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Comment

CALIFORNIA STAY LAW—SUPERSEDEAS AND STATUTORY

Presence of an appellate court structure in a legal system inevitably poses the question: what should be the litigants' rights pending appellate review? Should the successful party in the trial court be allowed to enforce his judgment immediately, despite possibility of reversal? Or should the losing litigant's appeal suspend the trial court's power to enforce its judgment? Undoubtedly the answers to these questions will vary according to the type of judgment under consideration.

As an example, consider the competing equities which must be weighed in seeking a solution to these problems when a money judgment is rendered. If enforcement is suspended and the judgment is affirmed, the plaintiff will be greatly damaged if the defendant's assets have been dissipated during the review period. But on the other hand, if plaintiff enforces the judgment prior to appellate review, a reversal will be useless to appellant if plaintiff has squandered the proceeds and is unable to make restitution.¹

In the search for a workable solution to the problem, tentative answers

¹ CAL. CODE CIV. PROC. § 957 gives appellate courts power to make restitution of property or rights lost by an erroneous judgment which is reversed or modified. See also *Asato v. Emirzian*, 177 Cal. 493, 171 Pac. 90 (1918).

must be tested in light of the probabilities as to affirmance or reversal. Considerable deference is due the trial court's determination, thus tipping the scales in respondent's favor.²

What solutions have been reached by the California courts and legislature in the myriad varieties of orders and judgments resulting from judicial processes? The purpose of this comment is to attempt to answer this question; to evaluate the effectiveness of the solutions, and to suggest changes if any are needed.³

DEVELOPMENT OF THE CALIFORNIA STATUTORY STAY LAW

A brief summary of the historical basis of the present California law may prove useful in its description and analysis. At early common law a writ of error, without security, suspended the trial court's power to enforce its judgment until appellate review was completed.⁴ Abuse of this procedure, by its use solely as a dilatory tactic, led the English Parliament to enact legislation requiring security in certain instances before the writ could suspend the lower court's enforcement power.⁵ In the United States, to avoid the common law rule, the Judiciary Act of 1789 contained provisions which made security a requisite for the validity of the writ of error.⁶ Experience had demonstrated the need for protecting respondent's right if the judgment was to be stayed.

Following this trend the California legislature early enacted statutes assuring such protection upon appeal from certain judgments.⁷ Adopted in the 1850's, this legislation has continued in essentially its original form in the Code of Civil Procedure.⁸ In essence it provides for the perfection of statutory stays in the trial court. The effect of a stay is to prevent the trial court from initiating any *further* proceedings "upon the judgment or order appealed from or upon the matters embraced therein."⁹

² See *Nuckolls v. Bank of California Nat. Assn.*, 7 Cal. 2d 574, 578, 61 P. 2d 927, 929 (1936).

³ CAL. CODE CIV. PROC. §§ 974-982 dealing with appeals from justices' courts are not within the scope of this comment. It is also limited to civil actions.

⁴ See *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 381 (1882), for a discussion of the historical development of *supersedeas*. See also POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 148 (1941).

⁵ *Kountze v. Omaha Hotel Co.*, *supra* note 4 at 382.

⁶ See *Kitchen v. Randolph*, 92 U.S. 86 (1876). Sufficient security to protect respondent's rights if the judgment was affirmed had to be posted in all cases in which the writ maintained the status quo during appeal.

⁷ See Cal. Stats. 1850, p. 78 and Cal. Stats. 1851, pp. 106-108.

⁸ CAL. CODE CIV. PROC. § 942, money judgments; CAL. CODE CIV. PROC. § 943, judgments for delivery of documents or personalty, orders appointing receivers, and foreclosure of chattel mortgages; CAL. CODE CIV. PROC. § 944, judgments directing execution of a conveyance or other instrument; CAL. CODE CIV. PROC. § 945, judgments directing the sale or delivery of possession of real property.

⁹ CAL. CODE CIV. PROC. § 946. The statement is often made that a stay deprives the trial court of all jurisdiction in the action. This is incorrect; the trial court may proceed upon other matters in the action not affected by the order appealed. *E.g.*, the appeal stays the judgment but not proceedings to prepare a record on appeal from the judgment. *Imperial Beverage Co. v. Superior Court*, 24 Cal. 2d 627, 150 P. 2d 881 (1944). The trial court may proceed upon a motion to re-tax cost. *Hennessy v. Superior Court*, 194 Cal. 368, 228 Pac. 862 (1924). An appeal from judgment of divorce does not deprive the trial court of jurisdiction in regard to a motion for temporary alimony and counsel fees pending the appeal. *Bruce v. Bruce*, 160 Cal. 30, 116 Pac. 722 (1911).

Classification of the pertinent code sections into two divisions, based upon the different procedures utilized to effect a stay, facilitates understanding the statutory scheme. One category includes Sections 942, 943, 944 and 945, which provide the procedure for staying one or more designated types of judgments. Generally these sections require the filing of an undertaking in the trial court or the deposit of the disputed property.¹⁰ The second category includes only Section 949. However, this is an important section which provides that in *all other cases* the mere perfection of an appeal creates an automatic stay *without an undertaking*.¹¹

THE WRIT OF SUPERSEDEAS

The trial court is not the sole guardian of the status quo. Superimposed upon the code provisions is the constitutional power of appellate courts to grant the writ of *supersedeas*.¹² This writ suspends the lower court's power to enforce the judgment while the issuing court is reviewing the case.¹³ Thus the rules governing the stay of any one type of judgment can be studied only by considering concurrently the impact of both the statutory law and the writ. Accordingly, a general discussion of the writ is needed to facilitate subsequent analysis of the stay law applicable to the various types of judgments.

Supersedeas is a writ the sole function of which is to prevent the court rendering judgment from enforcing it prior to completion of review.¹⁴ It may issue only in aid of the reviewing court's jurisdiction.¹⁵ A *supersedeas* does not supersede, reverse or suspend the validity of the judgment.¹⁶

¹⁰ Certain sections give the trial judge discretionary power to fix the amount of the undertaking necessary to create a stay. See Section 943 at note 61 *infra*, Section 945 at note 77 *infra*, and Section 949 at note 98 *infra*.

¹¹ CAL. CODE CIV. PROC. § 949 at note 98 *infra*. Although the court had no power to require a stay bond under this section until 1927, an appeal bond was required until 1921. Cal. Stats. 1921, p. 193. See *People v. Jackson*, 190 Cal. 257, 212 Pac. 4 (1923). This section was amended in 1927 to give trial courts discretionary power to require an undertaking. Cal. Stats. 1927, p. 874. For construction of amendment see text at note 173 *infra*.

¹² The California Supreme Court derives the power to grant *supersedeas* from CALIF. CONST. Art. VI, § 4, which states, "... the said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." *Hill v. Finnigan*, 54 Cal. 493 (1880). An identical provision in Art. VI, § 4b grants this power to the district courts of appeal. *Homestake Mining Co. v. Superior Court*, 11 Cal. App. 2d 488, 54 P. 2d 535 (1936).

¹³ "The writ of *supersedeas* is 'an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review' ... In modern times the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment." *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 306, 33 Pac. 123, 124 (1893), quoting *Williams v. Bruffy*, 102 U.S. 248, 249 (1880).

¹⁴ *Smith v. Smith*, 18 Cal. 2d 462, 116 P. 2d 3 (1941).

¹⁵ *McCann v. Union Bank & Trust Co.*, 4 Cal. 2d 24, 47 P. 2d 283 (1937); *Rosenfeld v. Miller*, 216 Cal. 560, 15 P. 2d 161 (1932). See constitutional authorization for the writ of *supersedeas* in note 12 *supra*.

¹⁶ See *Smith v. Smith*, *supra* note 14 at 464, 116 P. 2d at 5. But the distinction between suspending the *enforcement* of a judgment and suspending the *validity* of a judgment should be carefully noted.

Neither can it operate as an injunction by restraining the litigants from conducting their affairs in accordance with the lower court's decision.¹⁷

A writ of *supersedeas* is obtained by filing a petition in the reviewing court in which the appeal is pending,¹⁸ and may be granted only when the court has jurisdiction over an appeal properly before it.¹⁹ A successful petitioner, but for one possible exception,²⁰ must establish that his rights may be prejudiced unless the status quo is maintained during appellate review.²¹

If the appeal is from a judgment of a type which does not require court process for enforcement purposes, *supersedeas* may not issue as there is nothing upon which the writ can operate.²² Such judgments are described as self-executing.²³ *Dulin v. Pacific W. & C. Co.* is illustrative of the principle.²⁴ In a contest over election of a corporate director, the trial court declared one contestant duly elected, limiting its judgment to an adjudication of status. A *supersedeas* to prevent the board of directors from accepting the trial court's nominee pending review was denied because the board's action was not pursuant to court process.²⁵

Use of the Writ to Complement the Statutory Law

Study of the code provisions on stays might lead to the conclusion that the writ of *supersedeas* is unnecessary.²⁶ But decisional law shows that certain judgments are not within the statutory scheme.²⁷ Yet in certain

¹⁷ *Dulin v. Pacific W. and C. Co.*, *supra* note 13.

¹⁸ Rule 49, Rules on Appeal, 22 Cal. 2d 32 (1943).

¹⁹ *Whittell v. Renz*, 32 Cal. App. 2d 282, 89 P. 2d 668 (1939). If the appeal is to a district court of appeal, the supreme court cannot issue the writ. *Rosenfeld v. Miller*, *supra* note 15. Where appellant has no right of appeal, application for *supersedeas* will be denied. *Eggert v. Pac. States S. & L. Co.*, 20 Cal. 2d 199, 124 P. 2d 815 (1942).

²⁰ This requirement is apparently not needed when appellant is seeking the writ to prevent violation of a statutory stay. See text at note 30 *infra*.

²¹ *Kentfield v. Kentfield*, 4 Cal. 2d 585, 51 P. 2d 94 (1935); *Macario v. Macario*, 208 Cal. 601, 283 Pac. 291 (1929); *Halsted v. First Saving Bank*, 173 Cal. 605, 160 Pac. 1075 (1916). See *Stewart v. Hurt*, 9 Cal. 2d 39, 41, 68 P. 2d 726, 727 (1937).

²² *Caminetti v. Guaranty Union Life Ins. Co.*, 22 Cal. 2d 759, 141 P. 2d 423 (1943); *Hulse v. Davis*, 200 Cal. 316, 253 Pac. 136 (1927); *In re Imperial Water Co. No. 3*, 199 Cal. 556, 250 Pac. 394 (1926); *Dulin v. Pacific W. & C. Co.*, *supra* note 13; *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856 (1887); *Erickson v. Municipal Court*, 131 Cal. App. 327, 21 P. 2d 480 (1933); *People v. City of Westmoreland*, 135 Cal. App. 517, 27 P. 2d 394 (1933). For discussion of the rule for which these cases are cited in regard to prohibitory injunctions see text at note 129 *infra*.

²³ "The term 'self-executing' is practically self-defining and obviously denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose." *Feinberg v. One Doe Co.*, 14 Cal. 2d 24, 29, 92 P. 2d 640, 642 (1939).

²⁴ *Supra* note 13.

²⁵ A judgment giving relief other than mere declaration of status, such as ordering removal of directors, apparently would be stayed under Section 949. See *De Garmo v. Goldman*, 19 Cal. 2d 755, 767, 123 P. 2d 1, 7 (1942).

²⁶ Such a false thesis would be attributable largely to Section 949. Its introductory phrase suggests that all judgments not regulated by other sections are provided for in that section. Note 98 *infra*.

²⁷ *Food & Grocery Bureau v. Garfield*, 18 Cal. 2d 174, 114 P. 2d 579 (1941); *Kentfield v. Kentfield*, *supra* note 21; *Macario v. Macario*, *supra* note 21; *Halsted v. First Savings Bank*, *supra* note 21. See *Cullinan v. Mercantile Trust Co.*, 193 Cal. 562, 563, 226 Pac. 4, 5 (1924).

As the statutory stay provisions are in Part II (Civil Actions) of the Code of Civil Proce-

cases, unless a possible reversal of the judgment is to be a Pyrrhic victory for appellant, it is necessary to maintain the status quo during review.²⁸ Accordingly, a *supersedeas* has been granted to fill the void.²⁹

Use of the Writ as a Remedy When Stay is Being Violated

Aside from its function of complementing the code provisions, *supersedeas* also serves as a remedy when the trial court threatens to enforce its judgment despite a valid statutory stay.³⁰ Utilization of the writ in its remedial capacity will prevent further violation,³¹ but it will have no effect upon enforcement proceedings consummated before the statutory stay became operative.³² Although the writ is discretionary, there is some indication that it will issue as a matter of right to protect a statutory stay.³³

Use of Writ When Appellant Fails to Perfect Stay

As a general rule *supersedeas* will not be granted if the appellant could have perfected a statutory stay in the trial court.³⁴ Exceptions to this rule have in the main been instances in which the appellant's sureties failed to qualify³⁵ due to accident, inadvertence, or excusable neglect.³⁶ To pre-

ture, they are not applicable to special proceedings unless expressly made so by statute. *Carpenter v. Pacific Mut. L. Ins. Co.*, 13 Cal. 2d 306, 89 P. 2d 637 (1939). In such cases the appellate court may issue the writ in its discretion.

²⁸ Cases cited note 27 *supra*.

²⁹ CAL. CODE CIV. PROC. § 949 places another group of cases in the classification in which judgments are stayed only by the writ. See text at note 115 *infra*.

³⁰ *Estate of Dabney*, 37 Cal. 2d 402, 232 P. 2d 481 (1951); *Estate of Hultin*, 29 Cal. 2d 825, 178 P. 2d 756 (1947); *Smith v. Smith*, *supra* note 14; *Feinberg v. One Doe Co.*, *supra* note 23; *Jensen v. Hugh Evans & Co.*, 13 Cal. 2d 401, 90 P. 2d 72 (1939); *In re Schedel*, 69 Cal. 241, 10 Pac. 334 (1886). Apparently the writ of prohibition is an alternative remedy. *Gantner v. Superior Court*, 38 A.C. 751, 242 P. 2d 328 (1952); *Lerner v. Superior Court*, 38 A.C. 738, 242 P. 2d 321 (1952).

³¹ The writ will not issue in its corrective capacity unless a stay has been violated or at least threatened. *Foster v. Foster*, 5 Cal. 2d 669, 55 P. 2d 1175 (1936).

³² *Estate of Dabney*, *supra* note 30; *Messenkop v. Duffield*, 211 Cal. 222, 294 Pac. 715 (1930). Appellate courts will vacate proceedings taken in violation of a stay and order restitution. *Owen v. Pomona Land Etc. Co.*, 124 Cal. 331, 57 Pac. 71 (1899); *Holcomb v. Juster*, 39 Cal. App. 462, 179 Pac. 445 (1919).

³³ *Estate of Dabney*, *supra* note 30. See *Food & Grocery Bureau v. Garfield*, *supra* note 27 at 177, 114 P. 2d at 680; *Feinberg v. One Doe Co.*, *supra* note 23 at 29, 92 P. 2d at 641; *Zappettini v. Buckles*, 167 Cal. 27, 31, 138 Pac. 696, 699 (1939). *But see Ballinger v. Ballinger*, 7 Cal. 2d 307, 309, 61 P. 2d 45 (1936).

³⁴ *Guardianship of Morro*, 14 Cal. 2d 134, 92 P. 2d 1012 (1939); *Nuckolls v. Bank of California Nat. Assn.*, *supra* note 2; *Williams v. Borgwardt*, 115 Cal. 617, 47 Pac. 594 (1897).

³⁵ CAL. CODE CIV. PROC. § 948: "The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in this chapter, at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent."

³⁶ Cases cited note 37 *infra*. The one exception in that group of cases is *Julian v. Schwartz*. In that case the writ issued although the appellants made no attempt to comply with applicable statutory provisions. The supreme court upheld appellants' argument that respondent could not be injured by a stay without security.

vail, appellant must prove a good faith attempt to comply with the applicable statutory provision and post a bond for respondent's protection.³⁷ Respect for the legislature's statutory plan warrants such a restrictive policy aimed at preventing excessive appellate litigation, encouraging trial court control, and safeguarding respondent's right.³⁸

STATUTORY STAYS CREATED ONLY BY FILING AN UNDERTAKING OR
BY PLACING DISPUTED PROPERTY IN COURT CUSTODY

Stays Upon Appeals from Money Judgments

Execution on a money judgment may be stayed by most California trial courts for thirty days or until ten days after a motion for a new trial has been determined.³⁹ After this discretionary period, respondent may execute unless appellant has appealed and perfected a stay pursuant to Section 942.⁴⁰ This requires an undertaking by which the sureties must prom-

³⁷ *Peebler v. Olds*, 25 Cal. 2d 23, 152 P.2d 441 (1944); *Kim v. Chinn*, 20 Cal. 2d 12, 123 P.2d 438 (1942); *Julian v. Schwartz*, 2 Cal. 2d 280, 40 P.2d 818 (1935); *Rosenfeld v. Miller*, *supra* note 15; *Foster v. Fernandes*, 200 Cal. 274, 252 Pac. 726 (1927); *Segarini v. Bargagliotti*, 193 Cal. 538, 226 Pac. 2 (1924); *Nonpareil Mfg. Co. v. McCartney*, 143 Cal. 1, 76 Pac. 653 (1904); *Hill v. Finnigan*, *supra* note 12; *Back v. Hook*, 101 Cal. App. 2d 656, 225 P.2d 1005 (1951). See *Guardianship of Morro*, *supra* note 34 at 137, 92 P.2d at 1014; *Williams v. Borgwardt*, *supra* note 34 at 618, 47 Pac. at 594; *Dairy Holding Co. v. Pacific Coast D. Co.*, 19 Cal. App. 2d 252, 253, 64 P.2d 1111 (1937); *Willis v. Paul*, 116 Cal. App. 733, 735, 3 P.2d 339, 340 (1931); *Reliance Acceptance Corp. v. Lundblade*, 96 Cal. App. 371, 372, 274 Pac. 360 (1929).

³⁸ See *Williams v. Borgwardt*, *supra* note 34. The necessity for appellate court interference could be alleviated if Section 948 were amended to grant trial courts some discretion in the procedure for justification of sureties. This could be done simply by giving the trial courts power in meritorious cases to allow justification by sureties after the statutory period expires.

³⁹ CAL. CODE CIV. PROC. § 681a. *Milstein v. Superior Court*, 72 Cal. App. 2d 123, 164 P.2d 26 (1945); *Hamburger v. Ellingson*, 139 Cal. App. 311, 33 P.2d 850 (1934). Justice's courts are limited to 10 days rather than 30.

⁴⁰ "If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within 30 days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars (\$2,000), and the sureties do not state in their affidavits of justification accompanying the undertaking that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency. If the undertaking in this section first provided for be executed on the part of the appellant by a corporate surety authorized to execute the same by Section 1056 of this code, such undertaking shall be sufficient in amount if the surety be bound in one and one-half times the amount named in the judgment or order appealed from."

ise that appellant will pay the amount of the judgment if his appeal is unsuccessful plus all damages and costs which may be awarded against appellant.⁴¹ An appellant fortunate enough to obtain a written waiver from respondent or able to deposit the amount of the judgment in court need not comply with Section 942.⁴²

Inapplicability of Section 942 unless appellant himself is directed to pay money.—Section 942 has been construed as applicable only when the appellant is ordered in the judgment to pay money.⁴³ Accordingly, if the money judgment is against another party to the action, appellant cannot perfect a statutory stay. This interpretation is illustrated by *Halsted v. First Savings Bank*.⁴⁴ Plaintiff, claiming a bank deposit, joined the bank and another claimant as defendants. The trial court rejected plaintiff's claim and gave the defendant claimant a judgment against the bank. On plaintiff's appeal and petition for a *supersedeas*, alleging compliance with Section 942 and a threatened violation of the stay,⁴⁵ the supreme court held that although appellant had filed an undertaking, no stay existed because appellant was not required to pay the money. Only the bank, which did not appeal, could utilize Section 942. However, the court, exercising its discretionary power, granted the writ on the condition that appellant file a bond.

It is arguable that since the judgment was not within Section 942, it was a "case not provided for in sections 942, 943, 944 and 945" and therefore stayed under Section 949 merely by perfecting an appeal.⁴⁶ The court conceded that any judgment against appellant was stayed by the appeal, but decided the judgment against the bank was not one against appellant, thus concluding the money judgment was not stayed even under the broad coverage of Section 949. Regardless of the possible statutory arguments for the proposition that the judgment was stayed under Section 949, a proper result was reached. To grant a stay under Section 949, which requires no undertaking, would deprive respondent of the protection he needs, regardless of who is appealing. Respondent's protection, not appellant's status, should be the paramount consideration in granting a stay. Nevertheless, in *Halsted* the need for a stay was apparent and its availability

⁴¹ Breach of the undertaking entitles respondent to a judgment against the sureties who are bound for double the amount of the judgment. If the undertaking is by a corporate surety, the amount is decreased to one and a half times the judgment. Respondent may obtain the judgment in an *ex parte* proceeding, *Gray v. Cotton*, 174 Cal. 256, 162 Pac. 1019 (1917); *Meredith v. S.C.M.A. of Baltimore*, 60 Cal. 617 (1882); *Ladd v. Parnell*, 57 Cal. 232 (1881); *Roberts v. Fitzgerald*, 94 Cal. App. 747, 271 Pac. 1110 (1928); *Duerr v. Sloan*, 50 Cal. App. 512, 195 Pac. 475 (1920); and since it is a consent judgment there cannot be an appeal, *Judnick v. Judnick*, 47 Cal. App. 380, 190 Pac. 480 (1920).

⁴² Either procedure will create a stay under the provisions of Section 948, note 35 *supra*.

⁴³ *Halsted v. First Savings Bank*, *supra* note 21; *McCallion v. Hibernia Etc. Society*, 98 Cal. 442, 33 Pac. 329 (1893); *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617 (1891); *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169 (1889); *In re Schedel*, *supra* note 30; *Loudon v. Loudon*, 63 Cal. App. 204, 218 Pac. 442 (1923).

⁴⁴ *Supra* note 21.

⁴⁵ See text at note 30 *supra*.

⁴⁶ Note 98 *infra*.

should not depend on the discretionary writ. Legislation allowing such an appellant to obtain a statutory stay upon filing an undertaking would save litigants and appellate courts time and expense.

Of course, if *Halsted* had arisen as an interpleader action with the disputed fund deposited in court, a stay would have resulted without an undertaking whether the judgment was held to be a money judgment or one for the delivery of personalty.⁴⁷ The policy rationale is clear, a fund held by a court officer is not subject to dissipation as would be one held by a litigant.

What is a money judgment?—Although the answer to the question of what is a “judgment or order directing the payment of money,” within the meaning of Section 942, is usually obvious, there are some judgments for money which are not within the section’s scope. It is well settled that a judgment for costs does not require compliance with the section; execution is stayed merely by perfecting an appeal.⁴⁸ Equally clear is the rule that an alternative judgment for the delivery of personalty or payment of money is not stayed pursuant to this section,⁴⁹ but rather by the procedures of Section 943.⁵⁰

Alimony orders are regulated by Section 942.⁵¹ Since they usually direct payment of a certain sum monthly, necessarily the amount cannot be computed as a liquidated sum for the appeal period.⁵² Nevertheless, the problem of fixing an amount for the bond has been resolved in the following manner: the probable duration of the appeal in months is estimated and that figure is multiplied by the monthly allowance, with the resultant as the basis for fixing the amount of the undertaking.⁵³ Coverage by Section 942 is desirable, for if the order is not regulated by this section, it will be controlled by Section 949 and therefore stayed by the appeal without an undertaking. Protection of respondent requires a stay bond.

The present mode for determining the amount of undertaking is subject to criticism since duration of an appeal can only be estimated. Amendment

⁴⁷ *McCallion v. Hibernia Etc. Society*, *supra* note 43. A deposit in court stays a money judgment. See CAL. CODE CIV. PROC. § 948, note 35 *supra*. Likewise when the disputed property is placed in court custody a stay is created. See CAL. CODE CIV. PROC. § 943 note 61 *infra*.

⁴⁸ *Whitaker v. Title Ins. & Trust Co.*, 179 Cal. 111, 175 Pac. 460 (1918); *McCallion v. Hibernia Etc. Society*, *supra* note 43; *Mathewson v. Naylor*, 17 Cal. App. 2d 420, 62 P.2d 154 (1936); *California Standard Finance Corporation v. Cornelius Cole*, 132 Cal. App. 105, 22 P.2d 520 (1933). *But see* *Bolles v. Hilton & Paley, Inc.*, 101 Cal. App. 92, 93, 281 Pac. 73, 74 (1929).

⁴⁹ *Baar v. Smith*, 201 Cal. 87, 255 Pac. 827 (1927); *United States Fidelity Etc. Co. v. More*, 155 Cal. 415, 101 Pac. 302 (1909); *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383 (1897); *Crowley v. Superior Court*, 17 Cal. App. 2d 52, 61 P.2d 372 (1936). *See* *Churchill v. More*, 7 Cal. App. 767, 96 Pac. 108 (1908).

⁵⁰ See text at note 63 *infra*.

⁵¹ *Smith v. Smith*, 201 Cal. 217, 256 Pac. 419 (1927); *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020 (1906); *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456 (1885); *Ex Parte Earl*, 132 Cal. App. 445, 22 P.2d 773 (1933); *Hogan v. Locke Paddon*, 91 Cal. App. 606, 267 Pac. 392 (1928); *Millar v. Millar*, 51 Cal. App. 718, 197 Pac. 811 (1921).

⁵² Accordingly, a literal interpretation of Section 942 would prevent its application, as the undertaking requires that the sureties be bound for “double the amount named in the judgment or order.”

⁵³ See *Hogan v. Locke Paddon*, *supra* note 51.

of the section to authorize an undertaking in which the amount is designated by a sliding scale formula would remedy the objection. The sureties would promise to pay the sum resulting from multiplication of the monthly allowance by the number of months which actually elapsed between the order's rendition and its affirmance.

Stays operate only on the judgment appealed from.—Closely related to the problem of what is a money judgment is the rule that the appeal must be taken from the specific judgment sought to be stayed.⁵⁴ An appeal from another order will not stay a money judgment in the same action even if the conditions of Section 942 have been satisfied. In *Carit v. Williams*, defendant moved to set aside an execution order issued on a money judgment.⁵⁵ Upon denial of the motion he appealed and sought to stay the original judgment. The court held no relation back doctrine could be applied and the stay was denied.

Although reaffirmed,⁵⁶ there has been some deviation from the rule in district court of appeal opinions. These cases involve orders under Code of Civil Procedure Section 685, which grants trial courts discretion to issue execution although the five year period for execution of judgments has expired. It has been held that an appeal from such an order will stay execution without an undertaking.⁵⁷ Perhaps the result in these cases should not be questioned, since before the execution order the plaintiff had lost his unconditional right to satisfy his judgment.⁵⁸ But surely in the usual case, appellant should not escape the bond requirement by appealing from the order granting execution instead of from the money judgment. Nevertheless, it may be vital to prevent enforcement of the judgment while the order is being reviewed. The supreme court has solved this problem by issuing a *supersedeas* conditional upon the filing of an undertaking.⁵⁹

Undoubtedly a stay of the main judgment is often desirable although the appeal is from a related order.⁶⁰ The decisional law upon this subject demonstrates the inherent difficulty in drafting stay statutes which will be

⁵⁴ *Macario v. Macario*, *supra* note 21; *Bryan v. Superior Court*, 169 Cal. 761, 149 Pac. 938 (1915); *Weldon v. Rogers*, 154 Cal. 632, 98 Pac. 1070 (1908); *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375 (1897); *Carit v. Williams*, 67 Cal. 580, 8 Pac. 93 (1885).

⁵⁵ *Supra* note 54.

⁵⁶ *Macario v. Macario*, *supra* note 21; *Crowley v. Superior Court*, *supra* note 49. See *Weldon v. Rogers*, *supra* note 54 at 637, 98 Pac. at 1071.

⁵⁷ *Helvey v. Castles*, 73 Cal. App. 2d 667, 167 P.2d 492 (1946); *Peterson v. Lampton*, 46 Cal. App. 2d 751, 116 P.2d 952 (1941).

⁵⁸ However, the failure in *Weil v. Weil*, 97 Cal. App. 2d 378, 217 P.2d 979 (1950) (alternative holding), to distinguish between Section 685 orders and a regular execution order cannot be treated in such a cavalier manner. If the appeal prevents the issuance of execution, the money judgment is effectively stayed.

⁵⁹ *Macario v. Macario*, *supra* note 21.

⁶⁰ When an appeal could be taken from an order denying a motion for a new trial, appellant could stay execution on a money judgment in the action by appealing from denial of such a motion and complying with Section 942. See *Starr v. Kreuzberger*, 131 Cal. 41, 66 Pac. 1 (1900); *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9 (1899); *Fulton v. Hanna*, 40 Cal. 278 (1870). However, the right to appeal from such an order was abrogated in 1915. Cal. Stats. 1915, p. 209. *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937 (1919). The courts have refused to create other exceptions to the rule announced in *Carit v. Williams*. See text at note 55 *supra*.

adequate in all possible situations. If trial courts were granted some discretion in staying judgments where an appeal has been taken from a related order, the problem would be alleviated.

The surety bond procedure utilized to stay execution on a money judgment illustrates that it is possible to compromise the competing equities which must be considered in staying a judgment. However, it must be noted that in many cases appellant will be financially unable to procure a stay bond. Perhaps this objection must be dismissed as insolvable, as are others directed at litigation costs, but the problem should be minimized as much as possible by not requiring security in excess of what is necessary. The possibility of decreasing the amount now required in the undertaking should be carefully studied.^{60a}

Stays Upon Judgments Directing Delivery of Documents or Personalty; Appointing Receivers; Foreclosing Mortgages Upon Personalty

On appeal from a judgment commanding assignment or delivery of personal property or documents, the appellant is afforded an alternative method of preventing enforcement pending review.⁶¹ The judgment can be stayed under Section 943, either by placing the document or property in the custody of a court officer or by filing an undertaking.⁶² This section is not limited to judgments which only order the delivery of personalty or documents; it also covers judgments which direct either delivery of personal property or, in the alternative, its value.⁶³

However, Section 943 is inapplicable if appellant does not have the sub-

^{60a} It seems to be the practice of surety companies to require collateral from the appellant equal to the amount of the undertaking unless appellant appears to be financially able to satisfy the appellate courts' order in case of affirmance. Coupled with the cost of the premium, the collateral requirement undoubtedly prevents perfection of a stay in many cases. A decrease in the amount of the undertaking should result in a corresponding decrease in the amount of security required by bonding companies.

⁶¹ CAL. CODE CIV. PROC. § 943: "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal . . ." *Estate of Bond*, 193 Cal. 482, 225 Pac. 450 (1924); *Eastern O. Co., Inc. v. Superior Court*, 38 Cal. App. 374, 176 Pac. 366 (1918).

⁶² If the latter procedure is selected, sureties must engage that appellant will obey the reviewing court's order.

If the trial judge refuses to fix the amount of the undertaking, the writ of mandate will lie to compel such action. *Winsor Pottery Wks. v. Superior Court*, 13 Cal. App. 360, 109 Pac. 843 (1910).

Failure to comply with the appellate court's order within a reasonable time after return of the remittitur constitutes a breach of the stay bond for which respondent can recover. *U.S. Film Co. v. U.S. Fidelity Etc. Co.*, 44 Cal. App. 227, 186 Pac. 364 (1919). But unlike the section regulating money judgments, Section 943 does not authorize entry of a judgment against the sureties on an *ex parte* motion. *Churchill v. More*, *supra* note 49.

⁶³ *Baar v. Smith*, *supra* note 49; *United States Fidelity Etc. Co. v. More*, *supra* note 49. Compliance with Section 943 is necessary although appellant has filed a written undertaking pursuant to Section 514 for redelivery of the property. *Swasey v. Adair*, 88 Cal. 203, 26 Pac. 83 (1891).

ject matter of the judgment in his possession.⁶⁴ Illustrative of this rule is a judgment ordering the sale of pledged property. Since appellant as pledgor does not have possession, the judgment can be stayed on appeal only pursuant to Section 949 without a bond, as a case "not provided for" in the other sections.⁶⁵ If the disputed property has been placed in court custody during the trial, perfection of an appeal will stay further proceedings to enforce the judgment.⁶⁶

Whether a judgment which adjudicates rights in a specific fund is a money judgment or one directing the delivery of personalty is an open question.⁶⁷ The question is academic if the money has been deposited in court, since a stay is created regardless of which section controls. If the specific fund is personalty, deposit in court satisfies Section 943,⁶⁸ and assuming it is a money judgment, Section 948 provides that deposit in court operates to stay the judgment.⁶⁹

The question becomes more than academic, however, when the fund is held by one other than appellant. If the judgment is characterized as a money judgment, not only will Section 942 be inapplicable because a third person, not appellant, is directed to pay the money, but Section 949 will also be held inapplicable.⁷⁰ On the other hand, if the fund is personalty, Section 943 will not apply because appellant does not have possession, but the automatic stay provisions of Section 949 will apply, allowing a stay without an undertaking.⁷¹ Therefore, in order to protect respondent, it seems advisable to classify "specific fund" judgments as money judgments. Especially would this be true if Section 942 were amended to allow a non-performing appellant to obtain a stay by filing an undertaking.⁷²

Where the judgment directs delivery of personalty justification of Section 943's option to post a surety bond is not difficult. Continued utilization of the property is an obvious advantage to the community. But where the judgment directs assignment or delivery of a document, the stay bond pro-

⁶⁴ Baar v. Smith, *supra* note 49; Rohrbacher v. Superior Court, 144 Cal. 631, 78 Pac. 22 (1904). See Jensen v. Hugh Evans & Co., *supra* note 30 at 404, 90 P. 2d at 73; *In re Schedel*, *supra* note 30 at 243, 10 Pac. at 335.

⁶⁵ Rohrbacher v. Superior Court, *supra* note 64. Of course, there is a risk that respondent will dispose of the property without judicial sanction during appeal, but this risk is always present in a pledge transaction. The pledgor presumably contemplated this risk in selecting the pledgee, and the usual remedies are available.

⁶⁶ Gavin v. Landfair Realty Corp., 13 Cal. 2d 56, 87 P. 2d 1012 (1939); Boldemann Chocolate Co. v. Price, 3 Cal. 2d 257, 43 P. 2d 810 (1935). See McCallion v. Hibernia Etc. Society, *supra* note 43 at 445, 33 Pac. at 330.

⁶⁷ A dictum in *In re Schedel*, *supra* note 30 at 243, 10 Pac. at 335, stated that a specific fund was not personal property. But a contrary dictum appears in *McCallion v. Hibernia Etc. Society*, *supra* note 43 at 445, 33 Pac. at 330. No decision was made in *Navarro v. Lippold*, 86 Cal. App. 2d 677, 195 P. 2d 543 (1948), and in *Halsted v. First Savings Bank*, *supra* note 21, it was assumed that it was a money judgment.

⁶⁸ *McCallion v. Hibernia Etc. Society*, *supra* note 43.

⁶⁹ Note 35 *supra*.

⁷⁰ *Halsted v. First Savings Bank*, *supra* note 21.

⁷¹ Baar v. Smith, *supra* note 49; Rohrbacher v. Superior Court, *supra* note 64.

⁷² See text at note 46 *supra*. It should also be noted that if the judgment were controlled by Section 949 the court could not require a stay bond. See text at note 173 *infra*.

cedure has no such justification. This suggests that deposit in court should be the only method allowed.

Section 943 also provides a means for staying orders appointing receivers.⁷³ Appellant can obtain the stay by filing an undertaking in which the sureties engage that appellant will pay the damages occasioned by the appeal if it is unsuccessful.⁷⁴

A judgment or order which directs the sale of personal property upon foreclosures of a mortgage can also be stayed under Section 943.⁷⁵ The undertaking must assure respondent that appellant will deliver the property or its value to the proper officer if the judgment is affirmed.⁷⁶

Stays Upon Judgments Directing the Sale or Delivery of Possession of Real Property

A judgment directing the sale or delivery of possession of real property is stayed by complying with Section 945.⁷⁷ To give respondent the required

⁷³ "... If the judgment or order appealed from appoint a receiver, the execution of the judgment or order cannot be stayed by appeal, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking." See *El Dora Oil Co. v. Gibson*, 201 Cal. 231, 256 Pac. 550 (1927); *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579 (1911).

⁷⁴ *Jacobs v. Superior Court*, 133 Cal. 364, 65 Pac. 826 (1901); *Santa Ynez M. Corp. Ltd. v. Superior Court*, 26 Cal. App. 2d 279, 79 P. 2d 185 (1938); *Sunset Farms Inc. v. Superior Court*, 9 Cal. App. 2d 389, 50 P. 2d 106 (1935); *Pacific Broadcasting Co. v. Superior Court*, 100 Cal. App. 649, 280 Pac. 991 (1929); *Western Etc. Mtg. Co. v. Superior Court*, 22 Cal. App. 413, 134 Pac. 732 (1913).

⁷⁵ "If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay to the proper officer the full value of such property at the date of the appeal."

Prior to 1897, an appeal without a stay bond suspended the trial court enforcement. Cal. Stats. 1897, p. 56. *Powers v. Chabot*, 93 Cal. 266, 28 Pac. 1070 (1892); *Powers v. Crane*, 67 Cal. 65, 7 Pac. 135 (1885); *Snow v. Holmes*, 64 Cal. 232, 30 Pac. 896 (1883).

⁷⁶ *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69 (1914); *Toebe v. Heydenfeldt*, 138 Cal. 56, 70 Pac. 1013 (1902).

⁷⁷ "If the judgment or order appealed from, direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." See *Archer v. Miller*, 192 Cal. 67, 218 Pac. 410 (1923); *Sing v. Baker*, 187 Cal. 587, 203 Pac. 737 (1921); *Jameson v. Chanslor-Canfield Etc. Oil Co.*, 173 Cal. 612, 160 Pac. 1066 (1916); *Southern Pacific Co. v. Superior Court*, *supra* note 76; *Wheeler v. Karnes*, 130 Cal. 618, 63 Pac. 62 (1900); *Sheppard v. Tyler*, 92 Cal. 552, 28 Pac. 601 (1891); *Walsh v. Soule*, 66 Cal. 443, 6 Pac. 82 (1885).

protection the section prevents an appeal from functioning as a stay unless appellant also files an undertaking, covenanting that no waste will be committed,⁷⁶ and assuring respondent compensation for the use and occupation of the property if the appeal is unsuccessful.⁷⁹ And if the judgment directs the sale of mortgaged property and payment of any deficiency, the undertaking must also provide for the deficiency payment.⁸⁰ Although there must be a covenant upon each applicable provision, it is not necessary that a separate sum be designated for each; a lump sum to cover all covenants will be sufficient.⁸¹ The trial judge must fix the amount of the undertaking and if he refuses, mandamus will lie to compel his action.⁸² But appellate courts have no power to demand additional security.⁸³

Trial court permission a prerequisite in certain cases.—When appealing from a judgment in forcible entry, forcible detainer, or unlawful detainer appellant must meet additional requirements. Section 1176 declares that these judgments cannot be stayed without the trial judge's permission.⁸⁴ Once permission has been obtained, compliance with Section 945 is still necessary.⁸⁵ This procedure apparently represents a legislative decision that respondent would not be sufficiently protected in all cases by a bond and that the trial judge could best determine whether there should be a stay. Appellate courts have deferred to this decision and have refused to issue a *supersedeas* where a stay has been denied.⁸⁶

Section 945 inapplicable if appellant is not in possession.—When appellant is not in possession of the property Section 945 is not applicable.⁸⁷ Rather, the judgment will be stayed merely by the appeal under Section 949.⁸⁸ There is no reason to object to such a stay without security in some situations. For example, if the property is held by a court receiver, respond-

⁷⁶ Bank of Woodland v. Stephens, 137 Cal. 458, 70 Pac. 671 (1902).

⁷⁹ Sheppard v. Tyler, *supra* note 77; Walsh v. Soule, *supra* note 77.

⁸⁰ Boob v. Hall, 105 Cal. 413, 38 Pac. 977 (1895).

⁸¹ Wheeler v. Karnes, *supra* note 77.

⁸² Hinkel v. Crowson, 182 Cal. 68, 186 Pac. 1042 (1920); Gordan v. Graham, 153 Cal. 297, 95 Pac. 145 (1908); Gutierrez v. Hebbard, 104 Cal. 103, 37 Pac. 749 (1894); Green v. Hebbard, 95 Cal. 39, 30 Pac. 202 (1892).

⁸³ Jameson v. Chanslor-Canfield Etc. Oil Co., *supra* note 77.

⁸⁴ Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922 (1903); Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048 (1902); Magnaud v. Traeger, 66 Cal. App. 526, 226 Pac. 990 (1924); Canderas v. Superior Court, 49 Cal. App. 580, 193 Pac. 957 (1920); Plummer v. Agoure, 20 Cal. App. 319, 128 Pac. 1014 (1912). Only the judge who renders the judgment may grant the stay. Magnaud v. Traeger, *supra*.

⁸⁵ Wood-Drury, Inc. v. Superior Court, 18 Cal. App. 2d 340, 63 P.2d 1184 (1936).

⁸⁶ Bateman v. Superior Court, *supra* note 84; Cluness v. Bowen, *supra* note 84; Plummer v. Agoure, *supra* note 84.

⁸⁷ McClintock v. Powley, 210 Cal. 333, 291 Pac. 833 (1930); Keeling Collection Agency v. McKeever, 209 Cal. 625, 289 Pac. 617 (1930); Zappettini v. Buckles, *supra* note 33; Owen v. Pomona Land Etc. Co., *supra* note 32; McMillan v. Hayward, 84 Cal. 85, 24 Pac. 151 (1890); Root, Neilson & Co. v. Bryant, 54 Cal. 182 (1880). Appellant will be considered in possession, if someone occupies the premises, subordinate to him. McClintock v. Powley, *supra*; McMillan v. Hayward, *supra*.

⁸⁸ Cases cited note 87 *supra*.

ent will be sufficiently protected.⁸⁹ Likewise, where respondent is in possession no security is necessary.⁹⁰

Nevertheless, situations exist in which failure to require security would jeopardize respondent's rights, although appellant is not in possession. The first case holding Section 945 inapplicable when appellant was not in possession, *Root, Neilson & Co. v. Bryant*, illustrates such a situation.⁹¹ In this action to foreclose a mechanic's lien upon saw-mill property, plaintiff impleaded a bank which held a subordinate lien. From a decree directing sale of the property, the bank appealed and petitioned for a *supersedeas* on the theory that a stay existed by virtue of the appeal, since they were not in possession. The court agreed, concluding that since this was not a case provided for in Sections 942, 943, 944, and 945, appellant was therefore entitled to the automatic stay of Section 949. The court's construction of these sections is perhaps necessitated by the language, but if so, it is questionable whether the result demanded by the code is desirable. If a stay bond is necessary for respondent's protection this necessity is not obviated because appellant does not occupy the property; it is still subject to waste. Thus in the *Root* case if the value of the saw-mill property barely covered plaintiff's claim at time of trial, protracted waste committed during the appeal period would seriously injure respondent. While it may seem harsh to subject appellant to liability for damages beyond his control, it is he who benefits from the stay.⁹²

The *Root* case was cited with approval fifty years later in *Keeling Collection Agency v. McKeever*, a similar case involving a mechanic's lien and a deed of trust.⁹³ It was held that appellant, not in possession of the realty, was entitled to an automatic stay under Section 949. *Keeling* was more than a reaffirmation of *Root*, however, since three years before *Keeling* was tried Section 949 had been amended to grant trial courts discretionary power to demand an undertaking.⁹⁴ The possibility that this power could have been utilized to protect respondent was recognized in *Keeling*, even though the court concluded there was no showing that the trial court had abused its discretion in not requiring a bond. But this possibility of relief held out to future, similarly situated, respondents was considerably weakened a few years later when it was held an abuse of discretion to require a bond from an appellant not required to perform by the judgment.⁹⁵

⁸⁹ See Zappettini v. Buckles, *supra* note 33.

⁹⁰ See Owen v. Pomona Land Etc. Co., *supra* note 32.

⁹¹ *Supra* note 87.

⁹² Compare *Root, Neilson & Co. v. Bryant*, *supra* note 87, with *Johnson v. King*, 91 Cal. 307, 27 Pac. 644 (1891), and *Spence v. Kowalsky*, 95 Cal. 152, 30 Pac. 202 (1892). In the latter two cases it was held that although appellant was not the mortgagor, he was responsible for the deficiency judgment provided for in the bond.

⁹³ *Supra* note 87.

⁹⁴ See text at note 172 *infra*.

⁹⁵ See text at note 173 *infra*.

Stays Upon Judgments Directing Execution of an Instrument

Section 944 declares that a judgment or order which directs execution of an instrument cannot be stayed until the instrument is executed and deposited in court.⁹⁶

It is probable that while compliance with this section is sufficient in some instances to stay the judgment, in others it is only a prerequisite to a statutory stay. Thus, if the judgment merely commanded execution of an instrument, a stay could be obtained by appealing and depositing the executed instrument in court. On the other hand, if the judgment ordered appellant to execute a deed and deliver possession of real property, compliance with Section 945, by filing an undertaking, also would be necessary. There have been no square holdings as to the Section 944's scope, but dicta in two cases support this thesis.⁹⁷

STAYS CREATED BY THE PERFECTION OF AN APPEAL

Mere perfection of an appeal stays the judgments covered by Section 949.⁹⁸ The section embodies a vestigial remnant of the early common law

⁹⁶ "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court." See *Guardianship of Morro*, *supra* note 34; *Ambrose v. Alioto*, 62 Cal. App. 2d 680, 145 P.2d 32 (1944). See *Ballinger v. Ballinger*, *supra* note 33 at 308, 61 P.2d at 45; *Archer v. Miller*, 192 Cal. 67, 70, 218 Pac. 410, 411 (1923); *Greenspot Desert Inns, Inc. v. Roy*, 63 Cal. App. 2d 54, 59, 146 P.2d 39, 41 (1944); *Ott Hardware Co. v. Holmberg*, 36 Cal. App. 402, 404, 179 Pac. 422, (1918).

⁹⁷ In *Greenport Desert Inns, Inc. v. Roy*, *supra* note 96, a lessee in possession obtained a judgment ordering the lessor to execute a conditional sale contract. The court indicated that the lessor could have obtained a stay by depositing an executed contract with the county clerk, implying that only Section 944 was involved.

In *Archer v. Miller*, *supra* note 96, plaintiff in possession sought to quiet title to land. The trial court found defendant entitled to a decree of specific performance upon payment of the purchase price designated in a sales contract between the parties. Plaintiff appealed and sought a *supersedeas*. He contended that although a stay had been perfected by depositing a deed in court, the court clerk had indicated his intention of delivering the deed to respondent. Respondent's position was that no stay existed as appellant had not also filed a bond pursuant to Section 945. This contention was accepted by the supreme court but the writ was granted because respondent had failed to pay the purchase price.

⁹⁸ "In cases not provided for in sections 942, 943, 944 and 945, the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from; but the court in its discretion may require an undertaking in an amount to be fixed by it conditioned for the performance of the judgment or order appealed from if the same is affirmed or the appeal is dismissed; provided, that where such judgment or order appealed from directs the sale of perishable property the court below may order the property to be sold and the proceeds thereof to be deposited with the clerk of the court to abide the judgment of the appellate court. But such appeal does not stay proceedings without a writ of *supersedeas*, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this State, or where the order grants, or refuses to grant, a change of the place of trial of an action, or where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder, or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy, or where it adjudges a building or place to be a nuisance, and as a part of the judgment in the case orders and directs the closing of the building or place, against its use for any purpose for any period of time."

doctrine that a writ of error functioned as a *supersedeas*. Scope and effect of the section are defined in the introductory clause which states:

In cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from . . .⁹⁹

The exclusions are not limited to those of the introductory clause,¹⁰⁰ four others being enumerated in remaining portions of the section. But, unlike the judgments excluded in the introductory clause which are stayed under other code provisions, judgments within the four exclusions can be stayed only by issuance of the writ of *supersedeas*. These specially treated judgments or orders are those which adjudge defendant guilty of usurping or unlawfully holding a public office,¹⁰¹ grant or deny a change of venue,¹⁰² allow inspection of corporate records,¹⁰³ or close a building which has been declared a nuisance.¹⁰⁴

The remaining portions of this comment will be devoted to an investigation of those judgments or orders coming within the automatic stay provisions of Section 949, concerning which the most confusion has arisen. But before this consideration it seems advisable to analyze a concept which

⁹⁹ Since 1927 the trial court has had discretionary power to require an undertaking whenever a defendant is ordered to perform by the judgment. See text at note 173 *infra*.

¹⁰⁰ The section also allows the trial court to sell perishable property and deposit the proceeds. See *Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357 (1910).

¹⁰¹ Appeal from judgment that appellant had usurped the office of police judge did not stay the judgment. *Ex Parte Henshaw*, 73 Cal. 486, 15 Pac. 110 (1887). A judgment removing an officer for malfeasance in office is not within the exception, and will be stayed by appeal. *Covarrubias v. Board of Supervisors*, 52 Cal. 622 (1878). Formerly judgments determining election contests under CAL. CODE CIV. PROC. § 1126 (repealed) were stayed by appeal. *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172 (1899). Now, however, Section 8575 of the Elections Code declares, "... the person declared elected by the superior court shall be entitled to the office in like manner as if no appeal had been taken."

¹⁰² "The writ will issue only when justified by a showing that substantial questions will be presented upon the appeal from an order denying change of venue." *Bardwell v. Turner*, 219 Cal. 228, 229, 25 P.2d 978, 979 (1933). The writ was granted in these cases: *Bardwell v. Turner*, *supra*; *Tucker v. Howe*, 217 Cal. 23, 17 P.2d 103 (1932); *Alhambra Shumway Mines v. Alhambra Gold Mine Corp.*, 109 A.C.A. 115, 240 P.2d 340 (1952); *Willingham v. Pecora*, 40 Cal. App. 2d 123, 104 P.2d 405 (1940). The writ was refused in these cases: *Yee Kee Chong v. Pacific Freight Lines*, 72 Cal. App. 2d 219, 164 P.2d 43 (1945); *Kane v. Universal Film Exchanges*, 32 Cal. App. 2d 365, 89 P.2d 577 (1939); *McKenzie v. Los Angeles Life Ins. Co.*, 88 Cal. App. 259, 263 Pac. 338 (1928). The provision in Section 949 was apparently overlooked in *Catsiftes v. Catsiftes*, 29 Cal. App. 2d 207, 84 P.2d 258 (1938).

¹⁰³ "It is incumbent upon the petitioner to show that substantial questions will be presented upon appeal and that some special reason exists why the inspection of the record should be stayed pending the appeal." *Laher Etc. Corp. v. Superior Court*, 52 Cal. App. 2d 467, 468, 126 P.2d 391 (1942). The writ issued in these cases: *Capron v. Pacific Southwest D. Corp.*, 1 Cal. App. 2d 295, 36 P.2d 664 (1934); *Becker v. Hendricks*, 109 Cal. App. 166, 292 Pac. 546 (1930); *Sisson v. Guaranty Mortgage Co.*, 90 Cal. App. 510, 265 Pac. 1031 (1928). The writ was denied in these cases: *Laher Etc. Corp. v. Superior Court*, *supra*; *Homestake Mining Co. v. Superior Court*, *supra* note 12; *Pierce v. Hill*, 101 Cal. App. 547, 281 Pac. 676 (1929).

¹⁰⁴ *United States v. Berg*, 202 Cal. 10, 258 Pac. 942 (1927); *People v. Jackson*, *supra* note 11; *People v. Smith*, 71 Cal. App. 2d 211, 162 P.2d 475 (1945); *People v. Piazza*, 59 Cal. App. 43, 209 Pac. 1017 (1922).

has caused much confusion in the application of Section 949's automatic stay rule.

Self-Executing Judgments

So-called self-executing judgments are not stayed either by the statutory stay provisions of Section 949 or by the writ of *supersedeas*.¹⁰⁵ A self-executing judgment is one which creates rights in and of itself without need for implementation by further court proceedings.¹⁰⁶ This doctrine has its basis in the theory that a stay, statutory or *supersedeas*, does not deprive the trial court's decision of its validity, but merely prohibits any further proceedings which would be utilized to enforce the judgment, for example, execution on a money judgment. Since there are no further trial court proceedings to be initiated upon a self-executing judgment, there is no judicial process upon which a stay could operate. Action on the judgment could be prevented only by an injunction restraining the litigants or other parties from acting, but neither a stay nor a *supersedeas* can function as an injunction.¹⁰⁷

A judgment which merely adjudicates status may serve to illustrate this rule. A litigant who has been adjudged the duly elected director of a corporation cannot be deposed by an appeal.¹⁰⁸ The board of directors may exclude the losing litigant and admit the winner to the board. Such action requires no further court proceedings for the trial court's decision to be effective. Similarly, an order suspending a lawyer from the practice of law is held to be self-executing.¹⁰⁹

Examples of other self-executing judgments include:¹¹⁰ an order to the Insurance Commissioner approving a proposed rehabilitation and reinsurance agreement,¹¹¹ an order dismissing a petition for postponement of a

¹⁰⁵ *Caminetti v. Guaranty Union Life Ins. Co.*, *supra* note 22; *Stewart v. Hurt*, *supra* note 21; *Boggs v. North American Bond Etc. Co.*, 6 Cal. 2d 523, 58 P. 2d 918 (1936); *Hulse v. Davis*, *supra* note 22; *Dulin v. Pacific W. & C. Co.*, *supra* note 13; *Merced Mining Co. v. Fremont*, 7 Cal. 130 (1857); *Martin v. Board of Trustees, Etc.*, 37 Cal. App. 2d 481, 99 P. 2d 684 (1940); *Erickson v. Municipal Court*, 131 Cal. App. 327, 21 P. 2d 480 (1923); *In re Graves*, 62 Cal. App. 168, 216 Pac. 386 (1932). See also cases cited in note 129 *infra*, in which it was held a prohibitory injunction is self-executing.

¹⁰⁶ See note 23 *supra*.

¹⁰⁷ Cases cited note 105 *supra*.

¹⁰⁸ *Dulin v. Pacific W. & Co.*, *supra* note 13.

¹⁰⁹ *Tyler v. Presley*, *supra* note 22; *Lincoln v. Superior Court*, 95 Cal. App. 35, 271 Pac. 1107 (1928); *In re Graves*, *supra* note 105. *But see* *Parker v. Dental Examiners*, 108 Cal. App. 156, 291 Pac. 421, 422 (1930). See also Note, 166 A.L.R. 575 (1947).

¹¹⁰ Statements can be found in cases from other jurisdictions declaring that a self-executing judgment can be stayed. However, examination shows these cases involve either the trial court's power to suspend its judgment without statutory authorization, e.g., *Blaustein v. Standard Oil Co.*, 4 Terry 238, 45 A. 2d 533 (Super. Ct. 1945) (trial court kept alive writ of foreign attachment by staying its order quashing the writ); *Palmer v. Harris*, 23 Okla. 500, 101 Pac. 852 (1909); or the trial court's power to enjoin litigants from disturbing the status quo pending appeal, e.g., *Strangways v. Ringgold*, 107 Ark. 433, 153 S.W. 619 (1913) (injunction by trial court restraining party from proceeding in organization of a drainage district).

¹¹¹ *Caminetti v. Guaranty Union Life Ins. Co.*, *supra* note 22.

sale under a deed of trust,¹¹² a judgment that a city never had been lawfully incorporated,¹¹³ and an order quashing execution.¹¹⁴

Courts in many jurisdictions use injunctive power to restrain litigants from disturbing the status quo pending appeal from a self-executing judgment.¹¹⁵ California courts have refused to do so and also have denied *superseedeas* when to grant it would be equivalent to issuing an injunction.¹¹⁶

The California rule is well grounded in precedent,¹¹⁷ but does not appear strongly supported by reason. A contention that the supreme court has injunctive power in aid of appellate jurisdiction was summarily rejected in an early case with the statement that the power had not been granted by the legislature.¹¹⁸ The constitutional provision that "They [the supreme court] shall also have the power to issue all other writs and process necessary to the exercise of their appellate jurisdiction," went unmentioned.¹¹⁹ Courts in some jurisdictions have reached a contrary result in construing similar provisions.¹²⁰

Power to grant injunctions seems well within the constitutional provisions and would be highly desirable. In meritorious cases where *superseedeas* would be inapplicable because the judgment was self-executing, the appellate court could restrain the parties so as to preserve the subject of the appeal.¹²¹

¹¹² *Boggs v. North American Bond Etc. Co.*, *supra* note 105.

¹¹³ *People v. City of Westmoreland*, *supra* note 22.

¹¹⁴ *Halse v. Davis*, *supra* note 22.

¹¹⁵ *E.g.*, *Barry v. Willard*, 114 Fla. 800, 154 So. 843 (1934); *State Ex Rel. Phoenix Loan Co. v. Marsh*, 139 Neb. 290, 297 N.W. 551 (1941); *Hough v. Roberts Min. & Mill Co.*, 58 Nev. 317, 78 P.2d 102 (1938); *Clark v. Kraft*, 169 Wash. 49, 13 P.2d 7 (1932). See also Note, 133 A.L.R. 1105.

¹¹⁶ *Canavarro v. Theatre Etc. Union*, 15 Cal.2d 495, 101 P.2d 1081 (1940); *Seltzer v. Musicians Union Local No. 6*, 12 Cal.2d 718, 87 P.2d 699 (1939); *McCann v. Union Bank & Trust Co.*, 4 Cal.2d 24, 47 P.2d 283 (1935); *Wollenshlager v. Riegel*, 186 Cal. 622, 200 Pac. 726 (1921); *Napa Val. Elec. Co. v. Calistoga Elec. Co.*, 174 Cal. 411, 163 Pac. 497 (1917); *Hicks v. Michael*, 15 Cal. 107 (1860); *Solorza v. Park Water Co.*, 80 Cal. App. 2d 809, 183 P.2d 275 (1947). The rejection of this doctrine is advocated in Note, 30 CALIF. L. REV. 209, 211 (1942). If this were done a prohibitory injunction could be "stayed" by enjoining the litigant from enforcing it.

¹¹⁷ Cases cited note 116 *supra*.

¹¹⁸ *Hicks v. Michael*, *supra* note 116.

¹¹⁹ See note 12 *supra*. See also *Martin v. Rosen*, 2 Cal. App. 2d 450, 38 P.2d 855 (1934), overruled in *McCann v. Union Bank & Trust Co.*, *supra* note 116.

¹²⁰ *Astca Inc. Co. v. Lake County*, 86 Fla. 639, 98 So. 824 (1922); *Finlen v. Heinze*, 27 Mont. 107, 123, 69 Pac. 829, 70 Pac. 517 (1902).

¹²¹ This would allow the court to maintain the status quo upon an appeal from a decree denying an injunction, where such action seemed advisable to preserve the rights involved in the appeal. As an illustration of this rule see *Strangways v. Ringgold*, *supra* note 110. For contrary California rule see *Napa Val. Elec. Co. v. Calistoga Elec. Co.*, *supra* note 116.

Orders Concerning Court Officers

Orders to,¹²² or appointing, administrators,¹²³ guardians,¹²⁴ or executors¹²⁵ are stayed on appeal by Section 949. As court officers these individuals derive their power to act from the court,¹²⁶ and their acts, like the processes of a court, are considered further court proceedings. In practical effect there is no distinction between a sheriff proceeding under a writ of execution and a guardian executing court orders. Both are enforcing the court's decision, under its authority.

Failure of respondents to discern the similarity between orders to court officers and other enforcement proceedings, such as a writ of execution, has often led to needless litigation. *Coburn v. Hynes* is a case in point.¹²⁷ Appellant contended that his appeal from an order appointing a guardian created a stay. In answer to respondent's argument that the order was self-executing, the supreme court granted *supersedeas* and observed that a guardian is an officer of the court and acts pursuant to court authority.

The self-executing argument was again rejected in *Estate of Dabney*, a recent case involving an appeal from a decree of distribution.¹²⁸ The court held that an appeal prevented the executor from distributing the assets of the estate until appellate review was completed.

Injunctions

Statutory law.—Whether injunctive decrees are governed by the automatic stay of Section 949 has led to confused reasoning and results. As the rules have developed, prohibitory injunctions are not stayed by an ap-

¹²² E.g., an order to an executor, a decree of distribution. *Estate of Dabney*, *supra* note 30; *Estate of Welling*, 197 Cal. 189, 240 Pac. 21 (1925); *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560 (1898); *Pennie v. Superior Court*, *supra* note 43; *Born v. Horstmann*, *supra* note 43; *In re Schedel*, *supra* note 30; *Estate of Garaud*, 36 Cal. 277 (1868); *Linstead v. Superior Court*, 17 Cal. App. 2d 9, 61 P. 2d 355 (1936).

Pennie v. Superior Court, *supra*, held that an appeal from an order granting family allowance stayed enforcement of that order. Now, under CAL. PROB. CODE § 684 an appeal will not stay such an order if an undertaking is filed in double the amount of the payments.

¹²³ *Estate of Sam Lee*, 26 Cal. 2d 295, 158 P. 2d 193 (1945); *In re Wood's Estate*, 94 Cal. 566, 29 Pac. 1108 (1892). An order appointing a special administrator is not appealable. CAL. PROB. CODE § 461.

¹²⁴ *Coburn v. Hynes*, 161 Cal. 685, 120 P. 2d 26 (1911); *Guardianship of Walters*, 93 Cal. App. 2d 208, 208 P. 2d 713 (1949); *Rungie v. Superior Court*, 55 Cal. App. 2d 115, 130 P. 2d 140 (1942).

¹²⁵ *Estate of Hultin*, *supra* note 30; *Estate of Stough*, 173 Cal. 638, 161 Pac. 1 (1916).

¹²⁶ That an executor is an officer of the court see *Larrabee v. Tracy*, 21 Cal. 2d 645, 134 P. 2d 265 (1943); *Estate of Conkley*, 35 Cal. App. 2d 581, 96 P. 2d 383 (1939). That an executor or administrator derives his power to act from the order of the court see *County of Los Angeles v. Morrison*, 15 Cal. 2d 368, 101 P. 2d 470 (1940).

¹²⁷ *Supra* note 124.

¹²⁸ *Supra* note 30.

¹²⁹ *Food & Grocery Bureau v. Garfield*, *supra* note 27; *Canavaro v. Theatre, Etc., Union*, 15 Cal. 2d 495, 101 P. 2d 1081 (1940); *Clayton v. Schultz*, 12 Cal. 2d 703, 87 P. 2d 355 (1939); *Ohaver v. Fenech*, 206 Cal. 118, 273 Pac. 555 (1928); *Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115 (1916); *Heinlen v. Cross*, 63 Cal. 44 (1883); *Merced Mining Co. v. Fremont*, 7 Cal. 130 (1857); *Rubin v. American Sportsmen Etc. Soc.*, 102 Cal. App. 2d 288, 227 P. 2d 303, 25 So. CALIF. L. REV. 121 (1951); *Suburban Gas Service, Inc. v. Higgins*, 98 Cal. App. 2d 767, 220 P. 2d 798 (1950); *French Art Cleaners v. State Etc. Cleaners*, 88 Cal. App. 2d 45, 198 P. 2d 91 (1948); *Jaynes v. Weickman*, 51 Cal. App. 696, 197 Pac. 672 (1921).

peal,¹²⁹ yet an appeal from a mandatory injunction does create a stay.¹³⁰ The reason for this dichotomy is not readily apparent.¹³¹

Two rationales have been advanced to support the proposition that an appeal does not stay a prohibitory injunction. In an early case the supreme court, stating that a prohibitory injunction restrains rather than commands performance, analogized the automatic stay section to its companion sections which reach only those judgments commanding that an act be done, and thus held that no stay could be created.¹³²

An apparent rationale of subsequent cases is that a prohibitory injunction is not enforced by subsequent court proceedings, leaving nothing upon which a stay will operate.¹³³ Ensuing contempt proceedings for violation of the injunction are not viewed as enforcement of the original decree, but rather as separate punitive proceedings, in no way "proceedings in the court below upon . . . the order."¹³⁴ Characterizations of a prohibitory injunction as self-executing, and thus not subject to stay, seems to be a restatement of the same doctrine.¹³⁵

But enforcement of a mandatory injunction by the contempt power is regarded as an affirmative enforcement of the judgment, likened to execution, and thus stayable.¹³⁶ This mandatory-prohibitory distinction has been soundly criticized on the ground that use of the court's contempt power is equally coercive in either situation.¹³⁷

Thus under present law, classification of injunction as prohibitive or mandatory is crucial. The distinction often being but a matter of form,¹³⁸ courts have repeated that substance and not form controls the classification.¹³⁹ Frequently injunctions are declared mandatory, although couched in prohibitory terminology. *Ambrose v. Alioto* exemplifies this construc-

¹³⁰ *Smith v. Smith*, *supra* note 14; *Byington v. Superior Court*, 14 Cal. 2d 68, 92 P. 2d 896 (1939); *Feinberg v. One Doe Co.*, *supra* note 23; *Joeger v. Mt. Shasta Power Corp.*, 214 Cal. 2d 129, 99 Pac. 362 (1908); *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333 (1889); *In re Donovan*, 94 Cal. App. 2d 399, 210 P. 2d 860 (1949); *Ambrose v. Alioto*, 62 Cal. App. 2d 680, 145 P. 2d 32 (1944).

¹³¹ This distinction is criticized in a comment in 28 CALIF. L. REV. 599 (1940).

¹³² *Merced Mining Co. v. Fremont*, *supra* note 129.

¹³³ *Feinberg v. One Doe Co.*, *supra* note 23; *Ohaver v. Fenech*, *supra* note 129; *Wolf v. Gall*, *supra* note 129; *Clute v. Superior Court*, *supra* note 130. See also Comment, 28 CALIF. L. REV. 599, 601 (1940).

¹³⁴ See language of Section 949, *supra* note 98.

¹³⁵ *Ohaver v. Fenech*, *supra* note 129; *Wolf v. Gall*, *supra* note 129; *Heinlen v. Cross*, *supra* note 129.

¹³⁶ Cases cited note 130 *supra*.

¹³⁷ Comment, 28 CALIF. L. REV. 599, 601 (1940). As suggested in that comment, the contempt power is especially coercive when the action prohibited is of a continuous nature such as diversion of water. See also Note, 30 CALIF. L. REV. 209 (1942).

¹³⁸ See *Feinberg v. One Doe Co.*, *supra* note 23. Defendant employer was restrained "from employing, or continuing to employ, or hereafter employing" a present employee. The court held the order mandatory. It was said "the order directed and commanded the defendant to discharge said employee."

¹³⁹ *Byington v. Superior Court*, *supra* note 130; *Feinberg v. One Doe Co.*, *supra* note 23; *Ohaver v. Fenech*, *supra* note 129; *Clute v. Superior Court*, *supra* note 129; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58 (1896); *Ambrose v. Alioto*, *supra* note 130.

tional rule;¹⁴⁰ the decree restrained defendant from delivering a fishing boat's "catch" to anyone other than a designated company. The provision was held to be mandatory.

Further alleviating the harshness of the mandatory-prohibitory distinction is the doctrine that an injunction is mandatory if it compels surrender of property rights.¹⁴¹ In *Byington v. Superior Court* the supreme court held that an order which denied petitioner the right to appropriate water was mandatory and thus stayed, on the ground that it compelled surrender of a property right.¹⁴²

Impact of writ of supersedeas.—Many injunctions remain too clearly prohibitive to be thus transformed and remain outside the pale of the automatic stay. In *Food & Grocery Bureau v. Garfield*, *supersedeas* was issued to fill the void and provide a stay upon an appeal from a prohibitory injunction.¹⁴³ Attorneys faced with prohibitory injunctions long had contended that in this situation the appellate courts had power to issue the writ to aid its appellate jurisdiction. Considerable dicta afforded encouragement to this contention,¹⁴⁴ but not until *Garfield* in 1941 did the oft repeated dicta become law.

Contradiction between statutory law and writ law as applied to prohibitory injunction.—The *Garfield* case seems self-contradictory. It holds the injunction self-executing and therefore not subject to stay under Section 949; yet, although it has been repeatedly held that the writ of *supersedeas* has no effect upon such a judgment,¹⁴⁵ the writ was granted.

Since Section 949 was held inapplicable it hardly can be argued that the case impliedly overruled the cases holding a prohibitory injunction self-executing. Indeed, the proposition was expressly reaffirmed.¹⁴⁶ Nevertheless, action upon a judgment was suspended and this could have been taken only by court process or by independent action by litigants. Therefore, since *supersedeas* functions only to suspend the lower court's power to enforce its judgment, implicit in the writ's issuance in *Garfield* is the recognition that enforcement proceedings are possible upon a prohibitory injunction.¹⁴⁷

This conclusion can be avoided only if the writ itself functions as an

¹⁴⁰ *Supra* note 130.

¹⁴¹ *Byington v. Superior Court*, *supra* note 130; *Joeger v. Mt. Shasta Power Corp.*, *supra* note 130; *Clute v. Superior Court*, *supra* note 130; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156 (1893). See dissenting and concurring opinions in *United Railroads v. Superior Court*, 172 Cal. 80, 155 Pac. 463 (1916), for discussion of this doctrine. See also Comment, 28 CALIF. L. REV. 599, 602 (1940).

¹⁴² *Supra* note 130.

¹⁴³ *Supra* note 27.

¹⁴⁴ *Clayton v. Schultz*, *supra* note 129 at 708, 87 P. 2d at 357; *Dry Cleaners & Dyers Institute v. Reiss*, 5 Cal. 2d 306, 310, 54 P. 2d 470, 471 (1936); *Goodall v. Brite*, 1 Cal. 2d 583, 586, 36 P. 2d 190, 191 (1934) *semble*; *People v. Associated Oil Co.*, 211 Cal. 93, 98, 294 Pac. 717, 720 (1930); *Ohaver v. Fenech*, *supra* note 129 at 124, 273 Pac. at 557.

¹⁴⁵ See text at note 22 *supra*.

¹⁴⁶ "If on the other hand the injunction is prohibitory, it is self-executing and its operation is not stayed by appeal." *Supra* note 27 at 177, 114 P. 2d at 580.

¹⁴⁷ See text at note 22 *supra*.

injunction, restraining the respondent from initiating contempt proceedings on the original injunction pending review. But other judicially created roadblocks render this escape route unavailable. First, the courts have held the writ may *not* function as an injunction.¹⁴⁸ Second, and more important, the courts have rejected the theory that any injunctive relief can be utilized in aid of their appellate jurisdiction.¹⁴⁹ Unless this rule is overturned, cases in which a *supersedeas* issues upon a prohibitory injunction cannot be explained upon an injunction theory.

A realistic solution to the problem would be to recognize that prohibitory injunctions are not self-executing and that contempt proceedings for their violation are court proceedings which carry out the original injunction. Such a decision would reconcile the writ cases.¹⁵⁰ Further, it would follow that an appeal from a prohibitory injunction would create an automatic stay since the point of distinction from mandatory injunctions would thus be eliminated.

Perhaps such a result would not be desirable, since it is arguable that neither injunction should be automatically stayed by appeal. Appeal is often utilized as a delaying tactic. The solution of the promulgators of the Federal Rules of Civil Procedure was to give discretionary power to the trial court to stay the decree.¹⁵¹ A similar plan might be desirable in California. If injunctions were removed from the automatic stay section, appellant would still have two opportunities to prevent enforcement pending appeal. The trial court might suspend its decree until it has been affirmed,¹⁵² and failing there, appellant could apply for a *supersedeas* in the appellate court.

However, a countervailing argument for including injunctions in Section 949 merits mention. Since the 1927 amendment to the section allows the trial court to give respondent protection by requiring the appellant to file an undertaking it is possible to argue that both litigants would receive sufficient protection even with an automatic stay. One conclusion seems certain. Whichever alternative is selected, there should be no distinction between mandatory and prohibitory injunctions.

Stays Upon Appeals from Child Custody Decrees

Appeal from a child custody decree automatically stays further trial court proceedings to carry out that decree.¹⁵³ Accordingly, if a wife has

¹⁴⁸ *Dulin v. Pacific W. & C. Co.*, *supra* note 13.

¹⁴⁹ Cases cited note 117 *supra*.

¹⁵⁰ See text at note 145 *supra*.

¹⁵¹ FED. R. Civ. P. 62. This does not deprive the appellate courts of their power to stay the judgment. See subdivision g of Rule 62.

¹⁵² *Tulare Irr. Dist. v. Superior Court*, 197 Cal. 649, 242 Pac. 725 (1925).

¹⁵³ *Gantner v. Superior Court*, *supra* note 30; *Lerner v. Superior Court*, *supra* note 30; *Foster v. Foster*, 5 Cal. 2d 669, 55 P. 2d 1175 (1936); *Foster v. Superior Court*, 4 Cal. 2d 125, 47 P. 2d 701 (1935); *Browning v. Browning*, 208 Cal. 518, 282 Pac. 503 (1929); *DeLemos v. Siddall*, 143 Cal. 313, 76 Pac. 1115 (1904); *Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473 (1902); *Ex Parte Queirolo*, 119 Cal. 635, 51 Pac. 956 (1898); *In re Lukasik*, 108 A.C.A. 502, 239 P. 2d 492 (1951); *Olcott v. Superior Court*, 68 Cal. App. 2d 603, 157 P. 2d 36 (1945); *Moon v. Superior Court*, 59 Cal. App. 2d 447, 139 P. 2d 84 (1943); *In re Browning*, 108 Cal. App. 503, 291 Pac. 650 (1930); *Ritter v. Superior Court*, 99 Cal. App. 121, 278 Pac. 240 (1929); *In re Dupes*, 31 Cal. App. 698, 161 Pac. 276 (1916).

custody and the husband obtains a modification order awarding custody to him, the wife may retain the child until her appeal is determined, without fear of contempt proceedings.¹⁵⁴

Is an automatic stay desirable when child custody is the issue? Experience in other fields has demonstrated the necessity for deleting certain judgments from the automatic stay section.¹⁵⁵ These decisions were based on the realization that the harm occasioned by staying these particular judgments outweighed the advantages of maintaining the status quo until the litigants' rights were finally determined. Re-examination of the automatic stay effect upon custody decrees may be warranted.

Usually trial courts modify custody decrees because a change in circumstances convinces the court that the child's welfare would be better served by such modification.¹⁵⁶ Yet, an appeal from the order, and consequently a stay, may continue for three years.¹⁵⁷ The immediate change found necessary by the trial court is nullified during a crucial period. Courts have rejected arguments pointing out this anomaly, stating that the statutory law was clear and any remedy must come from the legislature.¹⁵⁸

Perhaps denying a stay would produce dire results in those cases which are reversed upon appeal. Reversal of a decree which has been enforced would cause the child's environment to be changed twice within a short period. Admittedly, this would not serve the child's best interest, but removal of custody decrees from Section 949 should not preclude the possibility of a stay.

First, trial courts should have discretionary power to suspend orders pending review.¹⁵⁹ Second, as a last resort, an appellate court could issue *supersedeas* in meritorious cases.¹⁶⁰ Furthermore, since the trial court's decision will be accorded great weight in these cases it is fair to assume that in a large majority of cases the decree will be affirmed.¹⁶¹ The litigants' rights seem adequately protected by this procedure, and, more important, there would be increased assurance that the child would have proper care during the appeal period.¹⁶²

¹⁵⁴ *Ex Parte Queirolo*, *supra* note 153. If, however, the appellant delivers the child to the respondent without trial court coercion, the children will not be returned because the appeal effects a stay. The appeal stays only trial court proceedings. *DeLemos v. Siddal*, *supra* note 153.

¹⁵⁵ Of the exceptions new found in Section 949, only one was in the original statute. Cal Stats. 1851, p. 108. See text at note 100 *supra*.

¹⁵⁶ *Foster v. Foster*, 8 Cal. 2d 719, 68 P. 2d 719 (1937).

¹⁵⁷ See *Foster v. Foster*, *supra* note 153.

¹⁵⁸ *Ex Parte Queirolo*, *supra* note 153.

¹⁵⁹ This would be analogous to the trial court's power to suspend injunctive relief during appellate review. See text at note 152 *supra*.

¹⁶⁰ The Iowa Supreme Court has construed its statutory stay provision as not applying to child custody decrees. *Scheffers v. Scheffers*, 241 Iowa 1217, 44 N.W. 2d 676 (1950). The court held the decree could be enforced unless appellant obtained a stay order from the appellate court. Many similar cases are collected from other jurisdictions. See also Note, 163 A.L.R. 1319 (1946).

¹⁶¹ See note 2 *supra*.

¹⁶² There is some authority that the juvenile department of the superior court could protect the child's welfare during appeal. *Dupes v. Superior Court*, 176 Cal. 440, 168 Pac. 888

A recent case, *Gantner v. Gantner*,¹⁶³ held that an appellate court could entertain motions and enter orders necessary to the child's welfare, when the trial court had been deprived of power by the appeal. It had been held in *Gantner v. Superior Court* that the father's appeal from an order denying his motion to change custody to him deprived the trial court of jurisdiction to make any order changing the status quo during appellate review.¹⁶⁴ However, when acting on the mother's request to the supreme court to grant the order, the court indicated that an appellate court would have jurisdiction to do so, but would not disturb the status quo "without a showing that serious evils threatened the welfare of the children."¹⁶⁵

In *Gantner v. Gantner*, the court was concerned only with an appellate court's power to allow the children to be taken from the country during appellate review.¹⁶⁶ But the underlying theory upon which the court relied does not appear to be limited to such orders. Apparently appellate courts have power to transfer actual custody of a child to respondent during an appeal from a modified custody decree when such action is proved necessary for the child's welfare.¹⁶⁷

(1917). See *Ritter v. Superior Court*, *supra* note 153 at 122, 278 Pac. at 240. But cf. *In re Bullock*, 139 Cal. App. 664, 668, 34 P.2d 769, 771 (1934).

As to the power of the trial court to vacate a temporary custody order although an appeal is taken from an order denying a petition for guardianship, see *In re Pinnell*, 184 Cal. 270, 193 Pac. 574 (1920). It was held that the trial court could vacate the order and restore the children to the mother from whom they had been removed by the temporary order.

¹⁶³ 38 A.C. 754, 38 A.C. 868, 242 P.2d 329 (1952). In that case, the supreme court held the appellate court's jurisdiction could be invoked to provide for the child's welfare during appeal. The wife had been granted custody of the children in a divorce decree which provided that neither party should remove the children from California without court approval. Subsequently the mother sought an order allowing her to take the children to Australia for a vacation. The father resisted the motion, alleging she would not return the children to California since her family home was in that country. He also asked the court to modify the divorce decree so as to award custody to him. Both motions were tried together. Meanwhile, he obtained a temporary stay from the district court of appeals restraining the lower court from entering an order upon the mother's motion. The application for modification of the divorce decree was denied and the court stated the order for a vacation would be granted whenever the temporary stay was lifted. This was the posture of the case when it reached the supreme court.

¹⁶⁴ *Supra* note 30. A writ of prohibition also issued in *Lerner v. Superior Court*, *supra* note 30. The facts were similar. The mother appealed from an order granting custody to the father. The father then petitioned the court for modification of a provision concerning education. If the trial court had been allowed to issue the order, the child would have been moved to New Jersey.

The decision in both *Gantner v. Superior Court* and *Lerner* seems realistic. Since the trial court orders which were prohibited would have allowed removal of the children beyond the jurisdiction, it hardly can be contended that they did not affect the orders which were pending review in the supreme court.

¹⁶⁵ *Gantner v. Gantner*, *supra* note 163 at 756, 242 P.2d at 330. As an example of a situation in which the court's power would be exercised the court cited the following example. "It might be necessary for a mother to remove her child from the state for an operation necessary to save the life of the child that could be performed only in another state or country." *Supra* at 755, 242 P.2d at 330.

¹⁶⁶ It should be noted that "the perfecting of an appeal stays proceedings in the court below." (Emphasis added.) Note 98 *supra*. It has no effect upon the appellate court.

¹⁶⁷ What will be done, when a trial court allows removal orders similar to those in *Gantner v. Superior Court* and *Lerner*, *supra* note 164, while the court has jurisdiction? Such an order

Whether this solution is preferable to one in which the order is stayed only in the trial court's discretion or by an appellate court writ of *superseas* seems doubtful. Not only are appellate courts swamped with litigation, but trial courts should be better equipped, through experience, to deal with this type of proceeding. The trial judge has had the parties before him, he should be fairly well acquainted with the litigation's history, and it is the type of litigation usually tried in trial courts.¹⁶⁸

However, there is an opposing argument for retaining the present statutory law as supplemented by the *Gantner v. Gantner* decision. It is arguable that a trial judge would be more reluctant to stay his orders in custody cases than in cases tried under less emotionally charged conditions. Further, to expect a trial judge to suspend enforcement of an order which he considered necessary to a child's welfare is perhaps an unrealistic assumption of judicial objectivity.

Yet, assuming in many meritorious cases appellant would be forced to rely on the appellate court for a stay, the recommended change still seems superior to the present law. Under the proposed change, appellant would carry the burden of obtaining a stay. But under the present law, appellant receives an automatic stay, subject to modification only by respondent proving a case under the *Gantner v. Gantner* rule. As between litigants, it is more consonant with the general stay law that appellant should carry the burden.

Stays Upon Judgments in Which the Appellant is Not Ordered to Perform

Several classes of judgment are stayed under Section 949, although the judgments do not direct the appellant to perform. Many of these judgments could be stayed only pursuant to this section; for example, an appeal by a legatee from a decree of distribution.¹⁶⁹ However, some of these judgments would be stayed under a companion section but for the fact that appellant was not ordered to perform.¹⁷⁰ Illustrative of this group is an appeal from a judgment ordering the sale of realty when the appeal is by an appellant not in possession. Thus instead of complying with Section 945, appellant obtains a stay under Section 949, and consequently no security is required.¹⁷¹

Trial court power to require security seems necessary whenever the

would seem to be self-executing thus precluding both a statutory stay and *superseas* and allowing the child to be removed from the jurisdiction, without need of further court proceedings. See *DeLemos v. Siddall*, *supra* note 153. (Note a contrary dictum in *Gantner v. Gantner*, *supra* note 163 at 735, was deleted in a modification opinion, 38 A.C. 868.) Furthermore, an appeal from such order would prevent the trial court from subsequently enjoining removal of the child from the jurisdiction, nor could the appellate court restrain the party, since California appellate courts cannot utilize injunctive power in aid of their appellate jurisdiction. See text at note 117 *supra*.

¹⁶⁸ Perhaps the appellate court will use commissioners if facts in addition to those in the record are needed to dispose of a motion. See *Walkow v. Walkow*, 36 Wash. 2d 510, 210 P.2d 108 (1950), 26 WASH. L. REV. 55 (1951), in which the Washington Supreme Court utilized the trial court in disposing of a motion during an appeal from a child custody decree.

¹⁶⁹ See text at note 122 *supra*.

¹⁷⁰ See text at notes 64, 87 *supra*.

¹⁷¹ See text at note 88 *supra*.

delay occasioned could possibly jeopardize respondent's chance to satisfy completely his judgment if affirmed.

However, in interpreting an amendment to Section 949,¹⁷² apparently granting trial courts this discretionary power, the supreme court held it was an abuse of discretion to require security where the appellant was not required to perform by the judgment.¹⁷³ *Jensen v. Hugh Evans & Co.*, in construing the amendment stated this rule in unnecessarily broad terms.¹⁷⁴ There was no need to require a bond in that case, respondent being amply protected without it. The *Jensen* case rule should be limited to cases in which it would be a useless act to require an undertaking. This would allow the trial court to require security in situations where the judgment's value is subject to diminution during appeal. It seems equitable that, as between respondent and appellant, the one benefiting from the stay should assume the risk.

CONCLUSIONS AND RECOMMENDATIONS

One conclusion that can be drawn from a study of the California law pertaining to judgment enforcement pending appellate review is that the law is unduly complicated, unwieldy and inflexible.¹⁷⁵ As a procedural mechanism for safeguarding substantive rights, stay laws should not be so cumbersome that they deprive courts and litigants of energy which should be devoted to the merits of the case. Too often the present law requires counsel to expend a disproportionate amount of time in determining the stay law applicable to a particular judgment. An injunction decree illustrates this thesis. A maze of decisional law would have to be closely analyzed in classifying a particular injunction for the purpose of staying its enforcement and even then, as evinced by the reports, the characterization is often wrong.

In addition to the objections to the stay law on grounds of complexity and inflexibility, it is questionable whether the optimum has been attained in compromising the competing equities which must be considered in developing laws on this subject. Judicial construction of certain sections as inapplicable to appellants not required by the judgment to perform, thus casting the particular judgment into the purview of the automatic stay section, has resulted in an inequity which disregards respondent's rights since he is denied security.

¹⁷² This language was added: "but the court in its discretion may require an undertaking in an amount to be fixed by it conditioned for the performance of the judgment or order appealed from if the same is affirmed or the appeal is dismissed." Cal. Stats. 1927, p. 874.

¹⁷³ This holding had been accurately predicted by Brannen, *Discretionary Requirement of Bond for Stay of Execution in California*, 23 CALIF. L. REV. 602 (1935).

¹⁷⁴ 13 Cal. 2d 401, 90 P. 2d 72 (1939). In this case third parties were claiming funds held by a sheriff under a writ of execution. A proceeding was held pursuant to the provisions of CAL. CODE CIV. PROC. § 689. Judgment was rendered for the original plaintiff and the claimant appealed. They sought *supersedeas* upon the theory that the trial court abused its discretion in demanding an undertaking as a prerequisite to a stay. This contention was accepted. But as the court indicated, respondent was amply protected without a stay bond. The sheriff held the money, and his performance was assured by his official bond.

¹⁷⁵ For an example of the inflexibility of the present law see text at note 54 *supra*.

While solution of this particular problem can be effectuated by the judiciary in limiting the broad rule announced in the *Jensen* case, legislative change is preferable. This is largely due to the judicial codification of the *Jensen* rule which has begun in a manner which forecasts little hope that the rule will be limited. The rule has been stated in its broadest aspect in cases in which the trial court's discretionary power was considered.¹⁷⁶

An additional reason exists for preferring legislative action. Many proposed changes can be effected only by legislation.¹⁷⁷ Thus, it would be advantageous for the legislature to examine all stay provisions as construed by decisional law and to enact coordinated laws directed toward simplicity and preservation of both appellant's and respondent's substantive rights. Further study by a group able to draw upon the practical experience of the judiciary and appellate counsel would be helpful in drafting this needed legislation.¹⁷⁸

In drafting legislation, careful consideration should be given to the question of whether certain judgments should not be removed from the effect of Section 949 so that the stay would not be automatic. Special attention should be focused upon injunctions and child custody decrees. However, members of the bar with varied appellate court practice may suggest many more. If more judgments are excepted from Section 949, it would be desirable to grant the trial court power to stay its judgment with or without security rather than to shift the burden entirely to the appellate courts, as is done by the existing exceptions to the section.¹⁷⁹

Another change is needed to give California courts power to protect adequately rights involved in an appeal. Appellate courts should be able to issue injunctions in aid of their appellate jurisdiction. Repeated denial of this power by the courts indicates express constitutional authorization is needed.¹⁸⁰ If appellate courts had this power, the status quo could be maintained whenever it was necessary to preserve the rights to be adjudicated upon appellate review. Court proceedings could be stayed by *supersedeas*, while action by litigants would be prevented through use of the injunction.

Robert D. Raven

¹⁷⁶ *Williams v. Wells Fargo Bank*, 17 Cal. 2d 104, 109 P. 2d 649 (1941); *Neusted v. Skernswell*, 69 Cal. App. 2d 361, 159 P. 2d 49 (1945).

¹⁷⁷ See text at notes 53, 60, 150 and 158 *supra* and note 38 *supra*.

¹⁷⁸ FED. R. Crv. P. 62 would serve as a helpful point of departure for such a study. It embodies both the desired simplicity and flexibility needed in procedural rules.

¹⁷⁹ See text at note 100 *supra*.

¹⁸⁰ This would necessitate amendment of Sections 4 and 4b of Art. VI of the Constitution, so that an injunction would be enumerated as a writ which could be issued in aid of appellate jurisdiction. See note 12 *supra*.