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Extraordinary Writs--Discretion or Matter of Right

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EXTRAORDINARY WRITS — DISCRETION OR MATTER OF RIGHT?

The writs of certiorari, prohibition and mandamus are extraordinary legal remedies,[1] issuing only when there is no other plain, speedy, and adequate remedy.[2] The cases generally state that the issuance of the writs is not a matter of right, nor governed entirely by fixed rules, but is within the "sound" or "wise" discretion of the court.[3]

On the other hand, in *Havemeyer v. Superior Court*[4] the supreme court said:

> It is next suggested that the writ of prohibition does not issue *ex debito justitiae* [as a matter of right], but it is to be granted or withheld, in the sound discretion of the court. . . .
>
> [T]he law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court . . . but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law.[5]

This note is an attempt to resolve the apparent conflict in the cases[6] and to illuminate the nature of the discretion, if any, exercised by the courts in passing upon applications for the writs.

The Code of Civil Procedure contains provisions authorizing and regulating the issuance of the three writs, but it does not specifically provide that they should, or should not, issue as a matter of right. The code provides that certiorari and prohibition "may" be granted, and that mandamus "must" be granted, when there is not a "plain, speedy, and adequate remedy, in the ordinary course of the law."[7] The cases, however, do not appear to make any distinction between the

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[1] White v. Superior Court, 110 Cal. 54, 42 Pac. 471 (1895); Potomac Oil Co. v. Dye, 10 Cal. App. 534, 537, 102 Pac. 677, 678 (1909); 3 WITKIN, CALIFORNIA PROCEDURE *Extraordinary Writs* § 1 (1954).

[2] CAL. CODE CIV. PROC. §§ 1068, 1086, 1103.

[3] 3 WITKIN, CALIFORNIA PROCEDURE *Extraordinary Writs* § 9 (1954).

[4] 84 Cal. 327, 401, 24 Pac. 121, 140 (1890).

[5] *Id.* at 401, 24 Pac. at 140.

[6] The majority of the cases state that the writs are discretionary or equitable proceedings; *e.g.*, Betty v. Superior Court, 18 Cal. 2d 619, 116 P.2d 947 (1941); Wine v. City of Los Angeles, 177 Cal. App. 2d 157, 164, 2 Cal. Rptr. 94, 99 (1960); Barnard v. Municipal Court, 142 Cal. App. 2d 324, 326, 298 P.2d 679, 680 (1956); Hutchinson v. Reclamation Dist., 81 Cal. App. 427, 254 Pac. 606 (1927).

For cases apparently adhering to the "matter of right" doctrine see *Havemeyer*, note 4 *supra*; May v. Board of Directors, 34 Cal. 2d 125, 133, 208 P.2d 661, 666 (1949), citing CAL. CODE CIV. PROC. § 1086. In Potomac Oil Co. v. Dye, 10 Cal. App. 534, 537-38, 102 Pac. 677, 679 (1909), the court said, "[W]here one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it. . . ." The court said in Robinson v. Superior Court, 35 Cal. 2d 379, 386, 218 P.2d 10, 15 (1950), "[I]t is obvious that if the error involves a breach of what has been deemed a 'clear legal duty' and there is no other adequate remedy" the writ will issue.

[7] CAL. CODE CIV. PROC. §§ 1068, 1086, 1103. Certiorari and prohibition are jurisdictional writs; CAL. CODE CIV. PROC. §§ 1068, 1102.

requirements for obtaining the writs based on the difference in statutory language.[8] Indeed, many of the cases have granted or denied the writs without mentioning the appropriate code provision.[9]

The cases which deny that the writs issue as a matter of right generally go further and state either that the granting or denial of relief is a matter within the sound discretion of the court,[10] or that the proceeding is "equitable" [11] or in the "nature of" [12] an equitable proceeding. For example, in *American Securities Co. v. Forward*[13] the supreme court said that petitioner may have "an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse relief." [14] In another case the supreme court said that an application for a writ is a legal proceeding "in which equitable principles are applicable." [15] In yet a third it was said that a writ proceeding is "an equitable proceeding in which the trial court [is] vested with a wide discretion." [16]

It is inherent in the nature of an equitable proceeding that the court has power to exercise its discretion.[17] Therefore, the courts which state that to grant or deny the writ is within their discretion are saying no more than that as a general rule the principles of equity apply to the proceeding. For example, the court in one case stated that the writ was refused in its discretion and then went

[8] Star-Kist Foods, Inc. v. Quinn, 54 Cal. 2d 507, 6 Cal. Rptr. 545, 354 P.2d 1 (1960); Simmons v. Superior Court, 52 Cal. 2d 373, 341 P.2d 13 (1959); Harden v. Superior Court, 44 Cal. 2d 630, 284 P.2d 9 (1955). In Harelson v. South San Joaquin Irr. Dist., 20 Cal. App. 324, 128 Pac. 1010 (1913), the court stated that it could not arbitrarily deny relief. It found that the petitioner had no other plain, speedy, and adequate relief and therefore that it must issue the writ. Petitioner was the real party in interest and no issue of equitable defenses was raised or can be seen in the reported facts of the case. The court cited CAL. CODE CIV. PROC. § 1086; another example of a court citing the same code section is May v. Board of Directors, 34 Cal. 2d 125, 208 P. 2d 661 (1949), note 6 *supra*.

[9] Robinson v. Superior Court, 35 Cal. 2d 379, 218 P.2d 10 (1950); Barham v. Superior Court, 18 Cal. 2d 889, 116 P.2d 449 (1941); Bashore v. Superior Court, 152 Cal. 1, 91 Pac. 801 (1907).

[10] Bartholomae Oil Corp. v. Superior Court, 18 Cal. 2d 726, 730, 117 P.2d 674, 676 (1941); Fawkes v. City of Burbank, 188 Cal. 399, 205 Pac. 675 (1922); First Nat'l Bank v. Superior Court, 12 Cal. App. 335, 345, 107 Pac. 322, 326 (1909).

[11] Allen v. Los Angeles County Dist., 51 Cal. 2d 805, 811, 337 P.2d 457, 461 (1959); Crestlawn Memorial Park Ass'n v. Sobieski, 210 Cal. App. 2d 43, 26 Cal. Rptr. 421 (1962).

[12] Dowel v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956); see also El Camino Land Corp. v. Board of Sup'rs Tehama County, 43 Cal. App. 2d 351, 110 P.2d 1076 (1941); Dierssen v. Civil Service Comm., 43 Cal. App. 2d 53, 110 P.2d 513 (1941); Clough v. Baber, 38 Cal. App. 2d 50, 100 P.2d 519 (1940).

[13] 24 P.2d 810 (Cal. 1933), *writ granted on other grounds on rehearing*, 220 Cal. 566, 32 P.2d 343 (1934).

[14] 24 P.2d at 814.

[15] Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 795, 136 P.2d 304, 307 (1943); see also Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956); Farrington v. Fairfield, 194 Cal. App. 2d 237, 16 Cal. Rptr. 119 (1961); Wallace v. Board of Education, 63 Cal. App. 2d 611, 147 P. 2d 8 (1944).

[16] Allen v. Los Angeles County Dist., 51 Cal. 2d 805, 811, 337 P.2d 457, 461 (1959).

[17] STORY, EQUITY §§ 18-20 (3d ed. 1920); WALSH, EQUITY §§ 8, 53 (1930).

on to find that petitioner had unclean hands.[18] Another court also denied the petition on the basis of unclean hands, saying that the proceeding for a writ is equitable.[19]

It is suggested that when the courts which adopt the *Havemeyer* position say that the writs issue as a matter of right, they do not mean that they have no power to exercise discretion, nor that none of the traditionally recognized equitable defenses apply. That is, the courts have exercised some discretion in determining that the right to the writ is clear. Only minimal discretion is called for in a simple, clear case, such as one in which there is no possibility of another adequate remedy, no question of the substantiality of the right, nor the presence of reprehensible conduct or delinquent action on the part of the petitioner. For example, in *Havemeyer* none of these possible problems was an issue in the case. Petitioner had no other remedy to prevent a receiver from taking immediate control over the company in his possession;[20] he filed for prohibition on the very day that he was notified of respondent's action, and there was no evidence of any relevant[21] inequitable conduct. In other words, virtually no issues were raised where the court might exercise its discretion. The statement that the writs issue as a matter of right when one has a clear legal right and no other adequate remedy seems in each of these matter-of-right cases to be a conclusion from the particular facts before the court, rather than an explanation of the process employed by the court in reaching that conclusion.

Another case supporting this inference is *First Nat'l Bank v. Superior Court.*[22] In that case the issues were substantially the same as in *Havemeyer*, except that petitioner made no objection to the appointment of the receiver for nearly a year. The court found that petitioner's apparent acquiescence had caused a substantial change in the position of other creditors in reliance thereon, and distinguished *Havemeyer* on its facts when it denied petitioner's application, saying:

> Under circumstances where irreparable injury is resulting from the unauthorized appointment of a receiver and the injury is a continuing one, and there is no plain, speedy or adequate remedy at law, *and the writ is sought seasonably*, the court should not regard itself as clothed with discretion, but should treat prohibition as a writ of right. Such was the case of *Havemeyer v. Superior Court.*[23]

Thus discretion is exercised only when the issues demand it. To say that there is a conflict between cases which state that the writs issue as a matter of discretion and those which state that they issue as a matter of right when the case

[18] Bashore v. Superior Court, 152 Cal. 1, 91 Pac. 801 (1907).

[19] Wallace v. Board of Education, 63 Cal. App. 2d 611, 147 P.2d 8 (1944).

[20] Petitioner was asking for a writ of prohibition to restrain a superior court from carrying out its order appointing a receiver. Apparently a receiver had been ordered to take over the property in question as a result of a prior case. Petitioner was in possession and claimed that he had acquired a fee simple title. Havemeyer (petitioner) further claimed that since he owned the property and was not a party to the suit in which the receiver was appointed, the superior court had exceeded its jurisdiction.

[21] Apparently respondent attempted to show that the petitioner was a criminal, had low morals, etc. The court ignored this evidence because it was not relevant to the transaction before it.

[22] 12 Cal. App. 335, 107 Pac. 322 (1909).

[23] *Id.* at 345, 107 Pac. at 326 (emphasis added).

does not call for discretion is to overlook the basic factual differences between the two situations.

Conclusion

The varying language reflects the failure of the courts to reflect upon the legal significance of the word discretion. Discretion could encompass an oriental type of justice, wherein one man decides cases as he personally feels they ought to be decided.[24] However, to a jurist trained in the common law, discretion does not connote an isolated mental process. It is not in the nature of prerogative, whimsical, absolute or capricious power, for the common law jurist demands that there be some degree of predictability in a legal proceeding. On the other hand, too much rigidity is undesirable, as indicated by the development of chancery to avoid the strict uses of the common law writs. Legal discretion must lie somewhere in between.

To obtain predictability the common law jurist relies on a framework developed by prior cases—what has been done in the past is a valuable and needed guide for the future. Thus it has become a well recognized principle that the discretion of a court is governed by a form of stare decisis.[25] It is within such a framework that his "power of decision" is to operate.

From what has been said we may deduce that virtually all the principles of equity apply, when the court finds that the facts warrant, to the issuance of certiorari, prohibition and mandamus. The cases which say that the writs are equitable in nature are substantially stating the true essence of the remedies. To a prospective petitioner this means that if he has a substantial right, for which certiorari, prohibition or mandamus would be an appropriate remedy (*i.e.*, to review, prohibit or command as specified by the code), and he has no other adequate remedy, the writs will issue unless there is some equitable defense. The denial of an extraordinary writ will not be capricious or at the personal discretion of an individual judge, but rather in sound judicial discretion based largely on precedent.

Extraordinary writs like equitable remedies cannot be predicted with absolute certainty in a given case, but also like equitable remedies this unpredictability[26] is overshadowed by the desirable flexibility of the writs.

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[24] NORTHROP, THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE 161-62 (1959).

[25] Note 17 *supra.*

[26] CAL. CONST. art. VI, §§ 2, 24, requires written opinions whenever the court determines a "cause." The denial of an extraordinary writ is not the determination of a "cause," and therefore many decisions in writ proceedings are unaccompanied by written opinion. See WITKIN, CALIFORNIA PROCEDURE *Appeal* § 171 (1954).

It is suggested that predictability in writ proceedings could be increased without impairing flexibility if written opinions were given when the writs are denied. Some writers have condemned the requirement of written opinions in general because they unnecessarily burden the courts and compel attorneys to spend valuable time reading in order to keep up with current law; *e.g.*, Gibson, *The California Constitution and Its Judicial Article*, 29 So. CAL. L. REV. 389, 395 (1956). Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486 (1930); Saeta, *What Price Written Opinions?* 9 CAL. S. BAR J. 222 (1934). Though this reasoning undeniably has merit, the emphasis should be on the fact that the judicial