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STATE COURT INJUNCTIONS AND THEIR ENFORCEMENT IN ENVIRONMENTAL LITIGATION

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The remedies available for the restraint or redress of environmental injury are direct correlatives of our deeply rooted heritage of property rights. Equity has long sanctioned appropriate applications of injunctive relief and just compensation has hallmarked our jurisprudence long before its constitutional inscription. Where the exercise of traditionally regarded rights comes into conflict with rights of equal rank or with values which have by comparison evolved only recently to the stature of a property right, the courses of action available to rectify the conflict are rarely clear-cut and often inadequate. The past decade has witnessed the adoption of extensive administrative apparatus to assist the judiciary in the increasingly technical field of environmental regulation and public policy determination. But the wheels of administrative justice may move too slowly, insufficiently or not at all to suit the needs of injured parties, and thus the courts remain the last resort for both public and private litigants. Greater understanding of traditional prerequisites together with an appreciation for both the advantages and the limitations of the injunction and its enforcement may well enhance the scope and effectiveness of environmental litigation.

INJUNCTIONS

Traditional Requirements

Courts have generally regarded the injunction as one of the harshest remedies available to a court of equity. The time-honored reluctance of the judiciary to restrict the exercise of one property right in favor of another has led to the creation of a number of frequently impenetrable barriers to the award of injunctive relief.

Adequacy and Availability of the Remedy. While it is commonly understood that an injunction is unavailable where there exists an adequate remedy at law, the mere existence of a legal remedy is not alone determinative since the legal remedy must be as complete, practical and efficient to the ends of justice and its prompt adminis-

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tration as the equitable relief which would otherwise be afforded.[1] The adequacy of the remedy available at law must usually be considered on a case-by-case basis since it is dependent upon the particular circumstances at hand and the result sought to be achieved by the injunctive decree.

Where public officials are authorized by specific legislation to seek injunctive relief for violations or threatened violations of statutory or regulatory standards,[2] the injunction sought is the available remedy at law and the common-law prerequisite is avoided.[3] Private plaintiffs, however, are not afforded standing under such legislation in Texas and consequently must confront this cardinal principle of equity even where the statutory violation constitutes the proximate or direct cause of the injury complained of.[4]

Although Texas' environmental legislation has not conferred standing upon private litigants to enjoin violations of statutory standards, article 4642 authorizes an injunction "[w]here the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him."[5] Where this broad statutory standard is met, one need not allege and prove that the remedy at law is inadequate.[6] Although usually stated as a separate consideration, it is often the very character of the injury threatened that alone determines the adequacy and availability of the remedy at law.

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1. West v. Humble Oil & Ref. Co., 496 S.W.2d 212, 215 (Tex. Civ. App.—Waco 1973), *rev'd on other grounds*, 508 S.W.2d 812 (Tex. 1974); Long v. Castaneda,475 S.W.2d 578, 582 (Tex. Civ. App.—Corpus Christi 1971, writ ref'd n.r.e.); Baucum v. Texam Oil Corp., 423 S.W.2d 434, 442 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); Southwestern Chem. & Gas Corp. v. Southeastern Pipe Line Co., 369 S.W.2d 489, 494 (Tex. Civ. App.—Houston 1963, no writ).

2. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02(a) (Vernon 1976); TEX. WATER CODE ANN. § 26.123 (Vernon Supp. 1978).

3. *See, e.g.*, Gulf Holding Corp. v. Brazoria County, 497 S.W.2d 614, 619 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Ralph Williams Gulfgate Chrysler Plymouth, Inc. v. State, 466 S.W.2d 639, 642 (Tex. Civ. App.--Houston [14th Dist.] 1971, writ ref'd n.r.e.); City of Corpus Christi v. Lone Star Fish & Oyster Co., 335 S.W.2d 621, 623 (Tex. Civ. App.—San Antonio 1960, no writ).

4. Garland Grain Co. v. D-C Home Owners Improvement Ass'n, 393 S.W.2d 635, 640 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.) (state agency must be made a party if private person is to have standing to sue for public nuisance); City of Weslaco v. Turner, 237 S.W.2d 635, 644-45 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.) (state agency must be made a party).

5. TEX. REV. CIV. STAT. ANN. art. 4642, § 1 (Vernon 1952).

6. Furr v. Hall, 553 S.W.2d 666, 672 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); Republic Ins. Co. v. O'Donnell Motor Co., 289 S.W. 1064, 1066 (Tex. Civ. App.—Dallas 1926, no writ).

Character of the Injury. Article 4642 additionally provides for the issuance of an injunction where irreparable injury is threatened to real or personal property, irrespective of any remedy at law.[7] Since it has been held that an injunction will not issue where the threatened harm may be recompensed in damages,[8] the irreparable injury requirement may be merely a restatement of the unavailable or inadequate remedy at law principle. In drafting the petition, particular attention should be directed to the character of the injury threatened as well as the inadequate nature of the remedy afforded at law since the mere assertion that a private plaintiff has no available adequate remedy is subject to special exception as a mere conclusion lacking supportive factual allegations.[9]

Where the harm threatened is compensable, yet the damages cannot be measured by a definite, certain and usual pecuniary standard, an injunction is within the exercise of the court's discretion.[10] Nonetheless, if the legal remedy is determined to be adequate upon appellate review, the trial court will be deemed to have abused its discretion in granting the injunction.[11]

When the injury threatened is of a continuing or recurring nature, such as the constant trespass of stream-born pollutants onto plaintiffs' property, the litigant may be able to overcome the irreparable injury requirement, even though the injury may be compensable, in order to avoid a multiplicity of suits.[12] While prevention of a multiplicity of suits is an objective of equity usually aimed at restraining the prosecution of numerous malicious or vexatious suits,[13] the remedy has been held to be available for the restraint of the offending act where the only legal remedy afforded is the continuation of the

7. TEX. REV. CIV. STAT. ANN. art. 4642, § 4 (Vernon 1952).

8. Hancock v. Bradshaw, 350 S.W.2d 955, 957 (Tex. Civ. App.—Amarillo 1961, no writ); Spradley v. Whitehall, 314 S.W.2d 615, 618 (Tex. Civ. App.—Fort Worth 1958, no writ).

9. Hunt v. Merchandise Mart, Inc., 391 S.W.2d 141, 143 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

10. Southwestern Chem. & Gas Corp. v. Southeastern Pipe Line Co., 369 S.W.2d 489, 494 (Tex. Civ. App.—Houston 1963, no writ); Wilson v. Whitaker, 353 S.W.2d 945, 947 (Tex. Civ. App.—Houston 1962, no writ).

11. *E.g.*, R.E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472, 474 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); Winslow v. Duval County Ranch Co., 519 S.W.2d 217, 224 n.11 (Tex. Civ. App.—Beaumont 1975, no writ); Hancock v. Bradshaw, 350 S.W.2d 955, 957 (Tex. Civ. App.—Amarillo 1961, no writ).

12. *See* Barr v. Thompson, 350 S.W.2d 36, 41-42 (Tex. Civ. App.—Dallas 1961, no writ); *cf.* Ellen v. City of Bryan, 410 S.W.2d 463, 465 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.); Lamb v. Kinslow, 256 S.W.2d 903, 905 (Tex. Civ. App.—Waco 1953, writ ref'd n.r.e.).

13. *See* Barr v. Thompson, 350 S.W.2d 36, 41-42 (Tex. Civ. App.—Dallas 1961, no writ); 31 TEX. JUR. 2d *Injunctions* §§ 57, 58 (1962).

offense coupled with the filing of a series of suits for compensation within each of the forthcoming limitation periods.[14]

Where an injury is characterized as temporary or transient, so as to require suits for compensation every two years in accordance with the statute of limitations,[15] such biennial litigation hardly constitutes as complete, practical, efficient or prompt a remedy as an injunction issued in equity. While the distinction between permanent and transient injury has been declared obsolete by one Texas court,[16] the doctrine underlying the distinction would have the statute of limitations bar compensatory recovery for damages attributable to a permanent injury where suit was filed more than two years subsequent to the event complained of. While the bar to recovery in such instances where harm is of a continuous and recurring nature works harsh results, an injunction may lie since the litigant no longer has a remedy at law. Additionally, where the injury is continuous or so frequently recurring that it takes on a permanent, ever-increasing character, the legal remedy is inadequate if a jury cannot fix a time when the wrong may be said to be complete.[17]

Imminence of the Harm and the Effect of a Completed Act. As a general rule, acts and practices discontinued or abandoned prior to the institution of a suit brought to restrain such practices do not furnish a basis for injunctive relief.[18] Yet where the proof shows that the activity complained of would support the relief requested and has been a settled course of conduct by the defendant continuing to or near the time of trial, courts can assume that the conduct will continue, absent clear proof to the contrary, and issue the injunc-

14. *See* Woody v. Durham, 267 S.W.2d 219, 221 (Tex. Civ. App.—Fort Worth 1954, writ ref'd); City of Wichita Falls v. Bruner, 191 S.W.2d 912, 920 (Tex. Civ. App.—Fort Worth 1945, no writ).

15. *See* Baker v. City of Fort Worth, 146 Tex. 600, 602, 210 S.W.2d 564, 566 (1948); International & G.N.R.R. v. Kyle, 101 S.W. 272, 272 (Tex. Civ. App. 1907, no writ). TEX. REV. CIV. STAT. ANN. art. 5526, § 1 (1958) provides that all actions for injury done to the estate or property of another shall be "commenced and prosecuted within two years after the cause of action shall have accrued."

16. *See* Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 317 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975).

17. Hastings Oil Co. v. Texas Co., 149 Tex. 416, 431, 234 S.W.2d 389, 398 (1950); Speedman Oil Co. v. Duval County Ranch Co., 504 S.W.2d 923, 929 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

18. Corpus Christi Classroom Teachers Ass'n v. Corpus Christi Independent School Dist., 535 S.W.2d 429, 432 (Tex. Civ. App.—Corpus Christi 1976, no writ); Panola County Comm'rs Court v. Bagley, 380 S.W.2d 878, 884 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.); Davis v. Upshur County, 191 S.W.2d 524, 525 (Tex. Civ. App.—Texarkana 1945, no writ).

tion.[19] Where a defendant is shown to have settled into a continuing practice violative of statutory law, courts will not assume that the practice has been abandoned without clear proof. As the United States Supreme Court has noted, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit and there is probability of resumption."[20]

In *Alamo Title Co. v. San Antonio Bar Association,*[21] an unauthorized practice of law case, an injunction was authorized notwithstanding the defendant's incapacity and retirement, his declared resolve to abandon former practices, his trial announcement of his renunciation of such conduct, his assurance of nonresumption, his intention to refrain, and his alteration of plans. Indeed, the court held that the issuance of an injunction in such circumstances was within the sound discretion of the trial court.[22]

Balancing the Equities and the Effect of Statutory Standards. Although the plaintiff has proved irreparable injury and lack of an adequate remedy at law, an injunction may still be denied where it is reasonably clear that the party seeking relief will suffer substantially fewer damages by refusal of the writ than the restrained party and the public at large would suffer should the relief be granted.[23] The most frequently cited case for the "balancing of equities" doctrine, *Storey v. Central Hide & Rendering Co.,*[24] established the principle that where a jury finds facts constituting a nuisance, there should be a balancing of equities in order to determine if an injunction should be granted.[25] The supreme court provided guidelines for trial courts to follow in making such determinations by quoting extensively from the Nuisance section of Texas Jurisprudence:[26]

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19. Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 827 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); *see* Texas Employment Comm'n v. Martinez, 545 S.W.2d 876, 877-78 (Tex. Civ. App.—El Paso 1976, no writ).

20. United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952); *accord,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132 (1969); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228 (5th Cir. 1971).

21. 360 S.W.2d 814 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

22. *Id.* at 817. *See also* Davies v. Unauthorized Practices Comm., 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

23. Nueces County Drainage & Conservation Dist. No. 2 v. Bevly, 519 S.W.2d 938, 947 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

24. 148 Tex. 509, 226 S.W.2d 615 (1950).

25. *Id.* at 514, 226 S.W.2d at 618.

26. These provisions of Texas Jurisprudence are no longer found in the sections cited by the Storey court. *Compare* 31 TEX. JUR. *Nuisances* § 35 (1934) *with* 41 TEX. JUR. 2d *Nuisances* § 68 (1963).

> According to the doctrine of 'comparative injury' or 'balancing of equities' the court will consider the injury which may result to the defendant and the public by granting the injunction as well as the injury to be sustained by the complainant if the writ be denied. If the court finds that the injury to the complainant is slight in comparison to the injury caused the defendant and the public by enjoining the nuisance, relief will ordinarily be refused.
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> Someone must suffer these inconveniences rather than that the public interest should suffer . . . These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments . . . .
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> On the other hand an injunction may issue where the injury to the opposing party and the public is slight or disproportionate to the injury suffered by the complainant.[27]

To date, the most comprehensive scrutiny of the cases applying the doctrine of comparative injury or balancing of equities is found in *Estancias Dallas Corp. v. Schultz*.[28] In reviewing the award of injunctive relief to restrain the emission of excessive noise from an apartment complex's air conditioning equipment, the *Estancias* court noted *Storey*'s reliance on the public injury. Likewise, the court noted that in the many decisions reviewed, each appellate court referred to the benefit of the public generally in permitting a nuisance to continue through the balancing of equities. In finding little or no evidence reflecting a benefit conferred upon the public by defendant's apartment complex, the *Estancias* court upheld the injunction.[29]

While balancing the private/public equities is appropriate in traditional common law suits brought to enjoin private nuisances, evidence which balances the equities in a statutory cause of action for injunction is irrelevant. In the recent case of *Texas Pet Foods, Inc. v. State*,[30] the court's holding is unequivocal:

> The defendant stands charged with violations of state statutes. The same statutes which condemn the activity charged against the defen-

27. Storey v. Central Hide & Rendering Co., 148 Tex. 509, 514-15, 226 S.W.2d 615, 618-19 (1950).

28. 500 S.W.2d 217 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

29. *Id.* at 221.

30. 529 S.W.2d 820 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

> dant also provide for its prohibition by injunction. Under these circumstances, if a continuing violation of the statute is established the rule for the balancing of equities has no application.[31]

The extent to which a private plaintiff may defeat the traditional application of balancing the equities in his quest for the abatement of an injury proximately caused by a violation of statutory or regulatory requirements has been inadequately considered by Texas courts. In *Garland Grain Co. v. D-C Home Owners Improvement Association*[32] plaintiffs sought to enjoin the pollution of a creek solely on the grounds that the pollution constituted a public nuisance.[33] In overturning the injunction awarded by the trial court, the Tyler Court of Civil Appeals remarked:

> The state is not a party to this suit. Even though the pollution of a public stream is made unlawful by the provisions of Article 7621d, Vernon's Ann. Tex. Civ. St., the duty of prohibiting pollution of public waters is vested exclusively in the state. . . . The rights of the general public are not involved unless the state — the custodian of those rights — is made a party to the suit. Absent such a view of the statute, the public policy of our state on such vital matters could be thwarted, without the state having had an opportunity to have its side of the controversy presented in a court of justice.[34]

However, the specific difficulty in *Garland Grain Co.* was plaintiffs' inability to show injury proximately caused by the wrongful conduct. In virtually the same breath that the court announced the above policy, it somewhat incongruously declared:

> As in all other suits, the plaintiff in an injunction suit has the burden of proving not only the wrongful conduct, but also that the injury complained of was proximately caused by such wrongful conduct. . . .
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> . . . *Though a nuisance may be public it furnishes an individual no right of action, unless he has in some way been actually injured or will suffer such an injury by its maintenance.* No one can consti-

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31. *Id.* at 830. *See also* City of Galveston v. State, 518 S.W.2d 413, 419 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Langford v. Kraft, 498 S.W.2d 42, 48 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); Gulf Holding Corp. v. Brazoria County, 497 S.W.2d 614, 619 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Houston Compressed Steel Corp. v. State, 456 S.W.2d 768, 773 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ); Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1954, no writ).

32. 393 S.W.2d 635 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

33. *See id.* at 639-40.

34. *Id.* at 639-40.

> tute himself a guardian of the public and maintain an action for public nuisance which does not sensibly injure him or his property, although he be a member of the community where such nuisance exists.[35]

Although plaintiffs' failure to show personal injury resulting from the statutory violation prevented their having standing to seek injunctive relief, it seems likely that such a policy will not bar other litigant's recovery where the evidence of harm is more convincing. Where the state, through legislative enactment or the regulatory efforts of duly empowered administrative agencies, has prohibited certain activities detrimental to public rights and sensibilities, the prohibited activity should be considered a nuisance per se. A private litigant who can demonstrate private injury and who seeks to abate such a nuisance ought to be able to utilize the statutory or regulatory proscription to collaterally estop his defendant from balancing the equities in favor of the proscribed conduct, since such concerns were or should have been considered in the adoption of the statutory or regulatory prohibition. Allowing a prohibited activity to continue unabated defeats the legislative purpose underlying the prohibition and substitutes the wisdom and discretion of the courts for that of the legislature.

"There simply are no equities in behalf of anyone who is polluting public waters" in violation of state law,[36] or in behalf of anyone violating any other statutory or regulatory requirement. Balancing the equities accordingly should not be applicable to the determination of whether an injunction should issue to restrain statutorily prohibited conduct, irrespective of the public or private status of the party seeking the relief.[37] Where the legislature prohibits certain activities as detrimental to the public welfare, any equities in favor of the offending activity have already been balanced. To the extent that the judiciary allows the offending activity to continue unabated, the equities have been "juggled," not "balanced." The prin-

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35. *Id.* at 639-40 (emphasis added).

36. Magnolia Petroleum Co. v. State, 218 S.W.2d 855, 860 (Tex. Civ. App.—Austin 1949, writ ref'd n.r.e.); *see* Continental Oil Co. v. City of Groesbeck, 95 S.W.2d 714, 715 (Tex. Civ. App.—Waco 1936, writ dism'd). Both of these cases rested their conclusions on a statute, repealed in 1961, which made it unlawful to pollute a public body of water used for domestic purposes. 1923 Tex. Gen. Laws, ch. 85, § 1, at 177.

37. *See, e.g.*, Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 831 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); City of Galveston v. State, 518 S.W.2d 413, 419 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); Red Lake Fishing & Hunting Club v. Burleson, 219 S.W.2d 115, 119 (Tex. Civ. App.—Waco 1949, writ ref'd).

ciple that he who seeks equity must have "clean hands" is entirely ignored where a statutory violator is permitted to defeat a prayer for injunction on the ground that the public will suffer if the law is obeyed.

Sufficiency of the Pleadings and Injunctive Decree. Legislative enactments authorizing the issuance of an injunction to restrain violations of statutory law are generally designed to protect property rights and the rights of the community at large and are thus often referred to as public interest statutes — designed to protect the public health and welfare. It is therefore generally recognized that "[w]here a statute gives the remedy of injunction under certain circumstances, the court will grant an injunction without reading into the statute any unexpressed limitations upon equitable relief."[38] In such circumstances, "the demand for relief is not determinative of the right to relief or the character or extent thereof."[39] It is also recognized that any complainant may obtain under his general prayer the injunctive relief to which he is entitled upon the facts stated in the complaint, even though it is asked upon a different theory of law than that upon which a special prayer for relief is based.[40]

Pollution control, a subject which is fairly new to the law and yet becoming increasingly more important to the public welfare, by its very nature defies the establishment of precise standards. Involving a highly specialized science and covering an exceedingly broad spectrum, it is often complex and not easily reduced to simple stratagems for uniform yet effective application. Realizing this, the Texas Legislature, in the interest of health and the enjoyment of life and property, has acted on several occasions to prohibit or control a variety of environmentally destructive activities by vesting courts with the injunctive authority required to compel compliance with the public health and pollution control measures set out by agency rules and statutes.[41]

Accordingly, courts are empowered to compel polluters to take such steps as are necessary to alleviate or abate polluted conditions resulting from their activities.[42] Such relief as is necessary to accom-

38. 42 AM. JUR. 2d *Injunctions* § 159 (1969).

39. *Id.* § 275.

40. Lockhart v. Leeds, 195 U.S. 427, 436-37 (1904).

41. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02(a) (Vernon 1976), art. 4477-7, § 8(c) (Vernon Supp. 1978), art. 4664 (Vernon Supp. 1978); TEX. WATER CODE ANN. § 26.123(a) (Vernon Supp. 1978).

42. *See* Rhodia, Inc. v. Harris County, 470 S.W.2d 415, 421 (Tex. Civ. App.—Houston

plish the goals of the public health and welfare statutes and the objectives of the application for writ of injunction, when within the jurisdiction of the court, may be granted without a special or precisely particularized prayer therefor.[43] *Davies v. Unauthorized Practice Committee*[44] recognized that where suit is brought to protect the public interest and prevent unauthorized acts, it may well be impossible to set forth all possible unauthorized practices in the prayer for relief as well as in the injunctive decree.[45] Private plaintiffs should nonetheless take particular care in drafting their pleadings so that the petition on its face sets forth a prima facie case and satisfies the traditional requirements for the issuance of the writ.[46]

The Texas Rules of Civil Procedure require that every injunctive order set forth the specific reasons for its issuance, be specific in its terms, and describe in reasonable detail the act or acts sought to be restrained without reference to the complaint or other documents.[47] As noted by the Texas Supreme Court in *San Antonio Bar Association v. Guardian Abstract & Title Co.*,[48]

> The injunction must be in broad enough terms to prevent repetition of the evil sought to be stopped, whether the repetition be in form identical to that employed prior to the injunction or (what is far more likely) in somewhat different form calculated to circumvent the injunction as written. . . . Nor should it be greatly concerned with rights of the defendants that are asserted largely in the abstract. Otherwise it would probably take longer to write the decree than it would to try the case, and the injunction might well become unintelligible and self destructive.[49]

Thus, the injunction should be as specific and definite as the subject matter permits in order that no difficulty be presented in its understanding. Where the decree is drawn as definite, clear and precise as possible and, when practicable, provides reasonable notice to the defendant of the acts he is restrained from doing, the injunction will

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[1st Dist.] 1971, no writ).

43. *Id.* at 421 (subject to special exception).

44. 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

45. *See id.* at 594.

46. *See* Inman v. Padrezas, 540 S.W.2d 789, 796-97 (Tex. Civ. App.—Corpus Christi 1976, no writ).

47. TEX. R. CIV. P. 683; *see* Charter Medical Corp. v. Miller, 547 S.W.2d 77, 78 (Tex. Civ. App.—Dallas 1977, no writ).

48. 156 Tex. 7, 15, 291 S.W.2d 697, 702 (Tex. 1956).

49. *Id.* at 15, 291 S.W.2d at 702.

be upheld.[50] The procedural requirements of rule 683 are somewhat relaxed where the public interest is involved.[51] In such instances, any doubt is to be resolved in favor of the public and against the violator since the public interest, not the requirements of private litigation, measures the need for injunctive relief.[52]

Where reference to documents is deemed necessary, the documents should be attached to the injunctive order and incorporated within the decree so that the attachments become part of the order and make it complete within itself.[53] References to statutory or municipal ordinance requirements do not violate rule 683 where the order contains the reasons for the issuance of the injunction, describes in reasonable detail the acts to be enjoined and clearly identifies the persons bound by the order.[54] One should not refer to administrative regulations, however, without incorporation and attachment to the writ.

Use of the Temporary Injunction

The temporary injunction has long been considered a useful tool for preservation of the status quo until final determination of the merits of the case. The issuance or denial of a temporary injunction is generally recognized to be within the trial court's discretion, absent abuse of discretion or failure to apply the law correctly to undisputed facts.[55] In determining whether an abuse of discretion has occurred, all reasonable presumptions in support of the trial court's judgment serve as a guide to the appellate court.[56] The appellate court should not substitute its judgment for that of the trial

50. Villalobos v. Holguin, 146 Tex. 474, 477, 208 S.W.2d 871, 875 (1948); Davies v. Unauthorized Practice Comm., 431 S.W.2d 590, 594 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

51. Hughes v. Board of Trustees, 480 S.W.2d 289, 294-95 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

52. Davies v. Unauthorized Practice Comm., 431 S.W.2d 590, 595 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

53. Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 829 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

54. *See* Beene v. Bryant, 201 S.W.2d 268, 272 (Tex. Civ. App.—Amarillo 1947, no writ).

55. *E.g.*, Manning v. Wieser, 474 S.W.2d 448, 449 (Tex. 1971); Oil Field Haulers Ass'n v. Railroad Comm'n, 381 S.W.2d 183, 191-92 (Tex. 1964); Professional Beauty Prod., Inc. v. Schmid, 497 S.W.2d 597, 599 (Tex. Civ. App.—El Paso 1973, *aff'g & rev'g on rehearing*, 513 S.W.2d 236 (1974).

56. *See, e.g.*, Construction & Gen. Labor Union Local 688 v. Stephenson, 148 Tex. 434, 437-38, 225 S.W.2d 958, 960 (1950); International Union of Operating Eng'rs v. Cox, 148 Tex. 42, 44, 219 S.W.2d 787, 788-89 (1949); Brooks Gas Corp. v. Sinclair Oil & Gas Co., 408 S.W.2d 747, 752 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

court if, after embarking upon its own review of the evidence, it finds any evidence to support the trial court's order.[57] Moreover, plaintiff need not establish by a preponderance of the evidence that he would prevail on the merits at final trial in order to be entitled to the writ.[58]

Preservation of the Status Quo. The status quo to be preserved by a temporary injunction is "the last actual, peaceable, noncontested status which preceded the pending controversy."[59] Where the acts sought to be restrained constitute a violation of statutory or regulatory requirements, the status quo can be preserved only by an injunction against the violative conduct. As stated by one Texas appellate court,

> In an injunction case wherein the very acts sought to be enjoined are acts which prima facie constitute the violation of express law, the status quo to be preserved could never be a condition of affairs where the respondent would be permitted to continue the acts constituting the violation. In such instances, the status quo to be preserved by a temporary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy and when it is determined that the law is being violated it is the province and duty of the court to restrain it.[60]

Once statutory or regulatory requirements are shown to have been violated, it is not an abuse of discretion for the trial court to grant a temporary injunction which accomplishes some of the objectives of the lawsuit on the merits.[61] Accomplishing the objectives of the suit on the merits in non-statutory injunction proceedings is likewise permissible where irreparable harm would be suffered if the writ is withheld.[62]

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57. *See* Butler v. Butler, 296 S.W.2d 635, 637-38 (Tex. Civ. App.—Fort Worth 1956, no writ); L. LOWE, TEXAS PRACTICE 255-56 n.73 (2d ed. 1973).

58. Transport Co. v. Robertson Transps., Inc., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953).

59. *Id.* at 558, 261 S.W.2d at 553-54.

60. Houston Compressed Steel Corp. v. State, 456 S.W.2d 768, 773 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). *See also* Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 829 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1954, no writ).

61. "[I]f the preservation of the status quo should accomplish the objective of the suit this is nevertheless as it should be, for no man may engage in actions in violation of the statutory law, or of a rule of law having similar force and authority." Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth 1954, no writ). *See also* Gifford v. State, 229 S.W.2d 949, 952 (Tex. Civ. App.—El Paso 1950, no writ).

62. Smith v. Houlis, 228 S.W.2d 900, 903 (Tex. Civ. App.—Waco 1950, no writ). The Waco Court of Civil Appeals stated that:

Availability of Supersedeas Bond. As a matter of right, all permanent injunctions may be superseded pending appeal by the filing of a proper supersedeas bond.[63] Rule 385(d) of the Texas Rules of Civil Procedure,[64] however, governs an appeal from an interlocutory order and provides that an appeal from a temporary injunction "shall not have the effect of suspending the order appealed from, unless it shall be so ordered by the court or judge entering the order." Thus, a supersedeas bond suspending the effectiveness of a writ of temporary injunction is entirely within the discretion of the trial court to grant or deny.[65] Indeed, it would appear that appellate courts are not equipped with the authority to interfere with trial court interlocutory orders which grant or deny supersedeas. In *Oakdowns, Inc. v. Watkins*[66] it was held that appellate courts are without power to compel the trial court to rescind an order granting or denying the suspension of a temporary writ of injunction pending appeal or the order granting that writ, since to do so would substitute the appellate court's discretion for that of the trial court.[67] Nonetheless, the very same policy and factual considerations which compel the trial court to issue a temporary injunction militate against superseding the temporary injunction and allowing the irreparable injury or illegal conduct to continue unrestrained. Indeed, it is the policy of the law not to grant supersedeas in such instances.[68]

Where supersedeas has been improvidently granted, the trial court ought to be able to exercise its discretion in a manner calculated to serve the public interest and preserve the status quo by rescinding the supersedeas bond prior to the perfection of appeal from an interlocutory order granting the temporary injunction. Rule

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> Under the facts reflected by this record, we are of the opinion that the court did not err in granting the temporary injunction, even though it gave appellees all of the relief prayed for and all of the relief that could be obtained upon final hearing, because the evidence shows that they were entitled to such relief and unless the same was granted they would in all probability suffer irreparable injury.

Id. at 903; *see* Beene v. Bryant, 201 S.W.2d 268, 272 (Tex. Civ. App.—Amarillo 1947, no writ).

63. *Ex parte* Kimbrough, 135 Tex. 624, 627, 146 S.W.2d 371, 372 (1941); Continental Oil Co. v. Lesher, 500 S.W.2d 183, 185 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); *see* TEX. R. CIV. P. 364(e).

64. TEX. R. CIV. P. 385(d).

65. *See, e.g.*, Wesware, Inc. v. Blackwell, 486 S.W.2d 599, 601 (Tex. Civ. App.—Austin 1972, no writ); Ralph Williams Gulfgate Chrysler Plymouth, Inc. v. State, 449 S.W.2d 139, 140 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); Owens v. Coker, 368 S.W.2d 959, 960 (Tex. Civ. App.—Beaumont 1963, no writ).

66. 85 S.W.2d 1100 (Tex. Civ. App.—Dallas 1935, no writ).

67. *Id.* at 1101.

68. Owens v. Coker, 368 S.W.2d 959, 960 (Tex. Civ. App.—Beaumont 1963, no writ).

385 requires two separate steps for the perfection of such an appeal — filing a bond and filing the record in the appellate court within the time specified by the rule.[69] Both steps must be taken in order to perfect the appeal since the terms imposed by rule 385 are mandatory and jurisdictional.[70]

Mandatory v. Prohibitory Character of the Injunction. Mandatory temporary injunctions have long been considered proper when warranted by the facts.[71] In public health statutory causes of action, the statutes involved often grant broad discretion to the trial court in drafting the temporary injunction decree and occasionally provide expressly for the issuance of mandatory as well as prohibitory relief.[72]

In both public and private environmental litigation, trial courts may be justified in determining that irreparable injury will result unless the defendant undertakes direct affirmative action to abate the problem. In such instances, the status quo is classified as a condition of action and not of rest. The following observation of United States Supreme Court Chief Justice Taft has been generally adopted by Texas courts:[73]

> The office of the preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of

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69. TEX. R. CIV. P. 385(a), (b).

70. *See* State v. Gibson's Distrib. Co., 436 S.W.2d 122, 123 (Tex. 1968); Walker v. Cleere, 141 Tex. 550, 552-53, 174 S.W.2d 956, 957-58 (1943); Cattleland Oil Co. v. Willis Drilling Co., 509 S.W.2d 383, 384 (Tex. Civ. App.—Corpus Christi 1974, no writ).

71. *See, e.g.*, City of Dallas v. McElroy, 254 S.W. 599, 601 (Tex. Civ. App.—Dallas 1923, writ dism'd) (granted only in extreme cases); Murrah v. Shirley, 237 S.W. 307, 309 (Tex. Civ. App.—Dallas 1922, no writ) (granted in cases of unusual extremity); Cartwright v. Warren, 177 S.W. 197, 199 (Tex. Civ. App.—Dallas 1915, no writ) (granted only in extreme cases). A mandatory injunction is generally defined as "affirmatively compelling the doing of some act, rather than merely negatively forbidding continuation of a course of conduct . . . ." Alabama v. United States, 304 F.2d 583, 590 (5th Cir.), *aff'd*, 371 U.S. 37 (1962).

72. One example of this type of statutory provision can be found in section 4.04 of the Texas Clean Air Act. *See* TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.04 (Vernon 1976).

73. *See, e.g.*, Rhodia, Inc. v. Harris County, 470 S.W.2d 415, 419 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); Hidalgo County Water Improvement Dist. No. 2 v. Cameron County Water Control & Improvement Dist. No. 5, 253 S.W.2d 294, 298 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); McMurrey Ref. Co. v. State, 149 S.W.2d 276 (Tex. Civ. App.—Austin 1941, writ ref'd).

> equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits.[74]

In the absence of proof that serious harm will result if the mandatory relief requested is withheld, the injunction must be denied.[75] Where the application for mandatory injunction seeks the destruction of private property to prevent the violation of an ordinance or statute, the applicant must allege and prove the serious nature of the injury to be suffered by the public if the injunctive relief is withheld.[76] A mere showing that the statute is or has been violated will not support mandatory relief that is destructive of private property.[77]

Dissolution of the Temporary Injunction. In recent times, Texas appellate courts have generally ruled that a trial court's rendition of final judgment on the merits has the effect of dissolving any temporary injunction previously issued in the same cause.[78] As is the case with all final judgments, enforcement of a permanent injunction may be totally suspended during the pendency of appeal by the filing of a supersedeas bond; therefore, dissolution of the temporary injunction may vitally threaten the litigant's main objective in bringing the suit. Indeed, a plaintiff's interest in preventing irreparable harm and preserving the status quo may be entirely undermined while the time-consuming stages of appellate review are pursued. While it would appear that a trial court has the authority to preserve the status quo during the appeal of the final judgment by expressly providing for the termination of the temporary injunction upon the exhaustion of all appeals from the trial of the merits, recent decisions manifest an injudicious reluctance to allow a trial court to extend the enforceability of a temporary injunction beyond the date of rendition of judgment on the merits.

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74. McMurrey Ref. Co. v. State, 149 S.W.2d 276 (Tex. Civ. App.—Austin 1941, writ ref'd) (quoting Toledo A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 730, 741 (C.C.N.D. Ohio 1893)). *See also* Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 829-30 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.); Rhodia, Inc. v. Harris County, 470 S.W.2d 415, 419 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

75. City of Dallas v. Gaechter, 524 S.W.2d 400, 402 (Tex. Civ. App.—Dallas 1975, writ dism'd); Cabla v. Shockley, 402 S.W.2d 289, 291 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.).

76. Zelios v. City of Dallas, No. 19541, at 2 (Tex. Civ. App.—Dallas, Mar. 15, 1978) (not yet reported).

77. *Id.* at 2.

78. *See, e.g.*, Theis v. City of San Antonio, 555 S.W.2d 931 (Tex. Civ. App.--El Paso 1977, writ filed); Texas Liquor Control Bd. v. Jones, 378 S.W.2d 898, 902-04 (Tex. Civ. App.-Austin 1964, no writ); City of Corpus Christi v. Cartwright, 281 S.W.2d 343, 344 (Tex. Civ. App.—San Antonio 1955, no writ).

In *Theis v. City of San Antonio*[79] a plaintiff-employee obtained a temporary injunction reinstating employee benefits "until a trial of this cause on its merits." Following the issuance of a final judgment for damages and a permanent injunction in plaintiff's favor, the defendant-employer filed a supersedeas bond staying the final judgment and then suspended the plaintiff-employee. The El Paso Court of Civil Appeals, while correctly holding that the self-terminating temporary injunction was dissolved by the entry of the final judgment, went beyond a facile construction of the plain language in the order and ruled:

> The weight of authority in this state is to the effect that a temporary injunction ceases to exist by operation of law when a final judgment is entered granting the permanent injunctive relief. Even the attempt by a trial judge to extend the interlocutory injunction past the final judgment is void and of no force and effect.[80]

While the *Theis* ruling offered no case citations to support the "weight of authority" relied upon, the earlier authorities themselves are instructive. In *City of Corpus Christi v. Cartwright*[81] the San Antonio Court of Civil Appeals, in dicta, stated,

> A temporary injunction remains in force only until a final decree is rendered by the district court. . . . After a final judgment has been rendered by the district court and an appeal perfected to this court, the case enters a different phase and under certain circumstances a trial judge may enter a stay order pending appeal or, under extraordinary circumstances when it is necessary to preserve our jurisdiction, we may enter an original order under authority of Article 1823, Vernon's Ann. Tex. Stats.[82]

In the 1902 case of *Riggins v. Thompson*[83] the Texas Supreme Court considered a temporary injunction which expressly provided for its own termination upon the date of final hearing. The court ruled that the "language of the Judge's fiat" was determinative.[84] The court additionally ruled that the court of civil appeals, which had also entered an injunction during the pendency of the appeal, only possessed original jurisdiction to protect its own appellate jurisdiction

79. Theis v. City of San Antonio, 555 S.W.2d 931 (Tex. Civ. App.—El Paso 1977, writ filed).

80. *Id.* at 934.

81. 281 S.W.2d 343 (Tex. Civ. App.—San Antonio 1955, no writ).

82. *Id.* at 344 (citations omitted).

83. 96 Tex. 154, 72 S.W. 14 (1902).

84. *Id.* at 158, 71 S.W. at 16.

and that the tenure of its injunction lapsed with the filing of the writ of error in the supreme court.[85] Thus, it would not only appear that the protection afforded by a protective writ under article 1823[86] is difficult to obtain due to the undefined "extraordinary circumstances" which must be proved to the satisfaction of the appellate court to warrant the writ's issuance, it is likewise clear that the labors required to obtain the writ must be successfully repeated at each level of appellate review in order to prevent the same irreparable injury from occurring which warranted the issuance of the temporary injunction at first instance.

Since the court in *Cartwright* seemed to favor the trial court's entry of a stay order pending appeal over the exercise of original appellate jurisdiction, there would appear to be no jurisdictional obstacle to prevent this approach.[87] Nor would there appear to be any jurisdictional limitation on a trial judge's ability either to provide for the temporary injunction's dissolution upon the exhaustion of the appeal from the trial on the merits or to extend the temporary injunction pending appeal on the merits when supersedeas is issued. Closely in point, the 1886 Texas Supreme Court decision in *Gulf, Colorado & Santa Fe Railway v. Fort Worth & New Orleans Railway,*[88] concerned an order of a trial judge expressly restraining the defendants from engaging in certain acts until the final determination of the suit. Reasoning that the suit was not terminated until the appeal had been heard and determined, the court held that the plaintiff's filing of a supersedeas bond and appeal from the district court's dissolution of the injunction and dismissal of plaintiff's cause of action resulted in keeping the injunction in full force and effect until the merits of the appeal were determined.[89]

The rationale of the *Santa Fe Railway* decision closely followed the reasoning of the court expressed some nine years earlier in *Williams v. Pouns.*[90] There the court ruled that a temporary injunction remains in force during the appeal of a superseded final judgment. In arriving at this ruling the court stated:

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85. *Id.* at 159, 71 S.W. at 16-17.

86. TEX. REV. CIV. STAT. ANN. art. 1823 (Vernon 1964) (authorizing writs necessary to enforce jurisdiction).

87. *See* City of Corpus Christi v. Cartwright, 281 S.W.2d 343, 344 (Tex. Civ. App.—San Antonio 1955, no writ).

88. 68 Tex. 98, 2 S.W. 199 (1886).

89. *Id.* at 100, 2 S.W. at 200.

90. 48 Tex. 141 (1877). *See also* Fisk v. Miller, 20 Tex. 579 (1857).

> To hold that the appeal would not suspend the decree dissolving the injunction during its pendency in this court, would require an exception to a general rule, as to the effect of appeals upon the judgments of inferior courts, for which we can see no good reason. The question presented in this case . . . is not whether the appeal will revive a judgment which had been dissolved previous to the final judgment from which the appeal is prosecuted, but whether an injunction, which was in full force and effect when the final judgment from which the appeal is prosecuted was rendered, does not remain in force while this judgment is suspended or superseded by the appeal.[91]

Thus, contrary to the supposition advanced in *Theis v. City of San Antonio,*[92] the weight of authority in this state is to the effect that a properly worded temporary injunction remains in force where a final judgment is superseded for the duration of the appeal. In order to remove all doubt as to the tenure of the interlocutory decree, the temporary injunction should expressly provide for its own continuation "until final determination of the suit." Inclusion of such a provision will make the rulings in *Santa Fe Railway* and *Williams v. Pouns* much more difficult to distinguish.

ENFORCEMENT

On rare occasion, but with sufficient frequency to warrant examination here, it may be necessary to follow up the imposition of the harsh remedy of injunction with the invocation of an even more severe remedy, contempt. From a practical point of view, the ultimate test of the sufficiency and validity of an injunction is its ability to support a contempt action. The general civil practitioner, however, may find the criminal or quasi-criminal nature of the contempt proceeding to be slightly foreign to the more accustomed climate of civil litigation. While it would be far too ambitious to provide an indepth discussion on the topic, a few distinctions, developments and trends in the field of contempt should be noted.

Nature of the Contempt Proceeding

Enforcement of an injunction through the contempt power of the court may be exercised pursuant to rule 692 of the Texas Rules of Civil Procedure[93] or through the use of article 1911a.[94] Article 1911a

91. Williams v. Pouns, 48 Tex. 141, 145 (1877) (citations omitted).
92. 555 S.W.2d 931, 934 (Tex. Civ. App.—El Paso 1977, writ filed).
93. *See* TEX. R. CIV. P. 692.
94. TEX. REV. CIV. STAT. ANN. art. 1911a (Vernon Supp. 1978).

provides that a court may punish any person guilty of contempt of the court by a fine of not more that $500 and/or by confinement in the county jail for not more than six months.[95] Such contempt has been classified as criminal in nature since the proceeding is punitive and its primary purpose is to vindicate public authority.[96] Punishment in such instances is generally fixed and definite and no subsequent voluntary compliance will enable the defendant to avoid punishment for his past contemptuous acts.[97] A contempt proceeding undertaken pursuant to rule 692, however, may be classified as civil since it is remedial or coercive in nature.[98] While rule 692 provides that "disobedience of an injunction may be *punished* by the court," it only authorizes the court to "commit such person to jail without bail until he purges himself of such contempt."[99] Imprisonment by virtue of rule 692 is perceived as conditional upon obedience and therefore the contemnor "may procure his release by compliance with the provisions of the order of the court."[100] Some courts, however, have been dissatisfied with the illusive distinction on civil or criminal lines and have been inclined to view the contempt proceeding as quasi-criminal in nature.[101] As will be seen later, these distinctions take on greater significance when fifth amendment self-incrimination claims are presented to the reviewing court.

Enforcement of an injunction through the contempt authority of the court is classified as constructive or indirect where the contemptuous conduct occurs outside the presence of the court, while contempt arising from conduct within the presence of the court is classified as direct.[102] Substantially more due process rights have been afforded constructive contemnors than direct contemnors.[103]

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95. *Id.* § 2(a).

96. *Ex parte* Hosken, 480 S.W.2d 18, 23 (Tex. Civ. App.—Beaumont 1972, no writ); *see* Deramus v. Thornton, 160 Tex. 494, 501, 333 S.W.2d 824, 829 (1960).

97. *Ex parte* Werblud, 536 S.W.2d 542, 546 (Tex. 1976); *Ex parte* Hosken, 480 S.W.2d 18, 23 (Tex. Civ. App.—Beaumont 1972, no writ).

98. *Compare* TEX. R. CIV. P. 692 *with Ex parte* Werblud, 536 S.W.2d 542, 545 (Tex. 1976).

99. TEX. R. CIV. P. 692 (emphasis added).

100. *Id. Compare id. with Ex parte* Werblud, 536 S.W.2d 542, 545 (Tex. 1976) *and Ex parte* Hosken, 480 S.W.2d 18, 23 (Tex. Civ. App.—Beaumont 1972, no writ).

101. *Ex parte* Cardwell, 416 S.W.2d 382, 384 (Tex. 1967); *Ex parte* Davis, 161 Tex. 561, 564-65, 344 S.W.2d 153, 156 (1961); *cf.* Gowen v. Wilkerson, 364 F. Supp. 1043, 1045 (W.D. Va. 1973) (contempt proceding for failure to pay alimony was quasi-criminal in nature).

102. *Ex parte* Werblud, 536 S.W.2d 542, 545 (Tex. 1976); *Ex parte* Ratliff, 117 Tex. 325, 327, 3 S.W.2d 406, 406 (1928); *Ex parte* Hosken, 480 S.W.2d 18, 22 (Tex. Civ. App.—Beaumont 1972, no writ).

103. *See* United States v. Wilson, 421 U.S. 309, 310-11 (1975); *Ex parte* Werblud, 536

A further distinction has developed in the field of contempt, that being the classification of the contemptuous conduct as "petty" or "serious." At common law, only "serious" offenses warranted a right to trial by a jury whereas "petty" offenses did not.[104] The line of demarcation falls where the penalty ultimately and actually imposed for contempt is in excess of six months confinement.[105] The distinction was most recently addressed by the United States Supreme Court in *Muniz v. Hoffman*,[106] whose reasoning was adopted by the Texas Supreme Court in its application of the distinction to state court contempt proceedings in *Ex parte Werblud*.[107] Accordingly, where multiple fines are imposed for separate acts of contempt committed on separate dates, a fine in excess of $500, in and of itself, does not necessitate a trial by jury where the imprisonment actually imposed does not exceed six months.[108]

Jurisdiction of the Contempt Proceeding

As in all cases, courts sitting in contempt proceedings must have both in rem and in personam jurisdiction. Adequate "notice or knowledge of the order which one is charged with violating is" also "a jurisdictional prerequisite to the validity of the contempt order."[109]

Upon the perfection of appeal from the order of injunction, the trial court loses jurisdiction to enforce the injunction and the court of civil appeals' jurisdiction vests over all matters pertaining to the order of temporary injunction.[110] Once the appellate court's jurisdiction over the injunctive order has attached, the appellate court alone has the authority to entertain contempt proceedings to enforce

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S.W.2d 542, 546 (Tex. 1976). *See generally* Odom & Baker, *Direct & Constructive Contempt*, 26 BAYLOR L. REV. 147 (1974).

104. *See generally* Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

105. Baldwin v. New York, 399 U.S. 66, 69 (1970); *Ex parte* Werblud, 536 S.W.2d 542, 546-47 (Tex. 1976). Where a contemnor has been convicted of numerous criminal contempt charges, he is not entitled to a trial by jury in a state court when a sentence of no more than six months confinement is actually imposed. Taylor v. Hayes, 418 U.S. 488, 495 (1974).

106. 422 U.S. 454, 475-76 (1975).

107. 536 S.W.2d 542, 546-47 (Tex. 1976).

108. *See* Muniz v. Hoffman, 422 U.S. 454, 477 (1975); *Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976).

109. *Ex parte* Conway, 419 S.W.2d 827, 828 (Tex. 1967); *Ex parte* Stanford, 557 S.W.2d 346, 348 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

110. *See, e.g., Ex parte* Werblud, 536 S.W.2d 542, 544 (Tex. 1976); *Ex parte* Conway, 419 S.W.2d 827, 828-29 (Tex. 1967); *Ex parte* Travis, 123 Tex. 480, 481, 73 S.W.2d 487, 489 (1934).

the terms of the injunction and compel obedience thereto pending appeal.[111] When the jurisdictional elements are satisfied, the appellate court may exercise its contempt power by conducting its own hearing,[112] or by referring the taking of testimony and the hearing of evidence to a district court judge who then forwards the transcript of the evidence to the appellate court.[113] In *Ex parte Werblud,* the supreme court indicated its preference for the appellate court to refer to a district court the taking of testimony and hearing of evidence, particularly where a jury may be required to determine factual issues.[114] Where appellate contempt proceedings are designated as criminal in nature, it would appear that a habeas corpus petitioner may choose his forum for review, since both the Texas Supreme Court and the Texas Court of Criminal Appeals maintain jurisdiction to consider review of the appellate contempt proceeding by way of habeas corpus.[115]

Impact of the Privilege Against Self-Incrimination

The ramifications of the civil/criminal contempt distinction set out in *Ex parte Werblud* are initially difficult to perceive. In classifying the proceeding as criminal or punitive in nature, the *Werblud* court, over four dissents, found that the constitutional privilege against self-incrimination is absolute and applies to a contemnor who is called to the witness stand by the complaining party and who asserts through counsel his right not to testify.[116] The thrust of the ruling is that once asserted, the privilege cannot be waived even where a contemnor's defense counsel examines the defendant at length, elicits extensive exculpatory testimony, and offers a number of defensive exhibits through the defendant-witness. The majority in *Werblud* chose not to follow either the procedure suggested by the *Werblud* dissent or the ruling of a recent federal court decision

111. *Ex parte* Browne, 543 S.W.2d 82, 86 (Tex. 1976); *see Ex parte* Werblud, 536 S.W.2d 542, 544 (Tex. 1976); *Ex parte* Travis, 73 S.W.2d 487, 489 (Tex. 1934).

112. *See Ex parte* Duncan, 127 Tex. 507, 514, 95 S.W.2d 675, 679-80 (1936); Texas Pet Foods, Inc. v. State, 529 S.W.2d 820, 831 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

113. *See* International Ladies' Garment Workers' Local 123 v. Dorothy Frocks Co., 97 S.W.2d 379, 380 (Tex. Civ. App.—San Antonio 1936, no writ).

114. *See Ex parte* Werblud, 536 S.W.2d 542, 545 (Tex. 1976).

115. *Compare id.* at 542 (habeas corpus heard in supreme court) *with Ex parte* Musick, 368 S.W.2d 211 (Tex. Crim. App. 1963) (habeas corpus heard in Court of Criminal Appeals). *But see Ex parte* Waters, 498 S.W.2d 144, 145 (Tex. 1973); *Ex parte* Rutherford, 556 S.W.2d 853, 854 (Tex. Civ. App.—San Antonio 1977, no writ). *See generally* Greenhill, *Habeas Corpus Proceedings in the Supreme Court of Texas,* 1 ST. MARY'S L.J. 1, 7 (1969).

116. *See Ex parte* Werblud, 536 S.W.2d 542, 547 (Tex. 1976).

which held that "even if the danger of self-incrimination was great, petitioner's remedy was not to voice the blanket refusal to testify, as his counsel intimates was done, but rather to take the stand and as to each question elect to raise or not to raise the Fifth Amendment privilege."[117]

Nor does it appear that Texas courts will inquire into the nature of the harm which stems from a violation of the privilege. The federal district court in *Gowen v. Wilkerson* ruled that even if petitioner had an absolute right to refuse to take the witness stand, further inquiries should be made to determine whether the privilege had been validly waived and if not, whether the testimony elicited constituted more than harmless error.[118] While the admission of evidence over objection is generally deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection,[119] the *Werblud* court did not inquire into the degree of harm generated by the error for which habeas corpus was granted. It would thus appear that a finding of prejudice resulting from the contemnor's testimony is not required in Texas contempt proceedings. While the *Werblud* dissent would have limited the privilege against self-incrimination to the contemnor's ability to decline to answer questions which might tend to prove his own contempt,[120] *Ex parte Werblud* now renders the imposition of a fine or imprisonment void and subject to collateral attack where a contemnor has not been afforded an absolute privilege against self-incrimination.

In *Ex parte Stringer*[121] the language of the court's holding expressly followed the majority opinion in *Werblud.* The distinguishing factor in *Stringer,* however, was that subsequent to the contemnor's being called to the witness stand and his counsel's assertion of the privilege, the privilege was again asserted in the form of an objection to various questions put to the contemnor.[122] On each oc-

117. Gowen v. Wilkerson, 364 F. Supp. 1043, 1045 (W.D. Va. 1973); *see Ex parte* Werblud, 536 S.W.2d 542, 549 (Tex. 1976) (Reavley, J., dissenting).

118. Gowen v. Wilkerson, 364 F. Supp. 1043, 1045 (W.D. Va. 1973). "The question at this point becomes whether petitioner effectively and intelligently waived the privilege against self-incrimination, and, then, if this court finds that he did not, whether it constitutes beyond a reasonable doubt more than harmless error." *Id.* at 1045.

119. *See* Craig v. Allen, 556 S.W.2d 644, 647 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

120. *Ex parte* Werblud, 536 S.W.2d 542, 549 (Tex. 1976) (Reavley, J., dissenting).

121. *Ex parte* Stringer, 546 S.W.2d 837, 842 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (on motion for rehearing).

122. *See id.* at 839.

casion the objection was overruled and the contemnor was compelled to answer. Thus, even the more restrictive application of the privilege in contempt proceedings suggested by the *Werblud* dissent would have compelled the granting of the writ of habeas corpus and the contemnor's release in *Ex parte Stringer*.

The principal difficulty with the civil versus criminal contempt distinction lies with its application. The complaining party has little control over the disposition of the contempt proceeding and the court is free to apply whatever sanction it deems appropriate. While the classification of the contempt proceeding as criminal in nature within the context of a habeas corpus review provides an easy rule of thumb for application of the privilege by appellate courts, the determination of whether to exercise a civil contempt sanction authorized by rule 692,[123] or the criminal contempt sanction provided by article 1911a,[124] is exclusively within the province of the trial court. The party initiating the contempt proceeding only has the duty of setting forth the specific facts constituting the contemptuous conduct before the court and providing notice of such allegations to the alleged contemnor. The court then decides, after hearing the evidence, whether to impose a strictly civil sanction as opposed to a criminal contempt citation. Thus, *every* contemnor faces the possibility that the court may impose a fine or period of confinement after hearing the evidence of the contemptuous conduct. Under the *Werblud* rationale it would thus seem that every defendant in a contempt proceeding, whether the process is labeled civil or criminal after the fact, may refuse to testify when called to the witness stand since there exists an ever-present possibility that the power bestowed by article 1911a will be exercised.

Such is precisely the fear expressed in the *Werblud* dissent wherein it places reliance on *Ex parte Butler*.[125] In *Butler* the court held that a defendant party could avoid answering a question in a civil deposition if his response might subject him to a criminal penalty.[126] Thus, even where a contemnor is ultimately found to be merely in civil contempt, under the ruling in *Werblud*, the contemnor may refuse to testify since there is an ever-present possibility that the court may deem it proper to exercise the criminal contempt

123. TEX. R. CIV. P. 692.

124. TEX. REV. CIV. STAT. ANN. art. 1911a (Vernon Supp. 1978).

125. *Ex parte* Werblud, 536 S.W.2d 542, 549 (Tex. 1976) (Reavley, J., dissenting) (citing Ex parte Butler, 522 S.W.2d 196 (Tex. 1975)).

126. *Ex parte* Butler, 522 S.W.2d 196, 198 (Tex. 1975).

sanction. This appears to be the rationale followed in *Ex parte Wright*,[127] where the relator was confined until such time as he purged himself by delivery of certain property to his former daughter-in-law. While the contemnor/relator was released from custody on the basis of insufficient evidence in this clearly civil contempt proceeding, the court nonetheless recognized the contemnor's right against self-incrimination.[128] Indeed, on motion for rehearing, the *Stringer* court reconsidered the power bestowed on the trial court by article 1911a. Since a judge is authorized to enter a coercive order, a punitive order, or an order which is both coercive and punitive, the *Stringer* court reasoned that the nature of the order entered at the conclusion of the contempt proceeding cannot be determinative of a contemnor's right against self-incrimination.[129] Accordingly, where a contemnor is called to testify as an adverse witness in a civil contempt proceeding and a fifth amendment objection is raised, counsel should request and obtain immunity from possible imposition of a criminal contempt citation prior to questioning the accused contemnor as an adverse witness.

While the inability to call an alleged contemnor to the witness stand in a contempt proceeding brought to enforce an order of the court is certain to prove problematic in disputed property cases and divorce actions, the assertion of the constitutional privilege against self-incrimination may be even more significant in the traditional civil discovery context. Temporary injunctions in environmental litigation are generally sought and obtained near the outset of the cause of action. As noted earlier, a litigant only need show a probable right to the remedy and is not required to establish by a preponderance of the evidence that he will prevail upon final litigation in order to be entitled to the writ of temporary injunction.[130] Obtaining the evidence required to establish a preponderance at final trial often necessitates the discovery of useful information from the defendant, or defendant's agents and representatives, through deposition, interrogatories, or requests for admissions. It would therefore appear that counsel for defendant could effectively impede or alto-

127. 538 S.W.2d 483 (Tex. Civ. App.—Beaumont 1976, no writ).

128. *Id.* at 486. "The fact that Relator did not appear at the hearing on contempt is not determinative since an accused in such a hearing may not be required to give incriminating evidence against himself." *Id.* at 486.

129. *See Ex parte* Stringer, 546 S.W.2d 837, 843-44 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (motion for rehearing).

130. Transport Co. v. Robertson Transps., Inc., 152 Tex. 551, 556, 261 S.W.2d 549, 552 (1953). See note 55 *supra* & accompanying text.

gether undermine plaintiff's discovery efforts by instructing all individuals embraced within the scope of the temporary injunction to refuse to cooperate with such discovery efforts on the basis that such information could be used against them in a contempt proceeding brought to enforce the order of temporary injunction and would thereby violate their privilege against self-incrimination.[131] If such may be the trend of judicial decision, we can look forward to an expanded use of transactional immunity decrees within the context of strictly civil injunction proceedings.

CONCLUSION

The availability and enforceability of injunctive writs has long befuddled both courts and litigants where conflicting personal and property rights complicate the equitable resolution of emotion-charged litigation. Personal freedom and the right to use and enjoy one's property form the basis for persuasive argument available to all contestants in environmental litigation. In each instance, the prerogatives and perspectives of the trier of fact and the ultimate discretion of the trial court is of paramount importance. As Roscoe Pound noted in the *Spirit of the Common Law,*[132] the law does not so much create new interests as decide which ones it shall recognize. As society's use and value preferences change, the law evolves. As our environmental consciousness is increasingly provoked by an ever-diminishing supply of cherished resources heretofore taken for granted, litigants will summon the courts for effective assistance and relief. As the process evolves, it is hoped that guidelines more cogent and explicit than those summarized here shall emerge.

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131. *Cf. Ex parte* Butler, 522 S.W.2d 196, 199 (Tex. 1975); Meyer v. Tunks, 360 S.W.2d 518, 520-22 (Tex. 1962); State v. Huff, 491 S.W.2d 216, 221-22 (Tex. Civ. App.—Amarillo 1973, no writ).

132. *See generally* R. POUND, THE SPIRIT OF THE COMMON LAW 166-216 (1921).