intends to imply that jurisdictional matters will not be then considered, it is, of course, incorrect. And finally, the fact that the judgment is a “void thing” has no particular significance for all judgments entered without jurisdiction are void in that sense. If that were a basis of distinction, the question of jurisdiction would always be reviewable by writ without regard to the adequacy of the remedy by appeal.

The second main argument is this:

We have not always differentiated between inherent power to hear and power to proceed. This has resulted in a confusion in our decisions. With this distinction preserved, the law is clear. Where there is a lack of inherent jurisdiction in the court itself, a writ of prohibition will lie to restrain it from further proceedings; or where the court has erroneously decided that such inherent jurisdiction is lacking, mandamus will lie to compel it to entertain the cause and to hear and determine. Where, however, the question is whether the court, acting within the scope of its admitted jurisdiction, has acquired jurisdiction over the parties or the particular subject-matter, the writ will not issue. In such a case, the court is exercising its judicial function in passing on the question, not whether it has inherent jurisdiction, but whether it has acquired jurisdiction or a right to proceed within the limit of an admitted jurisdiction. If, in the exercise of its discretion or judgment, it commits error, the proper remedy is by appeal, and not by writ of prohibition or mandamus. Viewed in this light, the decision in the Piper case... is entirely consistent, for there the court did not hold that it lacked jurisdiction inherently, but simply that its jurisdiction had not been properly invoked.⁹⁹

According to the majority opinion the confusion disappears and the law becomes clear when the meaning of “inherent jurisdiction” is understood. Aye, there's the rub!! Apparently it means something other than jurisdiction over the parties or the subject matter. But, what? If “inherent jurisdiction” has any real meaning, it was incumbent

⁹⁹ Id. at 92-93, 172 Pac. at 260.
upon the majority to explain it with some clarity. Very likely it has no such meaning and the view of the dissenting opinion is correct.

If the writ may issue in this case, then it may issue in all cases where a general demurrer which goes to the jurisdiction, either of the person or of the subject-matter, is sustained to a complaint. The issuance of the writ in this case again opens the door to appeals by writs of mandamus and not in the ordinary way. . . . I agree that, prior to State ex rel. Miller v. Superior Court . . . this court had issued writs of mandamus where there was a remedy by appeal. But, as stated in that case, all those decisions were overruled where the question of jurisdiction of the court below was the sole test of jurisdiction in this court, and the quotation from the Langley case, supra . . . shows that the rule has been adhered to where there was a remedy by appeal. The general rule in other states may be that errors of this kind may be reviewed by a writ of mandamus, but that is not the rule in this court and we have frequently so held, because the statute of this state controls, and provides that such writs may be issued only where there is not a plain, speedy and adequate remedy by appeal. . . .100

I agree, of course, that the extraordinary writ of prohibition or mandamus may be a speedy and easy way of reviewing errors which occur in the trial court, but until the majority opinion becomes the law and reads out of the statute § 1015, as it undoubtedly does, and overrules State ex rel. Miller v. Superior Court, supra, and numerous other cases holding to the same effect, I must withhold my concurrence in that practice.101

The result of the second Martin case has been to add further confusion to an already muddied area.102 Subsequent cases relying upon

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100 Id. at 98-99, 172 Pac. at 262.
101 Id. at 100, 172 Pac. at 262-63.
102 An analysis somewhat different from that presented here is found in 5 BANCROFT, CODE PRACTICE AND REMEDIES § 4040 n.19 (1928): "19. In Washington it appears originally to have been held that the question of jurisdiction was the sole test of jurisdiction. That view was expressly overruled and it was said that the adequacy of the remedy and not the question of jurisdiction was the true test in determining whether prohibition would lie. State v. Superior Court, 40 Wash. 555, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395, 82 Pac. 877 (expressly overruling all decisions which make the question of jurisdiction the sole test as to the granting of the writ). For some time the court adhered to this view. State v. Superior Court, 97 Wash. 338, L. R. A. 1917F, 905, 166 Pac. 630; State v. Clifford, 78 Wash. 555, 139 Pac. 650; State v. Wright, 76 Wash. 383, 136 Pac. 482; State v. Superior Court, 73 Wash. 296, 131 Pac. 816; State v. Superior Court, 67 Wash. 370, 121 Pac. 836. Subsequently, the distinction was made that, when there is a lack of inherent jurisdiction in the court itself, the writ of prohibition will issue regardless of the fact that there may be another remedy, but that where the question is as to whether the court is acting within the scope of its admitted jurisdiction, prohibition will not issue. State v. Superior Court, 122 Wash. 555, 211 Pac. 764 (citing State v. Superior Court, 101 Wash. 81, 4 A.L.R. 572, 172 Pac. 257, which, however, was a case concerning mandamus and not prohibition, and which does not appear to be, as maintained, a very thorough review of the previous cases dealing with prohibition)."
either the first\textsuperscript{103} or the second\textsuperscript{104} Martin cases have failed to dispel any of the confusion. Two of the more recent cases of moment are cited in State ex rel. Munro v. Superior Court:\textsuperscript{105}

It is, of course, true that the writ of prohibition will only issue where there is no adequate remedy by appeal or otherwise. State ex rel. New York Cas. Co. v. Superior Court, 31 Wn. (2d) 834, 199 P. (2d) 581. . . . But where the court is attempting to proceed entirely without jurisdiction, we have held that the remedy by appeal is inadequate and prohibition will lie. State ex rel. Western Canadian Greyhound Lines v. Superior Court, 26 Wn. (2d) 740, 175 P. (2d) 640.\textsuperscript{108}

The phrase “entirely without jurisdiction” attributed to the Greyhound case is another of those cryptic expressions. It implies that in other instances a court may be proceeding “somewhat without jurisdiction.” Whether there are shades of lack of jurisdiction is questionable. It would seem that the court either has or has not the power to act, and that by definition no middle ground exists.

To summarize, the following exceptions have been created to the general rule that a writ will not issue unless the remedy by appeal is inadequate: (1) When the question involves the legal existence or construction of the court;\textsuperscript{107} (2) When the court is proceeding without first having acquired jurisdiction;\textsuperscript{108} (3) When a statute grants a right independent of the merits of the cause, and the facts are undisputed with no element of discretion involved;\textsuperscript{109} (4) When the court is proceeding without “inherent jurisdiction”;\textsuperscript{110} (5) When the court is proceeding “entirely without jurisdiction.”\textsuperscript{111}

It is submitted that none of these exceptions, except perhaps the first, finds any support in law, in reason, or in any sound judicial policy. They have been the source of immeasurable confusion to the bar, and they contribute to an overburdening of the appellate court with applications for relief.

\textsuperscript{103} State ex rel. Antonsen v. Superior Court, 29 Wn.2d 725, 189 P.2d 219 (1948); State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946); State ex rel. Gamble v. Superior Court, 190 Wash. 127, 66 P.2d 1135 (1937); State ex rel. Bark v. Superior Court, 144 Wash. 44, 257 Pac. 837 (1927); State ex rel. McClaskey v. Superior Court, 115 Wash. 354, 197 Pac. 30 (1921).

\textsuperscript{104} State ex rel. Park v. Superior Court, 142 Wash. 366, 253 Pac. 111 (1927); State ex rel. Maurer v. Superior Court, 122 Wash. 555, 211 Pac. 764 (1922).

\textsuperscript{105} State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452 (1891).

\textsuperscript{106} State ex rel. Hopman v. Superior Court, 88 Wash. 612, 153 Pac. 315 (1915); State ex rel. Wood v. Superior Court, 76 Wash. 27, 135 Pac. 494 (1913).

\textsuperscript{107} State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452 (1891).

\textsuperscript{108} State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630 (1917).

\textsuperscript{109} State ex rel. Martin v. Superior Court, 101 Wash. 81, 172 Pac. 257 (1918).

\textsuperscript{110} State ex rel. Munro v. Superior Court, 35 Wn.2d 217, 212 P.2d 493 (1949); State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946).
The statutes and cases require as a prerequisite to issuance of an extraordinary writ that the trial court be acting without or in excess of its jurisdiction. The task of the remainder of this article is to determine what is meant by "jurisdiction." To that end the best introduction is direct reference to the few general statements offered by the Washington Supreme Court.

In *State ex rel. New York Cas. Co. v. Superior Court*\(^{112}\) is found the following:

Jurisdiction of the subject matter means not only authority in the court to hear and determine the class of actions in which the particular action is comprised, but also authority to hear and determine the particular question which it assumes to determine; hence the essential elements of jurisdiction are said to be three: (1) the court must have cognizance of the class of cases to which the one to be adjudged belongs; (2) the proper parties must be present; and (3) the point decided must be, in substance and effect, within the issues before the court.\(^{118}\)

And in *Graham v. Graham*,\(^{114}\) where the trial court intended to appoint a guardian *ad litem* without conducting a hearing, the supreme court said:

From the standpoint of definition, the term "jurisdiction" is somewhat illusive, to say the least. It has been characterized as one of the nebulous, slippery, weasel words of the law. These observations would seem to apply equally to the phrase "excess of jurisdiction." Clearcut, authoritative definitions of the phrase are not too numerous. At best, they are quite confusing. It was pointed out above that the trial court definitely has jurisdiction or possesses the power to act in the matter of appointment of guardians *ad litem* in the usual run-of-the-mill situation. Therefore, the question now to be resolved is whether it should be said that the trial court, in proceeding without a hearing in the face of timely objection and resistance, was acting in excess of jurisdiction. For the reasons indicated, we have stated hereinabove that under certain circumstances a hearing and an opportunity to be heard are essential. Absent such essentials, we are convinced that a court would be proceeding in *excess of its jurisdiction*.\(^{115}\)

On the other hand, the supreme court declined to prohibit a supe-

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\(^{112}\) 31 Wn.2d 834, 199 P.2d 581 (1948).
\(^{113}\) Id. at 840, 199 P.2d at 585.
\(^{114}\) 40 Wn.2d 64, 240 P.2d 564 (1952).
\(^{115}\) Id. at 68-69, 240 P.2d at 566.
rior court from considering a temporary injunction directed against enforcement of a city ordinance in *State ex rel. McGlothern v. Superior Court*:\(^\text{118}\)

The parties and the subject-matter are all before the superior court by process and under general appearances. The immediate cause of the controversy relates to an intermediate step or order in the progress of the cause which the superior court has unquestioned power and jurisdiction to hear and determine.\ldots

Under the constitution and statutes, the superior courts of this state have been given general jurisdiction. Jurisdiction means the power to hear and determine. It is the power not to hear and determine correctly, nor the power to hear and determine incorrectly, but the power to simply hear and determine; and if, in the face of all presumptions, a litigant fears an erroneous ruling, it can in no sense disturb or defeat the power of the court to hear and determine. In the progress of the cause towards the final judgment, the superior court has the jurisdiction to reconsider its orders.\(^\text{117}\)

Similarly, in *State ex rel. Meyer v. Clifford*\(^\text{118}\) the supreme court declined to restrain the entry of an order for the exhumation of a body. A couple of cases\(^\text{119}\) were overruled, and the court said: "The words in the statute \ldots 'in excess' of the jurisdiction of such tribunal, clearly do not mean an error either in law or fact committed in the exercise of an acknowledged jurisdiction."\(^\text{120}\) The following statement in the dissent to one of the overruled cases was quoted with approval:

To hold that a court of general jurisdiction exceeds that jurisdiction every time it issues a writ or grants any other form of relief in an improper case or upon an improper showing, is to lose sight of all distinction between a want of jurisdiction and mere error in the exercise of jurisdiction. Such a holding practically limits the term "jurisdiction" to the power to hear and determine rightly and without error.\(^\text{121}\)

And finally in *State ex rel. Case v. Superior Court*,\(^\text{22}\) where the court held that the superior court lost jurisdiction over a family allowance which abated at the death of the widow, the following dissent was registered:

Uniformity of the law (which is certainly a very desirable purpose that ought to be considered if we would have other than an indifferent

\(^{116}\) 112 Wash. 501, 192 Pac. 937 (1920).

\(^{117}\) Id. at 504-05, 192 Pac. at 938-39.

\(^{118}\) 78 Wash. 555, 139 Pac. 650 (1914).

\(^{119}\) State ex rel. Murphy v. Wright, 76 Wash. 383, 136 Pac. 482 (1913); State ex rel. City of Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778 (1908).

\(^{120}\) 78 Wash. at 560, 139 Pac. at 651.

\(^{121}\) Ibid.

exposition of the law) no longer obtains. It would be a futile effort to cite authorities in support of the rule that mere error is not a valid basis for issuance of the writ in the case at bar, in view of the disposition of this court to follow the "modern trend" and aid in furtherance of the program of a government of men not of laws.\textsuperscript{123}

Phrased in other terms, it should be concluded from the above statements that the trial court may function erroneously on some legal questions with the result that the court is deprived of power to continue to hear and determine the cause, while it may function erroneously on other legal questions with the result constituting "mere error." If the legal question under consideration falls into the former category, the matter is jurisdictional and meets one of the requirements for review by extraordinary writ. If it falls into the latter category, review must await appeal from the final judgment. This part of the article seeks to determine what type legal questions are jurisdictional.

The cases defining and applying the jurisdictional requirement for issuance of a writ are so diverse and superficial as to defy classification and analysis. The area is further complicated by the fact that the court has on occasion intimated a distinction between "lack of jurisdiction over the subject matter" and "excess of jurisdiction" while in most of the cases one or the other phrase is used without apparent regard for the distinction (if indeed there is any meaningful distinction). In this state of the case law the most profitable treatment is a discussion of the cases in groups even though the connection among all the cases in each group may not always be as neat and clean as might otherwise be desired.

However, before concluding this introductory presentation, attention must be directed to the cases involving questions of fact. The general rule is that a writ will not lie when jurisdiction depends upon a disputed question of fact.\textsuperscript{124} The stated reason for this rule is that an application for a writ does not always bring up a complete record to the appellate court, and therefore, it is not a proper mode of review for factual questions.\textsuperscript{125} It might be suggested as an even more compelling reason that the supreme court will not retry factual disputes.\textsuperscript{126}

But what are factual questions? In some writ cases matters de-

\begin{itemize}
\item \textsuperscript{123} Id. at 254, 160 P.2d at 609.
\item \textsuperscript{124} Sheffield v. Eagle Lion Films, 40 Wn.2d 361, 242 P.2d 1024 (1952); State ex rel. Neal v. Kauffman, 86 Wash. 172, 149 Pac. 656 (1915); State ex rel. Baldwin v. Superior Court, 11 Wash. 111, 39 Pac. 818 (1895).
\item \textsuperscript{125} Sheffield v. Eagle Lion Films, 40 Wn.2d 361, 242 P.2d 1024 (1952).
\item \textsuperscript{126} See Gilbert v. Rogers, 156 Wash. Dec. 184, 351 P.2d 535 (1960).
\end{itemize}
nominated questions of fact seem in reality to be questions of law. For example, the residence of a decedent at the time of her death, the propriety of service of summons, the construction of a lease and a guaranty, and whether a case had been merely stricken instead of dismissed have been termed questions of fact. Without engaging in a dissection of these holdings it must be observed that particularly in view of the surrounding circumstances set out in each case the questions before the court probably were legal, not factual.

Closely related to the cases involving questions of fact are those stating that a trial court passing on the question of its own jurisdiction is only exercising its "judicial function," and if error is committed, the proper remedy is by appeal, not by writ. Under this rule, if taken literally, questions of jurisdiction could never be reviewed by writ because (1) the "judicial function" includes both questions of law and of fact, and (2) a writ application will not be entertained unless the question has previously been considered by the trial court. However, the multitude of cases attest to the fact that jurisdictional questions may be reviewed by writ. In view of this it is submitted that "judicial function" is merely an unfortunate selection of words referring to determination of questions of fact. If this be the meaning, the rule is nothing more than another way of stating that the supreme court will not retry factual disputes.

A convenient point of departure into the specific subjects in this area is the case of State ex rel. Dodge v. Langhorne. There a witness for the prevailing party in the action sought by petition to have a judgment set aside so that he might recover the witness fee that had been awarded to the prevailing party as part of the judgment, but which the party had not paid to the witness. The trial court intended to hold the party in contempt for failure to comply with its orders pursuant to the petition. Held, that the trial court had no power to hear and determine the cause, the witness having failed to state a cause of action because he was not a party to the suit. Therefore, the writ

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129 Ibid.
131 On the other hand jurisdiction over an interstate bus company by service upon a driver was held not to be a question of fact in State ex rel. Western Canadian Greyhound Lines, Ltd. v. Superior Court, 26 Wn.2d 740, 175 P.2d 640 (1946).
132 See State ex rel. Western Canadian Greyhound Lines Ltd. v. Superior Court, 26 Wn.2d 740, 754, 175 P.2d 640, 648 (1946), and cases cited therein.
133 State ex rel. Nooksack River Boom Co. v. Superior Court, 2 Wash. 9, 25 Pac. 1007 (1891).
134 12 Wash. 588, 41 Pac. 917 (1895).
of prohibition issued. During the course of the opinion the supreme court made the following remarks:

Even if it be conceded that in this instance, the court had jurisdiction of the subject matter and of the relator, it does not follow, according to the principles laid down in the above authorities, that it had the right or power to make the order which it is attempting to enforce. In fact, it appears that the court clearly transcended its power in making the order. It assumed to act without the filing of a complaint and to determine without investigation or proof. This was an attempt to give effect to the will of the court, rather than that of the law. When the court struck out the answer of the relator, which was certainly relevant and material, as it was in effect a plea to the jurisdiction of the court, it committed error, and when it entered an order without a hearing its act was contrary to a fundamental principle of law. We have seen that in order to try and determine a controversy the defendant must be brought before the court by some process known to the statute. In this case that was not done.135

The opinion suggests several reasons to sustain the holding that the trial court exceeded its jurisdiction. Among them are (1) that the petition failed to state a cause of action, or (2) that the order was entered without a hearing, or (3) that if the court had jurisdiction, it transcended its power. Other cases dealing with these reasons will be discussed in the sections immediately following.

Failure To State a Claim. Notwithstanding the apparent position of the Dodge case, it would seem that failure to state a claim is a matter of defense, not jurisdiction, and a couple of cases have adopted that view. In State ex rel. Canadian Bank of Commerce v. Superior Court136 the plaintiffs sought enforcement of a lien upon packed fish under Alaska law. The trial court overruled a demurrer which was based on the ground that such a lien was unenforceable in this state. The supreme court declined to restrain the trial court from proceeding, holding that the objection did not go to jurisdiction, but to the sufficiency of the facts to constitute a cause of action.

To the same effect is the following dictum in State ex rel. Prentice v. Superior Court,137 in which the supreme court declined to prohibit modification of a judgment more than one year after its entry.

It may be that the prior judgment of the superior court is res judicata of the questions sought to be raised by cross-complaint in the new suit.

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135 Id. at 594-95, 41 Pac. at 919.
136 162 Wash. 377, 298 Pac. 716 (1931).
137 86 Wash. 90, 149 Pac. 321 (1915).
It may be that the cross-complaint for other reasons states no cause of action. The trial court, however, has jurisdiction of the subject-matter and of the parties. Its judgment, if reviewable at all, is adequately reviewable by appeal. To grant the writ on the record here would warrant the entertainment of prohibition as a short cut for reviewing judgments of the superior court in almost any case.\(^{138}\)

And finally, the dictum in *State ex rel. Chin v. Superior Court*\(^{139}\) in support of a holding that a defective information does not deprive the trial court of jurisdiction: "This information may, or may not, be defective, but it is not void. It is no more void than if it were attacked on the ground that it fails to state a crime, or that it states two or more crimes."\(^{140}\)

However, in a few related cases the court seemingly has adopted the contrary position without much discussion of the matter. In *State ex rel. Mower v. Superior Court*\(^{141}\) a metropolitan park district sought to condemn certain land. It was held that the district had no capacity to sue and consequently the superior court had no jurisdiction. But does this necessarily follow? The superior court had jurisdiction over the parties and over condemnation cases as a class. Is not lack of capacity to sue something akin to the defense of failure to state a claim? Do whatever differences exist justify the position that one is jurisdictional and the other is not?

Perhaps closer in point is *State ex rel. Lang v. Superior Court*,\(^{142}\) where the trial court was restrained from enforcing a property settlement by proceedings in contempt. The opinion assumes that the trial court lacked jurisdiction to take such action. Yet, the court had jurisdiction over the parties and over contempt proceedings as a class. Therefore, it may be argued with some force that this should have been denominated merely a failure to state a claim for relief by contempt.

Also, in *State ex rel. Munro v. Superior Court*\(^{143}\) prohibition issued against a trial court which intended to restrain a prosecuting attorney from instituting an action for trespass. The court said:

A writ of prohibition may issue to prevent a court from granting an injunction where, though having jurisdiction for certain limited purposes, it would, in doing so, go beyond such jurisdiction....

Before the court can take cognizance of an application for an injunc-

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\(^{138}\) *Id.* at 98, 149 Pac. at 324.

\(^{139}\) 139 Wash. 449, 247 Pac. 738 (1926).

\(^{140}\) *Id.* at 451, 247 Pac. at 739.

\(^{141}\) 43 Wn.2d 123, 260 P.2d 355 (1953).

\(^{142}\) 176 Wash. 472, 30 P.2d 237 (1934).

\(^{143}\) 35 Wn.2d 217, 212 P.2d 493 (1949).
tion, it should be made to appear, from the facts and circumstances of
the particular case, that it is one in which equitable interposition may
properly and legitimately be invoked. . . . Where no special circum-
stances are alleged bringing the case under some recognized head of
equity jurisdiction, the court has no authority to hear and determine
the case, and a writ will issue to prevent its granting injunctive relief. 144

Here again the trial court had jurisdiction over the parties and over
equity cases as a class. The opinion seems to say that there was a
failure to state a claim for relief in equity. If this is so, it also should
have been treated as a matter of defense, not jurisdiction, and the
writ should not have issued.

The Munro case was relied upon to restrain a superior court from
temporarily enjoining a legislative committee investigation of local
crime conditions in State ex rel. Hodde v. Superior Court. 145 Here,
however, the court split five to four with a dissenting opinion making
strong objection to issuance of a writ under these circumstances. The
dissent states:

I am of the opinion that the writ of prohibition should be denied
because the superior court has jurisdiction of the parties and of the
subject matter of the action. It is not threatening to act either without
jurisdiction or in excess of its jurisdiction.

The question whether, under the showing made in the trial court, an
injunction pendente lite should issue in the form contemplated involves
the merits of the controversy and may be reviewed by us only upon
appeal or application for a writ of certiorari.

Assuming, without deciding, that the superior court is threatening
to commit error by entering the proposed injunction, this court has
several times stated that it will not issue a writ of prohibition to pre-
vent the commission of error. 146

It is to be hoped that when the question next arises, the court will
give due consideration to the position expounded in this dissenting
opinion.

Lack of a Hearing. The few cases that have considered the ques-
tion have taken the position that entry of an order without providing
opportunity for a hearing may be an act in excess of jurisdiction. In
addition to the Dodge case, attention is directed to the quotation at
the beginning of this section from Graham v. Graham, in which the
superior court was restrained from appointing a guardian ad litem

144 Id. at 220, 212 P.2d at 495.
145 40 Wn.2d 502, 244 P.2d 668 (1952).
146 Id. at 518, 244 P.2d at 676.
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without a hearing. Likewise, in State ex rel. Skaggs v. Smith\(^{147}\) it was held that the superior court acted in excess of its jurisdiction in determining without notice to relator that an institution was in fact open for business. Since there was no question in the Skaggs case of the court's jurisdiction over the relator, the holding must mean that it was the failure to afford the opportunity to be heard that resulted in the entry of an order in excess of jurisdiction.

As recognized in the Graham case, failure to provide a hearing will not necessarily result in an excess of jurisdiction in all cases. Since the court has not provided any guidelines for the determination of what circumstances must be present for an excess of jurisdiction to occur, the question is far from settled. Nevertheless, as far as they go, these cases have the virtue of consistency seldom found in this field.

Transcending the Jurisdiction of the Court. One facet of the Dodge case remains to be explored. It is the argument that even assuming that the trial court had jurisdiction over the parties and the subject matter, it transcended its power in entering the particular order in question. Only one other case has been found in which the court discussed *in haec verba* the question whether the trial court "transcended" its power. And there it was apparently held that such action was not tantamount to an excess of jurisdiction.\(^{148}\) However, a number of cases have met the problem, only in terms of "excess of jurisdiction" or "lack of jurisdiction over the subject matter."

Before examining these cases it is important to recognize a couple of rather fundamental distinctions among factual situations falling under the headings of "lack of jurisdiction over the subject matter" or "excess of jurisdiction." First, are those cases in which there is some tangible property which is the "subject matter" of the action. If the property is geographically beyond the reach of the court, then "jurisdiction over the subject matter" is lacking. For example, it has been held that the court lacked jurisdiction to determine the right to possession of land in Alaska,\(^{149}\) and lacked jurisdiction over a fund located in another county.\(^{150}\)

Second, are those cases arising in courts of limited jurisdiction in which the court acts in "excess of its jurisdiction." If, for example, the court of first instance is not empowered to hear cases in which the

\(147\) 116 Wash. 572, 200 Pac. 92 (1921).

\(148\) State *ex rel.* Nelms v. Superior Court, 149 Wash. 50, 270 Pac. 128 (1928).


\(150\) City of North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053 (1892).
amount of recovery exceeds $100, an attempt to hear such a case would constitute an act in "excess of jurisdiction." Or if the action is commenced as the special statutory summary proceeding for unlawful detainer, the trial court exceeds its jurisdiction in granting general relief not specified in the statute. This problem has seldom arisen because the superior courts in this state are courts of general jurisdiction.

The problem which has presented itself is that of the superior court entering an order or judgment wholly outside the class under consideration. An absurd hypothetical example is the entry of a divorce decree in favor of one of the parties at the conclusion of an automobile accident case. The observation must be made at this point that the realm of absurdity is not necessarily coextensive with the realm of jurisdiction. An absurd ruling is not per se in excess of jurisdiction. Be that as it may, the supreme court has quite often held that such action by a trial court is in excess of its jurisdiction.

Hence, in the *Dodge* case itself the trial court in insolvency proceedings was prohibited from granting relief to a witness seeking his witness fee from a party to the action. Similarly, prohibition has been granted to prevent a trial court from adjudicating as part of a divorce action the legal fee to which plaintiff's counsel might be entitled from plaintiff or from appointing an administrator where a will previously had been admitted to probate.

In a criminal case, where the jury had found the defendant not guilty by reason of insanity and unsafe to be at large, the trial court was prohibited from undertaking to determine for itself whether the defendant was unsafe to be at large. The supreme court explained this holding as follows: "One of three essential elements which must be present to establish jurisdiction of a court in any case is that the

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152 State *ex rel.* Seaborn Shipyards Co. v. Superior Court, 102 Wash. 215, 172 Pac. 826 (1918).
153 See RCW 2.08.010. Of course, even a court of general jurisdiction may lack jurisdiction in any given case as the result of failure to comply with technical requirements. State *ex rel.* Edwards v. Superior Court, 37 Wn.2d 8, 221 P.2d 518 (1950); State *ex rel.* Fleischner v. Superior Court, 20 Wash. 709, 54 Pac. 937 (1898); State *ex rel.* Alldio v. Superior Court, 17 Wash. 54, 48 Pac. 733 (1897). Or, the cause may present a political, rather than a judicial, question. State *ex rel.* Maurer v. Superior Court, 122 Wash. 555, 211 Pac. 764 (1922) (canvassing election returns). But see State *ex rel.* Cann v. Moore, 23 Wash. 115, 62 Pac. 441 (1900) (proceedings of political convention).
154 State *ex rel.* Arthur v. Superior Court, 58 Wash. 97, 107 Pac. 876 (1910).
155 *In re* Guye's Estate, 54 Wash. 264, 103 Pac. 25 (1909).
point decided must be, in substance and effect, within the issues before
the court.\textsuperscript{157}

A slightly different explanation was offered in an early case\textsuperscript{158} where
it was held to be an excess of jurisdiction to insist that an attorney
apologize for contempt of court as a condition to his right to appear
before the court. To the argument that the trial court had jurisdic-
tion over the attorney and the subject matter, the supreme court made
this answer:

This contention is doubtless correct, if the orders entered were such
as, under any state of facts connected with the proceedings, the law
would authorize. We think, however, that the latter part of the said
first order, if it required anything at all more than the payment of the
fine mentioned in said order, required something which the court had
no right, under any circumstances, to order . . . .\textsuperscript{159}

Here at least the bar has been furnished with an intelligible and
workable rule. To be sure, borderline factual situations will arise in
which application of the rule will prove a difficult task, but in this
regard it differs not from rules of law in general.

In the remaining sections discussion will be directed to other fact
patterns which have prompted judicial pronouncements on the ques-
tion whether the trial court is exceeding its jurisdiction. In general,
the problem will continue to be whether the defect in the proceedings
deprees the court of power to act, or whether such defect is a mere
matter of error.

\textbf{Moot Issues.} Our state supreme court has never squarely faced
the question whether mootness is a jurisdictional defect. However,
extraordinary writs have been issued on the ground of lack of juris-
diction over the subject matter in a number of cases where the fact
pattern suspiciously resembles a case of moot issues. For example,
it was held that a trial court lost jurisdiction of a divorce action upon
the death of the wife,\textsuperscript{160} lost jurisdiction of a creditor's claim upon the
death of an incompetent debtor even though the guardian of the debtor
remained before the court,\textsuperscript{161} and lost jurisdiction of a family allow-
ance matter upon the death of the widow.\textsuperscript{162}

\textsuperscript{157} \textit{Id.} at 784, 238 P.2d at 1203.
\textsuperscript{158} State \textit{ex rel.} Rohde v. Sachs, 2 Wash. 373, 26 Pac. 865 (1891).
\textsuperscript{159} \textit{Id.} at 375, 26 Pac. at 866.
\textsuperscript{160} State \textit{ex rel.} Atkins v. Superior Court, 1 Wn.2d 677, 97 P.2d 139 (1939).
\textsuperscript{161} State \textit{ex rel.} National Bank of Commerce v. Frater, 18 Wn.2d 546, 140 P.2d
272 (1943).
\textsuperscript{162} State \textit{ex rel.} Case v. Superior Court, 23 Wn.2d 250, 160 P.2d 606 (1945).
Little fault could be found with these holdings if the courts of this state were without power to hear and determine moot cases. But such is not the situation. Although as a general rule the courts will only entertain truly adversary proceedings and will not engage in advisory litigation, this apparently is not a jurisdictional matter because on at least one occasion the supreme court has undertaken to decide a case notwithstanding that the questions involved had become moot. Consequently, it must be concluded that the supreme court has erred in interfering with the orderly course of trials where the matter may have become moot.

Res Judicata and Double Jeopardy. Only a few cases have been found in which the question, either explicitly or implicitly, was whether double jeopardy or res judicata was jurisdictional for the purposes of issuance of an extraordinary writ.

*State ex rel. Prentice v. Superior Court* includes the off-hand statement of that court that res judicata would not be a jurisdictional matter. However, in the closely related area of double jeopardy the cases have come to the opposite conclusion with no effort whatever to justify such holdings.

Thus, a writ was granted to prohibit a trial court from vacating a judgment and sentence so that it could be shown that a more heinous offense had been perpetrated, and therefore a greater punishment imposed. Similarly, a trial court was barred by writ from proceeding on a charge after an identical charge against the same defendant had been dismissed in the justice court.

It is easy to understand the desire of the supreme court in criminal matters to save the defendant the agony of suffering a criminal prosecution needlessly. But here, as elsewhere, the orderly administration of justice would seem to dictate that such questions be left in the hands of the trial judge without interlocutory interference by the appellate court.

Noncompliance with Time Limitations. Does the failure to comply with a time limitation deprive the trial court of jurisdiction to hear a matter? In *State ex rel. Teeter v. Superior Court* it was held that

\[163\text{ State ex rel. Yakima Amusement Co. v. Yakima County, 192 Wash. 179, 73 P.2d 759 (1937).}\
\[164\text{ 86 Wash. 90, 149 Pac. 321 (1915).}\
\[165\text{ State ex rel. Plumb v. Superior Court, 24 Wn.2d 510, 166 P.2d 188 (1946).}\
\[166\text{ State ex rel. Harger v. Chapman, 131 Wash. 581, 230 Pac. 833 (1924).}\
\[167\text{ 110 Wash. 255, 188 Pac. 391 (1920).}\

the general statute of limitations is a mere matter of defense, and not jurisdictional. Unfortunately, this sound ruling has not been consistently adhered to in other cases involving time limitations. For instance, it has been held that prohibition would lie since the trial court lacked jurisdiction to consider a supplementary affidavit filed after the five-day statutory time limit had expired, or to proceed in a will contest which was not commenced within the required one-year period, or to vacate a judgment more than one year after it was entered. It is difficult to understand why these special statutory time requirements are jurisdictional while the general statute of limitations is not.

Even more puzzling is the action of the court in *State ex rel. Prentice v. Superior Court* where it was held that prohibition would not lie to prevent modification of a decree more than one year after its entry because such is a matter of error, not excess of jurisdiction. The will contest case was distinguished on the ground that it was based upon a "special statute," and the prior vacation of judgment case was distinguished on the ground that certiorari, not prohibition, was there granted. This attempt to explain, rather than overrule, the prior erroneous holdings was both an unfortunate and an unsuccessful effort. In the first place, it is not easy to comprehend the meaning and significance of the suggested distinction of a "special statute." What makes the will contest statute a special statute? If the answer is that it applies only to a particular class of cases, why does this fact make the time limit jurisdictional? If there be an answer to this last question, it was incumbent upon the court to state it for the edification of the bar.

As for the attempted explanation of the prior vacation of judgment case on the ground that it was a writ of certiorari, all that can be said is that it simply is not so. A reading of that case makes it abundantly clear that a writ of prohibition was considered and granted. The court in the *Prentice* case would have done a service if it had expressly overruled the prior inconsistent cases. Its failure to do so, or to adequately distinguish them, leaves the question in a state of uncertainty.

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169 *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494 (1913).


171 86 Wash. 90, 149 Pac. 321 (1915).

172 *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494 (1913).

173 *State ex rel. Pacific Loan & Inv. Co. v. Superior Court*, 84 Wash. 392, 146 Pac. 834 (1915).
Lack of Jurisdiction over the Person. Although jurisdiction over the parties to the action is one of the least confused areas in this field, it is far from clear. In several cases irregular or improper service of summons has been recognized as a jurisdictional defect to sustain resort to review by extraordinary writ. In other cases it has been stated that insufficiency of service of summons is merely error occurring in the course of the trial which may be reviewed on appeal, and therefore a writ will not lie. This latter group of cases is difficult to explain or defend except to suggest that the court was merely careless in its use of language, and that the real holdings were that the writ would not lie because the remedy at law was adequate or because the question of sufficiency of service rested on controverted facts. To the extent that these cases cannot be so explained they must be in error because the failure to bring a party within the reach of the court is unquestionably a jurisdictional defect.

Improper Venue. The question is whether matters of venue are reviewable by extraordinary writ. RCW 4.12.025 provides that an action may be brought in any county in which the defendant resides, and that the residence of a corporation shall be deemed to be in any county where the corporation transacts business. It has consistently been held that these statutory requirements are jurisdictional. In some cases however the court has sustained the use of the extraordinary writ not so much on the ground that venue is jurisdictional but on the ground that a writ is the proper mode of procedure to review a matter which is "independent of the merits." This latter rationale

174 State ex rel. Barks v. Superior Court, 144 Wash. 44, 257 Pac. 837 (1927) (service on Sunday); State ex rel. Hopman v. Superior Court, 88 Wash. 612, 153 Pac. 315 (1915) (noncompliance with statute); State ex rel. Nolte v. Superior Court, 15 Wash. 500, 46 Pac. 1031 (1896); State ex rel. Boyd v. Superior Court, 6 Wash. 352, 33 Pac. 827 (1893).

175 State ex rel. Park v. Superior Court, 142 Wash. 366, 253 Pac. 111 (1927); State ex rel. Teeter v. Superior Court, 110 Wash. 255, 188 Pac. 391 (1920).


178 State ex rel. Hand v. Superior Court, 191 Wash. 98, 71 P.2d 24 (1937); State ex rel. Gamble v. Superior Court, 190 Wash. 127, 66 P.2d 1135 (1937); State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630 (1917).
has given rise to a much wider utilization of writs to review questions of venue which are not so clearly jurisdictional.

For example, the granting or denial of a change of venue for the convenience of witnesses has been reviewed by writ on the ground that although this question ordinarily is one of discretion (not jurisdiction), a writ will lie to prevent any abuse of discretion or any arbitrary or capricious action. The cases do not indicate whether the granting of the writ is based upon the ground that abusing discretion is tantamount to acting in excess of jurisdiction or on the ground that the matter is "independent of the merits."

A very strong argument could be made that such abuse of discretion is not jurisdictional in view of the fact that the court clearly has jurisdiction over the parties and subject matter, and the point decided is, in substance and effect, within the issues before the court. In any event, a change of venue for the convenience of witnesses is certainly a matter "independent of the merits" and therefore reviewable by writ as the law now stands.

In much the same way, the more recent cases have permitted use of a writ to compel a change of venue on the ground of prejudice of the trial judge.

This development in the case law prompted the following dictum in State ex rel. Antonsen v. Superior Court:

It also, in the course of time, became evident that, in many cases, questions concerning the venue of an action which did not involve jurisdictional matters should, when decided by the superior court, be promptly reviewed by this court so that the forum before which the action should be tried might be definitely determined prior to the opening of the trial.

The principal justification for preliminary appellate review by writ of nonjurisdictional venue matters seems to have been that they are "independent of the merits." This is hardly an adequate reason for ignoring the statutory requirement of absence or excess of jurisdiction as a prerequisite for issuance of a writ. And why should this

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179 See RCW 4.12.030.
182 29 Wn.2d 725, 189 P.2d 219 (1948).
183 Id. at 729, 189 P.2d at 221. The statement is dictum because the case involved
practice, if proper, be limited to venue matters? The trial court is
called upon to make numerous determinations “independent of the
merits” prior to trial. Why should they not also be reviewed by ex-
traordinary writ? The answer, and it applies to venue as well as non-
venue matters, is that this would result in multiple, piecemeal appeals.

It might be argued that venue matters are sui generis in that an
error of venue nullifies the entire trial, while an error in some other
preliminary matter would not have such a sweeping effect. This distinc-
tion is more theoretical than real because in most cases any preju-
dicial error by the trial court will require a retrial of the entire matter.
If the judicial policy against multiple, piecemeal appeals is to be re-
tained, preliminary appellate review of nonjurisdictional venue mat-
ters should be discontinued.

Loss of Jurisdiction upon Appeal. A somewhat different situation
exists when questioning the jurisdiction of a trial court upon appeal
of a cause. Here the concern is not with the power of the trial court
over the parties or over a given class of cases but with its power to
act in the particular cause under consideration. Under these circum-
stances the supreme court has uniformly held that the trial court may
not act on the matter unless specifically so directed by the appellate
court. Thus, trial courts have been restrained from holding parties in
contempt for failure to obey an order pending appeal, from reconsid-
ering sufficiency of bond pending appeal, from entering an order
beyond the scope of the remittitur upon remand, and from vacating
or modifying a judgment subsequent to determination of the appeal.

There can be no quarrel with the result of these holdings by the
supreme court. It is suggested however that recourse to the rules gov-
erning issuance of extraordinary writs is both unnecessary and inap-
propriate in this type of case. The original jurisdiction of the appel-
late court is not in question, but rather its revisory jurisdiction. In
such a case it is irrelevant to ask whether the trial court has jurisdic-
tion over the parties or the subject matter, or for that matter whether
the remedy at law is adequate. The real and sole test is whether the
action by the trial court threatens to undermine the appellate power
of the reviewing court. If so, the trial court must be restrained, but

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change of venue to the county of defendant's residence, which is jurisdictional.

184 State ex rel. Mangaoang v. Superior Court, 30 Wn.2d 692, 193 P.2d 318 (1948);
185 State ex rel. Schloss v. Superior Court, 3 Wash. 696, 29 Pac. 202 (1892).
186 State ex rel. Waterman v. Superior Court, 127 Wash. 37, 220 Pac. 5 (1923).
187 State ex rel. Wolferman v. Superior Court, 8 Wash. 591, 36 Pac. 443 (1894).
the basis of such restraint is the inherent power of the appellate court to protect and preserve its revisory jurisdiction. In at least one early writ case the court recognized that its holding was "necessary for the due protection and enforcement of the powers vested in this court by the constitution." Yet, notwithstanding this realization the court went on to consider whether the trial court lacked jurisdiction and whether there was an adequate remedy at law. The result of such an approach was, and will continue to be, the unnecessary consideration of the irrelevant question whether an extraordinary writ should issue.

CONCLUSION

It must be abundantly clear that the state of the case law in this field is such that a strong supportive holding may be found for either side of most questions concerning jurisdiction or adequacy of the remedy at law. Add to this the apparent holdings in some cases that "mere error" may constitute an excess of jurisdiction and the apparent holdings that in some circumstances adequacy of the remedy at law need not be considered, and it is easy to understand why so many counsel are encouraged to seek a writ as a mode of interlocutory appellate review.

It has become fashionable at this point in a law review article to launch a blistering attack against the supreme court for its intellectual shortcomings which have resulted in, and are manifested by, the unfortunate state of the law in the field under consideration. An alternative approach has been to assume a patronizing attitude toward the overworked or otherwise handicapped jurists. Neither of these avenues can fairly be followed here.

If fault must be assigned, it falls to a great extent upon the bar. The reason is this. In most cases both counsel are more than willing to have an interlocutory appellate determination of some question arising prior to or during trial; this practice reduces the chances of reversal on appeal and retrial. (Of course, this convenience is provided at the expense of other litigants awaiting appellate review in the normal course. There are just so many cases that the supreme court can hear in a term.) As a consequence, the briefing on the question of the propriety of the writ very often falls short of perfection. This is not so much a matter of conscious, affirmative irresponsibility of counsel as an inability to generate sufficient zeal under the circumstances to unravel the confusion extant among the decisions.

188 Id. at 594, 36 Pac. at 444.
One other very practical factor contributes to these deficiencies in the law, and here the judiciary must be held answerable in part. In most cases the questions of the propriety of the writ and the merits of the controversy are considered at the same time. If the appellate judge becomes convinced that the trial court is in error on the merits, the temptation is great to so decide forthwith and thereby avoid a useless trial and a second appellate review of the same issue. This is the origin and the basis of the argument: "If we would have to so hold on appeal, why not say so now?" The answer to this argument (as discussed at greater length in the body of this article) is that it may be applied to every interlocutory ruling or order by a trial court, and whatever may be the apparent immediate advantages of piecemeal determinations, it is beyond cavil that such practices in the long run impose an undue burden upon the judicial process.

Finally, it must be observed that writ matters usually do not receive the same due deliberation accorded by the supreme court to other questions. The reason is that the bar has come to expect, and usually receives, a speedy decision on such matters. Moreover, sometimes the circumstances themselves demand a speedy decision to prevent irreparable harm.

The sad state of the care law demands remedial action. What remedies are available? And will they solve the problem?

It might be suggested that the propriety of the writ be determined at a preliminary hearing completely separate from, and without regard to, the merits of the matter. Such a procedure would be ineffective for two reasons. First, in most instances the question of jurisdiction and the "merits" are closely related, if indeed they are not the same question. That is to say, the trial court's act or omission to which the petitioner objects usually is the same act or omission on which the question of jurisdiction rests. In such cases, of course, it is not possible as a practical matter to separate consideration of the "merits" and availability of the writ. Second, writ matters often require speedy decision which cannot be accomplished if two separate hearings are necessary.

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189 Such is the present procedure on writs of certiorari, except that the decision whether the writ is available is made by the Chief Justice, not by the court. Under Rule on Appeal 57 (1955) the Chief Justice may (1) decide that the writ is available, or (2) decide that the writ is not available, or (3) continue the hearing to a motion day to be decided by the court. This last option is the obvious choice in close cases. Under present practice the continued hearing on the availability of the writ is considered by the court at the same time as the hearing on the merits. Hence, in most close cases the propriety of the writ and the merits of the matter ultimately are considered together.
It might be suggested that the supreme court publish a rule of court stating clearly that writs will not issue in these cases unless the trial court is acting without jurisdiction and the remedy at law is inadequate. Such a rule holds little promise of success because it could state nothing more than the present statutes, which have either been ignored or circumvented in many cases.

It might be suggested that at the earliest opportunity the supreme court issue a definitive decision overruling the numerous erroneous cases and announcing that henceforth the court will rigorously adhere to the requirements of the statutes. If the past is any criterion, this also holds little promise of success. In a couple of the cases discussed in the body of this article the court produced exhaustive opinions in an effort to reestablish the "correct procedure." The existing state of the law attests to the fact that such efforts have failed.

There is no magical panacea for these ills. The antidote is judicial self-restraint and self-discipline in the face of "hardship" cases where the natural desire to see "justice done now" threatens to impinge upon the more important policy against piecemeal appeals.