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The Extraordinary Writ of Prohibition in Missouri

By
J. P. McBAINE

1.

Introduction

The frequent use of the writ of prohibition by the Bar of this state¹ has incited the writer to investigate the Missouri decisions and, if possible, to classify them to the end that we may make an orderly and analytical statement of the Missouri law on this important topic.

The earliest reported Missouri case is *Morris v. Lenox et al.* decided by the Missouri Supreme Court in 1843.² The Circuit Court of Crawford County had issued a writ of prohibition to one Martin, a justice of the peace, to prevent further proceeding in a civil suit of *Morris v. Lenox*. It appeared that Morris had sued Lenox in the justice court,

“For one horse colt, valued at-----\$50.00
Damages in loss of said colt-----\$35.00-85.00.”

Judgment was given for Morris and Lenox appealed. The opinion does not state for what sum the judgment was given. Lenox had not filed his necessary affidavit for appeal, consequently his appeal was dismissed by the circuit court. Later the circuit court, evidently concluding the victory should not go to Morris, on Lenox's application, granted a writ of prohibition to the justice of the peace commanding him to take no further steps in the action. Morris appealed to the supreme court. It was held, in an opinion by Tompkins, J., that the circuit court erred in issuing the writ. The decision was based upon the proposition that the justice had

1. An examination of the reports, the official reports and the Southwestern Reporter, up to June 6, 1923, disclosed about 200 reported decisions.
2. (1843) 8 Mo. 253.

jurisdiction of the cause and his judgment for Morris should stand.

The brief of counsel for Lenox shows that Lenox's contention was that the civil suit was a tort action for more than \$50.00, and while the justice had jurisdiction in contract actions for the amount sued for—\$135.00—he had no jurisdiction of tort actions for more than \$50.00.

In the course of the opinion the court said: "A writ of prohibition issues from a superior to an inferior court to restrain the latter from exceeding its jurisdiction. 5 Bacon, 446, Title, Prohibition. The justice clearly had jurisdiction here, and the writ was improvidently issued."

This early decision, perhaps, sheds little light upon the subject as the opinion is very brief and contains no statement of the reason why the supreme court concluded the justice had jurisdiction. If the statement upon which the judgment of the justice was based may be considered, it would seem that the action was for tort and that the justice had no jurisdiction. The nature of the writ, however, is indicated by the opinion. As appears from the passage quoted above, the most difficult problem involved in the use of this writ is also there suggested, viz, when is a court "exceeding its jurisdiction"?

2.

History of the Writ

Before proceeding further with the Missouri cases it may be profitable to examine briefly some of the early authorities on the subject. Our oldest English law treatise, entitled *De Legibus et Consuetudinibus*, by Glanville, was written about 1186-88.³ The author first mentions the writ in connection with the "Grand Assise", the early trial by jury introduced by Henry II, employed to try writs of right, which made it possible to avoid "the doubtful event of the Duell".⁴ The author sets out a writ of prohibition running in the name of the King forbidding a judge from holding in

3. A translation of Glanville by John Beames, Esq., with an introduction by Joseph Henry Beale, pp. XI, XII.

4. Glanville by Beames, p. 45.

his court a certain cause in which the court was about to give judgment against a tenant "unless the Duel be waged".⁵ He also sets forth a writ issued to the Court Christian, an ecclesiastical court, forbidding that court from proceeding further in a suit wherein M claimed an advowson⁶ as against one R. The writ read, "And since suits concerning the Advowsons of Churches belong to my Crown and Dignity, I prohibit you from proceeding in that cause, until it be proved in my court, to which of them the Advowson of such Church belongs."⁷

Bracton, who wrote in the time of Henry III,⁸ whose treatise has been described as having "no competitor either in literary style or in completeness of treatment till Blackstone composed his commentaries five centuries later",⁹ also considers the writ of prohibition. He devotes considerable space to the subject.¹⁰ Instance after instance is given of the writ issued to the ecclesiastical courts. He also devotes a chapter to the writ when directed against judges of the temporal courts,¹¹ citing many instances where the writ is issuable to the latter courts where, he says, "exception is to be taken to the jurisdiction of any judge, who makes himself judge upon pleas and actions which belong to the Crown and the royal Dignity, when a person has been drawn into a plea before him".

Neither Glanville nor Bracton, though, attempt much more than the citation of instances in which the writ will issue.

Fitzherbert in His *Natura Brevium*, published about 1534,¹² also discusses prohibition at some length. He too cites many instances where the writ issues but also refrains from generalizing

5. Glanville by Beames, p. 47.
6. "A right of presentation to a church or benefice, of appointing a clergyman to the living." Stimson's Law Dict. 66.
7. Glanville by Beames, p. 8.
8. Written from 1216 to 1240. See "A History of English Law" by Holdsworth, Vol. II, p. 189.
9. II Holdsworth, History of English Law, p. 187.
10. VI Bracton, *Legibus et Consuetudinebus Angliae*, Edited by Twiss, p. 161, et seq.
11. VI Bracton, by Twiss, p. 243.
12. II Holdsworth, A History of English Law, p. 442.

as to its scope and limitations. He asserts the writ issues "as well unto the temporal as unto the spiritual Court".¹³

In the later works of Blackstone¹⁴ and Bacon¹⁵ the subject is fully treated and carefully prepared definitions are to be found. The nature and scope of the writ is thus defined by Blackstone:

"A prohibition is a writ issuing properly only out of the court of a king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."¹⁶

It is defined as follows by Bacon: "As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was framed; which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c., upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executed the sentence, and in some cases the judges that give it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case."¹⁷

13. Fitzherbert *Natura Brevium*, 9th Ed. p. 94.

14. 1765.

15. 1768.

16. 3 Blackstone's Commentaries, Lewis' Ed. 1110.

17. 8 Bacon's Abridgement, 206.

Several Missouri cases shed much light upon the history of the writ.¹⁸

3.

The Writ Only Issues by a Superior Body

In working out the nature of the writ by a process of inclusion and exclusion, i. e. by pointing out when it issues and when it does not issue, perhaps there is no better place to commence than to determine what body may issue the writ and against what body the writ may be issued.

Section 1 of article VI of the constitution vests the judicial power of the state in the various courts of the state later provided for in the constitution. Section 3 of the same article gives the supreme court general superintending control over the inferior courts, and expressly provides that it has power to issue writs of habeas corpus, mandamus, quo warranto, certiorari "and other original remedial writs".¹⁹ By express legislative enactment the supreme court, and each division thereof, the courts of appeals, the circuit and common pleas courts are given power to issue writs of prohibition within their several jurisdictions.²⁰ The supreme court at the head of the judicial system of the state may issue the writ to any court in the state.²¹ A single judge thereof in vacation can issue an order to show why a writ of prohibition should not issue.²² There

18. *Thomas v. Mead* (1865) 36 Mo. 232; *State ex rel. West v. Justices, etc.* (1867) 41 Mo. 44; *State ex rel. Macklin v. Rombauer* (1891) 104 Mo. 619, 15 S. W. 850, 16 S. W. 502.

19. Secs. 1 & 3, Article 6, Constitution of Missouri 1875.

20. Sec. 2058, R. S. Mo. 1919.

21. *State ex rel. Sale v. Nortoni* (1906) 201 Mo. 1, 98 S. W. 554.

22. *State ex rel. Macklin v. Rombauer, et al.* (1891) 104 Mo. 619, 15 S. W. 850, 16 S. W. 502. The majority opinion upheld the validity of the rule upon the ground that under the constitution the supreme court had authority to issue writs of prohibition, and had both law and equity powers, and that under the English system a court of equity, in order to prevent a failure of justice, had power, in vacation, to make an order to show cause returnable to a superior law court in term time. The court relied upon *Blackborough v. Davis* (1701) 1 P. Wms. 43. See also *State ex rel. American Lead Co. v. Dearing* (1904) 184 Mo. 647, 84 S. W. 21.

are numerous decisions to the effect that the supreme court may issue the writ to the various courts of appeals of the state.²³

The supreme court has issued the writ to county courts,²⁴ probate courts,²⁵ circuit courts,²⁶ common pleas courts,²⁷ statutory criminal courts,²⁸ and justices of the peace.^{28a}

The courts of appeals of the state are also given power by the constitution "to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties".²⁹

The power to issue prohibition was also expressly conferred upon them by legislative enactment passed in 1895.³⁰

23. *State ex rel. Scott v. Smith* (1891) 104 Mo. 419, 16 S. W. 415; *State ex rel. Campbell v. St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874; *State ex rel. Laclede Bank v. Lewis* (1882) 76 Mo. 370; *State ex rel. Sale v. Nortoni* (1906) 201 Mo. 1, 98 S. W. 554; *State ex rel. Federal Lead Co. v. Reynolds* (1912) 245 Mo. 698, 151 S. W. 85; *State ex rel. Johnson v. Caulfield* (1912) 245 Mo. 676, 150 S. W. 1047; *State ex rel. Wurdeman v. Reynolds* (1918) 275 Mo. 113, 204 S. W. 1093.
24. *State ex rel. United Rys. Co. v. Wiethaupt* (1911) 233 Mo. 155, 142 S. W. 323; *State ex rel. Ellis v. Elkin* (1895) 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037; *State ex rel. West v. Justices, etc.* (1867) 41 Mo. 44.
25. *State ex rel. Deems v. Holtcamp* (1912) 245 Mo. 655, 151 S. W. 153; *Cuendet v. Henderson* (1902) 166 Mo. 657, 66 S. W. 1079.
26. *Thomas v. Mead* (1865) 36 Mo. 282; *State ex rel. St. Louis etc. Ry. Co. v. Withrow* (1895) 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *State ex rel. Norbourne Land Co. v. Hughes* (1922) 294 Mo. 1, 240 S. W. 802.
27. *State ex rel. Merriam v. Ross* (1894) 122 Mo. 345, 25 S. W. 947; *Kochler v. Snider* (1903) 177 Mo. 546, 76 S. W. 1032; *Oliver v. Snider* (1903) 176 Mo. 63, 75 S. W. 591.
28. *State ex rel. Walker v. Murphy* (1896) 132 Mo. 382, 33 S. W. 1136
- 28a. *Houston etc. Ry. Co. v. Caldwell* (1910) 231 Mo. 505, 132 S. W. 1067.
29. Art. VI. Sec. 12, Constitution of Missouri.
30. Laws of 1895, p. 95; R. S. Mo. 1919, sec. 2058.

There are instances where the courts of appeals have issued the writ to county courts,³¹ probate courts,³² circuit courts,³³ statutory criminal courts³⁴, and justice courts.^{34a}

By article VI, section 22 of the constitution general original civil and criminal jurisdiction is conferred upon the circuit courts of the state. Section 23 of the same article gives to those courts general superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in the circuit. The power of the circuit court to issue writs of prohibition to inferior courts, under those constitutional provisions has often been approved.³⁵ As in other instances, above mentioned, in 1895 the legislature expressly conferred upon the circuit courts power to issue writs of prohibition.³⁶

A common pleas court, in proper instances, may also issue the writ.³⁷

31. *State ex rel. Mermod v. Heege* (1880) 39 Mo. App. 49; *State ex rel. Verble v. Haupt* (1913) 181 Mo. App. 18, 162 S. W. 532; *State ex rel. City v. Marshall* (1914) 183 Mo. App. 593, 167 S. W. 1050.
32. *Burke v. McClure* (1922) 211 Mo. App. 446, 245 S. W. 62; *State ex rel. Mitchell v. Gideon* (1922) 237 S. W. 220; *State ex rel. Finch v. Duncan* (1910) 195 Mo. App. 541, 193 S. W. 950.
33. *State ex rel. Emory v. Porterfeld* (1922) 211 Mo. App. 499, 244 S. W. 966; *State ex rel. Youngman v. Calhoun* (1921) 231 S. W. 647; *State ex rel. Methudy v. Killoren* (1921) 229 S. W. 1097.
34. *State ex rel. Mason v. Laughlin* (1879) 7 Mo. App. 529.
- 34a. *State ex rel. K. C. Auditorium Co. v. Allen* (1891) 45 Mo. App. 551; *State ex rel. Schonhorst v. Cline* (1900) 85 Mo. App. 628.
35. *Howard v. Pierce* (1866) 38 Mo. 296 (issued to a county court); *State ex rel. Griffith v. Bowerman* (1890) 40 Mo. App. 576 (power to issue to county court, in a proper case, recognized); *Morris v. Lenox* (1843) 8 Mo. 253 (power to issue to a justice of the peace, in a proper case, recognized); *Wertheimer v. Mayor* (1860) 29 Mo. 254 (power to issue to a police court, in a proper case, recognized); *Coleman v. Dalton* (1897) 71 Mo. App. 14 (power to issue to a probate court, in a proper case, was recognized). See sec. 2058 R. S. Mo. 1919, expressly conferring power upon circuit courts to issue the writ.
36. Laws of 1895, p. 95; R. S. Mo. 1919, sec. 2058.
37. *Koehler v. Snider* (1903) 177 Mo. 546, 76 S. W. 1032; R. S. Mo. 1919, sec. 2058; *Wertheimer v. Mayor* (1860) 29 Mo. 254.

It seems that those are the only courts in our judicial system that may issue the writ.

Special attention should be given the question when the writ may be issued by the supreme court to the courts of appeals. Both courts primarily are appellate courts. Each, though, has original jurisdiction to issue extraordinary writs as has been pointed out. The appellate jurisdiction of the courts of appeals is final in its field subject, however, to the superintending control of the supreme court.³⁸ By constitutional mandate the courts of appeals must follow the last controlling decision of the supreme court.³⁹ The question has arisen, several times, whether a court of appeals has, in truth, appellate jurisdiction of a case over which it has asserted appellate jurisdiction. The rule has been firmly established that the supreme court may issue prohibition to the courts of appeals to prevent those courts from entertaining appellate jurisdiction of appeals of which the supreme court has exclusive ap-

38. Art. VI., Sec. 3, Constitution of Missouri.

39. Amendment of 1884 to the constitution, sec. 6. *State ex rel. Curtis v. Broaddus* (1911) 238 Mo. 189, 142 S. W. 340. "Certiorari", by W. W. Graves, 24 Law Series Missouri Bulletin, p. 3. "Certiorari from the Missouri Supreme Court to the Courts of Appeals", by J. P. McBaine, 13 Law Series Missouri Bulletin, p. 30. See *Missouri, Kansas & Texas Ry. Co. v. Smith* (1900) 154 Mo. 300, 55 S. W. 470, where it was held prohibition would not lie to prevent a court of appeals from executing a judgment which it had rendered on appeal in a case where it was practically conceded the last controlling decision of the supreme court had not been followed. This decision was prior to *State ex rel. Curtis v. Broaddus* (1911) 238 Mo. 189, 142 S. W. 340, *supra*, wherein the supreme court held it had power by certiorari to quash such a decision. The propriety of prohibition was not questioned in *Missouri, Kansas & Texas Ry. Co. v. Smith, supra*, but the writ was denied because it was thought courts of appeals had power to decide for themselves whether they followed controlling supreme court decisions. The usual remedy now employed, as will be seen from the articles mentioned in this note, is certiorari. If a judgment of a court of appeals, which is in conflict with a controlling supreme court decision, is not fully executed, prohibition, it would seem, will also lie.

pellate jurisdiction under the constitution.⁴⁰ It also has been held that if the pending case, i. e., the case in the inferior courts, is one where writ of error or appeal, if taken, would go to the supreme court, a court of appeals has no power, exercising its original jurisdiction, to issue a writ of prohibition to the inferior court.⁴¹ The rule in this situation has been stated as follows: (Walker, J., in *State ex rel. v. Reynolds* (1918) 275 Mo. l. c. 122.)

“The result of this ruling, expressed in general terms, is, that while the constitution gives courts of appeals co-equal authority with the supreme court in the issuance of original writs and in the superintending control over inferior courts, it does not mean that the courts of appeals shall issue such writs, or have such superintending control, in cases in which the supreme court would have jurisdiction by appeal or writ of error.”⁴²

Also the writ will issue from the supreme court to prevent a court of appeals from exercising appellate jurisdiction of a cause where appellate jurisdiction is truly in another court of appeals.^{42a}

4.

*The Writ Only Issues to Stop Judicial Action
That is About to be Improperly Taken.*

The authorities are agreed that prohibition is limited to instances when a court, or some other legal body, board, or official, is about wrongfully to exercise judicial power that it does not possess.⁴³

It will not issue to prevent a court, or any other governmental body from exercising administrative powers that it does not pos-

40. *State ex rel. Campbell v. St. Louis Court of Appeals* (1888) 97 Mo. 276, 10 S. W. 874; *State ex rel. Federal Lead Co. v. Reynolds* (1912) 245 Mo. 698, 151 S. W. 85.

41. *State ex rel. Wurdeman v. Reynolds* (1918) 275 Mo. 113, 204 S. W. 1093; *State ex rel. Sale v. Norton* (1906) 201 Mo. 1, 98 S. W. 554; *State ex rel. Rogers v. Rombauer* (1891) 105 Mo. 103, 16 S. W. 695; *State ex rel. Blackmore v. Rombauer* (1890) 101 Mo. 499, 14 S. W. 726.

42. *State ex rel. v. Reynolds* (1918) 275 Mo. 113, 204 S. W. 1093.

42a. *State ex rel. Dunham v. Nixon* (1910) 232 Mo. 98, 133 S. W. 336.

43. *King v. Justices, etc.* (1812) 15 East 594. Judicial power was defined as follows by Bliss, J., in *Saline County Subscription Case*

sess.⁴⁴ These rules have been frequently recognized by the courts of this state, and in the main have been correctly applied to the facts presented, though in some instances it would seem that the decisions have been rather liberal in holding proposed action judicial rather than administrative.

The question was presented to the supreme court in *Howard v. Pierce et al.*, decided in 1866.⁴⁵ The facts in that case were as follows: One Pierce had instituted a proceeding in the county court of Cooper county to recover possession of certain real property occupied by a Methodist Church. The county court, holding the county owned the property, made an order declaring certain

(1869) 45 Mo. 52-53, in speaking of the writ of certiorari: "Was, then, the action of the county court of Saline county, in subscribing to the stock of this railroad company and issuing bonds, a judicial action? Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered."

The following observation by Gantt, J., in *State v. Hathaway* (1892) 115 Mo. 36, l. c. 49, 21 S. W. 1081 seems pertinent in this connection: "A judicial duty within the meaning of the constitution is such a duty as legitimately pertains to an officer in the department designated by the constitution as judicial. And we can but commend in this connection the language of the same court in *Flournoy v. City*, 17 Ind. 169. An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. This rule is one quite familiar in this state. It is one that governs sheriffs and constables in making levies and has been applied to the secretary of the state in determining the sufficiency of a certificate under the election law."

See 23 Cyc. 1614 and 1620 for the citation of many cases determining what is judicial power.

See 4 Words and Phrases 3847 and 3860. See 2 Bouvier's Law Dictionary, p. 1740, Judicial Power.

44. *State ex rel. West v. Justices, etc.* (1867) 41 Mo. 44; *Casby et al. v. Thompson, et al.* (1868) 42 Mo. 133; *Hockaday, ex rel. v. Newsom, et al.* (1869) 48 Mo. 196; High, Extraordinary Legal Remedies, 2 Ed. 738; *Smith v. Whitney* (1868) 116 U. S. 167, 6 Sup. Ct. Rep. 570.
45. (1866) 38 Mo. 296.

persons to be the owners and the rightful possessors of the property, and was about to carry out the order. The circuit court then issued a writ of prohibition to the county court. On appeal to the supreme court the circuit court was sustained.

In the course of the opinion it was pointed out that the proposed action of the county court was judicial action, that it did not possess jurisdiction in actions to recover possession of land, and that prohibition would lie to prevent the consummation of the orders of the county court. Holmes, J., writing the opinion, said: "As being a summary action of ejectment, this was clearly a judicial proceeding, whatever else may have been intended, etc."

The next case presented to the court was decided in 1867, the next year. It is entitled *State ex rel. West v. The Justices, etc.*⁴⁶ That was an original proceeding in the supreme court to stop the county court of Clark county from carrying out an order removing the county seat from Cahoka to Waterloo. It appeared that an election had been held in Clark county to determine whether the county seat should be removed and that the county court in canvassing the returns found that a majority, but not two-thirds, of the voters voted in favor of the removal. The county court ordered the removal erroneously, thinking a statute of 1855 governed which required a majority only, when, in truth, an act of 1865 governed which required a two-thirds vote to remove the county seat. Again the opinion was written by Holmes, J., who held prohibition would not lie as the action proposed to be stopped was not judicial action, but, on the contrary, was administrative action.⁴⁷

46. (1867) 41 Mo. 44.

47. The following instructive comment is found in the opinion l. c. p. 50:

"But the office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power, and not of ministerial or merely administrative function; and in a case where the court errs on a question of jurisdiction, or in the construction of a statute, in the exercise of such judicial power as an inferior court. It will not lie to restrain a ministerial act, as the issuing of an execution, or the levying of a tax to repair county buildings (*Ex parte Branolacht*, 2 Hill, 367; *Clayton v. Heidelberg*, 9 Sm. & M. 623); nor against ministerial officers, such as tax

Thus in the first two cases involving this question that came before the highest court of the state, the distinction was clearly and properly made between the use of the writ to stop judicial action and administrative action contended to be illegal.

An election for removing a county seat some twenty-eight years later again presented to the supreme court the problem of what is judicial action, and what is administrative action. The case referred to is *State ex rel. Ellis v. Elkin, et al.*,⁴⁸ a case that is often relied upon and, in fact, has become a leading case in the state. In that case the county court, whose duty it was to canvass and cast up the election returns in a county seat election, canvassed the returns and found the proposition had lost. The court later met and decided that the returns of the election officials of Wellsville precinct, Montgomery county, were not legally made, and hence the vote in that precinct should not be counted. The court then ordered the county seat removed from Danville to Montgomery City.

Counsel for the county court contended that prohibition should not issue by the supreme court as the matter of removing the county seat was administrative and not judicial action. The

collectors, commissioners to locate a county seat or the like; nor to restrain the issuing of a commission by the Governor. *State v. Allen*, 2 Ired. 183; *People v. Supervisors*, 1 Hill, 195; *Ex parte Blackburn*, 5 Ark. 21; *Grein v. Taylor*, 4 McCord, 206. In these cases there is no question of a conflict of jurisdiction between different courts in the administration of justice, and there are supposed to be other adequate remedies for any injury that may be done. In the case of the *King v. Justices of Dorset*, 15 East 594, the court refused a prohibition to restrain the justices from pulling down an old bridge for the purpose of building a new one, as creating a nuisance, and said that such an application of the writ had not been recognized in modern practice, where there was another remedy by indictment, though some ancient authorities were cited in support of it; and we have found no authority in this country that can be relied on for the application of the writ to a case of this kind. Even where a prohibition might be a proper remedy, the granting of it is subject to the discretion of the court."

48. *State ex rel. Ellis v. Elkin, et al.* (1895) 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037.

supreme court issued the writ, holding that the removal of the county seat was administrative action but that the order of the county court not to count the Wellsville vote was judicial action, that it was the decision of an election contest so to speak, and that the county court did not have the power to overturn its order of November 8, 1895, when it first canvassed the returns, counted the Wellsville vote, and found the proposition had not carried. It was decided the county court had no power beyond canvassing the returns certified to it by the election officials. Determining that the action of the county court in disregarding the Wellsville vote was judicial action, Barclay, J., for the court, said: "We regret the occasion that requires us to say that the use of such power by the county court, in the circumstances, was not authorized by law. The attempted action was judicial in its nature, and, as such, beyond the jurisdiction of the court in the matter it then had in hand." The court cited and expressly approved *State ex rel. West v. Justices*, supra.⁴⁹

Frequently orders of a county court have raised the question whether prohibition will issue as that body, as is well understood, possesses both judicial and administrative powers.⁵⁰ It has been held that prohibition will not lie to stop a county court from issuing a license to keep a dramshop when it was claimed the petition for the license was not signed by the number of tax-paying citizens required by law.⁵¹ This holding seems sound as the granting of licenses, while it involves a decision as to facts and an application of the statutory law, is not a matter that has customarily been settled in the first instance by the courts. Prohibition has issued to stop a

49. (1867) 41 Mo. 44.

50. *State ex rel. West v. Justices, etc.* (1867) 41 Mo. 44; *State ex rel. v. Cooper Co., etc.* (1853) 17 Mo. 507.

51. *State ex rel. Pulliam v. Fort* (1904) 107 Mo. App. 328, 81 S. W. 476. Bland, P. J., in the opinion states, however, that "A county court in granting a license to keep a dramshop acts judicially. *State ex rel. Campbell v. Keege*, 37 Mo. App. 328." Prohibition was denied on the grounds that the county court was not acting beyond or in the excess, of its jurisdiction, and that the exercise of sound discretion did not warrant the issuance of the writ, and also that appeal

county court from revoking a dramshop license, already granted, on the ground that fraud was practised upon the county court in matters relating to the issuance of the license.⁵² This decision was based upon the ground that to revoke a license, for fraud upon the court as to matters presented in securing the license, the county court would have to possess equity powers, and that it had no such power.⁵³

It has also been held that prohibition would issue to stop a county court from erroneously including a city of the third class in

was an adequate remedy, etc. But see *Higgins v. Talty* (1900) 157 Mo. 280, 57 S. W. 724 where a writ of prohibition was issued to stop a court from proceeding further in an equity suit to enjoin an excise commissioner from revoking a dramshop license. The decision was placed upon the ground that the excise commissioner had full power in the premises and that the courts could not interfere by injunction, and, it was said, that in determining whether the license should be revoked, the commissioner was not exercising judicial power. Burgess, J., for the court, said (l. c. 291): "Roselli's license is not a contract with the state, nor property within the meaning of the Constitution, but is subject at all times to the police powers of the state government, by which it is provided that such licenses may be revoked by the excise commissioner for violation of the law and this without waiting until Roselli has been convicted by a court having jurisdiction for violation of the law, and, that in proceeding to do so he was not acting judicially, but under the power conferred upon him by statute with respect to subject matter over which he has exclusive control."

52. *State ex rel. Verble v. Haupt* (1914) 181 Mo. App. 18, 163 S. W. 532.

53. As to this, Norton, J., in *State ex rel. Verble v. Haupt* (1914) 181 Mo. App. 18, 163 S. W. 532, *supra*, said: "However, the judgment of a county court granting a dramshop license may be vacated and set aside for fraud in procuring the judgment by a court of equity on a proper bill therefor, as has been heretofore determined. (See *Kochitzky v. Herbst*, 160 Mo. App. 443, 140 S. W. 925; *Burkhart v. Stephens*, 117 Mo. App. 425, 94 S. W. 720; *State ex rel. Heller v. Thornhill*, 174 Mo. App. 469, 160 S. W. 558). But no such proceeding is before us, and though the averments in the petition to revoke the license in the instant case may be sufficient to authorize a court of equity to proceed thereon, they avail nothing to move the county court to the same end, for, as before said, no power with respect to such matter is lodged with that tribunal."

an order for a local option election,^{53a} where the city authorities had previously decided the city had twenty-one more people than required to make it a city of that class. There was no discussion by the St. Louis Court of Appeals as to the nature of the power the county court was about to exercise. It seems very doubtful whether this was judicial power even in a most liberal sense.

The writ was denied against a county court when it was sought to prevent it from designating a certain bank county depository.⁵⁴ The decision was properly placed upon grounds that the act in question was an administrative act. The writ was also properly denied to stop a county court from building a vault and repairing a courthouse⁵⁵ where it was contended that there were no county funds legally available for the work. The writ was issued against a county court to prevent it from appointing commissioners to locate a private road, when, because of an appeal to the circuit court, the former court no longer had jurisdiction of the proceeding to establish the road.⁵⁶ This decision seems in harmony with the prevailing view as proceedings to establish roads over private property have been considered judicial proceedings.⁵⁷

- 53a. *State ex rel. City v. Marshall* (1914) 183 Mo. App. 593, 167 S. W. 1050.
54. *State ex rel. Bank v. Hawkins* (1908) 130 Mo. App. 41, 109 S. W. 77. Bland, J., writing the opinion, said: "Under the statute, the designation of the depository is an act in the administration of the financial affairs of the county, and the exercise of a ministerial or executive function conferred upon the county courts by the Legislature. That the exercise of such a function cannot be controlled or regulated by prohibition is the well-settled law of this State. (*State ex rel. West et al. v. Clark Co. Ct., et al.*, 41 Mo. 44; *Vitt v. Owens, et al.*, 42 Mo. 512; *Hockaday et al. v. Newsom*, 48 Mo. 196; *School Dist. v. Burris*, 84 Mo. App. 654; *High on Extraordinary Legal Remedies* (3 Ed.) Sec. 669).
55. *State ex rel. Carter v. Ballinger* (1909) 219 Mo. 204, 117 S. W. 1132.
56. *State ex rel. United Railways v. Wiethaupt* (1911) 238 Mo. 155, 142 S. W. 323.
57. *State v. Commissioners of Roads* (1817) 1 Mill 55, 12 Am. Dec. 596. This is a decision by the Constitutional Court of South Carolina. The following extract disclosed the reason why the court thought the matter a judicial matter:

It also has been held that not every act that is done by a court of general jurisdiction, the circuit court, is judicial action which may be stopped by prohibition, though the act is beyond the power of the court. The writ was denied when it was sought to stop a circuit judge from punishing the clerk for contempt who refused to make certain record entries of courts proceedings, which he had been ordered by the judge to make, though it was decided the entries were illegal.⁵⁸ And it has been said that the writ will not issue from a circuit court against a justice of the peace, and the constable, to stop action upon a writ of execution for costs in a misdemeanor case.⁵⁹ Issuance of the writ of execution was determined to be an administrative act. The writ, though, was issued,

“The commissioners of the roads are public functionaries, invested with judicial powers. They decide between citizen and citizen, in relation to the freehold and transfer, without compensation, at their discretion, the property of individuals, to the uses of the public. They cite parties before them, hear witnesses, give judgments and *enforce their judgments* by high penalties. They seem to be much more clearly and properly objects of these proceedings than visitors of eleemosynary corporations; and I am quite satisfied that the proceeding by prohibition is a proper proceeding in this case.”

58. *State ex rel. Caldwell v. Cockrell* (1919) 280 Mo. 269, 217 S. W. 524. The decision was not based upon the ground that the act that gave rise to the contempt proceeding was an administrative act, but upon the ground that the judge had power to order the clerk to write the record as the judge said. Goode, J., for the court, said: “The powers and duties of a clerk are as well settled as those of a judge. We have seen that the statutes forbid him to alter or impair a record, and they expressly command him to ‘record the judgments, rules, orders and other proceedings *of the court*’. (Italics ours.) (R. S. 1909, Sec. 2685). The authorities are uniform in declaring that in performing this duty he acts ministerially and subject to the court’s control.”
59. *Ostmann v. Frey* (1910) 148 Mo. App. 271, 128 S. W. 253. Norton, J., delivering the opinion, said: “It is therefore clear, as has been many times decided, that a prohibition will not lie to prevent the execution of a mere ministerial act by a ministerial officer and as a general rule the writ will not go against judicial officers in performing mere ministerial duties. (*State ex rel. v. Clark Co.*, 41 Mo. 44; *Casby v. Thompson*, 42 Mo. 133; *Vitt v. Owens*, 42 Mo.

when it was prayed for, to prevent a circuit judge from illegally suspending the clerk of the court.⁶⁰

There are also several instances where the writ has been applied for in connection with the administration of the election laws by election officials. The writ will not issue at the instance of a member of a party committee to prevent a majority of the members from illegally expelling him.⁶¹ The writ was also denied to prevent

512; *Hockaday v. Newsom*, 48 Mo. 196; *School Dist. v. Burris*, 84 Mo. App. 654, 23 Am. and Eng. Ency. Law (2 Ed.) 206; *High, Ex. Rem.* (3 Ed.) Sec. 782). As a general rule a writ of prohibition is not available to the end of preventing the issuance of an execution, such being regarded as a ministerial act only. It seems this doctrine generally obtains, although it is not the law in this state, as we understand it. (23 Am. and Eng. Ency. Law (2 Ed.) 224; *Ex. parte Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.)”

60. *State ex rel. Henson v. Sheppard* (1905) 192 Mo. 497, 91 S. W. 477. The opinion contains practically no discussion of the question whether the act in question was the exercise of judicial power or otherwise. Lamm, J., said: “To make an end of the matter in hand, it is our opinion that respondent could not legally suspend Henson from all his official duties and emoluments because of the charges pending against him, and that his attempt to do so was in excess of his jurisdiction and created an emergency in which the writ of prohibition, on well recognized principles, will go.”
61. *State ex rel. Rudolph v. Witthoef* (1900) 117 Mo. App. 625, 93 S. W. 284. Goode, J., writing the opinion, said: “I am of the opinion that the writ of prohibition will not lie on the facts suggested, because the alleged threatened action of the majority of the general committee against the rights of the relators is not of a judicial nature, and, moreover, there is as yet no proceeding before the committee which we may prohibit it from entertaining. (*State ex rel. v. Ryan*, 180 Mo. 32). Perhaps other reasons might be given for this conclusion. While I think prohibition is not an appropriate remedy, I think, too, that an attempt by the majority of the committee to prevent relators from participating in the business of the committee would be reviewable by either certiorari or mandamus. (*State ex rel. v. Reynolds*, 190 Mo. 540, 89 S. W. 877). Which of those remedies ought to be invoked, would depend on the circumstances of the case.”

election commissioners from illegally selecting judges and clerks for a proposed election.⁶²

The writ herein was issued to stop the school commissioners, and others, from illegally deciding whether a new school district should be created.⁶³ This seems very doubtful. The opinion seems to turn upon the proposition that as the board gave notice and made a decision that it was exercising judicial powers.

62. *Kalbfell v. Wood* (1906) 193 Mo. 675, 92 S. W. 230. In a *per curiam* opinion a Minnesota case defining judicial power was quoted from approvingly: "A most instructive case is that of Home Insurance Co. v Flint, 13 Minn. 244. In the course of the opinion the court said: 'The compliance with this law is the act threatened and sought to be restrained. If the word is used in the ordinary and legal acceptance, clearly there is nothing judicial in the making of the examination and certificate required. The word "judicial" is defined: (1) pertaining to courts of justice, as, judicial powers; (2) practiced in the distribution of justice, as judicial proceedings; (3) proceeding from a court of justice; as, a judicial determination . . . A judicial investigation proceeds after notice, and eventuates in a judgment, which is the final determination of the rights of the parties, unless reversed by an appellate tribunal. The necessity of notice in the inception, and the conclusive character of the determination, are perhaps as good a test as any other, as to what proceedings are judicial. In this case it cannot be pretended that notice is required, or that the determination or certificate would be conclusive in collateral proceedings.' "
63. *School District v. Burris* (1900) 84 Mo. App. 654. Smith, P. J., writing the opinion, said: "Prohibition will not lie to restrain a purely ministerial act. *State v. County Court*, 41 Mo. 44; *Casby v. Thompson*, 42 Mo. 134. But it will lie to restrain a judicial act. All acts based upon a decision, judicial in its nature and affecting either a public or private right, are judicial acts. *Wood on Mandamus*, etc., 165; *Sweet v. Hulburt*, 51 Barb. 312. As it has been held that referees appointed under a statute to hear and determine a right of way sought by one person over the land of another so far partake of the character of a judicial body as to be amenable to the writ of prohibition. *State v. Stockham*, 14 S. C. 417. And so, too, it has been held that a board of county commissioners acting in a judicial capacity in determining the damages to be paid for land taken for railway purposes may be prohibited from proceeding with the enforcement of such damages under a law which is un-

There are several cases that raise the important question whether boards, or single administrative officers, who are about to illegally revoke a license, can be stopped by writ of prohibition. It would seem that in most instances those bodies are only exercising administrative powers and that proposed illegal action which they are about to take cannot be stopped by the use of this writ. It is true, of course, that prohibition would be very effective in these cases but that is not the test. The writ should not be enlarged and employed to stop action of any kind about to be taken by any official, or other legal body, that is beyond the power of the official or the board. If it were true that it may issue to stop any illegal action that has not been fully completed most of the controversies would be presented for decision by use of the writ. The scope of the writ, on the contrary, is limited to instances where a court or some other official, body, or tribunal, is exercising judicial powers that are not possessed. The object of prohibition in general, says Bacon, is "the preservation of the right of the king's crown and courts, and the ease and quiet of the subject."⁶⁴ Hence, prohibi-

constitutional. *Railway v. County Comm.*, 127 Mass. 50; see also *State v. McGrath*, 91 Mo. 386".

See also *School District v. Sims* (1916) 193 Mo. App. 480, 186 S. W. 4, for a similar situation where the writ was denied only because it was held the commissioner and others constituting the board were not transcending their legal powers.

64. 8 Bacon's Abridgement-Ab. 206. Prohibition. "As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was (a) framed, which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, etc., upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts (b) punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case."

tion will not issue to stop the state board of health from proceeding with charges filed against a physician to revoke his license to practice medicine on the ground that the physician was licensed before the creation of the board, and not subject to its control.⁶⁵ Nor will the writ issue to stop the mayor, members of the city council, and city attorney, from sitting to determine whether a city marshal shall be removed.⁶⁶ Nor will it issue to stop the secretary of

65. *State ex rel. v. Goodier* (1906) 195 Mo. 551, 93 S. W. 928, Valliant, J., writing the opinion, quoted from Gantt, J., in *State v. Hathaway, supra*: "And we can but commend in this connection the language of the same court in *Flournoy v. City*, 17 Ind. 169: 'An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act.'"

After quoting, Valliant, J., wrote: "In the case now before us for judgment we hold that the State Board of Health is not a judicial body, that it has the power to revoke a license or certificate issued by it if after investigation in which the licensee is afforded an opportunity to be heard it is satisfied that he has been guilty of unprofessional or dishonorable conduct, and that in conducting such investigation (or trial if that term is preferred) it is not assuming to exercise a judicial function; therefore a writ of prohibition does not lie to prevent the investigation."

66. *State ex rel. v. Bright* (1909) 224 Mo. 514, 123 S. W. 1057. The opinion by Graves, J., contains a careful and exhaustive review of the decisions in Missouri and elsewhere. He uses the following language in summing up the authorities: "From the authorities there can be no question that the mayor and city council, sitting as a court of impeachment, as in this instance, is not a judicial body within the meaning of our Constitution. It is a mere administrative body under a municipal corporation, which class of corporations both by statute and common law have the power of motion. Even at common law such corporation had the right to delegate the power of motion to a select body, but under our statute the charter of the corporation has delegated the power in cities of the third class to the mayor and city council, and to this extent the seat of the power has been fixed. We conclude, therefore, that this body so constituted is not one to which the circuit court or the judge thereof could address a writ of prohibition. Not that the acts of such courts of impeachment may not be reviewed at all, but the court has no legal authority to stop the proceedings of such a body. The courts can review their authority upon writs of certiora-

state from revoking the license of a foreign corporation.⁶⁷ Recently, however, it has been held the writ will issue to prevent the superintendent of insurance from illegally revoking the license of a foreign corporation to transact business in Missouri.⁶⁸ This decision indicates a tendency to depart from the common law writ and to extend its scope so as to include illegal administrative action within its reach;⁶⁹ though it should be said of the opinion, that it expressly states that the superintendent was exercising "judicial power". It

ri. (*State ex rel. v. Wells*, supra.) Possibly other remedies might be used, but that is adrift in this case."

As appears from the closing sentences of the opinion, it does not follow because prohibition will not issue that there is no way to reach illegal action upon the part of administrative bodies.

67. *State ex rel. Missouri etc. Ry. Co. v. Johnston and Roach* (1911) 234 Mo. 338, 137 S. W. 595.
68. *State ex rel. v. Harty* (1919) 276 Mo. 583, 208 S. W. 835. The following statement is found in *State ex rel. Drake v. Doyle* (1876) 40 Wisc. 175 (Ryan, C. J.) l. c. 188: "It was likewise urged that the duty of revocation imposed upon the secretary of state, operates to confer judicial power on that officer. We cannot think that either the power to grant a license or the power to revoke it involves the exercise of a judicial function. Both appear to us to be plainly and equally ministerial functions. The secretary, upon certain facts appearing to him, is authorized to issue a license; upon certain other facts appearing to him, is required to revoke it. This is a common condition of ministerial duty. In such a case, the ministerial officer must exercise his personal intelligence in ascertaining the facts, upon which his authority is founded; but he acts upon his peril of the fact, and can in no sense be said to exercise a judicial function. If the use of personal judgment in such cases should be held to be judicial, the distinction between ministerial and judicial functions would be very much removed. The secretary of state is a ministerial officer, authorized by law to perform different duties, upon different contingencies. If he makes mistakes of facts in the performance of his functions, his action may be void or voidable only, in different circumstances. But he cannot judicially determine the facts on which he acts or refuses to act. This can only be done by the courts, whose duty it is, in proper cases, to review his action and determine the facts and his official duty upon them."
69. See 36 *Harvard Law Review* 863, for a note on prohibition in which the writer evidently favors an extension of the writ.

should be said in this connection that the prevailing view is that the act sought to be stopped is the test as to whether the writ will issue rather than the nature of the body about to act.⁷⁰

It has been held that prohibition will not issue to prevent the state auditor from issuing writs of distress, which the statute authorized, against a county collector who had not made an annual settlement.^{70a} It has also been held that a court would not be

70. *Robey v. Prince George County* (1900) 92 Md. 150, 48 Atl. 48; *State ex rel. v. Harty* (1919) 276 Mo. 583, 208 S. W. 835; *State ex rel. v. Goodier* (1906) 195 Mo. 551, 93 S. W. 928; *State ex rel. v. Elkin* (1895) 130 Mo. 90, 31 S. W. 1037. In *State ex rel. v. Harty* (1919) 276 Mo. 583, Walker, J., writing the opinion, used this language in upholding the propriety of the writ: "Respondent is sought to be restrained from revoking the license of relator to do business in this State. This power, under a proper state of facts, is recognized by statute (Sec. 7078, R. S. 1909), and is in its nature judicial. This is true whether construed in the light of one of our earliest cases (*State to use v. Fry*, 4 Mo. l. c. 121), defining judicial power as that whereby justice is administered according to the rights of those concerned; or under the more general definition as that authority vested in a court, officer or person to hear or determine when the right of persons or property or the propriety of doing an act is the matter to be determined (*Merlette v. State*, 100 Ala. l. c. 44; *Grider v. Tally*, 77 Ala. l. c. 424); or as more particularly applicable to the matter at issue, as the power conferred upon a public officer involving the exercise of judgment and discretion in the determination of questions of right affecting the interest of persons or property as distinguished from ministerial power (23 Cyc. 620, and cases). The right threatened by the respondent to be affected was one acquired and enjoyed in conformity with the law and its abrogation required not only a hearing upon the facts but the exercise of discretion and judgment on the part of the respondent in its determination. Clothed with these characteristics, the proposed act must, therefore be construed as judicial in its nature."

70a. *Casby et al. v. Thompson* (1868) 42 Mo. 133. Holmes, J., writing the opinion, said: "It will be sufficient to say that, in a case like this, a prohibition will not lie. The duties of the auditor in this matter were executive and ministerial, and not judicial, in their nature. This question was considered in the case of the *State ex rel. West v. The Clark County Court*, 41 Mo. 44, and the principles there laid down may be taken as determining this case. The auditor was not a court exercising judicial power."

stopped from carrying out an order requiring the acting sheriff to serve process rather than the city marshall.^{70b}

5.

*The Writ Issues to Stop the Exercise of Jurisdiction
Not Possessed.*

It is no doubt difficult satisfactorily to define the term jurisdiction. Time and again it has been defined by the Supreme Court of the United States as the power to hear and decide a case. "The power to hear and determine a cause is jurisdiction", said Baldwin, J., in *Grignon's Lessee v. Astor*, 2 How. 319, l. c. 338. "Jurisdiction is authority to hear and determine", said Swayne, J., in *Mc Nitt v. Turner*, 16 Wall. 352, l. c. 366. "But jurisdiction", said Holmes, J., in *Wedding v. Meyler*, 192 U. S. 573, l. c. 584, "whatever else, or more it may mean, is jurisdiction, in its popular sense of authority to apply the law to the acts of men". It has been more fully defined by Brewer, J., in *Reynolds v. Stockton*, 140 U. S. 254, l. c. 268, as follows: "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not."

70b. *State ex rel. Mason v. Laughlin* (1879) 7 Mo. App. 529.

It has been defined as follows by the author of a text upon "Jurisdiction of Courts".⁷¹ "Jurisdiction is the power conferred on a court, by constitution or statute, to take cognizance of the subject-matter of a litigation and the parties brought before it, and to legally hear, try and determine the issues, and render judgment, according to the general rules of law, upon the issues joined, be they either of law or of fact or both." This definition, in substance, has been adopted by the supreme court of this state.⁷²

It is not surprising when we consider that we have several courts, that questions often arise as to powers, or right to decide, of those courts. It is also obvious that some means should have been found of keeping various courts within the allotted jurisdiction. Prohibition is the appropriate remedy to accomplish that purpose.^{72a}

71. Brown, *Jurisdiction of Courts*, 1.

72. *Robinson v. Levy* (1909) 217 Mo. 498, 1. c. 513, 117 S. W. 577. Fox, J., said: "The definition of jurisdiction is nowhere more clearly or correctly stated than in *Munday v. Vail*, 34 N. J. L. 422. In treating of that subject it was there said: "Jurisdiction may be defined as the right to adjudicate the subject-matter in the given case. To constitute this, there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present; and, third, the point decided must be, in substance and effect within the issue." See also *Hope v. Blair* (1891) 105 Mo. 1. c. 93, 16 S. W. 595; *State ex rel. v. Muench* (1909) 217 Mo. 124, 117 S. W. 25; *State ex rel. v. Holtcamp* (1912) 245 Mo. 1. c. 666, 151 S. W. 153.

72a. The following is a clear statement of the rule by Lamm, J., in *State ex rel. Judah v. Fort* (1908) 210 Mo. 512, 1. c. 523, 109 S. W. 737: "It cannot be doubted that (subject to a judicial discretion to be exercised in issuing all discretionary writs) the writ of prohibition may go to confine a court within the limits of its jurisdiction whether such court has no jurisdiction at all or is exercising powers in excess of its rightful jurisdiction. So much is elementary. The writ may go whenever judicial functions are assumed, not rightfully belonging to the person or court assuming them. Generally speaking, it is available to keep a court within the limits of its power in any particular matter as well as to prevent the excess of jurisdiction in a cause not given to it by law. (*State ex rel. v. Foster*, Judge, 187 Mo. 590; *State ex rel. v. Elkin*, et al., County Judges,

Questions of jurisdiction, though, are often difficult to determine and much litigation has resulted because of difference of opinion as to where the power to decide has been placed under the constitution and statutes made in accord therewith.

One of the most interesting cases in Missouri, from the standpoint of local history, was decided by the issuance by the supreme court of the writ of prohibition. It well illustrates when one inferior court has not jurisdiction, and the use of prohibition to stop further action by such a court to decide the pending suit. The case referred to is *Thomas v. Mead*,⁷³ decided in 1865 shortly after the close of the Civil War. A circuit court in St. Louis was prevented from entertaining further jurisdiction over an equity case begun by one Meade, claiming to be clerk of the supreme court, to restrain David Wagner and Walter Lovelace, who had been appointed judges of the supreme court, from taking possession of the records of the supreme court. One Thomas, who was restrained by an injunction issued by the circuit court, which also included Wagner and Lovelace, applied to the supreme court for a writ of prohibition to prevent the circuit court from proceeding further with a contempt citation, growing out of a violation of the injunction that had been issued. The circuit court had decided that Wagner and Lovelace were not *de jure* members of the supreme court.

The supreme court issued the writ, holding, *inter alia*, that the circuit court had no power to decide who was entitled to the records of the supreme court, especially as the determination of the question involved a determination as to who legally constituted members of the court.⁷⁴

130 Mo. 90; State ex rel. v. Eby, Judge, 170 Mo. 497; State ex rel. v. Bradley, Judge, 193 Mo. 33; State ex rel. v. Fort, Judge, 178 Mo. 518.)”

73. (1865) 36 Mo. 232.

74. Holmes, J., writing the opinion, said: “It is manifest that the petition and proceedings, on their face, seek to reach by injunction a subject matter over which the circuit court has no jurisdiction by injunction or otherwise, namely, the control of this court over its own records, books, and papers, and seal, and to disorganize and depose the court itself, by making a majority of the

Mention has already been made of the case where the writ was issued to a county court to stop it from trying what was in substance an ejectment suit⁷⁵ when that court had no power to decide the right to possession of land in the county. A good example of the use of the writ to stop a court without jurisdiction is seen where it was issued to stop a statutory court that had not been given power to disbar an attorney from proceeding further in a disbarment proceeding.⁷⁶

A circuit court was stopped by prohibition from proceeding further on supplemental proceedings to determine compensation that property owners should recover when the matter had previously been determined as to them, and the supplemental proceedings, under the statute, could only be had as to property owners not previously legally in court.⁷⁷ A circuit court also was stopped from trying a quo warranto case against a county collector charged with unlawfully accepting and using a railroad pass while holding that office, because of a statute which made such an act a misdemeanor and provided that upon conviction thereof the guilty official should forfeit his office.⁷⁸

judges parties to a feigned cause in which they could not sit on appeal or writ of error, and by effectually depriving the court of the means and power of performing its functions. Such a proceeding, if not to be summarily treated as a high-handed contempt of the authority and dignity of the court, is certainly an unprecedented and altogether unwarrantable encroachment upon the proper jurisdiction of the Supreme Court. In this respect, we think the proceedings in the court below clearly transgress and exceed the bounds and limits of the proper jurisdiction of the circuit court; and the matter sufficiently appears on the face of the petition and proceedings as well as by the suggestion, which is neither answered nor denied."

75. *Howard v. Pierce* (1866) 38 Mo. 296.
76. *State ex rel. Jones v. Laughlin* (1881) 73 Mo. 443. The St. Louis Court of Appeals had previously denied the writ, taking the view that the court had jurisdiction. *State ex rel. Jones v. Laughlin* (1880) 10 Mo. App. 1.
77. *State ex rel. Tuller v. Seehorn* (1912) 246 Mo. 568, 151 S. W. 724.
78. *State ex rel. Letcher v. Dearing* (1913) 253 Mo. 604, 162 S. W. 618.

A court that has no equity powers will be stopped by prohibition from trying a suit in equity. A circuit court was stopped from affirming a probate court which had attempted to exercise equity jurisdiction, where it was held that the latter court had no equity jurisdiction.⁷⁹ Hence the writ was issued to stop a court of common pleas from enforcing a temporary injunction granted in vacation, returnable to that court at its next term.^{79a} It was held under the statutes fixing the jurisdiction of the common pleas court that it only had power in term time to order a temporary injunction returnable to that court, that if the order is made in vacation it must be returnable to the circuit court.

(To Be Continued)

79. *State ex rel. Baker v. Bird* (1913) 253 Mo. 569, 162 S. W. 119. Brown, J., writing the opinion, said: "Probate courts are specifically vested with jurisdiction to do certain things, and we think that they should be permitted to invoke equitable principles in adjudicating all issues by which the Constitution or statute are expressly confided to their care. Such is the conclusion reached in the cases of *Lietman's Executor v. Lietman*, 149 Mo. 112; and *In re Estate of Jarboe v. Jarboe*, 227 Mo. 59. While the rule announced in the two cases last cited is undoubtedly sound law, I am not willing to concede that a probate court has jurisdiction to entertain a suit or proceeding, the sole basis of which is a demand for equitable relief, even though such relief should incidentally pertain to some matter of probate jurisdiction."
- 79a. *Oliver v. Snider* (1903) 176 Mo. 63, 75 S. W. 591.