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Comment

APPELLATE REVIEW IN CALIFORNIA WITH THE EXTRAORDINARY WRITS

An important process of our judicial system is the appellate review of lower court proceedings. It is so much a part of our culture that an English movie, *Stairway to Heaven*, suggested that even a decree of Heaven not subject to review was improper, unfair, and not binding. Availability of review, however, is not essential to the administration of law, and the common law has not always provided for it.¹ Nor today is appellate review considered necessary for due process.² The purposes of review explain this difference between popular belief and legal reality. Dean Pound has recently written that appellate review

¹ POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 25.

² McKane v. Durston (1894) 153 U.S. 684, 687 (review by an appellate court of the final judgment of a criminal prosecution is not a necessity of due process); Reetz v. Michigan (1903) 188 U.S. 505, 508 (failure of a state to provide appellate review of a judgment in a civil case is not a violation of due process).

serves two functions, to correct and to prevent misapplication of law.³ In amplification he states:

... the scope of appellate proceedings may be said to be: (1) review of the process of ascertaining facts, (2) review of the finding of the applicable law, (3) review of the application of the law to the found facts, and (4) in the common-law system, authoritative ascertainment and declaration of a legal precept for such cases as the one in hand, when none has been clearly promulgated.⁴

To accomplish these objects, all cases, obviously, do not have to be reviewed. Even in those cases for which review should be allowed some limitations are necessary. For minimum expense the procedure must be orderly, and at some time client and lawyer alike must know that there is an end to the lawsuit. Consequently, rules governing review have been established.

In California, cases begun in the superior courts are reviewed on appeal by the supreme court and the district courts of appeal;⁵ cases begun in municipal courts, justice courts and other inferior courts are subject to review on appeal in the superior courts.⁶ The legislature and Judicial Council have fixed rules governing the procedure and scope of this review.⁷ Concurrent with the normal procedure, a somewhat limited review may be secured through the extraordinary writs. The writs most frequently used are habeas corpus, prohibition, certiorari, and mandamus; the right to them is assured by the state constitution.⁸ How well they function in supplementing the normal procedure of review will be the subject of this note.⁹ Although these writs, particularly mandamus and certiorari, are utilized to review administrative proceedings, this use of the writs will not be considered herein, since the deplorable condition of administrative review in California

³ POUND, *op. cit. supra* note 1, at 3.

⁴ *Ibid.* See also Sunderland, *A Simplified System of Appellate Procedure* (1943) 17 TENN. L. REV. 651.

⁵ CAL. CONST. art. VI, §§4, 4b.

⁶ *Ibid.* §5.

⁷ CAL. CODE CIV. PROC. §§934-988j; RULES ON APPEAL FOR THE SUPREME COURT AND DISTRICT COURTS OF APPEAL OF THE STATE OF CALIFORNIA (1943); RULES ON APPEAL TO THE SUPERIOR COURT (1945). For discussion of new rules on appeal, see Witkin, *New California Rules on Appeal* (1944) 17 SO. CALIF. L. REV. 79, 232. For discussion of these rules in subsequent practice, see Witkin, *Four Years of the Rules on Appeal* (1947) 35 CALIF. L. REV. 477.

⁸ *Infra* notes 11, 12, 13.

⁹ At one time twenty-five per cent of all cases in which opinions were written by the supreme court were original proceedings for extraordinary writs. 1 PEPPIN, MATERIALS ON CALIFORNIA JURISDICTION AND APPELLATE PROCEDURE (4 vol. unpublished mimeographed materials prepared for use of students at U. of Cal. School of Juris., Boalt Hall) 123. In 1946 about ten per cent of the cases in which the supreme court wrote an opinion came up by a writ.

has already been examined elsewhere.¹⁰ Nor will habeas corpus be considered because its development sets it somewhat apart from the other writs. Our discussion will be directed to the use of the writs of prohibition, certiorari and mandamus to secure review of court proceedings that would not otherwise be reviewable, or to secure a more speedy review when the normal procedures seem inadequate. These instances are: review of inferior court cases; review of nonappealable final orders; review of intermediate nonappealable orders; and review of intermediate appealable orders.

INTRODUCTION

The constitution provides that these three writs may issue from the supreme court,¹¹ the district courts of appeal,¹² and the superior courts;¹³ original proceedings, subject to the rules of the Judicial Council, may be commenced in any of these courts.¹⁴ When a proper suit is brought, these courts must exercise the jurisdiction conferred by the constitution.¹⁵ What constitutes a proper suit has been defined by the legislature,¹⁶ such definition in general being a codification of the common law.¹⁷ Our first inquiry, therefore, is historical.¹⁸

Prohibition

In the early clash of church and state, the writ of prohibition was the artillery with which the king diminished the authority of the ecclesiastical courts.¹⁹ Some confusion exists as to whether the writ first issued as an administrative order through Chancery, or whether it was originally judicial in nature.²⁰ Whatever the origin, clearly the central courts used the writ as a device to gather to themselves the business

¹⁰ TENTH BIENNIAL REPORT OF JUDICIAL COUNCIL OF CALIFORNIA (Dec. 31, 1944); McGovney, *Administrative Decisions and Court Review Thereof, in California* (1941) 29 CALIF. L. REV. 110; Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California* (1941) 29 *ibid.* 275; Notes (1937) 25 *ibid.* 694; (1947) 34 *ibid.* 741.

¹¹ CAL. CONST. art. VI, §4.

¹² *Ibid.* §4b.

¹³ *Ibid.* §5.

¹⁴ RULES ON ORIGINAL PROCEEDINGS IN REVIEWING COURTS (1943) Rule 56.

¹⁵ *Hyatt v. Allen* (1880) 54 Cal. 353.

¹⁶ CAL. CODE CIV. PROC. §§1067-1077 (certiorari); 1084-1097 (mandamus); 1102-1107 (prohibition). Outside the scope of this study are the special uses of certiorari, e.g., review of the Industrial Accident Commission.

¹⁷ E.g., *Mauer v. Mitchell* (1878) 53 Cal. 289, 292 (prohibition); *Noble v. Superior Court* (1895) 109 Cal. 523, 526, 42 Pac. 155, 156 (certiorari).

¹⁸ Except for habeas corpus the implications of the extraordinary writs remain largely unanalyzed. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (3d ed. 1940) 156, n. 5.

¹⁹ 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1922) 228; Notes (1923) 36 HARV. L. REV. 863; (1939) 37 MICH. L. REV. 789.

²⁰ PLUCKNETT, *op. cit. supra* note 18, at 157; Maitland, *The History of the Register of Original Writs* (1889) 3 HARV. L. REV. 97, 107, 111, 167, 212.

of the ecclesiastical courts. The private litigant petitioned for the writ; however, the wrong was to the state, the petition reading that the ecclesiastical court was acting beyond its jurisdiction.²¹ As the nominal authority of the king became an actuality, jurisdictional defects were evidently found with greater frequency, thus discrediting and limiting the ecclesiastical courts.

Developed as an exercise of royal power, prohibition became judicial in character and one of the most effective weapons of the common-law courts in later struggles. Under the Tudors, Admiralty had increased its authority at the expense of the common-law courts.²² Coke led the campaign to restore these courts to authority, and by adapting prohibition to his tactics he nearly reduced Admiralty to impotence.²³ A jurisdictional defect was alleged; the writ issued prohibiting further action by Admiralty; and, since the writ issued under the supposed authority of the king, there was no appeal. These two political struggles established the character of prohibition as a method of restraining judicial action in excess of jurisdiction²⁴ when there is no other adequate, speedy remedy.²⁵

Certiorari

The writ of certiorari was used to restrict the business of the local communal courts, and thus centralize judicial authority in the king's courts.²⁶ Since litigants had access to the more efficient tribunals at Westminster through use of the writ and thereby avoided the rigidity of the local courts, the popularity of certiorari was assured.²⁷ The authority of Chancery, and later of the courts of the King's Bench, for issuing the writ was derived from the concept of the king as the fount of justice; in cases affecting the Crown, in criminal cases where an impartial trial was not possible, and in cases involving revenue matters the writ would be issued.²⁸ By the end of the fifteenth century the king's authority over judicial matters was complete, since

²¹ Jenks, *The Prerogative Writs* (1923) 32 YALE L. J. 523. After 1831, prohibition was used regularly when a court exceeded its jurisdiction. *Ibid.* at 528. See Note (1939) 37 MICH. L. REV. 789.

²² MORGAN, *THE STUDY OF LAW* (1926) 13.

²³ *Ibid.*; ROBINSON, *ADMIRALTY* (1939) 30. Coke attempted to use certiorari to limit Admiralty, but Chancery, having the final decision, supported Admiralty. 1 HOLDSWORTH, *op. cit. supra* note 19, at 553.

²⁴ CAL. CODE CIV. PROC. §1102.

²⁵ *Ibid.* §1103. For discussion of what are other adequate, speedy remedies, see Note (1934) 22 CALIF. L. REV. 537.

²⁶ Goodnow, *The Writ of Certiorari* (1891) 6 POL. SCI. Q. 493. For an abbreviated statement of the use of the "original writs" to expand the king's courts, see KEIGWIN, *CASES IN COMMON LAW ACTIONS* (2d ed. 1938) 1 *et seq.*

²⁷ Goodnow, *loc. cit. supra* note 26.

²⁸ *Ibid.*

judges and administrators in both the local and king's courts were paid servants of the king.²⁹

To encourage original proceedings in the king's courts certiorari had issued to review proceedings before the lower tribunals. When this objective was achieved, disappearance of the writ might have been expected since the writ of error provided appellate review of courts acting in accordance with the common law. Certiorari, however, was retained to review courts of restricted jurisdictions,³⁰ and was widely used to review proceedings before justices' courts and administrative bodies.³¹ As the jurisdiction of these lower tribunals was enlarged, the scope of review allowed by certiorari necessarily increased.³² Nevertheless, the writ as accepted into California law is given a limited function, and its prerogative character retained. It is to be granted to annul an order or judgment only when a body exercising judicial functions exceeds its jurisdiction, and there is no appeal, nor a plain, speedy, and adequate remedy;³³ the scope of review is to determine whether the body has exceeded its authority.³⁴

*Mandamus*³⁵

Of the three extraordinary writs considered herein, the origins of mandamus are most tangled in the skein of history. Since administrative orders as well as judicial writs appeared in the original register, question arises as to whether these entries are court orders, or whether they are orders of the monarch.³⁶ What is clear, regardless of the source of the writ, is the use Coke made of mandamus to increase the authority of the common-law courts. In *Bagg's Case*,³⁷ acting upon the alleged authority of the king, he first issued mandamus to reinstate the petitioner in a public office. Since in theory the writ issued from the king, no appeal was allowed. The writ at first was utilized only to compel performance of some public duty,³⁸ but eventually it was issued to compel the discharge of a private office.³⁹

²⁹ *Ibid.* at 496.

³⁰ 1 HOLDSWORTH, *op. cit. supra* note 19, at 228, n. 6.

³¹ Goodnow, *op. cit. supra* note 26, at 500. In addition to Professor Goodnow's study, see Turrentine, *loc. cit. supra* note 10.

³² Goodnow, *op. cit. supra* note 26, at 520, 525. Cf. Jenks, *op. cit. supra* note 21, at 529.

³³ CAL. CODE CIV. PROC. §1068. See note 194, *infra*, and related text.

³⁴ CAL. CODE CIV. PROC. §1074.

³⁵ HIGH, EXTRAORDINARY LEGAL REMEDIES (3d ed. 1896); TAPPING, MANDAMUS (1853).

³⁶ Jenks, *op. cit. supra* note 21, at 529; cf. 3 BL. COMM. *110; Note (1935) 20 IOWA L. REV. 667.

³⁷ (1616) 11 Co. 93b, 77 Eng. Rep. 1271.

³⁸ The Case of Andover (1701) Holt 442, 90 Eng. Rep. 1143.

³⁹ Rex v. Barker (1762) Black W. 352, 96 Eng. Rep. 196.

In California, the writ of mandate is a command issuing from a court of competent jurisdiction directed to an inferior tribunal, board, corporation, or person requiring the performance of a particular duty associated with the official status of the party to whom the writ is directed; or it issues to compel the admission of the petitioner to enjoyment of an office to which he is entitled.⁴⁰ The writ will issue only when there is no other plain, speedy, and adequate remedy.⁴¹

Jurisdiction as a basis of review

Although these writs no longer issue upon an alleged command of an absolute sovereign from which there is no appeal, their prerogative character is retained to the extent that they are not granted as a matter of right; special circumstances must be shown. Prohibition and certiorari only issue upon the showing of a jurisdictional error. What, then, is jurisdiction? Usually it is defined as the power of a tribunal to hear and determine a cause,⁴² and to render a judgment which, in most cases, is not subject to collateral attack.⁴³ Where courts are the vanguard of competing political forces, their power will be measured by the quantum of physical force available to enforce their decisions.⁴⁴ Absent this contest, a single source of authority having been established, limitations on their power are fixed by what are perhaps the most elusive concepts in the law.

The *Restatement of Judgments* approaches the problem of jurisdiction by classifying into four categories the limitations on a court's power to render a binding judgment.⁴⁵ There must be: (1) control by the state over the parties, property, or status;⁴⁶ (2) reasonable notice and hearing;⁴⁷ (3) allocation of power to hear the suit, *i.e.*, the court

⁴⁰ CAL. CODE CIV. PROC. §1085.

⁴¹ *Ibid.* §1086. Section 1094.5 facilitates administrative review and is an extension of the traditional uses of mandamus. See authorities cited in note 10, *supra*.

⁴² 23 WORDS AND PHRASES (1940) 358 *et seq.*

⁴³ See RESTATEMENT, JUDGMENTS (1942) §10.

⁴⁴ Lest it be thought that this consideration is a dead issue, note this statement of Pollock: "I have amplified my knowledge of jurisdictions; just now I am where the Common Law prevails (as regards European British Subjects) by statute: and I have been where it is received as 'justice equity and good conscience,' *viz.* anywhere in British India outside the Presidency towns, also where law is mostly in the breast of the native Prince and the Resident between them, *viz.* the minor States of Rajputana, also where there is no law, or at least no *lex terrae* at all, *viz.* the Khaibar Pass beyond British territory and before you come to the Amir's." 1 HOLMES-POLLOCK LETTERS (Howe ed. 1941) 46.

⁴⁵ RESTATEMENT, JUDGMENTS (1942) §4.

⁴⁶ *Ibid.* §5; *cf.* RESTATEMENT, CONFLICT OF LAWS (1934) §42.

⁴⁷ RESTATEMENT, JUDGMENTS (1942) §6; *cf.* Sirdar Gurdial Singh v. Rajah of Faridkote, L. R. [1894] A. C. 670. In the United States, *Pennoyer v. Neff* (1877) 95 U. S. 714, is the leading case discussing the scope of the state's power; at least by dictum the principle of power in international law is included in the due process clause of the Fourteenth Amendment. *Cf.* *Milliken v. Meyer* (1940) 311 U. S. 457.

must be competent;⁴⁸ (4) compliance with conditions precedent to the exercise of the power.⁴⁹ The boundaries of the first two limitations are set by the Federal Constitution;⁵⁰ the boundaries of the last two are determined by state law.⁵¹ In California when an extraordinary writ is sought, the court seems to approach the jurisdiction issue in the same manner as the *Restatement*.⁵²

The *Restatement* reports that whenever the validity of a judgment is challenged the modern trend has been to consider many of the condition-precedent requirements as nonjurisdictional.⁵³ In California in the writ cases, however, such requirements are frequently found to be jurisdictional. Has the court been consistent in applying their analysis of jurisdiction? The California supreme court in the leading case of *Abelleira v. District Court of Appeal* has stated:⁵⁴

Though confusion and uncertainty in statement are frequent, there is a surprising uniformity in the application of the doctrine by the courts, so that sound principles may be deduced from the established law by marshalling the cases and their holdings in this field.

This statement is somewhat misleading. A sampling of the cases does not indicate that uniformity may be found in the application of the jurisdiction concept; rather, the case precedents have the design of a crazy quilt. For example, the amount-in-controversy requirement determining the competency of a court has been considered jurisdictional and correction of the error allowed with a writ proceeding.⁵⁵ Yet, in another case a court's erroneous finding that the amount requirement was met could not be remedied by means of a writ; it could be corrected only on appeal.⁵⁶ Statutes are sometimes technically interpreted and required procedures become jurisdictional as conditions precedent to the exercise of power, *e.g.*, refusal to award costs,⁵⁷ and erroneous release of an attachment.⁵⁸ At other times, however, although a statute is no less positively phrased, the required procedure may not be jurisdictional, *e.g.*, failure to file a verified claim prior to proceeding against a school district.⁵⁹ Also, what may be a condi-

⁴⁸ RESTATEMENT, JUDGMENTS (1942) §7.

⁴⁹ *Ibid.* §8.

⁵⁰ *E.g.*, *Pennoyer v. Neff*; *Milliken v. Meyer*, both *supra* note 47; *Hess v. Pawloski* (1927) 274 U. S. 352.

⁵¹ 34 C. J. §§834-837.

⁵² *Abelleira v. District Court of Appeal* (1941) 17 Cal. (2d) 280, 290, 109 P. (2d) 942, 948.

⁵³ RESTATEMENT, JUDGMENTS (1942) §8, and comment.

⁵⁴ (1941) 17 Cal. (2d) 280, 291, 109 P. (2d) 942, 949, 29 CALIF. L. REV. 515.

⁵⁵ *Consolidated Etc. Co. v. Superior Court* (1922) 189 Cal. 92, 207 Pac. 552.

⁵⁶ *Rausch v. Superior Court* (1940) 40 Cal. App. (2d) 707, 105 P. (2d) 627.

⁵⁷ *Bue v. Superior Court* (1928) 93 Cal. App. 147, 269 Pac. 553.

⁵⁸ *Hill v. Superior Court* (1940) 16 Cal. (2d) 527, 106 P. (2d) 876.

⁵⁹ *Redlands etc. School District v. Superior Court*, *infra* note 82.

tion precedent to the exercise of power by the court is not the same for all kinds of cases.⁶⁰ Thus, lack of substantial evidence to support the findings of fact may go to jurisdiction when a contempt order is involved,⁶¹ or it may not upon review of an order confirming sale of property by a guardian.⁶² Surely, this pattern reflects more than just "confusion and uncertainty in statement".

However, the court has told us to "marshal" the cases to discover the sound principles implicit in the jurisdiction-doctrine. Hence, we turn our attention to the factual and procedural setting in which the cases have arisen. We will ask why writ-relief was necessary. Our approach will be based upon the premise that the writs serve two basic needs: to provide speedy relief in place of regular appeal; to allow courts to review cases from which theoretically no appeal lies.

REVIEW OF INFERIOR COURT DECISIONS

In the state constitution of 1849, the appellate jurisdiction of the supreme court was so defined as to limit appeal of inferior court⁶³ proceedings to the superior court.⁶⁴ Appeal as of right or as of discretion to any other court was denied. This limitation on the jurisdiction of the higher appellate courts has remained unchanged. Presumably, the limitation was adopted to protect impecunious litigants from harassing appeals, to provide speedy disposition of cases involving small amounts, and to reduce the work load of the supreme court, allowing it to devote its time to considering major issues of law.⁶⁵

Our original constitution also provided that the supreme court and its justices had the "power to issue writs of *habeas corpus* . . . [and] all other writs and process necessary to the exercise of their appellate jurisdiction".⁶⁶ This clause, the supreme court later held, did not authorize the court to entertain original proceedings for writs other than *habeas corpus*.⁶⁷ Thus, because the supreme court did not have original jurisdiction to issue writs, this provision was consistent with the limitation upon appeals to the supreme court. The writs were in aid of appellate jurisdiction; where authority to hear and determine appeals was denied, authority to issue writs was likewise denied.

⁶⁰ See note 136, *infra*, for examples of conditions precedent given their fullest force and held jurisdictional.

⁶¹ *Bridges v. Superior Court* (1939) 14 Cal. (2d) 464, 485, 94 P. (2d) 983, 993.

⁶² *Estate of Kay*, *infra* note 144.

⁶³ For the purpose of this discussion municipal courts, because their judgments are appealable only to the superior court, are treated as inferior courts though they are generally not so regarded. See CAL. CONST. art. VI, §§5, 11a, 11, 12; *In re Rissman* (1927) 87 Cal. App. 176, 261 Pac. 727.

⁶⁴ CAL. CONST. (1849) art. VI, §4.

⁶⁵ BROWNE, DEBATES IN THE CONVENTION OF CALIFORNIA (1850) 225-235.

⁶⁶ CAL. CONST. (1849) art. VI, §4.

⁶⁷ *The People v. Turner* (1850) 1 Cal. 143.

The harmonious coexistence of the limitation upon appeals and the provision for issuance of extraordinary writs ended in 1862. An amendment to the constitution in that year specifically empowered the supreme court to issue writs of mandamus, certiorari, and prohibition.⁶⁸ Even though the limitation of the supreme court's appellate jurisdiction was left unchanged, the supreme court interpreted the amendment to allow it to issue the enumerated writs in original proceedings.⁶⁹ Therefore, the supreme court, and today the district courts of appeal, have original jurisdiction to issue writs.⁷⁰ Thus, the constitution includes two incompatible provisions: one limits appeals of inferior court decisions to the superior court, the other authorizes the higher appellate courts through original proceedings to review cases which they otherwise could not hear upon direct appeal. There has been no express attempt by an appellate court to resolve the conflict between these two contradictory provisions. We will therefore examine the decisions to determine if reconciliation is possible, looking first at the use of the writs to secure review after appeal has been taken to the superior court, and then at their use before appeal has been filed.

Review after appeal has been taken and determined in the superior court

The nature of the jurisdiction exercised by the superior court on appeal depends upon the type of appeal that is taken from inferior court proceedings. There are two principal types of appeal that may be taken: appeal on questions of law and fact;⁷¹ appeal on questions of law alone.

An appeal on law may be taken within thirty days, and the case is determined by the superior court upon a settled statement drawn by the justice who rendered the decision.⁷² When such an appeal is entertained, the superior court acts as any other appellate court; and

⁶⁸ CAL. CONST. (1862) art. VI, §4.

⁶⁹ *Tyler v. Houghton* (1864) 25 Cal. 26.

⁷⁰ It is interesting to note that when the constitution was amended in 1862, the phrase referred to in the text to note 66, *supra*, was changed to read: "... [and] *also*, all writs necessary or proper to the complete exercise of its appellate jurisdiction." (Italics added.) CAL. CONST. (1862) art. VI, §4. When the present constitution was written, the phraseology of this clause was changed to read: "... 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." (Italics added.) CAL. CONST. (1879) art. VI, §4. The supreme court in *Hyatt v. Allen*, *supra* note 15, held that the change in wording did not abrogate the holding in *Tyler v. Houghton*, *supra* note 69, that the supreme court could issue the enumerated writs in original proceedings.

⁷¹ Appeals may also be taken on questions of fact alone. However, since the procedure applicable to that type of appeal is the same as applied to appeals on law and fact, only the latter will be referred to in the text. CAL. CODE CIV. PROC. §976.

⁷² *Ibid.* §975.

if the suit is properly before the court, it may affirm, reverse, modify the judgment, order a new trial, or direct that the proper judgment be entered.⁷³ The superior court's jurisdiction on such appeals is "appellate".

On the other hand, when an appeal is taken on law and fact, the superior court may grant a trial *de novo*, except where appeal is taken from a municipal court.⁷⁴ The proceedings are conducted in nearly all respects as if the action had originated in the superior court. When the superior court conducts a new trial on appeal, its jurisdiction is "derivative", *i.e.*, its jurisdiction is derived from that of the inferior court. The absence of jurisdiction in the inferior court may cause the new trial proceedings in the superior court to be annulled by certiorari,⁷⁵ unless the defect is corrected pending perfection of the appeal,⁷⁶ or unless the subject matter of the action is within the original jurisdiction of the superior court.⁷⁷ The concept of "derivative" jurisdiction seems to rest upon a literal construction of section 976 of the Code of Civil Procedure,⁷⁸ and a fear that any other view would permit an enlargement of the original trial jurisdiction of the superior court.⁷⁹ The theory has been that if the inferior court lacked juris-

⁷³ *Ibid.* §980.

⁷⁴ *Ibid.* §§976, 980a. Appeals from municipal courts may be taken only on questions of law. *Ibid.* §983.

⁷⁵ *Will v. Sinkwitz* (1870) 39 Cal. 570; *S. P. R. R. Co. v. Superior Court* (1881) 59 Cal. 471; *Ballerino v. Bigelow* (1891) 90 Cal. 500, 27 Pac. 372; *Hoban v. Ryan* (1900) 130 Cal. 96, 62 Pac. 296; *Bates v. Ferrier* (1912) 19 Cal. App. 79, 124 Pac. 889; *Barnett v. Hull* (1912) 19 Cal. App. 91, 124 Pac. 885; *Tracy v. Sumida* (1916) 31 Cal. App. 716, 161 Pac. 503; *Couldthirst v. Southern Pac. R. R. Co.* (1920) 49 Cal. App. 525, 193 Pac. 796.

⁷⁶ *Ameriean Law Book Co. v. Superior Court* (1912) 164 Cal. 327, 128 Pac. 921; *Armantage v. Superior Court* (1905) 1 Cal. App. 130, 81 Pac. 1033; *Meads v. Warne* (1933) 133 Cal. App. 27, 23 P. (2d) 773.

⁷⁷ *City of Santa Barbara v. Eldred* (1892) 95 Cal. 378, 30 Pac. 562; *Hart v. Camall-Hopkins Co.* (1894) 103 Cal. 132, 37 Pac. 196; *De Jarnatt v. Marquez* (1901) 132 Cal. 700, 64 Pac. 1090; *Nolan v. Hentig* (1903) 138 Cal. 281, 71 Pac. 440; *City of Madera v. Black* (1919) 181 Cal. 306, 184 Pac. 397. *Cf. Lane v. Superior Court* (1907) 5 Cal. App. 762, 91 Pac. 405. Even though the subject matter of the action is within the original jurisdiction of the superior court, the proper procedure for bringing the case within its cognizance is by transfer from the justice court and not by taking an appeal on which the superior court must grant a trial *de novo*. If the transfer procedure is not followed, on proper objection the superior court must dismiss the action since the superior court is without jurisdiction to conduct the new trial on appeal. However, where the case is tried anew before the superior court, it has been held that in the absence of seasonable objection by the parties it will be treated as though the case originally started in the superior court. In other words, although a lack of jurisdiction to conduct a new trial on appeal still exists, the procedure constitutes a mere irregularity so far as the original trial jurisdiction of the superior court is concerned.

⁷⁸ "When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action or hearing on the order made after judgment must be tried or heard anew in the superior court."

⁷⁹ *Myrick v. Superior Court* (1885) 68 Cal. 98, 99, 8 Pac. 648: "If the Superior Court in this instance had a right to try a case upon issues of fact, which was within the juris-

diction a trial was not had in the inferior court and, therefore, the action could not be tried *anew* in the superior court.⁸⁰

The distinction between "derivative" jurisdiction and "appellate" jurisdiction is of primary importance when writs are sought. Therefore, we will first consider the effect of taking an appeal on law and fact, and then the effect of taking an appeal on law alone.

Appeal on law and fact. As pointed out above, when an appeal is taken on law and fact, the jurisdiction of the superior court is said to be derived from that of the inferior court. Therefore, when a writ is sought in a higher appellate court, the jurisdiction of both the inferior court and the superior court will be examined.⁸¹ The relationship of the concept of "derivative" jurisdiction to the writs was set forth in detail in *Redlands Etc. Sch. Dist. v. Superior Court*.⁸² In that case, a petition for a writ of certiorari was filed in the supreme court to annul a superior court's judgment in favor of plaintiff after an appeal had been taken upon questions of law and fact. A tort action had been commenced in a justice's court against the school district and its trustees. Defendants contended that the action was barred because a verified claim had not been filed as required by the School Code. The superior court, after a trial *de novo*, found that a verified claim had not been filed, but rendered judgment for plaintiff. The district court of appeal denied a writ of certiorari, and the supreme court then granted a hearing. The supreme court held that the filing of a verified claim was not a jurisdictional prerequisite to commencement or maintenance of the action in either the justice's court or the superior court; the superior court judgment was affirmed. Since appeal to the superior court had been taken on questions of law and fact, there had been a trial *de novo* in the superior court. The jurisdiction of the superior court, therefore, was derived from that of the justice's court; thus, the decision depended entirely upon whether or not the filing of a verified claim was a jurisdictional prerequisite to the maintenance of the action. There was entire agreement of the court as to the *ratio*

diction of a justice of the peace, who had never passed upon such issues as tendered, the former tribunal might be said to have original jurisdiction in such cases, which is contrary to the statute."

⁸⁰ *S. P. R. R. Co. v. Superior Court*, *supra* note 75; *Rickey v. Superior Court of Nevada Co.* (1881) 59 Cal. 661; *Fabretti v. Superior Court* (1888) 77 Cal. 305, 19 Pac. 481 (distinguishing *Funkenstein v. Elgutter* (1858) 11 Cal. 328; *People v. County Court* (1858) 10 Cal. 19); *Lugo v. Superior Court* (1921) 55 Cal. App. 561, 203 Pac. 812; *Himovitz v. Justice's Court* (1926) 77 Cal. App. 95, 246 Pac. 82. *Cf. Arnantage v. Superior Court*, *supra* note 76, at 135, 81 Pac. at 1035, per concurring opinion of Smith, J., to the effect that many of the above cases have, in effect, been overruled by holdings allowing amendments to the pleadings to be made in the superior court, thereby creating new issues that have not been tried in the justice's court.

⁸¹ *Supra* note 75 and related text.

⁸² (1942) 20 Cal. (2d) 348, 125 P. (2d) 490.

decidendi of the decision, *i.e.*, failure to file the verified claim was not a jurisdictional defect. Justice Carter took issue with dictum in the majority opinion that *certiorari* would not be available if a trial *de novo* had not been held in the superior court.⁸³ Although the judgment was not annulled, the decision makes clear that in instances of "derivative" jurisdiction, review may be had in the supreme court through the writs even though appeal as provided by the constitution is exhausted. Conceivably, the underlying basis of the decision might be a feeling on the part of the court that every trial should be followed by at least a limited, purely appellate review; or, stated differently, a trial *de novo* is not traditionally within the concept of an appeal.⁸⁴

Appeal on law. When appeal is taken upon questions of law alone, the superior court's jurisdiction is "appellate". If writ-review is to be secured, the alleged jurisdictional defect must go to the appellate capacity of the superior court. For example, if a suit is begun in an inferior court, defendant may appear specially to contest jurisdiction over his person. If the inferior court denies his motion to quash, defendant, once again appearing specially, might appeal to the superior court. Should the superior court order defendant to answer in the inferior court, this action might be reached by a writ.⁸⁵ The reason is that the defendant has appeared specially, and the superior court merely has jurisdiction to determine the jurisdictional question. It does not have jurisdiction to order defendant to answer.

However, if the superior court mistakenly affirms an erroneous determination of the lower court, such action could not be reached by an extraordinary writ because the appellate court has sufficient jurisdiction to give a final ruling on this issue.⁸⁶ In *Portnoy v. Superior Court*⁸⁷ petitioners had been convicted in a justice's court of violating a city ordinance. In an appeal on questions of law alone, the convictions were affirmed by the superior court. A petition for a writ of *certiorari* was denied by the district court of appeal, and a hearing was granted by the supreme court. Petitioners contended that both the justice's court and the superior court acted in excess of jurisdiction

⁸³ Justice Carter concurred solely on the ground that failure to file a verified claim was not a jurisdictional prerequisite to the maintenance of an action. He disapproved of the opinion of the majority insofar as it made its review of the jurisdiction of the justice's court depend entirely on the fact that there had been a trial *de novo* in the superior court. He stated: "The more reasonable approach would be to say that the action of both the superior court and the justice's court is void and reachable on *certiorari*." 20 Cal. (2d) at 363, 125 P. (2d) at 498.

⁸⁴ *Collier & Wallis Ltd. v. Astor* (1937) 9 Cal. (2d) 202, 70 P. (2d) 171 (holding that a trial *de novo* is not an appeal). Though this case did not arise by extraordinary writ, it indicates the attitude of the court toward a trial *de novo*.

⁸⁵ See, *e.g.*, *S. P. R. R. Co. v. Superior Court*, *supra* note 75.

⁸⁶ *Ibid.*

⁸⁷ (1942) 20 Cal. (2d) 375, 125 P. (2d) 487.

because the ordinance under which they had been convicted was unconstitutional and in conflict with state law. However, the supreme court in affirming the superior court's decision stated:

Since the superior court in the present case did not conduct a new trial of the action but merely affirmed the judgments of conviction, it follows that the appellate jurisdiction of the superior court was the same as that of any appellate court Regardless of whether the trial court had jurisdiction, therefore, it was within the jurisdiction of the superior court to affirm the judgments of conviction upon appeal.⁸⁸

Justice Carter's dissent contained the same reasoning stated in his special concurring opinion in the *Redlands* case.⁸⁹ He felt that the scope of review found applicable by the majority in the *Redlands* case should likewise be applied here. He also thought that the ordinance in question was unconstitutional; therefore, certiorari should issue to annul the judgments of both the justice's court and the superior court.

If we accept the analogy that the superior court, in its appellate capacity, acts as any other appellate court, the decision in the *Portnoy* case is correct. Even though a trial court's action is based upon an unconstitutional statute, the authority of an appellate court to determine, rightly or wrongly, the propriety of the lower court's decision is not restricted. The appellate court is created to review the acts of a lower court. If the appeal is properly before the appellate court, this court may reach an erroneous result which could be reversed if subject to further appeal; however, its authority to determine the appeal is not to be challenged. Since in the *Portnoy* case it was the authority of the superior court, not that of the justice's court, which was challenged by the petition,⁹⁰ the supreme court, to be consistent with its opinion in the *Redlands* case, could reach but one decision. It rendered that decision. The dictum of the court in the *Redlands* case, with which Justice Carter had taken issue, here materialized into a holding. Consequently, the constitutional limitation upon appeals was observed.

Nevertheless, review of inferior court proceedings by the higher appellate courts may not always be foreclosed when appeal to the superior court has been taken on questions of law alone. In *Andrews v. Superior Court*,⁹¹ by an exceedingly ingenious course of procedural legerdemain, a petitioner skirted the rule of the *Portnoy* case by the use of the writ of mandamus. Andrews had been convicted in a police

⁸⁸ *Ibid.* at 377, 125 P. (2d) at 489.

⁸⁹ *Ibid.* at 378, 125 P. (2d) at 489. For Justice Carter's reasoning in his concurring opinion in the *Redlands* case, see *supra* note 83.

⁹⁰ 20 Cal. (2d) at 377, 125 P. (2d) at 489.

⁹¹ (1946) 29 Cal. (2d) 208, 174 P. (2d) 313.

court for contributing to the delinquency of a minor, but sentence was suspended provided he leave the community. He took no appeal. Five years later he moved in the police court to have the judgment of conviction expunged from the record. Motion was denied, and he took no appeal. Instead, he sought mandamus in the superior court to compel the police court to expunge the record. The writ was denied, and the supreme court affirmed the denial, stating that the writ was not a substitute for appeal.⁹² Thereupon, Andrews moved in the police court for an order correcting the minutes and judgment to show that he had not entered a plea of guilty. The order was denied, and denial was affirmed by the superior court after an appeal on questions of law. Once again Andrews sought mandamus, this time from the district court of appeal, to compel the superior court to grant his appeal. Mandamus was denied. The supreme court granted a hearing, and issued the writ ordering the superior court to grant the appeal, *i.e.*, order the inferior court to correct the record. The basis of decision was that the police court was without jurisdiction because the subject matter of the offense was exclusively within the jurisdiction of the superior court.⁹³ Consequently, the original judgment was "void on its face" and the superior court, as an appellate court, had no discretion and could reach but one decision. The supreme court made this decision.⁹⁴

At first glance it seems that the supreme court is doing with one writ what it refused to do with another. Under the rule of the *Portnoy* case if certiorari had been sought Andrews would have lost. However, with mandamus he wins. Perhaps this incongruous result may be explained by considering the dual nature of the writs. When certiorari issues, a remedy in the nature of a direct appeal is granted, and the supreme court is restricted from granting such relief in these cases. Mandamus, however, is in the nature of a collateral attack and a void judgment may always be challenged. Such a reconciliation is not altogether satisfactory. First, it does not recognize that the superior court is the appellate court of last resort for these cases, which seems to be the premise supporting the limitation on appeals. Secondly, even

⁹² *Andrews v. Police Court* (1943) 21 Cal. (2d) 479, 133 P. (2d) 398.

⁹³ When the original judgment was rendered in the police court, this rule, apparently, was not settled. See *In re Guzman* (1941) 45 Cal. App. (2d) 359, 114 P. (2d) 46. Previously there had been "intimations" that police courts and superior courts had concurrent jurisdiction over the offense of contributing to the delinquency of a minor. See *Ex parte Dolan* (1900) 128 Cal. 460, 463, 60 Pac. 1094, 1095.

⁹⁴ Justice Carter wrote the opinion for the majority. Justice Edmonds dissented on the following grounds: "In the present proceeding, as the question for decision is posed in the majority opinion, Andrews again is endeavoring to use mandamus for the purpose of obtaining the relief which might have been accorded to him had he appealed from the order denying his motion to vacate the judgment. By its prior decision, this court held that he could not use mandamus as a substitute for an appeal, and the rule of *res judicata* stands squarely against him." 29 Cal. (2d) at 216, 174 P. (2d) at 318.

though a judgment may be subject to collateral attack, the doctrine of res judicata⁹⁵ sometimes operates to cut off this challenge.⁹⁶ Finally, the court offers no standard for determining when a judgment is more "void on its face" than any judgment first rendered by a court without jurisdiction; also, what is discretionary when the superior court acts in its appellate capacity becomes an open question.⁹⁷ Future cases alone can define the limits to which this procedural device may reach. What is clear is that even when appeal is taken on questions of law alone, the supreme court has a way of scrutinizing the inferior court's jurisdiction.

Review before appeal has been taken to the superior court

Because availability of appeal precludes the issuance of certiorari,⁹⁸ writ-review before appeal has been taken to the superior court is confined to the writs of prohibition and mandamus. Before writ-review will be granted, it must be shown that petitioner does not have a "plain, speedy, and adequate remedy in the ordinary course of law"; judicial discretion thus becomes an important element in determining the availability of writ-review. Many different factors influence the exercise of this discretion. Some receive express recognition,⁹⁹ while others, by their nature, must remain inarticulate.¹⁰⁰ Against these fac-

⁹⁵ *Ibid.*

⁹⁶ For the interplay of these two policies, see RESTATEMENT, JUDGMENTS (1942) §10: "(2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that (a) the lack of jurisdiction over the subject matter was clear; (b) the determination as to jurisdiction depended upon a question of law rather than of fact; (c) the court was one of limited and not of general jurisdiction; (d) the question of jurisdiction was not actually litigated; (e) the policy against the court's acting beyond its jurisdiction is strong." That the California supreme court recognizes this interplay seems implicit in *Rescue Army v. Municipal Court*, *infra* note 101, at 463, 464, 171 P. (2d) at 11; *cf.* *Brock v. Superior Court* (1947) 29 Cal. (2d) 629, 177 P. (2d) 273; see also *infra* note 202.

⁹⁷ The difficulties involved in answering this question may be suggested by examining the use of mandamus to review administrative proceedings. See Note (1946) 34 CALIF. L. REV. 741.

⁹⁸ *Noble v. Superior Court* (1895) 109 Cal. 523, 42 Pac. 155; *White v. Superior Court* (1895) 110 Cal. 54, 42 Pac. 471; *Tucker v. Justices' Court* (1898) 120 Cal. 512, 52 Pac. 808; *Elledge v. Superior Court* (1900) 131 Cal. 279, 63 Pac. 360; *Weldon v. Superior Court* (1903) 138 Cal. 427, 71 Pac. 502; *Valentine v. Police Court* (1904) 141 Cal. 615, 75 Pac. 336; *Olcese v. Justice's Court* (1909) 156 Cal. 82, 103 Pac. 317.

⁹⁹ *E.g.*, (1) Necessity for a speedier review: *Merced Mining Co. v. Fremont* (1857) 7 Cal. 130 (mandamus); *Kirby v. Superior Court* (1886) 68 Cal. 604, 10 Pac. 119 (prohibition); (2) The importance of the question for which review is sought: *Inglin v. Hoppin* (1909) 156 Cal. 483, 105 Pac. 582 (where statute providing for appeal is unconstitutional); *Hill v. Superior Court* (1911) 15 Cal. App. 307, 114 Pac. 805 (mandamus to compel trial of election contest in which there is a public interest); *Arfsten v. Superior Court* (1912) 20 Cal. App. 269, 128 Pac. 949 (where petitioner is imprisoned under void statute).

¹⁰⁰ Thus, the supreme court and the district courts of appeal apparently never give as their basis for deciding that an appeal is not a "plain, speedy, and adequate remedy in the ordinary course of law" such reasons as: (1) the need for a carefully narrowed

tors, the basic need for preventing protracted litigation in small cases operates as an ever-present restraint upon a too liberal allowance of review.

*Rescue Army v. Municipal Court*¹⁰¹ indicated that prohibition is available to restrain inferior courts from acting without jurisdiction before an appeal has been taken to the superior court. In that case petitioners sought to restrain the municipal court from trying them for violation of an ordinance regulating the solicitation of contributions. One of the petitioners alleged that he had twice been convicted of violating the ordinance in question, and each time the conviction was reversed by the appellate department of the superior court; that a third trial had been ordered, and the respondent court would proceed unless restrained. The petition further alleged that the ordinance was unconstitutional. The supreme court, in a four-to-three decision,¹⁰² held the ordinance constitutional and denied the writ. Chief Justice Gibson, speaking for the majority, said:

The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case.¹⁰³

However, the court explained, the trial court cannot be ousted of jurisdiction by the mere assertion of a claim that the ordinance or statute under which it is proceeding is unconstitutional; a court must always have jurisdiction to determine its own jurisdiction. Nevertheless, when, after a seasonable challenge, the trial court decides the jurisdictional question in its own favor and proceeds to act, then a higher court will, in an appropriate case, restrain the trial court from acting in excess of jurisdiction.¹⁰⁴ Thus, if the majority of the court had con-

construction of ordinances and statutes attacked on the ground that they violate rights guaranteed under the federal constitution; (2) conflict between decisions of lower appellate courts; (3) that the appeal to the superior court, if taken on questions of law alone, could never be brought before them. The third factor, though not given express recognition, may have been tacitly persuasive in *Elder v. Justice's Court* (1902) 136 Cal. 364, 68 Pac. 1022, and *Treppa v. Justice's Court* (1934) 1 Cal. App. (2d) 374, 36 P. (2d) 819. These cases granted, or approved the granting by the superior court, of a writ where an appeal was available on questions of law alone.

¹⁰¹ (1946) 28 Cal. (2d) 460, 171 P. (2d) 8. For cases when prohibition has been issued to an inferior court before appeal, see *Hayne v. Justice's Court* (1889) 82 Cal. 284, 23 Pac. 125; *Westinghouse Co. v. Justice's Court* (1926) 79 Cal. App. 759, 250 Pac. 1104.

¹⁰² Justices Shenk, Traynor and Spence concurred in the majority opinion of Chief Justice Gibson. Justice Carter dissented on the ground that the statute was unconstitutional, and further disagreed with the reasoning of the majority on the question of jurisdiction to determine jurisdiction. Justice Schauer concurred with Justice Carter's opinion only insofar as it related to the constitutionality of the ordinance. Justice Edmonds dissented on the ground that the ordinance was unconstitutional.

¹⁰³ 28 Cal. (2d) at 462, 171 P. (2d) at 10.

¹⁰⁴ *Ibid.* at 464, 171 P. (2d) at 11.

sidered the ordinance in question to be unconstitutional it would have granted the writ.

Justice Carter, in his dissenting opinion, contended that the ordinance was unconstitutional. He also disapproved the process by which the majority reached the conclusion that prohibition was available in this situation. Fundamentally, Justice Carter's disagreement seems to be with the decision in the *Portnoy* case rather than with the decision in the instant case. His contention merits examination because of the frequency and positiveness with which it is put forth. He states:

Perhaps the reasoning in the majority opinion was adopted to escape the untenable position taken by the majority of this court in *Portnoy v. Superior Court*, *supra*. It was there stated, after declaring that a court had jurisdiction to determine jurisdiction (the constitutionality of a statute) erroneously: 'In the present case both the justice's court and the superior court on appeal have held that the ordinance is constitutional, and it cannot be said that in so holding they had exceeded their jurisdiction.' . . . This statement is clearly contrary to the holding in the majority opinion in the case at bar. If, as conceded in the opinion of the Chief Justice, the issue of constitutionality goes to the *jurisdiction* of the court, then that issue is still present and the decision of the court on that issue was subject to review by certiorari. The issue thus boils down to the simple proposition that whenever a lower court decides a jurisdictional question its decision is subject to review by certiorari, prohibition, habeas corpus or other appropriate writ.¹⁰⁵

Though the quoted statement from the *Portnoy* case, standing alone, is susceptible of the interpretation given it by Justice Carter, further examination fails to disclose any inconsistency between the quotation and the holding in the *Rescue Army* case. In the *Portnoy* case, petitioners sought certiorari to annul the judgments of both the inferior court and superior court. Certiorari was denied for two reasons: one, the inferior court judgment could not be reached since appeal to the superior court was available, and certiorari will not issue where appeal is possible; two, the superior court's judgment could not be reached, even though further appeal was not available, because appeal to the superior court had been taken on questions of law alone and as an appellate court it was not without jurisdiction to affirm erroneously the inferior court judgment. In the *Rescue Army* case, however, it is the trial court that is restrained from making an erroneous determination, and the availability of an appeal does not prevent issuance of prohibition.¹⁰⁶ Justice Carter's argument in the *Rescue Army* case would be correct only if his concurring opinion in the *Redlands* case

¹⁰⁵ *Ibid.* at 474, 171 P. (2d) at 17.

¹⁰⁶ Cases cited in note 98, *supra*.

were the law.¹⁰⁷ It may seem illogical that an action based upon an unconstitutional statute may in one instance be reached by a writ whereas in another it may not. Such a result seems inevitable if the constitutional provision establishing the superior court as the appellate court of last resort for proceedings begun in the inferior court is to be observed at all,—and if the rule is to be retained that an appellate court with jurisdiction may reach an erroneous result that may become final.

It is worthy to note the policy factors which possibly influenced the determination in the *Rescue Army* case that petitioner did not have a "plain, speedy, and adequate remedy in the ordinary course of the law". Not only was petitioner threatened with a multiplicity of prosecutions, but the constitutional question, involving civil liberties, was important. Had the appellate department of the superior court eventually affirmed the conviction, further review in the state courts would have been foreclosed unless petitioner were imprisoned;¹⁰⁸ appeal could then be taken only to the United States Supreme Court,¹⁰⁹ and that court would not have as a guide the highest state court's interpretation of the ordinance.¹¹⁰

Conclusion

Unquestionably there are serious flaws in the present system of appellate review of inferior court decisions. In many proceedings, the highest state court should always be given the opportunity to declare uniform state law.¹¹¹ In many other cases, the patent injustice of the decision demands further appellate relief. The writs have bridged some of these gaps.¹¹² However, application of the writs is confusing to both lawyer and judge. In too many cases, consideration by an upper appellate court is dependent upon the skill of counsel in taking

¹⁰⁷ See *supra* note 83.

¹⁰⁸ *In re Bell* (1942) 19 Cal. (2d) 488, 122 P. (2d) 22.

¹⁰⁹ *Robertson v. California* (1946) 328 U.S. 440.

¹¹⁰ The importance of the construction given ordinances such as this by state courts is well illustrated by *Cox v. New Hampshire* (1941) 312 U.S. 569. But see the *Rescue Army* case in the Supreme Court of the United States, *Rescue Army v. Municipal Court* (1947) 331 U.S. 549. There the Supreme Court refused to exercise jurisdiction on appeal from the decision of the California supreme court on the ground that the opinion of the court was not sufficiently clear. The majority of the court, however, seem to be proceeding with a superabundance of caution in deciding questions of civil liberties. The dissent, by Justices Douglas and Murphy, realistically pointed out that the constitutional issues were clearly enough drawn for decision.

¹¹¹ *E.g.*, whenever a right established by the state or federal constitution is involved; whenever there is a conflict in opinions written by the appellate departments of the superior court. In practice, opinions are written by the appellate departments only when appeals are taken on law alone. These are the very cases for which writ-relief is least available.

¹¹² *E.g.*, *Rescue Army v. Municipal Court*, *supra* note 101; *Williams v. Superior Court* (1935) 9 Cal. App. (2d) 314, 49 P. (2d) 1126.

the right sort of appeal from the inferior court, and in selecting the correct writ at the proper time. Too often the plea for swift justice may mask the urge to delay.¹¹³ "Jurisdiction" is too elusive a concept to block out those cases in which uniformity of law and attainment of substantial justice demands higher court review, unless the policy against harassing appeals in minor cases is to be sacrificed. The jurisdiction concept should be abandoned. With the abandonment of this concept, the question arises as to what sort of system of appellate review should be adopted. Resolution of conflicting policies inherent in any attempt to establish an ideal appellate court structure is beyond the scope of this study. However, one approach is suggested. Where there is need for immediate relief to avoid irreparable injury or useless litigation in the obvious case, that relief should be granted only by the court to whom the litigant has an absolute right of appeal. That court's decision on the right to interlocutory relief should be final. Where the problem is to secure further appeal after the appeal of right has been taken, there are two possible solutions: vest in the higher appellate courts discretion to determine whether a further appeal is to be granted; or, establish definite standards for those exceptional situations in which a right to further review beyond the superior court is to be given, and provide that in all other cases the appeal of right is to be final.

EXTRAORDINARY REVIEW OF ORDERS AND JUDGMENTS OF THE SUPERIOR COURTS

A brief consideration of the normal appellate process for cases begun in the superior courts is necessary to acquire an understanding of the use of the writs as a supplement to this process. As previously stated, some limitations on appeal are necessary if lawsuits are to be completed with dispatch. To allow an immediate appeal of all orders would result in delay and expense for both state and litigants without proportionate attendant benefits. The legislature, to prevent protracted litigation, has provided for immediate appeal from only a limited number of intermediate orders and interlocutory judgments.¹¹⁴

¹¹³ The provisions for the alternative writs of mandamus and prohibition seemingly make it possible to use petitions for extraordinary writs to delay the proceedings. See CAL. CODE CIV. PROC. §§1087, 1104. See Conclusion to this comment, *infra*.

¹¹⁴ The following orders are appealable: 1) an order granting a new trial; 2) an order denying a motion for judgment notwithstanding the verdict; 3) an order granting or dissolving an injunction; 4) an order refusing to grant or dissolve an injunction; 5) an order appointing a receiver; 6) an order dissolving or refusing to dissolve an attachment; 7) an order changing or refusing to change the place of trial; 8) any special order made after final judgment. CAL. CODE CIV. PROC. §963. The appealable orders in probate proceedings and in guardianship proceedings are enumerated in sections 1240 and 1630 of the Probate Code. Section 963 of the Code of Civil Procedure also provides, "An appeal may be taken from a superior court in the following cases: . . . from any

In all other cases, appeal will lie only from final orders or judgments.¹¹⁵ The "final judgment" requirement is the foundation of our appellate practice. However, certain final orders and judgments,¹¹⁶ primarily contempt judgments,¹¹⁷ are nonappealable. As a general rule a judgment is not considered final until the court has entered a judgment embracing *all issues*, both of the complaint and of counterclaims, involved in a particular proceeding.¹¹⁸ However, the hardship which sometimes results from insistence on a final disposition of the entire proceeding before an appeal will lie has led to judicial modification of the "final judgment" requirement. Thus, an appeal will lie from a final judgment on *collateral matters, i.e.,* if "the order requires the payment of money by the party complaining . . . or the doing of an act by or against him, the order is in effect final as against such party and may be appealed from by him".¹¹⁹ This judicial modification of the "final judgment" requirement is artificial and difficult to apply.¹²⁰

As previously stated, the legislature has provided that certain orders are specifically appealable before a final judgment is ren-

interlocutory judgment, order or decree, hereafter made or entered in actions to redeem real or personal property from a mortgage thereof, or a lien thereon, determining such right to redeem and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, and interlocutory decrees of divorce . . ." Nonappealable intermediate orders may be reviewed on an appeal from the final judgment. CAL. CODE CIV. PROC. §956.

¹¹⁵ CAL. CODE CIV. PROC. §963. For a discussion and criticism of the final judgment requirement, see Crick, *The Final Judgment As a Basis for Appeal* (1932) 41 YALE L. J. 539.

¹¹⁶ This classification includes consent judgments. See *infra* note 158, and related text.

¹¹⁷ See discussion in text, *infra*.

¹¹⁸ *Mather v. Mather* (1936) 5 Cal. (2d) 617, 55 P. (2d) 1174; *Mather v. Mather* (1943) 22 Cal. (2d) 713, 140 P. (2d) 808; *Mather v. Mather* (1944) 25 Cal. (2d) 582, 154 P. (2d) 684 and *Greenfield v. Mather* (1939) 14 Cal. (2d) 228, 93 P. (2d) 100 illustrate what can happen when the court fails to enter a final judgment embracing all the causes of action. The extensive litigation in the *Mather* case (including *Greenfield v. Mather, supra*) arose from the fact that in the original proceeding for a rescission of a property settlement agreement, the superior court first entered a judgment to the effect that the plaintiff should take nothing by a third count of the complaint, and several months later entered another judgment to the effect that the plaintiff take nothing by his complaint, or the first and second counts thereof. Each of these judgments was declared to be a partial and not a final judgment. Further errors in entering the final judgment after the case was remanded account for the extensive litigation in this case. The history of this litigation is summarized in *Mather v. Mather* (1944) 25 Cal. (2d) at 583, 154 P. (2d) at 684. See Note (1942) 31 CALIF. L. REV. 90 (discusses the more liberal federal rule).

¹¹⁹ *Title Ins. & Trust Co. v. Calif. Etc. Co.* (1911) 159 Cal. 484, 491, 114 Pac. 838, 841.

¹²⁰ See *ibid.* at 490, 114 Pac. at 840 for a general discussion of the difficulties which have been encountered in deciding what is a final judgment on a collateral matter. Because of this uncertainty, there is danger that a party in need of immediate relief might take a premature appeal on the theory that a particular order is a final judgment on a collateral matter only to have his appeal denied, thereby causing additional expense and delay.

dered.¹²¹ It has recognized that delaying an appeal from orders affecting property rights such as the granting of an injunction, the appointment of a receiver, or the refusal to dissolve an attachment may result in serious hardship and render impossible a restoration of the *status quo* when appeal is finally available. However, the inherent inflexibility of an *a priori* selection of intermediate orders which are subject to immediate review compels resort to other forms of relief in the situations when appeal does not lie and hardship may result. The following discussion will be an analysis of the availability of the extraordinary writs to provide review when final orders and judgments are not appealable, when appeal is not presently available, and finally, when present appeal appears inadequate.

When final judgments and orders are not appealable

A nonappealable final order is one which a reviewing court will never examine in the ordinary course of appeal. It is to be distinguished from an intermediate nonappealable order which, though not immediately appealable, may be reviewed on appeal from the final judgment. Final orders are nonappealable for differing policy reasons which will be considered in connection with the discussion of the various types of orders.

Contempt Judgments. At common law any interference with court proceedings, such as misconduct on the part of attorneys or refusal of a witness to testify, was considered to be in the nature of a criminal offense. Apparently, because the contempt proceeding was likened to a summary criminal trial, review of the contempt judgment was not available.¹²² When contempt proceedings were later broadened to enforce private rights, such proceedings were considered civil trials, and appeals were eventually permitted under the English statutes relating to civil appeals.¹²³ The common-law rule barring appeals from a criminal contempt proceeding has been changed by statute in a number of American jurisdictions, so that a writ of error is available to review the judgment.¹²⁴ This writ permits the court to consider errors of law apparent on the face of the record.¹²⁵ In these jurisdictions an appeal will also lie in a civil contempt proceeding.¹²⁶ In California,

¹²¹ *Supra* note 114.

¹²² OSWALD, CONTEMPT OF COURT (3d ed. 1910) 230.

¹²³ *Ibid.* at 229.

¹²⁴ DANGEL, CONTEMPT (1939) 284.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 288. In New York a distinction is drawn between cases where contempt has been committed in the immediate presence of the court and is punished summarily, and cases in which formal proof is required. In the former situation the judge makes a return setting forth the facts within his knowledge on which the contempt order is based; this return is conclusive on review of the contempt. When contempt has not been committed in the court's presence, and formal proof is required, an appeal of ordinary scope

however, both criminal and civil contempt judgments are still final and nonappealable.¹²⁷ Thus, the extraordinary writs provide the only means of obtaining review of contempt judgments.

To illustrate the use of the extraordinary writs to review contempt judgments let us assume the following facts. Corporation *A* has obtained an injunction which forbids the picketing of *A*'s plant by *B*, a member of an organizing union. *B* fails to appeal, or perhaps review by appeal is too slow. *B* violates the injunction and is cited for contempt. No appeal is possible. However, he may contest the lower court's authority to issue the injunction by seeking a writ of prohibition to restrain its enforcement.¹²⁸ If the reviewing court is convinced that the lower court will enforce a void order and thereby cause unnecessary expense and delay, it may grant a writ of prohibition.¹²⁹ Or the reviewing court, to avoid delay in entering the final judgment, may deny the writ of prohibition so that the petitioner must present his defense in the contempt proceeding.¹³⁰ Thereafter, if *B* is adjudged guilty of contempt he could challenge the contempt order by a petition for certiorari,¹³¹ basing his action on lack of authority by the

is available. For a discussion of this point, see *Matter of Douglas v. Adel* (1935) 269 N. Y. 144, 199 N. E. 35. The New York law of contempt and suggestions for clarification of the statutes relating to review are considered in THIRTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK (1947) 231 and appendix at 251. Federal practice distinguishes between civil and criminal contempts, the former being governed by the rules of civil appeals and the latter by the rules of criminal appeals. For a discussion of this point, see *Nye v. United States* (1941) 313 U. S. 33. For a general discussion of appeals and review of contempt cases in federal courts, see LONGSDORF, *CYCLOPEDIA OF FEDERAL PROCEDURE* (1930 supplements) §3733.

¹²⁷ CAL. CODE CIV. PROC. §1222. The California courts have held that no appeal lies from such judgments and orders because of this code provision. *Gale v. Tuolumne County* (1914) 169 Cal. 46, 145 Pac. 532; *Tripp v. Tripp* (1922) 190 Cal. 201, 211 Pac. 225. The summary contempt procedure provided for in sections 1209 to 1222 of the Code of Civil Procedure should be distinguished from punishment of contempt as a misdemeanor under section 166 of the Penal Code. For a discussion of this point, see *In re Morris* (1924) 194 Cal. 63, 227 Pac. 914; *In re Bruns* (1936) 15 Cal. App. (2d) 1, 58 P. (2d) 1318. The discussion in the text is concerned only with summary procedure. In summary contempt procedure the term "criminal contempt" is sometimes used to describe interference with court procedure, while civil contempt refers to enforcement of an order or injunction for the benefit of a private party. See discussion of this matter in *Bridges v. Superior Court*, *supra* note 61, at 473, 94 P. (2d) at 987.

¹²⁸ See *Evans v. Superior Court* (1939) 14 Cal. (2d) 563, 96 P. (2d) 107. A writ of prohibition issued to prevent the enforcement of a preliminary injunction which restrained the building and loan commissioner from paying a special counsel; since the commissioner was authorized by statute to compensate a special assistant, the lower court was without authority to issue the injunction.

¹²⁹ *Ibid.*

¹³⁰ For a good discussion of the policy of requiring completion of contempt proceedings before review is granted, see *C. S. Smith Met. M. Co. v. Superior Court* (1940) 16 Cal. (2d) 226, 228, 105 P. (2d) 587, 588.

¹³¹ *E.g.*, in *Fortenbury v. Superior Court* (1940) 16 Cal. (2d) 405, 106 P. (2d) 411, an injunction restraining picketing was annulled on certiorari on the ground that the lower court lacked authority to enjoin peaceful picketing.

court to grant the contempt order even though the injunction was valid,¹³² or lack of authority because the injunction was invalid.¹³³

A writ may, of course, be denied on the ground that the request is premature. The really critical issue, however, where prohibition, certiorari, or habeas corpus¹³⁴ is sought, is whether the court has *authority* to act.¹³⁵ An absence of authority or jurisdiction is generally found if there has been a failure to comply with conditions precedent to the exercise of the court's power.¹³⁶ Thus, a contempt order may be granted only if the violated injunction is valid.¹³⁷ The affidavits alleging contempts committed outside of court must be specific.¹³⁸ The violator's knowledge of the court order¹³⁹ and his ability to obey it¹⁴⁰ are conditions precedent and accordingly must be alleged. If these pleading requirements, which may be expanded by the reviewing court to serve the ends of justice, are not satisfied, the defects cannot be corrected by an evidentiary showing and subsequent findings of the court.¹⁴¹ This treatment of defects in pleadings in contempt cases may be compared with the usual treatment of a complaint in a civil suit which fails to state a cause of action. Although failure to state a cause of action goes to the jurisdiction of a court and may be raised on appeal for the first time,¹⁴² it might not constitute reversible error.¹⁴³ In effect the defect may be cured by subsequent pleadings and findings. Further, in constructive contempt proceedings, the reviewing court will examine the evidence for sufficiency to determine

¹³² Before a court has authority to adjudge a person guilty of contempt, certain procedural requirements must be followed or the contempt judgment may be annulled on certiorari. These procedural requirements are discussed in the text, *infra*.

¹³³ *Supra* note 131.

¹³⁴ The availability of habeas corpus will not be considered in this article.

¹³⁵ See the introduction for a discussion of the requirement that a jurisdictional error must be found before these writs will issue.

¹³⁶ *E.g.*, a writ will issue when the affidavit in a constructive contempt proceeding is defective, *Phillips v. Superior Court* (1943) 22 Cal. (2d) 256, 137 P. (2d) 838; when the court is without power to grant the injunction which is being enforced by contempt, *Fortenbury v. Superior Court*, *supra* note 131; when the contemner does not have the ability to obey the order, *Ex parte Todd* (1897) 119 Cal. 57, 50 Pac. 1071; when it cannot be shown that the contemner committed an act clearly and specifically prohibited by a court order, *Weber v. Superior Court* (1945) 26 Cal. (2d) 144, 156 P. (2d) 923. In each of these situations, a condition precedent to the court's power to punish for contempt had not been performed.

¹³⁷ *Fortenbury v. Superior Court*, *supra* note 131.

¹³⁸ *E.g.*, *Otis v. Superior Court* (1905) 148 Cal. 129, 82 Pac. 853.

¹³⁹ *Phillips v. Superior Court*, *supra* note 136.

¹⁴⁰ *Mery v. Superior Court* (1937) 9 Cal. (2d) 379, 70 P. (2d) 932; *cf. In re McCarty* (1903) 154 Cal. 534, 98 Pac. 540.

¹⁴¹ *Dreher v. Superior Court* (1932) 124 Cal. App. 469, 12 P. (2d) 671.

¹⁴² *Ohio Electric Car Co. v. Le Sage* (1920) 182 Cal. 450, 188 Pac. 982.

¹⁴³ *E.g.*, in *Ades v. Brush* (1944) 66 Cal. App. (2d) 436, 152 P. (2d) 519, the failure of the complaint to allege negligence was not reversible error when it was clear that the defendant was not the victim of surprise as a result of the defect and sufficient evidence of negligence had been introduced at the trial.

if the lower court had authority to act.¹⁴⁴ When petitioner is held for contempt committed in the presence of the court, the order adjudging his guilt must be as specific as the affidavits.¹⁴⁵ Because of the breadth of what the court will look at to determine if jurisdiction exists, the conclusion is that the writs provide an appeal of contempt orders.¹⁴⁶

This extensive use of the writs to review contempt proceedings evidently springs from a strong feeling that review is necessary if arbitrary and capricious punishment is to be avoided.¹⁴⁷ However, the method of securing review could be improved. If it is necessary at all, it should be allowed as a matter of right and not made dependent upon the vague and frequently inarticulate concept of jurisdiction. When contempt is actually committed in court, since introduction of evidence is unnecessary and generally only a question of law is in issue, a speedy summary review would amply protect the court's dignity and the interests of the contemner.¹⁴⁸ The California courts have utilized the writs to avoid the undesirable rule that contempt judgments are not subject to review. It remains for the legislature, however, expressly to abandon the harsh rule of nonreviewability by providing for appeal as a matter of right.

Orders after final judgment nonappealable because not authorized by statute. Special orders after final judgment are expressly made appealable by section 963 of the Code of Civil Procedure. Since certiorari will not issue when there is a right of appeal¹⁴⁹ and since prohibition is not available when action by the court has been completed,¹⁵⁰

¹⁴⁴ *Bridges v. Superior Court*, *supra* note 61 (certiorari was granted by the United States Supreme Court and the judgment reversed on grounds unrelated to the scope of review on appeal from a contempt judgment). *Cf. Estate of Kay* (1947) 30 A. C. 211, 181 P. (2d) 1 (not a contempt case), in which the court held that the sufficiency of the evidence was not jurisdictional and would not be considered on certiorari. As a general rule, the reviewing court will not consider the sufficiency of the evidence except in case of judicial proceedings before administrative tribunals where jurisdictional facts must exist before the tribunal has the power to act. *In re Horr* (1918) 177 Cal. 721, 171 Pac. 801; *Winning v. Board of Medical Examiners* (1931) 114 Cal. App. 658, 300 Pac. 866.

¹⁴⁵ *E.g.*, in *Pyper v. Jennings* (1920) 47 Cal. App. 623, 191 Pac. 565, it was held that when a witness is being punished for contempt for refusing, in open court, to produce a book or other document, the contempt order must recite facts showing that the document contains evidence pertinent and material to the issue to be tried.

¹⁴⁶ By expanding jurisdictional requirements to include sufficiency of the evidence, reviewing courts must make the same extensive examination of the record as in the case of an ordinary appeal. As noted in the text, *supra*, the reviewing court is more strict about pleading niceties in contempt cases than in the ordinary civil appeal.

¹⁴⁷ The great number of contempt judgments annulled through use of the writs indicates the great danger of injustice inherent in a nonreviewable contempt procedure.

¹⁴⁸ This distinction between the review of contempt committed in the presence of the court, and contempt committed outside the court's presence would follow the New York practice, discussed in note 126, *supra*.

¹⁴⁹ CAL. CODE CIV. PROC. §1068.

¹⁵⁰ *Ibid.* §1103; *State Bd. of Equalization v. Superior Ct.* (1937) 9 Cal. (2d) 252, 70 P. (2d) 482.

it would seem that extraordinary relief could not be utilized to review orders made after final judgment. This supposition is incorrect, however, since the supreme court has held that certain orders made after final judgment are nonappealable. As to these orders, then, certiorari is available.

In *Stanton v. Superior Court*,¹⁵¹ the trial court made an order which purported to vacate two judgments previously entered and to substitute different judgments therefor. In holding that certiorari was available in this case, the supreme court said:

We are also satisfied that neither of these orders or subsequent judgments can be said to be special orders after final judgment within the meaning of section 963 of the Code of Civil Procedure, because such section contemplates orders given by a court having jurisdiction to act.

To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system.¹⁵²

The decision in the *Stanton* case was apparently motivated by a desire to give the petitioner speedy relief.¹⁵³ Apart from the dubious construction of section 963,¹⁵⁴ however, the decision lays a procedural trap. It is not always clear which special orders after final judgment will be considered nonappealable,¹⁵⁵ and in seeking certiorari the petitioner risks a decision that the order is appealable; by then the time for taking an appeal may have run. If an appeal is taken first this risk is avoided, but if the order is held nonappealable under the rule of the *Stanton* case, the appellant will then have to petition for a writ of certiorari. Thus the advantages of speedy review gained in individ-

¹⁵¹ (1927) 202 Cal. 478, 261 Pac. 1001.

¹⁵² *Ibid.* at 489, 261 Pac. at 1005.

¹⁵³ The doctrine of the *Stanton* case is well established. *Accord*: *Treat v. Superior Court* (1936) 7 Cal. (2d) 636, 62 P. (2d) 147; *Whitley v. Superior Court* (1941) 18 Cal. (2d) 75, 113 P. (2d) 449; see *Lankton v. Superior Court* (1936) 5 Cal. (2d) 694, 55 P. (2d) 1170; *Shrimpton v. Superior Court* (1943) 22 Cal. (2d) 562, 139 P. (2d) 889, 31 CALIF. L. REV. 576.

¹⁵⁴ The doctrine of the *Stanton* case was severely attacked by Justice Traynor in a concurring opinion to *Shrimpton v. Superior Court*, *supra* note 153. He argued that there is no statutory basis for holding that such orders are not appealable as special orders after final judgment, and that the *Stanton* case was a departure from established case law.

¹⁵⁵ There appears to be a tendency to expand this class of nonappealable orders after final judgment. Thus in *Treat v. Superior Court*, *supra* note 153, the majority opinion recognized that the lower court had inherent power to correct mistakes in its proceedings by annulling, within a reasonable time, orders and judgments prematurely and inadvertently made. But the supreme court decided that the lower court had exceeded its jurisdiction in vacating the findings and judgment since there was no express statement in the vacating order that the court was exercising its inherent power. This holding seems to indicate a willingness to find a jurisdictional defect.

ual cases are outweighed by the confusion caused by this distortion of the meaning of "special orders after final judgment". If the supreme court fails to overrule the *Stanton* case, legislative action would be desirable to eliminate this unnecessary use of the extraordinary writs.

Miscellaneous nonappealable final orders and judgments. Occasionally judicial bodies make other orders or judgments from which the legislature has given no right of appeal. Denial of this right may result either from an oversight or from some policy consideration. The extraordinary writs have been used to provide review when, for either of these reasons, appeal is not available. For example, in *Williams v. Superior Court*,¹⁵⁶ a court reporter was cited for contempt for failure to comply with a previous order directing him to prepare a reporter's transcript. The order to show cause was vacated by another department of the superior court. Since this vacating order affected the contempt proceeding against the reporter, it was not sufficiently connected with the original judgment for which the record was sought to constitute a special order after final judgment from which an appeal will lie.¹⁵⁷ Therefore, the party who desired the record was without a remedy if extraordinary relief were denied. By granting review on certiorari, the supreme court prevented real hardship to the litigant. If the legislature had anticipated this situation, it would probably have made the vacating order appealable.

On the other hand, when review of a *consent judgment* is sought, policy considerations are different since the legislature would probably not wish to grant appeal in this situation. There is sound policy that a case be first contested in the trial court and not in the appellate court.¹⁵⁸ Waiver of this contest should foreclose to the litigants their right to appeal. Yet, a writ of prohibition has been issued to prevent enforcement of a consent judgment predicated on a contract in restraint of trade.¹⁵⁹ Here, two important policies were in conflict. Although the writs provide relief in such cases when no appeal will lie, there is danger that review may be granted to avoid hardship in an individual case without a proper consideration of the factors barring appeal.¹⁶⁰

¹⁵⁶ (1939) 14 Cal. (2d) 656, 96 P. (2d) 334.

¹⁵⁷ CAL. CODE CIV. PROC. §963.

¹⁵⁸ *Erlanger v. Southern Pac. R. R. Co.* (1895) 109 Cal. 395, 42 Pac. 31, is one of many cases holding that no appeal will lie from a consent judgment.

¹⁵⁹ *Hunter v. Superior Court* (1939) 36 Cal. App. (2d) 100, 97 P. (2d) 492.

¹⁶⁰ *O'Brien v. Olson* (1941) 42 Cal. App. (2d) 449, 109 P. (2d) 8, provides an example of the tendency to expand the cases in which review by certiorari is available. In this case a governor of California removed all prison directors after a hearing as authorized by article X, section 1 of the constitution of California which provides: "The Governor shall have the power to remove either of the Directors for misconduct, incompetency, or neglect of duty, after an opportunity to be heard upon written charges". There is no provision for appealing such removal. The district court of appeal held, however,

When appeal is not presently available

A lawsuit may be considered to be a series of judicial acts: the assumption of jurisdiction, the making of intermediate orders, and the rendition of a final judgment. We are presently concerned with extraordinary review of those judicial acts which are not immediately appealable. Since no order is made in connection with the assumption of jurisdiction to act, appeal will not lie;¹⁶¹ but, as we shall see, prohibition may test the court's jurisdiction to act, and mandamus may compel exercise of jurisdiction. Resolution by the legislature of conflicting policies determines which intermediate orders shall be immediately appealable, and which shall be reviewed on an appeal from the final judgment.¹⁶² Our system of enumerating appealable orders is simple, but it is also arbitrary. Attorneys turn to the writs for immediate appellate relief otherwise denied them.

Since prohibition is used to halt pending proceedings, mandamus to compel the exercise of jurisdiction, and certiorari to review a completed judicial act,¹⁶³ an analysis of the review provided by the writs when appeal is not presently available may best be presented by considering each writ separately.

Prohibition. The use of prohibition to halt proceedings indicates that the legislative designation of when appeal may lie has not completely satisfied the courts. Prohibition has been issued to restrain further proceedings when appeal was not presently available, in the

that the governor was exercising a judicial function and that certiorari would lie to review his decision. After an examination of the sufficiency of the evidence, the writ was denied; *cf.* *Estate of Kay*, *supra* note 144, holding that sufficiency of the evidence does not go to jurisdiction. It is difficult to ascertain whether certiorari should be available in such cases, though it would seem to provide a check on arbitrary action in cases of this sort.

¹⁶¹ 2 CAL. JUR. 129.

¹⁶² *E.g.*, in a receivership proceeding the court may make a number of orders which affect the ownership of property; if immediate appeal is denied, restoration of the status quo is rendered impossible, yet if immediate appeal of each order is granted, the proceedings would be so prolonged as to be worthless. Section 963 of the Code of Civil Procedure allows an immediate appeal from the order appointing a receiver, but not from other receivership orders. But the final judgment rule has been modified to provide relief in certain situations involving receivership proceedings. *Title Ins. & Trust Co. v. Calif. Etc. Co.*, *supra* note 119.

¹⁶³ It should be noted that certiorari will not lie until the action of the court has been completed (*Gauld v. Board of Supervisors* (1898) 122 Cal. 18, 54 Pac. 272), whereas prohibition can only be used to halt unauthorized proceedings when further action by the court is required (*supra* note 150; this point is discussed in *Evans v. Superior Court*, *supra* note 128, at 580, 96 P. (2d) at 116). Permitting review of intermediate orders by certiorari conflicts with the policy against delaying the completion of lawsuits. On the other hand, the issuance of prohibition may bring the lawsuit to a speedy end, and thus further the policy against delays. Mandamus may be used to compel a reluctant court to exercise its jurisdiction, thus preventing delay in the termination of litigation. *Lissner v. Superior Court* (1944) 23 Cal. (2d) 711, 146 P. (2d) 232.

following situations: when title to land in another state is in issue;¹⁶⁴ when the jurisdictional amount requirement is not satisfied;¹⁶⁵ when an action between the same parties is pending in another superior court;¹⁶⁶ when the nonresident plaintiff failed to comply with a statute requiring an undertaking for costs.¹⁶⁷

These uses of the writ of prohibition serve a valid purpose. It seems foolish to try a lawsuit when at the outset it appears that the final judgment may be a nullity and subject to collateral attack because the court has acted without jurisdiction. However, the use of prohibition to arrest further proceedings may conflict with the policies requiring a full hearing¹⁶⁸ and a speedy termination of the litigation. After a *prima facie* case is established, an alternative writ of prohibition may be granted; several months may pass before the court finally decides whether or not the peremptory writ will issue. Thus a review based on as indefinite a concept as jurisdiction may be granted when it is not necessary;¹⁶⁹ or, if the peremptory writ is denied, issuance of the alternative writ may cause needless delay rather than hasten judicial review. If the standards for issuing prohibition were more certain, this unnecessary delay might be avoided.¹⁷⁰ Prohibiting proceedings should rest on a clear and articulate policy that recognizes specific situations in which there is no basis in law for further proceedings.¹⁷¹ If such policy is absent and the legislature has

¹⁶⁴ *Ophir Silver Min. Co. v. Superior Court* (1905) 147 Cal. 467, 82 Pac. 70.

¹⁶⁵ *Consolidated Etc. Co. v. Superior Court*, *supra* note 55.

¹⁶⁶ *Rilcoff v. Superior Court* (1942) 50 Cal. App. (2d) 503, 123 P. (2d) 540.

¹⁶⁷ *Carter v. Superior Court* (1917) 176 Cal. 752, 169 Pac. 667.

¹⁶⁸ See text, *infra*, for a discussion of the use of prohibition to test constitutionality of legislation. It is pointed out that a full hearing is necessary in such situations.

¹⁶⁹ When the alternative writ is issued the parties are required to file briefs in the reviewing court with authorities pro and con on the jurisdictional issue in dispute; thus the suit is being tried piecemeal. Whether or not the peremptory writ issues, the time of the court and the parties is consumed in this proceeding. Moreover, the record before the reviewing court is fragmentary because the writ of prohibition is used to halt incomplete proceedings; consequently, it is possible that the reviewing judges may not appreciate the full effect of their decision but allow themselves to be swayed by the equities apparent in this record. If the concept of jurisdictional defects is too greatly enlarged there may be some danger that prohibition will issue to halt proceedings for a defect that might have been cured if the trial had been allowed to continue; thus, in effect, the constitutional requirement that prejudicial error must be shown in order to justify reversal (CAL. CONST. art. VI, §4½) would be circumvented.

¹⁷⁰ It would be easier for a judge to determine if an alternative writ should issue. In addition, it would tend to discourage petitions for extraordinary review based on the hope that the reviewing court will be impressed with the equities of the case and find the particular defect "jurisdictional".

¹⁷¹ A statute might be drafted which would list the defects justifying the issuance of prohibition. This list ought to include defects which clearly could not be cured by subsequent proceedings, such as an attempt to try a local action involving title to land located in another state, and violations of express statutory provisions which are very likely to result in great damage to a litigant, such as a failure to comply with a statute

not designated that immediate review is necessary, a flexible procedure allowing review of the proceedings at a preliminary stage does not seem desirable.¹⁷² At least, if prohibition is to be allowed, it should be confined to cases in which the fragmentary record places the issue before the reviewing court as clearly as any record on appeal which would be available if the proceedings were allowed to continue through the trial stage.¹⁷³

Recent cases indicate a trend to test constitutionality of statutes by means of the writ of prohibition. It is possible that without the writ remedy the constitutional issue might never be raised. In *Jardine v. Superior Court*,¹⁷⁴ a writ of prohibition was used to test the constitutionality of section 388 of the Code of Civil Procedure. This code section allows service of process on an unincorporated association. The supreme court held that a writ of prohibition was an appropriate means of securing review of the constitutionality of applying the code section to the Los Angeles Stock Exchange. If prohibition had not been available, the defendant could challenge the validity of the statute only by allowing a default judgment to be entered against him, a dangerous gamble indeed, since appearance to defend on the merits would be a waiver of the right to challenge service.¹⁷⁵ Because the constitutionality of the statute could not be tested without incurring the risks of suffering a default judgment, there is some justification for the use of prohibition in this case.¹⁷⁶ Moreover, the record would be no more complete had the defendant suffered a default and then challenged the statute. Finally, a speedy determination of constitutionality is desirable in order to minimize hesitation in complying with a valid statute and to avoid the hardship of complying with one subsequently declared void.

However, the desirability of a speedy determination of the constitutional issue may depend on the manner in which it is raised. For example, if a statute authorizing a special commission to condemn land for a prison is challenged on the ground that its title does not meet the

requiring an undertaking for costs when a suit is brought by a resident of another state (CAL. CODE CIV. PROC. §1030) or a statute which declares a judge disqualified to act under certain circumstances (CAL. CODE CIV. PROC. §170).

¹⁷² See discussion, *supra* note 169.

¹⁷³ See discussion of use of prohibition to review constitutionality of statutes, in text, *infra*, and see discussion *supra* note 169.

¹⁷⁴ (1931) 213 Cal. 301, 2 P. (2d) 756.

¹⁷⁵ *Remsberg v. Hackney Manufacturing Co.* (1917) 174 Cal. 799, 164 Pac. 792.

¹⁷⁶ If prohibition had not been available, the supreme court might never have had the chance to pass upon the validity of the statute. It was therefore in the public interest that prohibition should be used in this case, rather than have the validity of the statute remain in doubt. However, if the validity of a statute were not involved, use of prohibition to test the validity of service of process would usually cause unnecessary delay and should be discouraged.

constitutional requirement that a statute shall "embrace but one subject, which subject shall be expressed in its title",¹⁷⁷ a speedy determination, eliminating the trial stage, would be desirable. The final conclusion does not depend upon a particular factual situation, but upon compliance with the formal requirements of a statute. On the other hand, if a statute is attacked as "an unjustifiable and arbitrary limitation on the liberty of contract in violation of both the state and federal Constitutions",¹⁷⁸ the factual situation in which the case arises is all-important. In such a case a determination of constitutionality before a full and fair hearing has been held and facts found, even though the particular litigants do not object, seems unfair to all persons affected by the statute. There is no more pressing social need requiring immediate appellate action than in many cases which are considered in the regular process; and the constitutional question will be determined on an incomplete record if prohibition is issued.¹⁷⁹ The trend of the courts may be toward granting review of constitutionality prior to a full hearing in the trial court. As noted earlier, the writ of prohibition was used in the *Rescue Army*¹⁸⁰ case to allow the supreme court to pass upon the constitutionality of a municipal ordinance. Since the action was begun in an inferior court, had the writ not been available, it is possible that the supreme court would have been barred from considering the constitutional question.¹⁸¹ This factor is not involved in cases begun in the superior court. Yet the *Rescue Army* case was allegedly followed in *Lockheed v. Superior Court*.¹⁸² In the *Lockheed* case, an employer was sued by employees who claimed they were discharged in violation of section 1101 of the Labor Code;¹⁸³ defendants claimed the code section was unconstitutional. The supreme court said that "solely for the purpose of this opinion", because of the delay that had already taken place and because both sides agreed to the proceeding, the constitutionality of the statute would be considered in the proceeding for prohibition. The statute was sustained as constitutional, and the writ denied. As a precedent, the *Lockheed* case does not establish that prohibition to the superior court may be

¹⁷⁷ CAL. CONST. art. IV, §24.

¹⁷⁸ *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal. (2d) 481, 486, 171 P. (2d) 21, 24, *reh'g den.*

¹⁷⁹ If certiorari is used to challenge the constitutionality of a statute, this danger is obviated. Since certiorari will issue only when the action of the court has been completed, (*supra* note 163), the record can be as complete as on an ordinary appeal. However, because of the "no appeal" requirement, certiorari is usually not available to review the constitutionality of statutes. See discussion in text, *infra*.

¹⁸⁰ *Supra* note 101 and related text.

¹⁸¹ See discussion in text on appeals on law from inferior court proceedings, *supra*.

¹⁸² *Supra* note 178.

¹⁸³ This code section prohibits employer interference with political activities of employees.

available to determine constitutionality. The uncertainty of the court coupled with the fact that prohibition was denied make it possible to treat the decision on the procedural issue as *obiter dictum*. The court has evidently been reluctant to use prohibition for determining constitutionality. This reluctance should be encouraged and the present trend of the *Rescue Army* and *Lockheed* cases discouraged, unless it is clear that a full hearing in the lower court would furnish no aid in the final disposition of the constitutionality question. A decision based on an incomplete record is tantamount to an advisory opinion and the general unwillingness of courts to give advisory opinions seems based on sound policy.¹⁸⁴ If a speedier review is desired it should be achieved in a direct manner and not in the roundabout fashion provided by the writs.¹⁸⁵

Mandamus. This writ has been useful as a police measure exercised by the higher appellate courts over lower tribunals. Thus, mandate may be issued to compel the superior court to proceed with the trial of condemnation proceedings when, because of such condemnation proceedings, the petitioner has substantially altered its position;¹⁸⁶ or to compel a lower court to dismiss an information, when no trial was had within sixty days, and no showing made to justify a continuance.¹⁸⁷ If the lower court has discretion to act, however, mandate is rarely issued.¹⁸⁸ Clearly, if the function of appellate courts is to prevent misapplication of law and capricious acts by lower courts, some speedy procedure ordering performance of their duty is necessary. The writ of mandate seems to serve this function.

However, when the writ is used for speedy determination of the constitutionality of statutes, the process may be questioned. The court is doing something more than policing the lower court. In *People v.*

¹⁸⁴ *Chicago Etc. Railway Co. v. Wellman* (1892) 143 U. S. 339, presents a good discussion of the dangers of passing on a question of constitutional law without a full hearing.

¹⁸⁵ In cases involving constitutional issues the supreme court might allow an appeal immediately after the proceedings in the trial court have been completed without waiting for the district court of appeal to pass upon the constitutional issue. Section 4c of article VI of the California constitution provides, "The Supreme Court shall have power . . . to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made *before judgment has been pronounced* by a District Court of Appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein." (Italics added.) Thus, without any change in the constitution the supreme court is in a position to provide a speedy review after a full hearing has been had in the trial court.

¹⁸⁶ In *Times-Mirror Co. v. Superior Court* (1935) 3 Cal. (2d) 309, 44 P. (2d) 547, the newspaper had constructed a new plant costing \$4,500,000 because of the anticipated condemnation of the old plant.

¹⁸⁷ *Rice v. Superior Court* (1940) 40 Cal. App. (2d) 391, 104 P. (2d) 874.

¹⁸⁸ In *Hilmer v. Superior Court* (1934) 220 Cal. 71, 73, 29 P. (2d) 175, 176, the court said: "It is well settled that *mandamus* will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way."

Superior Court,¹⁸⁹ the validity of a statute authorizing a special commission to maintain eminent domain proceedings to acquire land for a prison was tested. The question raised was whether the title of the statute was adequate to permit the commission to exercise eminent domain authority.¹⁹⁰ To secure a speedy determination of the constitutionality of the exercise of this authority, a case was rigged so that in passing on a petition for a writ of mandate the supreme court was required to pass upon the constitutional issue.¹⁹¹ The constitutionality of the statute was upheld. Since in this case the statute was challenged on the ground that the power to condemn land was not expressed in its title, no factual setting was necessary to enable the court to pass on this point of constitutional law. *Arguendo*, the case suggests that our ordinary methods of testing constitutionality are inadequate for some cases.¹⁹² Perhaps the supreme court should pass upon the validity of statutes involving similar problems without preliminary trial proceedings. It might be desirable to limit such review to a ruling on purely formal defects in statutes. However, a better solution of the problem than rigging cases should be available.¹⁹³

Certiorari. This writ will issue to annul intermediate orders only

¹⁸⁹ (1937) 10 Cal. (2d) 288, 73 P. (2d) 1221.

¹⁹⁰ CAL. CONST. art. IV, §24, provides, in effect, that the title of an act must indicate the subjects of the act. In the statute involved in *People v. Superior Court*, *supra* note 189, eminent domain was not referred to in the title.

¹⁹¹ If the commission had begun eminent domain proceedings and the constitutionality of the statute had been challenged, determination of the issue would be prolonged. Instead, the State of California, hoping for an adverse decision, began eminent domain proceedings. The trial court accepted the argument of the defendants that the special commission had sole power to condemn land for the prison; therefore, it refused to set the case for trial. The state asked the supreme court for a writ of mandate ordering the trial court to set the proceedings for trial. In order to determine if the writ would issue the court had to determine if the statute authorizing the commission to condemn land was constitutional. The court, though withholding approval of this method of raising the constitutional issue, ruled on the question because the parties acquiesced in the proceeding and because this was a matter of public interest. The use of mandamus to hurdle procedural barriers is also well illustrated by *Andrews v. Superior Court*, *supra* note 91. Though it may be expedient in a particular case to sacrifice procedural formalities in favor of achieving a desirable result, the courts should give serious consideration to the policy which bars or delays review lest they inadvertently open the floodgates and allow these policies to be swept away in the swift current of litigation.

¹⁹² *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 5 P. (2d) 585, is another illustration of the use of mandamus to provide a speedy determination of the validity of a statute. The Secretary of the Board of Directors of the Golden Gate Bridge and Highway District refused to sign certain bonds on the ground that the bonds were invalid because of the invalidity of the law which authorized their issuance. The purpose of this refusal was to obtain a speedy determination of the validity of the bonds. The court upheld the validity of the statute. The result was desirable, since a determination of the validity of the bonds made them more readily marketable. Perhaps in cases involving a substantial public interest, some speedy review of constitutionality should be available.

¹⁹³ For a discussion of one means of speedy determination of constitutionality, see Gartner, *When Should Constitutionality of Acts of Congress be Judicially Determined, During Enactment or Years Afterward?* (1935) 24 GEO. L. J. 98.

if there is "no appeal".¹⁹⁴ Does this mean no immediate appeal from the particular order, or no appeal at any time? Unfortunately, this question is not settled. In *Bank of America v. Superior Court* the supreme court said:¹⁹⁵

Certiorari will not lie if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment, even though the order itself is not appealable.

Since the court had first found that there was no jurisdictional error, the above statement was mere dictum. On the other hand, in *Howard v. Superior Court*¹⁹⁶ the supreme court suggested that certiorari will lie to review an intermediate order even though the order may be reviewed on an appeal from the final judgment. Further, in the otherwise troublesome decision, *Estate of Kay*,¹⁹⁷ the supreme court, in refusing certiorari to review an intermediate order because lack of substantial evidence does not go to jurisdiction, made no mention of the nonavailability of certiorari to review intermediate nonappealable orders. This silence suggests impliedly that in proper cases the writ of certiorari may be available.

Estate of Kay merits attention on two other grounds. First, it illustrates the inherent limitations in an *a priori* selection of intermediate appealable orders. Second, it dramatically expresses the failure of the writs to provide relief in hard cases, assuming that certiorari was otherwise available. A superior court judge had arbitrarily confirmed a guardian's sale of an incompetent's property. Since this order was not enumerated among the orders immediately appealable,¹⁹⁸ the only immediate relief possible was extraordinary review. The supreme court refused to grant certiorari, holding that lack of substantial evidence to support the order did not go to jurisdiction.¹⁹⁹ The hardship

¹⁹⁴ CAL. CODE CIV. PROC. §1068.

¹⁹⁵ (1942) 20 Cal. (2d) 697, 703, 128 P. (2d) 357, 361. *Hughson v. Superior Court* (1932) 120 Cal. App. 658, 659, 8 P. (2d) 227, collects district court of appeal cases which support this dictum.

¹⁹⁶ (1944) 25 Cal. (2d) 784, 154 P. (2d) 849. The court, though denying certiorari, suggested that certiorari might be available to review intermediate orders in some situations. In *Baker v. Superior Court* (1887) 71 Cal. 583, 12 Pac. 685, an order of the trial court extending the time for defendant's answer beyond the period authorized by statute was modified on certiorari although there would be an appeal from the final judgment in the suit.

¹⁹⁷ *Supra* note 144.

¹⁹⁸ Section 1630 of the Probate Code lists the appealable orders in guardianship proceedings. *Guardianship of Reser* (1943) 57 Cal. App. (2d) 935, 135 P. (2d) 709, collects cases involving orders confirming sales by a guardian. It is difficult to see how any policy is effected by denying immediate appeal. The danger of trying a suit piecemeal as in receivership proceedings is not present. Probably, the best explanation is that the legislature inadvertently failed to specify the order as appealable.

¹⁹⁹ *Cf. Bridges v. Superior Court*, *supra* note 61, and *Obrien v. Olson*, *supra* note 160, which held that the sufficiency of the evidence would be considered on a petition for

to the petitioner was severe in this case,²⁰⁰ but the danger of confusion in other guardianship proceedings made this holding necessary. Although justice required appellate review, the necessity for finding a "jurisdictional" defect prevented relief by means of the writ.

The relief now provided by prohibition, mandamus, and certiorari when appeal is not presently available is illogical and inconsistent to say the least. The most appropriate writ to provide relief is certiorari, but the concept of jurisdiction is too restrictive a standard for its effective use even if no problem were presented by the "no appeal" requirement. Prohibition, with its inherent weakness of a fragmentary record, may be more readily available since it is not subject to the "no appeal" requirement, but here the jurisdictional concept may be too broad a standard for determining when a proceeding should be interrupted.²⁰¹ Mandamus is useful to compel a court to act, but generally when the court has acted mandamus is not available to review errors.²⁰² Thus, although some relief may be available through the writs, the problem of providing appropriate review of intermediate orders continues.

Appealable orders but appeal considered an inadequate remedy

Although an intermediate order may be immediately appealable, a writ may be sought to secure speedier review. Since appeal is available, granting this review does not conflict with any policy adopted to prevent delay; rather it encourages such a policy. Because certiorari will not lie if an immediate appeal is available,²⁰³ only the writs of prohibition and mandamus may be issued. Once again the technical nature of the writs may prevent the desired speed.

In deciding if prohibition will issue, the reviewing court considers

extraordinary review. In *In re Kay's Guardianship* (1946) 171 P. (2d) 946, the district court of appeal had held that certiorari should issue because of the insufficiency of the evidence.

²⁰⁰ Justice Schauer in his dissenting opinion argues the equities of this case.

²⁰¹ *Supra* note 169.

²⁰² In *Grivi v. Superior Court* (1935) 3 Cal. (2d) 463, 467, 45 P. (2d) 181, 183, the court said: "It cannot be doubted that the writ of *mandamus* does not lie to correct errors of an inferior tribunal and in so far as it seeks to avoid the force or effect of a judgment or order of the court it constitutes a collateral attack thereon. [Citations omitted.] We are therefore to accept the facts appearing on the face of the record and limit our inquiry to the question of whether there was jurisdiction in the judge to file the report of which complaint is made." In this case, the presiding judge of a superior court had investigated the practice of an attorney in obtaining a divorce for a client and had made it part of the record of the divorce proceeding. The supreme court held that the superior court judge was without jurisdiction to act in this manner; therefore, mandamus would issue to compel him to strike his report from the record. This case illustrates the use of mandamus to correct earlier acts which represent an excess of jurisdiction. Of course, it is difficult to determine what is mere error and what is an excess of jurisdiction.

²⁰³ *Supra* note 33.

whether the remedy by appeal is adequate;²⁰⁴ but however inadequate the remedy by appeal may be, prohibition will not be granted unless the court finds a jurisdictional error.²⁰⁵ As elsewhere, this requirement creates difficulties. For example, in *Golden State Glass Corp. v. Superior Ct.*²⁰⁶ the lower court had appointed a receiver to handle the affairs of a corporation.²⁰⁷ The supreme court found that the appointment of the receiver was not authorized and that the relief afforded by appeal was not plain, speedy and adequate.²⁰⁸ The opinion provoked a dissent from Justice Shenk who disagreed on both points. Before the case had reached the supreme court, the district court of appeal, without passing on the jurisdictional point, had denied prohibition on the ground that the remedy by appeal was plain, speedy, and adequate.²⁰⁹ When application of the concept of jurisdiction is unpredictable, an attorney desiring speedy review risks having his petition for a writ denied after time for an appeal has run if he guesses wrong. Even if the jurisdictional barrier is cleared, the court may still declare the remedy by appeal to be adequate and deny the writ.²¹⁰

Sparing use of the writs should be encouraged since the time saved for one case may be at the expense of other cases which are delayed. The reviewing courts should insist on a showing that delay of the appeal is against the public interest, or that very great damage will result to the litigant. However, if speedy review is desired the techni-

²⁰⁴ Prohibition has issued to restrain the enforcement of the following appealable orders when the remedy by appeal was felt to be inadequate: an injunction restraining the building and loan commissioner from hiring assistants as authorized by statute, *Evans v. Superior Court*, *supra* note 128; an order dissolving an attachment authorized by statute and necessary to preserve the fruits of the judgment, *Hill v. Superior Court* (1940) 16 Cal. (2d) 527, 106 P. (2d) 876; an *ex parte* appointment of a receiver when there was little evidence to show that the corporation was insolvent, *A. G. Col Co. v. Superior Court* (1925) 196 Cal. 604, 238 Pac. 926. These examples are representative of the type of cases in which the courts have felt that speedy relief is necessary.

²⁰⁵ CAL. CODE CIV. PROC. §1102.

²⁰⁶ (1939) 13 Cal. (2d) 384, 389, 90 P. (2d) 75, 77.

²⁰⁷ The lower court was apparently acting under section 564 (7) of the Code of Civil Procedure, which provides that a receiver may be appointed "In all other cases where receivers have heretofore been appointed by the usages of courts of equity". The issue was whether this particular case was included within the "usages of courts of equity".

²⁰⁸ *Cf. Sunset Farms, Inc. v. Superior Court* (1935) 9 Cal. App. (2d) 389, 50 P. (2d) 106.

²⁰⁹ (1938) 82 P. (2d) 492.

²¹⁰ Mandamus is also available although an appeal is provided, if the reviewing court is convinced that this remedy is not plain, speedy, and adequate. CAL. CODE CIV. PROC. §§1085, 1086; *Archer v. Superior Court* (1927) 81 Cal. App. 742, 254 Pac. 939. In *Alexander v. Superior Court* (1928) 91 Cal. App. 312, 266 Pac. 993, mandamus was held to lie to require a lower court to dissolve an attachment, though an order refusing to dissolve an attachment is made appealable by section 963 of the Code of Civil Procedure. The reviewing court held that the lower court had no discretion in the matter and that great damage would result from delay. The availability of the remedy is made uncertain by the requirements that the lower court have no discretion in the matter, and that the remedy by appeal be not plain, speedy, and adequate.

calities of the writs make for limited usefulness. The question arises whether it is advisable to provide some other procedure for speedy review. Surely, loss to a litigant is no less when the order is termed "mere error" rather than "jurisdictional error". If there is need for a speedier review than normal appeal, it should not turn on the question of jurisdiction but rather on those factors creating the need.²¹¹

CONCLUSION

Some of the cases have been "marshalled". Because in the large bulk of them the reasoning process consists of stating conclusions of what is "mere error" and what is "jurisdictional error", the cases seem to exist as islands, grouped in no archipelago. The reaching of opposite results on similar procedures makes a reconciliation of the cases difficult. Thus, formulating a general statement describing when extraordinary review is always available is not possible. Yet drawing some conclusions concerning appellate procedure in California is possible. Our basic premise was that appellate review was necessary to correct and prevent misapplication of law. Present use of the writs proves the validity of this premise. When appeal at any time is denied, when the upper appellate courts are precluded from hearing an appeal, when appellate action in the future may be too late—all these are instances in which we find use of the writs. Such use is evidently necessary to supplement the normal process of appeal. Therefore, we may ask whether the present review secured with the writs is an adequate supplement.

The first answer might be that the writs operate efficiently since their use is confined to the unusual situations, without the imposition of an excessive burden on the judicial system. Further, argument has been made that by judicial encouragement use of the writs could be extended to provide review for many situations not neatly fitted into the normal pattern of appellate procedure.²¹² This argument has some force; however, it rests upon the premise that direct solution of appellate procedure problems is impossible. Writ-review dependent upon "jurisdictional errors" allows for wasted time, both to bench and bar, because as each case arises, a determination, without direct consideration of the merits, must be made as to whether review is allowable. A decision on jurisdiction does not decide whether relief is necessary. Finally, determining when and how an appeal may be taken should be subjects capable of being made more certain.²¹³

²¹¹ This point is discussed in the Conclusion, *infra*.

²¹² Goodnow, *loc. cit. supra* note 26; Note (1943) 41 MICH. L. REV. 937.

²¹³ Witkin, *Four Years of the Rules on Appeal* (1947) 35 CALIF. L. REV. 477, 505 *et seq.* For the status of the writs in other jurisdictions, see CLARK, CODE PLEADING (2d ed. 1947) 148 *et seq.*, and references cited therein.

The opposite answer might be that amendment of the state constitution to eliminate the writs altogether is in order. Present confusion threatens important policies. Thus, observance of the policies supporting rules of normal appeal would be accomplished with the passing of the writs. However, experience has demonstrated that there are defects in our appellate procedure; eliminating the writs requires correction of these defects. Further, the writs serve an important function in securing review of administrative bodies, a subject not considered in this study. Thus, dispensing with the writs altogether can only be accomplished after a complete reconsideration of California's administrative and judicial appellate procedures. Such a reconsideration would be highly desirable. The extent to which the writs are used is sufficiently frequent to indicate that writ-relief is sought for more than unusual and rare cases. We have had adequate experience with limitation on appeals from the inferior courts, the hierarchy of appellate courts, and the problem of intermediate orders, to aid us in a reallocation of business so as to improve the operation of our courts and to correct present disorders. Finally, the time is appropriate. The increased population of California suggests that the courts may have an attendant increase in business, so that there is a need more than ever for efficient administration of courts. The present redrafting of the state constitution allows for sweeping changes in the judicial system, if they are considered necessary. Of course, this proposal for correcting the confusion created by the writs will require time within which to prepare necessary studies and statistics before conclusions can be reached.

Therefore, a compromise between the two answers must be made if there is to be an immediate clearing of the writ confusion. This compromise is based upon the premise that the writs will remain a part of California law; however, by substituting appropriate procedures for those cases in which experience has demonstrated a need for review, some of the present confusion will be eliminated. For those cases for which no substitute procedure is created, the writs will still be available; and the responsibility will be with the courts to consider carefully the policies involved in the cases and to reconsider precedents.

If the substituted procedures are to discourage use of the writs, their attractive features must be preserved, *i.e.*, making available otherwise unavailable review, and providing a speedy remedy. Either or both features may be involved in an individual case. Speedy relief is made possible by the somewhat informal procedure for securing a writ. Petitioner files a typed petition in the appropriate court after first notifying the court where the original cause is pending. Within

five days, answer is made. If a *prima facie* case is made out, an alternative writ is issued granting the desired relief, which may or may not be made final after subsequent argument. Thereafter, a record is prepared for formal argument. The issue at bar determines the type of record to be prepared, which may be as extensive as any record on appeal. Preparation of the record is arranged for as any other record. The alternative writ, which may subsist for several months and then be discharged, is the source of the speedy relief. To preserve this feature of the writ when a direct appeal is taken, provision for temporary relief will sometimes be necessary.²¹⁴

Turning our attention to when writs are used, we first notice that they bring before the appellate courts cases which those courts could not otherwise review. Securing review for contempt orders is the striking instance. When contempt is involved, the basis for granting a writ is very broad. The effect is to allow review tantamount to an appeal as a matter of right. Present uncertainties could be cleared by recognizing this fact and permitting an appeal for a contempt order as is allowed for any final judgment. No significant social policy militates against this change. No particular advantage is vested in the writ process. Preparing a record for appeal should involve no more time or expense than preparing one for a writ proceeding. The immediate relief afforded by the alternative writ could be provided by allowing a stay of the contempt order when appeal is taken.²¹⁵

The review of inferior court judgments by higher appellate courts allowed by the writs creates a problem not as susceptible of solution. Conceding the present organization of California courts, limitation on appeals from the inferior courts seems a sound policy not lightly to be abandoned. Yet the willingness of the upper courts to grant writs indicates that some review is necessary. Therefore, restatement of the limitation on appeals seems appropriate. But how? One solution would be for the legislature to specify when appeal to the higher courts is available, *e.g.*, when constitutional questions are involved. Such a solution would create interpretative problems of whether individual cases are those for which further appeal is allowed. And even though they are not within such grant, appellate action might still be necessary to perform substantial justice. Another solution would be to state that public policy favors limiting appeals from inferior court cases,

²¹⁴ Such relief is of the same character as that provided by the writ of supersedeas, and might well be made available with that writ. However, the exact relief provided by supersedeas is not clearly defined. Present uncertainties would have to be resolved if the writ of supersedeas is to give the intermediate relief now provided by the alternative writ. See Notes (1940) 28 CALIF. L. REV. 599, 604; (1942) 30 CALIF. L. REV. 209.

²¹⁵ For a suggested solution when the contempt is committed in the presence of the court, see *supra* note 126, and related text.

but to grant to the supreme court discretion to hear appeals when proper petition is made. Although there is the danger that the supreme court would immediately be swamped with petitions, careful scrutiny and a cautious granting of hearings should discourage frivolous petitioning. Eventually, as case precedents are developed, the court will be able to formulate rules governing such appeals. Since the bases for appeal could be enlarged or restricted without legislative action whenever practice indicates a need, a desirable flexibility could be achieved. To accept either solution, because the appellate jurisdiction of the supreme court would be enlarged, a constitutional amendment would probably be necessary.²¹⁶

Our final consideration is with review of intermediate orders. Here, also, the use of the writs highlights inadequacies in our present appellate process. Yet the reconciliation of present practice for reviewing these orders with pressing needs in individual cases is fraught with serious difficulties. Consideration must be given the important policy against trying suits piecemeal. Because the writs are not available in most cases to secure review of these orders, it may be argued that no change is necessary. However, such argument ignores the problem. What solution then? For those orders immediately appealable, change should not be necessary. The present use of the writs to secure a speedier review, for the most part, seems unnecessary and confuses rather than aids appellate procedure. For intermediate orders not presently appealable, there are two possible remedies—both of them similar to suggested solutions for reviewing inferior court judgments. First, a standing committee of the State Bar could make an annual report to the Judicial Council recommending when specific orders should be appealable before final judgment. After considering what additional burden might be placed on the judiciary and making proper comment, the Judicial Council could deliver this report to the legislature for appropriate action. The most serious criticism of this remedy is that only future abuses are corrected, and no relief may be given in the individual case most clearly exposing need for review. A second solution is to allow the appellate court, upon proper petition, to grant review within its discretion.²¹⁷

²¹⁶ The same result probably could not be accomplished by the legislature by enlarging the offices of the writs. See *Camron v. Kenfield* (1881) 57 Cal. 550; *Farmers' Union v. Thresher* (1882) 62 Cal. 407; *Hobart v. Tillson* (1884) 66 Cal. 210, 5 Pac. 83. See also *Baines v. Zemansky* (1917) 176 Cal. 369, 168 Pac. 565, holding that CAL. CODE CIV. PROC. §1102 so far as it purports to extend the writ of prohibition to include ministerial functions is unconstitutional. For further discussion of the inferior court problem in California, and a proposed revision of the inferior court system, see *The Township and City Courts of California* (1945) 20 CALIF. ST. BAR J. 293.

²¹⁷ Whether such power should be vested in the supreme court, the district courts of appeal, or both would depend upon the amount of business now handled by these courts, and which one is better qualified to carry this additional work load.

Discretionary review of all orders and final judgments substituted for appeal as a matter of right is open to serious criticism. No single agency should possess such extensive power affecting important individual rights. However, discretionary review to supplement appellate practice may provide needed flexibility when, for reasons of policy, appeal as of right cannot be made available for all orders but is necessary for some. There has been some experimentation with discretionary review,²¹⁸ and positive argument in its favor.²¹⁹ The arguments pro and con are worthy of consideration.

Against discretionary review may be advanced arguments stressing the practical impossibility of such review. The risks are: petitions for review will be made for all intermediate orders; it is not always readily apparent what orders deserve review; the courts may as often as not allow undeserving appeals. Pandemonium might result. Court calendars may become clogged as the court struggles with its additional work load. Furthermore, if discretionary review of intermediate orders is allowed, question arises as to the status of the case in the trial court. Does the action continue? Or is the entire suit removed to the appellate court? If the entire suit is removed, and thereafter the order or judgment is affirmed and the case sent back to the trial court, final disposition of the case will have been seriously delayed. Very little might be left of the important rules supporting the policy against piecemeal trials.

In favor of discretionary review, it might be argued that granting such power merely allows the court to do without circumlocution what it has accomplished with the jurisdictional writs, and with modifications of the final judgment requirement. Pandemonium might be prevented if the court realizes the lurking dangers and is chary in its use of such power. Further deterrents to frivolous petitioning might be found in the imposition of penalties; or, it might be necessary to require certification by the trial court, which would not be binding on the appellate court but would serve as a guide in exercising discretion.²²⁰ Perhaps, petitioner should be required to show that irreparable damage, as the term is used in deciding availability of equitable relief, will result if immediate relief is not granted; or, that petitioner will suffer monetary loss which could not be recovered from respondent in the event that the intermediate order is declared erroneous on appeal from the final judgment. If the latter showing is made, re-

²¹⁸ See Note (1942) 15 So. CALIF. L. REV. 504.

²¹⁹ See concurring opinion of Frank, J., in *Audi Vision Inc. v. RCA Mfg. Co.* (C. C. A. 2d, 1943) 136 F. (2d) 621, 625; *Zalkind v. Scheinman* (C. C. A. 2d, 1943) 139 F. (2d) 895, 897, 898, n. 3(b). See also, Crick, *loc. cit. supra* note 115; Note (1947) 47 COL. L. REV. 239.

²²⁰ *Supra* note 218, at 512.

spondent should be allowed an opportunity to give an undertaking to cover these potential damages and thus avoid review of the intermediate order. As for the status of the case while an order is being reviewed, flexibility of procedure is necessary. Some cases will demand removal of the entire suit to the appellate court; whereas, in others by merely staying the order from which appeal is taken and allowing the trial to continue, appellant's rights would be protected. This problem could best be solved, it seems, by permitting the appellate court to grant such relief as it determines appropriate for individual cases. Finally, as cases are decided, the scope of the court's discretion will acquire meaning having the force of precedent.

These are the arguments for and against discretionary review. Their individual force must be tested by the experience of the courtroom and not by touchstones of theory. The basic question involved is: How much flexibility can be allowed without hampering the appellate process? The answer depends upon whether the courts will be able to exercise the power with ease, and whether the bar will carry its responsibility by not petitioning for review of all orders merely to confuse and delay lawsuits.

What emerges from this study is the realization that our appellate courts are not operating as efficiently as possible. Both for review of inferior court judgments and for orders issued by superior courts there is no single solution to present disorders. Yet solution is possible. Clearly, the combined efforts of the bench and bar should be able to provide a more rational procedure for present appellate needs than an inept adaptation of these devices that are vestiges of the feudal heritage of our law.