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Loss of the Right of Appeal in Civil Actions

By HERBERT CHAMBERLIN*

Although there is no constitutional right to an appeal,¹ that right in California is a basic one² derived from statute.³ Who may appeal, what is appealable, and how and when an appeal may be taken are clearly defined in California.

Only an "aggrieved party" has the right of appeal.⁴ This means a party to the record⁵ "having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment."⁶ A person "aggrieved" by a judgment or order but who is not party to the record may obtain a right of review by timely motion to vacate the judgment or order and appeal from the order denying his motion.⁷

Only a judgment or order defined as appealable is subject to the right of appeal.⁸ This means that "no appeal can be taken except from an appealable order or judgment as defined in the statutes and developed by the case law."⁹ Furthermore, the California Rules on Appeal define the time and manner in which a right of appeal must be exercised.¹⁰ These rules have the force of positive law,¹¹ and they have been held to

* LL.B., Hastings College of Law, 1913; LL.M., Yale University, 1914.

¹ *City of Los Angeles v. Schweitzer*, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962).

² *Estate of Hart*, 204 Cal. App. 2d 634, 22 Cal. Rptr. 495 (1962).

³ *People v. Superior Court*, 202 Cal. App. 2d 850, 21 Cal. Rptr. 178 (1962).

⁴ CAL. CODE CIV. PROC. § 938: "Any party aggrieved may appeal in the cases prescribed by this title."

⁵ "[I]t is a settled rule of practice in this state that only a party to the record can appeal." *Eggert v. Pacific States Sav. & Loan Co.*, 20 Cal. 2d 199, 201, 124 P.2d 815, 816 (1942).

⁶ *Estate of Colton*, 164 Cal. 1, 5, 127 Pac. 643, 645 (1912).

⁷ *Luckenbach v. Laer*, 190 Cal. 395, 212 Pac. 918 (1923); *Greif v. Dullea*, 66 Cal. App. 2d 986, 153 P.2d 581 (1944).

⁸ CAL. CODE CIV. PROC. §§ 963, 983; CAL. PROB. CODE § 1240.

⁹ *Lavine v. Jessup*, 48 Cal. 2d 611, 613, 311 P.2d 8, 9 (1957).

¹⁰ CAL. RULES ON APPEAL 1-3.

¹¹ *Helbush v. Helbush*, 209 Cal. 758, 763, 290 Pac. 18, 21 (1930); *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App. 2d 84, 89, 9 Cal. Rptr. 405, 408 (1960); *Cantillon v. Superior Court*, 150 Cal. App. 2d 184, 187, 309 P.2d 890, 892 (1957).

be constitutional.¹²

If an appellant is not an "aggrieved party" or if his purported appeal is from a nonappealable judgment or order his problem will not be loss of a right of appeal for he has none to lose. He is merely an interloper on the appellate highway. But if he is properly on that highway he will find appellate courts zealously guarding his right of appeal.¹³ And he will find them tolerant in extricating him from any "procedural morass" in which he has become involved.¹⁴

Where a right of appeal exists it may be lost either voluntarily or involuntarily.

Loss by Untimely Appeal

The surest way to lose a right of appeal is by failure to file a timely notice of appeal. Such failure is incurable and inexcusable. "To entitle one to appeal, he must conform to the procedure provided for appeals."¹⁵ In plain language the California Rules on Appeal provide for a notice of appeal and specify the time within which it must be filed and when the period for filing begins and ends.¹⁶ In both civil and criminal cases the time requirements for taking an appeal are mandatory and appellate courts are without jurisdiction to consider a late appeal.¹⁷ "Nor can jurisdiction be conferred upon the court by the consent or stipulation of the parties, estoppel or waiver."¹⁸

Untimeliness in becoming party to the record might also result in loss of the right of appeal by an aggrieved person desiring review of a judgment or order to which he was not a party of record.

Loss by Agreement or Consent

An appellant does not get very far when he asks an appellate court

¹² Millsap v. Hooper, 34 Cal. 2d 192, 208 P.2d 982 (1949).

¹³ "The policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law. The 'right of appeal is remedial, and in doubtful cases should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment.'" Koehn v. State Board of Equalization, 50 Cal. 2d 432, 435, 326 P.2d 502, 504 (1958), quoting People v. Bank of San Luis Obispo, 152 Cal. 261, 264, 92 Pac. 481, 482 (1907).

¹⁴ Shepardson v. McLellan, 59 A.C. 93, 27 Cal. Rptr. 884, 378 P.2d 108 (1963).

¹⁵ City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 452, 19 Cal. Rptr. 429, 431 (1962).

¹⁶ CAL. RULES ON APPEAL 1-5.

¹⁷ *In re Del Campo*, 55 Cal. 2d 816, 13 Cal. Rptr. 192, 361 P.2d 912 (1961).

¹⁸ Estate of Hanley, 23 Cal. 2d 120, 123, 142 P.2d 423, 428 (1943).

to reverse a judgment or order that was prompted by his agreement or consent.

It is the universal rule that a judgment or order will not be disturbed on an appeal prosecuted by a party who expressly consented to the making thereof. This doctrine is established in this state by a long line of decisions. . . . It is also settled in this state that where a party who has expressly consented to and stipulated for the making of a certain judgment or order, attempts to appeal from the judgment or order so agreed to and made in pursuance of the consent and stipulation, the appellate court will not consider the appeal at all, but will dismiss it on motion made in that behalf.¹⁹

In the case from which this statement is taken the parties had stipulated to the judgment that was rendered and entered and the stipulation contained an express waiver by defendant (appellant) of the right to appeal. The same rule has been applied in a wide variety of cases. It is frequently met in the line of cases where a plaintiff has stipulated for reduction of damages in compliance with a conditional new trial order. In that connection it has been said:

“It is settled that by agreeing to reduce the verdict and enter judgment for a lesser amount, a successful plaintiff waives his right to appeal, even though he made the remission under protest and the court may have erroneously found the verdict to be excessive.”²⁰

The rule is not confined to any particular situation but is met and applied in widely different types of cases, such as divorce,²¹ judgments on demurrers,²² and partition.²³

Loss by Acceptance of Benefits

Allied with the rule just mentioned and overlapping it is the qualified general rule that by accepting the benefits of a judgment or order a party loses his right to appeal from it. This general rule and its qualifications are thus stated:

“It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal there-

¹⁹ *Hibernia Sav. & Loan Soc’y v. Waymire*, 152 Cal. 286, 287-288, 92 Pac. 645, 646 (1907).

²⁰ *Fairfield v. American Photocopy Equip. Co.*, 158 Cal. App. 2d 53, 57, 322 P.2d 93, 95 (1958).

²¹ *Zinke v. Zinke Rebooting Shoe Co.*, 208 Cal. App. 2d 690, 25 Cal. Rptr. 360 (1962); *Johns v. Johns*, 171 Cal. App. 2d 353, 340 P.2d 639 (1959); *Fowler v. Fowler*, 126 Cal. App. 2d 496, 272 P.2d 546 (1954).

²² *Wilson v. City of Los Angeles*, 156 Cal. App. 2d 776, 320 P.2d 93 (1958).

²³ *Brooms v. Brooms*, 151 Cal. App. 2d 351, 311 P.2d 567 (1957).

from." . . . However [I]n order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute.' . . . "It is only in cases where an appellant is shown to have received and accepted advantages from a judgment to which such appellant would not be entitled in the event of a reversal of the judgment that her acceptance thereof has been held to operate to defeat the appeal." . . . Otherwise stated, "(w)here the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof does not necessarily estop himself to attack other and severable portions thereof upon appeal." . . . As to severability, "[T]he test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters or issues embraced therein are the same as, or inter-dependent upon, the matters or issues which have not been attacked."²⁴

The foregoing rules supply appropriate tests for determining whether or not a right of appeal has been lost by acceptance of the benefits of the judgment or order appealed from. The right of appeal is lost if the benefits accepted are consequential and acceptance is voluntary and unconditional.²⁵ The right of appeal is not lost if the benefits accepted are inconsequential or if acceptance is involuntary or conditional.²⁶ The first of these tests was applied by the supreme court in *Schubert v. Reich*,²⁷ where an appeal from an order granting plaintiff a new trial was dismissed because the appellant had accepted the sum of 75 dollars for attorney fees imposed by the trial court upon plaintiff as a condition for granting the new trial. And the second test was applied by the supreme court in *Estate of Poisl*,²⁸ in holding that "an agreement that the acceptance of the benefits of a judgment shall not bar the right of appeal will be recognized and preserves that right."²⁹

Loss by Satisfaction of Judgment

The general rule that the voluntary satisfaction of a judgment de-

²⁴ *Gudelj v. Gudelj*, 41 Cal. 2d 202, 214, 259 P.2d 656, 663-64 (1953).

²⁵ *South San Francisco Unified School Dist. v. Scopesi*, 213 A.C.A. 433, 28 Cal. Rptr. 882 (1963); *Levine v. Chandler*, 212 A.C.A. 246, 27 Cal. Rptr. 831 (1963); *People ex rel. Dep't of Public Works v. Loop*, 161 Cal. App. 2d 466, 326 P.2d 902 (1958).

²⁶ *Mears v. Mears*, 180 Cal. App. 2d 484, 4 Cal. Rptr. 618 (1960); *Ramsey Trucking Co. v. Mitchell*, 188 Cal. App. 2d Supp. 862, 11 Cal. Rptr. 283 (App. Dep't, Super. Ct., Fresno 1961).

²⁷ 36 Cal. 2d 298, 223 P.2d 242 (1950).

²⁸ 48 Cal. 2d 334, 309 P.2d 817 (1957).

²⁹ *Id.* at 338, 309 P.2d at 819.

prives a party of the right of appeal is subject to the qualification that the payment of the judgment be by way of compromise or with an agreement not to take or prosecute an appeal.³⁰ Also, the courts distinguish between "an appellant receiving the fruits of a judgment and one paying a judgment . . . Thus when there has been a payment of the judgment by the appellant, he does not lose his right of appeal if it is compulsory, such as under execution or other coercion."³¹

Section 1049 of the Code of Civil Procedure provides:

An action is deemed to be pending from the time of the commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.³²

If this code section were accepted literally a right of appeal would be lost whenever a judgment or order was satisfied. But it has been held that the right of appeal is not foreclosed by that section where payment of the judgment by the appellant is compulsory.³³ However, recordation of an abstract of judgment by a judgment creditor is not deemed compulsion.³⁴

Loss by Passage of Time

Lapse of time and changing conditions often render an appeal moot and cause dismissal of the appeal. For example, the soundness of an order granting a preliminary injunction becomes moot when final judgment is entered.³⁵ Also, the right of a civil service employee to be on an eligible list becomes moot when the time to place him on the list expires.³⁶ And an order refusing to disqualify an attorney from defending an action becomes moot when the action is dismissed.³⁷ The right of appeal is accordingly lost.

Loss by Penalty or Forfeiture

The right of appeal may be lost by an appellant who is in contempt of the court whose judgment or order he seeks to have reviewed.³⁸ A

³⁰ Estate of Merrill, 29 Cal. 2d 520, 175 P.2d 819 (1946).

³¹ Reitano v. Yankwich, 38 Cal. 2d 1, 3, 237 P.2d 6, 7 (1951).

³² CAL. CODE CIV. PROC. § 1049.

³³ Reitano v. Yankwich, 38 Cal. 2d 1, 237 P.2d 6 (1951).

³⁴ Mathys v. Turner, 46 Cal. 2d 364, 294 P.2d 947 (1956).

³⁵ Agnew v. City of Los Angeles, 51 Cal. 2d 1, 330 P.2d 385 (1958).

³⁶ Feder v. Lahanier, 200 Cal. App. 2d 483, 19 Cal. Rptr. 638 (1962).

³⁷ Getrost v. Lanham, 200 Cal. App. 2d 801, 19 Cal. Rptr. 686 (1962).

³⁸ Estate of Scott, 150 Cal. App. 2d 590, 310 P.2d 46 (1957); Tobin v. Casaus, 128 Cal. App. 2d 588, 275 P.2d 792 (1954).

corporation forfeiting its right to do business by nonpayment of franchise tax also forfeits its right to appeal.³⁹

Conclusion

It has been demonstrated that although an "aggrieved" party's right to appeal is assured by statute, he may under certain circumstances lose that right. The nature of those circumstances, however, is such that he suffers no injustice, since he may protect himself from loss by diligent compliance with the reasonable demands of the law.

³⁹ *Reed v. Norman*, 48 Cal. 2d 338, 309 P.2d 809 (1957).