In summary, the suggested improvements would protect criminal defendants against the imposition of multiple consequences for the same conduct—even though the rules of former jeopardy continue unchanged. While a defendant would still be subject to multiple convictions for the same acts under the narrow Indiana former jeopardy doctrine, successive prosecutions of the same defendant for the same acts would be prohibited by the procedural device of the required joinder. Double punishment for the same criminal conduct would be precluded by the requirement that sentences imposed for multiple convictions run concurrently. Further relief from the substantive operation of the former jeopardy tests would be afforded by the addition of the defense of res judicata. These reforms, if perfected, would seem to bring the administration of criminal justice into conformity with the stated objectives of the doctrine of former jeopardy.

APPELLATE REVIEW BY EXTRAORDINARY WRIT IN INDIANA

The courts of Indiana have developed a complex body of case law governing the use of extraordinary writs to review the acts, orders, and judgments of inferior courts.[1] The Indiana cases state general require-

1. Mandamus originated in England for the King's use under guise of a court order. HIGH, EXTRAORDINARY LEGAL REMEDIES, § 2 (2d ed. 1884) (hereinafter cited as HIGH); FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES, § 187 (1926) (hereinafter cited as FERRIS). The purpose of the writ was to prevent the miscarriage of justice by the courts or other public officials; it was granted where there was no other remedy available and "in justice there should be one." HIGH, p. 4. The nature of the writ of mandamus at this time was therefore highly prerogative in that it issued at the will of the sovereign. Indeed, the King often sat in his court and issued the writ in person, and after this practice was abandoned, the court continued the fiction that the King was still present in his courts and the writ was issued in his name, and by his authority. HIGH, § 3; FERRIS § 189.

The writ of prohibition developed as a device by which the King's Bench controlled the authority and jurisdiction of the ecclesiastical courts, and it is generally considered as pertaining primarily to questions of jurisdiction. HIGH §§ 764, 767; FERRIS §§ 304-05.

The history and nature of the writs in America is not the same as their English predecessors'. In crossing the Atlantic, the writs lost their prerogative nature to a great extent. Since the sovereignty rests with the people in the United States, the courts were not able to create for the purpose of giving the writs their prerogative nature the fiction that it was an uncontrolled sovereign issuing the writs. HIGH § 4; FERRIS §§ 189, 304. Therefore, the writs were considered subject to the requirement that court orders be based on authority of the law. The idea that the writs might not be subject to the ordinary rules and limitations of law did not fit in with the political attitude of America at that time. This is not to say that the writs lost their extraordinary nature, but merely that the remedies afforded by the writs became a matter of right under certain circumstances.

Even though these writs are no longer considered prerogative, they are both still

ments which must be met before a writ will be issued.[2] For prohibition, there are generally two requirements: the relator must show that the inferior court had no jurisdiction to act;[3] and also that he has no other

considered extraordinary, and will issue only where an extraordinary remedy is necessary; therefore, the presence of a normal alternative remedy will preclude the issuance of the writs. HIGH §§ 15, 770; FERRIS §§ 19, 307. An examination of the INDIANA REPORTS will reveal that in the past two decades, there has been a marked increase in the use of the writs against inferior tribunals.

2. It must be remembered that constitutional and statute law will greatly affect the case law. The Indiana Constitution contains express provisions concerning the highest court's authority to entertain original actions. IND. CONST., Art. 7, § 4. Interpreting these provisions, the Indiana Supreme Court has taken the position that the Constitution confers only such original jurisdicion on the Supreme and Appellate Courts as the legislature may choose, State *ex rel.* Sims v. Hendricks Circuit Court, 235 Ind. 444, 134 N.E.2d 211 (1956); State *ex rel.* Collins v. Lake Superior Court, Room No. 4, 233 Ind. 536, 121 N.E.2d 731 (1954); State v. Roberts, 226 Ind. 106, 76 N.E.2d 832 (1947), but that other state courts which have general common law jurisdiction have inherent power to issue the writs. State *ex rel.* Standard Oil Co. v. Review Board, 230 Ind. 1, 101 N.E.2d 60 (1951); *cf.* State *ex rel.* Harkness v. Gleason, 187 Ind. 297, 119 N.E. 9 (1918). More specifically, the Supreme and Appellate Courts of Indiana have only narrow, statutory authority to issue the writs, and the Circuit Courts have inherent power. This is a severe limitation on the use of the writs as a means of appellate review.

The Indiana statute confers upon the courts of Indiana the power to issue the writ of mandamus for the purposes of aiding that court in its appellate jurisdiction, compelling a lower court to assume jurisdiction where it has a lawful duty to do so, and compelling a trial court to grant a change of venue when it has been unlawfully refused. The statute conferring the power on the courts to grant writs of prohibition mentions only the purpose of restraining inferior courts to their lawful jurisdiction as grounds for issuing the writ. IND. ANN. STAT. § 3-2201 (1946), and see State *ex rel.* Williams v. Goshern, Judge, 220 Ind. 369, 43 N.E.2d 870 (1942). Compare the federal "all writs" statute which is very broad. 62 STAT. 869 (1948), 28 U.S.C. § 1651 (1950). It provides for the issuance of both writs in aid of the court's jurisdiction, either appellate or original, or whenever the issuance of the writ would be agreeable to usages and principles of law. Thus the writs have been used to review the order of a trial court pertaining to discovery and pre-trial orders, the mode or sequence of the trial or jury, and orders making reference to a master; also where the state's limited right of appeal is involved, where practical considerations require review, and where novel questions are involved which don't lend themselves to adequate review by appeal at a later time. 6 MOORE'S FEDERAL PRACTICE § 54.10 (2) (2d ed. 1957). This statute provides a high degree of flexibility and discretion.

3. State *ex rel.* Sims v. Hendricks Circuit Court, 235 Ind. 444, 134 N.E.2d 211 (1956); Lintzenich v. Vanderburg Probate Court, 233 Ind. 488, 121 N.E.2d 723 (1954); State *ex rel.* Public Service Commission v. Marion Circuit Court, 230 Ind. 277, 103 N.E.2d 214 (1952); State *ex rel.* Feiger v. Circuit Court of Marion County, 227 Ind. 212, 84 N.E.2d 585 (1949); State *ex rel.* Ernest v. Hamilton Circuit Court, 223 Ind. 418, 61 N.E.2d 182 (1945).

Jurisdiction is generally said to consist of two elements: personal service, and power to hear and determine the type of case or controversy. This latter element is jurisdiction over the subject matter and is usually the material element involved in collateral attack proceedings. If a criminal action is brought in a probate court, this court is said to lack power or jurisdiction to hear and determine the case. The confusion surrounding the term jurisdiction is exemplified in the case of State *ex rel.* Public Service Commission v. Johnson Circuit Court, 232 Ind. 501, 112 N.E.2d 429 (1953), where the court issued the writ on the avowed grounds that the court below had no jurisdiction to determine the issue, citing *Freeman on Judgments* to the effect that there were three elements to jurisdiction. These elements were personal service, jurisdiction of the subject matter, and propriety of granting the injunction in that particular case. However,

adequate legal remedy.[4] For mandamus, the requirements depend on the purpose for which the writ is sought. If to compel an inferior court to assume jurisdiction, the inferior court must have had this legal duty;[5] if to aid the higher court's appellate jurisdiction, the relator must have a clear legal right, and the inferior court the ministerial, non-discretionary duty to confer that right upon the relator;[6] and if to compel a change of venue, the relator must show a proper ground for the change of venue.[7] Regardless of the purpose, there is the requirement, as for prohibition, that the relator have no other adequate legal remedy.[8]

I. Exceptions to the General Requirements: Review by Extraordinary Writ v. Appeal

Cases involving the use of mandamus and prohibition to control the activities of inferior courts indicate that for this purpose the usual requirements for issuing the writs frequently are disregarded. For example, it is often said that the inferior court "lost jurisdiction" because of some particular order or judgment made by that court, when actually this is at best an unorthodox use of the term jurisdiction to justify the use of an extraordinary writ in obtaining appellate review. In other cases it may be said that the inferior court has a "ministerial duty" to change an order when in fact the order is clearly discretionary. These cases generally involve an attempt to obtain review of an interlocutory

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the section cited in Freeman dealt with the matter of jurisdiction on direct attack, and elsewhere he defines the term for the purpose of collateral attack as consisting of the usual two elements: personal service and jurisdiction of the subject matter.

4. State *ex rel.* Sims v. Hendricks Circuit Court, 235 Ind. 444, 134 N.E.2d 211 (1956); State *ex rel.* Collins v. Lake Superior Court, Room No. 4, 233 Ind. 536, 121 N.E.2d 731 (1954); State v. Roberts, 226 Ind. 106, 76 N.E.2d 832 (1947).

5. State *ex rel.* Steers v. Hancock Circuit Court, 232 Ind. 384, 112 N.E.2d 384 (1935); State *ex rel.* Benson v. Superior Court of Marion County, 205 Ind. 464, 187 N.E. 203 (1933).

6. This requirement usually concerns writs against public officials and corporations, *i.e.*, parties other than inferior tribunals. However, it is also material if the inferior court refuses to act, or is guilty of an omission, after assuming jurisdiction. A corollary of the higher court's duty to issue the writ in aid of its appellate jurisdiction is its duty to not only force an inferior court to assume jurisdiction, but also to continue the exercise of this jurisdiction once it is assumed. Thus the cases state that the writ will issue to command the inferior court to determine an issue between the parties, but that it will not, in an original action, tell that inferior court how to determine the issue. State *ex rel.* Karres v. Marion Superior Court No. 4, 136 N.E.2d 16 (Ind. 1956); State *ex rel.* Tomlinson v. Jeffrey, 231 Ind. 101, 107 N.E.2d 1 (1952).

7. State *ex rel.* Beckham v. Vanderburg Circuit Court, 233 Ind. 368, 119 N.E.2d 713 (1954); State *ex rel.* Lindsey v. Beavers, 225 Ind. 398, 75 N.E.2d 660 (1947).

8. State *ex rel.* Black v. Busch, 226 Ind. 445, 81 N.E.2d 850 (1948); State *ex rel.* Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947); State *ex rel.* Morgan v. Real Estate Building and Loan Association, 151 Ind. 502, 51 N.E. 1061 (1898). See also State *ex rel.* William H. Block Co. v. Marion Superior Court, 221 Ind. 228, 47 N.E.2d 139 (1943) holding that mandamus and prohibition are related remedies. The tendency is to apply for both writs in the same action.

order before final judgment, to obtain review of a final judgment by extraordinary writ instead of by appeal, to obtain review of the judgment after the time for appeal has expired, or to obtain review of a judgment when there has been no statutory provision for appeal. Although these cases are theoretically inconsistent with the stated rules governing the extraordinary writs and those governing appeals, they involve instances where review by the use of the writs achieves a necessary result which would otherwise be unobtainable.

A. Use of the Writs Where A Remedy of Appeal Exists, But is Not Yet Available: Interlocutory Orders

The rule in Indiana, as in most other jurisdictions, is that appeals will generally be allowed only from final judgments.[9] The rationale of the rule is that it will protect the appellate court from a barrage of piecemeal appeals,[10] prevent the relegation of the trial court to the role of a mere trier of fact,[11] and avoid delays in the trial court.[12] It is also said

9. On the final judgment rule generally, see AM. JUR., *Appeal and Error*, §§ 21-27, 94-97; MOORE, *op. cit. supra* note 2, §§ 54.11-54.12; CRICK, *The Final Judgment Rule as a Basis for Appeal*, 41 YALE L. J. 539 (1932); PORTER, *Appeals from Interlocutory and Final Decrees in the United States Circuit Courts of Appeal*, 19 B.U.L. REV. 377 (1939); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. J. 1102 (1950); Comment, *The Writ of Mandamus—Obtaining Judicial Review of the "Non-Appealable" Interlocutory Order*, 6 KAN. L. REV. 78 (1957); Comment, *Collateral Orders and Extra-ordinary Writs as Exceptions to the Finality Rule*, 51 NW. U. L. REV. 746 (1957).

The rule is statutory in 41 states, and in the federal courts. See CRICK, *op. cit. supra*, p. 552, n. 64.

10. There was good reason for this fear when the courts were overworked because the judges of the appellate courts had the additional burden of riding circuit. An opposing argument, however, is that the restricting of appeals to only those from final judgment may produce more litigation than it prevents, because of the difficulties in defining final judgment. This objection should become of less significance over the years, since court decisions will tend to define the term. Another reason opposing the final judgment rule is that the "overworked appellate courts" argument assumes that there will be an appeal from nearly every erroneous interlocutory order. However, there are reasons why this may not necessarily happen. First, it is unlikely that the adverse party will appeal from every order entered for the reasons that generally there may not be a dispute on the ruling. It would be difficult to estimate the percentage of orders which are of such doubtful nature that their validity would be questioned by an appeal for the purpose of determining that question only. It is probably true that even though an order will be objected to, this is generally a precautionary measure by counsel for which there is no penalty or little inconvenience. Second, it is safe to assume that the adverse party will not appeal from an order unless he thinks the time and expense of review is less than his interest in having the order reviewed before final judgment. Thus it may well be that only a fraction of interlocutory orders will be erroneous, and even if they are, they may never be appealed from individually.

11. At the trial level the aim of the court is to settle the dispute according to the law as it is applied to the facts. This in itself would be sufficient if it were not for the element of error. Admitting that this is a possibility, we have established appellate courts to which the controversy can be transferred if it appears there has been error in the proceedings. Thus the basic premise behind the structure of our court system is that most litigation will be disposed of at the trial level, with recourse to an appellate

that until final judgment has been rendered, the trial court may reverse its decision and correct its error destroying the necessity for an appeal.[13] Although the final judgment rule originated in early English Common Law,[14] the policy reasons supporting the rule have undergone a marked evolutionary change.[15] The American courts adopted the rule primarily as a convenient device to limit the number of appeals.[16] Almost from the inception of the rule in America exceptions began to appear when it became evident that an inflexible application of the rule resulted in individual cases of hardship and injustice.[17] Statutory and court rule exceptions to the final judgment rule may either list specific exceptions, conferring no discretion on the appellate courts, or they may merely list a general policy, conferring wide discretion. The use of rigid statutory exceptions to the final judgment rule removes hardships in certain cases; however, it does not provide needed flexibility. This method is employed in nearly every jurisdiction[18] including Indiana[19] and the Federal

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court only where there is prejudicial error. Were this not true, there would be no point in having trial courts in the first place, for if we are to assume that there is likely to be error every time a trial court makes an order, there is no basis in logic for the existence of the trial court as an efficient means of administering justice, unless it would be to be a mere referee for the purpose of ascertaining the facts of the case.

12. The validity of this argument must depend on the dispatch with which the higher court can and will attend to the matter.

13. With this possibility, there is actually no dispute from which to appeal, until it can be said that the trial judge has settled the matter, and this will not be until after he has made his final judgment without recourse by either party other than appeal. However, reversal may be a remote possibility as a matter of fact, and even if there is a reversal by the trial court, it may be of little value if it is not made until the end of the trial in a motion for a new trial or related motion.

14. The rule was a creation of the law courts—the equity courts having always allowed interlocutory review at the discretion of the Chancellor. CRICK, *op. cit. supra* note 9 at 540-48.

15. The reasoning at that time behind the rule was that before final judgment the court below had exclusive jurisdiction, and if the appellate court were to review any matter concerning the action, it would be the case of two courts having concurrent jurisdiction over a single controversy. Probably the rationale was that what one really desired was a final judgment in his favor, not an interlocutory one, and until a final judgment has been rendered, neither party has really lost anything. The early ostensible reasoning was more conceptualistic—the reasons for the rule now are more practical.

16. CRICK, *op. cit. supra* note 9, at 548-51.

17. CRICK, *op. cit. supra* note 9, at 553, n. 66.

18. Compare the Nebraska statute, NEB. REV. STAT. 25-1920 (1943) (one exception), with the Arizona statute, ARIZ. REV. STAT. ANN. § 12-2101 (1956) (detailed list of exceptions). These statutory exceptions generally include the equitable interlocutory orders pertaining to injunctions, receiverships, accountings, etc., as well as many interlocutory orders in law cases, the most common being the ruling on a motion for a new trial.

19. "An appeal to the Supreme Court may be taken from an interlocutory order of any circuit, superior, or probate court, or judge thereof, in the following cases:

First. For the payment of money or to compel the execution of any instrument in writing, or the delivery or assignment of any securities, evidences of debt, documents or things in action.

Second. For the delivery of the possession of real property or the sale thereof.

courts; [20] however, a few jurisdictions have vested broad discretion in the appellate courts to review interlocutory decisions when they see fit.[21] Although such flexibility is desirable, the price is uncertainty unless a well-defined test is devised to guide the courts in the exercise of their discretion.

Third. Granting, or refusing to grant, or dissolving, or overruling motions to dissolve, temporary injunctions, either in term or in vaction.

Fourth. Orders and judgments upon writs of habeas corpus made in term or in vacation." IND. ANN. STAT. § 2-3218 (1946).

". . . Eleventh. Appeals may be taken to the Supreme Court from the following orders: Interlocutory orders for the payment of money or to compel the execution of any instrument in writing or the delivery or assignment of any securities, evidences of debt, documents or things in action.

Twelfth. Interlocutory orders for the delivery of the possession of real property or the sale thereof.

Thirteenth. Interlocutory orders appointing or refusing to appoint receivers, and interlocutory orders granting or refusing to grant, or dissolving or overruling motions to dissolve, temporary injunctions.

Fourteenth. Interlocutory orders upon writs of habeas corpus. . . ." IND. ANN. STAT. § 4-214 (1946).

". . . No appeal will be dismissed as of right because the case was not finally disposed of in the court below as to all issues and parties, but upon suggestion or discovery of such a situation the appellate tribunal may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable, without prejudice to parties who may be aggrieved by subsequent proceedings in the court below. . . ." IND. SUP. CT. RULE 2-3.

20. "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . [and others], or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property; (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; (4) Judgments in civil actions for patent infringement which are final except for accounting." 62 STAT. 929 (1948), 28 U.S.C. § 1292 (1949).

"When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." FED. R. CIV. P. 54(b).

21. Eight jurisdictions give the courts some degree of discretion to review interlocutory decisions. For statutes conferring the most discretion see RULE OF CIVIL PROCEDURE No. 332, IOWA CODE §§ 684.18, 684.19 (1954) and S.D. CODE § 33.0701 (1939).

IOWA RULE OF CIVIL PROCEDURE No. 332 provides:

> "(a) Any party aggrieved by an interlocutory order or decision, including one appearing specially whose objections to jurisdiction have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted, after notice, and hearing . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a

In addition to the legislative exceptions, the courts themselves have created case law exceptions to the final judgment rule.[22] Among those recognized in the federal courts are the collateral order exception, as exemplified by *Cohen v. Beneficial Industrial Loan Corp.*,[23] which involved a ruling on a motion that plaintiff post security for costs before trial. Similar cases are those involving attachment proceedings[24] and rulings on bail.[25] The theory stated is that since such a ruling is not related to the merits of the principal controversy, it is deemed final for purposes of appeal.[26] The rationale is that unless the order is immediately reviewed, a subsequent reversal is valueless. The unsecured costs will already have been incurred,[27] the property dissipated,[28] or the party incarcerated without benefit of bail.[29] This is merely to say that the harm becomes irreparable.[30] A second exception, recognized in *Forgay v. Conrad*,[31] in-

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determination of its correctness before trial on the merits will better serve the interests of justice. . . ."

"(b) The order granting such appeal may be on terms of advancing it for prompt submission. It shall stay further proceedings below, and may require bond."

The portion of the South Dakota statute conferring discretion to hear interlocutory appeals provides:

"(6) [Appeals may be taken from] . . . any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court . . . only when the Court considers that the ends of justice will be served by termination of the questions involved without awaiting the final determination of the action or proceeding."

It would seem that since the final judgment rule is for the protection of the courts, to confer discretion on the courts to hear interlocutory appeals a fortiori does not remove this protection. It is only when the appellate courts have to hear every appeal that there is the danger of overwork. Also, the courts are in a much better position to determine how much protection they need than is the legislature.

22. It is much easier to do this where the rule is of common law origin for the reason that where the rule is statutory, judicial exception would amount to usurpation of the function of the legislature to the extent that the legislature has made a general rule and has not made exception to it. Therefore, where the final judgment rule is statutory, the judicial exception will more generally be accomplished by other than express means.

23. 337 U.S. 51 (1949); MOORE, *op. cit. supra* note 2 at § 54.14.

24. Swift & Co. Packers v. Compania Colombiania Del Caribe, 339 U.S. 684 (1950).

25. Stack v. Bayle, 342 U.S. 1 (1951).

26. It would appear that the court is defining the term final judgment in a manner other than the normal meaning of the term, since the case is certainly not finally disposed of when the collateral order is entered.

27. See note 23 *supra*.

28. See note 24 *supra*.

29. See note 25 *supra*.

30. Two recent Indiana cases, one involving an order to sell real estate in a decedent's estate, In re Retseck's Estate, 231 Ind. 695, 110 N.E.2d 749 (1953) and another involving an order to file an amended executory's report, In re Heineman's Estate, 122 Ind. App. 343, 101 N.E. 194 (1951), seem to recognize the collateral order, or as the court terms it, the "severability" exception.

These cases are not square holdings because the order to sell real estate in the *Retseck* case was immediately reviewable by appeal, and in the *Heineman* case, appeal

volved the granting of an accounting. Here the court indicated that where such a highly complex, equitable remedy is involved, it will be unnecessary to wait until final judgment to determine the validity of the order. For all practical purposes the decision on the merits is final, although not technically so until both the fact of liability is established and either the extent of the remedy is determined or the administration of the remedy is completed.[32] Extraordinary inconvenience or expense are therefore also grounds for immediate review of an interlocutory order. The administration of receivership proceedings may continue for years before final judgment, and accounting proceedings require unusual time and expense to determine the extent of the remedy.

Where the force of precedent or tenets of statutory construction will not allow express judicial exception, the courts may still covertly circumvent the final judgment rule by sanctioning the use of the extraordinary writs to obtain immediate review of interlocutory orders.[33] These hard cases are characterized by confusing opinions and result in a general disruption of the law.

The final judgment rule is often implicitly circumvented through the use of the writs where a court of general, original jurisdiction improperly issues a temporary restraining order. It is significant that Indiana law allows no immediate appeal from a temporary restraining order;[34] since, as noted previously, a ruling on a temporary injunction is statutorily reviewable by immediate appeal.[35] The theory behind this statutory exception is that the granting of an injunction generally involves unusual circumstances and high risk of irreparable injury to the person enjoined. The improper granting or denial of such a drastic remedy for any length of time may create an injustice much greater than would more ordinary interlocutory orders. The temporary restraining order is similar in nature to the temporary injunction in that the purpose of both is to maintain the status quo until a subsequent determination can be obtained. The only significant difference for present purposes between the remedies is their duration, that of the temporary restraining order being much

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was denied. See also State *ex rel.* Cook v. Howard, 223 Ind. 694, 64 N.E.2d 25 (1945); and State *ex rel.* Emmert v. Hamilton Circuit Court, 223 Ind. 418, 61 N.E.2d 182 (1945).

31. 6 How. 201 (1848).

32. The court faces the issue squarely and admits that where the need exists, it will be unnecessary to wait until after final judgment to determine the validity of the order.

33. The means employed is to manipulate the meaning of terms in the statutes and prior cases. Final judgment itself may be given many meanings.

34. State *ex rel.* Board of Medical Examination and Registration v. Hays, 228 Ind. 286, 91 N.E.2d 913 (1950); Swaim v. City of Indianapolis, 202 Ind. 233, 141 N.E. 871 (1930), rehearing denied 202 Ind. 233, 174 N.E. 290 (1930).

35. See note 19 *supra.*

shorter.[36] In some cases, however, the similarities may be so great that immediate review is warranted, and the policy behind the statutory exception for injunctions is applicable to the temporary restraining order.[37]

Frequently, the trial court has restrained an administrative agency from carrying out its decision, or police officials from enforcing a criminal statute. In every case the express grounds for granting the writ is that the inferior court had no "jurisdiction" to grant the restraining order. In *State ex rel. Fry v. Lake Superior Court*,[38] the trial court had erroneously granted an order against city and county police officials temporarily restraining them from prosecuting the relator for alleged violations of the Alcoholic Beverage Act. The Supreme Court granted a writ of prohibition holding that the trial court was without jurisdiction to issue the restraining order because there was no property right in volved, *i.e.*, it disposed of the case on the merits.[39]

Other cases have arisen where an inferior court has temporarily restrained police officials or prosecutors. Reversals by means of the extraordinary writs because of lack of "jurisdiction" include those involving illegal operation of a greyhound race track (prohibition),[40] and operation of a liquor establishment without a license (prohibition).[41] An inferior court's temporary restraint of an administrative agency has been immediately reviewed and reversed on the same ground in cases involving

36. The fact that the temporary restraining order is granted in *ex parte* proceedings whereas the temporary injunction is not would not seem to be a significant difference. Temporary restraining orders are issued upon showing that an emergency exists and run until proper notice can be given and a hearing held. This involves no fixed period of time. IND. ANN. STAT. § 3-2104 (1946).

37. Interlocutory review should probably depend on the facts of the case, since it is conceivable that the shorter duration will result in as great a harm as if the longer duration were involved. On the other hand, it is conceivable that the shorter duration will result in no injustice. The area in between these extremes generally will be a matter of degree in that the harm or injustice will not be as great as where the longer duration is involved, but is nevertheless greater than in cases not involving injunctions. Generally then, in most cases, there will be the same grounds for immediate review as in the case of the temporary injunction; however, the extent of the harm which calls for immediate review will generally be less than in the case of the temporary injunction.

38. 205 Ind. 355, 186 N.E. 310 (1933). IND. ANN. STAT. § 4-1112-4-1114 (1946) gives this court general original jurisdiction, coextensive with the Lake Circuit Court.

39. There was the added factor that the trial court was interfering with the functions of another branch of government, a fundamental separation of powers problem.

40. State *ex rel.* Egan v. Lake Superior Court, 211 Ind. 303, 6 N.E.2d 945 (1937); see also note 38 *supra*. An underlying reason behind the decision may have been that once this sort of activity is allowed, it is increasingly difficult to stamp out. Again the separation of powers problem is present.

41. State *ex rel.* Zeller v. Montgomery Circuit Court, 223 Ind. 476, 62 N.E.2d 149 (1945). In addition to the possible harm to the community in the sale of liquor by one without a license and the control of police officials, there is involved in this case an attempt by a trial court to usurp the discretion of an administrative agency, an organ of the executive branch, which is specialized and peculiarly adapted to handle cases of this sort which so frequently have political undertones.

the revocation of a liquor license by the Alcoholic Beverage Commission (prohibition),[42] a scheduling of rates by the Public Service Commission (prohibition and mandamus),[43] and an order suspending a license by the Commissioner of Motor Vehicles (prohibition).[44]

A temporary restraining order case not involving the separation of powers problem was *State ex rel. Blaize v. Hoover*,[45] where the Knox Circuit Court was held not to have "jurisdiction" to interfere with a dispute over political party leadership. The relator had been erroneously restrained from serving as head of a particular political organization. The Supreme Court granted prohibition, again deciding the case on the merits.[46]

Two recent cases indicate that the court is abandoning this unorthodox use of the term jurisdiction. In the first,[47] the Supreme Court issued a writ of prohibition against the trial court which had ordered the Public Service Commission to grant a certificate of convenience and necessity. Either because the court is intentionally expanding the area of judicial review or because it prefers to return the term jurisdiction to its conventional meaning, the issuing of the writ was placed on the ground that the trial court had no *authority* to issue the order against the Public Service Commission, tacitly admitting that the court below did have *jurisdiction* of the subject matter and parties.[48]

It may be argued that there is not a sufficient difference between "jurisdiction" and "authority" to warrant a distinction, but traditionally the term jurisdiction has been given a rather narrow legal meaning, whereas the term authority has acquired no such connotation.[49] It is possible that the term authority was used in the same sense as power or

42. State *ex rel.* Alcoholic Beverage Commission v. Marion Circuit Court, 221 Ind. 572, 49 N.E.2d 538 (1943); see also note 41 *supra*.

43. State *ex rel.* Public Service Commission v. Evansville City Coach Lines, 229 Ind. 552, 99 N.E.2d 597 (1951). IND. ANN. STAT. § 4-2010 (1946) gives this court general original jurisdiction. Although harm here may be a temporary higher cost to the public of bus transportation, this decision also may better be explained by judicial encroachment on the discretion of an administrative hody.

44. State *ex rel.* Smith v. Delaware Circuit Court, 231 Ind. 173, 108 N.E.2d 58 (1952). Although the separation of powers problem is again involved, another factor is present in that to allow a grossly unqualified driver access to the highway exposes the public to a very real, imminent danger from which irreparable injury may flow.

45. 210 Ind. 215, 2 N.E.2d 391 (1936).

46. Even temporarily restraining political activities may result in irreparable injury to the relator, to his party, and also to the community as a whole.

47. State *ex rel.* Public Service Commission v. Johnson Circuit Court, 232 Ind. 501, 112 N.E.2d 429 (1953).

48. Although this case does not involve a temporary restraining order or other interlocutory order, the language concerning the jurisdiction of the trial court is significant. This case is discussed further in Part I, Section C. See note 68 and surrounding text, *infra*.

49. See note 3 *supra*, and dissenting opinions in the *Zeller* case, note 41 *supra*.

jurisdiction, but it is more probable that it was used in the sense of propriety or suitability. The fact that these cases involve questions of judicial review of administrative agencies, scarcely matters of jurisdiction, supports the latter view.[50]

The second case, *State ex rel. Alcoholic Beverage Commission v. Superior Court of Marion County*,[51] involved a temporary restraining order issued by the trial court preventing the Alcoholic Beverage Commission from revoking a liquor wholesaler's permit. Here again the Supreme Court, in issuing prohibition, held that the trial court lacked authority, rather than jurisdiction, to issue the restraining order. These two cases seem to indicate a trend toward explicit exception to the jurisdictional requirement for issuing the writs rather than circumvention under the guise of faulty jurisdiction.

In the earlier case of *State ex rel. Harkness v. Gleason*[52] it was held on similar facts that the Supreme Court would not review by extraordinary writ the action of a court of general, original jurisdiction in granting or not granting a temporary injunction. The rationale was that the error could be challenged on appeal, and that the Supreme Court was not disposed to examine the trial court's discretion in granting the temporary injunction. Majority opinions in the above temporary restraining order cases generally have not discussed the *Gleason* case, although it has never been expressly overruled. The dissenting opinions in the *Zeller* case,[53] however, in which the entire question of jurisdiction is thoroughly examined, discuss the case at length.

Each of the foregoing cases involved a temporary restraining order which is similar to the temporary injunction for which a statutory exception to the final judgment rule has been created. In the following cases, although this similarity may be lacking, interlocutory review has still been allowed on the express grounds that the trial court had no "jurisdiction" to make the interlocutory order.

State ex rel. Rose v. Hoffman[54] presents another example of the unorthodox use of the term jurisdiction. The trial court had refused to

50. Relevant statutes governing judicial review are IND. ANN. STAT. §§ 63-3001-3030 (1951) (Commissioner of Motor Vehicles); §§ 54-443-453 repealing 54-429 (1951) (Public Service Commission); and § 12-921 (1956) (Alcoholic Beverage Commission).

51. 233 Ind. 563, 122 N.E.2d 9 (1954).

52. 187 Ind. 297, 119 N.E. 9 (1918).

53. See note 41 *supra*. It is possible to distinguish the *Zeller* and other temporary restraining order cases from the *Gleason* case in that the latter involved a temporary injunction from which there was an immediate appeal, whercas the *Zeller* and similar cases involved temporary restraining orders from which there was no appeal. This strengthens the view that the court will seek a means of review in the hard case if one is not readily available. However, the cases are irreconcilable on the question of jurisdiction.

54. 227 Ind. 256, 85 N.E.2d 486 (1949).

grant the relator a jury trial on the ground that he had not requested it five days before the date of the trial, as required by court rule. The Supreme Court, upon granting mandamus, held that the inferior court lost jurisdiction at that time. Since this interlocutory order does not closely resemble any of the statutory exceptions, only the inconvenience of proceeding to final judgment before finding out the order was erroneous appears to have been the ground for granting the writ.

In *State ex rel. Dep't of Conservation v. Pulaski Circuit Court*,[55] a judgment overruling a plea in abatement and an order that the state plead over were reviewed in an original action before final judgment. The plea in abatement was entered on the ground that sovereign immunity had not been waived. The Supreme Court granted prohibition on the ground that the trial court had no jurisdiction. Again, there was no apparent reason, other than the inconvenience of proceeding to final judgment, for not reviewing this ruling by appeal after final judgment.[56]

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55. 231 Ind. 245, 108 N.E.2d 185 (1952).

56. Generally, the courts have denied interlocutory review of orders and rulings of this type, holding that the trial court did not lose jurisdiction. State *ex rel.* Collins v. Lake Superior Court, Room No. 4, 233 Ind. 563, 121 N.E.2d 9 (1954) (plea in abatement); State *ex rel.* Steers v. Hancock Circuit Court, 232 Ind. 384, 112 N.E.2d 855 (1953) (denial of motion for a new trial and motion for judgment notwithstanding the verdict); State *ex rel.* City of Indianapolis v. Brennan, Judge, 231 Ind. 492, 109 N.E.2d 409 (1952) (order refusing to join relator as party to declaratory judgment); State *ex rel.* Singer v. Nixon, 229 Ind. 276, 97 N.E.2d 865 (1951) (order sustaining demurrer); State *ex rel.* Allen v. Fayette Circuit Court, 226 Ind. 432, 81 N.E.2d 683 (1948) (order refusing to grant change of Judge); State *ex rel.* Bown v. Thompson, 226 Ind. 392, 81 N.E.2d 533 (1948) (order appointing a pauper attorney); State *ex rel.* McNabb v. Allen Superior Court, No. 2, 225 Ind. 402, 75 N.E.2d 788 (1947) (orders overruling a demurrer and vacating a final judgment); State *ex rel.* Burton v. Gelb, 225 Ind. 330, 75 N.E.2d 151 (1947) (ruling on petition to intervene); State *ex rel.* Schuble v. Youngblood, 225 Ind. 169, 73 N.E.2d 478 (1947) (ruling on motion to appoint a pauper attorney); State *ex rel.* Reichert v. Youngblood, 225 Ind. 129, 73 N.E.2d 174 (1947) (order refusing to grant a petition to remove a grand juror after indictment returned); State *ex rel.* Vonderschmidt v. Gerdink, 224 Ind. 42, 64 N.E.2d 579 (1946) (order refusing to return to prisoner to appear in trial); State *ex rel.* Ripa v. Lake Superior Court, 220 Ind. 436, 43 N.E.2d 871 (1942) (order appointing an executor); State *ex rel.* American Trust and Savings Bank v. Superior Court, 206 Ind. 1, 188 N.E. 203 (1933) (order refusing motion that relator have an audit of bank's books, and refusal to appoint a receiver); State v. Johnston, 204 Ind. 563, 185 N.E. 278 (1933) (order removing executor without citation).

On first impression it would seem desirable to review erroneous interlocutory orders to prevent proceeding to an erroneous judgment or conducting a useless second trial. However, where a great portion of the proceeding remains at the trial level before appeal can be obtained, there is the danger of further error in that portion, thereby necessitating two or more appeals. At this point interlocutory review is undesirable because the inconvenience of proceeding to an erroneous judgment or of a second trial may be less than, or equal to, the inconvenience from two appeals. This is a type of "bird in the hand is worth two in the bush" argument. However, if the review of the erroneous interlocutory order determines the entire proceeding, intrelocutory review is again desirable because the objection is removed. If the erroneous interlocutory order comes early in the trial, the adverse party should be forced to stipulate that a reversal of the order will determine the case. For example, if the ruling is on a plea in abatement or

The temporary restraining order cases, because of their analogy to a statutory exception, seem to present stronger cases for interlocutory review than the *Hoffman* and *Dep't of Conservation* cases.

The court in two cases has *explicitly* created an exception to the general rule common to both mandamus and to prohibition that a remedy of appeal precludes the issuance of the writs. The temporary restraining order cases discussed previously, although similar in result, differ in that they *implicitly* created the same exception for probably the same reason—that the final judgment rule worked a hardship in the particular case. The value of the explicit exceptions is in showing that the issue of circumvention was clearly thrust upon the court for its conscious determination. The earliest of these cases is *State ex rel. Coffin v. Superior Court of Marion County,*[57] decided in 1925. Here the trial court had issued a temporary restraining order restraining the relator from presiding at a political meeting to be held that same day. The respondent relied heavily on the *Gleason* case, involving similar facts, which held that the court below had jurisdiction and that an adequate remedy of appeal existed. The court distinguished the *Gleason* case on the ground that there was no emergency or possibility of irreparable injury in that case making appeal inadequate, such as there was in the case before it.[58]

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demurrer, the adverse party should be forced to stand or fall on that ruling alone in order to obtain interlocutory review. Otherwise, by amendment of the pleadings or by proceeding on the merits, further error becomes a possibility. Requiring stipulation is not so harsh when one considers that if the adverse party does not stipulate and proceeds on the merits, the decision may yet be for him in spite of the erroneous ruling, in which case there is no more inconvenience than appealing from the interlocutory appeal. Actually, what is involved here is a case where early appeal is desirable rather than interlocutory appeal, because if there is stipulation of finality by the parties, the interlocutory ruling then becomes in effect a final one. As a matter of fact, this provision for interlocutory review would be taken advantage of in very few cases. Only where the losing attorney is absolutely certain that he can obtain a reversal will he risk his chance to win on the remaining trial. But there are conceivably cases of this type where the party should have the opportunity to end the proceedings if he wishes. If the erroneous interlocutory order comes very late in the trial, there is no problem since it is no hardship to proceed to final judgment and then appeal from it. There is one exception, however. This is the erroneous ruling granting a motion for a new trial. Here, interlocutory review determines the proceeding automatically without stipulation by the adverse party, because of its position at the end of the trial. In short, two requirements must be met before interlocutory review is appropriate: first, there must be a great portion of the trial remaining if interlocutory review is not obtained; and second, if there is review, reversal of the erroneous order should end the proceeding. *Cf.* State *ex rel.* Williams v. Goshern, 220 Ind. 369, 43 N.E.2d 870 (1942).

57. 196 Ind. 614, 149 N.E. 174 (1925).

58. It should be noted that the hearing and review in the *Gleason* case were to transpire before the event was to take place; and in the *Coffin* case, the facts were that the meeting was to be held in the afternoon of the same day, wherefore the relator would in no event have the order reviewed until after the meeting was to be held. In the language of the court the difference was this:

> ". . . Such an order, directing what should be done that same afternoon in the matter of holding a meeting of precinct committeemen to take

A second case involving express judicial exception to the rule is *State ex rel. Standard Oil Co. v. Review Board.*[59] Sixteen parties filed claims against the relator under the Indiana Unemployment Security Act. Relator filed for prohibition in the Marion Superior Court alleging that the statute upon which the claims were based was unconstitutional, and that therefore the review board had no jurisdiction to hear the claims. He further alleged that the relator's remedy of appeal, although existing, was not adequate because of the extraordinary time and expense involved in defending and appealing each of the sixteen cases separately. The Supreme Court in reversing held that even though relator had a remedy of "appeal" from a subsequent final judgment, the lower court should have reviewed the proceeding by writ of prohibition.[60]

Both of these cases involved review of interlocutory orders or judg-

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important action of a permanent character, brought relator face to face with an acute situation not even tempered by the hearing which was to be given him a week later, after the meeting was over. . . . a special emergency arose which justified relator in asking for extraordinary relief if the court was without jurisdiction to issue the restraining order, or to confirm it by a temporary injunction." At pp. 627, 628.

However, the *Coffin* case, in holding the trial court did not have jurisdiction to issue the temporary restraining order, overlooked the other equally important holding of the *Gleason* case, which was that the trial court had jurisdiction to issue the temporary injunction. Actually the writ could not have issued in the *Gleason* case because the trial court did have jurisdiction, at least for purposes of collateral attack; whereas the *Coffin* opinion held that the writ could have issued if there was an emergency. On the jurisdictional question then, the two cases are indistinguishable, and it appears the *Coffin* case created a much broader rule in fact than did the express holding of the case. What the court in the *Gleason* case was evidently doing was placing its decision on an alternative ground by posing a hypothetical, or conceding one of the relators contentions and still denying relief. The court held that the trial court did have jurisdiction, therefore the writ would be denied. This was enough, but the court went further and held that even if the court below did not have jurisdiction as contended by the relator, the writ would still be denied because the remedy of appeal was adequate. Therefore, although the court in the *Coffin* case said they were not overruling the *Gleason* case, they were overruling it as a matter of fact on the jurisdictional question.

59. 230 Ind. 1, 101 N.E.2d 60 (1951).

60. The opinion stated:

". . . The appellant is faced with an oppressive multiplicity of suits. It must attend and defend itself at sixteen separate hearings. It will be put to the hazard of determinations by the Board allowing benefits in favor of sixteen claimants, all of which determinations the Board is without jurisdiction, power or authority to make. If unsuccessful in the defense of said claims, the appellant would be required to take and effect a separate appeal or review in each case; to prepare and file a separate transcript with respect to each determination of the Board; and to brief each case and argue each case in the Appellant [*sic*] Court if argument were requested by either party. All of this would involve expense and delay. It would consume many months during which time the relator would be remediless and would be compelled to submit to the exercise of such asserted jurisdiction, power and authority by the Board, and during which time the balance in the appellant's experience account or fund might be reduced and its contribution rate increased. We do not believe the remedy by review is adequate under the circumstances. . . ." pp. 15-16.

ments. The reasons for the exception were not identical, however. In the *Coffin* case the exception was based strictly on the inadequacies of final judgment appeal. In the *Standard Oil* case the exception was based on both the inequity of the final judgment rule and on multiplicity of appeals. Although the policy of the final judgment rule would be relevant in the latter case, since the final judgment might ultimately be in favor of the relator, the inconvenience of possibly proceeding to an erroneous final judgment in sixteen cases outweighed the reason for applying the rule. The fact that the inconvenience was amplified sixteen times distinguishes the *Standard Oil* case from the *Hoffman* case *supra.* However, this must be qualified by the additional fact that these were proceedings before an administrative tribunal which would probably involve less inconvenience than sixteen trial court proceedings. Obviously, the exception based on multiplicity of appeals should not be limited only to cases before final judgment since the same reasoning would apply had there been a final judgment and would presumably support the exception alone.

These two cases have limited, subject to one qualification,[61] the rule that a remedy of appeal precludes issuing the extraordinary writ, by excluding those situations where the remedy of appeal is inadequate.[62] However, the rule requiring lack of jurisdiction in the court below has not been expressly dispensed with by these cases.

B. Use of the Writs Where Appeal Exists and Is Available

Normally, review by immediate appeal is entirely adequate. The statute governing appeals allows immediate review of interlocutory habeas corpus rulings.[63] But in *State ex rel. Dowd, Warden v. LaPorte Superior Court,*[64] the Supreme Court granted prohibition before final judgment on the ground that the Superior Court had no jurisdiction to entertain writs of habeas corpus where the petitioner was in the Indiana State Prison in that county. The statute on habeas corpus grants to courts of general original jurisdiction the power to entertain writs of

61. The *Standard Oil* case implies that only courts having general common law jurisdiction can issue the extraordinary writs for this purpose; therefore, the Supreme Court and Appellate Courts cannot. There would seem to be a firm basis for this qualification considering the existing statutes governing the extraordinary writs. See p. *supra.*

62. Distinctions of this nature are not unknown in the law. The relation of law to equity is analogous. Just as in the case where the remedy at law is inadequate equity will grant an injunction, so where the remedy of appeal from final judgment is not adequate the appellate court has grounds for making exception to the final judgment rule.

63. See note 19 *supra.*

64. 219 Ind. 17, 36 N.E. 765 (1941). IND. ANN. STAT. § 4-1204 (1946) confers jurisdiction concurrent with the LaPorte Circuit Court except in juvenile matters.

habeas corpus;[65] however, this same statute states that habeas corpus shall not be issued when a prisoner is committed to a prison in that court's territorial jurisdiction pursuant to a court commitment valid on its face.[66] This latter provision cannot be said to affect jurisdiction, but merely prescribes a rule of law for the courts to follow in the exercise of jurisdiction. Consequently, a strong underlying reason must have moved the court in this particular case to review by extraordinary writ rather than by immediate appeal.[67] The purpose of the statute was to regulate the Circuit Courts in their granting of habeas corpus. If the LaPorte court should free the prisoner by habeas corpus, an appeal from this order might be of little or no value. In forcing the state to enter a normal appeal, the former prisoner would have the opportunity to abscond, which would constitute irreparable injury to the state. Therefore, a "more immediate" review by extraordinary writ rather than immediate appeal would seem justified. In addition, this practice would subvert the policy behind the general rule that convictions be appealed rather than

65. IND. ANN. STAT. § 3-1905 (1946); Murphy v. Daly, 206 Ind. 179, 188 N.E. 769 (1934)

66. IND. ANN. STAT. § 3-1918 (1946).

67. Some factors which are always present favor review by extraordinary writ which is probably faster and possibly less expensive than review by appeal—faster because the petition for original action is generally considered instanter by the court, or at most one or two days from filing, and less expensive because generally appellate-type briefs on the merits of the case are at least theoretically not filed in original actions, thereby reducing the attorney's fee, printer's fee, and probably court costs. *Cf. Zeller, supra* at note 44, dissenting opinion at p. 985. These docket and cost disadvantages, per se, would not appear to give rise to substantial injustice. These factors are always present; therefore, unless we are willing to completely substitute the extraordinary writs for appeal, the writs should never be granted solely because of these differences. However, in State *ex rel.* Shoemaker v. Fry, 224 Ind. 337, 67 N.E.2d 142 (1946), the Supreme Court issued a writ of mandamus to compel a Justice of the Peace Court to modify a final judgment in replevin, from which no appeal had been taken. Both the alternative writ and permanent writ were issued within the 180 day appeal period. In the words of the opinion: "it was not necessary for the appellant to appeal from the order of dismissal," implying that because of the inconvenience of the procedure of appeal, review by mandamus could be had.

Most cases have denied review where appeal is available: State *ex rel.* Welch v. Criminal Court, Marion County: Div. 1, 120 Ind. App. 317, 90 N.E.2d 912 (1950) (order dismissing petition to modify a final judgment on writ of habeas corpus); State *ex rel.* Meloy v. Barger, 227 Ind. 678, 88 N.E.2d 392 (1949) (order dismissing prosecution); State *ex rel.* Sweet v. Hancock, 223 Ind. 701, 64 N.W.2d 294 (1946), and State *ex rel.* Shrock v. Conboy, 222 Ind. 310, 53 N.E.2d 636 (1944) (order refusing writ of error coram nobis); State *ex rel.* Frye v. Conbay, 222 Ind. 293, 53 N.E.2d 543 (1944) (ruling sustaining motion to quash writ of habeas corpus); State *ex rel.* Jones v. Houraday, 220 Ind. 645, 46 N.E.2d 199 (1943) (order denying an application for a new trial); State *ex rel.* Shephard v. Nichols, 219 Ind. 89, 36 N.E.2d 931 (1941) (order that defendant transfer his car to plaintiff); State *ex rel.* Dawson v. Marion Circuit Court, 218 Ind. 451, 33 N.E.2d 582 (1941) (order granting temporary injunction against Lt. Governor and others); *cf.* the *Gleason* case discussed *supra* at p. 441 where the court held that it might have reviewed by extraordinary writ under certain circumstances, even though the temporary injunction in that case was immediately reviewable by appeal.

collaterally attacked by habeas corpus.

As noted previously, a multiplicity of appeals as in the *Standard Oil Company* case *supra,* would undoubtedly be grounds for review by the writs rather than by immediate appeal. The fact that the relator had immediate appeals instead of the possibility for appeals in the future would not eliminate all the factors demanding review by extraordinary writ.

C. Use of the Writs Where Appeal Exists, But Is No Longer Available

If there has been a final judgment with an attendant right to appeal, but the statutory time for appeal has expired, the adverse party may try to obtain review by extraordinary writ. Thus, in *State ex rel. Public Service Commission v. Johnson Circuit Court,*[68] the trial court ordered the Public Service Commission to vacate one order and enter another. This final judgment was entered on August 16, 1951. No appeal was taken within the prescribed period.[69] On February 13, 1953, the plaintiff obtained a rule to show cause why the relators should not be cited for contempt for failure to obey the order, and the Public Service Commission moved to modify the judgment. No ruling was made on either point, and thereafter relator brought prohibition in the Supreme Court to restrain the contempt proceedings in the trial court. The writ was granted, although the Public Service Commission failed to appeal from the final judgment in the trial court, and the time for appeal had run out. Underlying factors may have been the important public interest involved, represented by the Public Service Commission, and also the dire consequences which would befall the Commissioners if the writ were denied.[70]

D. Use of the Writs Where There Is No Appeal

The legislature may provide that no appeal will lie from special

68. See note 47 *supra.*

69. IND. ANN. STAT. § 2-3202 (1946) prescribes 180 days. IND. SUP. CT. RULE 2-2 reduces the time for filing transcripts of error to ninety days after judgment or ruling on the motion for a new trial.

70. The underlying reasons were not so obvious in a case involving the wrongful dismissal of an action to foreclose a mechanic's lien: State *ex rel.* Terminex Co. v. Fulton Circuit Court, 235 Ind. 218, 132 N.E.2d 707 (1956). The trial court had dismissed the relator's suit in April, 1955. The original action for mandamus was brought in the Supreme Court on March 13, 1956; therefore, this is a clear case of review after the time for appeal had expired. The writ was granted on the grounds that the inferior court had no jurisdiction to dismiss on any other than grounds enumerated in the dismissal statute. An examination of the briefs of counsel discloses, however, that the case was argued on the theory that the relator had no remedy of appeal because these particular entries of dismissal were not final judgments. If this is true, the court should have said so. As the opinion reads, however, the case remains an anomaly.

statutory proceedings in a trial court. *State ex rel. Acker v. Reeves*[71] concerned a statute providing for a recount of votes cast in the general election for all state offices, which was unconstitutional to the extent that it applied to members of the legislature. Previously, in *Laymen v. Dixon,*[72] it had been held that since this was a special remedy created by statute and there was no provision for appeal, the courts themselves could not create a remedy of appeal. The court, forced to find some other means to review the proceedings in order to pass on the constitutionality of the statute, allowed the use of prohibition and held that the court below had no jurisdiction to proceed on the basis of an unconstitutional statute.[73] A later case again used the extraordinary writ in deciding that the statute was void *ab initio* rather than merely from the date of the *Acker* decision.[74]

II. Conclusion

An analysis of the foregoing cases indicates that in some instances review by the remedy of appeal is inadequate. First, the final judgment rule, by denying immediate review, may make appeal unsatisfactory. It can be said in general that appeal is inadequate because of the final judgment rule if the litigants, being forced to review by appeal, may be irreparably injured or subjected to extraordinary inconvenience or expense. In addition, since no derogation of the policy of the final judgment rule is involved, an interlocutory order which will have as its consequence substantial, unnecessary, future trial litigation (such as the granting of a new trial) probably should be immediately reviewable, but only when a determination by the appellate court that the trial court's order is erroneous will immediately and finally conclude the proceedings. In this situation although appeal may be adequate since the final judgment rule will cause merely ordinary inconvenience as distinct from extraordinary inconvenience, there is no valid policy reason for observing the final judgment rule. Therefore, a proposed test for determining the propriety of interlocutory review should be irreparable injury (writs

71. 229 Ind. 126, 95 N.E.2d 838 (1951).

72. 63 Ind. App. 501, 114 N.E. 698 (1917).

73. It would seem that the preferrable means of attacking the unconstitutional statute would have been to have ordered the trial court, by writ of mandate, to have declared the statute void. Since the Indiana Constitution gives the Supreme Court appellate jurisdiction the court may review by extraordinary means where the legislature provides inadequate appellate procedure. Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940); Lake Erie & W. R. Co. v. Watkins, 157 Ind. 600, 62 N.E. 443 (1902). This use of the writ could be justified on the grounds that it is issued in aid of the Supreme Court's appellate jurisdiction.

74. State *ex rel.* Beaman v. Circuit Court of Pike County, State *ex rel.* Beaman v. Circuit Court of Gibson County, 229 Ind. 109, 96 N.E.2d 671 (1951).

of attachment etc.), extraordinary inconvenience or expense (accounting proceedings etc.), or the ordinary inconvenience or expense of needless litigation at the trial level in situations where there is no possibility of subsequent error (granting of a motion for new trial).

The proposed test would include the federal "collateral order" exception (denial of bail, bond, writ of attachment) under the possibility of irreparable injury, and the Forgay-Conrad exception (granting accounting, appointing receiver) under the possibility of extraordinary inconvenience or expense.

The Indiana temporary restraining order cases would not automatically meet the proposed test since it does not necessarily follow that one subjected to a temporary restraining order may be irreparably injured or subjected to extraordinary trouble or expense. Because of the short duration until appeal can be obtained, none of these cases meet the "inconvenience of needless litigation" test. Each temporary restraining order case should therefore be decided on its own facts.[75]

The legislature could create exceptions to the final judgment rule either by giving the courts themselves general discretion to create exceptions, or by enumerating specific exceptions in statutory form. Those who advocate conferring discretion on the courts to hear interlocutory appeals when they deem it advisable appear more persuasive than the advocates of enumerated, non-discretionary statutory exceptions to the final judgment rule. Placing discretion in the courts would provide needed flexibility to the law of appellate review,[76] while at the same time the test of irreparable injury, extraordinary inconvenience or expense, or certain inconvenience would provide some degree of certainty or predictability to the law. Adding the fact that such appeals as are proposed are to be at the discretion of the court and not as a matter of right, and further that the need for such appeal may be determined in camera or in a summary proceeding involving that issue only, it cannot be contended that modification of the rule will result in chaos at the appellate level. It can even be questioned whether the complete abrogation of the final judgment rule would result in promiscuous early appeals.[77]

75. For example, the liquor license cases, notes 37, 44, and 45 *supra,* would probably not meet the test on the basis of possibility of irreparable injury, whereas the *Smith* case, note 44 *supra* (suspension of motor vehicle license) would meet the test. The *Coffin* case, note 57 *supra* (restraint of political activity) would meet the test of irreparable injury ,and the *Standard Oil Co.* case, note 59 *supra* (multiplicity of appeals) meets the extraordinary inconvenience test. The *Hoffman* case, note 54 *supra* (motion for a jury trial), and the *Conservation Dep't* case, note 55 *supra* (plea in abatement) would not meet any of the tests, but the *McNabb* case, note 56 *supra* (order vacating final judgment) would meet the test of certain inconvenience.

76. See p. *supra.*

77. See notes 10 and 21 *supra.*

The means employed for exercising discretionary interlocutory review may be either by appeal (if the final judgment statute were amended) or by extraordinary writ. In choosing between the two, a factor to be considered (aside from constitutional problems in some jurisdictions) is the difficulty in reconciling this use of the writs with their traditional nature, where the jurisdiction of the inferior court is all-important. Also, the characteristics of the remedies with respect to how quickly the remedy can be obtained, the degree of trouble and expense to the litigants, and the amount of work required of the courts in administering the remedies should be considered.[78]

There are instances, other than those involving the final judgment rule, where the remedy of appeal is inadequate. Practical differences between appeal and the extraordinary writs sometimes make the latter preferable as a means of reviewing appealable judgments. Therefore, that part of the proposed test for the propriety of interlocutory review which is based strictly on the inadequacy of appeal, *i.e.,* irreparable injury and extraordinary inconvenience or expense, should also comprise a test for determining the propriety of discretionary review of appealable judgments by extraordinary writ.[79]

Remedies for justifiably failing to exercise appeal are already available; therefore, the court should be given no discretion to review by extraordinary writ where the remedy of appeal is no longer available because the time for filing has expired.

Turning to the law as it exists in Indiana, if it is accepted that a change in the Indiana law is needed, the best method for providing Indiana Appellate courts with the required discretionary power for interlocutory review would be to adopt an appeal statute similar to that of Iowa or South Dakota.[80] Similarly, the best method for obtaining discretionary power to review appealable judgments and orders by extraordinary writ would be simply to amend the governing statutes. Or it would be possible, although less desirable, for the legislature to expressly empower the courts to continue to use the extraordinary writs as a means of discretionary interlocutory review.

Because of the present statutory basis for both the final judgment rule and the granting of extraordinary writs in Indiana, any discretion

78. See note 67 *supra.*

79. The *Dowd* case, note 64 *supra* (habeas corpus), which would meet the irreparable injury test, is an example. Also the holding of the *Standard Oil* case, note 59 *supra* (multiplicity of appeals), would have allowed review by writ if the claims in that case had been finally adjudicated. Review by extraordinary writ can be rationalized in these cases on the authority of the court to issue mandamus in aid of its appellate jurisdiction.

80. See note 21 *supra.*

presently taken by the court involves a usurpation of the function of the legislature which, of course, should be avoided. If in hard cases, however, relief from either the final judgment rule or the inherent disadvantages of appeal is to be obtained, other than by statutory change, it must be through the continued unorthodox use of the extraordinary writs—in this instance perhaps the lesser of two evils. This practice does not conflict with the statute on final judgments since that statute deals only with review through direct appeals. If necessary, it would seem possible for the court on the basis of precedent alone to continue to use the writs as a means of interlocutory review or to review appealable judgments and orders where the proposed test is met. The *Coffin* and *Standard Oil* cases have qualified the common law rule that a remedy of appeal precludes review. The temporary restraining order and jury trial cases have greatly attenuated the statutory jurisdictional requirements. Therefore, even in the absence of statutory change the courts could at least continue to do what they have been doing—exercising discretion by means of the extraordinary writs, allowing interlocutory review when necessary, and reviewing appealable judgments by extraordinary writs when appeal is available but inadequate.