The Extraordinary Writs
and
The Review of Inferior Court Judgments

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The review of judgments in small cases presents obvious special difficulties. The delay and expense incident to appellate review as of right may be such as to make a small judgment little more than a license to litigate further, and the ridiculous prospect of multiple appeals needs no further description here. In California the "solution" to the problem has always been to cut off the absolute right of review at the level of the superior court.¹ This solution, while undoubtedly satisfactory in the majority of small cases, has the disadvantage of apparently putting egregious errors and important questions of law beyond the reach of the appellate courts of the state.² The purpose

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¹The term "appeal," as used herein, means a procedure whereby an aggrieved party may obtain a review as of right, as distinguished from those procedures to obtain review where relief may be denied in the discretion of the reviewing court. Originally, cases involving more than $200 (later $300), the legality of taxes, or criminal cases involving felonies could be appealed to the supreme court. Cal. Const. Art. VI, § 4 (1849). This was changed, as part of the policy of enlarging the jurisdiction of inferior courts, to the present restriction that only judgments in cases in which the superior court has original jurisdiction can be appealed to the supreme court or district courts of appeal. Cal. Const. Art. VI, §§ 4 and 4b (1879). See also Berg v. Traeger (1930) 210 Cal. 323, 292 Pac. 495; Unemployment Reserves Commission v. St. Francis Homes Assoc. (1943) 58 Cal. App. (2d) 271, 137 P. (2d) 64.

²The term "inferior court," as used herein, means those courts from which an appeal may be taken only to the superior court. Cf. Estate of Kay (1947) 30 Cal. (2d) 215, 220, 181 P. (2d) 1, 4; Estate of Sharon (1918) 17 Cal. 447, 457, 177 Pac. 283, 287, discussing superior court as "inferior court" when sitting in probate matters. The municipal courts, although courts of record, are inferior courts for this purpose. Cal. Const. Art. VI, § 12 (1879).

The Constitution of Iowa, on which much of the California Constitution was modeled, contained no limitation on the appeal of small actions, but, on the contrary, stated that the supreme court should "exercise a supervisory control over all inferior judicial tribunals." Iowa Const. Art. VI, § 3 (1846). The proposal to limit the right of appeal was suggested by Señor Noriego of Santa Barbara, who cited his unhappy experience of having to take a case involving one mule to the Supreme Court of Mexico. The proposal was bitterly debated, and, after many expressions of distrust and animosity toward lawyers, was adopted by a vote of 18 to 17. Debates in the Convention of California 212, 223-233 (1849). For illustrations of the working of a provision similar to that in Iowa see Wickhem, The Power of Superintending Control of the Wisconsin Supreme Court (1941) Wis. L. Rev. 153.
of this discussion is to show that this result is more apparent than real, and that in fact there is a confusing variety of devices by which the finality of a judgment of the superior court on appeal may be avoided.

The first way of by-passing the finality of the superior court on appeal is to cast the case into a form in which the superior court has original rather than appellate jurisdiction. This has been employed in cases involving the constitutionality of ordinances creating misdemeanors. The inferior courts, in many instances, have exclusive jurisdiction over misdemeanor *prosecutions*. They do not, however, have jurisdiction over the field of law involved in misdemeanors. It is, therefore, possible for the procedurally astute erstwhile defendant to become a plaintiff in an action to enjoin the prosecuting authorities from proceeding, or to obtain a declaratory judgment as to the validity of the ordinance.\(^3\)

The most common ways of avoiding the finality of the superior court on appeal arise, however, in cases where action has already been initiated in the inferior court or has proceeded to judgment. Of course, if a judgment of an inferior court in a civil case is void it is open to a collateral attack in a subsequent proceeding and is more vulnerable to a collateral attack than the judgment of a superior court because of the requirement that the proponent of the judgment has the burden of showing that the court had jurisdiction.\(^4\) And in criminal cases *habeas corpus*\(^5\) is available at least to determine constitutionality of the prosecution, and the writ of error *coram nobis* may be used to review a limited class of other errors.\(^6\)

Since the opportunity for a collateral attack may not be present in a civil case,\(^7\) and since *habeas corpus* is available only in case of

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\(^3\) Gospel Army v. Los Angeles (1945) 27 Cal. (2d) 232, 163 P. (2d) 704; see also Portnoy v. Superior Court (1942) 20 Cal. (2d) 375, 125 P. (2d) 487.

\(^4\) Lowe v. Alexander (1860) 15 Cal. 296; Schuler-Knox Co. v. Smith (1943) 62 Cal. App. (2d) 86, 144 P. (2d) 47; also see In re Bell (1942) 19 Cal. (2d) 488, 500, 122 P. (2d) 22, 29; Crenshaw v. Smith (1946) 74 Cal. App. (2d) 255, 168 P. (2d) 752. *Quaere*, if the proponent of the judgment has this burden if the inferior court is a court of record, *i.e.*, a municipal court. See also Hahn v. Kelly (1868) 34 Cal. 391, 409; Schwartz, Inc. v. Burnett Pharmacy (1931) 112 Cal. App. (Supp.) 781, 789, 295 Pac. 508, 511 (direct attacks).

\(^5\) In re Bell, *supra* note 4.

\(^6\) (1939) 27 CALIF. L. REV. 228.

\(^7\) As used herein, the term "collateral attack" refers to an attack upon a judgment in which the party making the attack seeks to maintain an action on the ground that the judgment is ineffective as a defense, or seeks to maintain a defense on the ground that the judgment is ineffective as a basis of the claim. An independent proceeding, the effect
actual confinement in a criminal case, the most useful devices for escaping the finality of the superior court on appeal are the three extraordinary legal remedies of certiorari, mandate and prohibition. Although seeking these remedies involves separate suits, they are actually direct attacks on the judgment in the sense that they are actions to prevent either the entry or enforcement of a judgment. And although certiorari and prohibition are nominally confined to the review of jurisdictional errors, the concept of jurisdiction as used in the cases involving them seems to be broader than the concept of jurisdiction in the collateral attack cases. The writs are not, therefore, simply alternative devices for reaching defects which can be reached by collateral attack. Furthermore, by using the writs the aggrieved party has a means of review at his immediate disposal rather than having to await the opportunity for collateral attack. The principal difficulty with the use of the writs is the reconciliation of the power to issue them given to the supreme court and the district courts of appeal with the finality purportedly given to the superior courts on appeal. The writ cases purport to review only jurisdictional errors and these only when an appeal is not available or is inadequate. Thus the broader the definition of jurisdiction in such cases, and the greater the readiness of the appellate courts in finding an appeal to the superior court inadequate, the more the use of the writs resembles ordinary appeals.

This discussion has, therefore, a two-fold purpose: (1) the description of the circumstances in which the writs have actually been used to review inferior court actions; and (2) the determination of the meaning of the word "jurisdiction" as shown by such cases.

**CERTIORARI**

The constitutional policy prohibiting the appeal of small judgments to the supreme court was implemented by the Practice Act of which is to obtain relief against the consequences of a judgment, is not here considered a collateral attack. Restatement, Judgments, § 112, comment b (1942). Thus, unless the plaintiff who has secured a judgment makes some attempt to enforce it, the defendant has no opportunity to make a collateral attack. This definition of collateral attack is not the same as that used in a number of California cases where habeas corpus, mandamus and prohibition, but not certiorari, are said to be collateral attacks. 15 Cal. Jur. 48.

8 In re Ford (1911) 160 Cal. 334, 116 Pac. 757; In re Stanridge (1937) 23 Cal. App. (2d) 95, 72 P. (2d) 162.
9 Supra note 7.
1851, which provided for appeals from justice's courts only to the county courts, regardless of the amounts involved.\textsuperscript{11} The Practice Act of 1851 appears to have been largely adapted from the proposed New York Code of Procedure of 1848 and the New York Code of Civil Procedure of 1850.\textsuperscript{12} In the Proposals of 1848 the commissioners proposed to deprive the court of appeals of jurisdiction of actions commenced in justice's courts principally because the right to successive appeals "has operated most oppressively upon the rights of suitors,"\textsuperscript{13} and an identical provision appeared in the Proposals of 1850.\textsuperscript{14}

It is important to note that the California Practice Act of 1851 followed the spirit and in many cases the letter of the Proposals of 1850 because these give us the clue to what may have originally been intended by the statutory provisions in regard to certiorari. Thus both the Proposals of 1850\textsuperscript{15} and the Practice Act of 1851\textsuperscript{16} provided: "A judgment or order in a civil action, may be reviewed as prescribed by this title, and not otherwise."\textsuperscript{17} Taken at its face value, it would seem that this provision and the provisions defining appealable matters constituted the exclusive means of obtaining reviews. This language, however, must be read in connection with that relating to the writs of certiorari (renamed review by the statute) which provided: "... the writ shall be granted in all cases where an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate

\textsuperscript{11} CAL. STATS. 1851, c. 5, §§ 333-367. This was amended in 1854 to permit appeals to the supreme court of cases appealed to the county courts involving more than two hundred dollars. Middleton v. Gould (1855) 5 Cal. 190 (dictum that a writ of error from the supreme court lay when the case was within that court's jurisdiction but no statutory appeal had been provided); 1 Peppin, unpublished Materials on California Jurisdiction and Procedure 188 (1941).

\textsuperscript{12} Report of the Commissioners on Practice and Pleadings (1848), hereinafter cited as "Proposals of 1848"; and Code of Civil Procedure Reported by the Commissioners on Practice and Pleadings (1850), hereinafter cited as "Proposals of 1850."

\textsuperscript{13} Proposals of 1848, 1st Report 21-23.

\textsuperscript{14} Proposals of 1850 § 28.

\textsuperscript{15} Id. § 1162.

\textsuperscript{16} CAL. STATS. 1851, c. 5, § 333.

\textsuperscript{17} This provision was apparently adapted from the Proposals of 1848, 1st Report § 271, which also provided expressly: "Writs of error ... are abolished." Failure to include this language may have been responsible for the view that the writ of error existed in California, despite the Practice Act, and made all judgments over $200 etc. reviewable without regard to the statute. Adams v. Town (1853) 3 Cal. 247; Ex parte Thistleton (1877) 52 Cal. 220.
remedy." The supreme court would grant writs of error in inferior court cases involving more than $200 even though the statutes did not provide for an appeal. Therefore, to find a case where the court would be obliged to construe in pari materia, the two sections quoted above, it would be necessary to find one where a justice's court had exceeded its jurisdiction where the judgment was less than $200. No such case seems to have arisen, but the inference is that the judgment would have been annulled. Thus the situation at the early law in California was quite similar to what it is now—the fact that a judgment was not directly appealable to the supreme court, or could not have been made appealable to that court, did not preclude a direct attack in that court on the ground that the order was in excess of jurisdiction.

The writ of certiorari at the common law, however, was not limited to an inquiry into jurisdictional errors. The common law writ, or what could be considered several writs by the same name, was used for a variety of purposes including removal of cases for trial in another court, removal to obtain issuance of coercive process, re-


Unfortunately the commissioners said only the following about their changes in the prerogative writs: "The report will be found also to contain an entire revision of the law respecting prerogative writs. It will be remembered that the act under which the Commissioners were appointed requires them to provide for the abandonment in legal proceedings, 'of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable.' They have deemed it practicable to substitute English, for the Latin names of prerogative writs. They consider it necessary to retain but four, the writ of review, which is substituted for the writ of certiorari, the writ of mandate in place of mandamus, the writ of assessment instead of ad quod damnum, and the writ of habeas corpus which is designated by them as the writ of deliverance. The writ of prohibition is nearly obsolete in our law and is unnecessary. For the writ of scire facias, quo warranto, and information in the nature of quo warranto, actions in the ordinary form are substituted, which are easier and safer and more in accordance with the spirit of the code." Proposals of 1849, 3rd Report 16.

19 See notes 11 and 17 supra.

20 Coulter v. Stark (1857) 7 Cal. 244 (action of justice found within his jurisdiction. It does not appear whether the order was appealable). Note that, prior to 1862, the supreme court had no original jurisdiction to issue the writs. Miliken v. Huber (1862) 21 Cal. 166.

21 "At common law, the province of this writ was more ample than under our statute—not being confined to mere questions of jurisdiction; but its use, so far as I have been able to ascertain, was confined, as by our own statute, to inferior Courts and bodies exercising judicial functions." People ex rel Church v. Hester (1856) 6 Cal. 679.

22 This was a removal to another court having concurrent jurisdiction rather than a change of venue. It is the only type of certiorari considered by Blackstone. 4 Bl. Comm. *262, *265 and *321. At *272, he mentions that orders of the quarter sessions may be quashed or confirmed on certiorari, but does not state the grounds.
removal of records for use as evidence, and to augment defective records. Only one of the common law uses of certiorari bears much resemblance to the local uses of the writ, i.e., certiorari to quash. Certiorari to quash was used to review the orders of tribunals which were not amenable to the writs of error and yet were under the supervisory jurisdiction of the King's courts. "Certiorari to quash lies not only for error on the face of the proceedings, but also for defect of jurisdiction not apparent on the face of the proceedings, but shown by evidence." Thus the scope of certiorari at the common law does not seem to have been limited to a particular class of error; the errors which were correctible were those shown on the face of the record. Although it was stated that "where the magistrates had jurisdiction the superior court will not grant certiorari," it was also said: "The key of the question [of the extent of review on certiorari] is the amount of material stated or to be stated on the record returned. . . . The Summary Jurisdiction Act cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face." Or to put it more simply, the statutes providing for records which did not show the evidence removed the opportunity to detect error on certiorari. But a jurisdictional error could be shown by evidence outside the record. Thus summarizing briefly: the available evidence indicates that at the common law certiorari to quash could be used to

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23 See generally, 9 HALSBUrY'S LAws OF ENGLAND 844-851 (2d ed. 1933). On certiorari to augment records on appeal see POUND, APELLATE PROCEDURE IN CIVIL CASES 177-182, 359 (1941).

24 9 HALSBUrY'S LAws OF ENGLAND 844; POUND, op. cit. supra note 23 at 288. On the limitation that the writ be directed to a court under the supervisory jurisdiction of the King's Court see Rex v. St. Edmundsbury (Bishop), [1946] 2 All Eng. 604, critically discussed in Gordon, CErTIORARI TO AN ECCLESIASTICAL Court (1947) 63 L. Q. REV. 208.

25 9 HALSBUrY'S LAws OF ENGLAND 853.

26 The Queen v. Bolton (1841) 1 Q.B. 66, 75, 113 Eng. Rep. 1054, 1058. See also Farmington River Water Power Co. v. County Commissioners (1873) 112 Mass. 206 (discussing early Massachusetts cases); Huse v. Grimes (1820) 2 N.H. 208 (distinguishing certiorari and writ of error on the basis of tribunals to which they lay and form of judgment rather than on scope of review).

27 9 HALSBUrY'S LAWS OF ENGLAND 888.


30 Rex v. Wandsworth Justices, [1942] 1 K.B. 281 (1941). The defendant was convicted of a petty crime without being allowed to present evidence in his own behalf. Held, that this was a denial of "natural justice" which could be quashed on certiorari, and that evidence could be received to show this even though the record was regular on its face.
quash any judgment based on errors of law appearing on the record, and errors of jurisdiction whether or not they appeared on the record.\footnote{81}{The restriction that the writ would not be granted if a writ of error lay, is not considered here.}

It has been said fairly frequently and on good authority that the description of the writ in the California Code of Civil Procedure is a restatement of the common law.\footnote{82}{McGovney, Administrative Decisions and Court Review Thereof in California (1941) 29 Calif. L. Rev. 110, 147: "In California, section 1068 of the Code of Civil Procedure crystallized the early common law scope of the writ of certiorari and confined it to jurisdictional error. While at times the California court has fudged a bit over this line and actually corrected errors that were not jurisdictional, it has always professed not to do so, purporting to stick to its view that the certiorari the constitution authorizes the courts to use is certiorari as defined in the Code of 1872." But on the same page the author states: "this narrow limitation [to jurisdictional error] has been disregarded by the courts in many states, and review by certiorari extended to the correction of errors of law made in the exercise of jurisdiction, and to inquiry whether an administrative decision was supported by substantial evidence."}

In view of the above discussion, however, it seems that this statement is not correct and that, as the commissioners said in 1849,\footnote{83}{See note 18 supra.} the statute revised the prior law. The reason for this change was not stated by the commissioners, and is not apparent even now. It may have been directed to either or both of the following ends: (1) to adopt what may have appeared to be the then new English rule enunciated in Queen v. Bolton;\footnote{84}{Supra note 26. As explained in Rex v. Nat. Bell Liquors, supra note 28, this did not alter the rules regarding certiorari but simply cut down the defects ascertainable from the record.} (2) to eliminate the conflict of authority on the scope of the writ that had already appeared in the American cases.\footnote{85}{See Note 12 Am. Dec. 529, 532-535 (1879).} Whatever its purpose, the statute was received at face value in California, at least to the extent that every error corrected on certiorari was called jurisdictional.\footnote{86}{See note 32 supra.}

Before launching into an inquiry into what have been considered jurisdictional errors, it should be made clear that the word jurisdiction has been used in a special sense in regard to the extraordinary writs. It certainly is not confined to jurisdiction in the fundamental sense, \textit{i.e.}, that jurisdiction which a court must have in order to come within the limits prescribed by the due process clause of the Fourteenth Amendment.\footnote{87}{Abelleira v. District Court of Appeal (1941) 17 Cal. (2d) 280, 288, 109 P. (2d) 942, 947; Restatement, Conflict of Laws § 74 (1934).} Nor is it confined to jurisdiction in the sense of "competency," \textit{i.e.}, the situation where the state has jurisdiction, but
has by statute or constitution provided that such jurisdiction shall be exercised only by certain courts.\textsuperscript{38} If jurisdiction in either of the above senses is lacking, a judgment is void and, generally, open to collateral attack. Lack of jurisdiction, in the sense in which it is used in the extraordinary writ cases, however, is not necessarily a ground for collateral attack.\textsuperscript{39} As used in the extraordinary writ cases lack of jurisdiction means lack of authority "to act except in a particular manner, or to give certain kinds of relief, or to act without the concurrence of certain procedural requisites."\textsuperscript{40} "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis are in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained on prohibition or annulled on certiorari."\textsuperscript{41} Since it is a close question of judgment as to whether a statute is a restriction on a court or a prerequisite to a party's rights,\textsuperscript{42} and since the doctrine of stare decisis demands the inference that new precedents will be added, such a definition cannot be applied with any precision, and one is remitted to a study of the facts of particular cases to arrive at the concrete meaning of the term.

The number of cases where certiorari has been used to annul the orders of an inferior court because they were made without or in excess of jurisdiction is very limited. The reason for this is the interpretation of the requirement in Code of Civil Procedure, section 1068, that there be "no appeal."\textsuperscript{43} "This language was not limited to the case where no appeal lay to the court petitioned for certiorari, but where no appeal lay to a court of general common-law jurisdiction,

\textsuperscript{38} Abelleira v. District Court of Appeal, \textit{supra} note 37; \textit{Restatement, Judgments}, § 7 (1942).
\textsuperscript{39} Rescue Army v. Municipal Court (1946) 28 Cal. (2d) 460, 171 P. (2d) 8; 42 Am. Jur. 157 (1942).
\textsuperscript{40} Abelleira v. District Court of Appeal, \textit{supra} note 37 at 288, 109 P. (2d) at 947.
\textsuperscript{41} Id. at 291, 109 P. (2d) at 948.
\textsuperscript{42} Redlands High School District v. Superior Court (1942) 20 Cal. (2d) 348, 360, 125 P. (2d) 490, 496.
\textsuperscript{43} Under the section "three concurring requisites are essential to the issuance of the writ of review, viz: 1. An excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions; 2. That there is no appeal; 3. That there is no other plain, speedy and adequate remedy," Noble v. Superior Court (1895) 109 Cal. 523, 526, 42 Pac. 155, 156. This is the traditional statement of the requirements in California.
such a court as could itself, in a proper case, issue certiorari.\footnote{44 Olcese v. Justice's Court (1909) 156 Cal. 82, 85, 103 Pac. 317. Cf. Denninger v. Recorder's Court (1904) 145 Cal. 629, 79 Pac. 360, reviewing constitutionality of ordinance by certiorari after conviction in inferior court without discussion of availability of appeal; People v. Johnson (1866) 30 Cal. 98 (seemle).} Thus, even though an inferior court has made a jurisdictional error, if there is an appeal to the superior court certiorari lies only to annul the orders of the superior court in excess of its own jurisdiction.\footnote{45 Olcese v. Justice's court, supra note 44.} The language from *Olcese v. Justice's Court* quoted above was actually part of an alternative holding, and the facts of the case show that the petitioner may have waived his right to assert the absence of jurisdiction over his person which was involved. But even if the statement is a dictum, it has been consistently followed,\footnote{46 American Law Book Co. v. Superior Court (1912) 164 Cal. 327, 128 Pac. 921 (after taking appeal to superior court, certiorari will not lie to test jurisdiction of justice's court over the person). Casner v. Justice's Court (1937) 23 Cal. App. (2d) 730, 74 P. (2d) 298; Day v. Justice's Court (1932) 119 Cal. App. 620, 7 P. (2d) 200; Bogmuda v. Young (1922) 58 Cal. App. 19, 207 Pac. 915; see also Associated Credit Exchange v. Barnett (1927) 85 Cal. App. 255, 259 Pac. 95.} and has been extended to criminal cases as well.\footnote{47 Roberts v. Police Court (1921) 185 Cal. 65, 195 Pac. 1053; Jones v. Police Court (1927) 88 Cal. App. 332, 260 Pac. 919; Albers v. Superior Court (1916) 30 Cal. App. 772, 159 Pac. 453; Hood v. Melrose (1914) 24 Cal. App. 355, 141 Pac. 396.} Of course, if the superior court acts beyond its appellate jurisdiction, the order can be annulled on certiorari by a higher court because an order of the superior court made in the exercise of its appellate jurisdiction is itself non-appealable.\footnote{48 Sekt v. Superior Court (1944) 24 Cal. (2d) 73, 147 P. (2d) 568; Sherer v. Superior Court (1892) 94 Cal. 354, 29 Pac. 716. Note that by taking an appeal to the superior court the petitioner for certiorari loses the right to object to lack of jurisdiction over the person. American Law Book Co. v. Superior Court, supra note 46. See also, Kempton v. Superior Court (1943) 3 Cal. App. (2d) 374, 376, 39 P. (2d) 846, 847, inferring that the appellant to the superior court, by requesting that court to act, may lose the right to object to its errors by certiorari.} The effect of the *Olcese* case has been to make certiorari virtually useless to review inferior court judgments—its rule makes it unnecessary to inquire into the jurisdiction of the inferior court.\footnote{49 Portnoy v. Superior Court (1942) 20 Cal. (2d) 375, 125 P. (2d) 487; Moyer v. Superior Court (1938) 29 Cal. App. (2d) 330, 84 P. (2d) 240.} This results in a situation where the appellate court may have before it an obvious error of law and yet consider itself powerless to correct it. As was said in *Sherer v. Superior Court*,\footnote{50 (1892) 94 Cal. 354, 355, 29 Pac. 716. See also People v. Johnson (1866) 30 Cal. 98, 101.} "Within the limits thus prescribed [appellate jurisdiction of the superior court], however, its errors in the exercise of its..."
jurisdiction, however gross or glaring they may be, must be submitted
to as part of the sacrifice which every individual is compelled to yield
to the infirmities of human government."

To avoid the situation of being unable to correct obvious excesses
of jurisdiction by inferior courts, two possibilities have been found:
(1) the concept of "derivative jurisdiction" in the superior court;
and (2) the creation of exceptions to the rule that the availability of
an appeal defeats the right to certiorari.

"Derivative" jurisdiction in the superior court.

*Redlands High School District v. Superior Court* held that when
an appeal in the form of a trial *de novo* was taken to the superior court
from the judgment of an inferior court, a jurisdictional error of the
inferior court could be reviewed on the theory that on the trial *de novo*
the jurisdiction of the superior court was not a true appellate juris-
diction, but was derived from that of the lower court. If the inferior
court did not have jurisdiction, the superior court does not have jurisdic-
tion to conduct the trial *de novo*, and, therefore, certiorari is avail-
able despite the appeal. Cases of this sort have not been helpful in
defining jurisdictional errors because the error has to be preserved
on taking the appeal—*e.g.*, an error of jurisdiction over the person
may be waived simply by taking the appeal,* and an error in the
subject matter jurisdiction of the inferior court may be considered
waived if the subject matter is within the jurisdiction of the superior
court and "seasonable objection" is not made.* Presumably, a pro-
cedural error which would have made the action of the inferior court
without jurisdiction in the sense of unauthorized could not be re-
viewed if not repeated on the appeal. It seems that the only case
that could be reviewed by certiorari in this situation would be the
one where a cause of action could not exist. The *Redlands* case held
that the filing of a notice of liability against a public corporation was
but a condition precedent to a cause of action because the statute did
not restrict the authority of the court. Thus the existence of a juris-
dictional error depended upon statutory interpretation, and the case,
being almost unique, does not permit the formulation of general

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51 *Supra* note 42.
52 American Law Book Co. v. Superior Court, *supra* note 46.
53 Redlands High School District v. Superior Court, *supra* note 42 at 356, 125 P.
(2d) at 494, and cases cited therein.
Exception to the rule that certiorari does not lie if an appeal is available. There is a group of cases creating a judicial exception to the statutory rule that certiorari will not lie if an appeal is available. These are the only cases where it has been necessary to define the meaning of the word “jurisdiction” as used in certiorari to inferior courts. The exception arises in cases where the right to appeal has been lost because the would-be appellant, through no fault of his own, had no notice of the proceeding or of the fact that a judgment was entered against him. The only cases where this exception has been found applied with regard to inferior courts are small claims cases. The defendant in a small claims case may take an appeal within five days after the entry of judgment. It can happen that the time for appeal has elapsed before the defendant knows that a judgment has been entered against him; and in such case the defendant may have certiorari to annul judgments without jurisdiction. Thus it has been held that nonresidence of the defendant within the county in which a small claims court sits, improper substitution of an administrator for a deceased plaintiff, and failure to serve the notice of trial are jurisdictional error. These are the only three cases that have been found where certiorari has been used to annul the order of an inferior court. The most noteworthy feature of all of them is that the jurisdictional error consisted in a violation of a statute or rule of practice—not in a violation of a “fundamental” jurisdictional principle.

54 Grinbaum v. Superior Court (1923) 192 Cal. 528, 556, 221 Pac. 635, 647 (failure to give alleged incompetent notice of guardianship proceedings).
55 CAL. CODE CIV. PROC. § 117.
57 O’Kuna v. Small Claims Court, supra note 56; CAL. CODE CIV. PROC. § 117. The statute was amended in 1943 to expand the territorial “jurisdiction” of the courts in cases of personal injuries. Id. (Deering 1947 supp.) § 117.
59 Elder v. Justice’s Court (1902) 136 Cal. 564, 68 Pac. 1022.
60 Of course, if the defendant actually appeals, he is thereafter precluded from seeking certiorari. Los Angeles Bond Co. v. Superior Court (1934) 1 Cal. App. (2d) 634, 37 P. (2d) 159; Meads v. Warne (1933) 133 Cal. App. 27, 23 Pac. 733.
61 The defect of venue in O’Kuna v. Small Claims Court, supra note 56, does not appear to have been one of those defects of venue which is considered jurisdictional. See also Schwartz, Inc. v. Burnett Pharmacy (1931) 112 Cal. App. (Supp.) 781, 295 Pac. 508. The defect had not been waived and, therefore, could be reached on a direct attack. And see McGorray v. Superior Court (1903) 141 Cal. 266, 74 Pac. 853.
62 The improper substitution of a plaintiff in Lee v. Small Claims Court, supra note 58, is not an error which is basis for a collateral attack. Liuzza v. Bell (1940) 40 Cal. App.
PROHIBITION

Since there are so few instances in which certiorari has been used to review actions of inferior courts, there seems to be no way to develop a concept of jurisdictional or reviewable error from certiorari cases alone. It has been recently said, although not directly held, that the meaning of the word jurisdiction as used in connection with prohibition is the same as in certiorari. Proceedings on the assumption that the statement is correct, an examination will be made of the meaning of the word as applied to inferior courts in prohibition proceedings.

A. Inadequacy of Appeal

A preliminary problem in considering the use of prohibition to review inferior court determinations is presented by the fact that even though an acknowledged jurisdictional issue is involved, prohibition will be denied unless the petitioner can show that the appeal, if any, to the superior court "is not a plain, speedy, and adequate remedy in the ordinary course of law." The factors which determine whether or not an appeal is an adequate remedy have not been well-defined by the cases. It is clear, however, that the fact that there is no appeal to the court whence the writ is sought does not of itself make the remedy by appeal inadequate. The reason is that if this alone were enough to warrant review by the writ, the writ would be simply a device for obtaining a second appeal. Similarly, it has been held that the existence of a

(2d) 417, 422, 104 P. (2d) 1095, 1098; RESTATEMENT, JUDGMENTS § 78, comment b (1942); 15 CAL. JUR. 929.

Failure to service notice of trial, as in Elden v. Justice's Court, supra note 59, has been held not to be a basis for collateral attack. Uplinger v. Yonkin (1920) 47 Cal. App. 435, 190 Pac. 822 (alternative holding). A proceeding in the absence of notice of trial is in the nature of a default case, Sheldon v. Landwehr (1911) 159 Cal. 778, 782, 116 Pac. 44, 45, and the improper entry of a default judgment is not a basis of collateral attack, Gray v. Hall (1928) 203 Cal. 306, 265 Pac. 246. But see Purcell v. Richardson (1912) 164 Cal. 150, 154, 128 Pac. 31, 33, saying that a justice's court judgment entered without notice of trial is void.

The two writs are sometimes called the "jurisdictional" writs. Rescue Army v. Municipal Court, supra note 39 at 474, 171 P. (2d) at 17; De Matei v. Superior Court (1925) 74 Cal. App. 147, 149, 239 Pac. 853, 854.


64 Strouse v. Police Court (1890) 85 Cal. 49, 24 Pac. 747.

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63 The two writs are sometimes called the "jurisdictional" writs. Rescue Army v. Municipal Court, supra note 39 at 474, 171 P. (2d) at 17; De Matei v. Superior Court (1925) 74 Cal. App. 147, 149, 239 Pac. 853, 854.
jurisdictional error does not, *per se*, warrant granting prohibition,\(^6^6\) although prohibition will be granted if there is no other way of reviewing the error.\(^6^7\) It is said that if the rule were otherwise the appellate courts would be converted into law and motion departments for the inferior courts.\(^6^8\) In addition to these express grounds for holding an appeal adequate, there are some cases where the statement that an appeal was adequate has been added without explanation and as a makeweight or alternative ground for denying the writ after the court has determined that in fact there was no error on the merits.\(^6^9\)

The factors which render an appeal inadequate must be surmised from the results of the cases. It seems, for example, that if the lack of jurisdiction is patent,\(^7^0\) or an issue of current public importance is involved,\(^7^1\) the writ will be granted, sometimes without discussion of the adequacy of an appeal. Prohibition has been granted when an appeal would not safeguard the petitioner's rights, *e.g.*, the right of a defendant to require an undertaking for costs by an out-of-state plaintiff.\(^7^2\) It has also been granted to prevent the entry of an appealable but plainly void or ineffective order,\(^7^3\) and when the right to appeal is not clear.\(^7^4\) In the two most recent cases involving the problem,

\(^6^9\) Duke v. Justice's Court (1940) 42 Cal. App. (2d) 178, 108 P. (2d) 707; see also Gray v. Justice's Court (1937) 18 Cal. App. (2d) 420, 63 P. (2d) 1160 and Kinard v. Police Court (1905) 2 Cal. App. 179, 83 Pac. 175, where the court considered the merits and denied the writ without discussion of the adequacy of the appeal.
\(^7^0\) Glide v. Superior Court (1905) 147 Cal. 21, 81 Pac. 225; Goodyear Tire and Rubber Co. v. Hanby (1931) 111 Cal. App. 382, 295 Pac. 562.
\(^7^1\) Antilla v. Justice's Court (1930) 209 Cal. 621, 290 Pac. 43 (territorial jurisdiction of justices' courts after 1929 legislative changes); Hewitt v. Justice's Court (1933) 131 Cal. App. 439, 21 P. (2d) 641 (jurisdiction of justices' courts in unlawful detainer proceedings by purchasers against vendors). See also People v. Superior Court (1947) 29 Cal. (2d) 754, 178 P. (2d) 1, an action in the superior court involving the immunity of the state from tort liability. In denying relief to the state on the merits the supreme court said that the importance of the question warranted review on prohibition.
\(^7^2\) Carter v. Superior Court (1917) 176 Cal. 752, 169 Pac. 667; Gadette v. Recorder's Court (1921) 53 Cal. App. 72, 199 Pac. 817.
\(^7^4\) Traffic Truck Sales Co. v. Justice's Court (1923) 192 Cal. 377, 220 Pac. 306. This ground is not expressly stated in the opinion. The case involved a forfeiture under the Wright Act. It was doubtful whether the conditional seller of a truck had a right of appeal in the forfeiture proceeding brought against the conditional purchaser. The seller
remedy by appeal was held inadequate because of the desire to prevent repetitious litigation, and because of the obvious advisability of settling a point of law of frequent occurrence.

Thus it would appear that there is no rule whereby one can determine in advance whether an appeal is adequate. As early as 1912 the complaint was made that it was difficult to reconcile the cases, although it was still attempted. Apparently the difficulty grew so great that the attempt was later abandoned, and cases can be found where the problem of adequacy of an appeal is simply ignored. In the two most recent cases in which the supreme court considered the problem, it came to the conclusion that it is both impractical and undesirable to attempt to phrase a definite rule. As was said in Rescue Army v. Municipal Court: "The fact that the remedies of trial and appeal were considered adequate in some cases and not in others does not mean that the application for the writ was arbitrarily granted in one and refused in another or that the decisions cannot be reconciled on principle. It is difficult, if not impossible, to lay down a hard and fast rule which will govern all situations, and it must be determined in each case, not only on the basis of precedent but from an examination of all the facts, whether there is an adequate remedy in the ordinary course of law. A reviewing court, in order to prevent a failure of justice, has discretion in accordance with established legal principles and practice, to determine the circumstances which justify the use of prohibition to restrain a lower tribunal from acting without or in excess of its jurisdiction. And in the exercise of that discretion it may take into consideration the desirability of the prompt settlement of an important jurisdictional question so that a multiplicity of void proceedings in other cases will be prevented."

The determination of the adequacy of an appeal is thus made by was granted certiorari although he had petitioned for prohibition. See also Ivory v. Superior Court (1938) 12 Cal. (2d) 455, 85 P. (2d) 894.

Rescue Army v. Municipal Court, supra note 39. This involved the third trial of a misdemeanor charge.

Gorbacheff v. Justice's Court (1947) 31 A. C. 176, 187 P. (2d) 407. This involved the determination of the period in which a tenant might sue for rent overcharges under the Federal Emergency Price Control Act.


Notes 75 and 76 supra.

(1946) 28 Cal. (2d) 460, 466, 171 P. (2d) 8, 13.
the court according to its evaluation of the importance of the issue
demanding solution or the aggravated circumstances demanding cor-
rection, and the supreme court has recognized and acknowledged that
the determination is a discretionary one varying from case to case.

B. Jurisdictional Errors

There are three classes of jurisdictional errors which prohibition
may be used to prevent: (1) errors in jurisdiction over the person;
(2) errors in jurisdiction over subject-matter (including territorial
jurisdiction); and (3) errors in procedure in cases where jurisdiction
of the person and subject-matter is conceded, which errors are so
gross as to amount to misuse of authority as distinguished from ab-
sence of power.81

The use of prohibition to test the jurisdiction in personam of in-
ferior courts is clear. Indeed this extraordinary remedy has become
the ordinary way of obtaining a ruling of an appellate court on mat-
ters connected with amenability to, and method of, service of process.
How this result came about will be described in some detail, for this
particular use of writ shows that in some situations it is little more
than a substitute for an appeal.82

Although the Code of Civil Procedure contains no reference to a
special appearance to contest jurisdiction over the person, such ap-
pearances are, in fact, allowed. The ruling on the special appearance
is not one of those orders from which an intermediate appeal is
allowed, and error in the ruling is waived by proceeding with a trial
on the merits.83 In view of the silence of the Code of Civil Procedure
the rule might have been settled to the contrary, i.e., that the court
in which the action was pending had the final authority to rule on

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

82 In some states the ruling on a special appearance may be appealed directly or
reviewed on an appeal from a final judgment. 1 Beale, Conflict of Laws §§ 82.2, 82.5
(1935).

1104. Cf. McDonald v. Agnew (1898) 122 Cal. 448, 55 Pac. 125; Hubbard v. Justice's
213, 104 Pac. 581; Germain Seed Co. v. Justice's Court (1919) 41 Cal. App. 307, 182 Pac.
784 (denying prohibition on the ground that the remedy by appeal from a default judg-
ment was adequate even though, by suffering the default, appellate review on the merits
was foreclosed). As to what activity in addition to the "special appearance" results in a
waiver of the right to contest jurisdiction over the person, see (1942) 30 Cal.R. L. Rev.
690. Jardine v. Superior Court (1931) 213 Cal. 301, 2 P. (2d) 756 finally held that pro-
hibition was regularly available.
the question and no remedy was open but collateral attack, or that a special appearance was not allowed. But whatever the merits of this position may be, the results of the cases have been to establish the special appearance and to make a ruling upholding jurisdiction an appealable order for practical purposes. Regardless of the advisability of making such an order reviewable before final judgment, the procedure developed has two undesirable features. First, because of the hazard that a request for any other relief will result in a waiver, the defendant is obliged to conceal whatever other objections he has to the proceeding no matter how meritorious, i.e., he cannot simultaneously object to the jurisdiction of the court over person and subject matter. Second, he is likely to lose his right to relief through the speedy entry of a judgment. If the defendant is aware of the suit, he may raise the issue not only by a motion to quash the service of summons but also by a motion to vacate a default if one has been entered. But if the defendant, even inadvertently or through ignorance of the facts, suffers a judgment to be entered against him, review by prohibition is precluded on the theory that there remains no further judicial activity to prevent. Thus, the paradox is presented that if the attack on jurisdiction is made before judgment is entered, a determination of the district courts of appeal or supreme court could be secured in a prohibition proceeding. But if the attack is made after judgment, the remedy is by an appeal only to the superior court.

Prohibition is also used to test the subject-matter jurisdiction of inferior courts. Its use here is not as clear-cut as in the cases involving personal jurisdiction because lack of jurisdiction over the subject matter is not waived by proceeding and can, therefore, be urged on an appeal after a trial on the merits. The cases involving subject-matter jurisdiction, therefore, can be complicated by the necessity of deciding whether an appeal is an adequate remedy, but, as illustrated above, when a serious question arises the tendency has been to gloss over the issue of adequacy of an appeal. Thus prohibition has

84 See generally York v. Texas (1890) 137 U. S. 15.
85 (1942) 30 Calif. L. Rev. 690.
86 American Law Book Co. v. Superior Court, supra note 46.
88 Query as to whether mandate might lie to compel the vacation of a judgment void for lack of personal jurisdiction. See generally Andrews v. Superior Court (1946) 29 Cal. (2d) 208, 174 P. (2d) 313 (judgment void for lack of jurisdiction over the subject matter). There may also, of course, be the possibility of a collateral attack or equitable relief.
89 Text at note 80 supra.
been used to determine whether a proceeding was of an equitable character, involved the title to real property, or the legality of taxes, cases of these descriptions being beyond the jurisdiction of the inferior courts. The writ is also used to determine whether an inferior court has exceeded its territorial jurisdiction.

The principal problem presented by the prohibition cases, in addition to the definition of adequacy of appeal, is that of determining those abuses of authority, short of lack of fundamental power, which constitute "jurisdictional" errors. The difficulty of this problem can be seen from the review of the cases where it has arisen.

First, prohibition may now be used to prevent a criminal prosecution under an unconstitutional law. This is true despite the fact that, in a fundamental sense, the court in which the case is first brought has jurisdiction to determine constitutionality. The explanation is, apparently, that despite the advantages, or even constitutionally declared policy, of terminating litigation in petty causes, the court has decided that vindication of constitutional rights is more important.

Secondly, prohibition can be used to prevent a court from entertaining an action in violation of a statute prohibiting the proceeding. Thus, where the pendency of insolvency proceedings in the superior court abated other actions, a justice's court was prohibited from proceeding in an action against the debtor. This has been extended to stay a proceeding until a particular statutory procedural requisite has been met, i.e., the deposit of costs by an out-of-state plaintiff.

95 See generally Roberts v. Police Court (1921) 185 Cal. 65, 195 Pac. 1053, holding that conviction is not beyond the jurisdiction of the court even though it was not based on sufficient evidence, because the court had power over the person. See also Los Angeles Bond etc. Co. v. Superior Court (1934) 1 Cal. App. (2d) 634, 37 P. (2d) 159. Thus although the method by which the court secures power is open to minute inspection on prohibition (text at notes 81-109), once it has secured power some flagrant errors are not so reviewable.
96 Hayne v. Justice's Court (1889) 82 Cal. 284, 23 Pac. 125.
97 Carter v. Superior Court (1917) 176 Cal. 752, 169 Pac. 667; Gadette v. Recorder's Court (1921) 53 Cal. App. 72, 199 Pac. 817.
and to determine whether an action is barred by lapse of time. And it has been held that a procedural requirement developed only by case law may be "jurisdictional" for this purpose. On the other hand, such serious allegations of error as denial of a jury trial and entertaining a state prosecution in face of a federal privilege have been held to be non-jurisdictional and therefore not reviewable in prohibition proceedings.

The group of cases involving the problem of when the failure of a complaint to state an offense is a jurisdictional error is, because of the common factual situation involved, the most graphic example of the looseness with which the term "jurisdiction" can be used. Here the cases have gone both ways. The significant point, however, is not the split, but the reason that has been assigned for holding the failure not a jurisdictional defect, i.e., that such a holding would be contrary to public policy in that it would make district courts of appeal law and motion departments for the inferior courts.

This reason would go more to the adequacy of other remedies than to the question of whether the error is jurisdictional, because the error is one which can be reviewed on habeas corpus if there is a complete failure to state an offense (as distinguished from the mere imperfect statement of an offense) even after conviction. The variation in the prohibition cases would seem to indicate, therefore, that the courts had not determined whether a review of the sufficiency of the complaint should be had prior to conviction, or, phrased somewhat differently,

98 Gorbacheff v. Justice's Court, supra note 76.
100 Powelson v. Lockwood (1890) 82 Cal. 613, 23 Pac. 143.
104 In re Garbarini (1933) 129 Cal. App. 618, 19 P. (2d) 27; (1934) 22 CALIF. L. REV. 536, 544, 546.
whether a demurrer to the complaint should be allowed.\textsuperscript{106} If a complaint fails to state a cause of action because of the unconstitutionality of the statute or ordinance on which it is based, it is now fairly clear that relief may be obtained by prohibition.\textsuperscript{106} But insofar as a complaint may fail to state a cause of action for reasons other than unconstitutionality, the right to relief is still doubtful.\textsuperscript{107}

Thus the only conclusions that can be drawn from the prohibition cases are: (1) that whatever the word “jurisdiction” means in the prohibition cases, as in the certiorari cases, it does not mean that fundamental lack of power which will render a judgment vulnerable to collateral attack;\textsuperscript{108} (2) that as new uses for the remedy have been shown, the concept of jurisdiction has expanded to meet the new uses so that any error which the reviewing court deems so gross as to warrant its interference is called “jurisdictional.”\textsuperscript{109}

\textsuperscript{105} There once was a somewhat similar vacillation on the question of use of prohibition to test \textit{in personam} jurisdiction. See note 88 \textit{supra}.

\textsuperscript{106} \textit{Rescue Army v. Municipal Court} (1946) 28 Cal. (2d) 460, 171 P. (2d) 8.

\textsuperscript{107} \textsc{Cal. Penal Code} § 1428.1 gave the defendant the right to demur to the complaint. The question in the prohibition cases is the right to review before final judgment. Since the statute does not give the defendant the right of appeal if the demurrer is overruled, the possibility of using prohibition remains. Compare the similar situation with reference to the evidence to support indictments. \textit{Greenberg v. Superior Court} (1942) 19 Cal. (2d) 319, 121 P. (2d) 713.

\textsuperscript{108} \textit{Rescue Army v. Municipal Court} (1946) 28 Cal. (2d) 460, 463, 171 P. (2d) 8.

The fact that a judgment is based on an unconstitutional statute or unconstitutional action by a court does not \textit{ipso facto} render it collaterally attackable. Boskey and Braucher, \textit{Jurisdiction and Collateral Attack: October Term 1939 (1940) 40 Col. L. Rev. 1006}; see also \textit{Gore v. Bingaman} (1942) 20 Cal. (2d) 118, 124 P. (2d) 17 (direct attack. Constitutional issue uncontestable, having become law of the case).

Although the deposit of costs by a non-resident plaintiff may be enforced by prohibition (cases cited note 102 \textit{supra}), failure to require a deposit does not oust the court of jurisdiction. \textit{Straus v. Straus} (1935) 4 Cal. App. (2d) 461, 41 P. (2d) 218 (alternative holding).

Failure to state a cause of action is not a jurisdictional defect and is not a ground for a collateral attack. \textit{Estate of Keet} (1940) 15 Cal. (2d) 328, 335, 100 P. (2d) 1045, 1049. \textit{Compare} the cases cited in note 107 \textit{supra}, where prohibition was nevertheless allowed. \textit{Compare} also \textit{Gorbacheff v. Justice's Court} (1947) 31 A. C. 176, 187 P. (2d) 407 (wherein it was held that if the statute of limitations had run the cause of action was extinguished and the jurisdiction of the court was limited to action begun in time, relying on cases in which the issue was presented on direct attack); \textit{Redlands High School District v. Superior Court} (1942) 20 Cal. (2d) 348, 360, 125 P. (2d) 490, 497 (wherein it was held that the statute of limitations was a restriction on the plaintiff's right of recovery rather than on the power of the court to proceed). The distinction, if any, between the two statutes involved was not pointed out by the court.

\textsuperscript{109} \textit{Foster, Jurisdiction, 8 ENCYC. Soc. Sci. 471, 472 (1932).}
The writ of mandate is actually adaptable to a greater variety of uses in the review of inferior court actions than are either of the other writs. Like prohibition it can be used to review actions of the lower court before it has entered a final judgment; like certiorari, it can be used to review such activities after judgment has been rendered. Whenever it is used, the test for its issuance is whether the court below abused its discretion rather than the narrower test (in language, at least) of excess of jurisdiction, for while every excess of jurisdiction would seem to be an abuse of discretion, the converse is not true. Despite these capabilities, relief through this writ has not been sought as much as either certiorari or prohibition. The few cases do, however, illustrate its potentialities.

Mandate can be used to review an intermediate order when the lower court's determination in making the order was not intended to be unreviewable and when the remedy by appeal is inadequate. When so used the order will not be disturbed unless an abuse of discretion is shown, and, of course, the tests as to what is an abuse of discretion are indefinable in a close case. The most common use of mandate in this connection is to compel a court to exercise jurisdiction after it has erroneously determined that it does not have jurisdiction. If the lower court simply refuses to proceed, mandate is the only remedy since there is nothing from which to appeal. But if the court actually dismisses the action, then there may be an appealable order and the question arises as to whether an appeal is an adequate remedy. No case has been found discussing the adequacy of an appeal in this situation. In the few cases where the argument has been urged it has been held as a matter of statutory interpretation that a dismissal for lack of jurisdiction, as distinguished from a dismissal

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110 Matter of Ford (1911) 160 Cal. 334, 116 Pac. 757 (use to compel dismissal of criminal prosecution for unreasonable delay in bringing action to trial).

111 Hays v. Superior Court (1940) 16 Cal. (2d) 260, 105 P. (2d) 975 (use to review refusal of trial court to allow party to take a deposition).

112 Miller v. Municipal Court (1943) 22 Cal. (2d) 818, 852, 142 P. (2d) 297, 316.

113 In Miller v. Municipal Court, id. at 821, 142 P. (2d) at 300, "the court declared it had no jurisdiction . . . . and ordered it [the action] off calendar."

114 In Aldrich v. Superior Court (1901) 135 Cal. 12, 66 Pac. 846 mandate was denied because an appeal was available. See also Albóri v. Sykes (1937) 18 Cal. App. (2d) 619, 623, 65 P. (2d) 84, 86.
on the merits, is not an appealable order and, therefore, the need for
decision has been avoided. 115

The use of mandate to review final orders has, so far, been confined
to cases where the order was void, i.e., the grounds for granting man-
date are the same as those which would support a collateral attack. 116
This presents a paradox: the test for relief by mandate is abuse of
discretion; the test for relief by certiorari is absence or excess of jurisdic-
tion; the latter seems more narrowly confined than the former;
a final judgment cannot be attacked by mandate unless it is collaterally
attackable, but an attack may be made by the other two writs even
though there is no ground for collateral attack.

The paradox goes even further: there are void orders which can-
not be attacked by certiorari but can be attacked by mandate. This is
shown by three cases.

In Kahn v. Smith 117 the superior court made an order granting
the defendant a new trial. The order was made one day after the ex-
piration of the time allowed by the Code. The plaintiff appealed from
the order, but then voluntarily dismissed the appeal and in lieu there-
of brought mandate to compel the clerk to issue execution on the
judgment. The writ was granted because the order granting a new
trial was void. The argument that an appeal was adequate was re-
jected with the statement "an appeal is not regarded as adequate in
this type of case." 118 Three judges dissented on the ground that the
plaintiff's remedy was an appeal which he had lost through his own
neglect. Now, under the rule of Olcese v. Justice's Court 119 as affirmed
in Portnoy v. Superior Court, 120 certiorari would have been denied be-
cause of the availability of an appeal. Kahn v. Smith is, therefore, a
good illustration of how the effect of certiorari can be achieved simply
by using another writ, or, conversely, the fact that certiorari is un-
available and time for appeal has lapsed does not mean the order is
unreviewable at the instance of the aggrieved party.

115 Lissner v. Superior Court (1944) 23 Cal. (2d) 711, 146 P. (2d) 232; Moch v.
Superior Court (1919) 39 Cal. App. 471, 179 Pac. 440. The above cases all refer to dis-
missals on the ground that no court in the state was competent to entertain the action.
Under CAL. CODE CIV. PROC. § 396, if the action has simply been brought in the wrong
court, it must be transferred to the correct court and an order of dismissal may be void.
See also Cook v. Winklepleck (1936) 16 Cal. App. (2d) (Supp.) 759, 59 P. (2d) 463.
117 (1943) 23 Cal. (2d) 12, 142 P. (2d) 13.
118 23 Cal. (2d) 12, 14, 142 P. (2d) 13, 14.
119 (1909) 156 Cal. 82, 103 Pac. 317.
120 (1942) 20 Cal. (2d) 375, 125 P. (2d) 487.
Perhaps even more striking are the two cases of *Andrews v. Police Court*\(^{121}\) and *Andrews v. Superior Court*.\(^{122}\) Andrews was convicted by a police court of the misdemeanor of contributing to the delinquency of a minor. Exclusive jurisdiction of this offense is given to the superior court; therefore, the judgment entered by the police court was void. Some five years after the conviction Andrews made a motion in the police court to vacate the judgment. This was denied and Andrews sought a writ of mandate in the superior court to compel the vacation. This writ was denied and the denial was affirmed on appeal on the grounds that Andrews had an adequate remedy by appeal to the superior court.\(^{123}\)

Thereafter Andrews renewed his motion in the police court,\(^{124}\) where it was denied; he appealed to the superior court, where the denial was affirmed. He then sought mandate which was granted on the ground that, the judgment being void, mandate was available to compel its vacation.

The *Andrews* cases, therefore, present at least the following problems: to what extent does the availability of an appeal preclude resort to mandate to achieve the same result; when can a result be achieved by mandate which cannot be achieved by certiorari? Does the second *Andrews* case mean that, in the *Portnoy* case,\(^{125}\) the defendant had gone through the motions of attempting to vacate the judgment, appealing and then seeking mandate, he would have obtained the relief which was denied him when he proceeded more directly on certiorari? Other questions which can now arise are whether the second *Andrews* case is limited to void judgments, or to cases where, apart from actual invalidity, a motion to vacate should have been granted;\(^{126}\) whether it can be applied to compel the granting of a new trial when an error in denying a new trial has been so gross as to constitute an abuse of discretion; and, finally, whether it applies to civil cases? If it does apply to other than void judgments, is not every judgment reviewable, despite the expiration of the time for appeal, if the

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\(^{121}\) (1943) 21 Cal. (2d) 479, 133 P. (2d) 398.

\(^{122}\) (1946) 29 Cal. (2d) 205, 174 P. (2d) 313.

\(^{123}\) Cf. Kahn v. Smith (1943) 23 Cal. (2d) 12, 142 P. (2d) 13 discussed supra.

\(^{124}\) Actually the motion in the first case was to "set aside and expunge the complaint and judgment," and in the second case was for an order correcting the records to show that Andrews had pleaded that he was indiscreet rather than guilty. Both motions were treated as challenging the jurisdiction of the court. Justice Edmonds dissented in the second case on the ground that the determination as to jurisdiction was res judicata.

\(^{125}\) Portnoy v. Superior Court (1942) 20 Cal. (2d) 375, 125 P. (2d) 487.

\(^{126}\) CAL. CODE CIV. PROC. § 473.
aggrieved party can convince the reviewing court that there is a serious error?

CONCLUSION

The above discussion has been intended to show the confusion in the field of the extraordinary writs and the illusory character of the remedies. From this confusion it is, however, possible to draw some conclusions. First, the writs provide a means of obtaining a direct review of non-appealable judgments and orders. Second, their use is not necessarily limited to the same grounds as are true collateral attacks. Therefore, they are actually used as a means of providing a sort of discretionary appeal.

That some form of review should be allowed to enable the appellate courts to correct the serious errors of law of the lower courts seems evident. The cases where such errors have been corrected are, by and large, cases in which it is hard to quarrel with the result, apart from the fact that they confuse the law relating to the extraordinary remedies. Indeed, it is possible to interpret these cases, not as examples of aberrations of familiar concepts, but as examples showing the inadequacy of familiar concepts to meet the problems to be solved. With the constant expansion of the jurisdiction of the lower courts it becomes increasingly necessary to allow the exercise of a less restricted degree of appellate judicial control over them than that permitted by the concepts of jurisdiction or abuse of discretion. On the other hand, allowing appeals of all cases on all questions as of right would provide a cure which might be worse than the disease.

Without attempting to go into detail or advocate any specific proposals, it seems that the following solutions or a combination of them might be in order:

(1) Define certain orders as appealable in order to avoid the necessity for resort to prohibition. This can be done by making the orders

2\textsuperscript{27} Another reason for permitting the appellate review of inferior court judgments in courts higher than the superior court is the fact that there are inconsistencies of decision among the appellate departments of those courts. From time to time the appellate departments have their opinions printed. They then are used as precedents. Inconsistencies of decision usually cannot be removed until a case involving the point falls within the original jurisdiction of the superior court. In addition to the methods suggested above, this problem could be solved by abolishing the appellate jurisdiction of the superior courts and making all inferior court judgments reviewable by the district courts of appeal on a discretionary basis somewhat similar to the "certiorari" now used to review the determinations of the Industrial Accident Commission. For a brief discussion of various methods of review see Scott and Simpson, Cases on Judicial Remedies 1242 (1938).
most frequently contested by that writ either appealable intermediately or reviewable on appeal from the final judgment.

(2) Broaden certiorari somewhat in the manner in which certiorari to the United States Supreme Court has been broadened, or make it analogous to the present petition for hearing to the California Supreme Court. This would mean that the writ would be extended to review any error on the record and that an appeal would bar use of the writ only when the appeal was to the court whence the writ was sought. Whether the petition should be to the district court of appeal, to the supreme court, or to the supreme court with power to grant a hearing in the district court of appeal is a question beyond the scope of this discussion.

(3) Allow the superior court on appeal to certify questions to an appellate court and require that court to determine the question so certified.

(4) Allow certain questions, e.g., issues of constitutionality, to be appealed as of right.

With the exception of making prohibition unnecessary by providing an appeal in some cases, none of these proposals would seem to interfere with the use of the writs to attack void judgments. On the other hand, under them a systematic means of obtaining reviews on the merits could be provided with definite time limitations and provisions for records on review and without the necessity of, in most cases, deciding expressly or impliedly what is lack of jurisdiction, what is abuse of discretion, and what is adequacy of appeal.