Arizona's Special Actions: Seeking Relief through an Extraordinary Maze

Milo R. Mecham

Seventeen years ago, the Arizona Supreme Court adopted the Rules for Special Action[1], combining the separate extraordinary writs of certiorari, prohibition, and mandamus. Special actions have since become an integral part of Arizona legal practice.

Special actions, and the extraordinary writs that they replaced, offer petitioners the opportunity to bring their claim before a court with the authority to grant them relief. Special actions themselves have no subject matter, but offer some hope for relief to all petitioners, no matter what the subject of their claim. It is this power and flexibility that makes a special action petition so attractive.

The attraction of this extraordinary relief is matched, however, by the confusion and complexity which surrounds special actions. Like the extraordinary writs that they replaced, special action petitions are granted at the discretion of the petitioned court. This untrammeled discretion was the source of the dissatisfaction which led to the creation of special actions. In a somewhat altered form it continues today, seventeen years later.

This Note will examine the concerns which led to the creation of special actions, and the use of special actions since their creation by the appellate courts of Arizona. Because special actions are discretionary writs applicable to a number of circumstances, each special action petition is uniquely related to the facts which gave rise to the petition.[2] This Note will examine the

---

1. Rules of Procedure for Special Action, [hereinafter Rules] *reprinted in* 17A ARIZ. REV. STAT. ANN. (1972 & Supp. 1986).

2. In 1967 the Arizona Law Institute issued a pamphlet: ARIZONA LAW INSTITUTE, EXTRAORDINARY WRITS IN ARIZONA (1967) [hereinafter EXTRAORDINARY WRITS]. This work provides an essential starting point in any attempt to understand the evolution of special actions in Arizona.

Concerning the expectations which might be raised by that work, comments no less applicable to this Note, then Judge John F. Molloy said:

> Because of the rapid movement of judicial thinking in this area, this article will be a disappointment to any reader who hopes to gain clear answers to all problems together with a set of working forms to hand to his secretary to complete when the exigencies of a particular case demand extraordinary relief.

EXTRAORDINARY WRITS, at 128.

While EXTRAORDINGARY WRITS is the most comprehensive of several studies of the writs prior to their unification, special actions have not been the subject of as many articles as were the extraordinary writs. The major exception to this is the Comment, *The Plight of the Sorcerer's Apprentice: Arizona's Special Action Practice* 1983 ARIZ. ST. L.J., 535-61.

pattern of special actions, especially those in the Arizona Supreme Court. This examination leads to a better understanding of the motives which underly the granting of any special action petition. This examination also supports the conclusion that special actions still lack a clearly defined character that can assist petitioners, respondents, and the courts in future special action. This Note will conclude with some suggestions as to how this confusion can be lessened.

THE ORIGIN OF SPECIAL ACTIONS

The Arizona Constitution gives the courts of Arizona power to issue the extraordinary writs of certiorari, mandamus, and prohibition.[3] It was the combination of these three previously distinct writs which created the new combination labeled a special action.

The three separate writs were an important part of Arizona legal practice, but the rules surrounding them remained "a murky world."[4] Practitioners felt that the cumbersome procedural requirements and the varying response of courts based on the discretionary nature of the writs left them doomed "to wander alone in the wilderness"[5] when seeking relief through the extraordinary writs. The two major sources of dissatisfaction were the exacting procedural requirements and the uncertainty which faced any petitioner seeking assistance through the writs because of the lack of a clear definition concerning the criteria necessary to obtain relief.

Procedures

The traditional distinction between certiorari and prohibition was that certiorari was granted when an inferior tribunal had taken some final action which exceeded its jurisdiction,[6] while prohibition was available when the tribunal threatened or was attempting to take action in excess of its jurisdiction.[7] This distinction created the potential for a court to deny the writ applied for because it was inappropriate.[8] Even prior to the adoption of the

3. The Arizona Constitution, art. 6, § 5, granted the supreme court original jurisdiction in mandamus only, not in certiorari or prohibition. The Arizona Constitution, art. 6 § 5 ¶ 4, gives the supreme court the power to issue all the writs as part of its supervisory and appellate power. The Arizona Constitution, art. 6, § 18, gives the superior courts full power to issue all the writs. In 1960, the Arizona Constitution, art. 6, § 5 was amended to add the words "other extraordinary writs to state officers," which is intended to give the supreme court the broadest use of the writs in original jurisdiction. *See* Clark, *Prohibition* in EXTRAORDINARY WRITS, *supra* note 2, at 12-13.

4. Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965).

5. Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 at 413 (1969). John W. Nelson was the Reporter for the Committee on Civil Practice and Procedure of the Arizona Bar Association which drafted the Rules of Procedure for Special Actions. His article in the *Arizona Law Review* represents a summary of the reasons behind the adoption of the Rules for Special Actions and a survey and forecast of their character.

6. State *ex rel.* Mahoney v. Stevens, 79 Ariz. 298, 288 P.2d 1077 (1955); Burke v. Superior Court, 3 Ariz. App. 576, 416 P.2d 997 (1966).

7. Loftus v. Russell, 69 Ariz. 245, 212 P.2d 91 (1949); Westerlund v. Croaff, 68 Ariz. 36, 198 P.2d 842 (1948) (court was usurping jurisdiction in the absence of power to do so).

8. Clarke, in his article *Prohibition* in EXTRAORDINARY WRITS, *supra* note 2, at 11 states: "[p]rohibition attempts to prevent action, or to halt it at its beginning. Therefore, it is not appropriate for reviewing errors that have already occurred, or for inquiring into irregularities that do not involve the essential question of jurisdiction." The cases cited to support this position do contain

Rules for Special Action, however, the supreme court had begun to treat petitions for these writs interchangeably.[9] The abolition of the technical differences in the writs for the purposes of petitions did simplify the problem of what writ to seek and eliminated the possibility of a court erroneously insisting on strict exactness. This aspect of the change, however, did not represent anything more than a recognition of the current practices of the courts.

Unresolved prior to the adoption of the Rules for Special Action was the problem of the procedural niceties of the pleadings. The epitome of this problem was the case of *Emery v. Superior Court.*[10] In that case the supreme court granted a writ of prohibition against the superior court, which served to prevent the effect of a writ of mandamus issued by the superior court. The supreme court held that the peremptory writ of mandamus[11] was invalid because it did not include any recitation of the complaint. This despite the fact that the complaint was attached to the writ and the complaint was adequate to support issuance of the writ.[12]

Prior to the adoption of the Rules for Special Action a continuing concern of the court was whether the extraordinary relief granted through an extraordinary writ was proper in a given case. Throughout this Note these questions will be referred to as jurisdictional questions. These jurisdictional questions concerned not only the procedural niceties of a properly drafted petition, but also questions concerning the character of the action which led to the petition. Because extraordinary relief was only proper when the respondent was exceeding its jurisdiction (for certiorari and prohibition), or when the respondent had improperly exercised its discretion (for manda-

---

statements to this effect by the Arizona Supreme Court. In only one of these cases, however, did the court deny the writ and this was on the grounds that the lower court was acting within its jurisdiction. Bank of Arizona v. Superior Court, 30 Ariz. 72, 245 P. 366 (1926).

The most common response of Arizona courts when a petitioner requested the wrong writ was to "look to substance not form." Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964). As discussed *infra* note 9 and accompanying text, this meant that the court would consider the petition to be a petition for the proper writ.

9. Buell v. Superior Court, 96 Ariz. 62, 391 P.2d 919 (1964) (petition for prohibition treated as a petition for certiorari); State *ex rel.* Ronan v. Superior Court, 94 Ariz. 414, 385 P.2d 707 (1963) (petition for certiorari treated as one for prohibition). The courts had also allowed petitions for the writs in the alternative. *See, e.g.* Phelps Dodge Corp. v. Superior Court, 7 Ariz. App. 277, 438 P.2d 424 (1968) (certiorari and mandamus); Ong Hing v. Thurston, 101 Ariz. 92, 416 P.2d 416 (1966) (prohibition and certiorari); Harbel Oil Co. v. Superior Court, 86 Ariz. 303, 345 P.2d 427 (1959) (prohibition and mandamus).

10. 89 Ariz. 246, 360 P.2d 1025 (1961).

11. Mandamus is a writ used by a petitioner to compel action. Davis, *Mandamus,* in EXTRAORDINARY WRITS, *supra* note 2, at 79. *See infra* text accompanying notes 43-55. The traditional procedure was to apply to the court for an alternative writ, which served as a basis for the court acquiring jurisdiction and served to stay procedings elsewhere. Molloy, *Procedural Aspects of Extraordinary Writs,* in EXTRAORDINARY WRITS, *supra,* note 2 at 140. After reviewing the pleadings and arguments, the court would either quash the writ or issue a peremptory writ, which would be permanent. *Id.* at 146. In practice, the appellate courts in Arizona usually issued a judgment on the matter which served as the peremptory writ, even though the actual writ was never issued. *Id.* at 146.

The other writs also served to bind or guide the lower courts. The issuance of a writ of prohibition acts itself as a stay of all action in the lower tribunal because it prevents the lower tribunal from acting in excess of its jurisdiction. Hislop v. Rodgers, 54 Ariz. 101, 92 P.2d 527 (1939). ARIZ. REV. STAT. ANN. § 12-2003 provides that the writ of certiorari will be accompanied by a stay of the lower court's proceedings.

12. Molloy, EXTRAORDINARY WRITS, *supra* note 2 at 127-28.

mus) the court needed to determine the character of the respondent's actions. Characterization of the respondent's' actions also served to resolve the merits of the petition, since if the action qualified for an extraordinary writ, the writ was granted and relief obtained.

Thus, what might be referred to as the merits of the petition were decided only incidentially to the relief granted. While granting the writ always meant granting the relief sought, denying the writ could never be taken as an approval of the respondent's actions. Any jurisdictional problem could prevent the court addressing the merits of the complaint.[13]

The Uncertain Character of the Writs

Many experienced practitioners found it difficult to clearly distinguish between the three separate writs of certiorari, prohibition, and mandamus.[14] Part of this confusion resulted from the Arizona Supreme Court's changing the grounds on which the writs would be granted. While early precedent in Arizona had held that, for example, certiorari could be used only when the lower court lacked jurisdiction, more recent decisions had held that certiorari could be used to challenge abuses of discretion.[15] Some observers felt that these complaints had been dealt with by the supreme court adopting the criteria of "see[ing] that essential justice is done."[16] Despite this reassurance, however, there was still considerable dissatisfaction with the separate writs.

The concerns about the use of the writs covered many different problems, but were all based on the problem of the discretionary character of the writs. A promise by the court that it would use the writs to see that justice was done did not give much guidance to the petitioner who was thinking about which writ to seek and what arguments could be used to gain the court's attention. Likewise, the court's holding that the possibility of alternative relief through appeal would not bar granting extraordinary relief, so long as the alternative was not equally plain, speedy, and adequate, did not give much assistance when potential petitioners were weighing the wisdom of seeking extraordinary relief rather than waiting to pursue an

13. Jurisdiction is often overused term. In extraordinary writ or special action practice it can have several different meanings. When a lower tribunal is accused of exceeding is jurisdiction, the word is used in its broadest sense to refer to questions of personal or subject matter jurisdiction. As most commonly used in this Note, jurisdiction will refer to the jurisdiction of the petitioned court to accept the petition for extraordinary relief.

14. *See, e.g.* Lesher, *supra* note 4; Clark, *Prohibition*, in EXTRAORDINARY WRITS, *supra* note 2, discussing the narrow distinctions between the writs as used by the Arizona courts.

15. This change is discussed *infra* notes 25-29 and accompanying text. The confusion created by the evolving nature of the writs led Lesher, *supra* note 4, to suggest:

> [I]t would seem better . . . for the court clearly to express itself, to stop paying lip service to concepts no longer controlling, and frankly to inform those concerned of the considerations actually hereafter to govern its use of these extraordinary writs of prohibition and certiorari.

Id. at 49.

16. Bernstein, *Prologue*, EXTRAORDINARY WRITS, *supra* note 2, at 3 quoting Caruso v. Superior Court, 100 Ariz. 167, 170, 412 P.2d 463, 465 (1966). Then Chief Justice Bernstein of the Arizona Supreme Court argued that while Lesher's criticism was valid when it was made, the supreme court had since resolved these problems. Bernstein, *supra*.

appeal.[17]

This dissatisfaction culminated in the creation of special actions by the Committee on Civil Practice and Procedure of the Arizona Bar Association, which drafted the Rules of Procedure for Special Actions. The Arizona Supreme Court adopted the Rules on August 1, 1969 to become effective January 1, 1970.[18]

The Rules for Special Action concentrated on the three most frequently used and most closely related writs—certiorari, prohibition and mandamus.[19] Based on the complaints from attorneys around the state, the rules were designed to simplify the procedures surrounding these three writs. Pursuant to the limitations established by the legislature,[20] the Rules were not designed to alter the rights of any parties who might come before the courts.[21]

All of the extraordinary writs which have been combined into the Special Actions are perogative writs, meaning that they are granted at the court's discretion to solve or rectify an injudicious act done by a lower court or some other governmental body.[22] While there were several differences in when the writs would be available, there were several commonly stated rules. These are embodied in the Rules for Special Action, to the effect that "[e]xcept as authorized by statute, the special action shall not be available where there is an equally plain, speedy and adequate remedy by appeal."[23]

---

17. In terms of the specific writs of certiorari, prohibition and mandamus, these issues will be discussed *infra* notes 24-50. These same complaints retain much of their validity after the creation of special actions. See *infra* note 78 and accompanying text.

18. Nelson, *supra* note 5 at 414.

19. The State Bar Committee Notes [hereinafter Notes] printed as part of the Rules, *supra* note 1, specifically explained that "the writ of *quo warranto*, A.R.S. §§ 12-2041 to 12-2045, is believed to be sufficiently different from the other three writs that it is not included here." Notes at Rule 1. *Quo warranto* is used to determine who is entitled to hold a given public office and "to determine the proper exercise of corporate franchises and powers." Tullar, *Quo Warranto*, in EXTRAORDINARY WRITS, *supra* note 2, at 101. There are several other extraordinary writs which have are rarely used in Arizona, including the writs of Error *Coram Nobis* (asserting an error of the court in the facts considered), and the writ of ne exeat (to use equity to obtain a security from a defendant to prevent a departure from the court's jurisdiction) as well as statutory writs. *See generally*, Brown, *Miscellaneous Writs*, in EXTRAORDINARY WRITS, *supra* note 2.

20. ARIZ. REV. STAT. ANN. § 12-109(A) provides for the rulemaking power of the supreme court, so long as such rules do "not abridge, enlarge, or modify substantive rights of a litigant."

21. The Notes, *supra* note 19, at Rule 1, provide that: "the Rule does not alter [the writs'] substance but merely establishes the procedure for obtaining their remedies."

22. Prohibition and certiorari were originally developed by the courts of England as a means of controlling the jurisdiction of the courts of law. Prohibition originated as a writ issued by the royal courts against the equity and admiralty judges when these judges threatened to exceed their jurisdiction. Hughes and Brown, *The Writ of Prohibition*, 26 GEO. L.J. 831 (1938). Certiorari was issued by a superior court to an inferior court or tribunal commanding them to return the records of a cause to curb the excesses of jurisdiction of the inferior court or tribunal when the applicant's rights had been prejudicially affected. F. FERRIS & F. FERRIS, JR., EXTRAORDINARY LEGAL REMEDIES, § 156-57, at 178 (1926). Mandamus had a broader range than the other writs, since it could issue against any of the king's officers, whenever these officers were not performing their dutues. F. FERRIS & F. FERRIS, JR., EXTRAORDINARY LEGAL REMEDIES, § 187 at 218.

23. Rules, *supra* note 1, at Rule 1. The State Bar Committee noted the leading cases defining the nature of the writs in Arizona to the effect that the writs would not lie when there was an adequate remedy through appeal. These cases are: Morrison v. Stanford, 100 Ariz. 211, 412 P.2d 708 (1966) (mandamus); Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966) (prohibition); and Genda v. Superior Court, 103 Ariz. 240, 439 P.2d 811 (1968) (certioriari) *overruled on other grounds*, Helber v. Frazelle, 118 Ariz. 217, 575 P.2d 1243 (1978). Notes, *supra* note 19, at Rule 1.

It is possible to misinterpret this rule. While early on any possibility of appeal would prevent

The Committee regarded the creation of special actions to be a continu-

granting a writ, later the courts used a less precise rule. The measure was not the possibility of appeal but the adequacy of an appeal.

Because the writs are discretionary, courts can refuse to accept jurisdiction for any reason. Often courts will state that the writ is being denied because there is an adequate remedy through an appeal. *See, e.g.*, State *ex rel.* Morrison v. Superior Court, 82 Ariz. 237, 311 P.2d 835 (1957) (certiorari denied). Further, in granting the writ, courts have often stated that they are doing so because there is no other remedy. *See, e.g.*, S.H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P.2d 931 (1947) (prohibition); State v. Superior Court, 86 Ariz. 231, 344 P.2d 736 (1959) (certiorari to review an improper extension of time for appeal). From these decisions it is easy to get the impression that the possibility of an appeal should work to prevent granting earlier relief through an extraordinary writ.

At the time of the adoption of the Rules For Special Action, however, significant cases in Arizona had allowed an extraordinary writ despite the availability of an appeal. The Advisory Committee took note of these cases, *see* Notes, *supra* note 19 at Rule 3. As the Committee recognized, both *Caruso* and *Genda* were cases where there was a potential appeal. In these and in other cases, the court accepted the case because it felt that the appeal would be inadequate, usually because the passage of time would work an extraordinary hardship or make the appeal moot. *E.g.*, City of Phoenix v. Superior Court, 101 Ariz. 265, 419 P.2d 49 (1966) (certiorari to review the prohibition of an election); Valley Drive-In Theatre Corp. v. Superior Court, 79 Ariz. 396, 291 P.2d 213 (1955) (prohibition for the incorrect use of an injunction); Application of Trico Electric Coop., Inc., 92 Ariz. 373, 377 P.2d 309 (1962) (mandamus granted when the public importance of the questions and the cost made an appeal inadequate).

Because these writs were discretionary, granting them depended on the particular circumstances. As the court stated in *Caruso*:

> A writ of prohibition is appropriate if the other remedies are not equally plain, speedy and adequate. Of course there is expense and delay in being put to a trial and then an appeal. But these facts alone will not justify issuing the writ.
>
> . . .
>
> . . . It is clear that the propriety of granting the writ depends upon the fact of each case. The guiding principle must be our obligation to see that essential justice is done.

100 Ariz. 167, 170-71, 412 P.2d 463, 465-66.

This attitude often led the court to consider the character of the results if the court were to deny the writ and insist on the alternative remedy. Thus, in Van Dyke v. Superior Court, 24 Ariz. 508, 211 P. 576 (1922), the court had before it an argument that a writ of prohibition should not have been issued because the petitioner would have been able to apply for a writ of certiorari. The court acknowledged that certiorari might have been the better means of proceeding, but saw no reason to refuse to hear arguments concerning one writ where an alternative writ would have been better. "We will not do justice in this matter by halves, nor decide the difference which exists here between tweedledum and tweedledee." *Id.* at 545, 211 P. at 588.

Especially in prohibition actions, the court often took into account the quick relief that the extraordinary writs allowed.

> Thus, if the proceedings complained of are clearly beyond the jurisdiction of the inferior court or tribunal, and must ultimately be held to have been mistaken, prohibition should issue before the party aggrieved is put to the difficulties that would be raised, and the court to the inconvenience that would ensue, by permitting such proceedings to continue.

Westerlund v. Croaff, 68 Ariz. 36, 42, 198 P.2d 842, 845 (1948) quoting 50 C.J., *Prohibition* § 56 at 682.

In all the writs, the court gave consideration to the circumstances of the parties. In Johnson v. Superior Court, 68 Ariz. 68, 199 P.2d 827 (1948), the petitioner sought a writ of mandamus ordering the superior court to stay its judgment and set a supersedas bond. Respondent objected that mandamus was not proper because the petitioner could,, under Rule 75(j) of the Rules of the Supreme Court adopted in 1939, petition the supreme court to stay the proceedings below while the appeal was heard. The supreme court acknowledged the correctness of this argument and stated that because of Rule 75(j), mandamus would no longer be available in such a case, but proceeded to issue the mandate because this was the first time such an argument had been used against the writ of mandamus in Arizona.

In extraordinary writ practice in Arizona before the adoption of special actions the rule denying a writ because an appeal was possible was always available to justify denying a petition, but courts were always ready to overlook the rule if the circumstances of the case suggested that such a rule would impede the course of justice. As will be seen in the discussion of special actions, the argument that an alternative remedy through appeal is available is still given weight, but respondent real parties should not rely on this as the sole defense against a special action. For a conservative discussion

ation and improvement of the three original writs. In the view of the Committee and of the Arizona courts immediately after the creation of special actions, special actions are merely a combination of the rights available through the separate writs. Therefore, to understand the nature of special actions, one must begin with the nature and use of the three writs immediately prior to the adoption of the Rules for Special Action.

The examples found in cases concerning the use of extraordinary writs prior to their combination into special action are important to present special actions for several reasons. Because the Committee did not intend to change the rights extant under the previous writs, cases concerning these previous writs have precedential value. Unless and until the court further changes the Rules for Special Action, it is still legitimate to raise the question of the court's jurisdiction to grant the writ in opposition to a petition for special action. While the brief discussion here will focus primarily on the evolution of the writs up until the creation of special actions, it serves to introduce the language of the separate writs and thus should serve as a guide for further exploration of prior extraordinary writ precedent.

Certiorari

The statutory definition of certiorari states that it will lie whenever an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction.[24] The key question in petitions for certiorari therefore concerned the jurisdiction of the inferior tribunal. Jurisdiction can have several meanings, however. Originally, the court granted certiorari only when the tribunal had acted in excess of its subject matter or personal jurisdiction.[25] The court specifically held that the question of whether the tribunal had erroneously exercised its jurisdiction was not a proper subject for certiorari.[26]

Gradually, however, what could be raised as a jurisdictional matter expanded. In addition to the possibility of actions in excess of jurisdiction, the court was willing to accept petitions which required it to examine the evidence to discover if, rather than lacking jurisdiction, the tribunal had acted in excess of its jurisdiction.[27] The court also became willing to examine the

---

of the relationship between appeal and extraordinary relief, see Rosenberg v. Arizona Bd. of Regents, 118 Ariz. 489, 493, 578 P.2d 168, 172 (1978).

24. ARIZ. REV. STAT. ANN. § 12-2001 (1982). Certiorari is most often granted against a lower court, but it need not be. Certiorari will lie against any governmental body or officer exercising judicial or quasi-judicial functions. In Batty v. Arizona State Dental Bd., 57 Ariz. 239, 245, 112 P.2d 870, 873 (1941) the court defined the essential nature of these functions as "the power to hear and determine whether a certain state of facts which requires the application of a law exists. . . ." Certiorari is an appropriate writ whenever this function is exercised. *Id.* at 250, 112 P.2d at 875. Certiorari is the writ used to give courts a review of numerous quasi-judicial administrative decisions. *E.g.*, ARIZ. REV. STAT. ANN. §§ 23-951, 23-1146 (1976) (worker's compensation); ARIZ. REV. STAT. ANN. § 9-465 (1973) (boards of adjustment).

25. *E.g.*, Reid v. Ford, 73 Ariz. 190, 239 P.2d 1079 (1952).

26. *E.g.*, Hazard v. Superior Court, 82 Ariz. 211, 310 P.2d 830 (1957); Wall v. Superior Court, 53 Ariz. 344, 89 P.2d 624 (1939); Tube City Mining & Milling Co. v. Otterson, 16 Ariz. 305, 313, 146 P.2d 203, 206 (1914) (the power to decide and determine a case includes the power to decide it wrong as well as to decide it right.)

27. DuVall v. Board of Medical Examiners, 49 Ariz. 329, 66 P.2d 1026 (1937); Metropolitan Lines, Inc. v. Brooks, 70 Ariz. 344, 220 P.2d 480 (1950). *Metropolitan* serves as a good example of

weight and sufficiency of the evidence to discover if the lower body had properly determined jurisdiction.[28]

These changes represent a change in the court's attitude toward the purpose of certiorari. While certiorari originally looked only at the power of the tribunal to act as it had, the examination of the evidence used by the tribunal indicated a willingness to look at the tribunal's decision itself. This trend moving from the barest jurisdictional questions to the justification for the tribunal's actions led directly to the most significant step in broadening the scope of certiorari—the holding in *State ex rel. Ronan v. Superior Court*[29] that certiorari and prohibition were proper means to examine a lower court's abuse of discretion.[30] With *Ronan*, certiorari in Arizona be-

---

this problem. The question there concerned the issuance of an operating permit for bus service between Florence and Phoenix. When the Corporation Commissioner issued a permit to Sun Valley bus lines to carry passengers to all points between Florence and Phoenix, Metropolitan Lines complained that the Commission was acting in excess of its jurisdiction because this permit would infringe on Metropolitan's already established service. The court agreed with Metropolitan: after proper procedures the Commission could have issued the permit, but in the absence of the proper procedures, the Commission lacked jurisdiction to issue the permit. *Id.* at 349, 220 P.2d at 483.

28. Hunt v. Norton, 68 Ariz. 1, 4, 198 P.2d 124, 126 (1948) (the sufficiency of the evidence may be reviewed in determining jurisdiction); Gibbons v. Findley, 77 Ariz. 391, 394, 272 P.2d 610, 611 (1954) (certiorari can be used to question an attempt by a board to base its jurisdiction on a finding of fact without evidence to support such a finding); Duncan v. Truman, 74 Ariz. 328, 331, 248 P.2d 879, 882 (1952) (the meaning of jurisdiction in regards to certiorari and prohibition should not be given too restrictive a meaning).

29. 95 Ariz. 319, 390 P.2d 109 (1964). The original writ requested in *Ronan* was a writ of prohibition. Following its rule to treat the substance of the petition, and not the form, the court considered the petition to have been a petition for certiorari. *See supra* note 9. A year earlier Ronan, as the county attorney of Maricopa County, had petitioned for a writ of certiorari and had the court treat it as a petition for prohibition (State *ex rel.* Ronan v. Superior Court, 94 Ariz. 414, 385 P.2d 707 (1963)). These two cases can be seen as an indication of the flexibility that the appellate courts sometimes used to overcome restrictions on the use of the writs. They also serve as an indication of the understandable confusion for the practicing bar surrounding the use of the writs.

In the second *Ronan* case (95 Ariz. 319, 390 P.2d 109 (1964)), the court cited the previous Arizona case of Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879 (1952). *Duncan* may be regarded as the case which established the rule in Arizona that an abuse of discretion could be reviewed by certiorari. Lesher, *supra* note 4 at 46. In *Duncan* the supreme court, after noting that its supervisory powers (exercised in certiorari) were not as broad as its appellate jurisdiction, went on to state that the California court had made an "excellent dissertation" on the subject of not imposing a too narrow restriction on certiorari in the case of Abelleira v. District Court, 17 Cal. 2d 280, 109 P.2d 942 (1941). This dicta became significant in *Ronan*. The court cited *Duncan* and went on to note that California's interpretation of certiorari is especially important because Arizona's certiorari statute is drawn from California. *Ronan*, 95 Ariz. at 322, 390 P.2d at 111. The court also cited with approval State Bd. of Medical Examiners v. Spears, 79 Colo. 588, 247 P. 563 (1926) to the effect that an abuse of discretion, or a regular failure to pursue the tribunal's authority, would be grounds for certiorari. *Ronan*, 95 Ariz. at 322, 390 P.2d at 111.

During the period of most rapid evolution of the writs in Arizona the supreme court showed a greater willingness to draw upon examples from other states. This culminated in the creation of special actions, in which the Committee drew upon the examples of New York and Colorado, which had both consolidated their extraordinary writs. Nelson, *supra* note 5, at 416 n. 10. Since the creation of special actions, however, Arizona courts have been satisfied with Arizona precedent, and have not made any significant reference to examples from other states.

30. *Ronan*, 95 Ariz. at 322, 390 P.2d at 111. The court later relied on *Ronan* as justification for hearing petitions even when little question about the lower tribunal's jurisdiction existed. *See, e.g.*, Kilpatrick v. Superior Court, 105 Ariz. 413, 466 P.2d 18 (1970) (review of denial of motion for summary judgment); Allison v. Chatwin, 99 Ariz. 99, 407 P.2d 69 (1965) (excessive supersedas bond in a child custody case); Buell v. Superior Court, 96 Ariz. 62, 391 P.2d 919 (1964) (habeas corpus).

While the court in Genda v. Superior Court, 103 Ariz. 240, 439 P.2d 811 (1968), did not announce a new rule, the *Genda* case might be regarded as an additional extention of the writ into an outright review of error. In *Genda* the parties in interest had appeared before an Arizona trial court in divorce proceedings. As part of these proceedings, the court incorporated a property settlement

came a writ that the courts could use to oversee any act of a lower judicial body to "see that essential justice is done."[31]

Thus, by the time of the adoption of the Rules for Special Action, certiorari had become a discretionary writ for the supreme court or the court of appeals to test the jurisdictional and discretionary actions of lower tribunals (courts, boards or officers) exercising a judicial or quasi-judicial function when there was no other adequate method of doing justice.

Prohibition

Prohibition's character is very much like the character of certiorari. The Advisory Committee to the State Bar considered them to differ only to the extent that one concerned actions threatened but not yet taken (prohibition) and the other concerned the same type of actions already taken (certiorari).[32]

The strength of prohibition as a writ was also its weakness. Prohibition was an excellent means to test the jurisdiction and, ultimately, the correctness of a tribunal's action. Because it could be used very early in the process there was a special force to the claim of harm and thus there was an added incentive for a court to grant the writ.[33] The requirement that the writ con-

---

including the husband's promise to support the couple's child after the child reached 21 if the child was unable to support himself. Subsequently all the parties moved to Indiana. Because of this move when the former wife filed a motion for continued support for the child (five years after the divorce), the Arizona trial court found that it lacked jurisdiction and granted a motion to dismiss.

The supreme court, recognizing that the recent cases concerning certiorari "reflect a more liberal approach to the issuance of extraordinary writs, with our primary concern to see that essential justice is done in the individual case," found that the trial court had jurisdiction to decide that it lacked jurisdiction. *Genda*, 103 Ariz. at 242, 439 P.2d at 813. The question then presented was whether the trial court had abused its discretion when it so decided. The supreme court held that the separation agreement gave the trial court continuing jurisdiction and that it therefore had abused its discretion when ". . . it refused to pursue the power it did have." *Id.* at 242, 439 P.2d at 813.

The question of whether any of the writs was used as a review of error is important because of the occasional use of special actions to review errors. *See infra* notes 109-13 and accompanying text. It has been argued that the court has unwisely expanded the grounds for the extraordinary writs since the creation of special actions. Underlying this may be a suggestion that such an expansion is contrary to the Rules and contrary to ARIZ. REV. STAT. ANN. § 12-109(A) (1982). Comment, *supra* note 2, at 545. To adopt this view would require that the court abandon a significant part of its use of special actions in the 1980s.

Such an argument ignores the inherent flexibility that has always existed in the extraordinary writs. To the extent that the argument depends on the idea that the Rules fixed the nature of the writs, this can be circumvented by a showing that courts prior to the adoption of the Rules used the writs to examine errors. No direct statement of such use has been found for all the writs, but the decisions in such cases as *Genda* demonstrate the willingness of the court to consider outright error within the general category of an abuse of discretion. *See also* State *ex rel.* Ronan v. Superior Court, 96 Ariz. 229, 393 P.2d 919 (1964) (certiorari granted to reverse the decision to vacate a bond forfeiture: because no reasonable cause was shown for the vacation, the court was powerless to exercise its discretion).

31. The statement is originally from Caruso v. Superior Court, 100 Ariz. 167, 171, 412 P.2d 463, 466 (1966), an action concerning a writ of prohibition. The court in *Genda* recognized *Caruso* and *Ronan* as demonstrating a similar attitude toward the two writs of certiorari and prohibition. *Genda*, 103 Ariz. at 242, 439 P.2d at 813.

32. The committee felt that by combining certiorari and prohibition into a single action "we may safely obliterate these distinctions of tense . . ." Notes, *supra* note 19, at Rule 3.

33. Comparatively early in the evolutionary development of the writs in Arizona, the court in Westerlund v. Croaff, 68 Ariz. 36, 42, 198 P.2d 842, 845 (1948) quoting 50 C.J., *Prohibition* § 56 at 682, recognized this compulsion to issue the writ even where an appeal would be possible. When the lower court's actions "must ultimately be held to have been mistaken, prohibition should issue before

cern itself only with pending action, however, always gave a court the opportunity to deny the writ because some action had already been taken.[34]

Despite this everpresent danger, prohibition was used in Arizona as a vehicle for the appellate courts to apply an early brake when there was a potential for significant error. Prohibition was used to attack the issuance of an injunction,[35] to prevent the operation of a writ of mandamus,[36] to test a contrary decision in a special appearance without further appearance giving rise to a consent of jurisdiction,[37] and to review non-appealable orders.[38]

Like certiorari, the original nature of prohibition limited it to questions of jurisdiction. Also like certiorari, by 1970 prohibition had become available to test abuses of discretion and perhaps to examine simple errors by lower tribunals.[39] Even earlier, the supreme court had acknowledged that

---

the party aggrieved is put to the difficulties that would be raised, and the court to the inconvenience that would ensue by permitting such proceedings to continue."

34. "This court will not issue a writ of prohibition to undo, nullify, or review an act already performed but solely to prevent the commission of a future act." Jacobson v. Superior Court, 1 Ariz. App. 342, 344, 402 P.2d 1018, 1020 (1965). Especially when it had become reasonably common for courts to look past the form to the substance of the petition and therefore to treat an incorrect petition as actually being a correct petition (*see supra* note 9 and accompanying text), such dicta might seem a hypertechnical response. It can better be seen, however, as an example of how the appellate courts used different aspects of the writs when needed. While in other cases the court might have overlooked such technical restrictions, here it relied on them as reason to deny what was an otherwise valid petition. The case involved a dispute between two justices of the peace over whether a child's body should be autopsied or interred. A writ of prohibition was being sought to prevent the execution of a writ of mandamus.

This obscure case can serve as an illustration of many things. It shows how the courts could use the technical rules as justification for their discretionary choice not to entertain a petition. This type of behavior, while here probably justified, illustrates much of the dissatisfaction with extraordinary writ practice. Behind this, the court's decision illustrates an equitable overtone to much of extraordinary writ practice: here the court denied relief essentially because neither party had particularly clean hands.

35. *E.g.*, Valley Drive-In Theatre Corp. v. Superior Court, 79 Ariz. 396, 291 P.2d 213 (1955); Corbin v. Rogers, 53 Ariz. 35, 85 P.2d 59 (1938).

36. *E.g.*, Corbin v. Superior Court, 100 Ariz. 104, 412 P.2d 45 (1966). In *Corbin*, the superior court had issued a writ of mandamus to compel the production of a written report used to refresh a police officer's memory prior to his testimony at a preliminary hearing before a justice of the peace. The supreme court held that the writ of mandamus should not have issued because an alternative to the writ existed through a motion to quash the information or through habeas corpus. In order to prevent defendants from defeating the object of preliminary hearings by a too quick jump to a superior court, the supreme court issued the writ of prohibition. While this decision may seem somewhat contrary to the notion that the writs were used to see that justice is done, it is in accord with the tendency of the courts to use the writs, especially prohibition, as a means of policing the behavior of the lower courts, especially with regard to the use of other writs.

The court had ruled in an earlier case that prohibition was itself not a proper method to complain about the adequacy of a preliminary hearing because an appeal could be taken. Martin v. Superior Court, 96 Ariz. 282, 394 P.2d 211 (1964). These cases should not be taken as an indication that the extraordinary writs were not available in criminal matters. Prohibition was used, for example to prevent a criminal prosecution in Rojas v. Superior Court, 100 Ariz. 364, 414 P.2d 740 (1966). Concerning criminal issues in special action practice, *see supra* notes 81-91 and accompanying text.

37. D.W. Onan & Sons v. Superior Court, 65 Ariz. 255, 179 P.2d 243 (1947).

38. *E.g.*, Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958) (prohibition to prevent enforcement of a discovery order). Because of its focus on threatened acts, prohibition was the most common writ used to challenge interlocutory orders. The character of these actions as, for the most part, non-appealable, made them ideal subjects for an extraordinary writ. Discussing such use of prohibition, the court in Thoresen v. Superior Court, 11 Ariz. App. 62, 65, 461 P.2d 706, 709 (1970), said: "[t]he remedy seems particularly appropriate where the privilege against self-incrimination is claimed, since the threatened harm of an assertedly unconstitutional disclosure cannot be remedied by appeal. The cat, once out of the bag, cannot be recaptured."

39. The court in *In re* West's Adoption, 87 Ariz. 234, 237, 350 P.2d 125, 126 (1960) stated the

while the writ should not be considered as an alternative to an appeal, the writ might be granted even though there were alternative remedies.[40]

The particular nature of prohibition as the writ which allowed the earliest intervention when the appellate courts observed an error, combined with the flexibility that all the discretionary writs provided, made the writ of prohibition a useful tool for practitioners and for the courts. Prior to the creation of special actions, prohibition was used to short-circuit the administrative review process,[41] to prevent further action when a court had lost jurisdiction as a case moved to another court,[42] and to examine matters that the passage of time had made moot.[43] While prohibition and certiorari corresponded closely, the writ of prohibition was itself a writ which provided petitioners the earliest opportunity to gain the assistance of reviewing courts to see that justice was done.

---

traditional rule that prohibition "will lie only where an inferior tribunal is acting without or in excess of its jurisdiction." Following the same path as with certiorari, however, and perhaps going beyond, the court had already begun to loosen these requirements, so that by 1966 the court held, in Caruso v. Superior Court 100 Ariz. 167, 170, 412 P.2d 463, 465 (1966), that prohibition would lie when a lower tribunal "had jurisdiction but exercised it erroneously."

40. "It may however, be granted notwithstanding the existence of another adequate remedy, for it is a remedy within the sound discretion of the court to which application is made . . ." City of Phoenix v. Rodgers, 44 Ariz. 40, 46, 34 P.2d 385, 387 (1934). This is a rather extreme statement of the principle: even in *Caruso* the court stated that the test should be whether "other remedies are not equally plain, speedy and adequate." *Caruso*, 100 Ariz. at 171, 412 P.2d at 465.

41. In State Bd. of Technical Registration v. McDaniel, 84 Ariz. 223, 230, 326 P.2d 348, 351 (1958), the court held that special circumstances could justify the conclusion that a regular appeal would not furnish an adequate remedy. In this case the court's grave doubts as to the legal sufficiency of the charges, the allegations of the unconstitutionality of the Act in question, and the possibility of criminal charges were sufficient to justify the conclusion of no adequate remedy. In other cases, such as Rhodes v. Clark, 92 Ariz. 31, 373 P.2d 348 (1962), the court held that the Administrative Review Act provided an adequate remedy. *McDaniel* is also useful to illustrate that seeking extraordinary relief did not limit the types of arguments which could be made. In response to a claim by the appellee that, not having argued the merits of the case leading to a writ of prohibition in the trial court, the respondent should not be allowed to argue them on an appeal, the court stated that because only questions of law were raised, the respondent could argue the merits on appeal. *McDaniel* at 230, 326 P.2d at 352.

As an illustration of the opposite side of this question, in Loftus v. Russell, 69 Ariz. 245, 253-54, 212 P.2d 91, 97 (1949), the court held that when a judge appeared and asserted the presence of jurisdiction it was unnecessary to show that an objection to jurisdiction had been made before the lower tribunal.

42. Prohibition will be valid against the actions of a court which once had jurisdiction in at least two ways. One is when the matter is taken up by a different court with exclusive jurisdiction, *e.g.*, McLendon v. Superior Court, 6 Ariz. App. 497, 433 P.2d 989 (1967) (juvenile courts have exclusive jurisdiction which serves to remove jurisdiction over the question of child custody from the superior court). The second is when, after the case is appealed, it returns on remand. In such circumstances the lower tribunal is no longer free to act on the subject of the appeal. Pacific Greyhound Lines v. Brooks, 70 Ariz. 339, 220 P.2d 477 (1950).

43. One method of dealing with the problem of potential mootness was to hold that because the order had not yet been implemented it was in the "interest of orderly administration of the law and the future guidance" of the decision maker that the court rule on the question. Pacific Greyhound Lines v. Brooks, 70 Ariz. 339, 341, 220 P.2d 477, 478 (1950). If such an interpretation was not possible, however, the court was willing to decide a moot question for the future guidance of the administration of law. Corbin v. Rogers, 53 Ariz. 35, 85 P.2d 59 (1938). For consideration of moot issues through the other writs, see State v. Superior Court, 104 Ariz. 440, 441, 454 P.2d 982, 983 (1969), an original proceeding for certiorari, where the court recognized that "where the matter is of considerable public importance or the principle involved is a continuing one," mootness would not be a barrier, and Arizona Osteopathic Medical Ass'n v. Friedena, 105 Ariz. 291, 463 P.2d 825 (1970) (consideration of writ of mandamus despite mootness).

Mandamus

Mandamus differed in several ways from certiorari and prohibition, but it shared enough characteristics so that it could be combined with them into a single special action. While certiorari and prohibition lay against tribunals exercising judicial or quasi-judicial powers, mandamus lay exclusively against governmental figures who exercised ministerial or discretionary powers of an executive character.[44] Mandamus would lie against a court when the question concerned the exercise of a nonjudicial duty, or where there was no discretion in the court's action.[45]

The major dispute surrounding the writ of mandamus was the question of discretion. It was fairly easy to get a writ if the petitioner could show that the duty owed was ministerial and not discretionary.[46] Discretionary actions were subject to mandamus when the respondent had a duty to act, but could choose to act in one of several ways. Where the petitioner was able to show that the respondent was under a duty to make a decision, the court needed to determine what order could be issued. One response was to find that circumstances had acted to remove the discretion.[47] Alternatively, the court sometimes issued an order directing the respondent to act, leaving to the respondent the discretion of what action was to be taken.[48] As the writ of mandamus developed, courts began to hold that by acting in an arbitrary fashion, the respondent had lost all discretion, and thus could be directed to act in a certain fashion.[49]

As with all the extraordinary writs, the mandamus petitioner must be a

---

44. Mandamus "proceeds on the assumption that the applicant has an immediate and complete legal right to the thing demanded." State Bd. of Technical Registration v. Bauer, 84 Ariz. 237, 240, 326 P.2d 358, 360 (1958). The thing demanded must be an act which "must be 'a ministerial act which the law specifically imposes as a duty resulting from an office,' (citations omitted) or if discretionary it must clearly appear 'that the officer has acted arbitrarily and unjustly and in the abuse of discretion. . . .'" Rhodes v. Clark, 92 Ariz. 31, 35, 373 P.2d 348, 350 (1962).

45. *E.g.*, Morrison v. Stanford, 100 Ariz. 211, 412 P.2d 708 (1966) (to allow defendants to present their defense before superior court's entering judgment against defendants) (arguably this might have been more accurately styled a petition for certiorari); Tovrea v. Superior Court, 101 Ariz. 295, 297, 419 P.2d 79, 81 (1966) ("The trial court is without jurisdiction to fly in the face of an appellate mandate, and when it does so, mandamus is the proper remedy.").

"Mandamus is available only where a court refuses to exercise jurisdiction rightfully possessed. But where the act is judicial or discretionary in character, mandamus will not lie to command what the action shall be." Johnson & Douglas v. Superior Court, 101 Ariz. 373, 374, 419 P.2d 730, 731, (1966).

46. *E.g.*, Arizona State Highway Comm'n v. Nelson, 105 Ariz. 76, 459 P.2d 509 (1969) (to compel the Attorney General and the Commissioner of Finance to approve a bond issue); Application of Trico Elec. Coop., 92 Ariz. 373, 377 P.2d 309 (1962) (require Corporation Commission approval of a contract to provide electrical services); Tempe Union High School v. Hopkins, 76 Ariz. 228, 262 P.2d 387 (1953) (require renewal of teacher's contract).

47. *E.g.*, Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969) (Highway Department had no authority to revoke driver's license during appeal of conviction); Robinson v. Lintz, 101 Ariz. 448, 420 P.2d 923 (1970) (the city must issue building permits based on the county's approval of subdivision plats prior to annexation).

48. *E.g.*, Bergstresser v. Industrial Comm'n, 105 Ariz. 27, 458 P.2d 961 (1969) (commission ordered to hold hearing after an 8 month delay in acting on petition for rehearing of temporary disability award). In State Bd. of Dispensing Opticians v. Carp., 85 Ariz. 35, 330 P.2d 996 (1958), the court held that the trial court had erred when it ordered the board to issue a license. Instead of determining how the board should act, the trial court should have confined its order to instructing the board to disregard the improper factors that led to its refusal of the license.

49. *See* Eastman v. Southworth, 87 Ariz. 394, 351 P.2d 992 (1960) (By delay the board had lost its power to exercise discretion in the granting of a license); Milburn v. Evans, 1 Ariz. App. 147, 400

party beneficially interested, but the petitioner need not be the party receiving the most direct benefit from the action demanded.[50] In mandamus actions, the writ would not issue when an alternative means of appeal was available, but as with the other writs, under certain circumstances the court determined other available remedies would not be adequate.[51]

More than the other writs, mandamus has equitable overtones. While it is a legal remedy[52] which operates on the office and not on the individual,[53] and which is not in the nature of a negative injunction,[54] there are equitable principles which are important in mandamus.[55] In Arizona this has led to the holding that one who seeks mandamus must have clean hands.[56] While this is the major acknowledgement of the equitable overtones of the extraordinary writs in Arizona, in fact several of the prerogative writs are subject to analogies to the rules of equity.[57]

Together the three extraordinary writs provided a means for a petitioner to seek justice from a court with authority to redress the injustice that the petitioner felt had been done. While each writ had certain unique attrib-

---

P.2d 354 (1965) (when action is arbitrary the element of discretion disappears and proper conduct becomes a ministerial act).

50. In Board of Regents v. Frohmiller, 69 Ariz. 50, 208 P.2d 833 (1949), the court held that the board had a sufficient beneficial interest to seek a writ compelling the State Treasurer to pay university employees.

51. *E.g.*, Morrison v. Stanford, 100 Ariz. 211, 412 P.2d 708 (1966) (where the petitioners were denied their day in court essential justice must be done); Application of Trico Elec. Coop., 92 Ariz. 373, 377 P.2d 309 (1962) (public aspects of questions, urgent need of party, and long and costly nature of ordinary appeal); Metropolitan Lines, Inc. v. Brooks, 70 Ariz. 344, 220 P.2d 480 (1950) (ordinary appeal would be inadequate either in promptness or completeness to avoid a partial or total failure of justice).

Gamet v. Glenn, 104 Ariz. 489, 455 P.2d 967 (1969) is an unusual case in that the supreme court accepted a petition for review and an application for an original writ of mandamus in the same case. Petitioners had sought a writ of mandamus from the court of appeals to compel the superior court to accept them as intervenors in a water rights dispute. The court of appeals refused the writ and held that there could be no review on a petition for rehearing and thus no petition for review filed from such a decision. To solve the dispute, the supreme court allowed both an original petition for mandamus and a petition for review, which was accelerated. The supreme court held that questions concerning the extraordinary writs could be decided on a petition for review or by a new application for a writ. *Id.* at 493, 455 P.2d at 971. The court held that under ARIZ. R. CIV. P., 24, the petitioners were not entitled to intervene. *Id.* at 492, 455 P.2d at 970. Recently the supreme court has acted again in combining an ordinary appeal and a special action petition, but without the same unique or compelling circumstances. Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 148 Ariz. 1, 712 P.2d 914 (1985). *See infra* note 121.

For mandamus actions where intervenors were recognized as active parties, *see, e.g.*, Greyhound Parks of Arizona v. Waitman, 105 Ariz. 374, 464 P.2d 966 (1970); *Trico Elec. Coop.*, 92 Ariz. at 388, 377 P.2d at 320; Warner v. White, 39 Ariz. 203, 4 P.2d 1000 (1931) (intervenor allowed to substitute for petitioner where of the same class represented in the action). *But see* Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580 P.2d 704 (1978) (in the absence of authorization in the Rules, there can be no class action special actions).

52. Board of Examiners of Plumbers v. Marchese, 49 Ariz. 350, 66 P.2d 1035 (1937). *See also* F. FERRIS, & F. FERRIS, JR., *supra* note 22, § 190, at 221.

53. Milburn v. Burns, 1 Ariz. App. 147, 148, 400 P.2d 354, 355 (1965).

54. Smoker v. Bolin, 85 Ariz. 171, 173, 333 P.2d 977, 978 (1958).

55. Sines v. Holden, 89 Ariz. 207, 209, 360 P.2d 218, 220 (1961); State Bd. of Barber Examiners v. Walker, 67 Ariz. 156, 192 P.2d 723 (1948).

56. *Sines*, 89 Ariz. at 209, 360 P.2d at 220. In *Sines* the petitioner sought a refund of retirement contributions when he was discharged and convicted of conspiracy to abuse his office (later reversed State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960)). The supreme court denied the writ because of the lack of clean hands and because the public interest would be adversely affected.

57. United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359 (1933); *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, § 2.10, at 111-12 (1973).

utes, they all had an underlying character that made the combination of the writs appear logical. Despite dissatisfaction with their complexities and their administration, nearly all the commentators of the time regarded the extraordinary writs as an important part of Arizona practice. Because they offered an opportunity for any aggrieved party to seek quick review, reform was felt to be important.

The extraordinary writs were in a period of transformation prior to the creation of special actions. The issues which could give rise to a writ were expanding, and the courts were using the writs more to address the merits of the questions raised by the writ. Along these same lines, the courts were moving away from a heavy emphasis on the question of the legitimacy of the writ as a remedy to a greater willingness to use the writs as a means to correct substantive errors made by the respondent.

The extraordinary writs were valuable because they offered a means for petitioners to overcome barriers when extraordinary circumstances warranted intervention. There were no voices raised calling for their abolition. Instead, the clamor was to simplify their use, so that courts, petitioners, and respondents could have a clearer picture of their usefulness and their limits. With these motives, the Committee consolidated the writs, set forth general rules establishing the availability of special actions, and clarified the procedural requirements.

RESULTS OF THE CHANGE TO A SINGLE FORM OF ACTION

Special actions were a major step in the direction of these changes. By consolidating the writs the new special action allowed the crossfertalization of these remedies to quicken. The creation of special actions was not the end of the process of change, however. Special actions continued to change, so that special actions in 1987 differ in some respects from special actions in 1970.[58]

The Nature of Special Actions

The nature of the satisfaction and dissatisfaction with the writs shaped the Rules for Special Action. Because the obtuse procedural requirements of the writs had been a constant source of trouble, the new Rules simplified the procedures for special actions.[59] The uncertainty of when a writ could be obtained led the new Rules to set forth a clear exposition of the grounds for special actions.[60] Petitioners had found the writs to be useful means to re-

58. The same conclusion regarding special actions of 1980 is reached in Comment, *supra* note 2.

59. In the Rules, *supra* note 1, Rule 4 sets forth the requirements for the pleadings. Rule 5 replaces alternative and preemptory writs with provisions for a non-automatic stay. The issuance of an interlocutory stay should comply with ARIZ. R. CIV. P. 65 or ARIZ. R. CIV. P. 62(c) when an injunctive stay is granted on appeal. Rule 6 provides that special actions brought in superior court will have a judgment in the same form as judgments for other civil actions. Rule 7 provides that in an appellate court a stay may be issued if there is to be a delay in hearing the petition, and that the order granting relief "shall take such form as the court directs, but in every such case the decision of the court shall be given in writing and the grounds of the decision shall be stated." *Id.* 7(d). The denial of relief may be made by minute entry.

60. *See infra* text accompanying notes 61-62.

solve a wide range of questions, therefore the new Rules preserved the flexibility of the former writs. Because the courts had found the writs to be useful for maintaining control through their examination of some of these important questions, the new Rules retained the discretionary character of the former writs.

The Rules of Procedure for Special Action attempted to set out clearly the character of the extraordinary writs as they existed in 1970.[61] The Rules state that the only questions that can be raised are:

> (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
>
> (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
>
> (c) Whether a determination was arbitrary and capricious or an abuse of discretion.[62]

In their notes, the Committee stated that paragraph (a) set "forth the traditional functions of the writ of mandamus,"[63] while (b) and (c) "inherit the tradition of the writs of certiorari and prohibition."[64] The Committee felt that all of these tests had been used in the extraordinary writs.[65]

As an attempt to codify a half century of common law development in Arizona, the Committee's statement of the nature of special actions is a valuable attempt to reduce much complexity to relative simplicity.[66] Whether the committee or the supreme court which adopted the Rules intended them to represent a permanent codification or a point in the evolution of the writs

---

61. The committee regarded Rule 3, where the questions raised in a special action were listed as a codification of "existing practice in Arizona." Notes, *supra* note 7, at Rule 3.

62. Rules, *supra* note 1, Rule 3.

63. Notes, *supra* note 19, at Rule 3.

64. *Id.*

65. The words of section (c) are the only real expansion of the traditional nature of the writs. The committee felt that this interpretation had been used by the Arizona courts in the recent past, citing several of the cases discussed *supra* notes 24-55 and accompanying text.

The legitimacy of this expansion of the traditional writs was, in an indirect fashion, tested in State *ex rel.* Hyder v. Superior Court, 128 Ariz. 216, 624 P.2d 1264 (1981). After a jury verdict of guilt, the trial court granted a motion for acquittal. The state tested this through a special action. The supreme court held that it had jurisdiction to accept the special action because the trial court had abused its discretion. *Id.* at 222, 624 P.2d at 1270. The real party in interest argued that the state was seeking a writ of mandamus, which should not lie against the discretionary actions of a trial court. The supreme court dealt with this in two ways. First, the court held that the combination of the writs into a single special action made it acceptable to apply mandamus to abuses of discretion, citing Rule 3(c). The court did not choose to deal with the Committee notes which stated that Rule 3(c) concerned prohibition and certiorari. As discussed *supra* note 47-49 and accompanying text, however, Arizona courts had recognized that an abuse of discretion could be cured through mandamus.

Second, the court held that the relief sought was actually more in the nature of certiorari and that Arizona courts had, in the past, used certiorari to examine questions of fact. After noting that there was a case, State v. Kingman Justice Precinct Court, 88 Ariz. 342, 356 P.2d 694 (1960), holding to the contrary, the court in *Hyder* held that it would not overturn subsequent decisions by returning to such a narrow standard. Further, the court held that there were sufficient differences between the cases to warrant a review of the facts here. *Hyder*, 128 Ariz. at 223, 624 P.2d at 1271.

66. The Committee recognized the character of its actions. Speaking specifically about subsection (c) of Rule 3 the committee said: "[t]he phrases used in this subsection are in fact words of art, each conveying traditional interpretations as developed by common law." Notes, *supra* note 19, at Rule 3.

is not clear. Whatever their intent, the writs have continued to evolve.[67]

The Evolution of Special Actions

While reference to the individual writs has not entirely disappeared,[68] very soon after the creation of special actions, specific reference to the parallel type of extraordinary writ became much less common. The questions brought before the courts through special actions remained nearly the same as they had prior to the adoption of the Rules. Questions of a lower tribunal exceeding its jurisdiction[69] and of whether desired actions were ministerial or discretionary,[70] were brought before the appellate courts. The courts also continued to use the now special action to review difficult questions which were not clearly within the tradition of any of the extraordinary writs.[71] Most important, the creation of special actions solidified earlier tendencies of the courts in Arizona, the product of which was the creation of an extraordinary remedy which was greater than the sum of the individual writs before their combination.

---

67. The evolution of the writs, both prior to the adoption of the Rules for Special Actions and after, raises the same issues as the dissent in *Hyder*, 128 Ariz. at 225, 624 P.2d at 1273. One way to cut through this Gordian knot is to recognize the common law character of the writs. These rights exist because the courts in the past have felt the need to create them in the interest of justice. As circumstances change, so must the writs if they are to serve their essential purpose: to do justice in extraordinary circumstances when the usual remedies do not serve.

The Arizona Constitution, art. 6, § 5 gives the supreme court the power to issue the writs as part of its appellate and revisory jurisdiction. Article 6, § 18 gives the superior courts the power to issue these writs as part of its original jurisdiction. In 1960, the Arizona Constitution was amended to give the supreme court original jurisdiction over all these writs, to match its appellate jurisdiction. It seems clear that the amended constitution intended to grant the same powers over the writs to the supreme court as held previously by the superior court. Clark, *Prohibition*, in EXTRAORDINARY WRITS, *supra* note 2, at 13. Because the supreme court and the superior courts have the same powers over the writs, the holding in Batty v. Arizona State Dental Bd., 57 Ariz. 239, 112 P.2d 870 (1941) is relevant to the question of how confined the courts must be in using special actions. In that case the court held that the constitution granted the superior courts the full power of the common law writs, and the legislature could not modify these powers. *Id.* at 250, 112 P.2d at 875.

68. In 1985 certain citizens of Maricopa County sought a writ of mandamus to force the city clerk of Apache Junction to put their initiative on the ballot. The supreme court opinion on an appeal from a denial of the writ makes no mention of special actions. Saggio v. Connelly, 147 Ariz. 240, 709 P.2d 874 (1985). Arizona's constitution (Art. 6, §§ 5, 18) and the statutes (ARIZ. REV. STAT. ANN. §§ 12-2021 to -2029 (1982)) still contain a description of mandamus, with no mention of special actions.

69. In Skinner v. Superior Court, 106 Ariz. 287, 475 P.2d 271 (1970) the supreme court held that the superior court had not lost jurisdiction when it discharged the petitioners in the underlying criminal case after a preliminary hearing. Ruling on a special action filed to challenge the reinstatement of the case, the court held that unless there is an abuse of discretion, the court can reinstate the case. In White Mtn. Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971) the court held that, in the absence of a waiver of immunity, the superior court had no jurisdiction over a subordinate economic organization of the Tribe.

70. In Birdsall v. Pima County, 106 Ariz. 266, 475 P.2d 250 (1970), the court held that the board of supervisors had a ministerial duty to approve the salaries for court officials set by the chief judge of the court. In Industrial Dev. Auth. v. Nelson, 109 Ariz. 368, 509 P.2d 705 (1973), the court ruled that the Attorney General must issue an opinion approving a bond issue, even when the Attorney General felt the law was unconstitutional, because the court held the law to be constitutional. In Board of Educ. v. Scottsdale Educ. Ass'n, 109 Ariz. 342, 509 P.2d 612 (1973), the court held that a special action in the nature of mandamus would not lie to enforce contractual agreements.

71. Nontraditional uses of special action would include, for example, uses of special actions to review errors, or uses of special actions to issue orders in the nature of mandamus to lower courts concerning the exercise of judicial discretion. For examples of such special actions, see *infra* notes 110-14 and accompanying text.

Prior to the creation of special actions, the limitation on certiorari that it would apply only to judicial or quasi-judicial tribunals sometimes proved determinative of the petition.[72] The court often solved this difficulty by treating a petition for one writ as actually being a petition for an alternate writ.[73] It was always possible, however, that the nature of the writ petitioned for could determine the nature and extent of the relief granted. One of the little noted effects of the creation of an all encompassing special action is that such questions disappeared. Because certiorari and prohibition would lie against any official or board exercising a judicial function, and mandamus would lie only against boards or officials (or private persons) exercising ministerial functions, the combination of the writs covers all possible types of governmental action.

The practical effect of this combination is to eliminate the defense against a special action petition that the wrong type of relief is being sought in a particular case. Prior to the creation of special actions the writs were evolving toward each other because the courts perceived the writs to have a common goal and a similar if not common nature. When the court explicitly held that the proper writ would be used instead of the writ sought, and that the purpose of the writs was to do justice, the court was redefining the writs. In these decisions the court was stating that the proper questions were the implications which followed from the correct or incorrect nature of the decision below. The broad scope of special actions, as set forth in the Rules, ratified this aspect of extraordinary relief and set the stage for a further expansion in the importance of extraordinary relief in Arizona.

Special actions are different from the prior extraordinary writs because they represent the broadest possible coverage and the broadest type of relief. A special action petition allows the court to choose as much from any of the previous writs as it wishes, and to create a new means to achieve the intended result. The example of the use of special actions in the nature of mandamus against lower tribunals serves as the best illustration of, if not a new writ, a broader character in extraordinary writs than previously existed.[74] These special actions in the nature of mandamus against tribunals represent a continuation and expansion of the willingness of Arizona courts to use mandamus against lower courts. In this regard, Arizona differs from

72. *E.g.*, Faulkner v. Board of Supervisors, 17 Ariz. 139, 149 P. 382 (1915) (incorporation of a town was not a judicial function); Board of Educ. v. Williams, 1 Ariz. App. 389, 403 P.2d 324 (1965) (mandamus will lie to order a school board to renew a contract, but certiorari will not lie to review the board's teaching assignments).

73. *See supra* note 23 and accompanying text.

74. In Yuma Greyhound Park, Inc. v. Hardy, 106 Ariz. 178, 472 P.2d 47 (1970), the supreme court ordered the judge of a superior court to enter an order compelling a serving member of Congress to answer deposition questions. In Lee v. Superior Court, 106 Ariz. 165, 472 P.2d 34 (1970), the supreme court ordered the judge of the superior court to vacate an order directing public defenders to represent indigent misdemeanents. In Shirley v. Superior Court, 109 Ariz. 510, 513 P.2d 939 (1973), the supreme court ordered a superior court to vacate an injunction and to issue an order to the board of supervisors certifying an election. In Fenton v. Howard, 118 Ariz. 119, 575 P.d 318 (1978) the supreme court, in an original special action, ordered the court of appeals to vacate its order and thus allow a superior court judge to appear and argue in opposition to the special action filed after his decision to quash a subpoena in a civil matter. *See also* State *ex rel.* Dean v. City Court, 123 Ariz. 189, 598 P.2d 1008 (Ct. App. 1979) (even though the trial judge has no interest, controlling precedent gives him such a right to appear).

some other courts, which use mandamus less often, or more narrowly, against inferior courts.[75]

The combination of reasons for extraordinary relief which resulted from the creation of special actions made it even easier for the appellate courts of Arizona to issue orders to the lower courts. Special actions represent the review power of certiorari with the compulsory power of mandamus.

The use of certiorari as an extraordinary writ was based on the theory that because the lower tribunal was acting in excess of jurisdiction its action lacked any force. Even when certiorari is extended to include abuses of discretion, it is on the theory that an abuse of discretion removes the court's jurisdiction.[76] Whatever the basis of the writ, certiorari as it has traditionally been used requires that the court "give judgment affirming, anulling or modifying the proceedings below."[77]

The difference between granting relief through a petition for certiorari and issuing a mandate upon a petition for mandamus may appear small. The traditional writs, however, did exhibit some such difference. As the distinctions between the writs narrowed, it became easier to treat the writs interchangeably. Certiorari gradually began to include abuses of discretion. In holding that the lower tribunal had acted erroneously or acted to abuse its discretion, the appellate court was essentially directing the actions of the lower tribunal.

Mandamus originally would not do any more than order an exercise of discretion. Gradually the courts became more willing to hold that through an abuse of discretion the official had lost all discretion and could be directed to make ministerial action. At this point, the only remaining difference between mandamus and certiorari was the traditional limitation that certiorari would lie only against tribunals exercising a judicial or quasi-judicial function and that mandamus could issue only against officials[78] to compel "an

75. *E.g.* Madrid, *Mandamus* in *Thirteenth Annual Review of Criminal Proceedure: United States Supreme Court and Courts of Appeals 1982-83,* 72 GEO. L.J. 652 & n.2767; Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 85 HARV. L. REV. 595 (1973). California has, like Arizona, taken a more expansive view of using mandamus to control the actions of lower courts, *e.g.* Remainders, Inc. v. Superior Court, 192 Cal. App. 2d 411, 13 Cal. Rptr. 221 (1961) (lower court was directed to vacate its order setting aside a default judgment). California courts have held, however, that neither mandamus nor prohibition can be used to resolve the admissibility of evidence because this is not an abuse of discretion, merely an erroneous ruling. Ballard v. Superior Court, 64 Cal. 2d 159, 410 P.2d 838, 49 Cal. Rptr. 302 (1966) (the substantive principle of *Ballard* has been changed in California by statute. *See* People v. Haskett, 30 Cal. 3d 841, 640 P.2d 776, 180 Cal. Rptr. 640 (1982)). In Arizona, the State has successfully brought and won a favorable judgment in a special action involving the suppression of evidence, State ex rel. Collins v. Superior Court, 145 Ariz. 493, 702 P.2d 1338 (1985) and the admissibility of evidence, State *ex rel.* Collins v. Seidel 142 Ariz. 587, 691 P.2d 678 (1984). In Zarate v. Jennings, 17 Ariz. App. 401, 498 P.2d 475 (1972), involving the court's refusal to order the production of a document used to refresh a police officer's recollection, the court of appeals held that it was in no position to direct the trial court's decision through a special action.

76. *See supra* notes 29-30 and accompanying text. This tendency to transform errors has been criticized as being itself an erroneous interpretation of the lower courts' actions in many cases. *See generally* Dobbs, *Trial Court Error as an Excess of Jurisdiction,* 43 TEX. L. REV. 854 (1965). With the combination of the writs in Arizona, this is less of a problem, since the range of actions subject to a special action includes not only jurisdictional errors but also abuses of discretion.

77. ARIZ. REV. STAT. ANN. § 12-2007(A) (1982).

78. In this context officials means any agent of the state or local government, not merely elected or other high officials.

act which the law specially imposes as a duty resulting from an office, trust or station."[79] When the writs were merged into a single special action the distinction between offices had to disappear.

The merger gave extraordinary writs a new character in that it allowed the courts to test the jurisdiction and discretion of any governmental official, and allowed the courts the power to issue orders, not just nullifications or modifications. Thus, in *Coleman v. Superior Court*,[80] the supreme court had before it a question of whether after being committed to a mental hospital as a juvenile, the petitioner could, upon reaching majority, be bound over for trial for the same offense. Rather than merely holding that the trial court was exceeding its jurisdiction in this matter, the supreme court issued an order to the court to quash the information and all further proceedings.[81]

While the idea of a new type of action arising from the creation of special actions has been rejected by the court,[82] it appears that merging the three writs, if it did not create new rights, at least made the new extraordinary relief a more powerful tool for the courts.[83] Keeping the discretionary character of the writs and merging the reasons for granting the writs while removing the limitations on who could be subject to the writs allowed the court to choose its targets for review with more freedom. Such a change would itself make the adoption of special actions important. Because, however, these writs, whether separate or combined, are rooted in the judiciary's common law power to do justice, the creation of special actions was not the end of the change in the character of extraordinary relief in Arizona.

The most immediate and longest lasting effect of the change has been to alter the focus of special action cases. Prior to the creation of special actions much of the court's discussion in extraordinary writ decisions concerned the court's jurisdiction to issue the writ. Now such questions are ignored or mentioned only briefly.[84] As the focus of opinions concerning extraordinary

79. ARIZ. REV. STAT. ANN. § 12-2021 (1982).

80. 110 Ariz. 386, 519 P.2d 851 (1974).

81. *Id.* at 389, 519 P.2d at 854. *See also*, State *ex rel.* Bean v. Hardy 110 Ariz. 351, 519 P.2d 50 (1974) (the court has jurisdiction to compel the judge to do what he had no discretion other than to do—in this case, to submit a charge to the jury); State *ex rel.* Baumert v. Superior Court, 118 Ariz. 259, 576 P.2d 118 (1978) (Over the dissent's suggestion that the case should be returned to the superior court for a new determination consistent with the court's decision, the majority reversed the superior court and directed it to affirm the judgment of the city court).

82. In citing precedent from before the creation of special actions, but not otherwise responding to the dissent's suggestion that the court was using the new special action in a fashion not acceptable to the older writs, the court in State *ex rel.* Hyder v. Superior Court, 128 Ariz. 216, 624 P.2d 1264 (1981), suggested that special actions were in no way different in character from the older individual writs. *See supra* note 59 and accompanying text.

83. While the court in *Hyder* rejected the notion that new rights were being created, to avoid a potential violation of the legislative restriction (see *supra* note 65 and accompanying text), an alternative way to avoid this problem, if that is necessary, would be to suggest that no new substantive rights have been created. Because the Rules made procedural changes to allow greater access to already existing substantive rights, the continued change in these procedural rights would not violate any limits on changing substantive rights.

84. It is hard to identify the most common statement regarding why jurisdiction of a special action was accepted, because there is considerable variation. Often the supreme court's discussion of the issues raised by a special action contain no discussion of the jurisdiction of the petitioned court to entertain the special action. This occurs for two reasons: 1) the supreme court has accepted the issues on a petition for review from the court of appeals; or 2) the supreme court chooses not to address the question. Either of these reasons may represent a conscious choice by the supreme court

relief has changed to a greater emphasis on the actions which gave rise to the petition, several other changes seem to have come about: most written opinions concerning special actions concern the resolution of successful petitions, while there are few opinions concerning unsuccessful petitions; the written opinions concerning special actions provide very little for petitioners and respondents in the nature of guidance concerning special action practice; and, perhaps because of all of these other changes, the number of special

---

or a failure of respondent's counsel to argue the jurisdictional questions. This last may, in turn, be a simple lapse or it may be a deliberate choice. The number of petitions for special action presented is enormous, and the appellate court's choice of this petition for hearing certainly reflects a decision that the issues raised need to be heard. Given this message from the court, it may be futile to seek dismissal because the petition was improperly granted. (For two examples where the court granted that the questions may have been appealable but proceeded to hear the special action, see United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985) and King v. Superior Court, 138 Ariz. 147, 673 P.2d 787 (1983)).

When the supreme court does discuss the question of jurisdiction, the justification is often either an oblique reference to Article 5, § 6 of the Arizona constitution, which contains the grant of power over extraordinary writs, or a reference to the Rules of Procedure for Special Action.

At various times the court has offered a more specific justification. What follows will serve as an illustration of the motivations behind the court's action. In addition to reference to the lack of an adequate remedy through appeal, the court has granted a petition because: the questions are exclusively questions of law and the trial judge without explanation failed to follow controlling Arizona law, Shea v. Superior Court, 150 Ariz. 271, 723 P.2d 89 (1986); to resolve a conflict in appellate court decisions, Marshall v. Superior Court, 145 Ariz. 309, 701 P.2d 567 (1985); the trial court proceeded in excess of its legal authority, acted in an arbitrary and capricious manner, or abused its discretion, and because it is an important issue of first impression in Arizona which, if resolved through appeal might necessitate two trials, Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985); there were several pending cases which presented the same issues, normal appellate procedures would result in unnecessary cost and delay, and the question presented was a clear issue of law with obvious statewide significance, Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985); questions of water rights adjudication and quantification were involved, the questions were pure issues of law which could be decided on an interlocutory basis, and the interests of the parties and the public demanded an early settlement, United States v. Superior Court, 144 Ariz. 265, 697 P.2d658 (1985) [historically most questions involving water rights in Arizona have been settled by special action or extraordinary writ]; issues of statewide importance affecting the operation of the juvenile court system were involved, Gammons v. Berlat, 144 Ariz. 148, 696 P.2d 700 (1985); to resolve an apparent conflict between two prior decisions of the court of appeals, Wisturber v. Paradise Valley Unified School Dist., 141 Ariz. 346, 687 P.2d 354 (1984); the question presented is of constitutional significance, Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984); the case presents matters of public concern and importance; speedy decision will serve the public interest, Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983); the question is a matter of first impression in Arizona, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983); the issues raised by the petition are such that justice cannot be satisfactorily obtained by other means and under no rule of law can a trial court's actions be justified (the error is patent), King v. Superior Court, 138 Ariz. 147, 673 P.2d 787 (1983); the issue was one of general interest and importance to the worker's compensation bar and involved a question of statutory construction which was likely to reoccur, Miceli v. Industrial Comm'n, 135 Ariz. 71, 659 P.2d 30 (1983); the order was not appealable, Richas v. Superior Court, 133 Ariz. 512, 652 P.2d 1035 (1982); Sheamaitis v. Superior Court, 114 Ariz. 288, 560 P.2d 806 (1976).

The realm of reasons given by the court of appeals has varied nearly as much, but there is more often a reference to the reasons given in the Rules, *supra* note 1. While it is not possible to cite as many examples of such decisions, special action relief has been granted by the court of appeals because: the trial court abused its discretion and granting relief would serve to terminate the litigation, Landon v. Stroud, 147 Ariz. 208, 709 P.2d 565 (Ct. App. 1985); because the trial court's order was not appealable and because the court abused its discretion, Sax v. Superior Court, 147 Ariz. 518, 711 P.2d 657 (Ct. App. 1985); because the remedy by appeal is not adequate and the question is of great significance to those who may desire to do business with Indian tribes, Val/Del, Inc. v. Superior Court, 145 Ariz. 558, 703 P.2d 502 (Ct. App. 1985); because the respondent court acted in excess of its authority, Arizona Dep't of Economic Sec. v. Superior Court, 147 Ariz. 408, 710 P.2d 1063 (Ct. App. 1984); because the trial court abused its discretion and exceeded its jurisdiction, Armstrong v. Hooker, 139 Ariz. 129, 677 P.2d 292 (Ct. App. 1984).

action petitions and opinions has increased over the years.[85]

THE USES OF SPECIAL ACTION

In any petition for special action there are three important interests to be considered: the interest of the court, the interest of the petitioner and the interest of the respondent real party in interest. It is easy to see the character of the interests of the petitioner and the respondent, while it is sometimes easy to forget the interest of the court. The creation and use of special actions have served the interests of petitioners, and probably of respondents, but it is less certain that special actions have served the real interests of the court.

Judicial Interests in Special Actions

Traditionally certiorari and prohibition were tools used by the courts to protect their jurisdiction. Mandamus, while not originally concerned with the jurisdiction of the courts, was used by the courts to protect the sovereign's power by directing the sovereign's agents to fulfill their obligations to the public. All of these writs served the useful purpose of an extraordinary means to advance the common good of order and justice. The discretionary character of the writs was designed to enhance the court's power and prestige. When properly used these writs should be a means for the courts to use their expertise and detachment from the immediacy of conflict to insure a just and smoothly operating system.

Special actions were created because of the widespread conviction in Arizona that the potential usefulness of extraordinary writs was frustrated by the confusion and difficulty surrounding their use. The Rules of Procedure for Special Action did attempt to address these problems by setting forth the proper grounds for use of special actions and the procedural rules surrounding petitions.

The procedural changes of the Rules seemed to have solved those problems.[86] Except for a few decisions involving questions of who were real parties in interest[87] and whether an original petition for special action or a

85. One reason for the expansion of issues is the proportional increase in special action questions heard by the supreme court. The supreme court hears special action questions both through original filings and through petitions for review from decisions of the court of appeals. Rules, *supra* note 1, Rule 8. For purposes of this Note, these two types of action have been considered to be the same, since they both originated as special actions. A computer-assisted search of all Arizona Supreme Court decisions since the creation of special actions reveals the following proportion of special action related decisions among the total number of opinions by the court (the first two years' decisions are omitted from this summary because of mandamus, certiorari and prohibition matters remaining from prior to the change): 1973 (15%); 1974 (13%); 1975 (20%); 1976 (17%); 1977 (13%); 1978 (15%); 1979 (13%); 1980 (24%); 1981 (24%); 1982 (22%); 1983 (29%); 1984 (25%); 1985 (23%). In 1975 the supreme court granted a large number of criminally related special actions because of the adoption of the new criminal code. Comment, *supra* note 2, at 552 n.139. In recent years the proportion of criminal matters addressed by the court through special actions has declined, although no written opinion of the court clearly indicates that the court has preference for non-criminal special actions.

86. See *supra* note 17 and accompanying text.

87. *E.g.*, Fenton v. Howard, 118 Ariz. 119, 575 P.2d 318 (1978) (judge named as respondent may appear as a real party even though he has no real interest); Klahr v. Court of Appeals, 134 Ariz.

petition for review was the best method of moving from the court of appeals to the supreme court,[88] there have been no serious conflicts over the procedures of special actions which have made it into written opinions.

It is less clear that the Rules setting forth the substantive nature of special actions have had the same salutary effect. It is proper, and reflective of all the rest of modern adjudication, that procedural barriers have been eliminated. It is proper that access to relief through the courts not be blocked by obtuse rules and ancient barriers. In this regard, therefore, it is proper that contemporary special action decisions by the courts concern themselves with the merits of the questions raised in the petition, and less with the strict questions of whether the actions which give rise to the petition are such that they require extraordinary relief.

One important reason for this result lies in the rules themselves. By allowing a petitioner to seek relief whenever there has been an action in excess of jurisdiction, an act which is a refusal to act according to a duty imposed by law, or an act which is an abuse of discretion, the Rules open a wide door. It is easy for a petitioner to argue that some or all of these factors are involved. To resolve these allegations the court must examine the respondent's actions. Thus, the Rules for special actions encourage the courts to examine the circumstances which gave rise to the petition. The actual jurisdiction of the court to hear the petition is dealt with briefly if at all.[89] To deal with a petition for special action now, the court must examine the actions which gave rise to the petition.

It is this examination which gives rise to the frustration felt by those who apply for a special action. Court decisions in cases arising out of special actions do not spend a great deal of time explaining why the special action

---

67, 654 P.2d 1 (1982) (child the subject of custody dispute was entitled to be a real party in interest in special actions to review court order).

88. In 1983, Rule 8 was changed to set forth clearly that the usual procedural is a petition for review to move from the court of appeals to the supreme court after the court of appeals has acted on a petition for special action. Rules, *supra* note 1, Rule 8.

89. *See supra* note 84 and accompanying text. Occasionally the court's decision on a matter acknowledges and dismisses respondent's argument that the court lacked jurisdiction. *See, e.g.*, State *ex rel.* Hyder v. Superior Court, 128 Ariz. 216, 222-23, 624 P.2d 1264, 1270-71 (1981); Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 334-36, 678 P.2d 517, 519-21 (Ct. App. 1983). It appears that jurisdiction is not a central concern in the special action matters that appear in written opinions because the court's jurisdiction is a threshold question. Because special actions are discretionary the only special actions which are accepted are those where jurisdiction is relatively clear.

There are alternative explanations, however. It is possible that neither petitioner's nor respondent's attorneys are prepared to argue the question of jurisdiction. It is also possible that the courts are not prepared to consider jurisdiction questions in special action petitions that they feel must be heard. Thus, in Porter v. Superior Court, 144 Ariz. 346, 697 P.2d 1096 (1985) the question of the denial of a motion to compel discovery was before the supreme court on a petition for review from the court of appeals declining jurisdiction in a special action. Aside from noting how the issue came before the court, there is no discussion of the question of the jurisdiction of the special action petition. (The supreme court held that the court commissioner abused his discretion in denying the motion to compel when the "ruling tends to thwart the purposes underlying rule 26(b)(1)." *Id.* at 348, 697 P.2d at 1098, citing ARIZ. R. CIV. P. 26(b)(1).

Jurisdictional questions are always potentially present in discretionary actions. The court can decline jurisdiction even when the application of prior tests would indicate that the petition should be accepted. Because of this the precedential value of any prior action serves only to show that jurisdiction has not been declined on such a question, because, for example there would be an adequate remedy by appeal. In citing a prior special action the petitioner is showing no more than that the question is susceptible to the expedited review of special actions.

was granted.[90] Such a lack of explanation, combined with the variation in what questions are accepted through special actions creates the potential for confusion among petitioners and respondents.

In an ironic way, it seems as if the source of practitioners' dissatisfaction with special actions arises from their success. Special action practice remains a murky and unpredictable world. There can be no doubt that everyone is better off now that Arizona courts have abandoned the useless intracacies of procedural and jurisdictional devices as a means to control extraordinary relief. Special actions are a useful reform. To the extent, however, that this reform has meant that the courts have lost control over extraordinary relief, the reform has not served a desirable purpose.

To understand the problem, and to discern the outlines of a solution, we can turn to the real and potential uses of special actions by petitioners and respondents.

Uses of Special Actions by Petitioners

Petitioners are the disadvantaged parties in the underlying action which gave rise to the petition for special action. They seek to use special action to gain a reversal of those actions which displease them. While successfully gaining a hearing through a special action is in no way predictive of a satisfactory result, it at least offers that chance. What follows is a brief examination of some successful petitions.

Criminal Issues

Over time, nearly every stage of the criminal justice system has been challenged through a special action. A criminal defendant has successfully challenged his indictment on the grounds that the prosecutor failed to inform the grand jury adequately of the law and the facts,[91] on the grounds that by restricting the questions that the grand jury could ask, the prosecutor was interfering with the grand jury's right to determine probable cause,[92] and on the grounds that in knowingly using misleading testimony the prosecutor was breaching her duty of good faith.[93] The jurisdiction of the grand jury has also been challenged.[94] All of these petitions arose when the trial

90. *See* supra, note 84 and accompanying text. Whenever it is possible to characterize a particular petition for special action as being similar to a prior petition, it probably would assist in gaining a hearing to cite the reasons for assuming jurisdiction given in a prior special action. This is true even when the substantive issue is not at all the same. Thus, in a question involving the right of appeal to a board of adjustment concerning the interpretation of a zoning ordinance, the court of appeals accepted jurisdiction because "this case presents a narrow legal issue of first impression, rather than controverted facts, and is a matter of important public interest," citing University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983), where the questions concerned partial summary judgment in a wrongful pregnancy action. P.F. West, Inc. v. Superior Court, 139 Ariz. 31, 32, 676 P.2d 665, 666 (Ct. App. 1984).

91. Crimmins v. Superior Court, 137 Ariz. 39, 668 P.2d 882 (1983).

92. Nelson v. Royalston, 317 Ariz. 272, 669 P.2d 1349 (Ct. App. 1983).

93. *Id.*

94. Franzi v. Superior Court, 139 Ariz. 556, 679 P.2d 1043 (1984). The court of appeals denied jurisdiction of the question. On a petition for review, the supreme court held that a grand jury's power to investigate may exceed its authority to indict and that lack of jurisdiction on the part of the grand jury to make an inquiry may not be raised as a defense if the response to the objectionable question is allegedly false. *Id.* at 560, 679 P.2d at 1047. Specifically regarding an indictment for

court denied petitioner's motion to dismiss the indictment.

Defendants have also been successful in getting criminal complaints dismissed because the police interfered with an opportunity to gather exculpatory evidence.[95] Both the defendant[96] and the state[97] have prevailed in special action attacks on the trial court's dismissal of complaints based on the constitutionality of the search and seizure leading to the arrest. Both the state and the defendant have been successful in special actions concerning evidentiary decisions made by the trial court,[98] concerning the right to compel or exclude witnesses[99] and the right to a jury trial in misdemeanor cases.[100] Under special circumstances the final verdict in a criminal trial can be the subject of a special action petition,[101] as can the defendant's subsequent treatment.[102]

---

perjured answers to questions allegedly outside the grand jury's authority the court held that the proof of perjury would suffice to prove the authority to ask the questions, because both involved the materiality of the questions. *Id.* at 561, 697 P.2d at 1048. By dealing with the questions raised in the special action, the court was acknowledging that the jurisdiction of the grand jury might be a legitimate defense, and that there could be jurisdiction to hear special action on the question.

95. McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982); Amos v. Bowen, 143 Ariz. 324, 693 P.2d 979 (Ct. App. 1984). Both cases were heard on the state's appeal of the superior court granting special action relief by an order directing the city court to dismiss. *McNutt* was heard on a direct appeal of the special action; *Amos* was heard on an appeal of the final judgment.

96. State *ex rel.* Eckstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983).

97. State v. Superior Court, 143 Ariz. 45, 691 P.2d 1073 (1984). Both this case and *Eckstrom* involved the question of roadblocks to apprehend drunk drivers. In both cases the trial courts dismissed the complaint and the state brought a special action. In neither case did the supreme court make any holding regarding the jurisdiction or discretion of the trial court to decide such questions.

The defendant is in no way precluded from bringing a special action to challenge the constitutionality of a complaint. *See, e.g.*, Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984) (double jeopardy and prosecutorial misconduct warranted dismissal of second complaint).

98. *Compare* State *ex rel* Collins v. Seidel, 142 Ariz. 587, 691 P.2d 678 (1984) (rules of evidence concerning admission of test results apply to both parties; state cannot use past cases for proof of general accuracy of tests yet seek to compel defendant to prove all elements) *with* State *ex rel.* Collins v. Superior Court, 145 Ariz. 493, 702 P.2d 1338 (1985) (trial court made an erroneous misinterpretation of prior cases in deciding to suppress defendant's statement).

99. *Compare* State *ex rel.* Baumert v. Superior Court, 133 Ariz. 371, 651 P.2d 1196 (1982) (as a matter of fairness defendant was entitled to depose officer) *with* State *ex rel.* Collins v. Riddel, 133 Ariz. 376, 651 .2d 1201 (1982) (trial court abused discretion in ordering relevation of identity of informant where information could not help defendant).

100. *Compare* State *ex rel.* Baumert v. Superior Court, 127 Ariz. 152, 618 P.2d 1078 (1980) (superior court abused discretion and exceeded jurisdiction in ordering a reversal of municipal court conviction of disorderly conduct where there was no entitlement to a jury trial under common law) *with* City Court v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972) (moral opprobrium of indecent exposure charge entitled defendants to a jury trial).

101. The state was able to challenge a judge's reversal of the jury's conviction of the defendant in State *ex rel.* Hyder v. Superior Court, 128 Ariz. 216, 624 P.2d 1264 (1981) because the action was otherwise non-appealable. Defendant's have also challenged their convictions, *e.g.*, Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1984) (trial court erred in not granting motion for acquittal where there was no foundation for evidence on blood alcohol level). An objection to this evidence was made at trial so an appeal on these questions was preserved. The supreme court granted the petition for special action after the petitioner argued that there was "no appeal from the superior court for most of the issues argued below (see ARIZ. REV. STAT. ANN. § 22-371 and Baca v. Don, 130 Ariz. 222, 635 P.2d 510 (Ct. App. 1981)) and construction of the new drunk-driving law is a matter of statewide concern," because the court found "the remedy by appeal inadequate and because . . . the case does present matters of public concern and importance; speedy decision will serve the public interest." *Id.* at 593, 680 P.2d at 124.

102. Subequent treatment can involve a number of questions including some which blend into special actions in the nature of mandamus actions against administrative agencies or personnel. Thus, under certain circumstances petitions for habeaus corpus will be treated as special actions because they are aimed more at compelling certain kinds of treatment than they are aimed at gaining

Civil Issues

As with criminal matters, nearly every stage of the civil process has been examined through special actions. The discretionary character of the writs is illustrated, among other ways, by the fact that nearly every issue raised in a special action has also been reviewed by the appellate courts through the appeal process. For some reason, not usually stated by the court, the alternative remedy by appeal was not deemed adequate in these special actions.

Special actions have been used to test the adequacy of the court's jurisdiction over foreign corporations,[103] to test the proper method for service of process,[104] and to test the adequacy of notice to members of a class in a class action suit.[105] In a case concerning the enforcement of a foreign judgment of paternity, the court held that the trial court judge abused his discretion in giving full faith and credit to a foreign judgment without holding a hearing when the petitioner raised a substantial question of fact concerning the foreign court's jurisdiction.[106]

Questions of the proper venue of a case have been reviewed through special action.[107] The supreme court has accepted a special action to test the validity of a dismissal for failure to state a claim and in the process of reviewing that action, the court redefined the nature of the claim.[108] The dis-

release for wrongfully held prisoners. *E.g.*, Pickett v. Boykin, 118 Ariz. 261, 576 P.2d 120 (1978) (petition for recalculation of time served in probationary proceedings); Stevenson v. Arizona Bd. of Pardons and Paroles, 109 Ariz. 412, 510 P.2d 384 (1973) (petition to be given hearing on application for commutation of sentence); Peru v. Raines, 130 Ariz. 44, 633 P.2d 453 (Ct. App. 1981) (petition for relief from "administrative segregation").

Special actions have also been used to challenge the revocation of probation when the revocation was based on an improper conviction. McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982). When the prisoner has been held for an unreasonable period of time awaiting a hearing on revocation of his probation, it is an abuse of a trial court's discretion not to order his immediate release. Padilla v. Superior Court, 133 Ariz. 488, 652 P.2d 561 (Ct. App. 1982). In this case, after the hearing was held, the court of appeals held that there had been no prejudice to the petitioner, thus release of the petitioner was not required. In addition to the implied holding that a petition for special action relief prior to the hearing would have resulted in relief, the court specifically mentioned that defendants held for such unreasonable periods could seek relief through civil actions. *Id.* at 490, 652 P.2d at 563, citing State v. Maldonado, 92 Ariz. 70, 76 n.7, 373 P.2d 583, 583 n.7 (1962). The state can bring a special action to compel the trial court to hold a prompt probation revocation hearing. State v. Fahringer, 136 Ariz. 414, 666 P.2d 514 (Ct. App. 1983) (abuse of trial court's discretion in not holding prompt hearing).

103. *E.g.*, Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 622 P.2d 469 (1980).

104. *E.g.*, Mervyn's, Inc. v. Superior Court, 144 Ariz. 297, 697 P.2d 690 (1985) (garnishment action is quasi-in-rem action where personal service of process is required unless party's address is unknown).

105. *E.g.*, A.J. Bayless Markets, Inc. v. Superior Court, 145 Ariz. 285, 700 P.2d 1385 (1985) (abuse of discretion to order notice by publication when alternative methods of personal notice had not been attempted).

106. Schilz v. Superior Court, 144 Ariz. 65, 71, 695 P.2d 1103, 1109 (1985).

107. *E.g.*, Gila Valley Irrigation Dist. v. Superior Court, 144 Ariz. 288, 697 P.2d 681 (1985) (it was not an abuse of discretion for trial judge to reverse dismissal on grounds on improper venue when there was no specific finding that venue was improper); Lemons v. Superior Court, 141 Ariz. 502, 687 P.2d 1257 (1984) (for good cause shown a dismissal for failure to pay fees on change of venue can be set aside); State v. Superior Court, 120 Ariz. 273, 585 P.2d 882 (1978) (where the state is a party, the Attorney General may demand a change of venue to Maricopa County).

108. Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (without holding that the trial court was in error for following precedent, the court overturned Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974), and held that the common law supported a claim for wrongful death of a fetus. *Id.* at 479, 6989 P.2d at 724).

missal of a complaint is subject to special action review when there has been an abuse of discretion.[109] Trial court decisions granting or denying summary judgments also have been tested through special actions.[110]

Questions concerning evidentiary matters and applicable law have been raised through special actions. Such questions include challenges to the grant of a motion in limine,[111] and a refusal to strike a witness.[112] The supreme court has held that while the trial court has broad discretion in matters of discovery, it was an abuse of discretion to deny the petitioner access to certain materials. In the process of this decision, the court defined the character of trial preparation materials under Arizona's Rules of Civil Procedure.[113] After a detailed examination of the jurisdictional interests in a conflict of laws question, the supreme court came to the opposite conclusion and vacated the trial court's choice of laws, without a specific holding that the trial court had abused its discretion or its jurisdiction.[114]

As with criminal matters, a decision by the trier of fact does not end the potential for special actions. An incorrect attempt to execute can be halted and challenged through a special action.[115] The supreme court has considered a motion to vacate an order denying a motion for a new trial to allow time to file a notice of appeal, on the grounds that the petitioner did not receive timely notice of the first denial of the motion for retrial.[116] It is, however, an abuse of discretion to refuse to dismiss an appeal when the time for filing has passed.[117] The court used a special action to vacate the jail sentence imposed for civil contempt after the petitioner had purged the contempt by paying the fine.[118]

General Patterns

The same patterns of special action being used to examine all aspects of governmental actions could be shown in actions concerning juvenile matters, family matters, and questions concerning quasi-judicial or administrative ac-

109. *E.g.*, Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985) (even though when complaint was filed there was no evidence of negligence it was an abuse of discretion to dismiss on grounds that pleadings were a sham).

110. *E.g.*, United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985) (proper to refuse motion for summary judgment where court had jurisdiction); Tanner Co. v. Superior Court, 144 Ariz. 141, 696 P.2d 693 (1985) (trial court erroneously interpreted statute in granting summary judgment); University of Ariz. Health Sciences Center v., Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983) (not an error to deny partial summary judgment in wrongful pregnancy action).

111. *E.g.*, Selective Resources v. Superior Court, 145 Ariz. 151, 700 P.2d 849 (1984) (the trial court erred in excluding highly relevant and nonprejudicial evidence concerning the effect on land values of a condemnation).

112. *E.g.*, Acosta v. Superior Court, 146 Ariz. 437, 706 P.2d 763 (Ct. App. 1985) (abuse of discretion to refuse to strike witness when no reasons shown for delay in producing witness).

113. Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725 (1983). The rule in question was ARIZ. R. CIV. P. 26(b)(3).

114. Wendelken v. Superior Court, 137 Ariz. 455, 671 P.2d 896 (1983).

115. *E.g.*, Wolfswinkel v. Superior Court, 145 Ariz. 154, 700 P.2d 852 (Ct. App. 1985) (the refusal to quash a void writ of special execution was an arbitrary refusal to perform a duty required by law).

116. Park v. Strick, 137 Ariz. 100, 669 P.2d 78 (1983).

117. DNB Constr., Inc. v. Superior Court, 125 Ariz. 61, 607 P.2d 380 (1980).

118. Korman v. Strick, 133 Ariz. 471, 652 P.2d 544 (1982).

tions.[119] Such an examination can be summarized as follows:

1) There are apparently no firmly fixed rules which would exclude any question raised by a petitioner.

2) Special action review is granted not because the actions in question were an abuse of discretion or in excess of jurisdiction. Special action petitions are accepted because the court wants to use the particular set of facts and questions raised to clarify this particular aspect of the law.

3) There is no fixed pattern of response to special action petitions or to the actions which gave rise to the petition: the court may or may not hold the respondent was abusing its discretion in the process of reversing the respondent's action; further the court may use special actions to set new law, to clarify new law, to clarify old laws, or to reconfirm old laws.

Respondent's Uses of Special Actions

As the winner in the actions which gives rise to the special action, the real party respondents are probably better off if there is no special action review. While it might be nice to gain an affirmation of the previous action, most respondents would probably subscribe to the motto "if it ain't broke, don't fix it." Overall, respondents have three possible avenues of defense against a special action petition: to try to get the petition denied; to emphasize offsetting equitable considerations which should serve to either get the petition denied, or get the relief denied, or both; or to emphasize the correctness of the previous action giving rise to the petition. Respondent's should not ignore any of these options.

---

119. Many of the special actions concerning quasi-judicial or administrative matters are statutory. These are most commonly filed in the superior court, or, in the case of Industrial Commission decisions, with the court of appeals. The adoption of the Rules for Special Actions was not intended to alter the statutory grant of review through a discretionary writ. The only effect was to change the name of procedure to that of a statutory special action. Rules, *supra* note 1, Rule 1.

While the statutory rules govern the character of statutory special actions, the absence of a statute would not necessarily preclude review of what is now reviewed in this manner. The original character of the extraordinary writs would allow a common law review of many of these actions. In Book Cellar, Inc. v. City of Phoenix, 139 Ariz. 332, 336, 678 P.2d 517, 521 (Ct. App. 1983), the court held that while the review would be more narrow than under a statutory special action, in the absence of the statute allowing special action review of board of adjustments decisions, there could still be a review in the nature of the common law writ of certiorari.

Special actions to review administrative or quasi-judicial actions are more rare than are special actions to review judicial decisions. Furthermore, given the relative ease of getting into court under modern rules of procedure, these special actions have been somewhat replaced by ordinary complaints. Nevertheless, these special actions represent an important aspect of special action practice which is, unfortunately, beyond the scope of this Note.

In these actions, appellate courts have continued to show the flexibility which makes special actions such an important remedy. Most importantly, the courts have been willing to look beyond the form of different requests to their substance. *See, e.g.*, State *ex rel.* Ariz. State Bd. of Pardons and Paroles v. Superior Court, 12 Ariz. App. 77, 467 P.2d 917 (1970) (an erroneous reliance on the Administrative Review Act will not prevent the court from treating the claim as a petition for special action). Appellate courts have continued the tradition of treating applications for one type of relief as an application for a more acceptable type. *E.g.*, State *ex rel.* Sawyer v. LaSota, 119 Ariz. 253, 580 P.2d 714 (1978) (petition for *quo warranto* treated as petition for special action); Brown v. State, 117 Ariz. 476, 573 P.2d 876 (1978) (petition for habeas corpus treated as special action petition). Note that while petitions for habeaus corpus do not always need a filing fee, to be considered as a petition for special action a filing fee must be paid, McCormick v. Wawrzazek, 133 Ariz. 386, 651 P.2d 1211 (Ct. App. 1982).To gain a waiver of filing fees petitioner's status as an indigent must be established. Graham v. Salazar, 135 Ariz. 334, 661 P.2d 184 (1983).

Defeating the Petition

The character of special actions is such that it is difficult to find successful defenses in the written opinions. Successful defenses to special actions do not get reported precisely because they are successful. While the respondent may prevail on the merits, this cannot be regarded as a successful defense to the special action itself. A successful defense would mean that the petition for special action was never accepted and thus there was no consideration of the questions raised. Because of the character of special actions a discussion of defenses must be composed primarily of statements as to the factors which generally preclude special actions, taken from cases where the court ignored these same factors.

Perhaps the best defenses can be found in the definition of special actions.[120] The absence of an act exceeding jurisdiction or an arbitrary act, if proven, should preclude granting a petition. Similarly, the argument that the respondent has acted or not acted properly according to respondent's duties and obligations should be considered by the court, and if true, should preclude accepting the petition. The difficulty with these arguments as defenses is that if they were unquestionably true there would have been no petition. As with all defenses to such discretionary actions, the merits of the case are a better defense than any technical argument over the jurisdiction of the court to grant the special action. The question of an adequate remedy by appeal serves as the best illustration of the problem.

Nearly every opinion related to special actions which includes any discussion of the jurisdiction of the court to hear the special action contains a statement that a special action petition will not be granted when there is an adequate remedy by appeal. Despite this, most special action decisions involve issues which could have been settled at a later date through an appeal.[121] When the court grants a petition for special action it is because the questions raised are significant enough that the eventual possibility of the court dealing with the question on appeal is not enough to prevent granting the petition. Indeed, the possibility of having to later deal with the same

120. *See supra* note 62 and accompanying text.

121. *See supra* notes 95-118 and accompanying text. The only possible exceptions are those discussed *supra* notes 95-101 and accompanying text (criminal matters where the state has "no appeal"), and what might be termed 'pure' mandamus actions—those against executive officers exercising ministerial duties. Most interlocutory questions can be considered eligible for resolution through appeal because the final judgment can be appealed based on the error committed at the interlocutory stage. In Nataros v. Superior Court, 1133 Ariz. 498, 499, 557 P.2d 1055, 1056 (1976), the court granted a special action petition even though it acknowledged that there was little chance that reversible error would have been found on appeal.

The most extreme example of the variation between the rule against an adequate remedy by appeal and the granting of a special action petition is the recent case of Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 148 Ariz. 1, 712 P.2d 914 (1985). The issue of the case involved the imposition of an injunction preventing the operation of food services for transients. After the trial court granted the injunction, the defendant filed a notice of appeal and a special action petition with the court of appeals. The court of appeals accepted the special action and accelerated the appeal, so that both could be heard at the same time. The decision by the supreme court reviewing the court of appeals decision contains no mention of the unusual character of the court of appeals actions. If this becomes the regular pattern of special actions, then the limitation of "no adequate remedy by appeal" has no meaning left.

issues is sometimes given as a reason for granting the special action.[122]

Despite the appellate courts' tendency to put aside its general rules concerning other adequate remedies at law[123] these and all other defenses should be raised when appropriate. They are legitimate arguments against any special action petition and may serve to tip the balance against granting of the petition. The proportion between petitions made and petitions granted indicates that there are many more successful defenses than unsuccessful defenses.

Equitable Arguments

While extraordinary remedies are legal remedies, they have many characteristics of equity, not the least of which is their *in personam* character.[124] Some aspects of equity have been applied to extraordinary relief in Arizona.[125] Where applicable, respondents should not hesitate to argue other equitable principles.[126] Equitable principles should be used at any point in the special action process, when resisting the petition or when arguing the merits of the underlying action. The traditional equity measure of adequate alternative relief could well be used in special actions. Like equity, special action relief is discretionary, therefore petitioned courts should be en-

122. *E.g.*, Summerfield v. Superior Court, 144 Ariz. 467, 469, 698 P.2d 712, 714 (1985).

123. *See supra* note 23 and accompanying text.

124. *See* D. DOBBS, *supra* note 57, § 2.11, at 113.

125. In Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 525, 622 P.2d 469, 472 (1980) the court stated that there was no time limit on when special actions could be brought. Subsequent courts have interpreted this to mean that the doctrine of laches or equitable estoppel is the only limit on the timeliness of special actions. State *ex rel.* Corbin v. Superior Court, 138 Ariz. 500, 675 P.2d 1319 (1984) (although any party may be estopped from bringing a special action due to a delay, even one of inaction or silence, a delay of six months did not serve to estop the state from filing the special action because the delay enhanced judicial economy through a combination of cases and did no prejudice); State *ex rel.* Arizona Dep't of Economic Sec. v. Kennedy, 143 Ariz. 341, 693 P.2d 996 (Ct. App. 1985) (a delay of two months was not enough to make the doctrine of laches appropriate, even had the opposing party raised it).

For the application of the equitable principle of clean hands, *see supra* notes 55-57 and accompanying text.

126. This Note has, like the Arizona courts, largely ignored any discussion of special actions or other extraordinary relief outside Arizona. The limitations of space and the focus of the Arizona courts serve as the only justification of this narrow focus in this Note. The idea of combining the extraordinary writs was itself taken from other state's examples. Nelson, *supra* note 5, at 416 n.10, states that because Arizona's special actions are modeled after New York's, "it is likely that the Arizona courts will follow New York in their interpretation of the rules." Nelson, *supra* note 5 at 416, also noted that Colorado had followed the same path of combining the three writs. *See* COLO. R. CIV. P. 106 as amended. The Colorado court, in North Poudre Irrig. Co. v. Hinderlider, 112 Colo. 467, 474, 150 P.2d 304, 308 (1944) held that while the combination had served to abolish the special forms of pleadings, the substantive aspects of such proceedings were preserved. *See also* Notes, *supra* note 19 at Rule 1 (citing N.Y. Civ. Prac. Laws and Rules § 7801 (McKinney's 1963) and COLO. R. CIV. PROC. 106 (1964) as the models for Arizona's rules for special action).

Few, if any, Arizona courts have felt it necessary to follow either the New York or Colorado precedents. Perhaps because of the emphasis by the Committee of their intent to conform to the provisions of ARIZ. REV. STAT. ANN. § 12-109(A) (1982), which prohibits any substantive change of rights through a change of rules, Arizona courts have confined themselves to the precedents established in cases prior to the adoption of the Rules for Special Actions, and to Arizona cases decided under the Rules.

This need not bind future courts, nor future petitioners or respondents. An analysis of how other states have dealt with the same problems which confront extraordinary relief practice in Arizona can only help resolve these problems in Arizona.

couraged to engage in the balancing of need, harm, urgency and certainty which are the hallmark of equity.

Arguing the Merits

Respondents in special actions have won once before. Given the contemporary nature of special actions, with the altered emphasis on the merits of the question raised, respondents should never neglect the claim that the underlying action leading to the special action petition was correct.

Judicial Uses of Special Actions

Appellate courts in Arizona have spent little if any space in written opinions discussing the contemporary nature of special actions. It is therefore difficult to state clearly how the courts view special actions. A semi-comprehensive study of recent special action opinions suggests that there are some patterns, but it is difficult to know if these are the product of deliberate choices, or if they reflect inchoate responses produced by either the nature of petitions or by the character of judicial personnel, or if they are the result of some random process.[127]

Special Actions as Writs of Error

Prior to the creation of special actions the general rule regarding extraordinary writs in Arizona was that the writs were not the equivalent of a writ of error. This meant not only that the writs were discretionary, as opposed to being a matter of right, but it also meant that 'mere error' would not be grounds for review through an extraordinary writ.[128] The one major exception to this was the writ of certiorari granted to review Industrial Commission or other quasi-judicial, quasi-administrative decisions.[129] Despite these limitations, however, as the previous discussion of the writs prior to the creation of special actions demonstrated, there were cases where the court reviewed erroneous actions.[130]

Since the creation of special actions, the willingness on the courts' part to make their decisions based on errors of judgment rather than jurisdictional errors has increased. The most common reasons for the court granting the relief sought is that the respondent abused its discretion or acted in excess of its jurisdiction. This is not surprising, because this is the language in the rules which gives the court its jurisdiction to hear the special action. Often, however, such language describes clearly erroneous behavior.[131] The

127. For an alternative categorization *see* Comment, *supra* note 2, at 549-54, which focused on three criteria that the court seems to use: the absence of an equally plain, speedy, and adequate remedy by appeal; the compelling circumstances of a petitioner; and the use of the special action as a supervisory mechanism. While nothing in this Note should be taken as a refutation of those criteria, there are alternative views of the courts' actions. For a brief listing of criteria somewhat similar to those given in the Comment, *see infra* text accompanying notes 135-56.

128. *See supra* note 26 and accompanying text.

129. Smith, *Certiorari*, in EXTRAORDINARY WRITS, *supra* note 2, at 54.

130. *See supra* note 30.

131. *E.g.*, Tanner Cos. v. Superior Court, 144 Ariz. 141, 696 P.2d 693 (1985) ("erroneous construction" of statute); State *ex rel.* Baumert v. Superior Court, 132 Ariz. 399, 646 P.2d 284 (1982) (no facts to support incorrect decisions); State *ex rel.* Collins v. Superior Court, 129 Ariz. 156, 629

recognition that the court is correcting errors through special actions is not as important as the type of errors that it sometimes recognizes. There is some difference between holding that a court has erred because it has exceeded its jurisdiction and holding that a court has exceeded its jurisdiction because it has erred.

The basis for a review of such errors is the idea that an error is an abuse of discretion. Because the Rules allow special action review of all abuses of discretion, all the decisions of inferior courts, tribunals, boards, and officers are subject to review by the appellate courts. The extraordinary writs are an ideal method for the appellate courts to police the behavior of the lower courts. The potential availability of special action review makes every decision available for review at the supreme court's discretion.

Special Actions and Interlocutory Appeals

In several special action decisions the supreme court has declared that it does not want to create an interlocutory appeal.[132] These statements were made in cases where the court heard a petition for a special action on interlocutory questions.

It would be easy but incorrect to conclude that special actions have actually become the equivalent of interlocutory appeals. Special actions can not serve as an alternative for interlocutory appeals because they depend too much on the discretion of the appellate court and because they are available for too many other issues.

While the presence of trial court error may influence the appellate court's decision to accept a special action, the type of error may not be the type usually examined in an interlocutory appeal. Further, an error of law is not necessary to the grant of a special action, even when a special action is directed at a court. Special actions are available at any time against any governmental official, not merely against a trial court during the preliminary stages of a trial. Therefore, the adoption of rules concerning interlocutory

---

P.2d 992 (1981) (to correct a plain and obvious error); Nataros v. Superior Court, 113 Ariz. 498, 557 P.2d 1055 (1976) (under no rule of law could the trial court's decision be justified). The author of the Comment, *supra* note 2, at 547, suggests that in decisions such as these, the court is blurring the distinction between discretion and jurisdiction, and that this blurring creates confusion among the practicing bar. It is difficult to justify maintaining the distinction between jurisdiction and discretion when the Rules clearly allow a court to grant a petition for special action whenever either problem exists. There can be no doubt that the courts are using both reasons when granting the petitions.

A more important question is whether special actions are being issued to review pure errors. It seems clear that the presence of error does at least occasionally motivate the court in their grant of these petitions. Citing State *ex rel.* Collins v. Superior Court, 129 Ariz. 156, 629 P.2d 992 (1981), the court of appeals in Amos v. Bowen, 143 Ariz. 324, 327, 693 P.2d 979, 982 (Ct. App. 1984) said "[s]pecial action jurisdiction may be assumed to correct a plain and obvious error committed by the trial court."

132. United States v. Superior Court, 144 Ariz. 265, 269, 697 P.2d 658, 662 (1985); King v. Superior Court 138 Ariz. 147, 150 n.3, 673 P.2d 787, 790 n.3 (1983).

In United States v. Superior Court the court may have been limiting its discussion of the general rule against using special actions for review of interlocutory or intermediate orders to "review of orders denying motions to dismiss or for summary judgment." 144 Ariz. at 269, 697 P.2d at 662. This limiting language may have been inadvertant, however, since it does not correspond to the general notion of the character of interlocutory questions. *See* Davis, *Arizona Appellate Practice: A Need for the Discretionary Interlocutory Appeal*, 17 ARIZ. B.J. 20 (1981); Comment, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607 (1975).

appeals would not abolish the need for special actions, nor would this solve whatever problems surround special actions.[133]

While special actions have been used to gain interlocutory review of lower court decisions, they have too many other functions to be classified as interlocutory appeals. The discretion involved in special actions and the expanse of issues covered by special actions make special actions different from an interlocutory appeal. Special actions are a means to increase the power of the courts. As used by the appellate courts in Arizona, especially the supreme court, special actions are important as a means to monitor and control the behavior of lower courts. As a means of control, special actions may or may not work well, but that is apparently one of the major forces behind the use of special actions in the 1980s.

The courts of Arizona are using special actions more and more often. The value of special action relief is that such relief allows the courts to use their power and expertise to rectify abuses of the system. The chance for abuse resulting from the lack of a coherent and easily understood set of rules makes special actions potentially dangerous. The potential for manipulation of the courts through special actions may result in special action petitions becoming too much of a distraction to the courts and may result in some worthwhile petitions being ignored while others less worthy are considered. If this is a problem for the courts, the first step toward a solution is to recognize the diverse categories of special actions.

CONTEMPORARY CATEGORIES OF SPECIAL ACTIONS

While the discretionary character of special actions makes each petition unique, there are some common patterns which can be seen in the use of special actions. An impressionistic presentation of the pattern illustrates the types of choices that the appellate courts make when considering petitions for special action.[134]

1. The traditional foundation

Breaking new ground in the use of special actions has not meant an abandonment of special actions in the prior tradition of the extraordinary writs. Special actions are still used to test the limits on the jurisdiction of lower courts,[135] the continued presence of jurisdiction in the lower court,[136]

133. *Contra* Comment, *supra* note 2.

134. As an alternative, it is necessary to recognize the possibility that there are *no* rules or patterns in the acceptance of special actions. Beyond the possibility of pure whim, the acceptance of special action petitions may depend on ideosyncratic factors such as the particular parties involved, the quality of the written petition and response, or the workload of the court when the petition is received.

Before examining the types of special actions, the reader should be warned that this listing is an impressionistic and incomplete examination of special actions. These categorizations, as with the rest of the Note, should not be taken as the last word on special actions.

135. *E.g.*, Hyder v. Superior Court, 127 Ariz. 36, 617 P.2d 1152 (1980). In a one page per *curiam* opinion, the court there held that in admitting polygraph evidence without stipulations from both parties the superior court was ignoring established Arizona precedent and thus exceeding its jurisdiction.

136. *E.g.*, Hare v. Superior Court, 133 Ariz. 540, 652 P.2d 13187 (1982) (superior court exceeded its jurisdiction when it adopted rule concerning plea agreements without the approval of the

the handling of a case on remand,[137] the validity of an extraordinary writ,[138] and the nature of a ministerial[139] or discretionary[140] administrative action.

2. *Housekeeping*

In addition to their occasional use as a form of declaratory judgment,[141] special actions are used by the appellate courts to clear up questions which need an authoritative statement. Often these matters are simple[142] but they can be of great moment.[143] Handling these matters through special action has the advantage that a definitive statement can be made quickly, in the first case where the issue arises, so that that case and all subsequent cases will not have to wait for a decision through appeal.

3. *Short cutting the appellate process*

Special actions as shortcuts are obviously closely related to the special action for housekeeping purposes. The difference is that these matters are not questions of first impression. Instead they are regularly occurring ques-

---

supreme court and in conflict with the Rules of Criminal Procedure); Rios v. Industrial Comm'n, 120 Ariz. 374, 586 P.2d 219 (1978) (jurisdiction of Industrial Commission to determine paternity and thus dependency).

137. Civil Rights Div. v. Superior Court, 146 Ariz. 419, 706 P.2d 745 (Ct. App. 1985) (special action may be utilized as a remedy after an appellate decision has become final to test whether the trial court is acting contrary to the directives of the appellate court); Scates v. Arizona Corp. Comm'n, 124 Ariz. 73, 601 P.2d 1357 (Ct. App. 1979); Sepo v. Case, 25 Ariz. App. 176, 541 P.2d 1160 (1975) (special action was proper method to test trial court's application of appellate court's ruling on remand).

While I am not aware of a specific holding that a special action decision would be *res judicata* in other aspects of the underlying action, it is clear that this should be true. The treatment of special action holdings as being the law of the case should, by itself, serve to demonstrate that special action decisions are *res judicata*.

The decision in *Civil Rights Div.* also illustrates the point made *supra* notes 80-81 and accompanying text concerning the appellate courts' use of special actions to direct lower court action. In *Civil Rights Div.*, at 423, 706 P.2d at 749, the court said, "[a]lthough our mandate in this case was not as specific as that in *Scates, supra*, and this trial court was required to perform more than a merely ministerial act, we nevertheless believe that the circumstances of this case render special action relief appropriate. . . ." The court of appeals then went on to direct the superior court to enter judgment on five specific points. *Id.* at 427, 706 P.2d at 753.

138. Cochise County v. Helm, 130 Ariz. 262, 635 P.2d 855 (Ct. App. 1978) (special action to challenge the venue of a special action filed in superior court).

139. Maricopa County v. State, 126 Ariz. 362, 616 P.2d 37 (1980) (ministerial duty existed for state to accept state prisoners after sentencing; however, impossibility of performance is an adequate defense).

140. Board of County Supervisors v. Rio Rico Volunteer Fire Dist., 119 Ariz. 361, 580 P.2d 1215 (Ct. App. 1978) (if an officer has acted arbitrarily or in abuse of discretion, mandamus (special action) can be used to order officer to act properly).

141. Board of Supervisors v. Woodall, 120 Ariz. 379, 586 P.2d 628 (1978) (Board sought decision regarding board's authority to hire private counsel).

142. McBride v. Superior Court, 130 Ariz. 193, 635 P.2d 178 (1981) (in actions commencing prior to the statutory change in interest rates, the new rate would be used from the effective date of the statute).

143. Cheney v. Superior Court, 144 Ariz. 446, 698 P.2d 691 (1985); Shea v. Superior Court, 150 Ariz. 271, 723 P.2d 89 (1986) both cases involve the application of the new Uniform Contribution Among Tortfeasors Act, ARIZ. REV. STAT. ANN. §§ 12-2501 to 12-2509 (Supp. 1985)). *Shea* illustrates an occasional tendency to decide all the issues, once the case is before the court. Thus, in *Shea*, the court ruled on the indemnity liability of the parties as well as resolving the question of the court's power to accept the case again after dismissal so as to qualify the case under the Uniform Contribution Among Tortfeasors Act, ARIZ. REV. STAT. ANN. §§ 12-2501 to 12-2509 (Supp. 1985).

tions which are fact specific, subject to varying interpretation, and almost certainly subject to appeal no matter what decision is made by the trial court. Conflict of laws[144] and personal jurisdiction questions[145] epitomize these concerns. The advantage to the courts and the parties of using a special action for this type of problem is that it provides an early resolution for issues which may well determine the outcome, and which, absent an early review, may require retrial of the case. The disadvantage for the courts is that this is obviously a form of interlocutory review.[146]

4. Where there is no other form of review

These actions appear most often as, and may be limited exclusively to, petitions by the state involving adverse decisions by trial courts in criminal matters.[147] They differ from the ordinary special action as a short cut because the state cannot rely on the opportunity to appeal an adverse judgment. There is a close analogy in civil cases with questions concerning dismissal of complaints, motions to amend complaints, or other non-appealable orders,[148] although these are much closer to the use of special actions as a short cut. In a similar vein are special actions to review juvenile custody orders.[149]

5. As a means of reprimand

Occasionally, the behavior of the respondent will be so distasteful to the

144. Bryan v. Silverman, 146 Ariz. 41, 703 P.2d 1190 (1985).

145. Northern Propane Gas Co. v. Kipps. 127 Ariz. 522, 622 P.2d 469 (1980).

146. *See supra* text accompanying notes 132-33.

147. *E.g.*, State *ex rel.* Collins v. Superior Court, 145 Ariz. 493, 702 P.2d 1338 (1985) (improper suppression of statement to police); State *ex rel.* Hyder v. Superior Court, 128 Ariz. 216, 624 P.2d 1264 (1981); State v. Superior Court, 147 Ariz. 615, 712 P.2d 462 (1985) (improper disclosure of identity of confidential informant); State v. Superior Court, 129 Ariz. 360, 631 P.2d 142 (Ct. App. 1981) (review of a grant of a motion *in limine*). The closest analogy to this type of special action for the defendant in a criminal case would be a special action filed to prevent the use of prejudicial evidence, *e.g.*, Hitch v. Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985). For a discussion of the problem, see Thoresen v. Superior Court, 11 Ariz. App. 62, 461 P.2d 706 (1970), quoted *supra* note 36.

The problem of using this as a separate category, and the problem of using the general requirement that no appeal be possible before special actions can be heard, is that it is possible to appeal such decisions, *e.g.*, State v. Hicks, 146 Ariz. 533, 707 P.2d 331 (Ct. App. 1985) (state's appeal of granting of a motion to suppress). This illustrates the dilemma faced by petitioners and respondents, and probably by the courts hearing the petitions: what to do about the possibility of an alternative remedy through appeal. If there is a trend in court decisions concerning this problem, aside from those cases where the issue was apparently overlooked by everyone, it is to emphasize the lack of an adequate remedy other than through a special action. Because adequacy is an undefined term this serves to bring the courts, petitioners, and respondents back to the facts of the case before them for an individual determination of the adequacy of other remedies.

148. *E.g.*, Sax v. Superior Court, 147 Ariz. 518, 711 P.2d 657 (Ct. App. 1985) (order setting aside default judgment); Boone v. Superior Court, 145 Ariz. 235, 700 P.2d 1335 (1985) (improper dismissal of complaint when at the time of filing there was no evidence of liability); King v. Superior Court, 138 Ariz. 147, 673 P.2d 787 (1983) (order dismissing an action); DNB Constr. Inc. v. Superior Court, 125 Ariz. 61, 607 P.2d 380 (1980) (failure to perfect timely appeal; no relief granted); Romo v. Reyes, 26 Ariz. App. 374, 548 P.2d 1186 (1976) (denial of motion to amend); *see also* King v. Coulter, 113 Ariz. 245, 550 P.2d 623 (1976) (test of court's authority to dissolve corporation).

149. *E.g.*, Klahr v. Court of Appeals, 134 Ariz. 67, 654 P.2d 1 (1982); Arizona Dep't of Economic Sec. v. Superior Court, 147 Ariz. 408, 710 P.2d 1063 (Ct. App. 1984); Silver v. Rose, 135 Ariz. 339, 661 P.2d 189 (Ct. App. 1982).

court that it seems that the special action is being granted merely to give the court an opportunity to demonstrate its disagreement. These special actions can be discerned by the language the court uses, such as "under no rule of law can a trial court's actions be justified,"[150] that the Industrial Commission had "acted arbitrarily and unjustly,"[151] or that an employer had "acted in bad faith."[152]

6. As a means of resolving an extraordinary matter

There are some issues in Arizona which are so important that the court seems willing to grant a special action petition so that it can address the issue most quickly. Questions concerning water rights[153] or the relations between the state and the Indian tribes[154] or questions concerning both[155] are the most obvious entrants in this category, although other issues of first impression may fit as well.[156]

Is Reform Necessary? A Conclusion

It would be out of character for any study of extraordinary writs in Arizona not to address the question of reforming the system.[157] The calls for reform have centered on the procedural complexities formerly required and, as might be expected, on the continuing discretionary character of the actions. The procedural problems were apparently solved with the adoption of the original rules.

To address the question of further reform, one must begin with the question of what, if anything, is wrong with contemporary special actions? While it may be that there is nothing wrong, it is my impression that there are two interrelated problems remaining in special action practice. First, potential petitioners and respondents seek some guidance as to what are the best methods to approach a special action. Second, the appellate courts in Arizona may be burdened with too many special action petitions. These problems are interrelated because the most common response to the pressures of contemporary litigation is, when faced with uncertainty, to file the potentially proper motion or petition. If they are so closely connected, then of course the solution to one will also be the solution to the other.

However these problems are to be solved, there should be no further major changes in the structure of extraordinary relief. The creation of special actions out of the previous three separate writs was an important step in

150. King v. Superior Court, 138 Ariz. 147, 149-50, 673 P.2d 787, 789-80 (1983).
151. Miceli v. Industrial Comm'n, 135 Ariz. 71, 73, 659 P.2d 30, 32 (1983).
152. Lewis v. Jamieson, 135 Ariz. 322, 660 P.2d 1249 (Ct. App. 1983).
153. *E.g.*, Town of Chino Valley v. State Land Dept., 119 Ariz. 243, 580 P.2d 704 (1978).
154. *E.g.*, White Mtn. Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971); Val/Del, Inc. v. Superior Court, 145 Ariz. 558, 703 P.2d 502 (Ct. App. 1985).
155. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).
156. Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (1985) (fetal wrongful death); University of Ariz. Health Sciences Center. v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983) (wrongful pregnancy).
157. Every major discussion of the subject in the past has been a vehicle for either advocating reform, *see* Lesher, *supra* note 4; Extraordinary Writs, *supra* note 2; Comment, *supra* note 2, or explaining the reforms already taken, *see* Notes, *supra* note 19; Nelson, *supra* note 5.

the right direction. While the uncertainty which exists today was not solved by the combination of the writs, it seems as if the potential is present in contemporary special actions to solve this problem. Further major reform might or might not solve the problem: the danger is that such major reform might also undermine the accomplishments of contemporary special actions.

The Courts Must Decide

Contemporary special actions may be working well, whether one takes a cynical or a practical view. The lack of any apparent rules encourages petitions which might not be made if there were more clarity. The present absolute discretion allows the courts to choose among the widest possible spectrum of petitions. While an aura of arbitrary mystery may not be the best public image, it certainly maintains the impression of a powerful judiciary. From the courts' perspective, the only problem with contemporary special actions may be the increased workload, and this cost may be worth the accompanying gain, however viewed.

If, however, some reform is necessary, the question is: how can the system be clarified without too much loss? Contemporary special actions serve a valuable purpose in their expeditious handling of important questions, and this value should not be lessened by any reform.

The most needed reform is for the courts to outline their attitude toward special actions. If the courts can give more clarity in their views of the most important uses of special action the number of superfluous petitions should decline.

A Little Dicta Should Go a Long Way

To avoid suggesting that the solution to the excess workload on the courts is more work is difficult. Perhaps the greatest contribution that the courts could make would be to write opinions regarding the unsuccessful petitions. Written opinions concerning successful petitions, even opinions which announce that the present petition is an exception to a general rule, do nothing to discourage superfluous petitions.

Beyond this, it would probably help potential petitioners if the courts would make analogies to more familiar aspects of legal practice. The parallels between extraordinary relief and equity have already been mentioned.[158] The courts could go further by clarifying the extent to which other traditional boundaries apply. While the potential for using special actions to skirt the traditional limits on political questions, hypothetical questions and such may not be very great, announcing such limits may serve to illustrate how all special actions should be treated.

What Should Special Actions be For?

The value of contemporary special actions is twofold. One important function is the discretionary interlocutory function. Special actions serve as a means for the appellate courts to guide the lower courts so that the entire

158. *See supra* notes 54-56, 122-24 and accompanying text.

judicial system can function more smoothly. Related to this function, but ranging more broadly, special actions also give the appellate courts a role as arbitrator in disputes between private citizens and their government. The flexibility of special actions as a combination of the traditional writs allows the courts to provide an important service to the other branches of government and to citizens who come in contact with government at whatever level.

The present value of special actions, and the improvement made through the past evolution of this system of relief is best illustrated by the nature of contemporary special action decisions. While special action decisions may be weak in that they provide little guidance for future special action petitioners or respondents, they are strong in that the focus of the decision is on the merits of questions raised and not on procedural or jurisdictional questions.

The character of extraordinary writs has always been a means to control the excesses and abuses of the government. The best means to assure that the use of special actions does not itself become an abuse of power is the courts' own sense of duty and the vigorous opposition of respondents. Ultimately, however, the best defense against a special action petition must be the merits of the action which gave rise to the petition. In an area of law where the original and continuing motive has been to do justice, the observation that the merits of the respondent's case provide the best defense also serves as the best defense of the system of special actions.