

March 1953

## Use of Prohibition to Avoid the Final Judgment Limitation on Appeal

Albert W. Harris

Follow this and additional works at: <https://scholarship.law.berkeley.edu/californialawreview>

---

### Recommended Citation

Albert W. Harris, *Use of Prohibition to Avoid the Final Judgment Limitation on Appeal*, 41 CALIF. L. REV. 124 (1953).

### Link to publisher version (DOI)

<https://doi.org/10.15779/Z38XJ42>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# California Law Review

MEMBER NATIONAL AND WESTERN CONFERENCES OF LAW REVIEWS

Published Quarterly throughout the Year by Students of the School of Law  
of the University of California, Berkeley, California. Indexed in Index to  
Legal Periodicals and Public Affairs Information Service.

---

Subscription Price, \$5.00

Current Single Copies, \$1.50

---

## BOARD OF EDITORS

THOMAS C. ACKERMAN, JR., *Editor*

### *Associate Editors*

JUSTUS H. BANTZ, *Managing*  
ROBERT D. BURCH, *Revising*  
HARRY J. KEATON, *Revising*  
ROBERT A. MACKEY, *Revising*

EUGENE A. MASH, *Revising*  
FRANCIS A. WATSON, JR., *Revising*  
WERNER F. WOLFEN, *Articles and*  
*Book Reviews*

ALLEN E. BROUSSARD  
R. BRUCE HOFFE

GLADYS L. SCHWATKA

MARILYN MITCHELL, *General Secretary*

---

## Comment

### USE OF PROHIBITION TO AVOID THE FINAL JUDGMENT LIMITATION ON APPEAL

In order to speed up litigation and prevent piecemeal appeals, a California statute provides that an appeal may be taken only from the final judgment in an action.<sup>1</sup> Though a considerable number of interlocutory and intermediate rulings have been made directly appealable,<sup>2</sup> and the statute has been modified judicially to allow an appeal where there is a judgment final as to a collateral matter arising out of the action,<sup>3</sup> the ma-

---

<sup>1</sup> CAL. CODE CIV. PROC. § 963. For a complete discussion of the general law see Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L. J. 539 (1932).

<sup>2</sup> CAL. CODE CIV. PROC. § 963 allows appeals from the following orders: (1) granting of a new trial, (2) denying a motion for judgment notwithstanding the verdict, (3) granting or dissolving, or refusing to grant or dissolve an injunction, (4) appointing a receiver, (5) dissolving or refusing to dissolve an attachment, (6) changing or refusing to change place of trial, (7) any special order made after final judgment, (8) any interlocutory judgment, order or decree made 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, (9) such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, (10) interlocutory decrees of divorce, (11) granting a motion to quash service of summons. CAL. PROB. CCDE §§ 1240 and 1630 provide for the appeal of various interlocutory orders in probate and guardianship proceedings.

jority of rulings made by a trial court remain reviewable only on appeal from the final judgment. Sometimes any objection to the ruling is waived by engaging in the trial on the merits, and, in other cases, any review after the final judgment would be futile, as in the case of an erroneous order of inspection of confidential documents.

When the ordinary channels of appellate review are not open to an injured litigant, he can sometimes obtain immediate relief by obtaining a writ of prohibition. The writ is an order issuing from the superior court, the district court of appeal, or the supreme court, stopping the proceedings of an inferior tribunal.<sup>4</sup> Since the writ can stop all proceedings in the action,<sup>5</sup> or stop them until certain prerequisites are complied with,<sup>6</sup> or stop the enforcement of a particular order issued in the course of trial,<sup>7</sup> the result to the litigant is similar to appeal. Prior proceedings may be annulled where necessary to make the remedy complete.<sup>8</sup> Sometimes the writ of prohibition provides more effective relief even than appeal. Often no stay is provided on appeal, and the litigant must bear the burden of trial pending determination of the appeal unless he can obtain a writ of supersedeas.<sup>9</sup> On the other hand, the alternative writ of prohibition is issued on the showing of a prima facie case, and proceedings in the trial court are stopped pending the hearing on granting the final, peremptory writ.<sup>10</sup>

Historically,<sup>11</sup> and by statute in California, prohibition will issue only when: (1) the proceedings are "without or in excess of the jurisdiction" of the inferior tribunal,<sup>12</sup> and (2) there is no "plain, speedy and adequate remedy in the ordinary course of the law."<sup>13</sup> No attempt will be made here to formulate broad, general principles concerning the existence of either of these conditions. These problems have been dealt with at length.<sup>14</sup> Briefly, both requirements are footholds in an extremely loose bed of sand. It is endlessly repeated that the writ will not lie if the trial court "errs,"<sup>15</sup> but only when the court acts "without, or in excess of jurisdiction." For the purpose of writs of prohibition, "excess of jurisdiction" has been defined

<sup>3</sup> *Hildebrand v. Superior Court*, 173 Cal. 86, 159 Pac. 147 (1916); *Pacific States Sav. & L. Co. v. Mortimer*, 70 Cal. App. 2d 811, 161 P.2d 684 (1945). See *Title Ins. & Trust Co. v. California Co.*, 159 Cal. 484, 489-491, 114 Pac. 838, 840-842 (1911).

<sup>4</sup> CAL. CODE CIV. PROC. §§ 1102, 1103.

<sup>5</sup> See, for example, text at note 25 *infra*.

<sup>6</sup> See text at note 32 *infra*.

<sup>7</sup> See text at note 83 *infra*.

<sup>8</sup> *Hall v. Superior Court*, 198 Cal. 373, 245 Pac. 814 (1926); *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121 (1890).

<sup>9</sup> CAL. CODE CIV. PROC. § 949. See Comment, 40 CALIF. L. REV. 249 (1952).

<sup>10</sup> CAL. CODE CIV. PROC. § 1104.

<sup>11</sup> HIGH, EXTRAORDINARY LEGAL REMEDIES 708 (3d ed. 1896).

<sup>12</sup> CAL. CODE CIV. PROC. § 1102.

<sup>13</sup> *Id.* § 1103.

<sup>14</sup> See Goldberg, *The Extraordinary Writs and the Review of Inferior Court Judgments*, 36 CALIF. L. REV. 558, 569-576 (1948); Comment, 36 CALIF. L. REV. 75 (1948); Comment, 23 SO. CALIF. L. REV. 530 (1950).

<sup>15</sup> *E.g.*, *Putman v. Superior Court*, 209 Cal. 223, 286 Pac. 425 (1930) (time of submitting matter to referee); *Apartment Financing Corp. v. Will*, 69 Cal. App. 276, 231 Pac. 349 (1924) (resubmission of the matter to referee).

to include "any acts which exceed the defined power of a court in any instance."<sup>16</sup> A court has been held to act beyond its jurisdiction in this sense over a broad range of instances: where there is a bona fide lack of jurisdiction, that is, the court has no power to deal with the subject matter of the action;<sup>17</sup> and where the court clearly has the power to act, for example, issuing an order of inspection, but the appellate court says it has "exceeded its jurisdiction" so that the writ can be granted, and a party saved from irreparable injury.<sup>18</sup> Whether there is "no other adequate remedy in the ordinary course of the law," is a matter resting in the "sound discretion" of the court to which application for the writ is made.<sup>19</sup> This has resulted in contradictory holdings on what seem to be very similar facts.<sup>20</sup> Sometimes even the availability of certiorari or habeas corpus has been held to preclude prohibition, although the statute only requires that there be no other adequate remedy in the "ordinary course of the law," which would not seem to include other extraordinary writs.<sup>21</sup>

The purpose of this comment is to explore the instances in California in which the writ of prohibition can be used to obtain appellate review of an unappealable order prior to final judgment, viewing the problem pragmatically in terms of the factual situations presented and the results achieved. The discussion is limited to civil proceedings.<sup>22</sup> It excludes, except for collateral consideration, instances in which prohibition may be used to obtain faster relief when the order to be reviewed is appealable,<sup>23</sup> and use of the writ in the case of unappealable final judgments, such as contempt judgments.<sup>24</sup>

For convenience of analysis the problems arising have been divided

<sup>16</sup> *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 291, 109 P.2d 942, 948 (1941).

<sup>17</sup> *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70 (1905) (trying title to land in another state).

<sup>18</sup> *San Francisco v. Superior Court*, 38 Cal. 2d 156, 238 P.2d 581 (1951).

<sup>19</sup> See *Rescue Army v. Municipal Court*, 28 Cal. 2d 460, 466-467, 171 P.2d 8, 13 (1946).

<sup>20</sup> Compare *Golden State Glass Corp. v. Superior Ct.*, 13 Cal. 2d 384, 90 P.2d 75 (1939) (appeal from order appointing receiver held inadequate), with *Sunset Farms Inc. v. Superior Court*, 9 Cal. App. 2d 389, 50 P.2d 106 (1936) (appeal held adequate). An appeal is sometimes available even though the order in question is not specifically appealable, *supra* note 3. Availability of this appeal may bar the writ. *Colma Vegetable Ass'n v. Superior Court*, 75 Cal. App. 91, 242 Pac. 82 (1925) (substitution of personal for surety bond). Denial of the writ could be disastrous if the order had already been made and the time for the appeal had expired in the course of applying for the writ. The litigant would be without remedy. See Comment, 22 CALIF. L. REV. 537 (1934) for a general treatment of the problem of when there is another adequate remedy.

<sup>21</sup> See text at note 76 *infra*.

<sup>22</sup> There has been a wide use of the writ in criminal proceedings. Preventing double jeopardy: *Jackson v. Superior Court*, 10 Cal. 2d 350, 74 P.2d 243 (1937); where there was no reasonable evidence for the indictment: *Greenberg v. Superior Court*, 19 Cal. 2d 319, 121 P.2d 713 (1942), or information: *Parks v. Superior Court*, 38 Cal. 2d 609, 241 P.2d 521 (1952). Where the grand jury was improperly selected: *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341 (1891). *But cf.* *Fitts v. Superior Court*, 4 Cal. 2d 514, 51 P.2d 66 (1935).

<sup>23</sup> Prohibition is often granted in these cases. *E.g.*, *Hill v. Superior Court*, 16 Cal. 2d 527, 106 P.2d 876 (1940) (vacating an attachment); *Evans v. Superior Court*, 14 Cal. 2d 563, 96 P.2d 107 (1939) (preliminary injunction); *A. G. Col. Co. v. Superior Court*, 196 Cal. 604, 238 Pac. 926 (1925) (appointment of receiver).

<sup>24</sup> See Comment, 36 CALIF. L. REV. 75, 95-100 (1948).

roughly according to the stages of litigation: orders, (1) in proceedings prior to the actual trial other than pleadings, (2) during the pleading stage, (3) in the course of trial, and (4) after final judgment.

#### PROCEDURAL IRREGULARITIES PRIOR TO THE TRIAL

Often an action should be dismissed for reasons not connected with the merits of the case. When the court refuses to recognize these objections and attempts to proceed with the case, prohibition may issue. If the writ were unavailable the objecting litigant would have to choose between bearing the expense of a full trial on the merits with subsequent appeal or taking his chances on a default, where he would necessarily waive his defense on the merits and rely solely on the procedural point for reversal.

#### *Refusing to Dismiss an Action*

Where the trial court refuses to dismiss an action, although a litigant has failed to comply with time limitations imposed by statute at various procedural stages, prohibition may issue.<sup>25</sup> For example, proceedings were stopped when the court was proceeding in an action in which no default judgment had been entered by the plaintiff within three years after service and no answer had been filed,<sup>26</sup> and when it proceeded to hear the contest of a will more than a year after it had been admitted to probate.<sup>27</sup> Similarly, it has been indicated that prohibition would lie where an action was brought after the statute of limitations had run.<sup>28</sup>

A trial may also be stopped where another court has assumed exclusive jurisdiction over the cause,<sup>29</sup> or where the trial would be in violation of the judgment of a reviewing court.<sup>30</sup>

When a trial court proceeds with an action although sufficient bond has not been put up by the plaintiff, as required by statute in certain types of cases, prohibition will ordinarily issue.<sup>31</sup> Here there is an additional compelling factor for immediate relief. The primary reason for the requirement of a bond is to assure the defendant security for his costs incurred in the

<sup>25</sup> *Davis v. Superior Court*, 184 Cal. 691, 195 Pac. 390 (1921); see *Tomales Bay Corp. v. Superior Court*, 35 Cal.2d 389, 392, 217 P.2d 968, 970 (1950).

<sup>26</sup> *Rio Del Mar Club v. Superior Court*, 84 Cal. App.2d 214, 190 P.2d 295 (1948) (CAL. CODE CIV. PROC. § 581a).

<sup>27</sup> *Estate of Smith*, 214 Cal. 50, 3 P.2d 921 (1931) (CAL. CODE CIV. PROC. § 1333).

<sup>28</sup> See *Gorbacheff v. Justice's Court*, 31 Cal. 2d 178, 180, 187 P.2d 407, 409 (1947). *But cf. Ex Parte Tyler*, 107 Cal. 78, 40 Pac. 33 (1895) (habeas corpus denied).

<sup>29</sup> *Greene v. Superior Court*, 37 Cal. 2d 307, 231 P.2d 821 (1951), noted, 25 So. CALIF. L. REV. 224 (1952); *Browne v. Superior Court*, 16 Cal. 2d 593, 107 P.2d 1 (1940); *Milani v. Superior Court*, 61 Cal. App. 2d 463, 143 P.2d 402 (1943). *Contra: County of Sutter v. Superior Court*, 188 Cal. 292, 204 Pac. 849 (1922). *But cf. McGregor v. Board of Trustees*, 159 Cal. 441, 114 Pac. 566 (1911).

<sup>30</sup> *Hampton v. Superior Court*, 38 Cal. 2d 652, 242 P.2d 1 (1952).

<sup>31</sup> *Carter v. Superior Court*, 176 Cal. 752, 169 Pac. 667 (1917) (action by non-resident plaintiff); *Anderson v. Superior Court*, 122 Cal. 216, 54 Pac. 829 (1898) (insolvency proceedings); *Shell Oil Co. v. Superior Court*, 2 Cal. App. 2d 348, 37 P.2d 1078 (1934) (libel suit). The writ has even been issued when the order was appealable. *Sweins v. Superior Court*, 16 Cal. App. 2d 336, 60 P.2d 313 (1936); *Westphal v. Superior Court*, 120 Cal. App. 263, 7 P.2d 711 (1932) (appointment of receiver).

trial. If he were limited to an appeal from the final judgment, his costs would already have been incurred without any security, thus defeating the purpose of the statute. The action is not stopped permanently in these cases but only stayed until a sufficient bond is supplied.<sup>82</sup>

While the defendant may be entitled to a dismissal in certain cases, the plaintiff usually can have the case dismissed at his discretion within a prescribed time period, by taking a voluntary nonsuit.<sup>83</sup> In a case where the trial court refused to dismiss the action unless the plaintiff complied with certain unwarranted conditions, prohibition was granted to stop the trial.<sup>84</sup>

#### *Denial of a Motion to Quash the Summons*

While an appeal may be taken from an order granting a motion to quash,<sup>85</sup> no appeal is available when the motion is denied. Accordingly, in this latter instance, prohibition is a practical necessity and is available to test whether the court ever acquired jurisdiction over the defendant's person.<sup>86</sup> If the litigant were to defend on the merits, he would forfeit his jurisdictional defense.<sup>87</sup> Hence, without relief by prohibition, he would have to submit to a default judgment and give up any defense on the merits he might have, to raise the jurisdictional question in the appellate courts.

#### *Refusing to Stay Proceedings*

In some instances, before trial, a party desperately needs a stay of proceedings. Denial of a stay is not appealable but, again, the writ of prohibition will provide the needed remedy—at least where the stay is a statutory right,<sup>88</sup> or where an appeal is pending in the matter at trial.<sup>89</sup>

#### RULINGS ON THE PLEADINGS

The courts are more sparing in issuing writs of prohibition when the objection is that a trial court ruled erroneously on pleadings than where there is a jurisdictional deficiency in proceedings before the trial. Possibly the concept of a court exceeding its "power" by ruling on demurrers, amendments to the complaint, and other pleadings, seems incongruous. Also the litigant is rarely forced by the adverse ruling to choose between waiving the merits and appealing solely on ground of error in the ruling, or waiving the error by proceeding to trial. An error in ruling on the pleadings is reviewable on final appeal. Usually the only burden imposed on the injured party is the expense and delay of trial and appeal.

<sup>82</sup> Cases cited *supra* note 31.

<sup>83</sup> CAL. CODE CIV. PROC. § 581.

<sup>84</sup> *Hopkins v. Superior Court*, 136 Cal. 552, 69 Pac. 299 (1902).

<sup>85</sup> CAL. CODE CIV. PROC. § 963.

<sup>86</sup> *Frey & Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P.2d 203 (1936), *cert. denied*, 298 U.S. 684 (1936); *Jardine v. Superior Court*, 213 Cal. 301, 2 P.2d 756 (1931), *appeal dismissed*, 284 U.S. 592 (1931); *Berger v. Superior Court*, 79 Cal.App.2d 425, 179 P.2d 600 (1947).

<sup>87</sup> *Remsberg v. Hackney Manufacturing Co.*, 174 Cal. 799, 164 Pac. 792 (1917); *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317 (1909).

### *Sufficiency of the Complaint*

It is ordinarily said that the sufficiency of the complaint will not be inquired into on application for a writ of prohibition.<sup>40</sup> Where a demurrer is erroneously overruled, the litigant's only relief is an appeal from the final judgment.

Where the objection to the complaint is merely one of form,<sup>41</sup> or that it is not sufficiently specific in detail,<sup>42</sup> it seems particularly clear that relief by prohibition is unavailable.

However, when it is shown that the court, in denying the demurrer is proceeding without jurisdiction over the subject matter of the action, for example, trying title to land in another state, prohibition may issue.<sup>43</sup> A similar situation would seem to arise when the amount in controversy is not within the jurisdictional amount requirement of the particular court,<sup>44</sup> although the writ has been denied in such a case.<sup>45</sup>

When the constitutionality of a statute is challenged by a demurrer, motion to dismiss, or a similar plea, application for a writ of prohibition is appropriate to test the validity of the trial court's ruling as to its own jurisdiction.<sup>46</sup> Availability of the writ in such cases is particularly vital in inferior court proceedings where appellate jurisdiction vests exclusively in the superior court and higher appellate tribunals would otherwise be unable to rule on the issue.<sup>47</sup> Use of the writ has been extended also to cases in the superior court where an appeal to higher courts is available.<sup>48</sup>

It is difficult to generalize about other cases arising in the area of attacks on the cause of action. Where no appeal at all is available from the

<sup>38</sup> *Hayne v. Justice's Court*, 82 Cal. 284, 23 Pac. 125 (1889). Mandamus has issued, on application for prohibition, when the court has abused its discretion in denying a stay. *Simmons v. Superior Court*, 96 Cal. App. 2d 119, 214 P.2d 844 (1950).

<sup>39</sup> *Gantner v. Superior Court*, 38 Cal. 2d 688, 242 P.2d 328 (1952); *Lerner v. Superior Court*, 38 Cal. 2d 676, 242 P.2d 321 (1952); *In re Lukasik*, 108 Cal. App. 2d 438, 239 P.2d 492 (1951). *But cf. Davis v. Superior Court*, 95 Cal. App. 2d 586, 213 P.2d 527 (1950) (alimony order granted while appeal pending from divorce); *Klement v. Superior Court*, 21 Cal. App. 2d 456, 69 P.2d 869 (1937) (trial on complaint while appeal pending from dismissal of cross-complaint).

<sup>40</sup> *Lange v. Superior Court*, 11 Cal. App. 1, 103 Pac. 908 (1909). See *McMorry v. Superior Court*, 54 Cal. App. 76, 80, 201 Pac. 797, 799 (1921).

<sup>41</sup> *Cline v. Superior Court*, 184 Cal. 331, 193 Pac. 929 (1920) (leading of accusation).

<sup>42</sup> *Castagnetto v. Superior Court*, 189 Cal. 662, 209 Pac. 548 (1922) (affidavit for contest of nomination for office).

<sup>43</sup> *Ophir Silver Min. Co. v. Superior Court*, *supra* note 17.

<sup>44</sup> *Consolidated Co. v. Superior Court*, 189 Cal. 92, 207 Pac. 552 (1922).

<sup>45</sup> *Rausch v. Superior Court*, 40 Cal. App. 2d 707, 105 P.2d 627 (1940).

<sup>46</sup> *Hunter v. Justice's Court*, 36 Cal. 2d 315, 223 P.2d 465 (1950), noted, 24 So. CALIF. L. REV. 322 (1951); *Rescue Army v. Municipal Court*, 28 Cal. 2d 460, 171 P.2d 8 (1946). Note that while prohibition may issue, this does not necessarily mean that a judgment based on an invalid statute is void and open to collateral attack. See *Rescue Army v. Municipal Court*, *supra* at 463, 171 P.2d at 11.

<sup>47</sup> CAL. CONST. Art. VI, § 4 (1849). On review of inferior court decisions generally see Comment, 36 CALIF. L. REV. 75, 82-93 (1948).

<sup>48</sup> *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal. 2d 481, 171 P.2d 21 (1946). For a discussion of the disadvantages of reviewing constitutionality on application for a writ of prohibition in view of the fragmentary record presented, see Comment, 36 CALIF. L. REV. 75, 103-105 (1948).

proceedings, the court seems to feel compelled to grant relief.<sup>49</sup> For example, ordinarily, the failure of a complaint or information to state a public offense is not a ground for issuing the writ,<sup>50</sup> but prohibition has been granted when no appeal was available.<sup>51</sup>

Prohibition seems available at the pleading stage when a matter of considerable public importance is at issue.<sup>52</sup> This has been illustrated in eminent domain proceedings when the writ has been sought because of the failure of the plaintiff to comply with statutory preliminaries to maintaining the action, such as obtaining approval of the Public Utility Commission before taking property used for public utility service.<sup>53</sup> On the other hand, where a city brought an action without first trying to purchase the property and without formal authorization of the suit by the trustees, as required by statute, the writ was denied.<sup>54</sup>

It seems clear that failure of the trial court to recognize that an action is barred by *res judicata* is no ground for issuing the writ.<sup>55</sup>

### *Regulating the Issues*

It is commonly said that prohibition is not available to regulate the issues to be determined in a pending cause.<sup>56</sup> While this statement requires some reservations,<sup>57</sup> it seems generally accurate. For example, where the trial court erroneously denied a motion to strike a cross-complaint for separate maintenance and the complaint itself was only for a declaratory judgment as to whether certain property was community, the writ was denied.<sup>58</sup>

<sup>49</sup> See *infra* note 89 for an example of this.

<sup>50</sup> *Whitney v. Superior Court*, 182 Cal. 114, 187 Pac. 12 (1920) (information); *Fels v. Justice's Court*, 28 Cal. App. 2d 739, 83 P.2d 721 (1938) (complaint). *Contra*: *Treppa v. Justice's Court*, 1 Cal. App. 2d 374, 36 P.2d 819 (1934) (complaint).

<sup>51</sup> *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615 (1896); *Edson v. Superior Court*, 98 Cal. App. 367, 277 Pac. 194 (1929) (proceedings against public officials).

<sup>52</sup> *People v. Superior Court*, 29 Cal. 2d 754, 178 P.2d 1 (1947) (sovereign immunity from personal injury action of state owned railroad).

<sup>53</sup> *Northwestern Pac. R.R. v. Superior Court*, 34 Cal. 2d 454, 211 P.2d 571 (1949); *accord*, *Great Northern Ry. v. Superior Court*, 126 Cal. App. 575, 14 P.2d 899 (1932); Note, 6 So. CALIF. L. REV. 160 (1933).

<sup>54</sup> *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435 (1890).

<sup>55</sup> *Reidy v. Superior Court*, 220 Cal. 111, 29 P.2d 780 (1934); *United Security Co. v. Superior Court*, 205 Cal. 167, 270 Pac. 184 (1928); *Goodman Bros. v. Superior Court*, 51 Cal. App. 2d 297, 124 P.2d 644 (1942). See *Vitamin Milling Corp. v. Superior Court*, 1 Cal. 2d 116, 121, 33 P.2d 1016, 1018 (1934). The writ has been granted to stop retrial on issues not raised on motion for new trial. *Oldfield v. Superior Court*, 217 Cal. 581, 20 P.2d 671 (1933); *Robson v. Superior Court*, 171 Cal. 588, 154 Pac. 8 (1915).

<sup>56</sup> *Lichtenstein v. Superior Court*, 85 Cal. App. 2d 486, 193 P.2d 508 (1948). See *Wright v. Superior Court*, 85 Cal. App. 2d 151, 153, 192 P.2d 511, 512 (1948) (misjoinder of causes of action).

<sup>57</sup> *City of San Diego v. Superior Court*, 36 Cal. 2d 483, 224 P.2d 685 (1950) (prohibition issued to restrain the trial from proceeding on any but a particular theory of damages as established under a previous order relieving a party from default); *Robson v. Superior Court*, *supra* note 55 (on petition of one defendant, new trial restricted to issue between plaintiff and moving defendant).

<sup>58</sup> *Lichtenstein v. Superior Court*, *supra* note 56. Prohibition has also been denied when the court proceeded with trial on the complaint despite an appeal pending on dismissal of the cross-complaint. *Klement v. Superior Court*, *supra* note 39.

## ORDERS DURING THE COURSE OF THE TRIAL

A litigant faced with an erroneous ruling during a trial has the same practical problem that arises at earlier stages: can he get immediate relief, or must he bear the expense and delay of trial and appeal? Instances also arise where the remedy by appeal from the final judgment would be futile due to the nature of the order involved.

*The Nature of the Trial*

*Trial by jury.* For some time a litigant who was denied his constitutional right to jury trial had to go through with the trial and then raise the question on appeal from the final judgment.<sup>59</sup> Two district courts of appeal have, however, recently issued the writ where a party was denied this right in incompetency and guardianship proceedings.<sup>60</sup> There have been indications that prohibition would be even more likely to lie for denial of a jury trial in a criminal action.<sup>61</sup>

*Disqualified judge.* Prohibition will issue where a litigant stands to be denied a fair trial because the judge in the action is biased or interested in the outcome of the proceedings.<sup>62</sup> But where the affidavits submitted on the motion to change the judge are in conflict as to his bias the writ has been denied.<sup>63</sup> When the question of disqualification of the judge arises on a motion for a change of venue, rather than a motion for a change of judge, the order is immediately appealable,<sup>64</sup> but, since proceedings are not stayed pending appeal, holdings as to the adequacy of such appeal are in conflict.<sup>65</sup>

*Joinder of Parties*

Where the trial court refuses to join parties that are only "necessary" to the action, the only remedy is by appeal from the final judgment.<sup>66</sup> However, where the parties are "indispensable," so that their interests will inevitably be affected by any judgment, the proceedings may be stopped.<sup>67</sup>

On the other hand, where a party is improperly joined,<sup>68</sup> or where he

<sup>59</sup> *Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143 (1890). See *Beaulieu Vineyard v. Superior Court*, 6 Cal. App. 242, 250, 91 Pac. 1015, 1018 (1907).

<sup>60</sup> *Budde v. Superior Court*, 97 Cal. App. 2d 615, 218 P.2d 103 (1950); *Knight v. Superior Court*, 95 Cal. App. 2d 838, 214 P.2d 21 (1950). Prohibition has been denied where there were procedural errors in calling the jury and the unjustified use of a special venire. *Amos v. Superior Court*, 196 Cal. 677, 239 Pac. 317 (1925).

<sup>61</sup> See *id.* at 680-681, 239 Pac. at 318.

<sup>62</sup> *Hall v. Superior Court*, 198 Cal. 373, 245 Pac. 814 (1926), 15 CALIF. L. REV. 174 (1927); *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315 (1881); *Kreling v. Superior Court*, 63 Cal. App. 2d 353, 146 P.2d 935 (1944) (bias).

<sup>63</sup> *Talbot v. Pirkey*, 139 Cal. 326, 73 Pac. 858 (1903).

<sup>64</sup> CAL. CODE CIV. PROC. § 963.

<sup>65</sup> *North Bloomfield G. M. Co. v. Keyser*, *supra* note 62 (held inadequate). *But cf.* *Brock v. Superior Court*, 29 Cal. 2d 629, 177 P.2d 273 (1947) (appeal and supersedeas staying proceedings held adequate—alternative ground).

<sup>66</sup> *Jollie v. Superior Court*, 38 Cal. 2d 52, 237 P.2d 641 (1951).

<sup>67</sup> See *Bank of California v. Superior Court*, 16 Cal. 2d 516, 523, 106 P.2d 879, 884 (1940).

<sup>68</sup> *County of Sutter v. Superior Court*, 188 Cal. 292, 204 Pac. 849 (1922).

claims he is wrongly held in his individual capacity as well as executor of an estate,<sup>69</sup> prohibition has been denied.

### *Protection of Information*

Orders forcing a party or witness to divulge information or to reveal documents pose peculiar problems. When the order is erroneous, a party to the action subject to the order is given two equally unsatisfactory alternatives. The remedy of review on appeal from the final judgment is futile where he is seeking to protect the information from disclosure, since the mischief is done immediately on complying with the order. If he refuses to comply he can test the validity of the order by review of a contempt judgment through certiorari or habeas corpus, but this is risky at best. For the witness not a party, the dilemma is sharpened. Not being involved in the action, he cannot even appeal from the final judgment, woefully inadequate as this remedy may be. Unless prohibition is available, the witness must reveal the documents or risk a contempt judgment.

There are a variety of judicial methods of forcing disclosure, such as the subpoena duces tecum, the order of inspection, questioning at the trial itself, and the taking of a deposition. While these methods are used at various stages of the proceedings, they are grouped together here for purposes of convenience.

*The "fishing expedition."* It is not unknown for a litigant to use the subpoena duces tecum,<sup>70</sup> which requires a witness to produce documents in court or in connection with the taking of a deposition, or an order of inspection<sup>71</sup> for a "fishing expedition." He does not know exactly what papers the other party has, nor what they contain, but hopes he can find something of value. It is not the purpose of this discussion to determine when the documents are adequately described, or when their materiality is shown, but rather to establish what the injured party can do about it assuming that these conditions are not met.<sup>72</sup>

The validity of the subpoena, which may be issued by the clerk of the court without an order, may be challenged in the lower court by a motion to recall or quash, or, at a later stage in the proceedings, by an objection to the admission of the documents as evidence.<sup>73</sup> If the trial court overrules these objections, no immediate appeal is available.

When a writ of prohibition was sought to stop enforcement of a sub-

<sup>69</sup> *Wright v. Superior Court*, *supra* note 56.

<sup>70</sup> CAL. CODE CIV. PROC. § 1985.

<sup>71</sup> *Id.*, § 1000.

<sup>72</sup> For the court to properly issue either a subpoena duces tecum or an order of inspection, it must be shown that the party required to produce the papers actually has them in his possession, that they contain competent and admissible evidence material to the issue, and the documents must be sufficiently described so that they can be reasonably identified. *Milton Kauffman, Inc. v. Superior Court*, 94 Cal. App. 2d 8, 210 P.2d 88 (1949) (order of inspection); *Kullman, Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589 (1911) (subpoena duces tecum). See Harkelroad, *The Law of Discovery in the Courts of California*, 4 So. CALIF. L. REV. 169 (1931); Comment, 2 CALIF. L. REV. 236 (1914).

<sup>73</sup> *Southern Pac. Co. v. Superior Court*, 15 Cal. 2d 206, 100 P.2d 302 (1940).

poena on the ground that the affidavit was defective in describing the documents or showing their materiality, it was denied by the supreme court in *Lockheed Aircraft Corp. v. Superior Court*<sup>74</sup> and *C. S. Smith Met. M. Co. v. Superior Court*.<sup>75</sup> The court indicated that the proper procedure for the injured witness is to refuse to comply with the order, present his defense in the contempt proceedings, and, if found guilty, apply for certiorari or habeas corpus.<sup>76</sup> While there have been subsequent contrary decisions allowing the writ of prohibition prior to any refusal to comply,<sup>77</sup> they seem clearly opposed to the procedure advocated by the highest court.<sup>78</sup> The *Smith* and *Lockheed* cases have the undesirable effect of exposing the witness to the risk of being held in contempt if he wishes to protect his documents. On the other hand, discouraging applications for the writ lessens the interruption and delay of the trial and encourages use of subpoenas and other disclosure devices.

Where a subpoena issued on a defective affidavit has been disobeyed and the witness adjudged in contempt, prohibition has issued to stop the court from punishing him.<sup>79</sup> This is not a general practice,<sup>80</sup> but it seems a desirable one. A full hearing is had on the contempt charge, yet the witness need not go to jail to seek a remedy.<sup>81</sup>

*Confidential documents.* Sometimes an order of inspection is challenged, not on the ground the papers are not adequately described or their materiality shown, but rather because the documents are privileged from inspection under the law.<sup>82</sup> The courts seem more lenient in allowing the writ in these cases. Where the Franchise Tax Commissioner was ordered to allow

<sup>74</sup> 28 Cal. 2d 481, 171 P.2d 21 (1946).

<sup>75</sup> 16 Cal. 2d 226, 105 P.2d 587 (1940). *Accord*, *Rose v. Superior Court*, 44 Cal. App. 2d 599, 112 P.2d 713 (1941).

<sup>76</sup> *E.g.*, *Hupp v. Superior Court*, 22 Cal. App. 162, 153 Pac. 987 (1913) (certiorari).

<sup>77</sup> *Seven-Up Bottling Co. v. Superior Court*, 107 Cal. App. 2d 75, 236 P.2d 623 (1951). The court distinguished the supreme court cases on the basis that they involved an insufficient showing of facts and here there were no facts at all shown. The court proceeded on the novel theory that since the writ was appropriate when the trial court denied a motion to quash the summons, see text *supra*, at note 36, it was equally appropriate when a motion to quash the subpoena was denied. *Accord*, *Commercial Bank v. Superior Court*, 192 Cal. 395, 220 Pac. 422 (1923); *Smith-Golden, Inc. v. Superior Court*, 41 Cal. App. 2d 512, 107 P.2d 299 (1940) (mandamus issued to quash subpoena based solely on information and belief); *Shell Oil Co. v. Superior Court*, 109 Cal. App. 75, 292 Pac. 531 (1930) ("mandamus" issued to restrain the enforcement of an order of inspection); *Gubin v. Superior Court*, 104 Cal. App. 469, 286 Pac. 471 (1930) (order of inspection).

<sup>78</sup> See *C. S. Smith Met. M. Co. v. Superior Court*, *supra* note 75, at 228, 105 P.2d at 589.

<sup>79</sup> *Nelson v. Superior Court*, 9 Cal. 2d 729, 73 P.2d 232 (1932); *Pyper v. Jennings*, 47 Cal. App. 623, 191 Pac. 565 (1920); *Funkenstein v. Superior Court*, 23 Cal. App. 663, 139 Pac. 101 (1914); *Kullman, Salz & Co. v. Superior Court*, *supra* note 72.

<sup>80</sup> See *C. S. Smith Met. M. Co. v. Superior Court*, *supra* note 75, at 228-229, 105 P.2d at 589; *Commercial Bank v. Superior Court*, *supra* note 77, at 397, 220 Pac. at 423.

<sup>81</sup> Similarly when an order to take a deposition from a person not a party to the action has been made on the ground that only this witness could establish certain facts, yet the affidavit did not show facts sufficient to sustain this ground, the writ has issued both to prevent enforcement of the order, *Verdier v. Superior Court*, 88 Cal. App. 2d 527, 199 P.2d 325 (1948), *appeal dismissed*, 336 U.S. 957 (1949), and to stop punishment for disobeying the order, *Nelson v. Superior Court*, *supra* note 79.

<sup>82</sup> CAL. CODE CIV. PROC. § 1881.

the inspection of certain tax returns despite a provision in the Franchise Tax Act making it unlawful for the returns to be made public, prohibition issued to restrain enforcement of the order.<sup>83</sup> Similarly the writ was granted in a recent case to stop enforcement of an order for the inspection of a wage rate survey made by an administrative board, where the data was supplied by private employers under agreements with the board that it was to remain confidential.<sup>84</sup> Although both of these cases involved questions of "public importance," it is difficult to see any reason why a party claiming his papers are confidential should be allowed this immediate relief, while a witness claiming a subpoena duces tecum is being used as a "fishing expedition" is forced to go through contempt proceedings and seek certiorari or habeas corpus.<sup>85</sup>

Where the only objection to an order of inspection, and, presumably, to a subpoena duces tecum as well, is that compliance will cause considerable inconvenience and expense, the writ has been denied.<sup>86</sup>

### *The Admission of Evidence*

Similar to the problem of orders forcing disclosure of documents and confidential information is the question whether the writ of prohibition should lie to prevent enforcement of a ruling on admissibility of confidential evidence. Ordinarily questions of the admissibility of evidence are for the trial court to determine, subject only to review on appeal from the final judgment. Therefore prohibition will not be granted to stop the admission of evidence.<sup>87</sup> Yet, in cases where the litigant would be severely prejudiced by rigid application of this doctrine, it has been relaxed. In a replevin action to recover personal letters and documents wrongfully taken from the plaintiff, the court indicated it would allow the papers to be read into evidence by the defendant. Prohibition was granted stopping the reading.<sup>88</sup> The ruling seems sound. If the plaintiff's interest was in keeping the letters from being made public, an appeal from the final judgment would have been futile. Since he was not in possession of the papers he could not refuse to comply with the order. His only way to stop the reading of the papers was by dismissing the action, a remedy the court concluded was not adequate.<sup>89</sup>

---

<sup>83</sup> Franchise Tax Board v. Superior Court, 36 Cal. 2d 538, 225 P.2d 905 (1950).

<sup>84</sup> San Francisco v. Superior Court, 38 Cal. 2d 156, 238 P.2d 581 (1951).

<sup>85</sup> See text *supra* at note 76.

<sup>86</sup> Milton Kauffman, Inc. v. Superior court, *supra* note 72.

<sup>87</sup> Johnston v. Superior Court, 4 Cal. App. 90, 87 Pac. 211 (1906); *accord*, Wreden v. Superior Court, 55 Cal. 504 (1880).

<sup>88</sup> Kohn v. Superior Court, 12 Cal. App. 2d 459, 55 P.2d 1186 (1936). This should not be taken as the rule concerning the admissibility of illegally obtained evidence. See Grant, *Search and Seizure in California*, 15 So. CALIF. L. REV. 139 (1942).

<sup>89</sup> In an earlier case, prohibition was granted in a contest of nomination for office to prevent introduction of evidence not a proper ground of contest. While the court admitted that ordinarily such rulings are no basis for the writ, it was granted here because no appeal at all was available from the special proceeding. Miller v. Superior Court, 25 Cal. App. 607, 144 Pac. 978 (1914).

## ORDERS AFTER FINAL JUDGMENT

Statutory procedures are provided for modifying or vacating judgments or orders.<sup>90</sup> If they are not followed, and no appeal is taken, the judgment becomes final and the trial court is usually without power to disturb it. Frequently the trial court undertakes to vacate or modify the judgment anyway. Should the litigant be forced to bear the expense and burden of the new trial, and appeal from that judgment in order to reinstate the previous judgment, which properly should never have been disturbed?<sup>91</sup>

When a trial court set aside a final judgment without following the statutory procedure, and attempted to proceed to trial, a writ was granted stopping the proceedings.<sup>92</sup> The analogy has not been followed with respect to acts of the court within its so-called "inherent" power. For example, a trial court may at any time set aside a judgment entered through its own inadvertence, or modify a void judgment, and the writ will be denied in such cases, when sought to stop subsequent proceedings.<sup>93</sup> The court also has the "inherent" power to vacate a judgment obtained by extrinsic fraud. However, when the fraud has not been proven, the writ has issued to stop the new trial.<sup>94</sup>

Relief by a writ of prohibition may be blocked by the availability of an immediate appeal. "Any special order after final judgment" is appealable by statute,<sup>95</sup> but for some time it was the rule that this provision did not allow an appeal from an order that was void or not in pursuance of statutory authority.<sup>96</sup> Now an appeal is allowed regardless of the validity of the order,<sup>97</sup> so long as it affects the final judgment in some way.<sup>98</sup> Some doubt has been cast upon the availability of prohibition under these circumstances,<sup>99</sup> although the presence of an immediate appeal should not, per se, preclude the writ.<sup>100</sup>

*Albert W. Harris\**

<sup>90</sup> CAL. CODE CIV. PROC. §§ 473, 666. Formerly the rule was that the court must set out the particular statutory ground for vacating an order under § 473, or it would exceed its jurisdiction. *Lankton v. Superior Court*, 5 Cal. 2d 694, 55 P.2d 1170 (1936). However, in a mandamus proceeding it was held that on collateral attack, every presumption should be in favor of validity of orders under § 473. Hence there is no necessity to lay out the statutory grounds. *Phelan v. Superior Court*, 35 Cal. 2d 363, 217 P.2d 951 (1950). This rule applies to applications for prohibition as well. See *Key System Transit Lines v. Superior Court*, 36 Cal. 2d 184, 189, 222 P.2d 867, 870 (1950) (concurring opinion of Gibson, C. J.).

<sup>91</sup> See Comment, 36 CALIF. L. REV. 75, 98-100 (1948).

<sup>92</sup> *Mooney v. Superior Court*, 183 Cal. 705, 192 Pac. 542 (1920). *Accord*, *San Diego v. Superior Court*, 36 Cal. 2d 483, 224 P.2d 685 (1950) (order not "final").

<sup>93</sup> *Key System Transit Lines v. Superior Court*, *supra* note 90 (inadvertence); *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891 (1905) (void).

<sup>94</sup> *King v. Superior Court*, 12 Cal. App. 2d 501, 56 P. 2d 268 (1936).

<sup>95</sup> CAL. CODE CIV. PROC. § 963.

<sup>96</sup> *Stanton v. Superior Court*, 202 Cal. 478, 261 Pac. 1001 (1927).

<sup>97</sup> *Phelan v. Superior Court*, *supra* note 90; Note, 38 CALIF. L. REV. 931 (1950).

<sup>98</sup> *San Diego v. Superior Court*, *supra* note 92.

<sup>99</sup> See *Key System Transit Lines v. Superior Court*, *supra* note 90, at 188, 222 P.2d at 869 (concurring opinion of Gibson, C. J.).

<sup>100</sup> See *supra* note 23.

\* Member, second-year class.