

1-1963

Prohibition as Relief from an Injunction

Lowell F. Sutherland

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Lowell F. Sutherland, *Prohibition as Relief from an Injunction*, 15 HASTINGS L.J. 209 (1963).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol15/iss2/10

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

use of certiorari to review the exercise of discretion by a local board, even when the board was acting within its jurisdiction. The effect of this case evolution has been to transform certiorari from a jurisdictional writ, whose boundaries are set by statutes,²³ to a writ that performs functions beyond jurisdictional considerations.

Mandamus Pre-empts Certiorari

There is no apparent reason to continue the distinction between the use of certiorari at the local board level and at the inferior court level. This is particularly true since three years after the *Walker* case California Code of Civil Procedure section 1094.5 was enacted. The statute permits mandamus to issue as a means of reviewing the decisions of inferior tribunals, boards, or officers. One sub-section²⁴ permits the reviewing court to determine whether or not the inferior tribunal or board acted in "excess of its jurisdiction" while another sub-section²⁵ permits the writ to issue in cases where the inferior tribunal or board "abused its discretion." The passage of this statute offers a means of avoiding the use of certiorari both at the inferior tribunal and local board level. The practical effect of section 1094.5 is to eliminate the utility of certiorari in California.

California lawyers can avoid the confusion created by the *Garvin* and *Walker* decisions by resorting to mandamus rather than certiorari. But the fact that certiorari is available as a means of testing whether a local board has abused its discretion still remains despite the existence of statutes²⁶ and case law²⁷ confining certiorari to the question of jurisdiction.

*Gerald Schneider**

PROHIBITION AS RELIEF FROM AN INJUNCTION

An injunction may be an effective and versatile means of relief for a plaintiff, and, conversely, it may have a devastating effect on a defendant. An injunction against water pollution has caused the closing of a 1,000,000 dollar industry, employing a large number of local inhabitants, to protect a lower riparian owner who had proven damages of one hundred dollars per year.¹ If such an injunction is wrongfully granted, a defendant wants and is entitled to relief. It will be seen that the writ of prohibition offers review by an appellate court and a rapid and final determination of the injunction action.² It is the purpose of this note to determine to what extent the writ with its desirable characteristics is available to the wrongfully enjoined defendant. Since it is one

(1954); *Greif v. Dullea*, 66 Cal. App. 2d 986, 153 P.2d 581 (1944); *Ware v. Retirement Bd.*, 65 Cal. App. 2d 781, 151 P.2d 549 (1944).

²³ CAL. CODE CIV. PROC. §§ 1068, 1074.

²⁴ CAL. CODE CIV. PROC. § 1094.5(b).

²⁵ CAL. CODE CIV. PROC. § 1094.5(c).

²⁶ CAL. CODE CIV. PROC. §§ 1068, 1074.

²⁷ See note 8, *supra*.

¹ *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1, 101 N.E. 805 (1913). See *Driscoll v. American Hide & Leather Co.*, 102 Misc. 612, 170 N. Y. Supp. 121 (1918) (noting that the plant in *Whalen* has been closed since that decision).

² See CAL. CODE CIV. PROC. § 1102.

of several means of relief available, others will be discussed to indicate the nature of the case to which each is best suited.

The Choice of Remedies

An injunction may be in the form of a temporary restraining order, which may be granted *ex parte*.³ Appeal from the order may be made directly to the trial court, and the court may in its discretion relieve the defendant *ex parte*.⁴ In any event the *ex parte* order will be returnable on an order to show cause within 10 days, at which time the hearing on the preliminary injunction will be held.⁵ Usually, however, the temporary restraining order or preliminary injunction follows a hearing of arguments by both sides. In such a case the probability that the trial court would reverse itself at a subsequent hearing would seem slight unless new facts were presented.⁶ At this point the enjoined defendant must consider the possibility of a more sympathetic hearing from an appellate court.

The temporary restraining order, preliminary injunction and final injunction are appealable.⁷ Since appeal stays a mandatory injunction⁸ the filing of an appeal would relieve the defendant from the necessity of seeking further immediate relief. The inquiry may then be narrowed to prohibitory injunctions,⁹ which are not stayed on appeal.¹⁰ A prohibitory injunction may, of course, be very costly. Consider, for example, a defendant merchant who has been restrained from using a profitable marketing technique¹¹ or a defendant union which has been restrained from picketing in the heat of a labor dispute.¹²

When the delay of appeal is costly and it does not appear that plaintiff's injunction bond¹³ will be sufficient, the defendant must turn to the extraordinary

³ CAL. CODE CIV. PROC. § 527.

⁴ CAL. CODE CIV. PROC. §§ 165-66, 532-33.

⁵ CAL. CODE CIV. PROC. § 527. If the order is not returned for hearing within ten days the trial court loses jurisdiction and further proceedings on the application for the temporary restraining order may be restrained by prohibition. *Smith v. Superior Court*, 64 Cal. App. 722, 222 Pac. 857 (1923).

⁶ Three hearings may be involved in an action for an injunction. There may be a hearing before a temporary restraining order, a hearing before a preliminary injunction and the trial before the final injunction. See CAL. CODE CIV. PROC. § 527. Conceivably the trial court could change its opinion at either subsequent hearing. It may also consider arguments in chambers at any time before or after trial. CAL. CODE CIV. PROC. §§ 166(2), 657, 663.

⁷ CAL. CODE CIV. PROC. §§ 963(2), 983(5). See *Luitwieler v. Superior Court*, 54 Cal. App. 528, 202 Pac. 165 (1921).

⁸ *Food & Grocery Bureau v. Garfield*, 18 Cal. 2d 174, 114 P.2d 579 (1941); *Ohaver v. Fenech*, 206 Cal. 118, 273 Pac. 555 (1928); *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156 (1893); *Merced Mining Co. v. Fremont*, 7 Cal. 130 (1857); *Orange County Water Dist. v. City of Riverside*, 154 Cal. App. 2d 345, 316 P.2d 43 (1957).

⁹ The distinction between mandatory and prohibitory injunctions is often unclear. See the cases cited in note 8 *supra*.

¹⁰ See note 8 *supra*.

¹¹ *Food & Grocery Bureau v. Garfield*, 18 Cal. 2d 174, 114 P.2d 579 (1941) (trading coupons).

¹² *Retail Clerks Union v. Superior Court*, 52 Cal. 2d 222, 339 P.2d 839 (1959).

¹³ Required by CAL. CODE CIV. PROC. § 529.

writs. The extraordinary writs can avoid the delay of appeal,¹⁴ because they may, in the court's discretion, be set ahead of all other matters on the court's calendar.¹⁵ If the case is strong enough, temporary relief may be obtained before the hearing.¹⁶

Supersedeas, although not provided for in the code, is a common law writ which has received treatment similar to the code writs.¹⁷ Procedurally it acts only as a stay to prevent enforcement of a judgment or order pending appeal¹⁸ and a temporary stay order is available.¹⁹ It is a proceeding collateral to the appeal and does not offer a final determination.²⁰ Since there is no final determination, the examination of the merits appears to go no farther than to look for probable error to determine whether or not the appeal is in good faith. Thus the courts consider the "respective rights of the litigants [on appeal], which contemplates the *possibility* of affirmance as well as of reversal."²¹

Only recently have the courts invoked supersedeas to stay the execution of a prohibitory injunction.²² Most opinions in these cases give extensive consideration to the hardships caused the defendant by the injunction and the relative benefit to the plaintiff.²³ Supersedeas is granted to stay a prohibitory injunction only on a showing that the injunction would cause irreparable damage and would make a victory on appeal hollow or meaningless.²⁴

From the standpoint of the damage caused the defendant it might seem that no further remedies would be necessary.²⁵ If he could convince the trial

¹⁴ See as to the delay that may be involved *BELLI*, "READY FOR THE PLAINTIFF!" 222, 239 (1956).

¹⁵ CAL. CODE CIV. PROC. § 1108.

¹⁶ See CAL. CODE CIV. PROC. §§ 1087, 1104; CAL. RULES ON APPEAL 49.

¹⁷ 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 68 (1954).

¹⁸ *Dry Cleaners & Dyers' Institute v. Reiss*, 5 Cal. 2d 306, 54 P.2d 470 (1936); *In re Imperial Water Co.*, 199 Cal. 556, 250 Pac. 394 (1926).

¹⁹ CAL. RULES ON APPEAL 49.

²⁰ See note 18 *supra*.

²¹ *Wilkman v. Banks*, 120 Cal. App. 2d 521, 523, 261 P.2d 299, 300 (1953) (emphasis added); *Board of Dental Examiners v. Jameson*, 23 Cal. 2d 689, 690, 145 P.2d 905, 906 (1944); *Food and Grocery Bureau v. Garfield*, 18 Cal. 2d 174, 177, 114 P.2d 579, 581 (1941); *Rubin v. American Sportsmen Television Equity Soc'y*, 102 Cal. App. 2d 288, 227 P.2d 303 (1951).

²² "Even in a case of a purely prohibitory decree, however, where there is no automatic stay and the appellant is not entitled to a writ of *supersedeas* as a matter of right, this court has inherent power to issue the writ if such action is necessary or proper to the complete exercise of its appellate jurisdiction." *Food & Grocery Bureau v. Garfield*, 18 Cal. 2d 174, 177, 114 P.2d 579, 580 (1941).

²³ *Food & Grocery Bureau v. Garfield*, *supra* note 22; *Orange County Water Dist. v. City of Riverside*, 154 Cal. App. 2d 345, 316 P.2d 43 (1957); *John Paul Lumber Co. v. Agnew*, 116 Cal. App. 2d 638, 254 P.2d 131 (1953). See also *Clayton v. Schultz*, 12 Cal. 2d 703, 87 P.2d 355 (1939).

²⁴ *Ibid*; *Rubin v. American Sportsmen Television Equity Soc'y*, 102 Cal. App. 2d 288, 227 P.2d 303 (1951); *French Art Cleaners v. State Board of Dry Cleaners*, 88 Cal. App. 2d 45, 198 P.2d 91 (1948).

²⁵ A less easily obtained remedy is available to the more hardy defendant who may choose to defy the injunction. If adjudged guilty of contempt and jailed he may gain his appellate review and freedom, if the court has acted in excess of jurisdiction, by means of habeas corpus

court to reverse itself, his damages would probably be slight.²⁶ If he appeals from a mandatory injunction, it is stayed. If the injunction is prohibitory, the defendant may rely on plaintiff's injunction bond to recompense him. If it does not appear that this will be sufficient, supersedeas may issue to prevent irreparable damage which would make a victory on appeal fruitless.

Prohibition

No one of these remedies, however, provides both the *rapid* and *final* determination available from the writ of prohibition. It seems that prohibition can accomplish more than prevention of damage to the wrongfully enjoined defendant.²⁷ It prevents the loss of time and money by both parties and the courts by stopping all proceedings quickly. Thus it "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are *without or in excess of . . . jurisdiction. . .*"²⁸ "It may be issued [on verified petition] by any court, except municipal or justice courts, to an inferior tribunal or to a corporation, board, or person, in all cases where there is *not a plain, speedy, and adequate remedy in the ordinary course of law.*"²⁹

This latter requirement of absence of other plain, speedy, and adequate remedy receives little emphasis when the plaintiff has already been granted the rather extraordinary relief of injunction.³⁰ The controlling consideration is whether or not the lower court has acted in excess of jurisdiction.³¹ But it is fair to say that the concept of excess of jurisdiction in the prohibition cases is not limited to that traditional concept of jurisdiction which would render a judgment subject to collateral attack.³² It has been said that "as new uses for

or certiorari and apparently prohibition. See *Fortenbury v. Superior Court*, 16 Cal. 2d 405, 106 P.2d 411 (1940); *Wessels v. Superior Court*, 200 Cal. 403, 253 Pac. 135 (1927); *Hunter v. Superior Court*, 36 Cal. App. 2d 100, 97 P.2d 492 (1939); *Weber v. Superior Court*, 109 Cal. App. 259, 292 Pac. 650 (1930).

²⁶ See note 6 *supra*.

²⁷ Apparently no courts have discussed the true basis of prohibition. It must be remembered that it originated at a time when several systems of courts administered various areas of law. See 3 BLACKSTONE, COMMENTARIES *112-14.

²⁸ CAL. CODE CIV. PROC. § 1102 (emphasis added).

²⁹ CAL. CODE CIV. PROC. § 1103 (emphasis added).

³⁰ See *San Diego v. Superior Court*, 36 Cal. 2d 483, 224 P.2d 685 (1950). When it was argued that appeal was available the court has said: "Such an appeal, however, would raise a question that has already been fully presented and considered at length in this proceeding, and no purpose but delay, to the prejudice of the parties and the courts, would be served by refusing to decide the jurisdictional question at this time." *Hagan v. Superior Court*, 53 Cal. 2d 498, 501-02, 2 Cal. Rptr. 288, 290, 348 P.2d 896, 898 (1960). See also *Prim v. Superior Court*, 3 Cal. App. 208, 84 Pac. 786 (1906) (attachment pending appeal); the availability of another extraordinary writ apparently does not bar the issuance of prohibition; *Jacobsen v. Superior Court*, 192 Cal. 319, 330, 219 Pac. 986, 991, 29 A.L.R. 1399, 1407 (1923); see also *Harris, Use of Prohibition to Avoid Final Judgment Limitation on Appeal*, 41 CALIF. L. REV. 124, 126 (1953).

³¹ See *Witkin, The Extraordinary Writ—Friend or Enemy?* 29 CAL. S. BAR J. 467 (1954).

³² See *Goldberg, The Extraordinary Writs and the Review of Inferior Court Judgments*, 36 CALIF. L. REV. 558 (1948).

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.'"³³

It appears that in the injunction cases the concept of excess of jurisdiction has expanded to include cases where a court, having admitted jurisdiction of the parties and the subject matter, has committed error in the application of equitable principles. Exact boundaries are difficult to define, however. "An examination of the numerous cases which deal with this problem impels the conclusion that some confusion exists with reference to what constitutes an *excess*, and what constitutes an *error*, in the exercise of jurisdiction."³⁴ To determine to what extent prohibition is available in the fringe cases, the less expansive and more definite cases must be studied.

Legislative Limitations

The legislature has established certain limitations on the granting of injunctions.³⁵ Failure to recognize these limitations amounts to an act in excess of jurisdiction for which prohibition will issue.³⁶ Thus, an injunction may not issue to stay pending judicial proceedings unless to prevent a multiplicity of suits.³⁷ It may not issue to stay proceedings in a federal court or a court of another state.³⁸ A court may not enjoin the execution of a valid public statute by officers of the law for the public benefit.³⁹ Thus prohibition may be used to test the constitutionality of a statute.⁴⁰ The breach of a contract not subject to specific performance may not be enjoined, with some exceptions.⁴¹ The exercise of a public or private office by the one in possession may not be enjoined.⁴²

³³ *Id.* at 576.

³⁴ *Rodman v. Superior Court*, 13 Cal. 2d 262, 269, 89 P.2d 109, 112 (1939) (emphasis added).

³⁵ CAL. CODE CIV. PROC. § 526, CAL. CIV. CODE § 3423. See also CAL. REV. & T. CODE §§ 6931, 8146, 9171, 10276, 11571, 16123, 19081, 26101, for provisions prohibiting injunctions against the collection of certain taxes.

³⁶ *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145 (1903).

³⁷ See *Ibid.*; CAL. CODE CIV. PROC. § 526(1); CAL. CIV. CODE § 3423(1).

³⁸ CAL. CODE CIV. PROC. § 526(2-3); CAL. CIV. CODE § 3423(2-3).

³⁹ CAL. CODE CIV. PROC. § 526(4); CAL. CIV. CODE § 3423(4). Section 526(4) does not require that the statute be valid, but the courts have interpreted it in this manner. *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 333 P.2d 745 (1959); *Brock v. Superior Court*, 11 Cal. 2d 682, 81 P.2d 931 (1938); *Moore v. Superior Court*, 6 Cal. 2d 421, 57 P.2d 1314 (1935); *Loftis v. Superior Court*, 25 Cal. App. 2d 346, 77 P.2d 491 (1938); *Daugherty v. Superior Court*, 23 Cal. App. 2d 739, 74 P.2d 549 (1937). See also *Richardson v. Superior Court*, 138 Cal. App. 289, 32 P.2d 405 (1934).

⁴⁰ *Rescue Army v. Superior Court*, 28 Cal. 2d 460, 171 P.2d 8 (1946). For cases dealing with void and unconstitutional statutes in other closely allied contexts see *Financial Indem. Co. v. Superior Court*, 45 Cal. 2d 395, 289 P.2d 233 (1955) (mandamus cannot compel hearing of order to show cause why enforcement of a statute should not be enjoined); *Western Coop. Dairymen's Union v. Superior Court*, 30 Cal. App. 2d 722, 87 P.2d 394 (1939) (injunction against interference with enforcement).

⁴¹ CAL. CODE CIV. PROC. § 526(5); CAL. CIV. CODE § 3423(5). See *Hunter v. Superior Court*, 36 Cal. App. 2d 100, 97 P.2d 492 (1939).

⁴² CAL. CODE CIV. PROC. § 526(6); CAL. CIV. CODE § 3423(6). See *Somo v. Superior Court*, 135 Cal. App. 584, 27 P.2d 790 (1933) (corporation officer enjoined—held excess of jurisdiction).

Finally, a legislative act by a municipal corporation may not be enjoined.⁴³ If an injunction is granted in any one of these cases prohibition will issue "‘commanding’ respondents [the court] ‘to immediately cease and desist from any further proceedings’ in the said injunction action ‘other than to dissolve (the) restraining order and . . . to discharge (the) order to show cause.’"⁴⁴

Judicial Limitations

The courts have defined other acts rather clearly as being in excess of jurisdiction. A court may not interfere in the legislative or executive processes "contrary to the accepted doctrine of the separation of powers inherent in our tripartite form of government. . . ."⁴⁵ Thus the certification of a proposed freeholders' charter to the legislature has been held to be a matter beyond judicial cognizance and prohibition has issued when the lower court attempted to assume jurisdiction by granting an injunction.⁴⁶ Likewise, prohibition has issued when a court attempted to enjoin the construction of levees being built pursuant to a legislative act.⁴⁷

Exclusive Jurisdiction in Another Body

A court may not assume jurisdiction when exclusive jurisdiction has been granted to another body.⁴⁸ Prohibition has issued where a court enjoined peaceful picketing when jurisdiction was in the National Labor Relations Board.⁴⁹ Also a county board of supervisors has exclusive jurisdiction to decide questions of fact with respect to the status of reclamation district lands.⁵⁰

Thus we see that want of jurisdiction has resulted from a statutory limitation, the conferring of jurisdiction in another body in exclusion of the courts or a judicial self restraint to avoid interfering in matters better left to another branch of government. The language of the cases, however, indicates that excess of jurisdiction may have broader implications. The courts say that there must be a want or excess of jurisdiction "as defined by statute or by rules developed and followed under the doctrine of *stare decisis*."⁵¹ The lower court must not

⁴³ CAL. CODE CIV. PROC. § 526 (7); CAL. CIV. CODE § 3423 (7).

⁴⁴ Santa Clara County v. Superior Court, 33 Cal. 2d 552, 553, 203 P.2d 1, 2 (1948).

⁴⁵ *Id.* at 559, 203 P.2d at 5.

⁴⁶ *Ibid.*

⁴⁷ Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 Pac. 845 (1916) (dealing with CAL. CODE CIV. PROC. § 526 (4) and CAL. CIV. CODE § 3423 (4), note 40 *supra*).

⁴⁸ This is more a matter of pre-emption than of judicial self restraint. See notes 49-50 *infra*.

⁴⁹ Retail Clerks' Union v. Superior Court, 52 Cal. 2d 222, 339 P.2d 839 (1959), *cert. denied*, 361 U. S. 864 (1959); Heavy, Highway Bldg. & Const. Teamsters Comm. v. Superior Court, 203 Cal. App. 2d 591, 21 Cal. Rptr. 840, 421 P.2d 840 (1962); see Cox v. Superior Court, 52 Cal. 2d 855, 346 P.2d 15 (1959). "Excepting where the activities complained of are other than peaceful and orderly, the federal law affords the exclusive remedy [where the business is interstate in character], thus depriving the state court of jurisdiction to grant equitable relief by way of injunction." Calise v. Superior Court, 159 Cal. App. 2d 126, 132, 323 P.2d 859, 863 (1958).

⁵⁰ Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225 (1905). This case also considers CAL. CODE CIV. PROC. § 526 (7); CAL. CIV. CODE § 3423 (7). See note 43 *supra*.

⁵¹ City of Los Angeles v. Superior Court, 51 Cal. 2d 423, 429, 333 P.2d 745, 748 (1959); *accord*, Tide Water Associated Oil Co. v. Superior Court, 43 Cal. 2d 815, 279 P.2d 35 (1955); Abelleria v. Dist. Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942, 132 A.L.R. 715 (1941).

only have jurisdiction of the subject matter and the parties, but also authority to act in the manner in which it has indicated it intends to act.⁵² “[C]onversely, a want of jurisdiction frequently means *want of authority to exercise in a particular manner a power which the board or tribunal has*, the doing of something in excess of the authority possessed.”⁵³ Perhaps the best statement comes from a case which did not involve an extraordinary writ. “Generally it may be said that the following are the jurisdictional requirements: (1) legal organization of the tribunal; (2) jurisdiction over the person; (3) jurisdiction over the subject matter; (4) *power to grant the judgment.*”⁵⁴

Does a court have “power to grant” an injunction or “authority to exercise” its powers of injunctive relief when the plaintiff though otherwise properly in court was clearly not entitled to injunctive relief under the laws of equity? Or stated another way: Is it an act in excess of jurisdiction for a court to assume jurisdiction in equity in a case in which the court of chancery would have refrained from granting relief?

Consider the situation where plaintiff owns an unimproved lot purchased for speculative purposes. He seeks an injunction against defendant's copper mining activities, which represent an investment of 60,000 dollars, because they are causing sand to be deposited in a stream and carried down onto his land. Since the land is unused and unimproved the plaintiff will have great difficulty in proving irreparable damage to make out a case for equity. If the defendant raises the defense that plaintiff is trying to force him to buy the land at three to five times the purchase price and thus does not come to court with clean hands, a court of equity would have a further reason for denying relief. An injunction has been denied for both reasons.⁵⁵ It is probable although not certain that the proceedings of a court which had issued an injunction under either circumstance could be restrained by prohibition.

Mr. Witkin has said, “A number of controlling decisions hold that the court has no jurisdiction to grant an equitable remedy when the showing made is wholly insufficient. Nearly all are injunction cases.”⁵⁶ The cases he cites, however, are not based on purely equitable principles. They are similar to those discussed previously where exclusive jurisdiction was in another,⁵⁷ where the

⁵² *Fortenbury v. Superior Court*, 16 Cal. 2d 405, 106 P.2d 411 (1940); *Evans v. Superior Court*, 14 Cal. 2d 563, 96 P.2d 107 (1939); *Spreckles Sugar Co. v. Industrial Acc. Comm'n*, 186 Cal. 256, 199 Pac. 8 (1921); *Monterey Club v. Superior Court*, 48 Cal. App. 2d 131, 119 P.2d 349 (1941). Compare 3 BLACKSTONE, COMMENTARIES *112: “Or, if, in handling of matters clearly within their [the inferior courts'] cognizance, they transgress the bounds prescribed to them by the laws of England . . . prohibition will be awarded.”

⁵³ *Spreckles Sugar Co. v. Industrial Acc. Comm'n*, 186 Cal. 256, 260, 199 Pac. 8, 11 (1921) (emphasis added).

⁵⁴ *Vasquez v. Vasquez*, 109 Cal. App. 2d 280, 283, 240 P.2d 319 320 (1952) (emphasis added).

⁵⁵ *Edwards v. Allouez Mining Co.*, 38 Mich. 46, 31 Am. Rep. 301 (1878) (the dissent, 38 Mich. at 53, expressed the view that plaintiff's motives should not be questioned when he had done no legal wrong).

⁵⁶ 1 WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 139 (1954).

⁵⁷ *Fortenbury v. Superior Court*, 16 Cal. 2d 405, 106 P.2d 411 (1940) (certiorari used to escape punishment for contempt when jurisdiction was in the NLRB); see notes 48-50 *supra*.

code expressly denied the power to grant an injunction,⁵⁸ or where the judicial limitation was not based on principles of equity.⁵⁹ They are indicative, however, of a trend, and it would certainly seem that an injunction wrongfully granted because the trial court failed properly to apply principles of equity should likewise be the subject of prohibition to determine finally the injunction proceeding. The defendant in each case is in the same position. An injunction has been granted against him when the plaintiff was not entitled to an injunction.

A distinction might be raised between the failure of the plaintiff to make out a case in equity and the establishment of a valid equitable defense by the defendant. If no question of jurisdictional fact⁶⁰ is raised, there would seem to be no reason, under the expanded concept of excess of jurisdiction, why prohibition should not be granted in the latter case as well as the former once the injunctive order has been made.⁶¹ The defendant in either case has been enjoined when the plaintiff was not entitled to an injunction.

One case in California seems to have gone almost this far. In *Monterey Club v. Superior Court*⁶² the district attorney brought an action in the name of the people seeking to enjoin petitioner's gambling activities as a public nuisance. In granting prohibition the court said:

However, it is important to note that in the case before us the sufficiency of the allegations contained in the complaint is not the issue we are called upon to decide. In the instant case not only was an answer filed, but a hearing was had upon the order to show cause predicated upon the averments of the complaint, at which hearing . . . many affidavits were filed. At that hearing not one iota of evidence was presented which would bring the conduct of petitioner Martin, the club, or its activities, within the pale of our California nuisance statute.⁶³

⁵⁸ *Evans v. Superior Court*, 14 Cal. 2d 563, 96 P.2d 107 (1939); *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 154 Pac. 845 (1916) (see note 47 *supra*); *Loftis v. Superior Court*, 25 Cal. App. 2d 346, 77 P.2d 941 (1938) (see note 38 *supra*). These cases all deal with CAL. CODE CIV. PROC. § 526(4) and CAL. CIV. CODE § 3423(4). See also *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145 (1903) (action in another court cannot be enjoined); *Hunter v. Superior Court*, 36 Cal. App. 2d 100, 97 P.2d 492 (1939) (breach of contract cannot be enjoined).

⁵⁹ *Santa Clara County v. Superior Court*, 33 Cal. 2d 552, 203 P.2d 1 (1948) (separation of powers); *Harlan v. Superior Court*, 94 Cal. App. 2d 902, 211 P.2d 942 (1949) (procedural requirement of verified pleading required by CAL. CODE CIV. PROC. § 527 was not complied with).

⁶⁰ If a fact issue is raised in the pleadings which may be determinative of jurisdiction the lower court has jurisdiction to hear and decide the fact issue and prohibition will not issue while such an issue is unsettled. *Retail Clerks' Union v. Superior Court*, 52 Cal. 2d 222, 339 P.2d 839 (1959); *Brock v. Superior Court*, 11 Cal. 2d 682, 81 P.2d 931 (1938); *Agricultural Prorate Comm'n v. Superior Court*, 5 Cal. 2d 550, 55 P.2d 495 (1936). Compare *Elliot v. Superior Court*, 168 Cal. 727, 145 Pac. 101 (1941) (writ granted subject to results of a hearing to determine an issue of fact, viz, whether the petitioner had sufficient beneficial interest in the litigation to enable him to bring the writ of prohibition).

⁶¹ *Contra*, *Yolo Water & Power Co. v. Superior Court*, 43 Cal. App. 332, 337, 185 Pac. 195, 198 (1919), where the court said, "The existence of facts constituting a good defense on the merits to an application for a writ of injunction does not oust such court of the power to hear and decide the case."

⁶² 48 Cal. App. 2d 131, 119 P.2d 349 (1941).

⁶³ *Id.* at 149, 119 P.2d at 358.

Plaintiff had no right to relief, because although he had alleged damage to the morals and welfare of the community he had failed to prove this essential part of his cause of action.⁶⁴ Granting the injunction was held to be an act in excess of jurisdiction. It would seem that the decision was made purely on the rules of equity and injunction, that is, failure to prove the essentials of a cause of action to enjoin a public nuisance. The case, however, has not been cited for this proposition.

But even if such a precedent were not sufficient, the principles for which it stands should be strong enough to support the conclusion. A plaintiff receives an extraordinary remedy when the injunction is granted. If he is not entitled to it, it would seem only fair to allow the defendant extraordinary relief, especially if his damage will be difficult to determine.⁶⁵ Conversely, the plaintiff should know if he has an enforceable equitable right, for, if he does not, his injunction bond may be subject to a daily increasing claim by the defendant which may lead to further judicial action.⁶⁶ If plaintiff has a remedy at law his time would be better spent pursuing that than preparing for a distant appeal which may lead to more trial proceedings.

Conclusion

A wrongfully enjoined defendant has a wide selection of remedies from which to choose. The advantage of final and early determination by prohibition should make it one of the first considerations. Three conclusions may be made as to the availability of the writ to the wrongfully enjoined defendant:

(1) Prohibition will definitely issue if the injunction is prohibited by statute, if its issuance is an invasion of the exclusive jurisdiction of another tribunal or agency, or if it will violate the doctrine of separation of powers.

(2) Prohibition will probably issue if the plaintiff has not made a sufficient showing to entitle the enjoining court to jurisdiction in equity.

(3) The ground work appears to have been laid for prohibition to issue in *any* case in which the trial court has granted an injunction when all the facts do not indicate that an injunction was proper.

The policy consideration of avoiding needless and costly litigation in a case where an injunction cannot be granted applies equally to all situations, and prohibition should issue as readily in the latter cases as in the former if a skillful presentation is made by the enjoined defendant.

*Lowell F. Sutherland**

⁶⁴ *Ibid.* The court also said in granting the writ: "Assuming that the court in the instant proceeding had jurisdiction to grant the temporary injunction prayed for, then the granting or refusal of it was a matter addressed to the sound discretion of the trial court and the action taken by such a court will not be disturbed except where an abuse of discretion is shown." *Id.* at 144, 199 P.2d at 355. It would seem that this equates "excess of jurisdiction" with "abuse of discretion."

⁶⁵ If monetary damages would not adequately recompense the wrongfully enjoined defendant for his loss as a result of the injunction, he would appear to be in the same position as a plaintiff without an adequate remedy at law.

⁶⁶ An excellent example of extended litigation for an injunction and subsequent actions against plaintiff's injunction bond may be found in *Russell v. United Pacific Ins. Co.*, 208 A.C.A. 274, 25 Cal. Rptr. 1 (1962), *rehearing granted*, rehearing table, 208 A.C.A. No. 5 (1962).

* Member, Second Year Class.