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CALIFORNIA'S CIVIL APPEAL IN FORMA PAUPERIS —AN INHERENT POWER OF THE COURTS

The nation's civil courts should be open to the poor. A person who cannot afford the expenses normally incidental to litigation should be provided with an alternative method of obtaining relief. This social objective has long been recognized as worthwhile[1] and has stimulated the development of procedural relief for the indigent.[2] The various procedures created in order to remove this economic barrier to the courts have come to be categorized as "in forma pauperis"—literally meaning "[i]n the character or manner of a pauper."[3]

At present, the right of *civil* litigants to proceed in forma pauperis has been given constitutional dimension only in limited areas.[4] How-

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1. *See* Barvick, *Legal Services and the Rural Poor*, 15 KAN. L. REV. 537 (1967); Shriver, *Law Reform and the Poor*, 17 AM. U.L. REV. 1 (1967); Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO U.L. REV. 21 (1967); Stumpf, *Law and Poverty: A Political Perspective*, 1968 WIS. L. REV. 694.

2. For a description of the historical recognition of the social objectives underlying the development of in forma pauperis rights and powers see Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923). For a good treatment of the early development in California see Note, *Forma Pauperis Suits in California*, 27 CALIF. L. REV. 352 (1939).

3. BLACK'S LAW DICTIONARY 895 (4th ed. 1951).

4. The Fourteenth Amendment has been utilized in one limited situation—divorce—to require an in forma pauperis procedure in a civil case. Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie* the court held that it was a denial of due process to condition an indigent's access to the divorce courts on his ability to pay the customary expenses. In so doing, the court authorized a waiver of normal filing fees on behalf of the indigent litigant.

It was further suggested in *Boddie* that the imposition of general expenses, a procedure which effectively closes the courts to indigents yet leaves them open to wealthier litigants, violates equal protection provisions. *Id.* at 383-86 (Douglas, J., concurring). Justice Brennan, in a concurring opinion, was the only member of the court who suggested significant expansion; he felt that the equal protection clause compelled relief to civil paupers on a broader scale. *Id.* at 386-89.

Arguably, both the due process and equal protection objections should be applicable to contexts other than that of divorce. The court in *Boddie* refused to do so, however, and drafted a carefully limited opinion. *Id.* at 382-83. Because the Supreme Court has taken this guarded approach, there is little hope that the appeal in forma pauperis will be recognized as a constitutional right of civil indigents. Even in criminal cases one federal court has stated that the refusal to allow appeals in forma pauperis in a habeas corpus proceeding does not constitute a violation of the Fourteenth Amendment. Dorsey v. Gill, 148 F.2d 857, 877 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945). *But see* Mayer v. City of Chicago, 40 U.S.L.W. 4055 (U.S. Dec. 14,

ever, the federal government and several states have enacted statutes providing civil litigants with in forma pauperis relief.[5] California presently has no such statute,[6] but the courts have allowed civil litigants in forma pauperis relief under a theory presupposing an inherent judicial power to grant such relief.[7] This inherent power in the courts is traced to common law origins.[8] The tribunals of pre-1850 England had exercised such a judicial power to enable poor persons to sue in forma pauperis,[9] primarily because the early judges believed it

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1971). In *Dorsey*, the Supreme Court denied certiorari but nevertheless granted the indigent's motion for leave to proceed in forma pauperis.

5. 28 U.S.C. § 1915 (1970); ARK. STAT. ANN. §§ 27-401 to -406 (1962); COLO. REV. STAT. § 33-1-3 (1964); DEL. CODE ANN. tit. 10, § 989(e) (1953); FLA. STAT. ANN. § 57.081 (1969); GA. CODE ANN. § 24-3413 (1971); HAWAII REV. STAT. § 705-5 (1968); ILL. ANN. STAT. ch. 110A, § 298 (1968); IND. ANN. STAT. §§ 49-1305a to -1305b (1964), *as amended*, (Supp. 1971); KAN. REV. STAT. ANN. § 60-2001 (1964); KY. REV. STAT. § 453.190 (1969); LA. CODE CIV. PROC. ANN. art. 5181-85 (West Supp. 1971); MASS. GEN. LAWS ANN. ch. 262, § 4 (1959); MISS. CODE ANN. §§ 1574-76 (1956); MO. ANN. STAT. §§ 514.040-.050 (1952); MONT. REV. CODES ANN. § 93-8625 (Supp. 1971); N.J. STAT. ANN. § 22A:1-7 (1969); N.Y. CIV. PRAC. LAW §§ 1101-02 (McKinney 1963); N.C. GEN. STAT. §§ 1-1110 to -112 (1969); OKLA. STAT. ANN. tit. 18, § 151 (Supp. 1971-1972); S.C. CODE ANN. § 10-1604 (1962); TENN. CODE ANN. § 20-1629 (Supp. 1970); *Id.* § 29-201 (1955); VA. CODE ANN. §§ 14-1-183 to -185 (1964), *as amended*, (Supp. 1971); W. VA. CODE §§ 50-6-5, 50-7-3, 59-1-36, 59-2-1 (1966); WIS. STAT. ANN. § 271.29 (Supp. 1971).

6. California at one time had a statutory provision for in forma pauperis litigation in justice courts. CAL. CODE CIV. PROC. § 91 (Deerings 1931) (repealed, Cal. Stat. 1933, ch. 743, § 12, at 1810).

7. The California Supreme Court has not always accepted the theory that inherent power could be so exercised. *Cf. Ex parte* Harker, 49 Cal. 465, 467 (1875); Webb v. Hanson, 2 Cal. 133, 134 (1852). *But cf.* Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018 (1929), where the supreme court recognized a wide area for the exercise of inherent powers: "Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government." *Id.* at 442, 281 P. at 1020.

The use of inherent power to permit in forma pauperis procedures in California was first established in Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917). The power thus established continues to be exercised by the courts. Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971); Bank of America v. Superior Court, 255 Cal. App. 2d 575, 63 Cal. Rptr. 366 (1967); County of Sutter v. Superior Court, 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966); Boyer v. County of Contra Costa, 235 Cal. App. 2d 111, 45 Cal. Rptr. 58 (1965).

The courts in the state of Washington have adopted the lead of California in *Martin* and have implemented in forma pauperis appeals under an inherent judicial power. O'Connor v. Matzdorff, 76 Wash. 2d 589, 458 P.2d 154 (1969).

8. *See* notes 24-26 *infra*.

9. Brunt v. Wardle, 133 Eng. Rep. 1254 (C.P. 1841); Bland v. Lamb, 37 Eng. Rep. 680 (Ch. 1820); Fitton v. Macclesfield, 23 Eng. Rep. 459 (Ch. 1684); Anonymous, 86 Eng. Rep. 873 (C.P. 1677) (dictum) (in forma pauperis permissible at trial only).

necessary to provide the indigent some access to civil relief.

In the recent case of *Ferguson v. Keays*[10] the California Supreme Court held that indigents could be exempted from the payment of statutory appellate fees and based its holding on the court's inherent common law power to grant such relief which had been previously established in England.[11] The supreme court in *Ferguson* explained that the courts possessed this inherent power because California had adopted as a matter of statute all the English common law, including the existing powers of the common law courts, except where such common law procedures had been expressly overruled by statute.[12] The California courts had previously exercised this inherent power to permit the waiver of expenses for indigents at the trial level,[13] and the court in *Ferguson* concluded that the waiver of *appellate* filing fees by appellate courts was a logical extension of this prior authority.[14]

This note will analyze the court's assertion of this common law power in terms of a possible infringement by the judiciary upon the domain of the legislature, since a legislative enactment had established the requirement for the payment of appellate filing fees.[15] The precedent cited by the court to justify the exercise of inherent in forma pauperis powers at the appellate level will be examined, and the extent to which the court has established a workable procedure for determining and defining the existence and scope of other inherent common law appellate powers will be discussed.

Martin v. Superior Court—The Exhumation of an Inherent Power

The inherent power of California courts to allow proceedings in forma pauperis for civil litigants was first recognized in the 1917 decision of *Martin v. Superior Court.*[16] The indigent plaintiff had requested a jury trial, and under the California statute then applicable[17] if a jury trial was demanded, the court was to charge the jury's per diem and travel fees to the successful litigant in the lawsuit. To insure collection of these fees, advance deposits were normally required from

10. 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971).

11. *Id.* at 654, 484 P.2d at 73, 94 Cal. Rptr. at 401.

12. *Id.* Much of the pre-1850 common law of England is adopted by CAL. CIV. CODE § 22.2 (West 1954). See note 26 *infra.*

13. *E.g.*, Martin v. Superior Court, 176 Cal. 289, 297, 299, 168 P. 135, 138-39 (1917). See note 31 *infra.*

14. 4 Cal. 3d at 652, 484 P.2d at 71, 94 Cal. Rptr. at 399.

15. CAL. GOV'T CODE § 68926 (West Supp. 1971).

16. 176 Cal. 289, 168 P. 135 (1917).

17. Cal. Stat. 1871-1872, ch. 168, § 1, at 188, *as amended,* CAL. CODE CIV. PROC. § 196 (West Supp. 1971).

both parties, with the losing side receiving a refund after judgment.[18] The successful party was, however, given the right to recover as costs from the losing party the entire amount of such fees paid to the jury.[19]

The trial court in *Martin* determined that it did not have the power to waive the advance deposit required under the statute, and the indigent plaintiff appealed to the California Supreme Court. The supreme court held that the trial judge had erred since California courts had always possessed the inherent power to waive the advance deposit required under the statute in any case involving an indigent.[20]

The case was remanded to the trial court for further proceedings; however, the jury was subsequently dismissed on a procedural matter.[21] This created a new problem for the plaintiff in *Martin*. In addition to the statutory advance deposit requirement, another California statute required that when the jury had been dismissed, further court action would be delayed until the party who had requested the jury paid certain designated fees.[22] Thus, on remand the provisions of this statute apparently barred the indigent plaintiff from obtaining relief. This time, however, the trial judge exercised the court's inherent power and waived the payment of the necessary fees.

The opposing party in the lawsuit, who was not himself an indigent, petitioned the California Supreme Court for a writ of prohibition claiming error on the part of the trial judge in his waiver of the statutory requirement for the payment of the fees.[23] The supreme court, citing its prior holding in *Martin*, held that (1) the statutory provision requiring the payment of fees did not *specifically* apply to indigents and (2) only a specific inclusion of indigents in the statute by the legislature would remove from the trial judge his inherent power to give in forma pauperis relief.[24] The court concluded that the inherent

18. Martin v. Superior Court, 176 Cal. 289, 291, 168 P. 135, 136 (1917), *quoting* a rule of the Superior Court of the County of Alameda, California. In addition each party was required to deposit, on a daily basis, one-half of the reporter's fees. *Id.*

19. Cal. Stat. 1871-1872, ch. 168, § 1, at 188, *as amended*, CAL. CODE CIV. PROC. § 196 (West Supp. 1971). This circuitous procedure was eliminated with the enactment of Cal. Stat. 1917, ch. 569, § 1, at 788.

20. 176 Cal. at 297, 299, 168 P. at 138-39.

21. The jury was dismissed in order to allow time for amendment of the pleadings. Majors v. Superior Court, 181 Cal. 270, 272, 184 P. 18, 19 (1919).

22. Cal. Stat. 1917, ch. 569, § 1, at 788, *as amended*, CAL. CODE CIV. PROC. § 196 (West Supp. 1971).

23. 181 Cal. 270, 184 P. 18 (1919).

24. *Id.* at 273-76, 184 P. at 20-21. The court in *Martin* relied on the English case of Brunt v. Wardle, 133 Eng. Rep. 1254, 1257 (C.P. 1841) for the proposition that early English judges had exercised the common law power to allow indigents

common law power of the courts to waive statutory fees had been unaffected by the statutes.

> Neither individually nor collectively are [such statutes] even susceptible of the construction that the design of the legislature was to deny to the courts the exercise of their most just and most necessary inherent power.[25]

By invoking this inherent judicial power derived from the courts of the English common law,[26] the California courts have waived several types of statutory expenses since the time of *Martin*.[27] In each such instance, the court has invoked its inherent common law power on the basis that the legislature did not specifically include indigents within the coverage of the particular statute requiring the payment of fees.[28] Thus, the California courts have asserted that the inherent judicial common law power will be exercised to waive statutory fees for indigents at the trial level whenever the state legislature has not disclosed a specific intent to preclude its use—either in the statutory language itself or in the legislative hearings involving proposed statutes relating to court expenses.[29]

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to sue in forma pauperis. "[T]here is still the controlling fact that the power of the English common-law courts to remit fees on petition *in forma pauperis* did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute." 176 Cal. at 293-94, 168 P. at 137 (1917).

25. 181 Cal. at 273, 184 P. at 20.

26. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." CAL. CIV. CODE § 22.2 (West 1954), formerly CAL. POLITICAL CODE § 4468 (in effect at the time of *Martin*). This includes courts of equity as well as those of law. Martin v. Superior Court, 176 Cal. 289, 293, 168 P. 135, 137 (1917). Thus California appears to have accepted the bulk of English common law as it stood in 1850, the year when the state constitution was adopted. People v. Richardson, 138 Cal. App. 404, 408, 32 P.2d 433, 435 (1934).

27. *E.g.*, CAL. CODE CIV. PROC. § 978 (West 1955), was held waivable in Roberts v. Superior Court, 264 Cal. App. 2d 235, 241, 70 Cal. Rptr. 226, 230 (1968) ($100 deposit to cover costs waived).

28. *E.g.*, County of Sutter v. Superior Court, 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966), where the court waived the statutory requirement for the posting of a cost bond in lawsuits against public entities on the basis of the plaintiff's indigency, despite the fact that the language of the statutory provision did not exclude any section of the population from its coverage. The court explained: "Such statutes do not trench upon the judicial power to permit litigation *in forma pauperis*. Although the Legislature has power to modify or abrogate common law rules, a general statute . . . does not diminish judicial authority resting upon . . . common law doctrine." *Id.* at 775, 53 Cal. Rptr. at 427.

29. *Id.*; *accord*, Bank of America v. Superior Court, 255 Cal. App. 2d 575, 63 Cal. Rptr. 366 (1967).

Ferguson v. Keays—Waiver of Appellate Fees

In *Ferguson* the California Supreme Court consolidated three separate appeals from lower court rulings in civil cases.[30] In each of these three cases[31] an asserted indigent had asked an appellate tribunal to waive the fifty dollar appellate filing fee required by Government Code section 68926.[32]

The supreme court deliberately chose not to consider possible questions of equal protection or due process as the basis for its decision.[33] Instead, it acknowledged that California lacks any statutory in forma pauperis relief provisions[34] and held that appellate judges, like trial judges, possess an inherent common law power to waive appellate filing fees.[35]

Utilizing the judicial approach to the waiver of fees at the trial level which had been enunciated in *Martin*, the court reviewed the language of the statute and the legislative history for any specific intent to include indigents within the coverage of the statute.[36] The court concluded that the legislature had not manifested the requisite intent to specifically include indigents within its payment provisions.

> None of these various provisions pertains to the subject of the payment of filing fees by indigent persons; none expressly denies to the appellate courts the power to waive those fees.[37]

30. 4 Cal. 3d at 652, 484 P.2d at 71, 94 Cal. Rptr. at 399. This transfer was accomplished under CAL. APP. CT. RULE 28(a).

31. In *Ferguson* the applicant sought to appeal a lower court's denial of a writ of mandamus which stemmed from a petition to compel recognition of claimed exemptions from seizure under a writ of restitution. In Colon v. Superior Court, which also involved a writ of mandamus, the applicant had asked the court of appeal to instruct the trial court to order the county to pay the necessary fee for publishing summons in her marital dissolution action. In the third case, Rowe v. Superior Court, the applicant had sought a writ of mandamus to compel the trial court to furnish a free transcript of proceedings relating to child support. 4 Cal. 3d at 652-53, 484 P.2d at 71-72, 94 Cal. Rptr. at 399-400.

32. "The fee for filing the record on appeal in a civil case appealed to a court of appeal is fifty dollars . . . ." CAL. GOV'T CODE § 68926 (West Supp. 1971).

33. "[W]e need not reach the question . . . of due process or equal protection . . . ." 4 Cal. 3d at 656 n.6, 484 P.2d at 74 n.6, 94 Cal. Rptr. at 402 n.6.

34. *Id.* at 653, 484 P.2d at 72, 94 Cal. Rptr. at 400.

35. *Id.* at 652, 484 P.2d at 71, 94 Cal. Rptr. at 399. After this crucial determination, all three cases were transferred to an inferior court for further proceedings. *Id.* at 659, 484 P.2d at 76, 94 Cal. Rptr. at 404.

36. *Id.* at 654-55, 484 P.2d at 73-74, 94 Cal. Rptr. at 401-02. The legislature had recently increased the statutory appellate filing fee from $10 to $50. Cal. Stat. 1963, ch. 873, § 3, at 2121. Viewing the increase as a legislative attempt to counter the effects of inflation so the fee could effectively continue to defray costs and discourage unnecessary litigation, the court found no specific intent by this raise to specifically include indigents. 4 Cal. 3d at 658, 484 P.2d at 76, 94 Cal. Rptr. at 404.

37. 4 Cal. 3d at 656, 484 P.2d at 74, 94 Cal. Rptr. at 402. The court spe-

The court was careful, however, to recognize the legitimate purposes of the filing fees and to consider the impact of waving those fees. The court first explained that the requirement for the payment of appellate fees served both to provide "financial support for our courts and [to discourage] frivolous or unnecessary litigation."[38] A waiver of such fees would, of course, reduce the revenue available for the financial support of the courts; however, the court found such a reduction to be a necessary sacrifice on behalf of indigent appellants. The court formulated safeguards to preclude sham or frivolous appeals by indigents whose appellate filing fees were waived—safeguards such as certificates of merit and summary dismissal[39]—and concluded that these safeguards were adequate to preserve the legislative purpose in requiring payment of fees.[40]

The Precedent for Ferguson

The position of the *Ferguson* court that the court had the inherent common law power to waive the statutory fees because appeals in forma pauperis existed in English common law appears to be based on ample authority. Although there was dispute over this point in a few early English cases,[41] the availability of the appeal in forma pauperis seems to have become an established doctrine in the English common law courts by 1850.[42] However, the *Ferguson* decision, though in accord with this heritage of English law, does seem to conflict with language in an early appellate case in California, *Rucker v. Superior Court.*[43] *Rucker* involved a suit to quiet title in which the indigent petitioners sought to appeal from an adverse judgment at trial. The

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cifically noted that both the Judicial Council of California and the legislature have the power to make rules governing in forma pauperis relief. However, until those bodies have spoken on the subject, the California courts would continue to exercise their inherent powers to allow indigent litigants a reasonable opportunity to obtain appellate relief. *Id.*

38. *Id.* at 657, 484 P.2d at 75, 94 Cal. Rptr. at 403.

39. *Id.* at 658, 484 P.2d at 76, 94 Cal. Rptr. at 404. See text accompanying notes 73-74 *infra.*

40. How effectively will the courts be able to administer their inherent powers and such necessary counterparts as these safeguards? The court only briefly considered the possibility that the safeguards established to prevent sham or frivolous appeals may prove too strong, having the effect of limiting otherwise meritorious litigation. Id.

41. *Compare* Taylor v. Bouchier, 21 Eng. Rep. 365 (Ch. 1774) *and* Anonymous, 86 Eng. Rep. 873 (C.P. 1677) *with* Bland v. Lamb, 37 Eng. Rep. 680 (Ch. 1820) *and* Fitton v. Macclesfield, 23 Eng. Rep. 459 (Ch. 1684).

42. 1 E. DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 45 (2d Am. ed. J. Perkins 1846); 9 HALSBURY, LAWS OF ENGLAND §§ 863, 888, 911 (3d ed. 1954).

43. 104 Cal. App. 683, 286 P. 732 (1930).

petitioners requested that the trial transcripts prepared by the court clerk and court reporter be furnished without cost for the appeal. There was a statute in effect,[44] however, which provided that no court official need work in a civil case until his fees had been advanced. The petitioners, however, moved to have these fees waived because of their indigent status.[45] The court refused to waive the transcript fees, but carefully pointed out that the indigents had not been without an alternative remedy—they could have possibly filed a bill of exceptions without incurring the expense of the transcripts.[46] The court in *Rucker* did not find the waiver of statutory fees in *Martin* controlling because in the latter case the court had allowed the waiver of statutory fees only at the trial level:

> The ruling [in *Martin*] was based upon the rights of the courts of common law to admit to sue *in forma pauperis*, such poor persons as had not ability to pay the expenses incidental to the prosecution of actions to enforce their rights. It is not shown that this right extended to appeals or writs of error. The right of appeal is a creature of written law, and finds its authority in the Constitution and statutes of the state.[47]

Moreover, the *Rucker* court insisted, the transcript fee requested by the petitioners would exceed $100, and for the court to waive this fee would render the code section meaningless since there would be no effective limitation to the amount of such fees which could be waived by a court. The court found such a result unacceptable and refused to extend in forma pauperis relief to the petitioners. The court also expressed the view that indigent relief procedures must be carefully applied by the courts and not used indiscriminately:

> The right to sue or defend *in forma pauperis* is of such nature that unless it is carefully guarded it is most susceptible of abuse.

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44. Cal. Stat. 1903, ch. 200, § 3, at 234, *now*, CAL. GOV'T CODE § 69953 (West 1964).

45. 104 Cal. App. at 684-85, 286 P. at 732. The Ruckers supplied affidavits as to their indigency.

46. *Id.* at 686, 286 P. at 733.

47. *Id.* at 685, 286 P. at 732. A discussion of the issue raised by *Rucker* led one writer to conclude: "[T]he denial of the right to appeal in *forma pauperis* is predicated upon the reasoning that all appeals are statutory and, since the right to appeal was not adopted with the common law, the right to appeal in *forma pauperis* could not have been derived from that source." Comment, 4 S. CAL. L. REV. 295 (1931). *See also* Bradford v. Southern Ry., 195 U.S. 243 (1904), where the United States Supreme Court found that "the right to prosecute a writ of error or an appeal . . . depends on a statute, and not on the common law." *Id.* at 250. This conclusion led to the creation six years later of a statutory system for federal appeals in forma pauperis. Act of July 20, 1892, ch. 209, 27 Stat. 252, was amended to provide for appeals in forma pauperis by Act of June 25, 1910, ch. 435, 36 Stat. 866, *as amended*, 28 U.S.C. § 1915 (1970). *See* Kinney v. Plymouth Rock Squab Co., 236 U.S. 43, 45 (1915) (analysis of the effect of the 1910 amendment).

> Therefore if allowed at all it should be regulated with the utmost care.[48]

The *Rucker* opinion, though it was quite brief and did not discuss English precedent, apparently possessed considerable impact in California. Indeed, the right to appeal in forma pauperis was not recognized until *Ferguson*, some 41 years later. Nevertheless, the court in *Ferguson* dismissed the *Rucker* holding in rather summary fashion:

> Although the *Rucker* case . . . without citation of authority, questioned whether at common law the right to sue in forma pauperis extended to appeals or writs of error, several English cases prior to 1850 . . . had expressly recognized such a right. . . . [I]n the absence of any definitive authority to the contrary, we conclude that the common law courts possessed and exercised the power to permit indigents to appeal in forma pauperis.[49]

The summary treatment given the *Rucker* issue[50]—as to whether the common law courts allowed appeals in forma pauperis—implies the assumption by the court that since the power existed then, it exists now. This assumption by the court pervades much of the *Ferguson* decision and appears to lack a basis in documented authority. If the court's reasoning is to be extended beyond the factual confines of *Ferguson* itself, the decision warrants closer scrutiny. The use of the inherent common law power by the *Ferguson* court to waive appellate fees might be taken to mean that in any situation where the statutory modes of effecting relief are insufficient[51] the court may select the appropriate common law tool to achieve a just result. Even though this use of inherent power may produce a just result in a particular case, there appears to be no legal foundation for a California court, operating at the appellate level, to enhance its own authority by resort to such an inherent power. On the other hand, there would appear to be no sound basis for contending that the statutory system of appellate procedures was established solely to define and limit the scope of power of the appellate

48. 104 Cal. App. at 685, 286 P. at 732.

49. Ferguson v. Keays, 4 Cal. 3d 649, 654, 484 P.2d 70, 73, 94 Cal. Rptr. 398, 401 (1971). The existence of this power at English common law was supported by Drennan v. Andrew, L.R. 1 Ch. App. 300, 301 n.7 (1866) and cases cited therein.

50. 4 Cal. 3d at 654, 484 P.2d at 72-73, 94 Cal. Rptr. at 400-01. The court in *Ferguson* noted that it was dealing with a different statute and different policy considerations than those considered by the *Rucker* court. *Id.* The waiver of the statute in *Rucker* would impose on third parties the additional expense of preparing clerk's and reporter's trial transcripts for use on appeal. Such an expense, varying with the size of the transcript, differs from fixed court operating costs or filing fees involved in *Ferguson.*

51. If the *Ferguson* court had not provided a common law appeal in forma pauperis, such an injustice might well have resulted. If the indigents were unable to pay the required fee, there would have been no statutory basis for providing them with appellate relief. *Id.* at 653, 484 P.2d at 72, 94 Cal. Rptr. at 400.

courts. The following discussion will examine the right of civil appeal both under California law and the common law.

Appeal Under California Law and the Common Law

The California Constitution establishes appellate tribunals capable of hearing civil cases;[52] the California codes regulate their operation.[53] The early California case of *People v. Reid*[54] discussed the similarities between the modern statutory appellate remedy and the old common law writ of error[55] and reasoned that when the modern remedy overlaps with the old and there is a conflict, the modern remedy should be controlling:

> Where the legislature has provided a statutory remedy which supplants in whole or in part a corresponding common-law remedy . . . there is presented the situation of a conflict between the common law and the statute, in which case the latter must prevail.[56]

Although there were appellate procedures at common law somewhat analogous to modern appeals,[57] some of the common law procedures—such as the in forma pauperis appeal—have no counterpart in California's statutory system.[58] Thus, under the reasoning of *Reid* since

52. CAL. CONST. art. VI, § 1.

53. CAL. CODE CIV. PROC. §§ 901-23 (West Supp. 1971).

54. 195 Cal. 249, 254-56, 232 P. 457, 459-60 (1924).

55. A writ of error is used by an appellate court to review alleged errors in law committed by a court of record. The judgment of the lower court "may be reversed, corrected, or affirmed, as the case may require." BLACK'S LAW DICTIONARY 1785 (4th ed. 1951). For a description of this writ in its proper historical perspective see 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 201-02, 213-16 (7th ed. 1956); 3 J. REEVES, HISTORY OF THE ENGLISH LAW 57 (3d ed. 1814).

56. People v. Reid, 195 Cal. 249, 257, 232 P. 457, 461 (1924).

57. The case of Duvergier v. Fellowes, 6 Eng. Rep. 831 (H.L. 1832) provides an example of the process involved in the common law writ of error, which is more clearly analogous to modern appellate review. Plaintiff initiated an action of debt on a bond in the court of common pleas. Duvergier v. Fellows, 130 Eng. Rep. 1056 (C.P. 1828). Because of the illegality of one of the conditions of the bond, judgment was rendered for the defendant. Plaintiff then brought a writ of error to the court of Kings Bench. Duvergier v. Fellows, 109 Eng. Rep. 655 (K.B. 1830). The appellate court reviewed the lower court's determination that the condition of the bond was illegal and affirmed the judgment for the defendant. Plaintiff again brought a writ of error, this time to the House of Lords. Duvergier v. Fellows, 6 Eng. Rep. 831 (H.L. 1832). Again the determination as to the illegality of the condition was reviewed and the judgments of the courts below were affirmed. The process followed here seems quite similar to California's statutory appeal.

The appellate process in Chancery is illustrated in Drennan v. Andrew, L.R. 1 Ch. App. 300 (1866). *Drennan* involves a petition for a rehearing before the Lord Chancellor of a case previously decided by the Vice Chancellor.

58. Ferguson v. Keays, 4 Cal. 3d 649, 653, 484 P.2d 70, 72, 94 Cal. Rptr. 398, 400 (1971).

there is no statutory counterpart to such appellate procedures, there is no conflict and the common law remedy would not be superseded. However, a more important question is whether the common law in forma pauperis appellate procedures have been totally superseded because they are part of a larger unit—the common law appellate system—which has been replaced by California statutes as a unit. The underlying premise of the *Rucker* court was that the California statutory appellate system is a unit, complete in itself, which has superseded any common law appellate procedures.[59] The court, however, cited no authority for this conceptualization of California's appellate structure. The court in *Ferguson* obviously disagreed with the premise of the *Rucker* court and adopted the common law in forma pauperis appellate procedure.[60] The court in *Ferguson*, however, supplied no guidelines for the scope of its adoption of the common law appellate procedures.

The *Ferguson* court may have adopted the position that *all* common law appellate remedies not directly superseded by statute have been adopted as the law of California. On the other hand, the court may have taken the position that the in forma pauperis procedures, due to the special nature of the relief accorded, are excepted from the overall common law appellate system which has otherwise been totally superseded by statute. Only the first of these two alternative positions would allow the courts to utilize common law procedures to fill any further gaps in California's appellate system.

The court in *Ferguson* recognized one of these gaps[61]—the provision of free transcripts for indigents on appeal—but did not specifically state that courts could utilize the inherent common law power to provide indigents with free transcripts on appeal. Such a result could certainly be implied, however, and whether the court intended the waiver of statutory appellate filing fees as a specific exception or as a judicial precedent that could allow courts the inherent power to provide free transcripts will have to be determined in subsequent cases. *Ferguson* would have been a more workable precedent if the court had clearly established the extent to which common law appellate procedures have been superseded by statute.

One of the major arguments against any further expansion of the court's inherent power to grant remedial relief is the recognition that the legislature is best equipped to do research in this area and to ascertain the potential social effects of appellate in forma pauperis procedures.[62]

59. *See* Rucker v. Superior Court, 104 Cal. App. 683, 286 P. 732 (1930).

60. 4 Cal. 3d at 654, 484 P.2d at 73, 94 Cal. Rptr. at 401.

61. *Id.* at 654, 484 P.2d at 73, 94 Cal. Rptr. at 401.

62. The legislature could accomplish this through its committees or the Judicial Council. *See id.* at 655, 484 P.2d at 73, 94 Cal. Rptr. at 401.

The federal courts had been faced with a similar situation insofar as the rights of indigents to civil appellate procedures, and Congress enacted statutes allowing in forma pauperis appellate relief.[63] Included in the federal appellate system are express provisions for the waiver of fees[64] and for the provision of free transcripts.[65] A similar statutory system for in forma pauperis appeals in California could resolve the uncertainties and difficulties that may develop if the courts are required to rely on the exercise of inherent power to provide indigents with appellate relief. The statutory approach would appear to be a preferable means of clarifying and solidifying a satisfactory in forma pauperis appellate system in California.

Preventing Sham or Frivolous Appeals

Permitting indigents to litigate without paying court-related expenses is viewed as potentially troublesome because of a possible increase in the number of sham or frivolous appeals.[66] The reasoning advanced in support of this view is that if an individual is required to pay a statutory filing fee to commence a lawsuit, he will be less likely to use the courts for the purposes of harassing another party or pursuing meritless actions. To guard against such adverse results, courts and legislatures, when sanctioning proceedings in forma pauperis, have been compelled to substitute various other deterrents for the waived expenses. The old English common law courts reportedly used whipping of the unsuccessful pauper litigant as a deterrent.[67] California has developed a system of deterrents somewhat more enlightened than whipping, and perhaps more effective also.[68] The obvious danger of such deterrents is that the method selected to prevent frivolous litigation may prove too strong and may make the courts inaccessible to the poor as effectively as though there were no in forma pauperis proceedings available.[69]

The court in *Ferguson* contemplated briefly the possibility that an indigent's access to the appellate courts might be barred by an overly strict application of such deterrents:

It should go without saying that these sanctions must be evenly

63. 28 U.S.C. § 1915 (1970).
64. *Id.* § 1915(a).
65. *Id.* § 1915(b).
66. See text accompanying notes 38-40 *supra.*
67. Drennan v. Andrew, L.R. 1 Ch. App. 300, 301 n.7 (1866).
68. See text accompanying notes 72-73 *infra.*
69. *See* O'Connor v. Matzdorff, 76 Wash. 2d 589, 601-02, 458 P.2d 154, 160-61 (1969). *See also* Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases,* 2 VALPARAISO U.L. REV. 21, 26-27 (1967).

> applied and equally imposed upon indigent and nonindigent alike . . . ."[70]

Thus California's courts have been directed by the supreme court to avoid using these requirements[71] to impose any extra penalty or burden on indigents. Rather than providing for any new penalties, the court in *Ferguson* enumerated several extra safeguards to take the place of a filing fee. Regarding appellate proceedings in particular, the court established the following minimum guidelines: (1) the applicant must submit his counsel's certificate stating that the case has merit and is brought in good faith, and (2) the applicant must declare that he is too poor to pay the fees and must provide appropriate facts to support his declaration.[72] The *Ferguson* court also noted that the appellate courts reserve the power to dismiss summarily any proceeding found to be sham or frivolous.[73]

The standards for allowing indigents appellate relief appear to be an attempt by the court to accomplish as fairly as possible the social objective of providing in forma pauperis procedures. Rather than imposing greater penalties on indigents, these standards merely establish a procedure which allows an earlier determination of whether an action has merit. However, the application of the standards leave much to the discretion of individual courts. If guidelines were expressly provided by the California legislature for all in forma pauperis civil appeals—similar to those applicable to federal appeals[74]—the beneficial result would be unambiguous requirements which could be relied upon by indigents and court alike.

Conclusion

In *Ferguson v. Keays* the California Supreme Court recognized the inherent power of the state courts, in the absence of statutory authority, to permit in forma pauperis civil appeals. This power inherited from the pre-1850 English common law was deemed sufficient authority for an *appellate* court to waive general statutory fees for an indigent party on the basis that the legislation did not expressly include indigents within its coverage. Unfortunately, the court in *Ferguson* failed to consider the degree to which further common law appellate procedures may be incorporated into the California appellate system as presently understood and utilized. A clear and specific enunciation of the nature, scope, and extent of these inherent powers of California's appel-

70. 4 Cal. 3d at 658-59, 484 P.2d at 76, 94 Cal. Rptr. at 404.
71. *Id.*
72. *Id.* at 658, 484 P.2d at 75, 94 Cal. Rptr. at 403.
73. *Id.*
74. 28 U.S.C. § 1915(a) (1970).

late courts would certainly have been more enlightening. The California Supreme Court, by using this inherent power to ensure adequate relief for indigents, did not find it necesary to consider constitutional questions.[75]

Although the United States Supreme Court has provided extensive relief for the criminal pauper,[76] it has been reluctant, to afford the same type of relief to the civil pauper.[77] A statutory approach to in forma pauperis proceedings in California would be preferable and could provide as much relief for indigents as social policies would make desirable—subject, of course, to constitutional minimums. In addition to relieving the courts of the necessity of justifying an ill-defined inherent power, the enactment of appropriate statutes could provide the California courts with legislative assistance in effectively preventing sham or frivolous litigation.

In summary, a statutory system for appeals in forma pauperis seems likely to be the most efficient and effective means of guaranteeing equal justice to the poor.[78] Though the court in *Ferguson* reached a desirable result through the use of its inherent power to waive statutory appellate filing fees, the California legislature should not await a case by case determination by the courts to fully define these crucial rights for civil litigants.

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75. 4 Cal. 3d at 656 n.6, 484 P.2d at 74 n.6, 94 Cal. Rptr. at 402 n.6.

76. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

77. See discussion in note 4 *supra*.

78. *See generally* 28 U.S.C. § 1915 (1970).

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