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Prohibition: The Elusive and Misunderstood Writ

David W. Clarke
University of Richmond

PROHIBITION: THE ELUSIVE AND MISUNDERSTOOD WRIT

To many legal practitioners the writ of prohibition remains an enigma. Seldom used and even less often understood,[1] this extraordinary remedy at law[2] has long been recognized in Virginia as a tool with which to restrain an offending court from unwarranted conduct.[3] Used properly, the writ will encourage the due and regular administration of justice by confining each tribunal to the exercise of those powers with which it has been entrusted under the constitution and laws of the state.[4] The writ has been defined by the Virginia Supreme Court as "a proceeding between two courts—a superior and an inferior—and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the jurisdiction prescribed to it by law."[5] Common law provided[6] for this extraordinary remedy[7] and most states, including Virginia, have expressly granted their high courts jurisdiction over proceedings in prohibition.[8]

Despite this universal acceptance, the writ remains shrouded in confusion.[9] This comment will examine the writ of prohibition as it has been applied in Virginia. The goal is to dispel some of the confusion surrounding its use and to highlight some of the issues regarding its nature and

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1. "There is no legal remedy, no common law writ, of which so much that is erroneous has been written, in text books and in certain classes of judicial decisions in America, as that of the remedy by writ of prohibition." Wehle & Belcher, *Prohibition in Florida*, 4 U. FLA. L. REV. 546, 546 (1941) (quoting Cooper, *The Remedy by Prohibition in Florida as Affected by Some Recent Supreme Court Cases*, 2 FLA. ST. B.A.L.J. 6, 11 (1928)).

2. Like all other extraordinary remedies (certiorari, habeas corpus, mandamus, procedendo and quo warranto), prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress. J. HIGH, EXTRAORDINARY LEGAL REMEDIES 555 (1874); *see* notes 54-56 *infra* and accompanying text.

3. The earliest English accounts of the exercise of the writ come from the twelfth century. Hughes & Brown, *The Writ of Prohibition*, 26 GEO. L.J. 831, 832 (1938) (citing ROGERS, ECCLESIASTICAL LAW 776 (2d ed. 1849)). In Virginia, as in most states, the writ was adopted as a part of its common law heritage from England and was recognized by the Virginia Constitution. VA. CONST. art. VI, § 1.

4. J. HIGH, *supra* note 2, at 550 (citing Quimbo Appo v. People, 20 N.Y. 533 (1860)).

5. Mayo v. James, 53 Va. (12 Gratt.) 17, 23 (1855).

6. Prohibition is surmised to be as old as the common law itself. J. HIGH, *supra* note 2, at 551. *See* note 14 *infra* and accompanying text.

7. Although the writ is often called a remedy, such terminology may be misleading as its function is preventive rather than remedial. *See* notes 70-76 *infra* and accompanying text.

8. *See, e.g.*, CAL. CONST. art. 6, § 10; FLA. CONST. art. 5, § 3; ILL. CONST. art. 6, § 4(a); LA. CONST. art. 7, § 2; NEV. CONST. art. 6, § 4; N.M. CONST. art. 6, § 3; OHIO CONST. art. 4, § 2; OKLA. CONST. art. 7, § 4; TEX. CONST. art. 5, § 3; VT. CONST. art. 4, § 2; VA. CONST. art. VI, § 1; W. VA. CONST. art. 8, § 3. In addition, the Virginia statutes set out general provisions governing the writ. VA. CODE ANN. §§ 8.01-644 to -652 (Repl. Vol. 1977).

9. Comment, *The Writ of Prohibition in Pennsylvania*, 80 DICK. L. REV. 472, 473 (1976).

scope.

I. HISTORY

The writ of prohibition originated in England[10] as the King's prerogative writ, one which the crown had the exclusive right to issue.[11] The power to issue the writ was placed in the court known as the *Aula Regis*, the first known Supreme Court of England, over which the King personally presided.[12] The original and primary purpose of the writ of prohibition in England was to guard the jurisdiction of the King's court against the encroachment of other courts.[13] The earliest references to the writ of prohibition are from the twelfth century and reveal that the writ was employed by the King's court to limit the jurisdiction of the Roman Catholic courts.[14]

In the thirteenth century, the legal system of England was still in its infancy and suffered from lack of organization. Isolated courts with indefinite jurisdictions abounded. Each of these courts competed for greater prestige and judicial fees.[15] Of these struggles, the most bitter arose between the King's tribunals and the ecclesiastical courts[16] in the battle between church and state. As a result, the use of the writ had a political rather than a judicial emphasis.[17]

After most of the political infighting between the courts subsided, the writ became primarily a judicial instrument.[18] Greater emphasis was placed upon the interests of the individual litigants and less upon restraining invasion upon the regal dignity.[19] This change in emphasis gen-

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10. For a comprehensive review of the development of the English writ, see Hughes & Brown, *supra* note 3; Wolfram, *The "Ancient and Just" Writ of Prohibition in New York*, 52 COLUM. L. REV. 334 (1952).

11. Note, *Writs of Prohibition*, 36 HARV. L. REV. 863 (1923).

12. Hughes & Brown, *supra* note 3, at 834.

13. The prevailing maxim of the day was that "every good judge should enlarge his jurisdiction." *Id.* at 832. Yet, the courts following the maxim ran afoul of the prerogative writ.

14. The references are from Lord Glanville's treatise on the laws and customs of England written around 1181. Wolfram, *supra* note 10, at 344 n.2.

15. Note, *supra* note 11, at 863.

16. The ecclesiastical courts were created by decree of William the Conqueror to have jurisdiction over all religious matters. 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 88 (2d ed. 1968).

17. "Emphasis [was] being placed at this time strongly upon the enforcement of the King's prerogative." Note, *supra* note 11, at 863.

18. *Id.* at 864. This attitude continued and in the eighteenth century, in the interest of justice, the power to issue the writ was extended to the English Courts of Chancery, Common Pleas and Exchequer. 2 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 63 (3d ed. Cooley 1884).

19. In Virginia, the writ "has always . . . been regarded as an existing legal remedy." 53 Va. (12 Gratt.) at 18. *See* Jackson v. Maxwell, 26 Va. (5 Rand.) 636 (1826); Hutson v. Lowry, 3 Va. (2 Va. Cas.) 42 (1816); Millar v. Marshall, 3 Va. (1 Va. Cas.) 158 (1808). Presumably the writ would continue to exist in Virginia as a matter of common law apart from statute.

erated a more favorable climate for adoption of the writ in America.

In Virginia the writ was adopted as a part of the state's common law heritage from England.[20] In addition, the Constitution of Virginia recognized the writ and granted original jurisdiction to the supreme court in matters of prohibition.[21] Despite this early historical recognition, it was not until 1855 that the Virginia Supreme Court first reported a case involving the writ of prohibition. In that case, *Mayo v. James*,[22] the supreme court held the writ inapplicable against a mayor who, having ample power to take cognizance of cases involving a violation of any city ordinance or by-law, was not in excess of his granted jurisdiction. Since that time the writ has been utilized infrequently,[23] yet the writ remains, as the following discussion will show, a viable instrument for challenging a court's authority to hear a particular case.[24]

II. Nature of the Writ

A. *Context in Which a Petition for Writ May Arise*

The writ of prohibition, like a mandamus decree,[25] is a direct order issued from a superior court to an inferior court to restrain the lower court from activity beyond its granted jurisdiction.[26] The various courts in Virginia have each been granted jurisdiction, the power to hear and determine a case, that is in some way limited. The traditional bases for testing jurisdiction are threefold: first, the court must have jurisdiction over the parties involved;[27] second, the subject matter which is being ad-

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20. There was a recognition that justice required that the writ be used not only to protect the interest of the sovereign but also to restrain an encroachment upon the rights of his subjects. Hughes & Brown, *supra* note 3, at 841. The American courts, naturally, emphasized the petitioner's right against injury through unauthorized exercise of judicial power. Board of Supervisors v. Bazile, 195 Va. 739, 80 S.E.2d 566 (1954) (writ issued where damage or injustice is likely to follow).

21. Va. Const. art. VI, § 1 (original but not exclusive jurisdiction). *See* Supervisors of Bedford v. Wingfield, 68 Va. (27 Gratt.) 329, 333 (1876).

22. 53 Va. (12 Gratt.) 17. Note that there were earlier cases reported from lower courts. *See, e.g.*, Hutson v. Lowry, 3 Va. (2 Va. Cas.) 42 (1816); Millar v. Marshall, 3 Va. (1 Va. Cas.) 158 (1808).

23. The Virginia Supreme Court made a somewhat prophetic statement in 1855 when it said "[t]he writ of prohibition has not very often been resorted to in this state . . . ." 53 Va. (12 Gratt.) at 18.

24. *See, e.g., In re* Virginia Dep't of Corrections, 222 Va. 454, 281 S.E.2d 857 (1981) (most recent Virginia decision involving writ of prohibition).

25. In the most basic sense, mandamus commands action by inferior bodies whereas prohibition restrains the same. For a comparison of prohibition with mandamus, see Comment, *supra* note 9, at 485-87.

26. In Virginia the courts with authority to issue the writ of prohibition are: a) the supreme court, Va. Code Ann. § 17-96 (Repl. Vol. 1975); and b) the circuit courts, *Id.* § 8.01-261 (Cum. Supp. 1981).

27. *Id.* §§ 8.01-328 to -330 (Cum. Supp. 1981).

judicated must be one of which the particular court has been given cognizance;[28] and, third, the amount of recovery being sought in the particular action must not exceed limitations placed upon that level of the courts.[29] All of these limitations upon jurisdiction are founded upon the desire to maintain order and regularity in the system of courts.

The proceeding in prohibition is not a part or continuation of the prohibited proceeding as is true in the cases of the interlocutory appeal or appeal of a final judgment. Rather, the prohibition proceeding is wholly secondary or collateral to the proceeding in question in the sense that none of the substantive issues of that case are addressed. Thus, although the writ appears to be appellate in nature, it cannot be accurately described as such.[30] The prohibition petition is related to the prohibited proceeding only to the extent that, if successful, it will arrest that proceeding and prevent its being further prosecuted.[31] To the extent that the two proceedings are distinct and the prohibition action presents a question separate from the substance of the trial court action, the writ is, in form, original.[32]

B. *Conflicting Views of the Writ: A Matter of Discretion or of Right?*

A recognized debate exists as to whether the writ issues as a matter of right or whether its issuance is governed solely by judicial discretion.[33] The Virginia Supreme Court has consistently described the writ as one of sound judicial discretion to be granted or withheld according to the circumstances of each particular case.[34] Although the court has not expressed a rationale for this stand, it stated in *Supervisors of Bedford v.*

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28. *See, e.g.*, VA. CONST. art. VI, § 1; VA. CODE ANN. §§ 17-96, -97 (Repl. Vol. 1975) (setting out subject matter jurisdiction for supreme court).

29. *See, e.g.*, VA. CODE ANN. § 16.1-77 (Cum. Supp. 1981) (establishing $1,000 maximum amount in controversy for exclusive jurisdiction of general district courts).

30. 53 Va. (12 Gratt.) at 23. "[T]he remedy by prohibition is distinct from and independent of, though collateral to, the proceeding sought to be prohibited." *Id.* at 25. *Accord*, Farnsworth v. Montana, 129 U.S. 104 (1889). If, in fact, there is a final judgment then the writ will not issue. *See* notes 74, 75 *infra* and accompanying text.

31. 53 Va. (12 Gratt.) at 23.

32. The jurisdiction of the Supreme Court of Virginia is termed original. VA. CONST. art. VI, § 1; R. SUP. CT. VA. 5:5. However, one must be aware that in some cases of prohibition the jurisdiction is not original in the sense that it deals with matters never yet adjudicated. This is so because in many states there is a requirement that the issue of lack of jurisdiction be presented to the trial court prior to any petition for a writ.

33. Wehle & Belcher, *supra* note 1, at 548-49; Comment, *supra* note 9, at 493-94. For an example of a state which views the writ as one of right, *see* W. VA. CODE § 53-1-1 (Repl. Vol. 1981).

34. King v. Hening, 203 Va. 582, 125 S.E.2d 827 (1962); Board of Supervisors v. Bazile, 195 Va. 739, 80 S.E.2d 566 (1954); Supervisors of Bedford v. Wingfield, 68 Va. (27 Gratt.) 329 (1876). It is notable that these cases advocate the rule of discretion to the express exclusion of the rule of right.

Wingfield[35] that prohibition, as a prerogative writ, is to be used with "great caution and forebearance."[36] This view may reflect an attitude of deference toward judges in the inferior courts allowing them the opportunity to make judgments as to their own jurisdiction.[37] On the other hand, those states which describe the writ as one of right stress that liberal use of prohibition will encourage regularity in judicial proceedings by preventing unauthorized encroachment of jurisdiction by inferior courts.[38] This goal is not, however, unique to those states. In the *Wingfield* case, the Virginia Supreme Court also recognized that the writ is used "to secure order and regularity in judicial proceedings."[39]

The conclusion is, then, that the label of right or discretion is not determinative of when the writ will be granted or denied. Under either principle, the ultimate question is whether the inferior court has jurisdiction over the disputed matter.[40] However, one can find a difference in the disposition of cases involving the writ, depending upon the view of the device. For example, in a state where the writ of prohibition is considered a matter of right, the writ will issue regardless of the existence of other effective remedies such as a writ of error.[41] In Virginia and other jurisdictions which view the writ as discretionary, the existence of an alternative remedy is always sufficient reason for denying the writ.[42]

Beyond the questions relating to the context in which the writ of prohibition arises and its right or discretionary nature, one must consider what the Virginia courts have recognized as a lack of jurisdiction. This consideration and others which affect or condition the issuance of the writ are addressed in the following section.

III. Scope of the Writ

A. *Threshold: Lack or Excess of Jurisdiction*

As noted above, the determinative question in a prohibition proceeding is whether the inferior court is empowered to hear the controversy. Thus,

35. 68 Va. (27 Gratt.) 329 (1876).

36. *Id.* at 333.

37. The Virginia Supreme Court called it a matter of judicial courtesy to a lower court. King v. Hening, 208 Va. 582, 125 S.E.2d 827 (1962).

38. Comment, *supra* note 9, at 494.

39. 68 Va. (27 Gratt.) at 333.

40. Note that in some other states, *e.g.*, Pennsylvania and West Virginia, abuse of power is an additional ground for granting the writ. Arguably, a Virginia case holds similarly. *See* note 51 *infra* and accompanying text.

41. *See, e.g.*, Norfolk & W. Ry. Co. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S.E. 196 (1898).

42. 68 Va. (27 Gratt.) at 329. In Florida, a state which has adopted the "sound judicial discretion" approach, the writ is one of right where the court lacks jurisdiction and the petitioner, faced with injury, lacks another adequate remedy. Wehle & Belcher, *supra* note 1, at 546. None of the Virginia decisions has adopted this approach.

the major ground for relief is want or excess of jurisdiction on the part of the trial court.[43] Most of the prohibition cases dealt with by the Virginia Supreme Court have been based on a lack of subject matter jurisdiction.[44] There are no reported Virginia cases where the writ has been granted based on lack of personal jurisdiction,[45] but in at least one case the writ was issued where the amount in controversy limitation was violated.[46] In any case, if the "court or judge has jurisdiction to enter any order in the proceeding sought to be prohibited, the writ does not lie."[47]

In other jurisdictions as well, lack or excess of jurisdiction has been widely accepted as the primary ground for relief by the writ of prohibition.[48] One writer points to this narrow basis of application as the chief reason why the writ has been so seldom used and why the writ is not likely to expand to restrain other abuses of the courts.[49] Historically, another closely related ground for relief by prohibition arose where a court, having jurisdiction originally, exceeded that jurisdiction in the hearing of a case.[50] Several early Virginia cases utilized this rationale in holding that the writ can be issued against a court which attempts "to proceed by rules differing from those which ought to have been observed."[51] Recent

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43. Rollins v. Bazile, 205 Va. 613, 139 S.E.2d 114 (1964).

44. *See, e.g., In re* Virginia Dep't of Corrections, 222 Va. 454, 281 S.E.2d 857 (1981) (where statutory period for modification, vacation or suspension by trial court has passed, writ will issue to prevent action by judge of trial court); Lee v. Jones, 212 Va. 792, 188 S.E.2d 102 (1972) (criminal court has no subject matter jurisdiction over child under 15 years of age); County School Bd. v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956) (circuit court, being a court of general jurisdiction had jurisdiction of subject matter of mandamus action—prohibition will not lie); Burroughs v. Taylor, 90 Va. 55, 17 S.E. 745 (1893) (justice of peace lacks subject matter jurisdiction to grant new trial when more than 30 days have elapsed since judgment—prohibition will lie); Mayo v. James, 53 Va. (12 Gratt.) 17 (1855) (mayor has subject matter jurisdiction over cases involving violation of city ordinances—prohibition will not lie).

45. Prohibition is generally said to lie only to challenge subject matter rather than personal jurisdiction. However, this rule is not without exceptions. Boyer & Barton, *Writ of Prohibition in Florida Since 1951*, 29 U. FLA. L. REV. 241, 247 (1977).

46. James v. Stokes, 77 Va. 225 (1883). In this case the judge, under pretext of acquiescence, attempted to exert jurisdiction over a case which involved a recovery in excess of the amount in controversy limitation. The supreme court held that he could not split the action into three separate portions to circumvent the limitation.

47. Grief v. Kegley, 115 Va. 552, 557, 79 S.E. 1063, 1064 (1913). *See also* County School Bd. v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956); Fidelity & Deposit Co. v. Beale, 102 Va. 295, 46 S.E. 307 (1904).

48. Boyer & Barton, *supra* note 45, at 241.

49. *Id.* at 249.

50. Hughes & Brown, *supra* note 3, at 837.

51. Nelms v. Vaughan, 84 Va. 696, 698, 5 S.E. 704, 705 (1888). *See also* Shell v. Cousins, 77 Va. 328 (1883); James v. Stokes, 77 Va. 225 (1883); Hogan v. Guigon, 70 Va. (29 Gratt.) 705 (1878); McDougal v. Guigon, 68 Va. (27 Gratt.) 133 (1876); *Ex parte* Ellyson, 61 Va. (20 Gratt.) 10 (1870); West v. Ferguson, 57 Va. (16 Gratt.) 270 (1861). The Pennsylvania courts have more recently applied this rationale. *E.g.*, Commonwealth v. Smart, 367 Pa. 476, 483, 81 A.2d 316, 319 (1951); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d

Virginia cases, however, have not adopted this precept.[52]

The Virginia Supreme Court has placed in the generalized category of lack of jurisdiction several cases which are only tangentially related to the traditional concepts of jurisdiction. For example, the writ was held appropriate for application in a case to disqualify a judge on the basis of prejudice or pecuniary interest.[53] Similarly, where a statutory time limitation establishes an exclusive period in which any grant of a new trial may be made, the writ of prohibition will be used to restrain an official from granting a new trial after the expiration of that period.[54]

B. *Beyond the Threshold: Conditions Which Augment or Discourage Issuance of the Writ*

Some cases have conditioned the issuance of the writ upon necessity.[55] This is not a separate ground for recovery but merely a qualification of the threshold requirement of a lack or excess of jurisdiction. In *Supervisors of Bedford v. Wingfield*,[56] the Virginia Supreme Court, in setting out the general principles of law governing writs of prohibition, said that the writ issues only in cases of *extreme* necessity. The court defined "extreme necessity" by stating: "[B]efore [the writ] can be granted, it must appear that the party aggrieved has no remedy in the inferior tribunals."[57] Similarly, other cases add to the threshold requirement for issuance of the writ a showing of potential[58] injury or injustice to the petitioner. For example, in *Board of Supervisors v. Bazile*,[59] the Virginia Supreme Court described the writ of prohibition as an instrument "issued to restrain inferior courts from acting without authority of law where damage or injustice are likely to follow from such action."[60]

Prohibition will issue only to inferior courts, boards, officers or tribunals having judicial or quasi-judicial powers. The writ will not issue against individuals in their private character[61] but will issue against them

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426, 430 (1948).

52. *See, e.g.*, Lee v. James, 212 Va. 792, 188 S.E. 2d 102 (1972); Rollins v. Bazile, 205 Va. 613, 139 S.E. 2d 114 (1964); King v. Hening, 203 Va. 582, 125 S.E. 2d 827 (1962); Board at Supervisors v. Bazile, 196 Va. 739, 80 S.E. 2d 566 (1954).

53. Ewing v. Haas, 132 Va. 215, 111 S.E. 255 (1922).

54. Burroughs v. Taylor, 90 Va. 55, 17 S.E. 745 (1893). *Cf. In re* Virginia Dep't of Corrections, 222 Va. 454, 281 S.E. 2d 857 (1981) (time period for suspension of judgment).

55. *See, e.g.*, Lee v. Jones, 212 Va. 792, 188 S.E.2d 102 (1972).

56. 68 Va. (27 Gratt.) 329 (1876). *See also* Board of Supervisors v. Bazile, 195 Va. 739, 80 S.E.2d 566 (1954) (the writ is necessary where ordinary remedies are insufficient).

57. 68 Va. (27 Gratt.) at 333.

58. The writ of prohibition will prevent potential injury rather than remedy existing injury. *See* note 7 *supra*.

59. 195 Va. 739, 80 S.E.2d 566 (1954).

60. *Id.* at 747, 80 S.E. at 572. *See also* King v. Hening, 203 Va. 582, 125 S.E.2d 827 (1962); Supervisors of Bedford v. Wingfield, 68 Va. (27 Gratt.) 329 (1896).

61. *See, e.g.*, Bee Hive Mining Co. v. Industrial Comm'n, 144 Va. 240, 132 S.E. 177 (1926);

in their capacity as judges or officers of the courts or other tribunals. Any acts which are not judicial in nature, that is, those which are merely ministerial, administrative or executive in character, are not subject to the writ.[62] For example, in *Burch v. Hardwicke*,[63] an early Virginia case, the court denied a writ of prohibition to restrain a town mayor from his investigation of charges against the chief of police finding that the mayor acted not in a judicial capacity, but within his supervisory powers as the town's chief executive officer. In *Bee Hive Mining Co. v. Industrial Commission*,[64] however, the court granted the writ to restrain an administrative body, holding that an industrial commission acts in a judicial capacity when it attempts to issue an award unauthorized by the Workmen's Compensation Act. In the case of an administrative body, the distinction as to what acts are judicial or quasi-judicial remains obscure.[65]

The writ or prohibition is "never allowed to usurp the functions of a writ of error, and can never be employed as a process for the correction of errors of inferior tribunals.[66] This is especially true where the law provides that no writ of error shall lie.[67] However, the fact that a writ of error would issue, does not preclude prohibition as a form of relief. The two may be concurrent remedies in the sense that either could provide relief from injustice resulting from action in excess of jurisdiction.[68] The distinction is that the writ of prohibition issues prior to a final judgment whereas the writ of error issues subsequent to any judgment. Thus, where a court, by mistake, has taken jurisdiction of a matter and rendered judgment, that judgment is not void nor is there an opportunity to resort to

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Burch v. Hardwicke, 64 Va. (23 Gratt.) 51 (1873).

62. Bee Hive Mining Co. v. Industrial Comm'n, 144 Va. 240, 132 S.E. 177 (1926).

63. 64 Va. (23 Gratt.) 51 (1873).

64. 144 Va. 240, 132 S.E. 177 (1926).

65. One writer classified a wide variety of administrative activities as either judicial or quasi-judicial for the purposes of prohibition. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 416 (1st ed. 1958). That same writer advocates the abolition of the writ's use as a means of judicial review in the administrative law setting. K. DAVIS, ADMINISTRATIVE LAW TEXT § 23.14 at 436 (1959). He holds this position in spite of an ever growing need for judicial review in the rapidly increasing field of administrative law.

66. 68 Va. (27 Gratt.) at 334. The Virginia Supreme Court has consistently followed this precept. *See, e.g.*, Rollins v. Bazile, 205 Va. 613, 139 S.E.2d 114 (1964); Board of Supervisors v. Bazile, 195 Va. 739, 80 S.E.2d 566 (1954); Grief v. Kegley, 115 Va. 552, 79 S.E. 1062 (1913); Fidelity & Deposit Co. v. Beale, 102 Va. 295, 46 S.E. 307 (1904); Moss v. Barham, 94 Va. 12, 26 S.E. 388 (1896). A writ of error may be distinguished from a writ of prohibition in that in the former the superior court requires the trial court to remit the record of an action before it in which a final judgment has been entered to examine certain alleged errors.

67. *See* Nelms v. Vaughan, 84 Va. 696, 5 S.E. 704 (1888). Here the legislature had set a policy of providing a "cheap and speedy" method of contesting election results. In furtherance thereof, the statute provided there would be no appeal on the basis of error. *See also* Grief v. Kegley, 115 Va. 552, 79 S.E. 1062 (1913).

68. Board of Supervisors v. Gorrell, 61 Va. (20 Gratt.) 484 (1871). The court held that where a writ of error is found inadequate, a writ of prohibition will issue.

the writ of prohibition.[69]

IV. Procedure for Obtaining Writ

"[T]he superior tribunal may interpose the aid of prohibition at any stage of the proceedings below, even after verdict, sentence or judgment."[70] It is clear, however, that there must be a proceeding pending in the inferior court.[71] Although the writ may be applied to arrest such proceedings,[72] it will not perform the function of an interlocutory appeal.[73]

Because of the writ's preventive rather than remedial nature[74] it "issues only to prevent the commission of a future act, and not to undo an act already performed."[75] Where, therefore, the proceedings sought to be prohibited have been disposed of by the trial court and no action by the parties or the court can revive the cause on that level, prohibition will not issue. The Rules of the Supreme Court of Virginia provide that all final judgments, orders and decrees[76] shall remain under the control of the trial court for a period no longer than twenty-one days.[77] During that twenty-one day period the final judgment order, or decree is subject to modification, vacation or suspension by the trial court.[78] As such, still under the control of the trial court, the writ may be granted during that period. Thus, where the trial court has lost jurisdiction over convicted felons after judgment by entering a final order of suspension of their sentences and release and the passage of the twenty-one days, the writ will not lie. However, where no final action has been taken to remove the convicted felons from the control of the trial court because of the pendency of a motion to suspend, the writ will lie.[79]

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69. County School Bd. v. Snead, 198 Va. 100, 92 S.E.2d 497 (1956) (prohibition does not lie to prevent subordinate court from deciding erroneously or from enforcing erroneous judgment in case in which it had right to adjudicate).

70. *Prohibition (Writ of)*, 26 Va. Rep. Ann. 524 (monograph following Jackson v. Maxwell, 26 Va. (5 Rand.) 636 (1826). *Accord,* French v. Noel, 63 Va. (22 Gratt.) 454 (1872).

71. *See* Goodrich v. Commonwealth, 210 Va. 295, 171 S.E.2d 256 (1969) (writ denied where no proceeding had been instituted against the petitioner).

72. *See* French v. Noel, 63 Va. (22 Gratt.) 454 (1872); Mayo v. James, 53 Va. (12 Gratt.) 17.

73. Williams v. Maxwell, 396 F.2d 143 (4th Cir. 1968).

74. *See* note 7 *supra.*

75. J. High, *supra* note 2, at 552. *See also* United States v. Hoffman, 71 U.S. (4 Wall.) 158 (1867); Rollins v. Bazile, 205 Va. 613, 139 S.E.2d 114 (1964). *But cf.* James v. Stokes, 77 Va. 225 (1883) (though judgments actually rendered, executions levied and the money in the hands of constable, writ will still lie).

76. A final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the order. Daniels v. Truck & Equip. Corp., 205 Va. 579, 139 S.E.2d 31 (1964).

77. R. Sup. Ct. Va. 1:1.

78. *Id.*

79. *In re* Virginia Dep't of Corrections, 222 Va. 454, 281 S.E.2d 857 (1981) (involving five

As a general rule, the burden is placed upon the petitioner to make, prior to application for the writ, some plea or objection at the trial court level regarding that court's lack of jurisdiction.[80] Although the Virginia Supreme Court has adopted this requirement, it notes that the rule is not rigid or arbitrary.[81] As noted, the underlying principle of this rule is respect and courtesy to the inferior court.[82] However, this principle may yield where there is a great need for judicial expediency in avoiding unnecessary litigation on the merits.[83] This is particularly true where the case involves substantial rights of the litigants or matters of public interest and convenience.[84]

Subsequent to an unsuccessful objection to the jurisdiction in the lower court, unless exempted from this requirement on the basis of judicial expediency, application may be made to a superior court[85] for the writ of prohibition. In Virginia, the procedure for granting the writ is regulated entirely by statute.[86] Application may be made by any party to the proceeding below who is likely to be injuriously[87] affected by that court's action without jurisdiction.[88] The proper petition for the writ is one which states plainly and clearly the grounds for the relief of prohibition.[89] Such petition must be verified by oath after the adverse party has been served with a copy and reasonable notice of the intended application.[90] Under the rule to show cause requirement, now eliminated in Virginia, the adverse party had to appear before the court to deny the allegations made in the petition. The present notice requirement has substituted for the

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convicted felons, three of whom had been released after sentences were suspended and two others on whose convictions motions to suspend were still pending). *See also* Burroughs v. Taylor, 90 Va. 55, 17 S.E. 745 (1893).

80. *See* King v. Hening, 203 Va. 582, 125 S.E.2d 827 (1962). For an interesting look at this plea to jurisdiction requirement, see Commonwealth v. Latham, 85 Va. 632, 8 S.E. 488 (1889) (majority held no plea necessary hinting that even if it were necessary, motion to transfer would meet requirement).

81. 195 Va. 739, 80 S.E.2d 566.

82. *See* notes 37-39 *supra* and accompanying text.

83. 203 Va. 582, 125 S.E.2d 827.

84. *Id.* (public interest required speedy determination of jurisdictional issue in this annexation suit).

85. In Virginia, the proper venue for the writ is the circuit court of the county wherein the record or proceeding is to which the writ relates. VA. CODE ANN. § 8.01-261 (Cum. Supp. 1981). A writ from the Virginia Supreme Court shall issue and be tried at any place of session of the court. *Id.* § 17-98 (Repl. Vol. 1975).

86. VA. CODE ANN. §§ 8.01-644 to -652 (Repl. Vol. 1977); M. BURKS, VIRGINIA PLEADING AND PRACTICE § 200 (4th ed. 1952).

87. *See* notes 57-59 *supra* and accompanying text.

88. One Virginia case recognized an exception to the universal rule that the writ is issued only at the instance of the party aggrieved. The court, relying on the English history of the writ, stated that prohibition may be issued at the instance of a mere stranger. 53 Va. (12 Gratt.) 17. *See generally* Hughes & Brown, *supra* note 3.

89. VA. CODE ANN. § 8.01-645 (Repl. Vol. 1977).

90. *Id.* § 8.01-644.

rule to show cause. Thus, where the defendant fails to appear, or appearing fails to make a defense, a preemptory writ shall be awarded.[91] Although there are no Virginia cases dealing with defenses, the Code provides for their use.[92] In the interest of judicial economy, the statutes permit a superior court to make an order suspending the proceedings below until the final decision of the prohibition action.[93] Upon issuance of the writ, obedience may be enforced by process of contempt.[94]

V. CONCLUSION

The use of the writ of prohibition in Virginia is likely to remain sporadic as long as the courts strongly adhere to the rule demanding a lack of jurisdiction as the prerequisite to the writ's issuance. The recent Virginia Supreme Court cases do not reflect any trend toward relaxation of this requirement. Yet, as this analysis of the writ has shown, the writ remains viable and may be the answer for an otherwise remediless client. An awareness of the issues surrounding the writ and the procedural guidelies involved may help the legal practitioner to utilize the writ and thus avoid potential injustice to litigants.

David W. Clarke

91. *Id.* § 8.01-646.
92. *Id.* § 8.01-647.
93. *Id.* §§ 8.01-650, 651.
94. *Id.* § 8.01-652.