Volume 80
Issue 3 *Dickinson Law Review - Volume 80, 1975-1976*

3-1-1976

The Writ of Prohibition in Pennsylvania

John A. Covino

COMMENTS

The Writ of Prohibition in Pennsylvania

I. Introduction

Essential to the proper administration of justice within any system of courts consisting of appellate levels[1] is the requirement that the actions of each inferior court be confined to its lawful powers or jurisdiction.[2] To enforce this requirement the common law has long provided[3] the extraordinary remedy at law[4] known as the writ of prohibition. The writ of prohibition is the process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising jurisdiction with which they have not been legally vested.[5] Its function is to restrain or prohibit an offending court from continuing its unwarranted conduct when continuation threatens imminent harm[6] to the individual[7] on whose behalf[8] the

1. The adjudicative process of the common law has been conducted by means of trial and appellate courts since the eleventh century. Hughes & Brown, *The Writ of Prohibition*, 26 GEO. L.J. 831, 834 (1938) [hereinafter cited as Hughes & Brown].

2. Schlesinger v. Musmanno, 367 Pa. 476, 483, 81 A.2d 316, 319 (1951); *In re* McNair, 324 Pa. 48, 64, 187 A. 498, 505 (1936). An inferior court is considered to be acting outside its jurisdiction when it conducts a proceeding over which it lacks subject-matter jurisdiction and when it acts in excess of its authority within a proceeding over which it has subject-matter jurisdiction. *See* notes 77-97 and accompanying text *infra*.

3. *See* notes 24-37 and accompanying text *infra*.

4. Other extraordinary remedies at law are certiorari, habeas corpus, mandamus, procedendo, and quo warranto. The term "remedy" is actually a misnomer as applied to the writ of prohibition since the function of prohibition is more accurately described as preventive than remedial.

5. Commonwealth v. Homka, 1 Pa. D. & C.2d 685, 686 (C.P. (Q.S.) Phila. 1954). This is the universally accepted definition. *E.g.*, Huggins v. Mulvey, 160 Conn. 559, 560, 280 A.2d 364, 365 (1971); People *ex rel.* Sokoll v. Municipal Court, 359 Ill. 102, 107, 194 N.E. 242, 244 (1935); Smith v. Tuman, 262 Minn. 149, 154, 114 N.W.2d 73, 77 (1962); County of Hillsborough v. Superior Court, 109 N.H. 333, 334, 251 A.2d 325, 326 (1969); Swanson v. Swanson, 8 N.J. 169, 181-82, 84 A.2d 450, 453 (1951); Lee v. County Court, 27 N.Y.2d 432, 436, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 708 (1971); State *ex rel.* Arey v. Sherill, 142 Ohio St. 574, 585, 53 N.E.2d 501, 507 (1944); Boggess v. Wood, 96 Okla. Crim. 378, 379, 255 P.2d 952, 953 (1953); State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 99 (Tex. Crim. App. 1973); Hatley v. Lium, 126 Vt. 385, 386, 231 A.2d 647, 648 (1967).

6. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948).

7. The petitioner who seeks a writ of prohibition to restrain a court order need not be a party to a proceeding before that court. County of Carbon v. Leibensperger, 439 Pa. 138, 139, 266 A.2d 632, 633 (1970).

8. The American common law holds that the petitioner's rights against injury through unauthorized exercise of judicial power is the primary interest the writ of

writ is issued. The severity of the writ's effect[9] makes its issuance proper only in those cases in which no other relief is adequate.[10]

The writ of prohibition has existed throughout the entirety of Anglo-American jurisprudence. It has been a part of English law for over nine centuries[11] and most American states have expressly granted their high courts jurisdiction over proceedings in prohibition.[12] Despite its universal existence and the general acceptance of its fundamentals, however, the writ remains an object of confusion.[13] The decisions reveal a surprising number of conflicts concerning even fundamental principles. These include whether prohibition is primarily preventive or remedial in nature[14] and whether its issuance should be governed by equitable maxims even though it is a remedy at law.[15] Controversy also exists about the definition of judicial or

---

prohibition is intended to protect. The English view, in contrast, conceives of prohibition as primarily safeguarding the jurisdiction of a superior court from encroachment by such exercise. Hughes & Brown, *supra* note 1, at 840-41.

9. *E.g., In re* McNair, 324 Pa. 48, 52, 187 A. 498, 500 (1936).

10. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948); *accord,* Wasmund v. Nunamaker, 277 Minn. 52, 151 N.W.2d 577, 579 (1967); State *ex rel.* Masterson v. Ohio State Racing Comm'n, 164 Ohio St. 312, 315, 130 N.E.2d 829, 831 (1955). Other forms of relief include the remedies at law of appeal and certiorari and the equitable remedy of injunction. Because prohibition can be invoked only when all other forms of redress are inadequate or unavailable, it has been described as "more extraordinary than any of the other extraordinary remedies." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24.04, at 419 (1958).

11. Hughes & Brown, *supra* note 1, at 841.

12. *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; W. VA. CONST. art. 8, § 3.

In Pennsylvania § 201 of the Appellate Court Jurisdiction Act, PA. STAT. ANN. tit. 17, § 211.201 (Supp. 1975), grants the supreme court original jurisdiction of all cases of prohibition to courts of inferior jurisdiction. The superior court is granted original jurisdiction of prohibition cases ancillary to matters within its appellate jurisdiction under § 301 of the Act. *Id.* § 211.301. The commonwealth court also has authority to issue the writ in aid of its appellate jurisdiction through the interaction of § 8(g) of the Commonwealth Court Act, *id.* § 211.8(g), and § 401 of the Appellate Court Jurisdiction Act, *id.* § 211.401. *See* notes 138-73 and accompanying text *infra.*

13. 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 (1951), *quoting from* Cooper, *The Remedy by Prohibition in Florida As Affected by Some Recent Supreme Court Cases,* 2 FLA. ST. B. ASS'N L.J. 6, 11 (1928).

14. *Compare* Bennett v. District Court, 81 Okla. Crim. 351, 357, 162 P.2d 561, 564 (1945), *with* State *ex rel.* Hamer v. Stackhouse, 14 S.C. 417, 427-28 (1880); *cf.* Jacobson v. Superior Court, 1 Ariz. App. 342, 342-44, 402 P.2d 1018, 1018-20 (1965).

15. *Compare* Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948), *with* Family Court v. Department of Labor & Indus. Rel., 320

quasi-judicial; the writ properly can be issued only to restrain tribunals or officers within that classification.[16]

These conflicts arise not only between jurisdictions, but also within them and, in at least one instance, within the same case.[17] Their existence can be explained partially by the writ of prohibition's extraordinary nature, which makes litigation regarding its issuance rare[18] and reduces opportunities for analytical comment.[19] For example, in 1930 the subject of prohibition was said to be "almost unexplored" in Pennsylvania.[20] That appraisal is still accurate. Although several recent decisions[21] of the Supreme Court of Pennsylvania have noted procedural errors by petitioners who confused prohibition with other forms of relief, the court itself has difficulty with the same questions.[22] Because the great majority of proceeding in prohibition go unrecorded beyond entry on the court's miscellaneous docket,[23] the situation is aggravated. Thus, the practitioner wishing to inform himself about the writ and its proper function has no complete source of information.

Notwithstanding the infrequency of litigation concerning the writ of prohibition, a discussion of its use and function is not merely

A.2d 777, 780 (Del. Ch. 1974). There is also a dispute concerning the frequency with which the writ should be issued; some decisions encourage its use while others will issue it only with reluctance. *See* notes 182-89 and accompanying text *infra.*

16. *See* notes 190-201 and accompanying text *infra.*

17. Jacobson v. Superior Court, 1 Ariz. App. 342, 342-44, 402 P.2d 1018, 1018-20 (1965). Most surprising is the lack of acknowledgment within the cases of any conflict whatever. No discussion appears of a majority or minority view concerning these questions.

18. Two members of the Florida bar predicted that only ten percent of their brethren would encounter writs of prohibition during their careers. Wehle & Belcher, *Prohibition in Florida*, 4 U. FLA. L. REV. 546 (1951). Only forty-one decisions on proceedings in prohibition have been reported in Pennsylvania since the earliest reported case in 1898. *See* note 23 *infra.*

19. *See* Hughes & Brown, *supra* note 1, at 831.

20. Windolph, *The Writ of Prohibition*, 3 PA. B. ASS'N Q. 6 (1930) [hereinafter cited as Windolph]. The Supreme Court of Pennsylvania had no occasion to rule upon the constitutionality of its own jurisdiction of cases in prohibition until 1948. Similarly, in 1941 the New Jersey Supreme Court knew of only three actions in prohibition in its entire history. Carrick v. First Criminal Court, 126 N.J.L. 598, 599, 20 A.2d 509, 511 (Sup. Ct. 1941); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 99, 61 A.2d 426, 428 (1948).

21. Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 567, 310 A.2d 271, 276 (1973); County of Carbon v. Leibensperger, 439 Pa. 138, 140, 266 A.2d 632, 638 (1970); Chemical Nat. Res. Inc. v. Venezuela, 420 Pa. 134, 146, 215 A.2d 864, 869 (1966); Commonwealth v. Caplan, 411 Pa. 563, 568, 192 A.2d 894, 896 (1963).

22. The learned Justices have oversimplified the distinctions between the extraordinary writs of mandamus and prohibition. *See* notes 108-23 and accompanying text *infra.*

23. The practice of the supreme court is to record decisions regarding petitions for writs of prohibition in the official reports only if the petition was filed in response to a threatened act by a lower court within a proceeding already on appeal to the supreme court. Most proceedings in prohibition do not come within this category. Telephone conversation with Procedural Rules Committee of the Pennsylvania Supreme Court, March 6, 1975.

academic. Prohibition is a useful device that can provide extraordinary relief when no other remedies are adequate. This comment will address the aforementioned problems by examining the black-letter principles governing writs of prohibition and by analyzing areas of dispute with emphasis on decisions of the Pennsylvania courts.

II. Historical Considerations

A. English Background

Many elements of the present writ of prohibition have remained unchanged since its earliest development.[24] The writ can be traced to the eleventh century[25] when the English monarch presided over the country's highest judicial tribunal, the *Aula Regis*.[26] He would issue the writ to forestall attempted encroachments upon his sovereign jurisdiction.[27] The most frequent use of the writ during the next few centuries was to thwart bitter attempts of the ecclesiastical courts[28] to

24. For an exhaustive analysis of the development of the writ of prohibition in England see Hughes & Brown, *supra* note 1; Wolfram, *The "Ancient and Just" Writ of Prohibition in New York*, 52 COLUM. L. REV. 334 (1952) [hereinafter cited as Wolfram].

25. Hughes & Brown, *supra* note 1, at 832; Wolfram, *supra* note 24, at 334.

26. This court was comprised of the highest officers of the kingdom including the lord chamberlain and the chancellor, who served as secretary to the king and registrar of all decrees of the court. The court did not convene at any permanent location; rather it accompanied the king on all expeditions. 3 W. BLACKSTONE, COMMENTARIES ✶38-39; Hughes & Brown, *supra* note 1, at 834.

27. Those courts that exceeded their authority in attempting to implement the rule prevailing at the time that "every good judge should enlarge his jurisdiction" ran afoul of the prerogative writ. The king's subsequent delegation of the duty of issuing writs to his secretary, the chancellor, gave rise to the theory that the writ has its origins in chancery and that prohibition is properly considered a proceeding in equity rather than at law. This theory is erroneous, however, since at that time the chancellor represented a part of the law courts and the court of chancery had not yet evolved. *See* Planters Ins. Co. v. Cramer, 47 Miss. 200, 202 (1872); 3 W. BLACKSTONE, COMMENTARIES ✶38; Allen, *Mandamus, Quo Warranto, Prohibition, and Ne Exeat*, 1960 U. ILL. L.F. 102, 109; Hughes & Brown, *supra* note 1, at 834.

28. The ecclesiastical courts were created by decree of William the Conqueror. They were administered by churchmen and had jurisdiction over all religious matters. The Constitution of Clarendon in 1164 declared that the common-law courts had the power to determine the limits of their own jurisdiction. By implication this meant that the ecclesiastical courts were inferior and, thus, subject to writs of prohibition. 3 W. BLACKSTONE, COMMENTARIES ✶113; Hughes & Brown, *supra* note 1, at 832; *see* State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 50, 92 S.W. 191, 215 (1906); Pennsylvania Labor Rel. Bd. v. Butz, 411 Pa. 360, 363, 192 A.2d 707, 709 (1963); Wolfram, *supra* note 24, at 335. A humorous sidelight to this otherwise acrimonious controversy is provided by Coxeter v. Parson, 88 Eng. Rep. 1283 (K.B. 1699), in which a distinction about what constituted an action in libel that could properly be tried by the ecclesiastical courts was drawn. Chief Justice Holt stated that calling a clergyman a knave would be actionable, but calling him a blockhead or a fool would

usurp the jurisdiction of the king's tribunals. Thus, from its earliest days prohibition represented an extraordinary and prerogative power of the supreme judicial authority to be used only when no other remedy "savoring less of monarchial arbitrariness"[29] was available.

Eventually public protest over the arbitrary decisions of ambitious officials who conducted the business of the *Aula Regis*,[30] as well as King John's suspicion of their power,[31] led to that court's decline. It was "broken into distinct courts of judicature"[32] known by their status and location as the high courts at Westminster—the king's bench, the court of common pleas, and the exchequer.[33] The king's bench, so named to indicate that it was the sovereign tribunal of the monarch,[34] was granted the king's power of superintendence over all other courts.[35] This included authority to issue extraordinary writs, such as the writ of prohibition.[36] Blackstone observed, "The jurisdiction of this court . . . is very high and transcendent. *It keeps all inferior jurisdictions within the bounds of their authority*, and may either remove their proceedings to be determined here, or prohibit their progress below . . . ."[37]

B. Pennsylvania Background

The Judiciary Act of 1722[38] created Pennsylvania's judicial system and conferred upon the new supreme court supervisory power

---

not. He analogized to a case in which a judge was described as baffle-headed and could not obtain redress. *See* Windolph, *supra* note 20, at 9.

29. Pennsylvania Labor Rel. Bd. v. Butz, 411 Pa. 360, 363, 192 A.2d 707, 709-10 (1963).

30. These officials were known as chief justiciars. Hughes & Brown, *supra* note 1, at 834.

31. 3 W. BLACKSTONE, COMMENTARIES *39.

32. *Id.* at *40.

33. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 99, 61 A.2d 426, 428 (1948).

34. 3 W. BLACKSTONE, COMMENTARIES *41. Although the monarch was theoretically to preside over the court personally, the last to do so was James I. *Id.* at *41 n.*p.*

35. For early examples of the exercise of this supervisory power see King v. Justices of Yorkshire, 101 Eng. Rep. 352, 353 (K.B. 1794); Queen v. Yarrington, 91 Eng. Rep. 353 (Q.B. 1710).

36. Although theoretically only the king's bench had jurisdiction to issue the king's prerogative writ, the court of common pleas was given the power to do so under certain circumstances. Eventually the court of chancery also assumed jurisdiction over prohibition equally with the two common-law courts. This movement by chancery was strongly opposed by Coke. W. HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 292 (1788); Hughes & Brown, *supra* note 1, at 833; Windolph, *supra* note 20, at 8.

The high English Court of Common Pleas must not be confused with the much less powerful courts of common pleas of the current Pennsylvania judicial system. These Pennsylvania courts lack any jurisdiction over prohibition. Pennsylvania Labor Rel. Bd. v. Butz, 411 Pa. 360, 365, 192 A.2d 707, 710 (1963); *cf.* Alberts v. Bradley, 11 Pa. D. & C.2d 107, 111 (C.P. Alleg. 1956).

37. Commonwealth v. Onda, 376 Pa. 405, 408-09, 103 A.2d 90, 91 (1954), *quoting from* 3 W. BLACKSTONE, COMMENTARIES *42 (emphasis added by court).

38. Act of May 22, 1722, 1 SM. L. 131, ch. 255. This was also known as the

over inferior courts equivalent to that possessed by the king's bench.[39] The supreme court's jurisdiction over proceedings in prohibition was based on provisions granting that court the power to correct all errors of the inferior judiciary.[40] These powers were specifically confirmed and enlarged by the second comprehensive statute pertaining to judicial matters, the Judiciary Act of 1836.[41]

While the existence of the court's power of the king's bench has never been disputed,[42] the question whether the court was empowered to issue writs of prohibition became a matter of considerable doubt.[43] The difficulty arose because the first state constitution, the constitution of 1776, granted the legislature power to determine the limits of the supreme court's jurisdiction.[44] The legislature made such a determination within the constitution of 1874 when it expressly limited the scope of the supreme court's original and appellate jurisdictions to certain enumerated powers that did not include prohibition.[45]

Provincial Act of 1722. *See* Petition of Squires & Constables Ass'n, 442 Pa. 502, 512, 275 A.2d 657, 662 (1971); *In re* Carbon County Jud. Vacancy, 292 Pa. 300, 302, 141 A. 249, 250 (1928).

39. Act of May 22, 1722, 1 SM. L. 131, ch. 255, § 6 (proviso, ¶ 2-3) states,

> [T]he said judges, or any two of them, shall have full power to hold the said court, and therein to . . . examine and correct all and all manner of errors of the justices and magistrates of this province . . . .
>
> . . . [The judges are] hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the justices of the court of King's Bench, common pleas and exchequer at Westminster, or any of them, may or can do.

Similar legislation has conferred the powers of the king's bench upon the highest court of many states. *E.g.*, Fouracre v. White, 31 Del. 25, —, 102 A. 186, 196 (Super. Ct. 1917); Carrick v. First Criminal Court, 126 N.J.L. 598, 604, 20 A.2d 509 (Sup. Ct. 1941); *In re* Public Util. Comm'r, 201 Ore. 1, 16, 268 P.2d 605, 610 (1954). *See also* 3 W. BLACKSTONE, COMMENTARIES *45 n.6 (S. Tucker ed. 1803) (Virginia courts possess powers of the king's bench).

40. Act of May 22, 1722, 1 SM. L. 131, ch. 255, § 6 (proviso, ¶ 2-3).

41. Act of June 16, 1836, P.L. 784, No. 192, § 1 (repealed 1970); Commonwealth v. Onda, 376 Pa. 405, 409, 103 A.2d 90, 91 (1954); Appeal of Geary, 316 Pa. 342, 346, 175 A. 544, 545 (1934); Commonwealth v. McGinnis, 2 Whart. 112, 117 (Pa. 1837).

42. *E.g.*, Apex Hosiery Co. v. Philadelphia County, 331 Pa. 177, 178, 200 A. 598 (1938); Commonwealth v. Ickhoff, 33 Pa. 80, 81 (1859).

43. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 101, 61 A.2d 426, 429 (1948), *discussed in* notes 52-62 and accompanying text *infra*.

44. Commonwealth v. Balph, 111 Pa. 365, 384, 3 A. 220, 232 (1886) (dissenting opinion).

45. PA. CONST. art. 5, § 3 (1874) (emphasis added) read in relevant part as follows:

> The jurisdiction of the Supreme Court shall extend over the State and the judges thereof . . . shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, *but shall not exercise any other original jurisdiction*; they shall have appellate jurisdiction

Thereafter, the supreme court's power to prohibit unwarranted actions by its inferior tribunals was dependent upon whether the powers conferred upon the court at its creation continued in force despite subsequent constitutional limitations.

The court's first opportunity to address this issue came in 1898.[46] At that time, however, the court merely assumed its jurisdiction over the exercise of prohibitory power without comment about its authority.[47] The supreme court's next recorded opinion on prohibition in 1928[48] asserted that the power of prohibition had "never been taken from [this court],"[49] but like its predecessor, it failed to refer to the apparent constitutional conflict.[50] The court subsequently relied upon its 1928 statement to rebuff similar jurisdictional challenges[51] until *Carpentertown Coal & Coke Co. v. Laird*[52] in 1948. In that case respondents to a petition for a prohibitory writ forced resolution of the constitutional issue by alleging it as a defense.[53] The court ruled that authority for its exercise of prohibitory power was not derived from the 1874 constitution;[54] rather, it stemmed from the Judiciary Act of 1722, which created the supreme court and granted it the powers of the king's bench, including the sovereign power of superintendency over inferior tribunals and the concomitant power to issue writs of prohibition.[55] The court concluded that this conferral of powers at the time of the court's creation caused them to vest immediately and, therefore, made exercise of prohibitory power immune from any subsequent attempts at constitutional or statutory limitation.[56]

---

by appeal, certiorari or writ of error in all cases as is now or may hereafter be provided by law.

46. *In re* DeWalt, 40 A. 470, 471 (1898). This case was not recorded in the official reports.

In addition to the writer's research, substantial evidence exists that there had been no action in prohibition before the supreme court until 1898. In 1928 a common pleas court noted that "[t]here are no decisions in Pennsylvania throwing light on the question whether the common law writ of Prohibition can be issued in this state." Noah v. Jacoby, 77 Pitts. 461, 462 (Pa. C.P. 1928). The court cited only *In re* DeWalt; presumably it could find no other case. Likewise, in 1930 a contributor to the *Pennsylvania Bar Association Quarterly* knew of no case earlier than *DeWalt*. Windolph, *supra* note 20, at 6. Further support is found within the opinion of Chief Justice Maxey in *In re* Philadelphia County Grand Jury, 347 Pa. 316, 330, 32 A.2d 199, 204 (1943). Dissenting from the majority's issuance of a writ of prohibition in that case, he substantiated a vehement protest with an exhaustive description of the proper use of prohibition in several jurisdictions, but did not cite a Pennsylvania case earlier than *In re* McNair, 324 Pa. 48, 187 A. 498 (1936).

47. *In re* DeWalt, 40 A. 470 (1898).
48. *In re* First Cong. Dist. Election, 295 Pa. 1, 144 A. 735 (1928).
49. *Id.* at 13, 144 A. at 739.
50. *Id.*
51. *In re* McNair, 324 Pa. 48, 64, 187 A. 498, 505 (1936).
52. 360 Pa. 94, 61 A.2d 426 (1948).
53. *Id.* at 100, 61 A.2d at 429.
54. *Id.* at 99, 61 A.2d at 428-29.
55. *Id.* at 100, 61 A.2d at 429.
56. *Id.*

The court's ruling was pragmatic since it would have been ludicrous for the supreme court on a close constitutional question to deprive itself of its most powerful means of supervising inferior tribunals. The decision, however, reveals the strained rationale of a court struggling to reach the conclusion it desired. The idea that the court's prohibitory power is sovereign over any constitutional or statutory proscriptions is subject to question. In reaching its conclusion the court impliedly and without acknowledgment reversed a number of its previous decisions.[57] The reversed cases had held that the court possessed powers of the king's bench only to the extent that they had not been removed "by express terms or irresistible implication"[58] or "by . . . state and Federal constitutions."[59] The 1874 constitutional provisions that specifically gave the court certain king's bench powers and expressly denied it all others clearly qualified under those tests.

Additionally, the court had to circumvent a prior decision that declared that its exercise of original jurisdiction was limited by the 1874 constitutional provision.[60] The court did so by reasoning that prohibition is not an exercise of original jurisdiction, but an act of "revisory appellate jurisdiction" that is beyond the statutory ambit.[61] Despite its questionable reasoning, *Carpentertown*, nevertheless, clearly resolved that the Supreme Court of Pennsylvania has always possessed the authority to issue writs of prohibition.[62]

---

57. Commonwealth v. Jones, 303 Pa. 551, 555, 154 A. 480, 482 (1831); Carbon County Jud. Vacancy, 292 Pa. 300, 302, 141 A. 249, 250 (1928); *In re* Mulholland, 217 Pa. 631, 632, 66 A. 1105, 1106 (1907); Commonwealth v. Balph, 111 Pa. 365, 380, 3 A. 220, 229 (1886); Chase v. Miller, 41 Pa. 403, 411 (1862); Gosline v. Place, 32 Pa. 520, 523 (1859); Commonwealth v. McGinnis, 2 Whart. 113, 155 (Pa. 1837); Overseers of the Poor v. Smith, 2 S. & R. 362, 365 (Pa. 1816).

58. *In re* Mulholland, 217 Pa. 631, 632, 66 A. 1105, 1106 (1907); Chase v. Miller, 41 Pa. 403, 411 (1862); Overseers of the Poor v. Smith, 2 S. & R. 362, 365 (Pa. 1816).

59. Commonwealth v. Jones, 303 Pa. 551, 555, 154 A. 480, 482 (1931); Commonwealth v. Balph, 111 Pa. 365, 377, 3 A. 220, 227 (1886).

60. Commonwealth v. Balph, 111 Pa. 365, 379-80, 3 A. 220, 227 (1886).

61. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 101, 61 A.2d 426, 429 (1948).

62. The determination in *Carpentertown* that the supreme court exercises revisory appellate jurisdiction in adjudicating a proceeding in prohibition is another viable, pragmatic result reached through doubtful reasoning. Within the case the court contradicted itself twice on this issue. The court first stated that prohibition is not, strictly speaking, an exercise of original jurisdiction. Presumably this was done to avoid applicability of the alleged constitutional limitation on the court's original jurisdiction. Yet, the court immediately thereafter declared prohibition to be the exact counterpart of mandamus. By so doing it reversed itself; mandamus is considered an exercise of original jurisdiction. The court then changed its course again by con-

III. Description of the Writ

A. Nature

The writ of prohibition is a superior court's direct order commanding an inferior court to restrain its unwarranted action.[63] Courts are divided on the question whether prohibition is better described as a preventive[64] or a remedial[65] device. The validity of one description over the other depends upon whether the writ is viewed as correcting an act already begun or preventing its continuation. Since the evil to be avoided is the harm to the petitioner if the action continues,[66] prohibition is more accurately described as preventive.[67]

A proceeding in prohibition tests the jurisdiction of the inferior court.[68] Therefore, the proceeding is always a civil action regardless of whether the litigation in which the alleged judicial misconduct occurred is civil or criminal.[69] Furthermore, it is not an action between the parties to the controversy below[70] nor between a superior and an inferior court. Rather, it is an action between the petitioners and the inferior court.[71]

---

cluding that prohibition is an exercise of revisory appellate jurisdiction. *Id.* at 101, 61 A.2d at 429.

63. West Penn Power Co. v. Goddard, 460 Pa. 551, —, 333 A.2d 909, 913 (1975); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948).

64. Jackson v. Calhoun, 156 Ga. 756, 759, 120 S.E. 114, 116 (1923); State *ex rel.* Hamer v. Stackhouse, 14 S.C. 417, 427-28 (1880); Windolph, *supra* note 20, at 8.

65. Thompson v. Hart, 382 P.2d 758, 759 (Okla. Crim. App. 1963).

66. *See* note 8 *supra.*

67. Pennsylvania courts have adopted this view. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948). A comparison of the two terms as judicially defined supports this contention. Preventive is defined as "hindering, frustrating, or *prohibiting.*" BLACK'S LAW DICTIONARY 1352 (rev. 4th ed. 1968) (emphasis added). The meaning implied is the obstruction of something not yet completed. Remedial is defined as "giving the means of offering redress." Schultz v. Gosselink, 260 Iowa 115, 118-19, 148 N.W.2d 434, 436 (1967), *quoting* BLACK'S LAW DICTIONARY 1457 (rev. 4th ed. 1968). This implies that the wrongful conduct has already occurred. Prohibition cannot correct a wrong that has already occurred.

68. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 899-900 (1975); *see* note 5 and accompanying text *supra.*

69. J. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES 554 (2d ed. 1874) [hereinafter cited as HIGH]; Hughes & Brown, *supra* note 1, at 846.

70. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948); *accord,* Commonwealth *ex rel.* Watson v. Montone, 227 Pa. Super. 541, 546, 323 A.2d 763, 766 (1974); Marchand v. Probate Court, 123 Vt. 187, 191, 186 A.2d 85, 87 (1962).

71. The inferior court is called a respondent. Chemical Nat. Res., Inc. v. Venezuela, 420 Pa. 134, 141, 215 A.2d 864, 866 (1966). The black-letter rule states that a prohibition proceeding is one between a superior court and an inferior court. *E.g.,* Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948). This is misleading, however. The issue whether a writ should issue is contested between the petitioner and the inferior court he seeks to prohibit. Only when the superior court issues a writ and blocks the threatened action of the lower court can the proceeding be considered "between" the two courts.

Some debate exists about the type of jurisdiction exercised by the court that hears a prohibition proceeding. It is often described as original jurisdiction,[72] which is accurate in the sense that the court before which the proceeding is conducted must adjudicate both factual and legal disputes.[73] On the other hand, since the proceeding necessarily must arise from ongoing litigation or judicial action, it is not an exercise of original jurisdiction in a strict sense.[74] Additionally, the supervisory power that the petitioner seeks to invoke closely resembles the exercise of appellate jurisdiction.[75] Yet, because there is no lower court judgment to review, the proceeding cannot be described accurately as within the appellate jurisdiction of the superior court. The Supreme Court of Pennsylvania has developed a viable compromise to this dilemma by describing its jurisdiction over proceedings in prohibition as ancillary to the exercise of its appellate jurisdiction.[76]

B. Purpose

Prohibition is invoked to prevent inferior judicial or quasi-judicial bodies from assuming unwarranted jurisdiction.[77] Therefore, the key issue in any prohibition case is whether the inferior body has jurisdiction to take the allegedly wrongful action.[78] If jurisdiction exists, the writ cannot lie because prohibition is not a substitute for an appeal.[79] Even a defendant's absolute immunity from liability does not warrant exercise of prohibition to halt the proceedings if a court properly has jurisdiction. The determinative question is not whether the court is empowered to provide a remedy to the plaintiff, but whether it can hear the controversy.[80]

---

72. Appeal of Hamilton, 407 Pa. 366, 372, 180 A.2d 782, 785 (1962).

73. This is the definition of original jurisdiction. Commonwealth v. Balph, 111 Pa. 365, 383, 3 A. 220, 231 (1886).

74. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 100, 61 A.2d 426, 429 (1948); Commonwealth v. Ronemus, 205 Pa. 420, 424, 54 A. 1095, 1097 (1903).

75. *See* Commonwealth v. Balph, 111 Pa. 365, 382, 3 A. 220, 231 (1886); Commonwealth v. Baldi, 147 Pa. Super. 193, 197, 24 A.2d 76, 78 (1942).

76. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 100, 61 A.2d 426, 429 (1948); *see* note 62 *supra.*

77. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 899-900 (1975); *see* note 5 and accompanying text *supra.*

78. Commonwealth v. Mellon Nat'l Bank & Trust Co., 360 Pa. 103, 107-08, 61 A.2d 430, 433 (1948).

79. West Penn Power Co. v. Goddard, 460 Pa. 551, —, 333 A.2d 909, 913 (1975) (prohibition improper even when party lost right to appeal by failing to prosecute appeal within time prescribed).

80. Chemical Nat. Res., Inc. v. Venezuela, 420 Pa. 134, 143, 215 A.2d 864,

This black-letter principle must be considered, however, in light of the broad meaning given to the term "jurisdiction" for purposes of determining when unauthorized conduct has occurred.[81] The most blatant exercise of unwarranted jurisdiction occurs when a court initiates a proceeding even though it lacks even the slightest authority over the subject matter and parties. This is considered a lack of jurisdiction[82] and prohibition clearly lies to restrain further action by the court.[83] In addition, courts have construed the term "jurisdiction" expansively to find that unwarranted jurisdiction has been exercised when an inferior court, which has jurisdiction over the subject matter and parties, acts in excess of its authority while adjudicating the controversy.[84] This is termed an abuse of jurisdiction.[85] The majority of decisions also consider this latter type of judicial misconduct sufficient grounds for issuance of a writ of prohibition.[86] For example, in *Schlesinger v. Musmanno*[87] a common pleas judge[88] hearing a mundane trespass action attempted to bar plaintiff's attorney from participating in the case until the attorney admitted or denied his alleged membership in the Communist Party.[89] The judge obviously had jurisdiction to decide the trespass action, but clearly

867 (1966); Vendetti v. Schuster, 418 Pa. 68, 71, 208 A.2d 864, 866 (1965); McWilliams v. McCabe, 406 Pa. 644, 648, 179 A.2d 222, 224 (1962).

81. This is the general rule in Pennsylvania and other jurisdictions. *E.g.*, United States Alkali Ass'n v. United States, 325 U.S. 196, 203 (1944); State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 42, 92 S.W. 191, 199 (1906); Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 107, 320 A.2d 134, 136 (1974); State *ex rel.* Pabst v. Circuit Court, 184 Wis. 301, 304, 199 N.W. 213, 214 (1924).

82. One example of lack of jurisdiction would be if "a justice of the peace, empowered to hear only petty cases such as those involving traffic law violations, were to summon parties before him in order to decide whether a divorce decree should be granted." GELLHORN & BYSE, ADMINISTRATIVE LAW 138 (1970), *quoted in* Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 561, 310 A.2d 271, 275 (1973).

83. Abelleira v. District Court, 17 Cal. 2d 280, 288, 109 P.2d 942, 947 (1941).

84. *E.g.*, Commonwealth v. Smart, 368 Pa. 630, 639, 84 A.2d 782, 787 (1951); Schlesinger v. Musmanno, 367 Pa. 476, 483, 81 A.2d 316, 319 (1951); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948); *accord*, Abelleira v. District Court, 17 Cal. 2d 280, 288, 109 P.2d 942, 947 (1941); Lee v. County Court, 27 N.Y.2d 432, 437, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 708 (1971).

85. Commonwealth v. Smart, 368 Pa. 630, 639, 84 A.2d 782, 787 (1951).

86. *E.g.*, Commonwealth v. Smart, 368 Pa. 630, 639, 84 A.2d 782, 787 (1951); Schlesinger v. Musmanno, 367 Pa. 476, 483, 81 A.2d 316, 319 (1951). *Contra*, Commonwealth v. Mellon Nat'l Bank & Trust Co., 360 Pa. 103, 107, 61 A.2d 430, 433 (1948). The view expressed in *Mellon Bank* is that mere jurisdiction over the subject matter is sufficient to preclude an action in prohibition for alleged misconduct within the proceeding. This view, however, does not conflict with the majority rule because the question addressed in *Mellon Bank* was whether mere error by the court would sustain a petition for prohibition. The question whether an abuse of jurisdiction would be sufficient was not discussed.

87. 367 Pa. 476, 81 A.2d 316 (1951).

88. The judge in this case was the Hon. Michael A. Musmanno, who later served as a Justice on the Supreme Court of Pennsylvania from 1951 until his death in 1968. *See* 99 PENNSYLVANIA MANUAL 494-95 (E. Brittingham ed. 1969).

89. 367 Pa. at 481, 81 A.2d at 318.

lacked jurisdiction to inquire into the attorney's political affiliation. The supreme court issued a writ of prohibition to block the judge's inquiry and the citation of contempt he sought to impose for the attorney's refusal to answer.[90]

Abuse of jurisdiction must be distinguished from abuse of discretion. To constitute an abuse of jurisdiction, the act must be done without any authority. An abuse of discretion, on the other hand, occurs when a court has authority to take a certain course of action, but does so erroneously or unreasonably.[91] An abuse of discretion is reviewable on appeal;[92] therefore prohibition generally does not lie to restrain this type of judicial action.[93] Under certain circumstances, however, even an abuse of discretion can be subject to a proceeding in prohibition, such as when a petitioner has no other adequate remedy available to him.[94] The Supreme Court of Pennsylvania recently has supplanted the traditional inquiry of a prohibition proceeding into the inferior court's jurisdiction with a two-legged test in which the adequacy of other remedies and the necessity of the circumstances are the determinative criteria.[95] Typically the necessity issue arises in criminal cases[96] in which the trial court has exercised its discretion by allowing discovery of prosecution evidence by the defendant. If the accused prevails on the merits, the prosecution has no right of appeal from the court's discovery order. Thus, in Pennsylvania the prosecution is allowed to petition for prohibition of that order, although at least one Justice has noted that this is not, strictly speaking, a proper exercise of the extraordinary writ.[97]

---

90. *Id. See* Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 899 (1975).

91. BLACK'S LAW DICTIONARY 25 (rev. 4th ed. 1968).

92. *See* Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 110-11 n.1, 320 A.2d 134, 137 n.1 (1974) (Pomeroy, J., concurring).

93. *Id. See also* 108 U. PA. L. REV. 449, 456 (1960).

94. This approach reflects the American common-law view that the paramount interest to be protected by the prohibitory power is the petitioner's. *See* note 8 *supra.*

95. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 899 (1975); West Penn Power Co. v. Goddard, 460 Pa. 551, —, 333 A.2d 909, 913 (1975); Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 107-08, 320 A.2d 134, 135 (1974).

96. *E.g.*, Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 108, 320 A.2d 134, 136 (1974); Commonwealth v. Caplan, 411 Pa. 563, 568, 192 A.2d 894, 897 (1963).

97. Justice Pomeroy concurred with the majority in *Shiomos*, which granted the prosecution a writ of prohibition. He nonetheless remarked,

> As a matter of first impression, I would have difficulty agreeing that the deviation from our rule presented a case of 'extreme necessity' as that phrase is used in *Carpentertown Coal and Coke Co. v. Laird* [citation omitted]. We should, moreover, be zealous not to permit the remedy by prohibition to be utilized to review what may be, in essence, an exercise of discretion by the trial court.

He noted that the court previously had upheld exercise of the prohibitory power

Prohibition also is used to review an exercise of discretion when a petitioner seeks to terminate a grand jury investigation by alleging that the lower court erred in deciding to convene it.[98] Although no explanation is given within the reported cases, the probable rationale of the supreme court in granting the writ in this type of case is to provide an adequate remedy when otherwise none would exist. Without prohibition the petitioner would be subject to the burdens of a grand jury investigation that on appeal might be held void *ab initio*.[99] Restraint of these proceedings is the most frequently reported use of prohibitory power in Pennsylvania.[100]

The subject of a grand jury investigation has several grounds upon which to base a petition to prohibit the proceeding *ab initio*.[101] One ground is that the averments of alleged criminal activity upon which the lower court convened the grand jury were insufficiently specific to justify this action.[102] The strict requirements for convention of an investigative grand jury indicate the vulnerability of the judge's decision to a claim of abuse of discretion. Specific offenses must be alleged by the court or district attorney and these allegations must have an adequate factual basis.[103] A second ground for prohibition may exist if memorialists[104] file the petition to institute a grand jury investigation. Unless the memorialists have an interest in the investigation greater than that of the general public, they cannot

---

under such circumstances. Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 110-11 n.1, 320 A.2d 134, 137 n.1 (1974).

98. *E.g., In re* Philadelphia County Grand Jury, 347 Pa. 316, 320, 32 A.2d 199, 201 (1943); *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 289, 291, 2 A.2d 783, 792 (1938); *In re* McNair, 324 Pa. 48, 52, 187 A. 498, 500 (1936).

99. Chief Justice Maxey vigorously argued against this view, contending that an alleged abuse of discretion cannot properly sustain a writ of prohibition especially within the context of grand jury proceedings. *In re* Philadelphia County Grand Jury, 347 Pa. 316, 326, 32 A.2d 199, 204 (1943) (dissenting opinion).

100. Petition of Specter, 455 Pa. 518, 317 A.2d 286 (1974); Commonwealth *ex rel.* Camelot Det. Agency v. Specter, 451 Pa. 370, 303 A.2d 203 (1973); Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971); Smith v. Gallagher, 408 Pa. 551, 185 A.2d 135 (1962); Petition of Grace, 397 Pa. 254, 154 A.2d 592 (1959); Commonwealth v. Smart, 368 Pa. 630, 84 A.2d 782 (1951); *In re* Philadelphia County Grand Jury, 347 Pa. 316, 32 A.2d 199 (1943); *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 289, 2 A.2d 783 (1938); *In re* McNair, 324 Pa. 48, 187 A. 498 (1936).

101. Prohibition has been described as "the most efficient means of protection from unlawful grand jury investigation initiated as a result of abuse of lower court discretion." 108 U. PA. L. REV. 449, 457 (1960).

102. Commonwealth v. McCloskey, 443 Pa. 117, 136, 277 A.2d 764, 774 (1971); Petition of Grace, 397 Pa. 254, 259, 154 A.2d 592, 596 (1959); *In re* Philadelphia County Grand Jury, 347 Pa. 316, 320, 32 A.2d 199, 201 (1943); *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 289, 297, 2 A.2d 783, 788 (1938); *In re* McNair, 324 Pa. 48, 63, 187 A. 498, 499 (1936).

103. For a spirited argument that an allegation of specific crimes already has accomplished the purpose of a grand jury investigation, see Chief Justice Maxey's dissent in *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 289, 308, 2 A.2d 783, 793 (1938).

104. A memorialist is one who seeks to have a grand jury investigation under-

appeal a denial of their petition. Thus, if a lower court entertains such an appeal, prohibition will lie to prevent further proceedings.[105]

Another use of the writ of prohibition in grand jury investigations favors the prosecution. After being indicted, a defendant can seek to quash by alleging prosecutorial improprieties in presentation of evidence to the grand jury.[106] If the court grants defendant's petition to offer testimony in support of his motion to quash, the prosecutor can request a writ of prohibition to restrain the proceeding. The writ will be issued unless defendant's averments are based upon specific, sworn statements of witnesses to the alleged misconduct.[107]

C. Comparison with Other Forms of Relief[108]

1. Mandamus.—Apart from the basic difference between the extraordinary writs of mandamus[109] and prohibition—the former commands and the latter restrains action by inferior bodies or persons, the two are quite similar. In Hohfeldian terms, mandamus cannot properly be issued unless the petitioner demonstrates a refusal to act in accord with a clear *duty* owed him,[110] while prohibition is

---

taken by presenting a memorial for the court's consideration. Appeal of Hamilton, 407 Pa. 366, 369, 180 A.2d 782, 785 (1962) (Cohen, J., concurring).

105. Appeal of Hamilton, 407 Pa. 366, 371, 180 A.2d 782, 784 (1962).

106. Commonwealth v. Smart, 368 Pa. 630, 639, 84 A.2d 782, 786 (1951).

107. *Id.* at 637, 84 A.2d at 786. In reaching its decision the supreme court balanced the conflicting interests of maintaining the grand jury's traditional secrecy and preserving the defendant's right to proceed with his claim. *Accord*, Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 900 (1975).

108. The extraordinary writs of quo warranto and certiorari are not considered here because they lack similarity with prohibition. Quo warranto is the means by which validity of an officer's title can be challenged, as opposed to his jurisdiction to perform a certain act. Comment, *Quo Warranto in Pennsylvania: Old Standards & New Developments*, 80 DICK. L. REV. 218 (1976). Certiorari, unlike prohibition, acknowledges that the lower court had jurisdiction in the matter and is merely a petition for review. Windolph, *supra* note 20, at 7-8. Certiorari, however, is similar to prohibition in that both are considered exercises of revisory appellate jurisdiction. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 100-01, 61 A.2d 426, 429 (1948); Commonwealth v. Ronemus, 205 Pa. 420, 424, 54 A. 1095, 1097 (1903); Commonwealth v. Balph, 111 Pa. 365, 382, 3 A. 220, 230 (1886).

109. Mandamus is defined as

> an extraordinary writ which lies to compel the performance of a ministerial act or a mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a want of any other appropriate and adequate remedy.

Valley Forge Racing Ass'n v. State Horse Racing Comm'n, 449 Pa. 292, 295, 297 A.2d 823, 824-25 (1972).

110. Commonwealth *ex rel.* Specter v. Dennis, 10 Pa. Commonwealth Ct. 439, 442, 308 A.2d 915, 916-17 (1973).

not applicable unless it can be shown clearly that there is no *right* to take the action threatened.[111] The two extraordinary writs are also similar in their relationships to the exercise of discretion. Mandamus can be used against an unwilling judge to compel an exercise of discretion, but not to compel a particular result.[112] It can be used to review discretion only when the discretion was fraudulent, arbitrary, or based upon an error of law.[113] Likewise, prohibition theoretically cannot be used to review the exercise of discretion. (As has been noted, however, prohibition sometimes is used, with proper caution, to restrain an abuse of discretion when no other remedy is adequate).[114] Relief through either mandamus or prohibition is inappropriate when less extraordinary relief is adequate[115] and when the action sought to be mandated or prohibited is already completed.[116]

Comments by the Supreme Court of Pennsylvania accentuate these similarities. The court has described prohibition as "the exact counterpart of mandamus"[117] and has referred to differences between the two as "semantical only."[118] Caution must be exercised in accepting the court's proffered maxims, however, because they are only superficially accurate. While mandamus and prohibition are similar, failure to observe the basic distinction between the writs and the circumstances under which each is properly issued will distort the analysis necessary for determining the propriety of issuing one or the other under a given set of facts.

A writ of mandamus can issue against either a judicial tribunal or official or an executive agency or official.[119] Prohibition will lie only against the action of a judicial or quasi-judicial tribunal.[120] It cannot be granted to restrain a ministerial action.[121] These distinctions affect the issues facing the court before which petitions are

111. Commonwealth v. Mellon Nat'l Bank & Trust Co., 360 Pa. 103, 107, 61 A.2d 430, 433 (1948).

112. McKean, *Some Aspects of Judicial Discretion,* 40 DICK. L. REV. 168, 171 (1935) [hereinafter cited as McKean].

113. Commonwealth v. Caplan, 411 Pa. 563, 567-68, 192 A.2d 894, 896 (1963).

114. *See* notes 94-97 and accompanying text *supra.*

115. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 900 (1975) (prohibition); Valley Forge Racing Ass'n v. State Horse Racing Comm'n, 449 Pa. 292, 295, 297 A.2d 823, 825 (1972) (mandamus).

116. Since mandamus and prohibition respectively compel and restrain action before harm occurs, both are most accurately described as preventive devices. *See* notes 64-67 and accompanying text *supra.*

117. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 100, 61 A.2d 426, 429 (1948).

118. Kremer v. Shoyer, 453 Pa. 22, 28 n.3, 311 A.2d 600, 603 n.3 (1973); *cf.* City of Coronado v. City of San Diego, 97 Cal. 440, 441, 32 P. 518 (1893), which declared that besides the fact that mandamus commands and prohibition restrains, the two writs have "nothing in common."

119. Kaufman Constr. Co. v. Holcomb, 357 Pa. 514, 520, 55 A.2d 534, 537 (1937); McKean, *supra* note 112, at 170.

120. *See* notes 182-218 and accompanying text *infra.*

121. HIGH, *supra* note 69, at 554-55. Another distinction in this regard is that

brought. The petitioner seeking a writ of mandamus must prove merely that the offending tribunal or officer's refusal to act breaches a duty. He need not show that the action is executive or judicial, for that fact is irrelevant. On the other hand, the petitioner desiring a writ of prohibition must prove both that the conduct threatened is done without authority and that the tribunal or officer against whom relief is sought is judicial or quasi-judicial. Thus, the type of act *and* the type of actor must be considered.[122] While in most instances the allegedly offending tribunal is obviously judicial, questions concerning whether a particular administrative body is quasi-judicial and, therefore, subject to prohibition may be difficult to resolve.[123] Because of these distinctions prohibition applies to fewer fact situations than does mandamus and the statement that the two are exact counterparts is not completely accurate.

2. Injunction.—The equitable remedy of injunction[124] also shares many characteristics with the legal remedy of prohibition.[125] The two remedies are historically related[126] and their general purposes are nearly identical.[127] Both are used to prevent injustice[128] by restraining further action within an ongoing judicial proceeding and neither should be issued when another remedy is adequate.[129] Because of these similarities injunction and prohibition are often confused in much the same manner as are the writs of mandamus and prohibition. The Supreme Court of Pennsylvania frequently has

---

prohibition issues against the court as a body, whereas mandamus goes against the officer as an individual. Windolph, *supra* note 20, at 8.

122. This difference was alluded to by Justice Pomeroy in Kremer v. Shoyer, 453 Pa. 22, 27 n.1, 311 A.2d 600, 601 n.1 (1973).

123. *Compare* Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 313, 18 N.E.2d 287, 290 (1938), *with* State *ex rel.* Swearingen v. Railroad Comm'rs, 79 Fla. 526, 531-32, 84 So. 444, 446 (1920); *see* notes 190-201 and accompanying text *infra.*

124. Injunction is "the form of equitable proceeding which protects civil rights from irreparable injury, either by commanding acts to be done, or preventing their commission, there being no adequate remedy at law." Ladner v. Siegel, 298 Pa. 487, 495, 148 A. 699, 701 (1930).

125. The similarity between prohibition and injunction often results in the latter being classified as an extraordinary remedy. McKean, *supra* note 112, at 173.

126. Injunction is believed to have originated during the fifteenth century as an extension of the prohibition against waste. Goodeson v. Gallatin, 21 Eng. Rep. 346, 346-47 (Ch. 1771); McKean, *supra* note 112, at 173; Windolph, *supra* note 20, at 7.

127. Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 564, 310 A.2d 271, 276 (1973); County of Carbon v. Leibensperger, 439 Pa. 138, 140, 266 A.2d 632, 633 (1970).

128. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948); Ladner v. Siegel, 298 Pa. 487, 495, 148 A. 699, 701 (1930).

129. HIGH, *supra* note 69, at 550.

observed that motions for injunctions "may in fact be imperfectly framed requests for writs of prohibition."[130]

The similarity between the two remedies, however, is deceiving. Injunction and prohibition serve different functions in that they seek to restrain different subjects.[131] An injunction is directed against a party to restrain his imminent conduct. Any court before which the instant litigation is pending can properly grant it. Prohibition, on the other hand, is directed against the court to restrain its further action.[132] It can be granted only by a court superior to the one that allegedly has exceeded its authority. The party requesting an injunction from the court that is hearing the entire controversy has no dispute with that court's jurisdiction over the matter. Indeed by his request he is acknowledging this jurisdiction.[133] In contrast, a party seeking a writ of prohibition is challenging the jurisdiction of the lower court.[134]

For purposes of statutory interpretation, however, the supreme court regards the difference between injunction and prohibition as

---

130. Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 564, 310 A.2d 271, 276 (1973); County of Carbon v. Leibensperger, 439 Pa. 138, 140, 266 A.2d 632, 633 (1970).

131. *In re* Public Util. Comm'r, 201 Ore. 1, 16, 268 P.2d 605, 610-11 (1954); HIGH, *supra* note 69, at 755; Windolph, *supra* note 20, at 7.

132. People v. Wyatt, 186 N.Y. 383, 394, 79 N.E. 330, 334 (1906); *In re* Public Util. Comm'r, 201 Ore. 1, 16, 268 P.2d 605, 610-11 (1954); HIGH, *supra* note 69, at 550.

133. Hoffman v. McDonald, 35 West. 199, 201 (Pa. C.P. 1952); HIGH, *supra* note 69, at 550.

134. As the Westmoreland County court of common pleas observed,

> The writ of prohibition is directed to and operates directly upon the court, preventing it from exercising a jurisdiction which it does not possess, while an injunction is directed to the parties and not to the court, and recognizes the jurisdiction of the court as existing.

Hoffman v. McDonald, 35 West. 199, 201 (Pa. C.P. 1952).

This distinction was also noted by the supreme court in County of Carbon v. Leibensperger, 439 Pa. 138, 140, 226 A.2d 632, 633 (1970). In that case a justice of the peace attempted to collect back taxes by mailing each delinquent taxpayer an "Official Demand Before Suit," which listed the amount owed and assessed nominal court costs. One recipient paid the delinquency directly to the local tax collector, who had been named as plaintiff to the suit, without paying the costs. The justice of the peace thereupon issued a summons. The county filed for and received a preliminary injunction from the court of common pleas. On appeal the supreme court properly noted that although the suit was brought in equity, it was actually a request for a writ of prohibition. Since a court of common pleas cannot issue a writ of prohibition, the decree was vacated.

It is not known whether the common pleas court failed to recognize the difference between injunction and prohibition or simply believed that the justice of the peace was the actual plaintiff in the threatened proceeding and, thus, felt that injunctive rather than prohibitory relief was appropriate. The latter rationale is suggested by the lower court's finding it "abhorrent" that the justice of the peace was "suing for a debt allegedly owing him and *bringing the action* in his own court . . . ." *Id.* at 139-40, 266 A.2d at 633 (emphasis added). When a judge deviates from his role as arbiter of the controversy before him, the distinction between prohibition and injunction becomes "shadowy." Windolph, *supra* note 20, at 10.

merely semantic.[135] In *Borough of Akron v. Pennsylvania Public Utility Commission*[136] the court ruled that procedural requirements with which the commonwealth court had to comply before it could enjoin the Commission applied equally to issuance of a writ of prohibition.[137]

IV. Jurisdiction of Pennsylvania Courts To Issue Writs of Prohibition

After *Carpentertown Coal & Coke Co. v. Laird*[138] the legislature reaffirmed the jurisdictional claim of the supreme court by expressly granting that court original jurisdiction of all cases in which writs of prohibition are sought to bar action of an inferior tribunal.[139] In addition, the current constitution states that the "Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace from one court or district to another as it deems appropriate."[140] The supreme court would be unable to satisfy this constitutional mandate if it lacked jurisdiction to issue writs of prohibtion. Thus, the court's holding in *Carpentertown*,[141] the legislature's delineation of the court's jurisdictional powers, and the mandate of the constitution unquestionably establish the power of the supreme court to issue a writ of prohibition.[142]

The Superior Court of Pennsylvania was once only a statutory court;[143] not until 1941 was it granted original jurisdiction in prohibi-

135. Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 564, 310 A.2d 271, 276 (1973).

136. 453 Pa. 554, 564-65, 310 A.2d 271, 276-77 (1973).

137. Although the commonwealth court held that it lacked jurisdiction over prohibition, the supreme court reversed. Bethlehem Mines Corp. v. Commonwealth, — Pa. —, —, 340 A.2d 435, 437 (1975); *see* notes 149-73 and accompanying text *infra*.

138. 360 Pa. 94, 61 A.2d 426 (1948); *see* notes 52-62 and accompanying text *supra*.

139. PA. STAT. ANN. tit. 17, § 211.201 (Supp. 1975) states,

> The Supreme Court shall have original but not exclusive jurisdiction of:
>
> (1) All cases of habeas corpus;
>
> (2) All cases of mandamus or prohibition to courts of inferior jurisdiction;
>
> (3) All cases of quo warranto as to any officer of statewide jurisdiction.

140. PA. CONST. art. V, § 10(a).

141. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 61 A.2d 426 (1948).

142. While the supreme court's power of prohibition is confirmed by statutory and constitutional authority, it is not dependent on them. *See* notes 52-56 and accompanying text *supra*.

143. Appeal of Bell, 396 Pa. 592, 598, 152 A.2d 731, 734 (1959); Martonick v. Beattie, 383 Pa. 168, 171, 117 A.2d 715, 717 (1955); Commonwealth *ex rel.* Speer v. Speer, 267 Pa. 129, 134, 110 A. 268, 269 (1920); Bethlehem Mines Corp. v. Commonwealth, 11 Pa. Commonwealth Ct. 375, 377, 313 A.2d 790, 791 (1973).

tion actions.[144] Its jurisdiction in prohibition, however, was limited to actions within its appellate jurisdiction.[145] Although the superior court has been a constitutional court since 1968,[146] the relevant constitutional provision and the Appellate Court Jurisdiction Act of 1970[147] do not alter the limitations on its prohibition jurisdiction.[148]

Unlike those of the supreme and superior courts, the powers of the commonwealth court are limited expressly to those conferred upon it by statute.[149] In *Bethlehem Mines Corp. v. Commonwealth*[150] the commonwealth court denied itself jurisdiction over prohibition proceedings because it felt that this jurisdiction had not been included in its statutory conferral.[151] Upon appeal, however, the supreme court reversed, holding that no doubt exists about the commonwealth court's statutory authority to issue the writ in aid of its appellate jurisdiction.[152]

---

144. Act of May 21, 1941, P.L. 47, No. 28, § 1, *as amended*, Act of May 8, 1956, P.L. 1540, No. 511, § 1 (repealed 1963) stated,

> The Superior Court shall have no original jurisdiction, except in actions of mandamus and prohibition to courts of inferior jurisdiction where such actions are ancillary to proceedings within its appellate jurisdiction, and except that it, or any judge thereof, shall have full power and authority when and as often as there may be occasion, to issue writs of habeas corpus under like conditions returnable to the said court, but it shall have exclusive and final appellate jurisdiction of all appeals in the following classes of cases . . . .

145. *Id.*

146. PA. CONST. art. V, §§ 1, 3.

147. PA. STAT. ANN. tit. 17, §§ 211.101-.510 (Supp. 1975).

148. *Id.* § 211.301 states,

> The Superior Court shall have no original jurisdiction, except in actions of mandamus and prohibition to courts of original jurisdiction where such actions are ancillary to matters within its appellate jurisdiction, and except that it, or any judge thereof, shall have full power and authority when and as often as there may be occasion, to issue writs of habeas corpus under like conditions returnable to the said court.

149. The Commonwealth Court Act, *id.* §§ 211.1-.15, declares at § 211.8(g),

> The [commonwealth] court shall have power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of the jurisdiction given by this act and for the enforcement of any order which it might make, including such writs and process to or to be served or enforced by sheriffs and other officers of courts and political subdivisions as the courts of common pleas are authorized by law or usage to issue, and, except as otherwise provided by general rules, to make such rules and orders of court as the interest of justice or the business of the court may require.

The Appellate Court Jurisdiction Act, *id.* §§ 211.101-.510, states at § 211.401,

> (a) The Commonwealth Court shall have original jurisdiction of:
>
> (1) All civil actions or proceedings against the Commonwealth or any officer thereof, acting in his official capacity, except (i) actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court, and (ii) proceedings under the Eminent Domain Code;
>
> (2) All civil actions or proceedings by the Commonwealth or any officer thereof, acting in his official capacity, except proceedings under the Eminent Domain Code;
>
> (3) All civil actions or proceedings original jurisdiction of which is vested in the Commonwealth Court by section 508 of this act or by any act of the General Assembly hereafter enacted.

150. 11 Pa. Commonwealth Ct. 375, 313 A.2d 790 (1973).

151. *Id.* at 379, 313 A.2d at 792.

152. Bethlehem Mines Corp. v. Commonwealth, — Pa. —, —, 340 A.2d 435, 437 (1975).

The supreme court answered directly two arguments that the commonwealth court had adopted in ruling that it lacked prohibitory power. First, the commonwealth court had considered itself bound by an earlier decision of the supreme court[153] that appeared to deny the lower court any jurisdiction over quo warranto (an extraordinary writ like prohibition)[154] and to vest this jurisdiction solely in the supreme court, even though the latter's jurisdiction over extraordinary writs is "original *but not exclusive.*"[155] In *Bethlehem Mines*[156] the supreme court stated that the earlier decision was "based not on a statutory grant of original jurisdiction, but on our constitutional authority over justices of the peace."[157]

The second basis of the commonwealth court's holding in *Bethlehem Mines*[158] was grounded on its analysis of the interaction between the Commonwealth Court Act and the subsequent Appellate Court Jurisdiction Act.[159] The court noted that the Commonwealth Court Act grants it authority to issue "every lawful writ and process necessary or suitable for the exercise of its jurisdiction."[160] This appears to empower the commonwealth court to issue a writ of prohibition in matters ancillary to its jurisdiction in much the same manner as the superior court.[161] The commonwealth court held,[162] however, that because the legislature had used *express* language in granting prohibitory power to the supreme and superior courts within the Appellate Court Jurisdiction Act,[163] the lack of an express state-

153. Collins v. Gessler, 452 Pa. 471, 307 A.2d 892 (1973).
154. *See* note 108 *supra.*
155. PA. STAT. ANN. tit. 17, § 211.201 (Supp. 1975) (emphasis added). The supreme court declared erroneous plaintiff's reliance upon the Appellate Court Jurisdiction Act regarding the jurisdiction of the commonwealth court. Collins v. Gessler, 452 Pa. 471, 475-76 n.3, 307 A.2d 892, 894 n.3 (1973). Yet, no explanation was offered beyond the statement that "[s]ection 201 of the Appellate Court Jurisdiction Act, on its face, is controlling in this case." *Id. Collins* was questioned by the commonwealth court in Commonwealth *ex rel.* Specter v. Dennis, 10 Pa. Commonwealth Ct. 439, 448, 308 A.2d 915, 919 (1973), but was followed to preclude the commonwealth court from exercising jurisdiction in a mandamus action. *Specter,* in turn, was held to control the result in *Bethlehem Mines* regarding jurisdiction over prohibition actions.
156. Bethlehem Mines Corp. v. Commonwealth, — Pa. —, 340 A.2d 435 (1975).
157. *Id.* at —, 340 A.2d at 439.
158. Bethlehem Mines Corp. v. Commonwealth, 11 Pa. Commonwealth Ct. 375, 313 A.2d 790 (1973).
159. *See* note 149 and accompanying text *supra.*
160. 11 Pa. Commonwealth Ct. at 377, 313 A.2d at 792.
161. *See* notes 144-48 and accompanying text *supra.*
162. 11 Pa. Commonwealth Ct. at 377-78, 313 A.2d at 792.
163. *See* notes 139, 148 and accompanying text *supra.*

ment within the Commonwealth Court Act[164] precluded a finding that the legislature had intended to confer the power on the latter court.

The supreme court refuted this conclusion in two ways. First, it assumed that the Appellate Court Jurisdiction Act,[165] in fact, was silent about the commonwealth court's power over prohibition. Nevertheless, this silence could hardly be read "as indicating a legislative intent to deny authority to the commonwealth court to issue writs of prohibition."[166] The Appellate Court Jurisdiction Act contains two provisions that confer powers on the commonwealth court broad enough to include prohibition.[167] Therefore, the supreme court noted, the Act's silence about prohibition may indicate merely that the legislature thought further mention of the commonwealth court's prohibitory power unnecessary.[168] The supreme court then took the opposite approach and expressed doubt that the Act was silent on the issue at all.[169] The court noted that the Act granted the commonwealth court "original jurisdiction over all actions or proceedings against the Commonwealth,"[170] another grant of power broad enough to include prohibition.[171] The supreme court further noted that the Act contained exceptions to its grant of original jurisdiction to the lower court.[172] Therefore, if the legislature had intended to exclude prohibition, it could have done so in like manner.[173]

The supreme court has determined that Pennsylvania's courts of common pleas lack all authority to issue writs of prohibition.[174] In *Pennsylvania Labor Relations Board v. Butz*[175] the court based its decision on the Judiciary Act of 1722,[176] which created the courts of common pleas[177] as well as the supreme court.[178] This act did not

164. *See* note 149 *supra.*
165. *Id.*
166. Bethlehem Mines Corp. v. Commonwealth, — Pa. —, —, 340 A.2d 435, 438 (1975).
167. PA. STAT. ANN. tit. 17, §§ 211.8(g)-(h) (Supp. 1975).
168. — Pa. at —, 340 A.2d at 438.
169. *Id.*
170. *See* note 149 *supra.*
171. — Pa. at —, 340 A.2d at 438.
172. *See* note 149 *supra.*
173. — Pa. at —, 340 A.2d at 438.
174. Pennsylvania Labor Rel. Bd. v. Butz, 411 Pa. 360, 365, 192 A.2d 707, 709 (1963). Before 1963 the question whether courts of common pleas had authority to issue writs of prohibition had not been resolved. Two common pleas decisions, Noah v. Jacoby, 77 Pitts. 461, 462 (Pa. C.P. 1928); Winks v. Arona School Directors, 22 West. 28 (Pa. C.P. 1938), stated in dicta that prohibition could be exercised by such courts against a quasi-judicial tribunal, to which the court necessarily would be superior. In Alberts v. Bradley, 11 Pa. D. & C.2d 107, 111 (C.P. Alleg. 1956), it was suggested, however, that this reasoning could not properly be extended to authorize prohibition against the minor judiciary since they are not considered inferior judicial tribunals within the jurisdiction of the courts of common pleas.
175. 411 Pa. 360, 192 A.2d 707 (1963).
176. Act of May 22, 1722, 1 SM. L. 131, ch. 255.
177. *Id.* § 1.
178. *See* note 38 and accompanying text *supra.*

confer the powers of the king's bench upon the courts of common pleas and, therefore, unlike the supreme court these courts did not acquire prohibitory power. The court in *Butz* also held that subsequent legislative conferral of certain powers of the English Court of Chancery (which, as one of the three high courts at Westminster, shared the power of prohibition with the king's bench)[179] upon the courts of common pleas[180] did not give these courts the power to issue writs of prohibition.[181]

V. Requirements for Issuance of a Writ of Prohibition

Before a court can decide whether the common-law requirements for issuance of the prohibitory writ have been met in any given case, it must determine the degree of circumspection it will use in its consideration of the petition. There are two schools of thought. One view holds that the writ should be issued only reluctantly and under conditions of extreme necessity.[182] The opposite opinion states that application of the writ should be upheld and encouraged wherever possible.[183] The former view emphasizes that the writ is an extraor-

---

179. *See* note 33 and accompanying text *supra.*

180. PA. STAT. ANN. tit. 17, § 281 (1962) states,

> The several courts of common pleas shall have the jurisdiction and powers of a court of chancery, so far as relates to:
>
> I. The perpetuation of testimony.
> II. The obtaining of evidence from places not within the state.
> III. The care of persons and estates of those who are non compos mentis.
> IV. The control, removal and discharge of trustees, and the appointment of trustees and the settlement of their accounts.
> V. The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations, and partnerships.
> VI. The care of trust moneys and property, and other moneys, and property made liable to the control of the said courts.
>
> And in such other cases as the said courts have heretofore possessed such jurisdiction and powers, under the Constitution and laws of this commonwealth.

181. 411 Pa. at 364, 192 A.2d at 710. The *Butz* court also noted that an absurd situation would result if the courts of common pleas were allowed prohibitory powers. Theoretically, the court felt, with this power the lower courts could challenge the jurisdiction of the supreme court. *Id.* This latter analysis overlooked the principle that a writ of prohibition can issue only from a court superior to the one against which it is directed.

Mention should be made here that the former courts of quarter sessions also lacked jurisdiction to issue writs of prohibition. Commonwealth v. Homka, 1 Pa. D. & C.2d 685, 691 (C.P. (Q.S.) Phila. 1954). For an exhaustive analysis of the question see Kroemer v. Commonwealth, 3 Binn. 577, 578-79 (Pa. 1811); 1 J. STEVENS, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 113-14 (1883).

182. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 900 (1975).

183. Tribune Review Pub. Co. v. Thomas, 120 F. Supp. 362, 374 (W.D. Pa. 1954).

dinary one and that its exercise obviates the normal process of judicial review. The latter approach also stresses regularity in judicial proceedings in that liberal use of prohibition prevents unauthorized encroachments of jurisdiction by inferior courts. Pennsylvania decisions have propounded both views,[184] but several other jurisdictions have adopted the liberal approach. Preference for this view stems from the realization that a hesitant approach to the exercise of prohibitory power in the initial stage of proceedings simply increases the frequency with which the remedy subsequently will have to be used.[185] Under the liberal approach courts have issued writs of prohibition even when the common-law requirements for issuance were not satisfied.[186]

In the vast majority of cases, however, four basic requirements must be met before a court can[187] issue a writ of prohibition. First, the court or tribunal against which the writ is directed must be exercising judicial or quasi-judicial power. Second, the exercise of this power must be an extension of jurisdiction unauthorized by law. Third, the exercise of power must threaten injury to the petitioner. Last, the threatened injury must be one for which no other adequate remedy exists.[188] The key requirement that the inferior court's exer-

184. *Compare* Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 900 (1975), *with* Tribune Review Pub. Co. v. Thomas, 120 F. Supp. 362, 374 (W.D. Pa. 1954).

185. People *ex rel.* Childs v. Extraordinary Trial Term of Supreme Court, 228 N.Y. 463, 468, 127 N.E. 486, 487 (1920); *accord,* Petition of DiJoseph, 394 Pa. 19, 23, 145 A.2d 187, 188 (1958), *quoting from* Commonwealth v. Stepper, 54 Lack. 209, 212-13 (Pa. C.P. 1952).

186. State *ex rel.* Sears v. Romiti, 50 Ill. 2d 51, 54, 277 N.E.2d 705, 706-07 (1971); Lee v. County Court, 27 N.Y.2d 432, 436, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 708 (1971).

187. Courts conflict over whether issuance of a writ of prohibition can ever be a matter of right or whether it remains within the discretion of the issuing court. In its earliest days prohibition was a matter of right if the inferior court clearly lacked jurisdiction on the face of the proceedings. 37 MICH. L. REV. 789 (1939). This rule, however, was not controlling after the early seventeenth century. Good v. Good, 124 Eng. Rep. 66 (C.P. 1623). Today, at least one court has stated that the writ can be had as a matter of right when it is shown that jurisdiction is clearly lacking and no other adequate remedy is available. Family Court v. Department of Labor & Indus. Rel., 320 A.2d 777, 780 (Del. Ch. 1974); *accord, In re* Hughley Mfg. Co., 184 U.S. 297, 301 (1902); Smith v. Whitney, 116 U.S. 167, 173 (1886). Most courts, however, including the Supreme Court of Pennsylvania, hold that prohibition is never a matter of right. *E.g.*, Weidel v. Plummer, 243 Minn. 476, 480, 68 N.W.2d 245, 247 (1955); *In re* Public Util. Comm'r, 201 Ore. 1, 19, 268 P.2d 605, 613 (1954); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948); Lyons v. Steele, 113 W. Va. 652, 654-55, 169 S.E. 481, 482 (1933). The distinction between the two views is insignificant since under either view the court must still exercise discretion in deciding whether jurisdiction is clearly lacking or whether another remedy is adequate or available.

188. Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 107-08, 320 A.2d 134, 136 (1974); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 102, 61 A.2d 426, 430 (1948). *E.g.*, Family Court v. Department of Labor & Indus. Rel., 320 A.2d 777, 780-81 (Del. Ch. 1974); State *ex rel.* Sears v. Romiti, 50 Ill. 2d 51, 54, 277 N.E.2d 705, 706 (1971); Weidel v. Plummer, 243 Minn. 476, 480, 68 N.W.2d 245, 247 (1955); Lee v. County Court, 27 N.Y.2d 432, 436, 267 N.E.2d 452, 454,

cise of jurisdiction be unauthorized has already been discussed.[189] This section will examine the other requirements and note differences among jurisdictions concerning the interpretations thereof.

A. The Meaning of Judicial or Quasi-Judicial Power

The writ of prohibition is issued to keep inferior courts within the proper limits of their jurisdiction. Therefore, prohibition can be exercised only against judicial or quasi-judicial persons or tribunals. The separation of powers doctrine[190] bars preemptory judicial interference with executive[191] or legislative[192] action.[193]

Determining whether judicial or quasi-judicial power is being exercised by an administrative tribunal is often difficult.[194] The subtlety of the problem is especially pronounced when public utility

---

318 N.Y.S.2d 705, 708 (1971); State *ex rel.* Masterson v. Ohio State Racing Comm'n, 164 Ohio St. 312, 315, 130 N.E.2d 829, 831 (1955); State *ex rel.* Pabst v. Circuit Court, 184 Wis. 301, 304, 199 N.W. 213, 214 (1924).

189. *See* notes 77-97 and accompanying text *supra.*

190. Hetherington v. McHale, 10 Pa. Commonwealth Ct. 501, 510-11, 311 A.2d 162, 167 (1973); *accord,* Chemical Nat. Res. Inc. v. Venezuela, 420 Pa. 134, 152, 215 A.2d 864, 872 (1966).

191. Prohibition cannot be used, for example, to restrain the actions of a Governor. Williams v. Koelsch, 67 Idaho 341, 343, 180 P.2d 237, 238 (1947); Stein v. Morrison, 9 Idaho 426, 453, 75 P. 246, 255 (1904); Grier v. Taylor, 4 McCord 206, 207 (S.C. 1827). This limitation, however, does not prevent a Governor from petitioning for prohibition against allegedly wrongful judicial involvement in his scope of responsibility. Stein v. Morrison, 9 Idaho 426, 453, 75 P. 246, 255 (1909); *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 289, 2 A.2d 783 (1938); *accord,* Smith v. Whitney, 116 U.S. 167, 176 (1886) (writ cannot lie against Cabinet member).

192. *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 342, 344, 2 A.2d 802, 803 (1938).

193. The remedy in these cases is not prohibition, but a declaration of the unconstitutionality of the particular action taken by one of the two branches of government. This was the procedure followed in *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 342, 344, 2 A.2d 802, 803 (1938). The legislature had enacted a law forbidding the Dauphin County court of quarter sessions from conducting a grand jury investigation of alleged official misconduct simultaneously with an inquiry conducted by a special legislative committee. When the court ordered the witnesses subpoenaed by the committee not to appear, the supreme court granted the committee's petition to prohibit the order. *Id.* In a subsequent proceeding, however, the supreme court declared the legislation unconstitutional and allowed the two investigations to proceed concurrently. *In re* Investigation by Dauphin County Grand Jury, 332 Pa. 342, 358, 2 A.2d 802, 809 (1938).

194. A wide variety of administrative activities have been classified as judicial or quasi-judicial for purposes of prohibition. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 416 (1st ed. 1958). Professor Davis questioned the need for these labels. He contended that the determinative issue should be the extent to which the petitioner needs judicial protection from the threatened action of the administrative body. *Id.* at 416-17. This contention reflects the view that relief for the petitioner is the primary purpose for which a writ of prohibition will issue.

commissions fix rates for regulated utilities and railroads. Courts are divided on the question whether this action is legislative or judicial in nature. Decisions holding commission acts at least quasi-judicial emphasize the discretionary aspects of the rate-making procedure, especially the allowance of arguments and the weighing of evidence.[195] Decisions holding that this action is legislative stress that rate-making is within the statutory power of the legislature regardless of the manner in which it is done.[196] No reported Pennsylvania decision is dispositive of this question. The supreme court has ruled, however, that an order of a public utility commissioner requiring a municipality to provide water service to a particular resident was an exercise of quasi-judicial power.[197] A similar ruling was made regarding a state mining commission convened to determine damages for an allegedly improper removal of coal.[198]

Another question is whether it is sufficient that the action sought to be restrained is performed by one occupying a judicial position or whether it is required additionally that the act itself be judicial. The general rule clearly supports the latter position.[199] The Supreme Court of Pennsylvania has not addressed this question directly, but its holdings that the actions of a judge are not necessarily those of a court[200] imply concurrence with the majority view.[201]

---

195. *E.g.*, Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 313, 18 N.E.2d 287, 290 (1938); Hixon v. Snug Harbor Water & Gas Co., 381 P.2d 308, 310 (Okla. 1963); Oklahoma City v. Corporation Comm'n, 80 Okla. 194, 196, 195 P. 498, 500 (1921); Huntington Chamber of Commerce v. Public Serv. Comm'n, 84 W. Va. 81, 83, 99 S.E. 285 (1919).

196. *E.g.*, ICC v. Cincinnati, N.O. & T.P. Ry., 167 U.S. 479, 499-500 (1897); Arrow Transp. Co. v. Southern Ry., 308 F.2d 181, 184 (5th Cir. 1962), *aff'd*, 372 U.S. 658 (1963); Durant v. City of Beverly Hills, 39 Cal. App. 2d 133, 138, 102 P.2d 759, 763 (1940) ("universal rule"); State *ex rel.* Swearingen v. Railroad Comm'rs, 79 Fla. 526, 529, 84 So. 444, 445 (1920); *accord*, Berry v. Lindsay, 256 S.C. 282, 289-90, 182 S.E.2d 78, 83 (1971) (fixing of insurance premium rates held nonjudicial).

197. Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 563, 310 A.2d 271, 276 (1973).

198. Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 101, 61 A.2d 426, 430 (1948). The supreme court denied relief, however, because of the availability of an appeal from the administrative body's action. One commentator stated that the reasoning in *Carpentertown* virtually nullifies possible applicability of prohibition against such administrative action. Reader, *Judicial Review of "Final" Administrative Decisions in Pennsylvania*, 67 DICK. L. REV. 1, 23 (1962).

Other jurisdictions have granted a prohibitory writ against a decision of a public utility commission despite the availability of an appeal. *E.g.*, *In re* Public Util. Comm'r, 201 Ore. 1, 19, 268 P.2d 605, 614 (1954).

199. *E.g.*, Smith v. Whitney, 116 U.S. 167, 169 (1886); City of Coronado v. City of San Diego, 97 Cal. 440, 441, 32 P. 518 (1893); State *ex rel.* Swearingen v. Railroad Comm'rs, 79 Fla. 526, 529, 84 So. 444, 445 (1920); Crow v. Board of Sup'rs, 135 Cal. App. 451, 458, 27 P.2d 655, 658 (1933). *But see* Fouracre v. White, 31 Del. 25, —, 102 A. 186, 196 (Super. Ct. 1917).

200. Commonwealth v. Shawell, 325 Pa. 497, 504, 191 A. 17, 19 (1936); Moritz v. Luzerne County, 283 Pa. 349, 351, 129 A. 85, 86 (1925).

201. An archaic but descriptive example of the conflict raised by this question concerns the issue whether tribunals that determine the results of contested elections

B. The Meaning of Resultant Harm

To meet the requirement of resultant harm, the petitioner must prove that the exercise of judicial or quasi-judicial power will cause immediate harm unless forestalled.[202] Mere apprehension of injury is insufficient.[203] This rule was strictly interpreted in *Application of Tribune Review Publishing Co.*[204] In that case a newspaper sought to prohibit enforcement of a court of common pleas rule banning photographers from the courthouse. The petition was dismissed because no photographer had disobeyed the court order and, therefore, the ban had not yet actually harmed petitioner.[205]

Similarly, once the restraining effect of prohibition becomes unnecessary or useless, the writ cannot properly lie.[206] For instance, the supreme court may find that an inferior court lacked authority to act, but simultaneously it will render that finding moot by ruling that the statute under which the court acted is unconstitutional.[207] Prohibition also does not properly lie when an act is already completed. At that point an affirmative remedy is required.[208] On the other hand, when court orders are sought to be restrained, the controlling consideration is whether an order's effect is continuing. If the force of an order has "not been spent, nor its capacity for harm exhausted,"

---

exercise judicial or quasi-judicial powers. The supreme court has held that a computation board comprised of two common pleas judges exercised quasi-judicial functions in determining whether the allegations of fraud were sufficient to order an opening of the ballot boxes. This ruling was made despite the court's acknowledgment of the statutory instruction that the inquiry "shall not be deemed a judicial adjudication to conclude any contest." *In re* First Cong. Dist. Election, 295 Pa. 1, 8, 144 A. 735, 737 (1928).

Other courts have held, however, that even a final adjudication of an election is not an exercise of judicial or quasi-judicial authority because the power to make this determination falls within the realm of the legislature by constitutional provision. McWhorter v. Dorr, 57 W. Va. 608, 615-16, 50 S.E. 838, 840 (1905).

202. People *ex rel.* Childs v. Extraordinary Trial Term of Supreme Court, 228 N.Y. 463, 467-68, 127 N.E. 486, 487 (1920); Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 98, 61 A.2d 426, 428 (1948); Reader, *Judicial Review of "Final" Administrative Decisions in Pennsylvania,* 67 DICK. L. REV. 1, 23 (1962).

203. People *ex rel.* Childs v. Extraordinary Trial Term of Supreme Court, 228 N.Y. 463, 468, 127 N.E. 486, 487 (1920); Application of Tribune Review Pub. Co., 379 Pa. 92, 94, 113 A.2d 861 (1954).

204. 379 Pa. 92, 113 A.2d 861 (1954).

205. *Id.* at 94, 113 A.2d at 861.

206. United States v. Hoffman, 71 U.S. (4 Wall.) 158 (1866); Jacobson v. Superior Court, 1 Ariz. App. 342, 344, 402 P.2d 1018, 1018-20 (1965); People *ex rel.* Livingston v. Wyatt, 186 N.Y. 383, 394, 79 N.E. 330, 334 (1906); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 416 (1st ed. 1958).

207. Petition of Park, 329 Pa. 60, 63, 196 A. 495, 496 (1938).

208. United States v. Hoffman, 71 U.S. (4 Wall.) 158 (1866).

prohibition will lie to prevent further injury.[209] Even when final judgment has been entered, a writ can issue if the lack of jurisdiction is clear.[210] Nevertheless, the manifest inequity that arises when a litigant allows a trial to proceed to conclusion before he alleges lack of jurisdiction may inveigh against its issuance.

C. *The Meaning of Adequate Remedy*

A fundamental rule states that a writ of prohibition cannot be granted if another adequate remedy is available to the petitioner.[211] Generally matters that can be remedied on appeal cannot be checked by prohibition. Even though an appeal subsequently may provide a remedy, however, a petitioner need not endure a full trial if he can show the proceedings to be void *ab initio*.[212]

In Pennsylvania the adequacy of appeal issue most often arises in cases in which an interlocutory order is sought to be restrained. Prohibition is properly denied in this situation because a case cannot be appealed in piecemeal fashion; judicial proceedings would be unduly prolonged and chaotic.[213] The expense, inconvenience, or other hardship of awaiting an appeal of an interlocutory order will not justify issuance of a writ of prohibition.[214] The supreme court has denied prohibitory relief even when contempt was the only remaining avenue by which an unsatisfied petitioner could preserve rights of appeal.[215]

In criminal cases, however, the supreme court will grant prohibition against interlocutory orders.[216] The writ is available to restrain an order permitting defendant's pretrial inspection of physicial evi-

209. People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 35, 156 N.E. 84, 87 (1927) (Cardozo, C.J.). This principle was applied in a Pennsylvania case when a judge's order to padlock petitioners' offices for allegedly seditious activities was properly restrained. Petition of Communist Party, 365 Pa. 549, 550, 75 A.2d 583 (1950).

210. HIGH, *supra* note 69, at 559; Hughes & Brown, *supra* note 1, at 838.

211. Pirillo v. Takiff, — Pa. —, —, 341 A.2d 896, 900 (1975).

212. Bennett v. District Court, 81 Okla. Crim. 351, 357, 162 P.2d 561, 565 (1945); State *ex rel.* City of Huntington v. Lombardo, 149 W. Va. 671, 683, 143 S.E.2d 535, 541 (1965).

213. Commonwealth v. Mellon Nat'l Bank & Trust Co., 360 Pa. 103, 109, 61 A.2d 430, 434 (1948).

214. Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 374 (1955); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 202 (1945); Borough of Akron v. Pennsylvania Pub. Util. Comm'n, 453 Pa. 554, 562, 310 A.2d 271, 275 (1973).

215. Petition of Specter, 455 Pa. 518, 519, 317 A.2d 286, 287 (1974); *In re* Mack, 386 Pa. 251, 267, 126 A.2d 679, 702 (1956); Commonwealth v. Mellon Nat'l Bank & Trust Co., 360 Pa. 103, 113, 61 A.2d 430, 434 (1948) (vigorous dissent).

216. *See* Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 108, 320 A.2d 134, 136 (1974); Lewis v. Court of Common Pleas, 436 Pa. 296, 299, 260 A.2d 184, 186-87 (1969); Commonwealth v. Caplan, 411 Pa. 563, 568, 192 A.2d 894, 897 (1963); *In re* DiJoseph, 394 Pa. 19, 21, 145 A.2d 187, 189 (1958); Commonwealth v. Hoban, 54 Lack. 213, 218 (Pa. C.P. 1952) (no official report of supreme court case).

dence within the prosecutor's possession.[217] Although this order reflects an exercise of discretion by the trial judge rather than the abuse or lack of jurisdiction conceptually required for prohibition, the writ is proper because the prosecution has no right of appeal from a judgment of acquittal.[218]

VI. Conclusion

This brief examination of prohibition in Pennsylvania has focused upon theoretical and practical facets of this traditionally obscure subject. The conflicts and suggested resolutions presented chiefly concern academic aspects of prohibition, but practitioners should be familiar with its existence as a viable procedural device that can provide relief to an otherwise remediless client. Practitioners also should be aware of the distinction between prohibition and other extraordinary writs because confusion in this regard can lead to costly delays in litigation while amended petitions are adjudicated.

It is difficult to discern trends in the exercise of prohibition in Pennsylvania because the majority of cases before the supreme court are resolved in memorandum decisions and go unrecorded. An extrapolation of available decisions reveals, however, that the supreme court's exercise of prohibition is increasing dramatically. Most significantly, the court no longer strictly adheres to the rule demanding a lack of jurisdiction as a prerequisite to issuance of a prohibitory writ. On the contrary, the court has shown a willingness, especially in the area of criminal law, to exercise the power of prohibition even in instances when the only alleged excess of authority is an abuse of discretion.

JOHN A. COVINO

217. In Lewis v. Court of Common Pleas, 436 Pa. 296, 300, 260 A.2d 184, 188 (1969), the district attorney's petition for prohibition of the trial court's order to make available an FBI agent for interview by defendant was denied because the agent was not considered physical evidence within the possession of the Commonwealth. Such classification precluded any issue in prohibition. *See* PA. R. CRIM. P. 310.

218. Commonwealth *ex rel.* Specter v. Shiomos, 457 Pa. 104, 108, 320 A.2d 134, 136 (1974).