

INTERLOCUTORY REVIEW IN CALIFORNIA—PRACTICAL JUSTICE UNGUIDED BY STANDARDS*

WINSLOW CHRISTIAN†

I

INTRODUCTION

The thrust of the “Restatement” which is the centerpiece of this issue of *Law and Contemporary Problems*—synthesizing the complex body of case law into an orderly scheme of appeal, certified appeal, and restricted interlocutory appeal—surely moves in the right direction. Yet the experience of state appellate courts suggests consideration of a more open-ended system of interlocutory review, one that would give the United States courts of appeal broad discretionary power to issue writs or orders to supervise trial court action. Flexible schemes of civil appellate review have been successfully implemented in some jurisdictions; their workings are discussed elsewhere.¹

In California, a nominally restricted and formal procedure has in fact evolved into a flexible scheme of interlocutory review: a formerly rigorous final judgment requirement has been eroded by a few legislative exceptions and, more significantly, by judicial decisions gradually broadening the prerogative writs to permit discretionary review of interlocutory orders. Resort to writ practice for interlocutory review is particularly inviting to the appellate courts of California because nonpriority civil appeals are heavily backlogged—time lapse between completion of briefing and calendaring for hearing is two years or more in some districts. Appellate motivation to tolerate the growth of writ practice may be influenced also by the circumstance that, although California Constitution article 6, section 14 requires that appellate decisions “that determine causes shall be in writing with reasons stated,” a writ proceeding does not become a “cause” unless an alternative writ is issued placing the matter on calendar for argument. Thus, the appellate courts economize their labor by writing no opinions where writs are summarily denied. This emerging system of interlocutory review would be more serviceable if it were articulated in statutes or rules. Yet in its half-concealed state it shows that

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† Formerly Judge, California Court of Appeal, San Francisco; since September 1983, member, Litigation Section, Hanson, Bridgett, Marcus, Vlahos & Stromberg, San Francisco, California; currently on leave as Vice-President and Director of Litigation, Bank of America, San Francisco, California.

1. Clifford, *Civil Appellate Review in New Jersey*, LAW & CONTEMP. PROBS., Summer 1984, at 87; Kleinschmidt, *The Final Judgment Rule in Arizona*, LAW & CONTEMP. PROBS., Summer 1984, at 103.

a discretionary appellate power to supervise trial court action, sparingly exercised, may promote justice without unduly burdening the appellate court or disrupting the work of the trial court.

II

APPEAL

In California, an appeal lies in a civil case only from a final judgment, except for certain specified orders and interlocutory judgments specified by statute.² Although the appeal statute does not use the term "final judgment,"³ the statutes codify the final judgment (or "one judgment") rule as that rule is commonly applied in the United States.⁴ It is universally recognized that piecemeal appeals would be oppressive, costly,⁵ and a hindrance to the efficient administration of justice.⁶

A judgment is final when it terminates the litigation between the parties on the merits of the case.⁷ The California courts have held, however, that in some situations an appeal will be entertained even though litigation of the main issue continues. Where there is a final determination on a matter collateral to the main issue—an award of spousal support,⁸ for example, or other orders to pay money⁹—the determination is treated the same as a final judgment in an independent proceeding, and appeal will lie. In an action involving several parties with distinct interests, a judgment resolving all issues affecting one party is appealable.¹⁰ Moreover, an order denying intervention or substitution may be appealed by the moving party.¹¹

There are also statutory exceptions to the final judgment rule. Appeal may be

2. CAL. CIV. PROC. CODE § 904.1 (West Supp. 1984). Only the rules regarding appeal from the superior court will be discussed. On appeals from municipal and justice courts, see *id.* § 904.2

3. The statute allows an appeal to be taken . . .

From a judgment, except (1) an interlocutory judgment . . . (2) a judgment of contempt which is made final and conclusive by Section 1222, or (3) a judgment on appeal from a municipal court or justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court.

Id. § 904.1(a).

4. *Horton v. Jones*, 26 Cal. App. 3d 952, 956-57, 103 Cal. Rptr. 399, 402-03 (1972); 6 B. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 36 (2d ed. 1971 & Supp. 1983). On the similar rule in the federal courts, see *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 178-79 (1955).

5. *Gosney v. State*, 10 Cal. App. 3d 921, 928, 89 Cal. Rptr. 390, 395 (1970); 6 B. WITKIN, *supra* note 4, *Appeal* § 36.

6. *Sanders v. Lemaire & Mohi*, 35 Cal. App. 3d 106, 110, 110 Cal. Rptr. 507, 510 (1973).

7. *Id.* at 109, 110 Cal. Rptr. at 510.

8. *In re Marriage of Skelley*, 18 Cal. 3d 365, 368, 556 P.2d 297, 299, 134 Cal. Rptr. 197, 199 (1976).

9. See, e.g., *Wisniewski v. Clary*, 46 Cal. App. 3d 499, 120 Cal. Rptr. 176 (1975) (order to pay attorney fees as sanction for plaintiff's nonattendance at mandatory settlement conference); *Spence v. Omnibus Indus.*, 44 Cal. App. 3d 970, 119 Cal. Rptr. 171 (1975) (order requiring plaintiff to pay arbitration filing fee).

10. *Tinsley v. Palo Alto Unified School Dist.*, 91 Cal. App. 3d 871, 880, 154 Cal. Rptr. 591, 596 (1979); 6 B. WITKIN, *supra* note 4, § 42.

11. *Timberidge Enters., Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 878, 150 Cal. Rptr. 606, 610 (1978).

taken from an interlocutory judgment, in an action to redeem real or personal property from a mortgage or lien, determining the right to redeem and directing an accounting;¹² from an interlocutory judgment in an action for partition, determining the rights of the parties and directing partition to be made;¹³ and from an interlocutory judgment of dissolution of marriage.¹⁴

Orders, like judgments, are not appealable in California unless made so by statute.¹⁵ An order granting a motion to quash service of summons or granting a motion to stay or dismiss on the ground of inconvenient forum is appealable,¹⁶ since such orders are effectively final judgments as to the party released from the court's jurisdiction in the action.¹⁷ An order granting a new trial is appealable, as is an order denying a motion for judgment notwithstanding the verdict.¹⁸ Also appealable are orders dealing with the provisional remedies of attachment,¹⁹ injunction,²⁰ and receivership.²¹ Another category of orders made appealable by statute are those orders made after an appealable judgment.²² Finally, certain nonfinal orders are made appealable by the Probate Code.²³

The final judgment rule was instituted in the Practice Act of 1851,²⁴ which appears to have been largely adapted from the proposed New York Code of Procedure of 1848 and the New York Code of Civil Procedure of 1850.²⁵ Ironically, New York has gutted the finality requirement by allowing appeal as a matter of right from any order which involves some part of the merits or which affects a substantial right.²⁶ The extremely broad authority for appeal which has developed in New York "is a prime source of delay and expense in litigation and imposes an undue burden" on the appellate courts.²⁷

III

EXTRAORDINARY RELIEF

California's current procedure for interlocutory review evolved from the ancient English system of prerogative writs. The forms of relief most frequently

12. CAL. CIV. PROC. CODE § 904.1(h) (West Supp. 1984).

13. *Id.* § 904.1(i).

14. *Id.* § 904.1(j); *see also id.* § 597 (interlocutory judgment in a trial of special issues sustaining the defense of another action pending); CAL. REV. & TAX CODE §§ 3609, 3631 (West 1970) (interlocutory decrees requiring payment under a tax deed).

15. *County of Ventura v. Tillet*, 133 Cal. App. 3d 105, 109-10, 183 Cal. Rptr. 741, 744 (1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497 (1983).

16. CAL. CIV. PROC. CODE § 904.1(c) (West Supp. 1984).

17. 6 B. WITKIN, *supra* note 4, *Appeal* § 75.

18. CAL. CIV. PROC. CODE § 904.1(d) (West Supp. 1984).

19. *Id.* §§ 904.1(e).

20. *Id.* § 904.1(f).

21. *Id.* § 904.1(g).

22. *Id.* § 904.1(b).

23. *See* CAL. PROB. CODE § 1240 (West 1981).

24. 1851 Cal. Stats. 1851, ch. 5, § 336, at 104.

25. Goldberg, *Extraordinary Writs and the Review of Inferior Court Judgments*, 36 CALIF. L. REV. 558, 560-61 (1948).

26. N.Y. CIV. PRAC. LAW § 5701(a) (McKinney 1978).

27. Korn, *Civil Jurisdiction of the New York Court of Appeals and Appellate Divisions*, 16 BUFFALO L. REV. 307, 320 (1967).

used—certiorari, mandamus, and prohibition—have, however, become broader in scope and more flexible in application than the historic names imply.

Certiorari developed as a means to extend the reach of the King's courts; the writ would issue to bring up for review the record of a proceeding before a lower tribunal.²⁸ The writ (also called a "writ of review" in California legislation²⁹) serves essentially the same function today, but in theory can only be granted where the inferior tribunal has exceeded its jurisdiction and where there is no appeal or other plain, speedy, and adequate remedy.³⁰ The standard of review is to determine whether the inferior tribunal lacked jurisdiction of subject matter or person, or, if fundamental jurisdiction existed, whether the court acted in excess of its jurisdiction.³¹

The writ of prohibition was used by the central courts to limit and control the ecclesiastical courts; prohibition would issue where jurisdictional defects were found.³² Today, prohibition will arrest the proceedings of any lower tribunal which acts without or in excess of its jurisdiction,³³ and in cases where the petitioner has no adequate remedy.³⁴

Prohibition and certiorari have become more flexible remedies as modern California courts have expanded the concept of jurisdictional defects.³⁵ The old rule that certiorari and prohibition may not be resorted to where the court has both subject matter and personal jurisdiction³⁶ has given way to a concept that "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on *certiorari*."³⁷ As the writs are used in new ways, the concept of jurisdiction has been 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.'"³⁸

Mandamus was used at common law to compel performance of a public duty or to compel the discharge of a private office.³⁹ In California, the writ (sometimes called a writ of mandate⁴⁰) may be directed to any inferior tribunal, corporation,

28. Comment, *Appellate Review in California with the Extraordinary Writs*, 36 CALIF. L. REV. 75, 78-79 (1948). See also 14 AM. JUR. 2D *Certiorari* § 1 (1964).

29. CAL. CIV. PROC. CODE § 1067 (West 1980).

30. *Id.* § 1068.

31. *Id.* § 1074; *People v. Cimarusti*, 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421, 425 (1978); 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 28.

32. Comment, *supra* note 28, at 78; see also Comment, *Extent to Which Availability of Ordinary Remedy Defeats Issuance of Writ of Prohibition*, 22 CALIF. L. REV. 537, 537-38 (1934).

33. CAL. CIV. PROC. CODE § 1102 (West 1980).

34. *Id.* § 1103.

35. 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 39.

36. See *Amos v. Superior Court*, 196 Cal. 677, 681, 239 P. 317, 319 (1925) (prohibition); *Sherer v. Superior Court*, 96 Cal. 653, 654, 31 P. 565, 565 (1892) (certiorari).

37. *Abelleira v. District Court of Appeal*, 117 Cal. 2d 280, 291, 109 P.2d 942, 948 (1941).

38. Goldberg, *supra* note 25, at 576.

39. Comment, *supra* note 28, at 79; 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 4.

40. CAL. CIV. PROC. CODE § 1084 (West 1980).

board, or person, to compel the performance of a ministerial duty or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled.⁴¹ Mandamus will issue in cases where petitioner has no other adequate remedy.⁴²

Mandamus can be used in a variety of situations where the respondent has a clear and present duty and where the petitioner has a right to the performance of that duty.⁴³ Mandamus will lie to compel ministerial acts by administrative agencies such as taxing officials⁴⁴ or local and state boards and officers,⁴⁵ and can be used to reinstate public officials or employees after wrongful dismissal.⁴⁶ The writ may also be used to compel acts by corporations,⁴⁷ labor unions,⁴⁸ and other non-governmental bodies.

Significantly, the use of mandamus against courts and court officers has been judicially and legislatively expanded. Mandamus will lie to compel a court to exercise its discretion in the first instance.⁴⁹ Although mandamus is said not to control discretion, the writ will lie to compel proper action by a court where the facts are undisputed and the court's discretion could be exercised in only one way.⁵⁰

Mandamus will thus lie where a court deprives a party of the opportunity to plead a cause of action or defense and where extraordinary relief may prevent a needless and expensive trial and reversal.⁵¹ Mandamus has also been used to protect the right to a trial or hearing,⁵² as well as rights incident to a trial or hearing,

41. *Id.* § 1085.

42. *Id.* § 1086.

43. 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 61.

44. *County of Sacramento v. Hickman*, 66 Cal. 2d 841, 845-46, 428 P.2d 593, 595-96, 59 Cal. Rptr. 609, 611-12 (1967); *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979).

45. *See, e.g.*, *Schmitz v. Younger*, 21 Cal. 3d 90, 577 P.2d 652, 145 Cal. Rptr. 517 (1978) (attorney general); *Holt v. Kelley*, 20 Cal. 3d 560, 574 P.2d 441, 143 Cal. Rptr. 625 (1978) (county sheriff); *People v. El Dorado*, 5 Cal. 3d 480, 491, 487 P.2d 1193, 1199, 96 Cal. Rptr. 553, 559 (1971) (county); *Metropolitan Water Dist. v. Marquardt*, 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rptr. 724 (1963) (secretary of water district); *San Bernardino Fire & Police Protective League v. City of San Bernardino*, 199 Cal. App. 2d 401, 18 Cal. Rptr. 757 (1962) (mayor and city council); *see also* 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* §§ 71-72.

46. *See, e.g.*, *Thornton v. Board of Trustees*, 262 Cal. App.2d 761, 763, 68 Cal. Rptr. 842, 843 (1968) (public school teacher); *Ball v. City Council*, 252 Cal. App. 2d 136, 60 Cal. Rptr. 139 (1967) (chief of police).

47. *See Fry v. Pekarovich*, 46 Cal. App. 3d 165, 171, 120 Cal. Rptr. 55, 59 (1975) (nonprofit corporation); *Diller v. Flynn*, 226 Cal. App. 2d 449, 452-54, 38 Cal. Rptr. 229, 232 (1964) (savings and loan association).

48. *See Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *Lundquist v. Marine Eng'rs Beneficial Ass'n*, 208 Cal. App. 2d 390, 25 Cal. Rptr. 250 (1950).

49. *Payne v. Superior Court*, 17 Cal. 3d 908, 925, 553 P.2d 565, 578, 132 Cal. Rptr. 405, 418 (1976).

50. *Comden v. Superior Court*, 20 Cal. 3d 906, 913, 576 P.2d 971, 974, 145 Cal. Rptr. 9, 12 (1978), *cert. denied*, 439 U.S. 981 (1978); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 669, 114 Cal. Rptr. 106, 109 (1974).

51. *Taylor v. Superior Court*, 24 Cal. 3d 890, 894, 598 P.2d 854, 855, 157 Cal. Rptr. 693, 695 (1979); *see, e.g.*, *Holtz v. Superior Court*, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970) (compelling trial court to reinstate stricken allegations); *Blegen v. Superior Court*, 125 Cal. App. 3d 959, 963, 178 Cal. Rptr. 470, 473 (1981) (same); *Vedder v. Superior Court*, 254 Cal. App. 2d 627, 628, 62 Cal. Rptr. 222, 223 (1967) (mandamus will compel allowance of pleading amendment in some cases); *Louie Queriolo Trucking, Inc. v. Superior Court*, 252 Cal. App. 2d 194, 60 Cal. Rptr. 389 (1967) (compelling trial court to permit filing of supplemental complaint); 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 86.

52. *Hamilton v. Superior Court*, 37 Cal. App. 3d 418, 421, 112 Cal. Rptr. 450, 453 (1974); *Elliot v.*

such as the right to representation by an attorney,⁵³ right to a jury trial,⁵⁴ and right to an unprejudiced judge.⁵⁵ It will issue to compel the trial court to facilitate discovery,⁵⁶ and can be used to prevent misuse of discovery procedure.⁵⁷ Mandamus may also be used to compel acts concerning entry and enforcement of a judgment.⁵⁸

The use of mandamus has also been expanded by legislative action. A superior court order granting or denying a motion for change of venue may now be reviewed by the court of appeal upon petition for writ of mandamus.⁵⁹ Mandamus may also be used to compel a court to quash service of summons on the ground of lack of personal jurisdiction, or to stay and dismiss an action on the ground of inconvenient forum.⁶⁰ In addition, the California administrative mandamus statute⁶¹ establishes a procedure for using mandamus (certiorari might have been a more apt label) to inquire into the validity of any final administrative order or decision.

Prior to 1966, the California Constitution granted to courts the power to issue writs of certiorari, prohibition, and mandamus.⁶² These provisions were held to prevent the legislature and the courts from enlarging the common law scope and nature of the writs.⁶³ The courts nevertheless "tacitly assumed something in the nature of a prerogative power to create new writs,"⁶⁴ especially in cases where one writ issued, giving effect to a different writ which could not lie under the circumstances.⁶⁵ This judicial trend toward loosening the restrictions on common law writs was accommodated in the 1966 constitutional revision, which gave the courts

Superior Court, 265 Cal. App. 2d 825, 831-32, 71 Cal. Rptr. 807, 811 (1968); *see, e.g.*, *Yoakum v. Small Claims Court*, 53 Cal. App. 3d 398, 403, 125 Cal. Rptr. 882, 885 (1974) (compelling small claims court to hear plaintiff's motion for relief from default); *see also* 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 88.

53. *See Meadow v. Superior Court*, 59 Cal. 2d 610, 617, 381 P.2d 648, 652, 30 Cal. Rptr. 824, 828 (1963) (compelling lower court to grant plaintiff's motion for substitution of attorneys); *Golden State Glass Corp. v. Superior Court*, 13 Cal. 2d 384, 90 P.2d 75 (1939) (compelling recognition of plaintiff's attorney); *Big Bear Mun. Water Dist. v. Superior Court* 269 Cal. App. 2d 919, 925, 75 Cal. Rptr. 580, 584 (1969) (reviewing order barring attorney from participation in case).

54. *Bryan v. Superior Court*, 74 Cal. App. 3d 648, 654, 141 Cal. Rptr. 604, 608 (1977).

55. *Pacific and Southwest Annual Conference of United Methodist Church v. Superior Court*, 82 Cal. App. 3d 72, 147 Cal. Rptr. 44 (1978).

56. *Coy v. Superior Court*, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393, (1962); *Morris Stulsaft Found. v. Superior Court*, 245 Cal. App. 2d 409, 54 Cal. Rptr. 12 (1966).

57. *See, e.g.*, *Henry Mayo Newhall Memorial Hosp. v. Superior Court*, 81 Cal. App. 3d 626, 146 Cal. Rptr. 542 (1978) (party improperly ordered to further answer interrogatories); *American Mut. Liab. Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974) (attorney-client and work product privilege claims).

58. 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* § 89.

59. CAL. CIV. PROC. CODE § 400 (West 1973).

60. *Id.* § 418.10(c).

61. *Id.* § 1094.5 (West Supp. 1984).

62. CAL. CONST. art. VI, §§ 4, 4b (West 1954) (repealed 1966).

63. *See Modern Barber Colleges, Inc. v. California Employment Stabilization Comm'n*, 31 Cal. 2d 720, 729-31; 192 P.2d 916, 921-22 (1948).

64. 5 B. WITKIN *supra* note 4, *Extraordinary Writs* § 191.

65. *See, e.g.*, *Greene v. Superior Court*, 55 Cal. 2d 403, 359 P.2d 249, 10 Cal. Rptr. 817 (1961) (writ of prohibition annulling lower court's order); *Central Bank v. Superior Court*, 45 Cal. 2d 10, 285 P.2d 906 (1955) (writ of prohibition had effect of mandamus compelling lower court to transfer the case or try it as a civil action); *see also Kleps, Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285 (1950); 5 B. WITKIN, *supra* note 4, *Extraordinary Writs* §§ 191-208.

original jurisdiction in "proceedings for extraordinary relief *in the nature of* mandamus, certiorari, and prohibition."⁶⁶ The Constitutional Revision Commission deliberately broadened the constitutional language to encourage "a modernization of the procedure followed in connection with those extraordinary writs,"⁶⁷ intending to provide for a single form of extraordinary relief while precluding the development of new forms of review unrelated to the traditional common law writs.⁶⁸ In practice, courts and commentators continue to refer to a writ in a particular case by one of the traditional names; the constitutionally sanctioned and more accurate generic term "proceeding for extraordinary relief" has not gained currency.

IV

CURRENT WRIT PRACTICE

Judicial and legislative expansion of the extraordinary writs has produced an important *de facto* system of discretionary interlocutory review in California. The amount of writ traffic in the appellate courts is enormous, having nearly doubled in the past ten years. In 1970-71, 2,520 petitions for civil writs were filed in the Courts of Appeal and in 1980-81 those filings rose to 4,520; during the latter period, 4,466 civil appeals were filed.⁶⁹ During 1980-81 only 403 original proceedings for civil extraordinary relief were disposed of by written opinion;⁷⁰ thus, about nine out of ten applications were denied summarily in the exercise of discretion. What follows is a survey of some of the original proceedings disposed of in the appellate courts by written opinion in 1981-82. The survey reveals a striking variety of uses for the extraordinary writs as a means for discretionary interlocutory review of trial court action.

A. Injunction

Appeal may be taken from an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.⁷¹ Despite the presumed adequacy of the appellate remedy,⁷² mandamus was often used in 1981-82 to direct trial courts to vacate orders denying preliminary injunctions.⁷³ In one case, mandamus issued to require the superior court to vacate its judgment permanently enjoining the implementation of a newly enacted statute.⁷⁴ In another case, mandamus was used to require a trial court to vacate its order denying an application to reinstate

66. CAL. CONST. art. VI, § 10 (West Supp. 1983) (adopted 1966) (emphasis added).

67. 1967 JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 75.

68. CALIFORNIA CONSTITUTIONAL REVISION COMMISSION, PROPOSED REVISION 90 (1966).

69. 1982 JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 51, 55.

70. Data collected by the Administrative Office of the California Courts (unpublished).

71. CAL. CIV. PROC. CODE § 904.1(f) (West Supp. 1984).

72. See 5 B. WITKIN *supra* note 4, *Extraordinary Writs* § 47.

73. See, e.g., *American Booksellers Ass'n v. Superior Court*, 129 Cal. App. 3d 197, 181 Cal. Rptr. 33 (1982) (requiring trial court to enter orders granting preliminary injunctions); *Bertuccio v. Superior Court*, 118 Cal. App. 3d 363, 173 Cal. Rptr. 411 (1981); see also *Dawn Inv. Co. v. Superior Court*, 30 Cal. 3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982) (writ denied).

74. *Brown v. Superior Court*, 32 Cal. 3d 705, 653 P.2d 312, 187 Cal. Rptr. 21, *modified* 33 Cal. 3d 242, 655 P.2d 1260, 188 Cal. Rptr. 425 (1982).

a preliminary injunction that had been dissolved by a judgment of dismissal.⁷⁵

Similarly, although orders granting or dissolving temporary restraining orders or refusing to grant or dissolve such orders are directly appealable,⁷⁶ mandamus was used in 1982 to order a trial court to vacate a temporary restraining order.⁷⁷

B. Pleading

Despite judicial pronouncements that extraordinary relief at the pleading stage is "rarely" granted,⁷⁸ the broad expansion of mandamus to review abuse of discretion is reflected in decisions granting the writ to compel a lower court to allow an amendment or accept an amended complaint.⁷⁹ Several such decisions appeared in 1981-82.⁸⁰ Mandamus was also issued frequently to compel a trial court to vacate its order granting a motion to strike a pleading.⁸¹

Mandamus is now often used to require trial courts to vacate orders overruling demurrers and to enter new orders sustaining demurrers.⁸² Recently it has been used to compel a lower court to set aside an order sustaining a general demurrer and to overrule the demurrer as to some causes of action.⁸³

C. Discovery

Although orders granting or withholding discovery are reviewable on appeal from the final judgment,⁸⁴ appeal from such orders is usually considered to be an inadequate remedy; mandamus and prohibition are now "the proper remedies to review discovery rulings."⁸⁵ Hence there were many 1981-82 decisions in which the appellate courts, in the exercise of their discretion, issued writs to prevent enforcement of trial court orders compelling answers to interrogatories,⁸⁶ requiring

75. *City of Oakland v. Superior Court*, 136 Cal. App. 3d 565, 186 Cal. Rptr. 326 (1982).

76. 2 B. WITKIN, *supra* note 4, *Provisional Remedies* § 106.

77. *Brown v. Superior Court*, 137 Cal. App. 3d 778, 187 Cal. Rptr. 324 (1982).

78. *Taylor v. Superior Court*, 24 Cal. 3d 890, 894, 598 P.2d 854, 855, 157 Cal. Rptr. 693, 695 (1979).

79. 3 B. WITKIN, *supra* note 4, *Pleading* § 1043.

80. *E.g.*, *Peterson v. Superior Court*, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982) (en banc) (amended complaint); *Johnson v. Superior Court*, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (1981) (amendment); *Hirsa v. Superior Court*, 118 Cal. App. 3d 486, 173 Cal. Rptr. 418 (1981) (amendment).

81. *E.g.*, *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 179 Cal. Rptr. 342 (1981) (order striking certain requested remedies from complaint); *Blegen v. Superior Court*, 125 Cal. App. 3d 959, 178 Cal. Rptr. 470 (1981) (order striking claim for punitive damages); *Mediterranean Exports, Inc. v. Superior Court*, 119 Cal. App. 3d 605, 174 Cal. Rptr. 169 (1981) (order striking defendant's answer and cross-complaint); *Perkins v. Superior Court*, 117 Cal. App. 3d 1, 172 Cal. Rptr. 427 (1981) (order striking certain allegations from complaint). *Compare* *Commodore Home Systems, Inc. v. Superior Court*, 124 Cal. App. 3d 756, 177 Cal. Rptr. 526 (1981), *aff'd* 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982) (mandate to compel trial court to grant a motion to strike prayers for punitive damages denied).

82. *See, e.g.*, *Okun v. Superior Court*, 29 Cal. 3d 442, 629 P.2d 1369, 175 Cal. Rptr. 157, *cert. denied*, 454 U.S. 1099 (1981).

83. *E.g.*, *DeLancie v. Superior Court*, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982); *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (1981), *cert. denied*, 455 U.S. 943 (1982).

84. B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* § 1047, at 956 (2d ed. 1966).

85. *Freidberg v. Freidberg*, 9 Cal. App. 3d 754, 764, 88 Cal. Rptr. 451, 457 (1970).

86. *E.g.*, *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 236, 186 Cal. Rptr. 876 (1982) (mandamus); *Smith v. Superior Court*, 118 Cal. App. 3d 136, 173 Cal. Rptr. 145 (1981) (prohibition).

answers to questions at depositions,⁸⁷ and ordering the production of documents.⁸⁸ Mandamus is often used to compel the lower court to issue or quash a subpoena or subpoena duces tecum.⁸⁹ The writ was also used in 1981-82 to require the trial court to vacate protective orders which prevented discovery,⁹⁰ and to grant such protective orders.⁹¹

D. Other Orders

The decisions surveyed indicate that extraordinary relief is available to review a wide variety of other interlocutory orders. For example, although an order granting or denying a motion to disqualify an adversary's attorney is directly appealable,⁹² mandamus was used in 1981-82 to compel lower courts to vacate such orders.⁹³ Mandamus was also frequently used to review orders denying a motion to disqualify the trial judge,⁹⁴ and to compel the setting aside of mistrial orders.⁹⁵

Although orders denying certification of a class action have been held to be directly appealable,⁹⁶ a 1982 case treated a plaintiff's appeal from such an order as a petition for mandamus, and granted the writ to compel the trial court to enter an order granting class certification.⁹⁷ A writ was used in 1981-82 to compel a trial

87. *E.g.*, *Dickerson v. Superior Court*, 135 Cal. App. 3d 93, 185 Cal. Rptr. 97 (1982); *City of San Diego v. Superior Court*, 136 Cal. App. 3d 236, 186 Cal. Rptr. 112 (1981) (prohibition).

88. *E.g.*, *City & County of San Francisco v. Superior Court*, 130 Cal. App. 3d 481, 181 Cal. Rptr. 775 (1982); *Rifkind v. Superior Court*, 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82 (1981).

89. *E.g.*, *Hand v. Superior Court*, 134 Cal. App. 3d 436, 184 Cal. Rptr. 588 (1982) (trial court directed to vacate its order denying motion for issuance of subpoena compelling attendance of plaintiff's spouse at deposition and to enter an order issuing subpoena); *Simek v. Superior Court*, 117 Cal. App. 3d 169, 172 Cal. Rptr. 564 (1981) (trial court directed to vacate its order issuing subpoenas duces tecum and to enter an order quashing service of subpoenas).

90. *E.g.*, *Fremont Indem. Co. v. Superior Court*, 137 Cal. App. 3d 554, 187 Cal. Rptr. 137 (1982) (protective order preventing defendant from taking plaintiff's deposition); *Meritplan Ins. Co. v. Superior Court*, 124 Cal. App. 3d 237, 177 Cal. Rptr. 236 (1981) (protective order preventing depositions and subpoenaing of records).

91. *E.g.*, *County of Sacramento v. Superior Court*, 137 Cal. App. 3d 448, 187 Cal. Rptr. 154 (1982); *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982).

92. *See Jacuzzi v. Jacuzzi Bros.*, 218 Cal. App. 2d 24, 32 Cal. Rptr. 188 (1963).

93. *E.g.*, *Lyle v. Superior Court*, 122 Cal. App. 3d 470, 175 Cal. Rptr. 918 (1981) (vacating order to disqualify); *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 175 Cal. Rptr. 575 (1981) (same); *see also Valley Title Co. v. Superior Court*, 124 Cal. App. 3d 867, 177 Cal. Rptr. 643 (1981) (denial of mandate by which plaintiff sought to challenge disqualification of plaintiff's attorney).

94. *E.g.*, *Retes v. Superior Court*, 122 Cal. App. 3d 799, 176 Cal. Rptr. 160 (1981); *see also Penthouse Int'l., Ltd. v. Superior Court*, 137 Cal. App. 3d 975, 187 Cal. Rptr. 535 (1982) (mandate issued compelling court to vacate order striking motion to disqualify as insufficient and untimely); *People ex rel. Air Resources Bd. v. Superior Court*, 125 Cal. App. 3d 10, 177 Cal. Rptr. 816 (1981) (requiring trial court to vacate all orders made subsequent to referral of petition for disqualification to Judicial Council Chairperson); *Brown v. Superior Court*, 124 Cal. App. 3d 1059, 177 Cal. Rptr. 756 (1981) (requiring trial court to vacate order made after disqualification).

95. *Juarez v. Superior Court*, 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982); *Phelps v. Superior Court*, 136 Cal. App. 3d 802, 186 Cal. Rptr. 626 (1982).

96. *See, e.g.*, *Daar v. Yellow Cab Co.*, 67 Cal. 2d 895, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

97. *Rosack v. Volvo of America Corp.*, 131 Cal. App. 3d 741, 182 Cal. Rptr. 800 (1982) *cert. denied*, 460 U.S. 1012, 103 S. Ct. 1253 (1983) (holding such orders to be appealable only where the entire action is disposed of thereby); *see also California Employment Dev. Dep't v. Superior Court*, 30 Cal. 3d 256, 636 P.2d 575, 178 Cal. Rptr. 612 (1981) (denial of petition for mandate by which defendant sought to compel trial court to vacate class certification order).

court to vacate orders compelling arbitration,⁹⁸ and to direct a trial court to set aside its order vacating an arbitrator's award,⁹⁹ even though such an order is made appealable by statute.¹⁰⁰

E. Summary Judgment

An order denying summary judgment is ordinarily reviewable only on appeal from the final judgment,¹⁰¹ yet mandamus was granted in many 1981-82 decisions to require courts to vacate such orders.¹⁰² And orders granting partial summary judgment, the propriety of which may nominally be reviewed only on appeal from the final judgment,¹⁰³ were reviewed in 1981-82 on petition for extraordinary relief.¹⁰⁴

V

CONCLUSION

Interlocutory orders are ordinarily not appealable,¹⁰⁵ and "the courts cannot, or at least should not, through the guise of interpretation make an order appealable that the Legislature intended and provided should not be appealable."¹⁰⁶ Yet by expanding the concepts of excess of jurisdiction and abuse of discretion, the courts have used the extraordinary writs to review any number of interlocutory orders. And although mandamus is said not to be available as a substitute for an appeal,¹⁰⁷ the recent decisions have allowed extraordinary relief even where the offending orders are directly appealable. This development is anomalous in theory, but appears to be healthy; it promotes substantial justice when, in the discretion of the appellate court, immediate intervention is a practical necessity. Because the remedy is discretionary on the part of appellate courts having strong motives to avoid unnecessarily increasing their caseloads, the remedy will be used

98. *Hope v. Superior Court*, 122 Cal. App. 3d 147, 175 Cal. Rptr. 851 (1981), *cert. denied*, 456 U.S. 910 (1982); *see also Keating v. Superior Court*, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (denial of mandate).

99. *San Jose Fed'n of Adult Educ. Teachers v. Superior Court*, 132 Cal. App. 3d 861, 183 Cal. Rptr. 410 (1982); *see also Helzel v. Superior Court*, 123 Cal. App. 3d 652, 176 Cal. Rptr. 740 (1981) (mandate compelling trial court to vacate order deferring proceedings on petition to compel arbitration); *Dinong v. Superior Court*, 120 Cal. App. 3d 300, 174 Cal. Rptr. 590 (1981) (mandate directing trial court to vacate order disqualifying arbitrators).

100. CAL. CIV. PROC. CODE § 1294(c) (West 1982).

101. 4 B. WITKIN, *supra* note 4, *Proceedings Without Trial* § 195.

102. *See, e.g., Sartor v. Superior Court*, 136 Cal. App. 3d 322, 187 Cal. Rptr. 247 (1982); *City of Sacramento v. Superior Court*, 131 Cal. App. 3d 395, 182 Cal. Rptr. 443 (1982); *Baker v. Superior Court*, 129 Cal. App. 3d 710, 181 Cal. Rptr. 311 (1982).

103. *Swaffield v. Universal Ecsco Corp.*, 271 Cal. App. 2d 147, 173-74, 76 Cal. Rptr. 680, 696-97 (1969).

104. *State v. Superior Court*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865, (1981); *State v. Superior Court* 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865, (1981); *see also Burke v. Superior Court*, 128 Cal. App. 3d 661, 180 Cal. Rptr. 537 (1982) (petition denied); *LaRosa v. Superior Court*, 122 Cal. App. 3d 741, 176 Cal. Rptr. 224 (1981) (same).

105. *Rebco Dev., Inc. v. Superior Court*, 67 Cal. App. 3d 13, 16, 136 Cal. Rptr. 351, 352 (1977).

106. *Efron v. Ralmonovitz*, 185 Cal. App. 2d 149, 157, 8 Cal. Rptr. 107, 112 (1960); *see also Comment, The One Final Judgment Rule—A Fundamental Principle of Appellate Practice in California*, 15 HASTINGS L.J. 93, 103 (1963).

107. *Conway v. Municipal Court*, 107 Cal. App. 3d 1009, 1015, 166 Cal. Rptr. 246, 249 (1980).

sparingly.¹⁰⁸ The open-ended wholly discretionary character of the remedy appears to have some advantages over the three-gaited scheme of review presented in the "Restatement."¹⁰⁹

At the same time, continued use of traditional prerogative writs in the appellate courts of California, absent statutory recognition of the extent to which they are being used for interlocutory review, is deceptive to the unsophisticated practitioner and may hinder the articulation of standards guiding the exercise of discretion by the appellate courts. In this regard, the "special action" practice that has been developed in Arizona appears to have important advantages.¹¹⁰

108. *See supra* text accompanying notes 69-70.

109. *See supra* p. 1.

110. *See Kleinschmidt, supra* note 1.

