EXTRAORDINARY WRITS IN THE APPELLATE COURTS OF ARIZONA

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To appeal a case in Arizona is easy enough. The procedure is familiar and generally uncomplicated, and any lawyer who will read the controlling statutes and the courts' own rules can file his appeal, submit his record, prepare his briefs and argue his cause with some assurance that, mechanically at least, he knows what he is doing. The invoking of appellate jurisdiction is routine. But the courts of our appellate system are also courts of original jurisdiction, the exercise of which produces about ten percent of the opinions written and occupies about a quarter of the courts' time. It can also produce extraordinary headaches for the attorney who would invoke it. One who seeks the extraordinary writ moves in a murky world where statutes seem designed merely to confuse, where written rules are either incomplete or lacking entirely, and where the only path is in the footsteps of those who have gone before, a good many of whom have fallen off the edge.

Arizona's Constitution clothes the Supreme Court with original jurisdiction in two areas. As the provision is now written: "The Supreme Court shall have . . . original jurisdiction of habeas corpus, quo warranto, mandamus, injunction *and other extraordinary writs to state officers.*"[1] (Emphasis added.) The provision thus enlarged upon that narrower jurisdiction within which, prior to 1961, the court was restricted, in issuing writs to state officers, to the writs of habeas corpus, quo warranto, and mandamus.[2]

The second and more important part of the Supreme Court's original jurisdiction derives from the same article of the Constitution, and provides that the Supreme Court shall have "power to issue injunctions and writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to complete exercise of its appellate and revisory jurisdiction."[3]

The original jurisdiction of the Court of Appeals is defined in Arizona Revised Statutes, Section 12-120.21.[4] It has original jurisdiction

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[1] ARIZ. CONST. art. 6, § 5, as amended (1961).

[2] Lindsey v. Duncan, 88 Ariz. 289, 356 P.2d 392 (1960).

[3] ARIZ. CONST. art. 6, § 5, as amended (1961).

[4] ARIZ. REV. STAT. ANN. § 12-120.21 (Supp. 1964).

of habeas corpus[5] and its power to issue writs in the exercise of its appellate jurisdiction is apparently coextensive with that of the Supreme Court.[6]

Whether the matter is before the Supreme Court or the Court of Appeals, and whether the writ sought is directed to a state officer or a lower tribunal, the attorney seeking or resisting the writ faces the same essential procedural and mechanical problems. In fact, however, the great majority of writ cases involves the appellate and revisory power of the court. The typical case concerns a petition for a writ of prohibition and/or certiorari directed to the Superior Court, or the judge thereof. While the respondent may be some other tribunal than that court, it must nevertheless be a judicial tribunal, at least within the broad sense of that term. This is true because the appellate court has no "appellate" or "revisory" jurisdiction over any other sort. The Supreme Court has held itself to be without power to issue a writ to any lower tribunal unless it has at least ultimate appellate jurisdiction over that tribunal.[7] There would seem to be nothing in the 1961 constitutional amendment to change that rule.

This does not, however, mean that writs can issue only to a tribunal from which there exists *direct* appeal to the issuing court. The Supreme Court's appellate and revisory jurisdiction would seem clearly to extend down the line of courts of law, and to any of these its writs may issue. But may the Supreme Court issue a writ of certiorari to either the Superior Court or the Justice Court in connection with a *matter* over which the Supreme Court has no appellate power? If the Justice of the Peace exceeds his jurisdiction in an action in forcible detainer, may that excess be reviewed by the Supreme Court on a writ of certiorari? The case could never be appealed to that court; the court has no appellate jurisdiction over it.[8] It is clear, however, that although the Supreme Court has no appellate jurisdiction over that particular case, it has general appellate and revisory power over the tribunal involved, *i.e.*, the Justice Court. It is not clear from the statutes or case law whether that is enough to authorize its issuing the writ. In practice the problem is of little significance; as will be seen, there are other reasons why the Supreme Court would be unlikely to involve itself in such a case in any event.

The Supreme Court's jurisdiction to issue the extraordinary writ to the Court of Appeals is, of course, exclusive. Its jurisdiction to issue it to the Superior Court appears to be co-extensive with that of the

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[5] ARIZ. REV. STAT. ANN. § 12-120.21(A)(1) (Supp. 1964).

[6] ARIZ. REV. STAT. ANN. § 12-120.21(A)(4) (Supp. 1964).

[7] Lindsey v. Duncan, 88 Ariz. 289, 356 P.2d 392 (1960).

[8] ARIZ. REV. STAT. ANN. § 12-1182 (1956).

Court of Appeals. Its jurisdiction to issue the writ to inferior courts, courts not of record and other bodies exercising the judicial function is shared with both the Court of Appeals and the Superior Court.[9]

The Supreme Court has imposed one limitation upon its exercise of its original jurisdiction, which is of great practical importance. Whenever a petition for an extraordinary writ might lawfully have been made to a lower court, that petition must set forth the circumstances which make it appropriate that it issue from the Supreme Court.[10] In practice this rule has tended heretofore to limit writs in the Supreme Court to those cases in which the Superior Court was respondent. With the creation of the Court of Appeals, its consequence may well be the further limiting of writs from the Supreme Court to those directed to the Court of Appeals. The Court of Appeals has adopted Rule 1 for itself,[11] making a comparable showing a condition of its own issuance of an extraordinary writ in cases where it shares jurisdiction with the Superior Court.

Most of the problems arising from extraordinary writs relate to matters of practice and procedure. This is caused, in part at least, by the somewhat uncertain language of the statutes and court rules covering the subject. Statutes governing the particular writs generally indicate the circumstances in which each writ will issue and, in some cases, the general nature of the procedure to be followed. Rules of court specifically relating to extraordinary writs are usually directed to some expansion or clarification of the statutes. Neither statute nor rule, separately or together, adequately explains to the practicing attorney the details of the process by which extraordinary writs are sought and issued. It is largely with bread and butter questions of mechanics, therefore, that the practitioner seeking the extraordinary writ must cope.

Some considerations of the procedures involved apply equally to all of the extraordinary writs. There is, for example, the question of the proper designation of the parties to the proceeding. The identity and status of the petitioner are clear; he is the person beneficially interested in obtaining relief. His status and interest in the matter must show on the face of the petition, which must set out in clear terms the nature of the right of petitioner to the relief sought. In the cases of the writs of mandamus and certiorari, this requirement is spelled out by statute.[12] Even in the absence of such a statutory provision, the

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[9] ARIZ. CONST. art. 6, § 18.

[10] ARIZ. SUP. CT. R. 1(b).

[11] ARIZ. SUP. CT. R. 47.

[12] For mandamus, see ARIZ. REV. STAT. ANN. § 12-2021 (1956); for certiorari, see ARIZ. REV. STAT. ANN. § 12-2002(A) (1956).

rule holds: the petitioner must be a person beneficially interested in the result and his interest must show on the face of the petition. (It should be noted that what is here called the petition is variously referred to, in statute and court rule, as an "application," a "petition" or an "affidavit.")

The respondent is the person, body or tribunal sought to be brought before the court. Where the respondent is a court, it is proper to name it as such, *e.g.*, "The Superior Court of Arizona, in and for the County of Pima." There are, however, many cases in which the judges of the court, rather than the court itself, have been designated as respondents.[13] The best practice seems to be to name both the court and the judge, as "The Superior Court of Arizona, in and for the County of Pima, and John Henry Smith, a Judge thereof."[14] However it or he may be designated, the respondent is often a wholly nominal party. In petitions for the writs of prohibition and certiorari he almost always is. As the Superior Court, or as a judge who has acted or failed to act and whose conduct is asked to be reviewed, the respondent, as a rule, has no real interest in the outcome of these proceedings. If he appears at all (and he usually does so in form, if not in fact), it is by and through the agency of, and by the attorneys for, the real party in interest. This real party in interest is the party whose view has prevailed in the proceeding before the respondent, and at whose instance the respondent has presumably done the act sought to be reviewed by the writ. These parties must be designated as such in the petition for the writ, and must be served with notice of the petition and the hearings which follow its filing. In practice they are thereafter treated as though they, and not the inferior tribunals, were the respondents, and our court has even, in some opinions, referred to them as such.[15] The proceedings on a petition for any extraordinary writ are full adversary proceedings between the petitioner and the real party in interest. In petitions for writs of mandamus and quo warranto, of course, the respondent is most often himself the real party in interest, appears for himself by his own counsel, and has a lively interest in the outcome.

In any case involving the extraordinary writs, the pleadings are all-important. Petitions are granted or denied, writs issued or refused, almost entirely on the basis of what is before the court in writing. This is true because more than in any other type of proceeding in our appellate courts, time pressure precludes real consideration of anything else. In the Supreme Court, for example, petitions for these writs are heard on Tuesday mornings. There may be from two to five or six petitions

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[13] See, *e.g.*, Duncan v. Truman, 74 Ariz. 328, 248 P.2d 879 (1952).

[14] See, *e.g.*, Hazard v. Superior Court, 82 Ariz. 211, 310 P.2d 830 (1957).

[15] See, *e.g.*, Miller v. Superior Court, 88 Ariz. 349, 356 P.2d 699 (1960).

to be heard, along with the court's entire motion calendar, ex parte matters, and conferences on proposed decisions. Counsel who is granted ten minutes to explain his presence and his petition is, in the circumstances of that calendar, lucky. The judge's preliminary, and usually lasting, impressions about the merits of the case have already been formed from an examination of the pleadings. These, if all has gone well, were handed to each judge by the end of the preceding Friday. Between Friday night and Tuesday morning, the judges will have arrived at conclusions, however tentative they still may be, about the merits of the petition. It is the exceptional case in which the hearing changes the result. About seventy-five percent of all petitions for extraordinary writs brought to the Supreme Court are rejected summarily, without alternative writ and without opinion. For most of these, rejection is appropriate. There are others, however, which merit consideration which they do not receive, almost always because of hasty and inartistic draftsmanship of the petition.

The form and contents of the petition have been established partly by rule of court and partly by custom and practice. The pressure of time generally precludes its reduction to the form of an appellate brief. It is therefore filed as the rules of the appellate courts permit motions to be filed—*i.e.*, on legal size paper, typed with carbon copies or otherwise duplicated. Six copies are filed with the clerk, the original of which is verified by or for the petitioner. Appended to it, sometimes as an integral part of the petition and sometimes as a supplement thereto, is a memorandum of the points and authorities on which petitioner relies. The petition contains the designation of the parties, including the real parties in interest. It must spell out the nature of the writ requested, and it must contain all of those facts from which the court can conclude that the relief is appropriate. It serves the function here of the Complaint in the trial court, and like the Complaint, it must detail all of the ingredients of the petitioner's right. If the writ might lawfully have issued out of an inferior court, the petition must justify its filing in this one. In short, the petition must establish the existence of every fact on which issuance of the requested writ is conditioned.

The completed petition, verified by the petitioner and signed by his attorney, is presented to the Chief Justice of the court or such other justice as may then be acting for him, with a request that he assign a date for hearing. He will sign an order, which should be presented with the petition, setting a hearing on a following Tuesday morning. While there is no precisely established form for such an order, and while various are used, the form of the Order to Show Cause is appropriate, and has, for most lawyers, the advantage of familiarity. The order, in other words, may direct the respondent to appear at the designated time before the court to show cause why the writ should not be issued.

That order, together with a copy of the petition, must be seasonably served (in practice, immediately) on both the respondent and the real parties in interest.[16]

Great as the pressures of time are on the petitioner—and he is always in a hurry—they are even greater on his opposition. That party may find himself served with the Petition and Order to Show Cause less than a week before the Tuesday set for the hearing. In that time he must research the law, establish his defenses, and file his responsive pleading. That pleading may take the form of a Motion to Dismiss or an Answer. Both are commonly used, although the latter is more flexible in that it permits the establishment of defenses in fact as well as those in law. The responsive pleading is not required to be filed until the return (*i.e.*, the hearing) day and time.[17] A realistic view of his situation, however, ought to make clear to any responding attorney that he must not wait that long to file his pleading. It is highly desirable that the pleading be in the hands of the Clerk of the Court by the afternoon of the Friday preceding the hearing; otherwise, the judges will have for their advance reading and study only his adversary's petitions, standing unopposed. The attorney who on Tuesday morning tenders his responsive pleading for the first time will afterward find small comfort in the reflection that he might have done better if there had been more time for consideration of his position.

The response, whether called an Answer or a Motion, is usually typewritten on legal size paper and is filed in six copies. Like the petition, it is verified. It sets out such additional facts as the respondent desires to put before the court, together with the reasons why the writ should not issue. While the rule specifies[18] that the responsive pleading shall be accompanied by a "brief" in support thereof, this commonly takes the form merely of a typewritten memorandum of points and authorities made a part of the response itself and is only rarely in actual brief form.

The hearing on the petition is informal, the judges, not wearing their judicial robes, merely convening around a table in the courtroom. Counsel are advised of the time allotted for oral argument, with fifteen minutes to a side being generous and ten minutes common. (Counsel may, of course, submit the matter on the pleadings, if they wish, and waive oral argument. Most experienced practitioners do not.) When oral argument is finished, the court recesses to consider whether it shall issue an alternative, or preliminary, writ. When that decision has been reached, the parties are recalled to the hearing room and informed of

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[16] ARIZ. SUP. CT. R. 1(c).

[17] ARIZ. SUP. CT. R. 1(d).

[18] *Ibid.*

it. In three-fourths of the cases the writ is refused, without written opinion.

In the remaining cases, however, the court grants petitioners temporary relief in the form of the "alternative" writ. Petitioner is expected to have prepared the writ and to present it to the court for signing when requested to do so at the conclusion of the informal hearing. The alternative writ varies in form according to the type of extraordinary relief sought. In every case, however, it is by nature a preliminary step along the path to that final, permanent "peremptory" writ. The alternative writ functions to preserve the status quo for the time being; to give the court time for deliberate consideration of the matters involved; to call up such parts of the record of the tribunal below as that further consideration requires; and to afford to counsel the opportunity fully to brief the issues before the court. The court has jurisdiction in issuing the alternative writ to require such affirmative acts to be done by the parties as justice may require, all on a temporary and conditional basis pending ultimate disposition of the case. If the alternative writ is issued, the court will inquire of counsel whether they wish to submit additional briefs, and it will designate the times within which briefs shall be filed. Such briefs are usually submitted, not typed in informal fashion on pleading paper, but in the true brief form appropriate to a civil appeal.[19]

In the usual case the active participation of counsel ends with the filing of the supplemental briefs. Oral argument is not a matter of right, and is rarely called for by the court. From the time of the alternative writ the case is handled by the court very much like the ordinary civil appeal, although it will be granted whatever priority the court thinks appropriate on the list of cases submitted for decision. Since the alternative writ has issued, the court must now dispose of the case by written opinion.[20] If the petition is granted, the court will order the alternative writ made peremptory. The command of the writ thus made fixed and permanent varies according to the nature of the writ itself. The writ of prohibition is an order forbidding the respondent thereafter to do an act; the writ of mandamus is a fixed command that respondent shall act. In a case involving certiorari, the opinion will usually indicate the jurisdictional error committed below and how the respondent shall proceed to correct it.

Often the opinion itself serves as the peremptory writ, the respondent merely complying with the directions contained therein. The court may, however, cause its Clerk to issue a mandate to the respondent containing the court's command. In that event, the mandate

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[19] ARIZ. SUP. CT. R. 5, as amended, January, 1965.

[20] ARIZ. CONST. art. 6, § 2.

performs the function of the writ. There is seldom a requirement that the attorneys prepare a formal peremptory writ for the signature of the Chief Justice. In practice the matter is treated as though such a formal writ had in fact issued, when in fact the opinion and/or the mandate have performed all of the writ's functions.

While there are other writs referred to by Arizona statutes and court rules, there are five which are of some practical importance. Of these, one—habeas corpus—is not intended to be dealt with here. The substantive law of habeas corpus is sufficiently important, and as of this writing sufficiently complex and confused, to require much more extended treatment than can be given it in a generalized consideration of extraordinary writs. In this context it may be enough to note merely that petitions for writs of habeas corpus have not commonly been presented to the Supreme Court except by inmates of the State Penitentiary, usually acting *in propria persona.* Infrequently does an attorney seek the writ from that court, and only very rarely has that court issued the writ.[21] Lawyers seeking a writ of habeas corpus will usually recognize that their more appropriate forum is the Superior Court. Since the jurisdiction of the Superior Court in habeas corpus is co-extensive with that of the Supreme Court, petitioners before the latter are seldom able to meet the requirement of its Rule 1.[22]

The same comment applies, in general, to the writ of quo warranto. This writ, issued to test the legality of the respondent's occupancy of a public (or sometimes private) office, is defined and limited by statute.[23] At the appellate court level the writ is not frequently sought or issued. The Supreme Court has, however, favorably entertained petitions for the writ in appropriate cases. It has issued it to test the validity of the occupancy of a membership in the State Senate;[24] and it has issued it to test the validity of a city's incorporation by a Board of Supervisors.[25] The best discussion of the writ, especially at this level, is found in the early case of *State v. Jones.*[26] What is said in that opinion seems still to be good law. That case makes clear the court's reluctance, continuing to this day, to consider quo warranto cases. That reluctance stems from the common necessity, in these cases, of trying contested issues of fact, a procedure which the appellate court is ill-equipped to follow. Since in most cases the Superior Court has the same juris-

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[21] Dodd v. Boies, 88 Ariz. 401, 357 P.2d 144 (1960).

[22] ARIZ. SUP. CT. R. 1.

[23] ARIZ. REV. STAT. ANN. §§ 12-2041 to -2045 (1956).

[24] State *ex rel.* Jones v. Lockhart, 76 Ariz. 390, 265 P.2d 447 (1953).

[25] Parnell v. State, 68 Ariz. 401, 206 P.2d 1047 (1949).

[26] 15 Ariz. 215, 137 Pac. 544 (1914).

diction to issue the writ of quo warranto, and since it is in a far better position to try fact issues, the Supreme Court will usually invoke its Rule 1,[27] requiring that the petitioner seek his relief below.

Of the three writs commonly before our appelate courts, the writ of mandamus, although by no means uncommon, is the least used. Our statutes providing for the writ[28] are largely declaratory of the common law. Mandamus issues to compel the performance of an act imposed by law as a duty resulting from an office, or to compel the admission of a person to an office or right to which the law entitles him. At the Supreme Court level it may issue to an inferior tribunal in the exercise of the Court's general revisory and appellate jurisdiction, or it may issue to any state officer. There was a time, in simpler days than these, when the conditions precedent to and the limitations upon the petitioner's right to this writ were more clearly expressed and more generally understood. It was said, for example, that the writ would not issue to compel performance of a discretionary act.[29] It was held that mandamus was not proper, and that a writ would not issue, when petitioner had available to him the remedy of appeal,[30] (presumably the "plain, adequate and speedy remedy at law," lack of which the statute prescribes as a condition precedent to the writ of mandamus).[31] The guiding general principles under the older cases seemed to be these: if a public official has a legal duty to perform a ministerial act, having no discretion in the manner of its performance, mandamus will compel him to act,[32] and may tell him how to act;[33] if that public official has a legal duty to do some act, but has a discretion as to how it will be done (*e.g.*, to make a decision between alternatives), the writ will issue to compel the doing of the act, but not to dictate the manner of performance (*i.e.*, the choice of alternatives).[34] In passing, it might be observed that these "rules," while clearly stated in some cases to be such, never were, even in early days, as clear and certain as they were sometimes made to appear. The difference between a ministerial act and a discretionary act, in particular, was always obscure.

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[27] ARIZ. SUP. CT. R. 1.

[28] ARIZ. REV. STAT. ANN. §§ 12-2021 to -2029 (1956).

[29] Hutchins v. Frohmiller, 55 Ariz. 522, 103 P.2d 956 (1940).

[30] Arnett v. Smith, 26 Ariz. 430, 226 Pac. 529 (1924).

[31] ARIZ. REV. STAT. ANN. § 12-2021 (1956).

[32] Hunt v. Schilling, 27 Ariz. 1, 229 Pac. 99 (1924), *rehearing denied*, 27 Ariz. 235, 232 Pac. 554 (1925).

[33] Board of Barber Examiners v. Walker, 67 Ariz. 156, 192 P.2d 723 (1948).

[34] Territory v. Board of Supervisors, 2 Ariz. 248, 12 Pac. 730 (1887).

The more recent cases have tended, generally, to broaden the scope of the writ of mandamus. No longer, apparently, does the availability of an appeal necessarily bar the writ, the court having judicially noted the "long and costly procedures inherent in the ordinary process of appeal."[35] And no longer does the court automatically reject consideration of the manner in which discretion has been or is to be exercised. While it still has said that its own proper function is limited to requiring that a discretion be exercised,[36] it has nevertheless also held that it would not control the exercise of discretion *unless the respondent had acted arbitrarily or in an abuse of discretion.*[37] Once the court has indicated that mandamus will lie to correct abuses of discretion, it is no longer possible to state with any certainty the limit of the writ; what constitutes an abuse of discretion can almost never be determined *a priori.* It seems clear, however, that the court has been increasingly concerned to remedy injustices which it conceives to have been done by inferior tribunals by whatever means are at its disposal, even when those means, in the traditional sense, are not wholly appropriate to the occasion.

Over the years, a large majority of the petitions filed in the Supreme Court to invoke its original jurisdiction have involved the twin writs of prohibition and certiorari. A brief review of the generalized comments contained in the first part of this article will show that most of what was said there about extraordinary writs as a class is particularly appropriate in considering these two members of the class. Although their functions are logically different, and the difference rather easily stated, they are, nevertheless, so closely related in form and in function as to permit their treatment as part of one common subject, as two sides of the same coin. Like the writs already considered, certiorari is defined by specific statute.[38] Prohibition is not. While both may properly issue out of the Supreme Court to a "state officer,"[39] the occasion for such issuance must be very rare. The concern of this article is for writs of certiorari and prohibition as they are issued out of appellate courts in the exercise of their revisory and appellate jurisdiction. These writs are therefore limited by the rule of *Lindsey v. Duncan*:[40] there is no jurisdiction in the Supreme Court, at least, to issue the writ unless the respondent is a tribunal performing judicial

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[35] Application of Trico Elec. Coop., Inc., 92 Ariz. 373, 277 P.2d 309 (1962).

[36] Eastman v. Southworth, 87 Ariz. 394, 351 P.2d 992 (1960).

[37] Rhodes v. Clark, 92 Ariz. 31, 373 P.2d 348 (1962); Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority, 81 Ariz. 80, 299 P.2d 1071 (1956).

[38] ARIZ. REV. STAT. ANN. §§ 12-2001 to -2007 (1956).

[39] ARIZ. CONST. art. 6, § 5(1).

[40] 88 Ariz. 289, 356 P.2d 392 (1960).

functions, over which the issuing court has general appellate powers. The writ of certiorari lies "when an inferior tribunal board or officer, exercising judicial functions, has exceeded its jurisdiction and there is no appeal, nor . . . a plain, speedy and adequate remedy available."[41] Prohibition is the appropriate writ "to prevent an inferior court from acting without or in excess of jurisdiction, where wrong, damage and injustice are likely to follow and there is no plain, speedy and adequate remedy available."[42] It is not always easy to tell whether a petition should pray for the one writ or for the other. The writ is most often sought at a time when the proceedings in the lower tribunal are incomplete. As a general proposition it is correct to say that if the respondent tribunal has already done the act, made the decision or entered the order which is alleged as an excess of its jurisdiction, review by certiorari is proper. If the peremptory writ issues, it has the effect of undoing something already done. On the other hand, if the respondent tribunal's act is still incomplete, or is merely threatened, or its order has not yet been entered and is not yet final, the writ of prohibition properly lies. If the peremptory writ issues, then the threatened excess of jurisdiction never occurs at all, but is prevented from occurring by the writ. In practice it is hard to distinguish between the two different situations. The Supreme Court itself is not always careful to observe the technical distinction.[43] Moreover, that court will usually treat an application for either writ as though it had in fact sought whichever of the two is appropriate to the circumstances of the record below.[44] Where the applicant is in doubt, it may be useful in drafting the petition to designate the writ sought in the alternative. To do so will have no material effect on the procedural or substantive rules which will govern the application, since for most practical purposes, and with a possible exception noted hereafter, those rules are the same in either case.

Common to both certiorari and prohibition is the principle that the writ shall issue only when there is no plain, speedy and adequate remedy at law. In the case of certiorari, the condition is spelled out in the statute itself,[45] and has been recognized down the long line of decisions, from the earliest[46] to the most recent.[47] In prohibition, the re-

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[41] ARIZ. REV. STAT. ANN. § 12-2001 (1956).

[42] Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958).

[43] See, *e.g.*, Cloeter v. Superior Court, 86 Ariz. 400, 347 P.2d 33 (1959).

[44] State *ex rel.* Ronan v. Superior Court, 95 Ariz. 319, 390 P.2d 109 (1964).

[45] ARIZ. REV. STAT. ANN. § 12-2001 (1956).

[46] Territory v. Doan, 7 Ariz. 89, 60 Pac. 893 (1900).

[47] State *ex rel.* Ronan v. Superior Court, 95 Ariz. 319, 390 P.2d 109 (1964).

quirement existed at common law, was early recognized by the Arizona Court,[48] and is still a condition of the writ.[49] When there is no statutory right of appeal from the act sought to be reviewed, the court commonly finds the necessary absence of a plain, speedy and adequate legal remedy.[50] But does the availability of a statutory right of appeal automatically bar relief by these writs? It is at this point that the rules relating to certiorari on the one hand and to prohibition on the other may diverge. The statute purporting to control certiorari[51] is specific: it clearly makes the non-availability of an appeal a prerequisite of the writ. In a long line of cases the court has agreed.[52] Nevertheless, the court has for this purpose confined the word "appeal" to its narrowest technical limits, refusing, for example, to concede that the right of one aggrieved by an order of the Corporation Commission to file an action in the Superior Court was such "appeal" as precluded relief by certiorari.[53] And there are even cases where the court has issued the writ in apparent defiance of the statutory restriction (the constitutional validity of which, although open to some question, was not before the court), when appeals seem clearly to have been available.[54]. There is no such statutory language to complicate the picture in the case of the writ of prohibition. There are, it is true, many expressions to be found in our decided cases to the general effect that the writ will not lie when petitioner has an appeal from the act sought to be prohibited.[55]. It seems reasonably clear, however, that our court has never written into the law of prohibition any such rigid requirement. The real rule seems well established: that where the statutory right of appeal exists and does in fact provide the petitioner with a plain, speedy and adequate remedy at law, his petition will be rejected,[56] but that when such right, conceded to exist, nevertheless fails to provide a remedy judged by the Supreme Court to be "plain, speedy and adequate," the writ, if other-

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[48] Walker v. District Court, 4 Ariz. 249, 35 Pac. 982 (1894).

[49] See, *e.g.*, City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962).

[50] Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958).

[51] ARIZ. REV. STAT. ANN. § 12-2001 (1956).

[52] See cases starting with Territory v. Dunbar, 1 Ariz. 510, 25 Pac. 423 (1878), and progressing through State v. Stevens, 93 Ariz. 375, 381 P.2d 100 (1963). See also the specific ruling and statement in Miller v. Superior Court, 21 Ariz. 61, 185 Pac. 357 (1919).

[53] Whitfield Transportation, Inc. v. Brooks, 81 Ariz. 136, 302 P.2d 526 (1956).

[54] Forman v. Creighton School District No. 14, 87 Ariz. 329, 351 P.2d 165 (1960).

[55] See, *e.g.*, In the Matter of the Adoption of West, 87 Ariz. 234, 350 P.2d 125 (1960).

[56] Emery v. Superior Court, 89 Ariz. 246, 360 P.2d 1025 (1961).

wise proper, will issue.[57]

If there has, throughout most of their long development, been one basic rule governing these two writs, it must be this: that they issue only to correct or prevent an excess of jurisdiction. That concept is embodied in the statutes defining certiorari[58] and is given lip service in more Arizona cases than can conveniently be counted. Conceding for the argument that this bare statement of the proposition is true, problems remain. What is jurisdiction? What is excess of jurisdiction? These are questions with which the court has wrestled mightily, especially in recent years, in case after case; to which it has devoted almost agonized deliberation; and to which it has, regrettably, provided no wholly satisfactory answers.

It is impossible in an article of reasonable length to treat this subject without over-simplying what is in fact a remarkably complex problem. The word "jurisdiction" has an almost endless variety of meanings. It is perhaps most often thought of as the power of a court to hear and determine a cause. The briefest review of the cases in which writs have issued will demonstrate that this definition is of little value in this context, since in practically every case the respondent tribunal obviously had that power. At a comparatively early stage in its development of this subject, the Supreme Court elaborated on that basic definition to hold that "jurisdiction," for the purposes of these writs, meant jurisdiction of the person, of the subject matter, *and to render the particular judgment or order entered.*[59] It was still clear, however, that the issue was not whether that judgment or order was right or wrong, but merely whether its entry was an act which the court had the power—the "jurisdiction"—to do. The court said, in case after case, that "the writ of *certiorari* . . . issues only for the purpose of testing the existence of jurisdiction, and not to determine whether existing jurisdiction was used erroneously."[60] In 1952, in *Duncan v. Truman*,[61] which was to become a landmark in the Arizona law, the court again reexamined the question of this definition. The holding in that case was a restatement of the proposition that the writ issued only in very limited conditions:

> 'The writ has never been employed to inquire into the correctness of the judgment rendered where the forms of the law have

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[57] City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962); Westerlund v. Croaff, 68 Ariz. 36, 198 P.2d 842 (1948). See also Board of Technical Registration v. McDaniel, 84 Ariz. 223, 326 P.2d 348 (1958).

[58] ARIZ. REV. STAT. ANN. § 12-2001 (1956).

[59] Wall v. Superior Court, 53 Ariz. 344, 89 P.2d 624 (1939).

[60] State v. Superior Court, 39 Ariz. 242, 244, 5 P.2d 192, 193 (1931).

[61] 74 Ariz. 328, 248 P.2d 879 (1952).

> been followed, and where the court had jurisdiction, and was therefore competent. Hence, it has been held that the supervisory jurisdiction of the court on a certiorari must be restricted to an examination into the *external* validity of the proceedings had in the lower court. It cannot be exercised to review the judgment as to its *intrinsic* correctness, either on the law or on the facts of the case. The supervisory powers of the court should not be confounded with its appellate jurisdiction."[62] (Emphasis added.)

In the same case, however, the court said this:

> By its very nature a writ of certiorari never issues to correct mere error committed by a lower tribunal, but, as our statute on certiorari . . . indicates an entire absence of power to hear or determine the case is not required. A broader basis for granting the writ is recognized where jurisdiction has been exceeded. The word 'jurisdiction' has different shades of meaning and as applied to certiorari and prohibition matters it should not be given a too restrictive meaning. For an excellent dissertation on the subject see Abelleira v. District Court, 17 Cal. 2d 280, 295, 109 P.2d 942, 132 A.L.R. 715, 721.[63]

Now, there is no state which has extended the scope and function of the writs of certiorari and prohibition farther than California has in the *Abelleira*[64] case cited with such apparent approval, and in cases following and based upon it. California has long used these writs, not merely to test jurisdiction in the classic sense, but also to correct mere error. In its opinion in *Abelleira* the Supreme Court of California said:

> 'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration *or rules developed by the courts and followed under the doctrine of stare decisis*, are in excess of jurisdiction.'[65] (Emphasis added.)

It is difficult to imagine any conception of "jurisdiction" farther removed from that traditionally held, that "the power to decide is the power to err." The pursuit of this doctrine to its ultimate conclusion arrives very quickly at a point where these writs are merely fast and cheap substitutes for an ordinary appeal.

The Arizona Court's bow in the direction of *Abelleira* was, as it happens, in a dictum. But as is so often the case, the dictum has had more influence than the rule of the case. True, in one 1957 case, the court cited *Duncan v. Truman*[66] in denying a petition for a writ of certiorari for the reason that "the respondent court did have jurisdiction

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[62] Duncan v. Truman, 74 Ariz. 328, 333, 248 P.2d 879, 883 (1952), quoting Griffin v. Denton, 61 Ariz. 454, 456, 150 P.2d 96, 97 (1944).

[63] Duncan v. Truman, *supra* note 62 at 331, 248 P.2d at 882.

[64] Abelleira v. District Court, 17 Cal. 2d 280, 109 P.2d 942 (1941).

[65] *Id.*, 109 P.2d at 948.

[66] 74 Ariz. 328, 248 P.2d 879 (1952).

within the broad meaning of the term"[67] (emphasis added), (that is, within this definition jurisdiction is the power to hear and determine). That case stands alone, however, against a tide of decisions expanding the functions of the writs. Over a period of ten years, the Supreme Court has permitted writs of certiorari and prohibition to issue in cases in which to issue the writ meant virtually to abandon the traditional concept of jurisdiction. Perhaps best representative of the trend, and therefore most useful as bases for prediction, are two such cases: *Dean v. Superior Court*[68] and *State ex rel. Ronan v. Superior Court.*[69] In the *Dean* case, a writ of prohibition issued to restrain the respondent from enforcing an order for inspection of documents under Rule 34 of the Arizona Rules of Civil Procedure. The petitioner contended that the respondent had abused his discretion in issuing the order, because the conditions prescribed in Rule 34 for such an order had not been met. The Arizona Court held that order reviewable by prohibition, citing, again, California cases. It gave lip service to the proposition that "prohibition lies to prevent an inferior court from acting without or in excess of jurisdiction."[70] But the only possible effect of its ruling was the abolition of the requirement that the act reviewed be shown to have been outside the respondent's jurisdiction. In truth, the court held in *Dean* that *abuses* of jurisdiction are reviewable in Arizona by these writs. And, if there was any lingering doubt about its position, the court in *State ex rel. Ronan v. Superior Court*[71] resolved it. It therein issued a writ of certiorari in circumstances where the fact of the respondent's jurisdiction was clear, specifically holding that "a writ of certiorari may be used to review abuse of discretion."[72] Now an "abuse of discretion" is by no means the same as an "excess of jurisdiction." A court cannot abuse discretion which it does not have; without jurisdiction it can have no discretion. It would seem to follow that the issuing court cannot issue the writ to correct an abuse of discretion without conceding the power, *i.e.*, the jurisdiction, of the respondent to do the very act complained of.

What, then, is the law of Arizona now? In what circumstances, and to correct what errors, will these writs now and hereafter issue? It is submitted that it is impossible to give an answer on which anyone

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[67] Hazard v. Superior Court, 82 Ariz. 211, 216, 310 P.2d 830, 834 (1957) (the court refusing to consider whether the particular order entered was within the respondent's power).

[68] 84 Ariz. 104, 324 P.2d 764 (1958).

[69] 95 Ariz. 319, 390 P.2d 109 (1964).

[70] Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958).

[71] 95 Ariz. 319, 390 P.2d 109 (1964).

[72] State *ex rel.* Ronan v. Superior Court, *supra* note 71 at 322, 390 P.2d at 111.

can confidently rely. Relatively recent decisions can be cited in support of diametrically opposed conclusions. It seems certain that far more acts are reviewable by prohibition and certiorari than merely those considered "excesses of jurisdiction" as little as ten years ago. If abuses of discretion are reviewable, then there is, and can be, no clear limit on these writs. All kinds of mistakes can be corrected by the reviewing court, and the essential consideration would seem to be less the nature and quality of the error than the quantum of it; if the mistake was *bad* enough, and appeal is not considered a sufficient remedy, the writ will lie.

Whatever else may be true, the traditional rules which defined and limited these writs are no longer wholly valid, and their continued recitation is often positively misleading. The key now is not the absence of jurisdiction, no matter how defined, nor is it the absence of an appeal or other legal remedy. The writs have now become tools by which the Supreme Court of Arizona accomplishes the implementation of its own policies, by which it does the "essential justice" so often of principal concern to its members. There is no necessary reason why the writs should not be put to this use, nor any particular objection to the changes in the law thus required to be made if they are to serve that purpose. But it would seem better, in that case, 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.