The Writ of Prohibition in Arkansas

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COMMENT

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INTRODUCTION

Common law courts of Tudor England utilized the writ of prohibition primarily to secure leverage over the ecclesiastical courts. In modern usage, the writ represents the negative counterpart of mandamus and will issue to prevent an inferior court from proceeding in a cause over which it lacks jurisdiction. Issuance of the writ, an extraordinary remedy, lies in the court's discretion. The basic requirements to secure the writ include: undisputed jurisdictional facts, the inferior court's attempt to act without jurisdictional authority, and the lack of another adequate remedy. Recent decisions in Arkansas may have used the writ as a device for interlocutory appeal. This comment will review the historical background of the writ, codification in the Arkansas constitution and statutes, jurisdictional principles and the substantive principles which govern its nature and scope of issuance.

2. State ex rel. Purcell v. Nelson, 246 Ark. 210, 438 S.W.2d 33 (1969). The writ of mandamus is an affirmative remedy which requires some action by an inferior court beyond its legal authority. Neither writ may be used as a substitute for appellate review. Id. at 216, 438 S.W.2d at 39.
4. Midwest Lime Co. v. Independence County Chancery Court, 261 Ark. 695, 551 S.W.2d 537 (1977); Faver v. Cleveland Circuit Court, 216 Ark. 792, 227 S.W.2d 453 (1950); Arkansas Utilities Co. v. Pipkin, 202 Ark. 314, 150 S.W.2d 38 (1941).
5. Monette Road Improvement Dist. v. Dudley, 144 Ark. 169, 222 S.W. 59 (1920); Jones v. Coffin, 96 Ark. 332, 131 S.W. 873 (1910); Finley v. Moose, 74 Ark. 217, 85 S.W. 238 (1905); Russell v. Jacoway, 33 Ark. 191 (1878).
ENGLISH HISTORICAL DEVELOPMENT

The early English judicial system separated jurisdictional control between the ecclesiastical and common law courts but neither system had an express power of review over the other. In the struggle for jurisdictional supremacy, the Court of King's Bench developed the writ of prohibition to prevent the ecclesiastical courts from taking cognizance of matters for which a remedy at law existed. A secondary function of the writ was as a vehicle of superintending control over the inferior common law courts. Although classified as the King's prerogative writ, authority to use it was later extended to the Courts of Chancery, Common Pleas and Exchequer.

DEVELOPMENT IN ARKANSAS

Early Arkansas common law followed English precedent and used the writ of prohibition to supervise the exercise of jurisdictional authority by inferior courts. The writ developed as a preventive device to restrain proceedings be-

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8. 2 Pollock & Maitland, The History of English Law 665 (2d ed. 1968). "The King's court was not superior to the ecclesiastical court's; it could not reverse their judgments. It could, however, and would prohibit them from meddling with a temporal dispute, and the ecclesiastical judge who infringed a royal prohibition could be haled before the justices and punished." Id. at 665.
10. Id. at 169.
    A prohibition is a writ issuing properly only out of the Court of King's Bench, being the King's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.
    Id. at 12.
12. Ex parte Williams, 4 Ark. 537 (1842).
yond the scope of the lower court's authority. It incidentally functioned remedially in granting the petitioner relief from the burden of contesting unwarranted jurisdiction. The writ was an extraordinary measure, given only where no other protection was available. The Arkansas Constitution formally granted the Arkansas Supreme Court authority to issue the writ of prohibition in the exercise of its general superintending control over the inferior courts of law and equity. The power to grant the writ lies exclusively with the Supreme Court and is not vested concurrently with the chancery courts.

Perhaps because of its discretionary nature, the procedural requirements attending the writ have typically been elastic, relaxed in cases of extraordinary hardship and en-

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14. Merchants & Planters' Bank v. Hammock, 178 Ark. 746, 12 S.W.2d 421 (1929); Macon v. LeCroy, 174 Ark. 228, 295 S.W. 31 (1927); Order of Ry. Conductors of Am. v. Bandy, 177 Ark. 694, 8 S.W.2d 448 (1928).
16. Jeffrey v. Jackson County Court, 251 Ark. 1071, 476 S.W.2d 805 (1972). The court stated that the writ of prohibition, like the writ of mandamus developed at common law and was unknown to equity procedure. This holding was based on article VII, § 11 and § 15 of the Arkansas Constitution which provides that "The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not be vested in some other court provided by this Constitution." Id. at 1073, 476 S.W.2d at 806.
17. Midwest Lime Co. v. Independence County Chancery Court, 261 Ark. 695, 551 S.W.2d 537 (1977). The court stated that the writ of prohibition was discretionary in nature and should be applied cautiously. Id. at 700, 551 S.W.2d at 542. In Arkansas Utilities Co. v. Pipkin, 202 Ark. 314, 150 S.W.2d 38 (1941), the court noted that the writ issued out of the court's discretion and not as a matter of right. Id. at 317, 150 S.W.2d at 41. In Weaver v. Leatherman, 66 Ark. 211, 49 S.W. 977 (1899) the court stated that the discretionary character of the writ corresponded to other extraordinary remedies which apply only where the usual and ordinary forms of relief are inadequate. Id. at 212, 49 S.W. at 978.
forced more rigorously in borderline situations. Most procedural disputes have involved the requirements of objection to jurisdiction in the lower court and the timeliness of the application for the writ. The earliest cases demanded that the objection be raised in pleading in the inferior court and the plea overruled before the writ could issue. That requirement was somewhat circumscribed in 1920 when the court, looking to the discretionary nature of the writ, stated that objection was not mandatory if it would be obviously futile and would result in unnecessary or harmful delay. Nevertheless the general rule remains that objection to jurisdiction must be raised and overruled by the lower court in order to secure the writ.

Although not controlled by statute, application for the writ must be timely. Because issuance of the writ is discretionary, the time period to seek relief is similarly flexible. If the petitioner waits an unreasonable time without excuse before application, the court may apply the equitable doctrine of laches and deny the writ. By statute, petitions for the writs of prohibition and mandamus are advanced on the docket ahead of all other proceedings for summary determination. The statutes also provide that the court against whom relief is sought must receive notice of the hearing and an opportunity to show cause why relief should be denied.

18. Detroit Fidelity & Surety Co. v. Priddy, 185 Ark. 9, 45 S.W. 2d 44 (1932); Roberts v. Tatum, 171 Ark. 148, 283 S.W. 45 (1926); Monette Road Improvement Dist. v. Dudley, 144 Ark. 169, 222 S.W. 59 (1920).
19. Ex parte Williams, 4 Ark. 537 (1842). "The role was, at common law, that no prohibition lay to an inferior court in a cause arising out of jurisdiction, until the matter had been pleaded in the inferior court, and the plea refused." Id. at 540.
20. Monette Road Improvement Dist. v. Dudley, 144 Ark. 169, 222 S.W. 59 (1920).
21. Detroit Fidelity & Surety Co. v. Priddy, 185 Ark. 9, 45 S.W. 2d 44 (1932).
23. Ark. Stat. Ann. § 33-104 (Repl. 1962). "Petitions for such writs shall have precedence over all other actions and proceedings and shall be heard and determined summarily."
24. Ark. Stat. Ann. § 33-105 (Repl. 1962). "Notice of hearing upon any such petition shall be served in writing upon the officer or persons against whom the relief is sought, for such time in such manner as may be prescribed by the court having jurisdiction. Such notice shall state the style of the court, the docket number of the action or proceeding, the date and place of hearing, and the relief sought. The sufficiency of the notice shall be a question for the court." Ark. Stat. Ann. § 33-106
Determination of the petition is an appealable order. 25

JURISDICTIONAL PRINCIPLES

The writ will issue only upon a showing that the court against whom restraint is sought is attempting to exercise judicial or quasi-judicial power, that the petitioner lacks any other adequate protection by appeal or otherwise 26 and that the lower court's jurisdiction is unauthorized by law. The first element, judicial capacity, means that executive or legislative functions cannot be restrained by operation of the writ. Thus, an officer of a state agency, acting pursuant to statutory directive in a ministerial capacity cannot be controlled by the writ of prohibition. 27 The writ lies to a court, not a judge, 28 although dictum indicates that the writ may in exceptional cases extend to a judge acting in chambers. 29 Similarly, the writ does not operate against parties to litigation and so cannot prevent prosecution of a suit. 30

The writ's second jurisdictional principle is that the pe-
petitioner's alternate remedies, i.e. appeal, would not provide him "adequate" protection. In the 1800's and early 1900's petitioners seeking the writ of prohibition met several difficult procedural and substantive hurdles, couched against the background of the writ's extraordinary and discretionary nature. As previously noted, the procedural requirement that objection to jurisdiction must be raised in the inferior court was strictly construed. Sup. Substantively, petitioners had to demonstrate that no other protection existed against the usurpation of jurisdiction. Typically, only when the lower court clearly acted in contravention of statutory authority did the superior court find that the remedy of appeal was inadequate.

In Monette Road Improvement Dist. v. Dudley the court softened that standard and held that the writ could properly issue where the remedy by appeal, though available, was inadequate. The court stated that "if the absence of the right of appeal was essential to the issuance of a writ of prohibition, then that remedy would be entirely unavailable in any case, for under our Constitution the right of appeal is granted in all judicial proceedings. The true test is . . . whether or not the court is proceeding beyond its jurisdiction. . . ." The court further explained that "the remedy by appeal is afforded from an unjust judgment, whether it be void or merely erroneous; but the remedy by prohibition is afforded as a protection against a wrongful attempt to exercise jurisdiction unauthorized by law. The two remedies are independent. . . ." As a result, courts began to consider the burdens of delay and expense of litigation as factors re-

31. Ex Parte Williams, 4 Ark. 537 (1842).
33. Russell v. Jacoway, 33 Ark. 191 (1878). The writ of prohibition was granted to prevent a circuit court from exercising jurisdiction over a county election contest concerning the removal of a county seat. The court relied on the Ark. Const. article 7, § 28 which gives a county court exclusive jurisdiction "in all matters relating to county taxes, roads bridges . . . and in every other case that may be necessary to the internal improvement and local concerns of the county." The court held that the removal of the county seat was manifestly a matter of local concern. Id. at 194.
34. 144 Ark. 169, 222 S.W. 59 (1920).
35. 144 Ark. at 176, 222 S.W. at 60.
lating to the adequacy of the petitioner's remedy.\textsuperscript{36}

The third element needed for the writ of prohibition is that the lower court must be about to exercise jurisdiction beyond its legal authority.\textsuperscript{37} The petitioner must demonstrate that the inferior court lacks jurisdiction under any state of facts which may be proved.\textsuperscript{38} Thus, issuance of the writ presupposes that the jurisdictional facts are undisputed.\textsuperscript{39} Other factual disputes which do not affect the court's jurisdiction, such as whether defendants were engaged in a joint enterprise,\textsuperscript{40} would not be relevant to the issue of whether the writ of prohibition should be granted. When jurisdiction depends on contested facts which the inferior court is competent to decide, no writ will issue even if the superior court believes the facts were wrongfully determined.\textsuperscript{41} Similarly, the court will not use the writ of prohibition to inquire into matters lying in the lower court's discretion, such as whether to immediately enter default judgment upon late filing of an answer.\textsuperscript{42} Accordingly, the

\textsuperscript{36} Faver v. Cleveland Circuit Court, 216 Ark. 792, 227 S.W.2d 453 (1950); Murphy v. Trimble, 200 Ark. 1173, 143 S.W.2d 534 (1940).

\textsuperscript{37} Sparkman Hardwood Lumber Co. v. Bush, 189 Ark. 391, 72 S.W.2d 527 (1934); Russell v. Jacoway, 33 Ark. 191 (1878).

\textsuperscript{38} Monette Road Improvement Dist. v. Dudley, 144 Ark. at 175, 222 S.W. at 60 (1920).

\textsuperscript{39} Safeway Cab & Storage Co. v. Kincannon, 192 Ark. 1019, 96 S.W.2d 7 (1936); Metropolitan Life Ins. Co. v. Jones, 192 Ark. 1145, 97 S.W.2d 64 (1936); Finley v. Moose, 74 Ark. 217, 85 S.W. 238 (1905).

\textsuperscript{40} Carnes, Admx. v. Strait, Judge, 223 Ark. 962, 270 S.W.2d 920 (1954). See also Johnson v. Johnson, 243 Ark. 656, 421 S.W.2d 605 (1967). In a divorce action the writ of prohibition would not be used to resolve a domicile dispute. Murry v. Maner, 230 Ark. 132, 320 S.W.2d 940 (1959). The trial court's ruling concerning residence of the plaintiff in a personal injury suit could not be set aside by the writ of prohibition as appropriate relief was available by appeal. Id. at 135, 320 S.W.2d at 943. Sparkman Hardwood Lumber Co. v. Bush, 189 Ark. 391, 72 S.W.2d 527 (1934). The writ of prohibition, being restricted to pure jurisdictional disputes, could not be obtained to resolve whether a person served with process was a corporation's chief officer.

\textsuperscript{41} Finley v. Moose, 74 Ark. 217, 85 S.W. 238 (1905). "If the existence or non-existence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted; though the superior court may be of opinion that the questions of fact have been wrongly determined by the court below, and that their correct determination would have ousted the jurisdiction." Id. at 220, 85 S.W. at 240.

\textsuperscript{42} Burney v. Hargraves, 264 Ark. 680, 573 S.W.2d 912 (1978).
writ may not be used as an interlocutory device to review
discovery orders by the trial court.\textsuperscript{43}

\textbf{SUBSTANTIVE PRINCIPLES: NATURE OF SCOPE OF
ISSUANCE SUBJECT MATTER JURISDICTION}

The writ of prohibition prevents unauthorized exercise
of personal\textsuperscript{44} or subject matter jurisdiction.\textsuperscript{45} Broad classifi-
cations of subject matter jurisdiction problems include lack
of statutory power, venue issues, and the lapse of jurisdiction
due to the running of the statute of limitations. The divided
judicial system in Arkansas presents special jurisdictional
problems as the two systems interact, particularly in placing
outer limits on the power of equity courts.

In deciding whether the lower court has attempted to
act beyond its statutory power, superior court does not in-
quire into the sufficiency of the pleadings to state a cause of
action.\textsuperscript{46} Rather, the standard for issuance of the writ is that
the lower court has clearly exceeded its authority, regardless
of factual allegations.\textsuperscript{47} A primary issue in constructing a
statutory grant of jurisdiction is whether the authority is ex-
clusive or concurrent with another court or agency. For ex-
ample, a writ of prohibition was granted to prevent a circuit
court from proceeding in an employee’s negligence suit
against his employer when worker’s compensation laws
granted the compensation commission exclusive jurisdic-

\begin{itemize}
\item \textsuperscript{43} Arkansas Motor Coaches v. Taylor, 234 Ark. 803, 354 S.W.2d 731 (1962)
(could not use writ of prohibition to bar order to answer interrogatories), Farm Serv.
Co-op v. Cummings, 262 Ark. 810, 561 S.W.2d 317 (1978) (allegation that discovery
order would violate the attorney-client privilege held not appropriate for writ of prohi-
bition since court would not use writ as substitute for appeal).
\item \textsuperscript{44} Gainsburg v. Dodge, 193 Ark. 473, 101 S.W.2d 178 (1937).
\item \textsuperscript{45} Russell v. Jacoway, 33 Ark. 191 (1978).
\item \textsuperscript{46} Equitable Life Assurance Soc’y v. Mann, 189 Ark. 751, 75 S.W.2d 232
(1934); American Casualty Co. v. Lea, 56 Ark. 511, 20 S.W. 416 (1892). The court
would not consider the allegations of the complaint for purposes of the writ of prohibi-
tion. Therefore, whether agents bound a corporation by their actions acted within
the scope of their duties, or actions constituted doing business in the state were not
relevant issues for determination of jurisdiction, the province of the writ of prohibition.
\textit{Id.} at 515, 20 S.W. at 420.
\item \textsuperscript{47} Caldwell v. Dodge, 179 Ark. 235, 15 S.W.2d 318 (1929); Jones v. Coffin, 96
Ark. 332, 131 S.W. 873 (1910).
\end{itemize}
 tion. Similarly, because the Arkansas constitution states that the removal of a county seat is a matter of local concern over which the county court has exclusive original jurisdiction, the writ will prevent a circuit court from exercising jurisdiction. When a statute required a state commissioner to file annual financial statements in the county clerk’s office, though, the Arkansas Supreme Court held that the procedure was administrative rather than judicial. As a result, the county court did not have exclusive jurisdiction for all purposes, and a taxpayer could properly sue in equity to restrain the misuse of county funds. The writ also has been granted when a grand jury was selected without compliance with the Arkansas jury wheel statutes, to prevent a court from convening on an unauthorized date, and when an ordinance deprived a justice of the peace of jurisdiction over certain misdemeanors.

Perhaps because the statutory language sometimes is unclear about when exclusive jurisdiction attaches, courts have had difficulty in applying the writ of prohibition to venue cases. For example, a suit for damages for personal injury from an automobile collision could properly be brought in the county where the accident occurred or where the injured party resided at the time of injury. Jurisdictional conflict occurs, then, when several injured parties file suits in separate counties which involve the same subject matter. Further complications exist when one party files first but is second in time in serving process. After untangling the various parties, flings, and services of process, the court

48. Campbell v. Waggoner, 235 Ark. 374, 360 S.W.2d 124 (1962). Cf Co-Ark Constr. Co. v. Amsler, 234 Ark. 200, 352 S.W.2d 74 (1961) (widow’s negligence action against the deceased husband’s employer). The defendant company argued that the worker’s compensation laws provided exclusive relief. The court held that the inferior circuit court had jurisdiction to determine whether the deceased husband was an employee or an independent contractor. Id. at 203, 352 S.W.2d at 76.


51. Id. at 558, 283 S.W.2d at 690.

52. Streett v. Roberts, 258 Ark. 839, 529 S.W.2d 343 (1975).


54. Logan v. Harris, 213 Ark. 37, 210 S.W.2d 301 (1948).

in the first county to acquire jurisdiction is given exclusive
power to hear the action.\textsuperscript{56} The writ of prohibition may be
used to bar all other proceedings.\textsuperscript{57} An easier situation to
apply the writ would be to prevent an action for damage to
real property which lies outside the court's jurisdiction.\textsuperscript{58}
Note, however, that a factual dispute concerning where a
party resides may properly be determined by the trial
court.\textsuperscript{59} The court's ruling on residency may be remedied by
appeal but not by writ of prohibition.\textsuperscript{60}

Recently in \textit{Taylor v. Partain},\textsuperscript{61} the court used the writ
to resolve a venue dispute where the statute was silent.\textsuperscript{62}
The case involved a prosecution for failure to file an Arkansas
state income tax return. The court adopted a common
law venue rule that a failure to act (i.e. file a document) is an
offense committed in the county where the act should have
been performed.\textsuperscript{63} The court, in issuing the writ, reasoned
that the prosecution could not be brought in Sebastian
County where the return must be filed.\textsuperscript{64} This expanded use
of the writ as a substitute for interlocutory review seems ab-
errational, especially since no unusual hardship to petitioner
was demonstrated which could not be remedied by appeal.

Jurisdictional authority may lapse if the statute of limita-
tions has run.\textsuperscript{65} For example, failure to make timely de-
mand for a new trial in accordance with statutory directive
was ground for a writ of prohibition barring further proceed-
ings.\textsuperscript{66} Similarly, when an appeal was not perfected from a

\textsuperscript{56} Sim s v. Toler, 214 Ark. 732, 217 S.W.2d 928 (1949).
\textsuperscript{57} \textit{Id.} See also \textit{Carnes v. Strait}, 223 Ark. 962, 270 S.W.2d 920 (1954).
\textsuperscript{58} \textit{Western Union Tel. Co. v. Bush}, 191 Ark. 1085, 89 S.W.2d 723 (1935). The
destruction of growing crops by flooding was held a trespass to realty. The court book
judicial notice that corn and cotton crops unmatured in June are not severable and
therefore not chattels. Accordingly, the action would be local rather than transitory
and must be brought in the county where the land was situated. \textit{Id.} at 1093, 89
S.W.2d at 727.
\textsuperscript{60} \textit{Capital Transp. Co. v. Strait}, 213 Ark. 571, 211 S.W.2d 889 (1948).
\textsuperscript{61} 267 Ark. 476, 591 S.W.2d 653 (1980).
\textsuperscript{62} \textit{Id.} at 477, 591 S.W.2d at 654.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{66} \textit{Reasor-Hill Corp. v. Golden}, 220 Ark. 100, 247 S.W.2d 9 (1952).
county court within the time allotted by statute the circuit court was without jurisdiction to hear the appeal. While extraordinary circumstances could extend a statutory time period for certain civil motions, an unreasonable delay would cause a forfeiture of jurisdiction. The writ also issued to bar criminal proceedings when prosecution was initiated after the limitations period elapsed. Because criminal statutes are typically strictly construed in favor of the accused, the writ should prevent prosecution after the limitation period.

IN PERSONAM JURISDICTION

A court must have jurisdiction over the parties to the suit, or the writ of prohibition will be issued to restrain proceedings. The sufficiency of service of process typically amounts to a factual issue for the trial court's determination, correctable upon appeal. Thus, a non-resident corporation's claim that it did not have sufficient contacts with Arkansas to support personal jurisdiction under the state's long arm statute was a factual dispute, and not reviewable by writ of prohibition. Similarly, an allegation that personal jurisdiction was obtained by fraud and deceit was a factual issue for the trial court's resolution.

70. Id. at 660, 391 S.W.2d at 20.
73. Hawes Firearm Co. v. Roberts, 263 Ark. 510, 565 S.W.2d 620 (1978); William Penn Fraternal Ass'n v. Hickman, 256 Ark. 308, 506 S.W.2d 823 (1974). The court denied the writ of prohibition despite allegations that the petitioner lacked sufficient contacts with the state to be subject to personal jurisdiction under the Arkansas long-arm statute. Ark. Stat. Ann. § 27-2502(C)(1) (Repl. 1979). The court stated that petitioner's proper alternate remedies were (1) to file a motion to dismiss and offer proof to sustain the motion, (2) to let the suit take its course and leave the burden of proving minimum contacts with the plaintiff, or (3) to ignore the suit and defend in its resident state in the event of an adverse judgment. 263 Ark. at 512-13, 566 S.W.2d at 622-23.
The writ of prohibition may issue, though, when only a legal question exists concerning the validity of service of process. For example, no legal service of process could obtain against an unincorporated, voluntary association of persons which had no legal status. The court also invalidated personal jurisdiction when the petitioner, an Arkansas resident, was incorrectly served in accordance with the statutory procedure reserved for non-residents. The writ of prohibition was granted to prevent a chancery court from acquiring personal jurisdiction over a non-resident for alimony proceedings when the petitioner appeared in the jurisdiction solely to defend criminal charges. The right to exemption from service of civil process was viewed as a protection afforded by the public policy of encouraging attendance at trial.

SUPERVISORY CONTROL

The Arkansas Supreme Court may issue a writ of prohibition in the exercise of its general supervisory control over inferior courts of law and equity, even though personal and subject matter jurisdiction are satisfactory. The basic rationale for issuance of the writ in such situations is that the appeals process does not afford the petitioner adequate protection. The cases in which the supervisory power has been used do not fall into ready categories, so artificial classifications will be used to provide a framework for analysis. The

75. Gainsburg v. Dodge, 193 Ark. 473, 101 S.W.2d 178 (1937). Constructive service by publication was held insufficient to obtain personal jurisdiction over a non-resident who did not voluntarily submit to the court's jurisdiction. Id. at 477, 101 S.W.2d at 179.

76. Order of Ry. Conductors v. Bandy, 177 Ark. 694, 8 S.W.2d 448 (1928); District No. 21 United Mine Workers of Am. v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925).

77. Wilhelm v. Taylor, 236 Ark. 85, 364 S.W.2d 674 (1963). Petitioner, being a resident at the time the cause of action accrued, was not amenable to service under Ark. Stat. Ann. § 27-340 (Repl. 1979) which provides for service upon the secretary of state in suits against non-residents. 236 Ark. 85, 88, 364 S.W.2d 674, 676.

78. Caldwell v. Dodge, 179 Ark. 235, 15 S.W.2d 318 (1929).

79. Id. at 242, 15 S.W.2d 320.


81. Murphy v. Trimble, 200 Ark. 1173, 143 S.W.2d 534 (1940).
categories include: extraordinary burden on petitioner, the criminal law appellate process, and constitutional review.

The courts have applied the writ of prohibition to avoid the burden on the petitioner of the expenses and time demands of contesting an appeal when the facts are undisputed.\(^8^2\) Such cases are extremely rare, however. Thus, an entire retrial of the issues did not constitute an onerous burden,\(^8^3\) nor did a lengthy delay qualify for the protection of the writ.\(^8^4\) On the other hand, the writ may be granted when the petitioner needs a speedy remedy for adequate protection.\(^8^5\) For example, in one case the petitioner attempted to dismiss a suit in Arkansas instituted by her and where no cross complaint was filed.\(^8^6\) Subsequently, the petitioner filed suit in Texas to collect an indebtedness on a property settlement from a separation agreement. The Arkansas Supreme Court granted the writ of prohibition to restrain the Arkansas chancery court from enjoining the Texas proceeding. The rationale behind issuance of the writ was that if the petitioner waited to appeal the ruling, the property sought in Texas for satisfying the indebtedness might have been moved or dissipated.\(^8^7\)

Constitutional questions also may be reviewed under the court’s supervisory power and remedied by the writ of prohibition.\(^8^8\) The court has granted the writ to bar an action which sought to apply statutory rights and duties retroactively.\(^8^9\) Also, under the doctrine of the separation powers, the writ was issued to prevent a circuit court from de

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82. Faver v. Golden, Jundge, 216 Ark. 792, 227 S.W.2d 453 (1950); Murphy v. Trimble, 200 Ark. 1173, 143 S.W.2d 534 (1940).
83. Midwest Lime Co. v. Independence County Chancery Court, 261 Ark. 695, 551 S.W.2d 537 (1977). The court held that the chancery court had not abused its discretion in directing that the entire issue of liability for damages be retried and each case be tried separately even though petitioner had to defend against seventy-nine plaintiffs in suits involving thirty-nine damaged structures. Id. at 700, 551 S.W.2d at 539.
84. Weaver v. Leatherman, 66 Ark. 211, 49 S.W. 977 (1899).
86. Id. at 861, 120 S.W.2d at 361.
87. Id.
89. Id. at 1018, 214 S.W.2d at 216.
novo review of a state administrative board. The writ also issued where no adequate remedy by appeal existed to grant relief to a person deprived of first amendment rights of free speech and press by prior restraint. In contrast, a petitioner's contention that an Arkansas statute denied due process was viewed as irrelevant to the court's jurisdiction. Although the writ is not typically used as a substitute for appeal in such situations, in the recent case of *Beaumont v. Adkisson* the court determined that an act of the General Assembly violated an amendment to the Arkansas Constitution. The court held that because the lower court's order was based on an invalid act it should be voided and jurisdiction forfeited. Apart from the question of constitutional validity of the Act, the case goes against the mainstream of precedent concerning grounds for issuance of the writ of prohibition. The record failed to indicate why the appellate process could not have provided adequate protection for the petitioner's claim.

The third area in which the court has used the writ of prohibition in the supervisory authority over lower courts is protection of rights under the criminal statutes. The writ only applies to the jurisdiction of the lower court, though, and is not a substitute for a review on the merits. Thus, allegations that a warrant and affidavit were deficient were

91. Brown v. Kimbrough, 263 Ark. 913, 568 S.W.2d 226 (1978). The court granted the writ of prohibition to restrain the lower court from issuing a blanket injunction against the future sale of allegedly obscene material where no statutory provision authorized such a prospective injunction.
93. 267 Ark. 511, 593 S.W.2d 11 (1980). The court held that Act 629 which authorized a particular division of a judicial circuit to set salaries of two employees violated Arkansas Constitutional Amendment 14 which prohibits passage of local or special acts. Therefore, the Arkansas Supreme Court awarded the writ of prohibition to petitioner county judge of Pulaski County preventing the Pulaski County Circuit Court from ordering an appearance to show cause why petitioner should not be held in contempt. The circuit court order was based on an invalid act and thus was voided. The court did not explain why the remedy of appeal was not adequate to review the constitutionality of the Act.
94. 267 Ark. 511, 513, 593 S.W.2d 11, 13.
95. *Id.* at 514. 593 S.W.2d at 13.
96. Duncan v. Kirby, 228 Ark. 917, 311 S.W.2d 157 (1958).
viewed as non-jurisdictional issues potentially correctable on appeal.\textsuperscript{98} Also, an inquiry into the scope of prosecutorial discretion fell outside the coverage of the writ.\textsuperscript{99} The writ did properly issue to bar criminal prosecution where no statutory offense was charged.\textsuperscript{100} Also, grand jury proceedings were halted by the writ where selection was accomplished without compliance with the Arkansas jury wheel statutes.\textsuperscript{101} In contrast, although a county court had jurisdiction over bastardy cases, the writ would not bar criminal proceedings against a defendant in circuit court for failure to support his illegitimate child.\textsuperscript{102} Because criminal statutes are strictly construed in favor of the accused, a failure to comply with the Arkansas speedy trial rule causes a lapse of jurisdiction.\textsuperscript{103}

**EQUITABLE JURISDICTION**

A comprehensive analysis of equitable jurisdiction is beyond the scope of this comment. Brief treatment is appropriate, though, because the writ of prohibition may provide relief when a jurisdictional conflict occurs in the dividend court system in Arkansas.\textsuperscript{104}

The two court systems may have concurrent jurisdiction over some matters, but a party cannot pursue remedies concurrently.\textsuperscript{105} Thus, when a suit for partition of land was filed in circuit court and a motion to transfer to equity was denied, the party could not file a second suit for an accounting

\begin{itemize}
\item \textsuperscript{98} Id. at 415, 479 S.W.2d at 568.
\item \textsuperscript{99} Sargent v. Cole, 269 Ark. 121, 598 S.W.2d 749 (1980).
\item \textsuperscript{100} Duncan v. Kirby, 228 Ark. 917, 311 S.W.2d 157 (1958).
\item \textsuperscript{101} Streett v. Roberts, 258 Ark. 839, 529 S.W.2d 687 (1975).
\item \textsuperscript{102} Platt v. Ponder, 233 Ark. 682, 346 S.W.2d 687 (1961).
\item \textsuperscript{103} Callender v. State, 263 Ark. 217, 563 S.W.2d 467 (1978). Cf. Burns v. Bradley County Circuit Court, 254 Ark. 469, 494 S.W.2d 120 (1973) (the writ of prohibition was denied because a question of fact existed over whether petitioner caused "delay" within the meaning of the speedy trial statute. Ark. Stat. Ann. § 43-1708 (Repl. 1964)). See also Wade v. State, 264 Ark. 320, 571 S.W.2d 231 (1978) where the court again denied the writ because a dispute existed concerning the computation of time under the statute.
\item \textsuperscript{104} Note that an equity court lacks the power to issue a writ of prohibition. Jeffrey v. Jackson County Court, 251 Ark. 1071, 476 S.W.2d 805 (1972).
\item \textsuperscript{105} Dunbar v. Bourland, 88 Ark. 153, 160, 114 S.W. 467, 470 (1908).
\end{itemize}
and appointment of a receiver in equity. If the court erred in denying the motion to transfer, the party's party remedy was correction on appeal. Once equity properly assumes jurisdiction for one purpose it may be retained to provide additional relief. Thus, when a chancery court rendered the judgment in an original action for divorce and alimony, it had continuing jurisdiction to modify that decree and would not be restrained by the writ of prohibition.

Jurisdiction to issue injunctions rests solely with the chancery courts, but equity has been historically restricted to coverage of civil and property rights. Therefore, a chancery court lacks subject matter jurisdiction to enjoin the enforcement of criminal prosecutions, proceedings or sentencing. Similarly, since the Arkansas Constitution explicitly grants exclusive jurisdiction to the county courts in matters concerning an election contest, equity is divested of jurisdiction. Further, equity traditionally will not hear cases where an adequate remedy at law exists. For example, a suit to recover unliquidated damages for personal and property injuries could be appropriately determined at law. Thus, the writ of prohibition was granted to prevent a chancery court from appointing a receiver and impounding funds in such a damages action, as pendency of the suit was a prerequisite to equitable relief.

106. Id.
107. Richards v. Maner, 219 Ark. 112, 240 S.W.2d 6 (1951). See Burton v. Ward, 218 Ark. 253, 236 S.W.2d 65 (1951), in which a circuit court transferred a suit and the chancery court subsequently transferred it back but the circuit court refused to proceed. To break the impasse the Arkansas Supreme Court used the writ of mandamus to order the chancellor to assume jurisdiction.
115. Id. at 804, 277 S. W. at 549.
116. Id. at 802, 807, 277 S.W. at 549, 550-51.
CONCLUSION

The writ of prohibition has a strong common law heritage. Although originally developed to circumscribe the power of ecclesiastical courts, it now serves as a vehicle of judicial excesses of the lower courts. The province of the writ is jurisdiction. It should not serve as a substitute for appeal nor to resolve disputed facts. Recent decisions in Arkansas have broadened the use of the writ to serve as a type of interlocutory device.

As a practical matter, the writ offers a means of swiftly resolving venue conflicts andremediying statutory violations without the burdens and delays of the appellate process. Further, the writ provides some outer limits on the jurisdictional power of the equity courts.

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