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In an article such as this it is neither feasible nor advisable to deal specifically with the differing modes of procedure in every jurisdiction. There is a wide divergence in the methods of review relating to the appellate and supervisory powers of the courts of last resort in the various jurisdictions. Speaking generally as to the existing rules of procedure, it is no longer possible to be sure of the nature of a review proceeding in any particular jurisdiction from the name that is given to it. The modern statutory appeal in many jurisdictions is a substitute of both the common-law writ of error and the appeal in equity and partakes of the nature of both.

"The term 'appeal', as used, is a word of very indefinite meaning. It is sometimes used to denote the nature of appellate jurisdiction, as distinguished from original jurisdiction, without regard to the particular mode by which a cause is submitted to a reviewing court. It rests with each state or the federal government to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise."[1] The supreme court of Montana derives all its powers from the Constitution of the state, and the legislature may not limit those powers. The legislature may, however, prescribe the mode of procedure.

Section 2 of Article VIII provides that "The supreme court except as otherwise provided in this constitution shall have appellate jurisdiction only." Section 3 of the same article specifies the writs of original jurisdiction which the supreme court is expressly authorized to issue. The writ of Supervisory Control is not expressly enumerated.

The Montana history of the writ of supervisory control is one of evolution. The authority for its use is derived from the general grant of power under the "supervisory control"

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[1]2 Am. Jur. 844-846.

clause of section 2, Article VIII of the Constitution of the state, and specific authority under the "Other Original and Remedial Writs" clause of section 3 of the same article. The writ is not one expressly mentioned in section 3 but is grounded upon the phrase found in that section where, after naming certain writs which the supreme court is authorized to issue, it is said, "and such other original or remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction."

Provisions similar to the supervisory provision found in section 2 of Article VIII are also found in the constitutions of the states of Alabama, Arkansas, Colorado, Idaho, Kentucky, Michigan, Missouri, North and South Dakota, North and South Carolina, Wisconsin, Wyoming and possibly others. The writ, however, under that name is not in general use in any state except Montana. It appears that other writs or modes of procedure are in use in other states to accomplish the same or similar purposes. Of the eleven cases cited in Words and Phrases, under supervisory control, nine are from Montana, one each from Wisconsin and Missouri, and one additional Montana case is found under "supervision." The supreme court of Montana issues, hears, and determines more proceedings that come to the court by way of petitions for the writ of supervisory control than under all the other writs which the court is authorized to issue, and petitions for the writ are denied to fully half those who apply.

Amongst the many able jurists who have contributed to the establishment of the rule relative to the supervisory control of the supreme court of this state we are chiefly indebted to our late Chief Justice, The Honorable Theodore Brantly, a man endowed with unusual powers of logic and reasoning. The first outstanding case dealing with the court's powers of supervisory control was that of State ex rel. Whiteside v. First Judicial District Court[2], a contempt case involving the writs of habeas corpus and certiorari. In presenting the court's views as to the proper writ to be employed in that case, which led to the splendid interpretation of the supervisory control clause of the Constitution, the Chief Justice said that "The grant of appellate jurisdiction from its very nature implies also all the instrumentalities necessary to make it effective. It is an established doctrine that one of the essential attributes of appellate jurisdiction and one of the inherent powers of an

[2]24 Mont. 539, 63 Pac. 395.

appellate court is the right to make use of all the writs known to the common-law, and if necessary, to invent new writs or proceedings in order to suitably exercise the jurisdiction conferred. * * * It (the court's power of supervisory control) is a power separate and distinct from the court's appellate jurisdiction but a power to be called into use to meet any exigency for which no express remedy has been provided." In less than a year after the Whiteside opinion was handed down, this court, again speaking through Chief Justice Brantly, said[8]: "In the case of State ex rel. Whiteside v. District Court we endeavored to point out, by what we deemed a proper construction of sections 2 and 3 of Article VIII of the Constitution, that under that instrument there are four distinct grants of power, viz., appellate jurisdiction, a general supervisory control over all inferior courts, discretionary power to issue, hear and determine the various original writs enumerated, and the power to issue, hear and determine such other original and remedial writs as may be necessary to the complete exercise of the appellate jurisdiction."

It was further said in the Whiteside case, relative to the supervisory power of the supreme court, that "A similar clause is found in the constitutions of many of the states of the Union, and, we believe, the courts unanimously agree that the various constitutional conventions used the language purposely to confer a power separate and independent of any other power to meet exigencies to which the ordinary appellate powers of the court are not commensurate. * * * It is well said of this power (People v. Richmond, 16 Colo. 278, 26 Pac. 929): 'It is hardly necessary to add that the "superintending control" given by the Constitutional provision now under consideration refers primarily to courts, not to parties or cases; its purpose is to keep the courts themselves "within bounds," and to insure the harmonious working of our judicial system; it was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction; and, in so far as the rights of suitors in particular causes may be affected, the effect is incidental purely. To say that the "superintending control" was intended to include ordinary appellate power is to render the preceding clauses superfluous in so far as they constitute a grant of such power'."

A brief review of the common-law writs will by contrast aid in giving to the writ of supervisory control its distinctive functions.

[8]State ex rel. A. C. M. Co. v. District Court, 25 Mont. 504, 65 Pac. 1020.

In the case of State ex rel. City of Helena v. Helena W. W. Co., 43 Mont. 169, 115 Pac. 200, the supreme court said in effect that the appellate jurisdiction of the court is invoked by appeal, or perhaps by writ of error. "Appeal and Error" are generally treated by all text writers under the combined head, and in this jurisdiction not much use is now made of the writ of error under that name, appeal having been substituted for that writ. A prominent text writer (3 C. J. 299) has this to say about the employment of the writ of error:

WRIT OF ERROR.

"A writ of error is a writ issued out of a court of competent jurisdiction, directed to the judges of a court of record in which a final judgment has been given, and commanding them to send the record of the court of appellate jurisdiction therein named, to be examined, in order that some alleged error in the proceedings may be corrected.

"The writ of error had its origin at the common law and was adopted in the United States as a part of the common law system. While the writ of error is in most cases a writ of right at the common law it may be limited or altogether abolished by statute, unless the constitution forbids. The writ cannot be abolished by the legislature where the power to issue it is by the constitution vested in the court, and of course it cannot be abolished in the face of a constitutional provision to the effect that writs of error shall never be prohibited by law. But where the constitution provides that appeals and writs of error shall be allowed from certain final determinations, as may be provided by law, whether the remedy is by appeal or writ of error depends upon the legislature; and where the constitution makes provision for writs of error, but uses the term, not in its strict, technical, common-law sense, but to designate the process by which cases are brought up for appellate review, it does not have the effect of preserving the common-law writ." (3 C. J. 299.) At common-law certiorari is said to lie in all cases where a writ of error does not.

Certiorari is a proceeding appellate in the sense that it involves a limited review on the proceedings in an inferior jurisdiction, and lies only to inferior courts and officers exercising judicial powers, and is directed to the court, magistrate, or board exercising such powers, requiring the certifying of the record in a matter already determined. Its function is not to restrain or prohibit but to annul. It is a revisory remedy for the correction of errors of law apparent on the record,

and will not lie where there is another remedy, except for want of jurisdiction. United States v. Elliott, 3 Fed. (2d) 496.

Certiorari is a broader writ than writ of error, and will be issued by a supreme court in the exercise of its general revisory and appellate jurisdiction only when no other remedy is available. State v. Coleman, 190 Atl. 791 (R. I.), 109 U. S. R. 797.

Writ of certiorari is not writ of error, McClatchy v. Superior Court, 119 Cal. 413, 419, 51 Pac. 696, 39 L.R.A. 691, it nevertheless extends to the whole record of the lower court, Hotaling v. Superior Court, 191 Cal. 501, 217 Pac. 73, and it is in the nature of a writ of error, McAdam v. Block, 63 N.J.L. 508, 44 Atl. 208, but is broader than writ of error, State v. Coleman, supra.

The distinction between mandamus and certiorari is that mandamus issues to compel action and certiorari to review official or judicial action. 85 N.J.L. 374, 89 Atl. 1017.

Certiorari issues only to a tribunal or a person exercising judicial acts. Prohibition issues against one exercising either judicial or ministerial acts. Ducheneau v. House, 4 Utah 369, 10 Pac. 838.

The six original writs expressly mentioned in section 3 of Article VIII, all, except the writ of injunction, had well defined uses at the common law, and all, except prohibition and quo warranto, had been in use under the territorial government performing their common law functions for many years at the time the Constitution was adopted. None of them, except certiorari and prohibition, go exclusively to courts, or tribunals, or officers exercising judicial functions, and certiorari and prohibition were limited to inquiry into questions of jurisdiction. The writ of habeas corpus goes only to individuals, not to courts, to inquire into the legality of the imprisonment complained of. The writ of quo warranto goes to individuals to inquire by what authority he usurps an office or exercises a particular public franchise. Mandamus and prohibition are for directly opposite purposes. Generally speaking mandamus is to compel action; prohibition to prevent action. Mandamus is often used to compel a board or officer to act, but not to correct errors or control discretion. Chief Justice Brantly, in referring to the six original writs mentioned in section 3 of Article VIII, further said, "We are authorized to issue these writs, in our discretion, for whatever purpose they are suitable, without limitation or qualification. * * * As the appellate jurisdiction was granted for the purpose of revision and correction, and the original juris-

diction under these writs was granted to enable us to render such relief as is appropriate under them, so the supervisory power was granted to meet emergencies, to which those other powers and instrumentalities are not commensurate. It is independent of both, (that is, independent of both the supreme court's appellate jurisdiction, and its jurisdiction under the Constitutional writs expressly authorized by section 3 of Article VIII) and was designed to infringe upon the functions of neither."

Mr. Chief Justice Brantly again said, in the case of A.C.M. Co. v. District Court, 25 Mont. 505, 521, 65 Pac. 1020, that: "We also endeavored (in the Whiteside case) to define and point out the functions of these various powers so that each might be assigned its appropriate office within the purview of the constitution, and at the same time not be permitted to encroach upon the functions of any other. The offices of the original writs authorized were discussed and defined, and it was pointed out that they were put into the hands of this court for prerogative uses, and not as aids to the appellate jurisdiction; following the previous decisions of this court in In re MacKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451, and State ex rel. Clarke v. Moran, 24 Mont. 433, 63 Pac. 390. It was further pointed out that these writs are not adapted to supervisory uses, in that they may not properly be wrested from their well-known and well-defined uses at the common law, which were inherent in them as adopted into the constitution. The power of supervisory control was discussed, and a tentative definition of its functions laid down, so that it might not be confounded with the other powers granted, and the clause granting it be thus rendered meaningless. The means at our disposal for its exercise were likewise discussed, and it was found that the legislature, so far as action by that body was necessary, had provided such means.

"After studying the argument of the learned counsel in this case, and upon further consideration of the subject, we are confirmed in the conclusions reached in that case, not only that the power is distinct and independent of any other power granted, but that, from its nature, it must be exercised by means of instrumentalities distinct from those by which the others are made available."

The writ of supervisory control is distinguished from other original writs in that by its issuance the supreme court may control the actions of the inferior court in pending litigation and in a matter within the jurisdiction of such inferior

court. Such supervisory control by the supreme court can be exercised under no other writ. The power of the supreme court to control the course of litigation in the inferior court is a power which must be exercised with caution since its abuse would nullify the ordinary appellate procedure. It has been said, "To this court has been confided and intrusted the ultimate and supreme judicial power of supervisory control over all the inferior courts within the state. It is a power liable to abuse, and should be exercised with discretion, caution, sparingly, and only in exigent cases, to protect a manifest right or to redress a palpable wrong. * * * The power to exercise a general supervisory control over district courts, being conferred by a constitutional grant, cannot be lessened or interfered with by the legislative assembly. It may, of course, prescribe reasonable regulations and limitations as to the time within which, and the mode by which, the relief may be sought; the procedure is a legitimate subject of legislation,—for instance, the legislative assembly may require the application to be made within a certain period of time, it may require a bond or undertaking, it may provide for authentication and certification of the record or transcript, and the like. But it is without power to deprive this court of any part of its jurisdiction conferred by a rigid constitution." State ex rel. Sutton v. District Court, 27 Mont. 128, 69 Pac. 988.

It was said in the case of In re Weston, 28 Mont. 207, 215, 72 Pac. 512, that "The supervisory power of this court operates only upon inferior courts, not upon persons; and, under the rule of interpretation provided by the constitution itself, it cannot extend to or affect any other body or any individual or individuals."

In the case of State ex rel. City of Helena v. Helena Water Works Co., 43 Mont. 169, 115 Pac. 200, Chief Justice Brantly again endeavoring to clarify the proper employment of the writ of supervisory control, said: "The supervisory power—which is also appellate in its nature—was designed to control summarily the course of litigation in the inferior courts and prevent an injustice being done through a mistake of law or a willful disregard of it when there is no appeal from the erroneous order, or the relief obtained through the appeal would be inadequate." He then follows with the citation of a number of cases and relative thereto states: "Its appropriate use is illustrated by the following cases." The student who desires to pursue the ramifications of the use of the writ of supervisory control will find those cases quite instructive.

Mr. Justice Sanner, speaking for the court in the case of State ex rel. Topley v. District Court, 54 Mont. 461, 171 Pac. 273, refers to the writ of supervisory control as the "most extraordinary of all legal proceedings. * * * This proceeding will not lie unless there is no appeal or the remedy by appeal is inadequate * * * ; and we cannot permit it to be used as a convenient or shorter route to precedence over other causes equally entitled to our consideration."

In the case of State ex rel. Jerry v. District Court, 57 Mont. 328, 333, the court, speaking again through Chief Justice Brantly, said: "It is true that relator has an appeal from the order. That it is so, however, is not conclusive of his right to relief in this proceeding. In the early case of State ex rel. Whiteside v. District Court, * * * this court held that this proceeding may be resorted to even though the relator has an appeal, if the case is exigent and the remedy by appeal is inadequate."

Reference was made to the functions of the writ of supervisory control and its appropriate employment by Chief Justice Callaway in the case of Larsen v. District Court in 78 Mont. 435, 254 Pac. 414.

Mr. Justice Ford in the case of State ex rel. Whorley v. District Court, 88 Mont. 290, 292 Pac. 904, speaking for the court in that case said: "One of the functions of the writ of supervisory control 'is to enable this court to control the course of litigation in the inferior courts where those courts are proceeding within jurisdiction, but by mistake of law or willful disregard of it, are doing a gross injustice, and there is no appeal or the remedy by appeal is inadequate. Under such circumstances, the case being exigent, no relief could be granted under other powers of this court and a denial of a speedy remedy would be tantamount to a denial of justice'."

In the case of State ex rel. Odenwald v. District Court, 98 Mont. 1, 6, 38 Pac. (2d) 269, this court, speaking through Mr. Justice Matthews, mentions what the court regarded as justification for employing the writ of supervisory control in a matter of exigency. It was there said: "An exigency which will render the ordinary remedy by appeal inadequate may be defined as something arriving suddenly out of the current of events; an event or combination of circumstances calling for immediate action or remedy * * *; where something helpful needs to be done at once yet not so pressing as an emergency."

In the case of State ex rel. Regis v. District Court, 102 Mont. 74, 55 Pac. (2d) 1295, Mr. Justice Matthews, again

speaking for this court, said: "Assuming that an appeal might lie from such an order under certain circumstances, the 'supervisory writ,' evolved by this court as a necessary consequence of the provision of the Constitution granting to it 'general supervisory control over all inferior courts' (sec. 2, Art. VIII), and of section 8882 of the Revised Codes of 1921, declaring that, in the exercise of granted jurisdiction, if the course of proceeding be not specifically pointed out, any suitable mode of proceeding may be adopted which may appear most conformable to the spirit of the Code, in the absence of any legislative pronouncement on the subject, is employed to correct error within jurisdiction, independent of either the appellate or original jurisdiction declared in Article VIII of the Constitution, and is not to be confused with the original writs therein authorized to be issued by this court. (State ex rel. Whiteside v. District Court, 24 Mont. 539, 63 Pac. 395.) Neither the Constitution nor the Codes restrict the right of this court to issue such a writ; it is in the nature of a summary appeal —a shortcut—to control the course of litigation in the trial court when necessary to prevent a miscarriage of justice (State ex rel. Finley v. District Court, 99 Mont. 200, 43 Pac. (2d) 682), and may be employed to prevent extended and needless litigation. While, ordinarily, the writ will not be issued when the right of appeal exists, as it is to be used sparingly, the fact that an appeal is available is not conclusive against the writ." Citing cases.

Briefly summarizing what has been said, it is fairly established (1) that the writ of supervisory control, as distinguished from appeal, is issued only in the court's discretion, while appeal is a matter of right in the litigant. (2) That the court will not assume jurisdiction in any proceeding by writ of supervisory control except to determine questions of law. The facts must be undisputed. (3) The writ issues to determine questions of law only in actions *pending* in an inferior jurisdiction. In this it differs from all other writs which issue to review and correct matters which have been finally concluded in an inferior jurisdiction. (4) The writ will not issue when an adequate right of appeal exists. What is an "adequate right" has been set out by this court in a number of cases. (5) In any proceeding under the writ of supervisory control, as well as under other constitutional writs, the supreme court proceeds under its original not its appellate jurisdiction.