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The One Final Judgment Rule--A Fundamental Principle of Appellate Practice in California

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COMMENTS

THE ONE FINAL JUDGMENT RULE—A FUNDAMENTAL PRINCIPLE OF APPELLATE PRACTICE IN CALIFORNIA

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THE initial step in preparing an appeal should be a careful examination of the case to determine whether the particular order or judgment is appealable.[1] A great number of appeals are dismissed for failure to observe this elementary principle.[2]

Many a sturdy ship has gone to the bottom as a result of an unexpected encounter with an iceberg. The "sea" of appellate practice is filled with its own particular brand of "icebergs," through which the attorney must navigate a safe course for his client. One of the most formidable of these obstacles is the so-called "one final judgment rule."

Often the rule and its application is a picture of marvelous simplicity. However, in the words of one writer, "in complicated cases the one final judgment rule proves to be a delusion, and appeals from separate final judgments in a single action continue to present the most difficult problems in the field of appellate procedure."[3]

Underlying Principles

Before examining the rule itself, some consideration must be given to a few of the basic principles governing appeals in this state.

The California Constitution makes no provision concerning the procedure to be followed where an appeal is contemplated.[4] Appellate procedure is entirely statutory and subject to complete control by the legislature.[5] Statutes have been enacted designating those judgments

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[1] Swain, *Procedural Pitfalls*, 33 CAL. S. BAR J. 144 (1958).

[2] *Ibid.*

[3] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 10 at 2152 (1954).

[4] 3 CAL. JUR. 2d *Appeal and Error* § 4 (1952).

[5] Trede v. Superior Court, 21 Cal. 2d 630, 134 P.2d 745 (1943); City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962); Efron v. Kalmanovitz, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960); see generally 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 1 (1954). Note also that care should be taken to avoid confusion where the cases have used the term *right* instead of *procedure*. See 3 CAL. JUR. 2d *Appeal and Error* § 4 (1952).

and orders from which an appeal will lie.[6] It is the general rule that direct appeals will be permitted only from those orders and judgments which are made appealable by statute.[7]

The question of appealability is of vital importance. If the order or judgment appealed from is not within the provisions of one of the statutes an appellate court is *without jurisdiction* to hear the appeal.[8] Moreover, if a reviewing court determines that the purported appeal is from a nonappealable order, and the court is therefore without the necessary jurisdiction, it has no recourse other than to dismiss the appeal on its own motion,[9] even though the parties are silent upon the issue of appealability.

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[6] *E.g.*, CAL. CODE CIV. PROC. §§ 963, 974-75, 983; CAL. PEN. CODE §§ 1237-38, 1466; CAL. PROB. CODE §§ 1240, 1630.

[7] Lavine v. Jessup, 48 Cal. 2d 611, 311 P.2d 8 (1957); Collins v. Corse, 8 Cal. 2d 123, 64 P.2d 137 (1936); Sherman v. Standard Mines Co., 166 Cal. 524, 137 Pac. 249 (1913); City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962); Peninsula Properties Co. v. Santa Cruz, 106 Cal. App. 2d 669, 235 P.2d 635 (1951); see generally 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 9 (1954). *But cf.* Meehan v. Hopps, 45 Cal. 2d 213, 288 P.2d 267 (1955), critically analyzed in 3 WITKIN, *supra*, § 11(A) (Supp. 1961). However, these statutes are concerned only with appellate *procedure*. "[T]he specification of the judgments and orders which may be appealed from as such and separately in effect merely provides a *procedure*, and in no way limits the *scope* of appellate review. The language of the statutes is sufficiently broad to provide a *review* on appeal of practically every judgment, order, ruling, or matter affecting the substantial rights of the parties. For example, while interlocutory orders may not ordinarily be appealed from, they may be *reviewed* on appeal from the [final] judgment . . . ." [Emphasis added.] 3 CAL. JUR. 2d, *Appeal and Error* § 35 at 445 (1952). In addition, it is important hereafter to observe the technical distinctions between the terms "appealability" and "reviewability." "The 'appealability' of a decision, as that term is used in this article, means its ripeness for consideration by an appellate court, that is, whether it is procedurally apt for appeal, as distinguished from 'reviewability,' which is used as meaning whether, because of its substantive nature, the question is one fit for the appellate court to consider. While the distinction noted has been pointed out by the courts on occasion, it is frequently ignored and the terms 'appealable' and 'reviewable' used interchangeably." 4 AM. JUR. 2d *Appeal and Error* § 47 at 570 (1962).

[8] Rossi v. Caire, 189 Cal. 507, 209 Pac. 374 (1922); Sherman v. Standard Mines Co., 166 Cal. 524, 137 Pac. 249 (1913); City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962); Futlick v. F. W. Woolworth Co., 149 Cal. App. 2d 296, 308 P.2d 405 (1957).

[9] Collins v. Corse, 8 Cal. 2d 123, 64 P.2d 137 (1936); City of Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962); Olmstead v. West, 177 Cal. App. 2d 652, 2 Cal. Rptr. 443 (1960); Rosenberg v. Knesboro, 80 Cal. App. 2d 36, 180 P.2d 750 (1947); Bessinger v. Grotz, 52 Cal. App. 2d 379, 126 P.2d 355 (1942). Similarly, jurisdiction cannot be conferred by the *consent* or *stipulation* of the parties, *estoppel* or *waiver*. See Phillips v. Phillips, 41 Cal. 2d 869, 264 P.2d 926 (1953); Estate of Hanley, 23 Cal. 2d 120, 142 P.2d 423, 149 A.L.R. 1250 (1943); Lopes v. Capital Co., 192 Cal. App. 2d 759, 13 Cal. Rptr. 787 (1961); Olmstead v. West, *supra;* Crofoot v. Crofoot, 132 Cal. App. 2d 794, 283 P.2d 283 (1955). See also 2 STANBURY, CALIFORNIA TRIAL AND APPELLATE PRACTICE *Appeal* § 1173 (1958).

Collins v. Corse[10] illustrates the last mentioned principle. There was an appeal from a discovery order issued by the superior court granting respondent the right to inspect certain books of account of the appellants and directing them to furnish him with other documents relative to the case. From the order the appellants, defendants in the court below, appealed. Oddly enough neither brief questioned the appealability of the order, although one year earlier, in *Union Oil Co. of Cal. v. Reconstruction Oil Co.*,[11] the Supreme Court of California had held that orders relating to inspection and discovery were not appealable. The court nevertheless considered the issue of appealability as one which had to be dealt with. Citing *Union Oil Co.* as "direct authority for the conclusion" that such a discovery order was not appealable, the court dismissed the appeal on its own motion.

The California Rule

The one final judgment rule, "a fundamental principle of appellate practice in the United States,"[12] is found in statutory form in section 963 of the Code of Civil Procedure, which provides, in part: "An appeal may be taken from a superior court . . . : 1. From a *final judgment* entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court . . . ."[13] Other statutes make similar provision concerning appeals from the inferior courts;[14] however, the discussion which follows will be limited chiefly to the rule as it applies to appeals from the superior court under section 963.

The statutes also provide that certain types of interlocutory determinations are subject to a direct appeal.[15] However, the general rule

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[10] 8 Cal. 2d 123, 64 P.2d 137 (1936).

[11] 4 Cal. 2d 541, 51 P.2d 81 (1935).

[12] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 10 (1954). See also 4 AM. JUR. 2d *Appeal and Error* § 50 (1962); 4 C.J.S. *Appeal and Error* § 92 (1957).

[13] CAL. CODE CIV. PROC. § 963 (1) (emphasis added).

[14] See CAL. CODE CIV. PROC. §§ 972-82 (justice courts), 983-88j (municipal courts), 988t (new provisions relating to transfer of municipal and justice court appeals to the district court of appeals).

[15] *E.g.*, an appeal will lie under CAL. CODE CIV. PROC. § 963(2): "From an order granting a new trial or denying a motion for judgment notwithstanding the verdict, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, from any special order made after final judgment, from any interlocutory judgment, order, or decree, hereafter made or entered in actions to redeem real or personal property from a mortgage thereof, or a lien thereon, determining such right to redeem and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties and directs partition to be made, and interlocutory decrees of divorce."

is that where such is not expressly authorized by statute an appeal lies only from a *final judgment.*[16]

The Rule—Origin and Theory

The modern rule that only final judgments are appealable, except where modified by statute, can be traced to the common law decisions involving the writs of error.[17]

The precise factors which were originally responsible for the development of the one final judgment rule are not altogether clear.[18] They go far back into the early history of the English common law.[19] Be that as it may, the present-day reasons for the rule are "that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case."[20] Little imagination is required to visualize the unbearable delay and ultimate chaos that would result if every decision or ruling made by the trial court were *immediately* appealable.[21]

Operation of the Rule

Ideally, a discussion of the final judgment rule would begin with a definition of the term "final judgment." The difficulty here is that there is apparently no single definition that is completely satisfactory.[22] It is only after an examination of the individual cases dealing with the final judgment rule that the term begins to reveal its true colors.

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[16] Bakewell v. Bakewell, 21 Cal. 2d 224, 130 P.2d 975 (1942); Maier Brewing Co. v. Pacific Nat. Fire Ins. Co., 194 Cal. App. 2d 494, 15 Cal. Rptr. 177 (1961); Edlund v. Los Altos Builders, 106 Cal. App. 2d 350, 235 P.2d 28 (1951).

[17] 4 AM. JUR. 2d *Appeal and Error* § 50 (1962); Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539 (1932).

[18] Crick, *supra* note 17.

[19] *Ibid.*

[20] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 10 at 2151 (1954), quoted by the court in: Maier Brewing Co. v. Pacific Nat. Fire Ins. Co., 194 Cal. App. 2d 494, 15 Cal. Rptr. 177 (1961); Efron v. Kalmanovitz, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960); Brown v. Memorial Nat'l Home Foundation, 158 Cal. App. 2d 448, 322 P.2d 600, 72 A.L.R. 2d 997 (1958). See also 4 AM. JUR. 2d *Appeal and Error* § 48 (1962); 4 C.J.S. *Appeal and Error* § 92 (1957).

[21] At this point it is important to remember that it is the *procedure* for appeal under discussion and not the permissible *scope* of appellate review.

[22] 3 CAL. JUR. 2d *Appeal and Error* § 39 (1952). See also 3 WITKIN, CALIFORNIA PROCEDURE *Judgment* § 1 (various meanings of "final judgment"), § 2 (distinction between "orders," "judgments," "decrees," etc.) (1954).

The Judgment

It is clear that to meet the requirements of the final judgment rule there must be a *judgment.*[23] Thus, a verdict is not appealable.[24] Likewise, an appeal will not lie from findings of fact, nor from findings or conclusions of law, where there is no judgment.[25] Moreover, a memorandum or preliminary order authorizing a subsequent judgment is not appealable, and an appeal therefrom will be dismissed.[26]

The Code of Civil Procedure defines a judgment as "the final determination of the rights of the parties in an action or proceeding."[27] However, as will be seen shortly, the term "final judgment," as here used, is not limited to the final judgment entered in an action which finally determines all the issues presented by the pleadings.

In determining whether there has been a judgment, the question is not one of form, but rather one of legal effect.[28] The appellate court will look behind any label used by the trial court. Thus, in *Nevada Constructors v. Mariposa Pub. Util. Dist.*[29] the court dismissed an appeal from an order denying the defendants' motion for summary judgment. Although the order appealed from was entitled a "judgment" on its face, as evidenced by the records of the trial court, the appellate court refused to be bound by the denomination. Upon examination of the adjudication involved, the court concluded that it was in fact an order, interlocutory in nature, and not a judgment within the meaning of the final judgment rule. The appeal was therefore dismissed.

Finality

In addition to the requirement that there be a *judgment,* the judgment must be a *final* judgment to be appealable.[30] As on the issue

[23] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 10 at 2152 (1954); "In applying the final judgment rule it is necessary to make two basic distinctions: First, there must be a *judgment.* . . . Second, . . . the judgment must be *final* . . . ."

[24] Lamoreux v. San Diego & Arizona E. Ry. Co., 48 Cal. 2d 617, 311 P.2d 1 (1957); Sokolow v. City of Hope, 41 Cal. 2d 668, 262 P.2d 841 (1953); People v. Olds, 140 Cal. App. 2d 156, 294 P.2d 1034 (1956).

[25] Estate of Resler, 43 Cal. 2d 726, 278 P.2d 1 (1954); Estate of Murphy, 50 Cal. App. 2d 440, 123 P.2d 129 (1942); Ouzoonian v. Vaughan, 64 Cal. App. 369, 221 Pac. 958 (1923).

[26] Preston v. Hearst, 54 Cal. 595 (1880); Fox v. Fox, 127 Cal. App. 2d 253, 273 P.2d 585 (1954).

[27] CAL. CODE CIV. PROC. § 577.

[28] Nevada Constructors v. Mariposa Pub. Util. Dist., 114 Cal. App. 2d 816, 251 P.2d 53 (1952).

[29] *Ibid.*

[30] Scarbery v. Bill Patch Land and Water Co., 170 Cal. App. 2d 368, 338 P.2d 916 (1959); George v. Bekins Van & Storage Co., 83 Cal. App. 2d 478, 189 P.2d 301 (1948).

whether there has been a *judgment,* the question whether such judgment is a *final* judgment within the meaning of the final judgment rule turns not upon its denomination, but rather upon its effect.[31] The appellate court is required to look at the substance and legal effect, and the presence of the words "interlocutory" or "final" is not necessarily conclusive.[32]

An often cited statement of the test of finality is found in *Lyon v. Goss,* where the court said:

> [W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.[33]

Thus, in *Scarbery v. Bill Patch Land & Water Co.*[34] an appeal was dismissed when the court concluded that further judicial action was necessary to finally determine the rights of the parties. *Scarbery* was an action seeking declaratory relief, to quiet title and for a judgment declaring that all rights of the defendants arising out of a "lease and option to buy" had been terminated and cancelled by reason of their failure to perform certain of the conditions and covenants. The trial court concluded that the defendants were entitled to relief from their default and should be allowed an opportunity to perform the agreement. An interlocutory judgment and decree was entered in which it was decreed, in part, that the defendants should deposit certain sums and documents in escrow and that in the event of the failure of the defendants to deposit such sums of money within a specified period a final judgment should be entered, quieting plaintiffs' title and determining the amount of restitution, if any, plaintiffs should make to the defendants, and adjudicating the rights, duties and obligations of the parties in relation to the agreement.

Pursuant to the judgment, the defendants deposited certain sums and documents in escrow and gave notice thereof to the plaintiffs. To the defendants' compliance with the terms of the judgment the plain-

[31] Price v. Slawter, 169 Cal. App. 2d 448, 337 P.2d 914 (1959).

[32] *In re* Los Angeles County Pioneer Soc., 40 Cal. 2d 852, 257 P.2d 1 (1953); Taylor v. Taylor, 153 Cal. App. 2d 144, 314 P.2d 60 (1957).

[33] 19 Cal. 2d 659, 670, 123 P.2d 11, 17 (1942). See also *In re* Los Angeles County Pioneer Soc., 40 Cal. 2d 852, 257 P.2d 1 (1953); Scarbery v. Bill Patch Land and Water Co., 170 Cal. App. 2d 368, 338 P.2d 916 (1959); Berry v. Berry, 140 Cal. App. 2d 50, 294 P.2d 757 (1956). See generally 2 STANBURY, CALIFORNIA TRIAL AND APPELLATE PRACTICE *Appeal* § 873 (1958).

[34] 170 Cal. App. 2d 368, 338 P.2d 916 (1959).

tiffs filed objections which were overruled. The plaintiffs appealed from the interlocutory judgment, an order modifying it and the order overruling the objections to the defendants' purported compliance with the judgment. The defendants then moved to dismiss the appeal, claiming that the interlocutory judgment and decree appealed from was not an appealable judgment. The motion was granted and the appeal was dismissed.

The appellate court noted that the fact the judgment was entitled "Interlocutory Judgment and Decree" by the trial court was not necessarily conclusive. However, the court further observed that there had not been a final judgment, saying:

> Further judicial action on the part of the court is necessary to finally determine the rights of the parties in view of the question which has arisen as to the compliance by the parties with the terms of the agreement and the decree, and the trial court's specific decree that a final judgment be entered determining the ultimate rights of the parties under the agreement involved. [35]

Conversely, in *Kneeland v. Ethicon Suture Laboratories*[36] the court held an order quashing service of summons on a foreign corporation appealable on the ground that it met the test of the *Lyon* case, set forth above.

Erickson v. Boothe[37] was an action for declaratory relief, to determine whether the defendant had effectively exercised an option to "release" certain real property under the terms of a lease contract. A judgment for the plaintiff was reversed on appeal without direction.[38] The plaintiff thereafter filed a dismissal, and the defendant, who had also sought declaratory relief, moved for judgment in accordance with the dismissal on appeal. Ultimately, the trial court set aside the dismissal and entered judgment declaring that the defendant had effectively exercised the option and was entitled to be restored to possession, and declaring that the defendant was entitled to an accounting of the rents, issues and profits taken by the plaintiff while in possession. It further provided that unless the parties were able to agree on the accounting, and unless the plaintiff paid such by certain specified dates, the defendant could elect to proceed in the action to recover such rents, issues and profits. From this judgment the plaintiff appealed. The

[35] *Id.* at 372, 338 P.2d at 919.
[36] 113 Cal. App. 2d 335, 248 P.2d 447 (1952).
[37] 35 Cal. 2d 108, 216 P.2d 454 (1950).
[38] Erickson v. Boothe, 79 Cal. App. 2d 266, 179 P.2d 611 (1947).

Supreme Court dismissed the appeal, saying, "It is manifest that the judgment is merely interlocutory and was so intended because the court contemplated that further judicial proceedings would be necessary in this action before there would be a final adjudication of the matter. An appeal does not lie from such a judgment."[39]

An appeal will lie, however, where the conditions of the order are such as to be "self-executing." Thus, in *Yarbrough v. Yarbrough*[40] an appeal was allowed from an order vacating a default judgment, conditional upon the payment of costs by defendant, upon the grounds that the order was self-executing. Since no further judicial action was necessary, the determination was final for purposes of appeal.

Frequently the courts have stated that "there can be but one final judgment in an action," and that such a judgment is "one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy."[41] However, the Supreme Court of California has declared that such cases are applicable only where the interests of the parties are identical.[42] Where there has been a joinder of parties and causes there may be several separate interests in a single trial. In such cases separate judgments may be entered at different times, and "it is well settled that where parties have distinct interests there can be a separate, final and appealable judgment for each."[43]

Final Determination of A Collateral Matter[44]

For purposes of appeal, a final judgment is not necessarily the last one in an action and the term "final judgment" is not limited to a decree finally determining all issues presented by the pleadings.

As already mentioned, certain interlocutory orders are made appealable by statute.[45] Such orders are, of course, exceptions to the final judgment rule. In addition, the California courts have permitted an appeal where there has been a "final determination of some *collateral*

[39] Erickson v. Boothe, 35 Cal. 2d 108, 109, 216 P.2d 454, 455 (1950).

[40] 144 Cal. App. 2d 610, 301 P.2d 426 (1956).

[41] Bank of America v. Superior Court, 20 Cal. 2d 697, 701, 128 P.2d 357, 360 (1942); David v. Goodman, 89 Cal. App. 2d 162, 165, 200 P.2d 568, 570 (1948).

[42] Howe v. Key System Transit Co., 198 Cal. 525, 246 Pac. 39 (1926). See generally 3 CAL. JUR. 2d *Appeal and Error* § 40 (1952).

[43] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 12 at 2153-54 (1954). See also 3 WITKIN, *supra*, §§ 13-14; 3 CAL. JUR. 2d *Appeal and Error* § 40 (1952).

[44] For a more thorough treatment of the collateral order doctrine, see Comment, 15 HASTINGS L.J. 105 (this issue).

[45] See, *e.g.*, Cal. Code Civ. Proc. § 963 (2), set out in its entirety in note 15 *supra*.

matter distinct and severable from the general subject of the litigation."[46]

Generally spoken of as an "exception" to the rule of one final judgment, such a determination is regarded as "substantially the same as a final judgment in an independent proceeding,"[47] and upon that ground an appeal will be allowed.

It is under this so-called "exception" to the final judgment rule that an appeal may lie from an order which is not among those expressly designated by the statutes as appealable, even though there has been no final decree in the suit.[48]

However, to be appealable under this doctrine there appears to be an additional requirement beyond those of finality and collaterality mentioned above; namely, the order must direct the payment of money by appellant or the performance of an act by or against him.[49]

Role of the Extraordinary Writs

Certain determinations fail to fulfill the requirements of the final judgment rule. A typical example is the ordinary discovery order. Such an order generally cannot be regarded as a final determination of a collateral matter, since it is in the nature of a proceeding to compel evidence to prove or disprove the truth of the issues involved in the case.[50] Since they are likewise not among those interlocutory orders expressly made appealable by the statutes, orders relating to inspection and discovery are not directly appealable.[51]

Suppose, however, the trial court issues a discovery order compelling the disclosure of information which is subject to the claim of privilege. Or, conversely, suppose the court issues an order denying a motion for discovery to which the moving party was entitled. Obviously, to require the party adversely affected by the order to await a final judgment before seeking a remedy might very well subject him

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[46] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 11 at 2152 (1954).

[47] *Ibid.*

[48] Howe v. Key System Transit Co., 198 Cal. 525, 246 Pac. 39 (1926); Kneeland v. Ethicon Suture Laboratories, 113 Cal. App. 2d 335, 248 P.2d 447 (1952). See also 2 STANBURY, CALIFORNIA TRIAL AND APPELLATE PRACTICE *Appeal* § 875 (1958), wherein can be found a list of decisions illustrative of those in which independent appeals have been permitted from orders on collateral issues.

[49] Sjoberg v. Hastorf, 33 Cal. 2d 116, 199 P.2d 668 (1948).

[50] See Collins v. Corse, 8 Cal. 2d 123, 64 P.2d 137 (1936).

[51] *Ibid.*; Union Oil Co. of Cal. v. Reconstruction Oil Co., 4 Cal. 2d 541, 51 P.2d 81 (1935).

to unfair hardship or irreparable harm. Under these circumstances, the remedy available by way of appeal is wholly inadequate. How then is justice to be done?

The California cases are numerous in which the court has recognized the nonappealability of such orders, and yet afforded a remedy under one of the extraordinary writs, such as prohibition[52] or mandamus.[53] Since there is no "plain, speedy, and adequate remedy, in the ordinary course of law," the statutory requirements for issuance of the writs have been satisfied.[54]

Illustrative in this regard is *Dowell v. Superior Court,*[55] an action for damages for personal injuries, where petitioner sought a writ of mandamus to compel the trial court to set aside its order denying an application for inspection of a written statement which petitioner had given to defendant's claims investigator. The court concluded that petitioner had a right to inspect the statement in question and issued the writ. In so doing, the court noted that the order was not appealable and that mandamus was the proper remedy.

Finally, it should be noted that some determinations which fulfill all the requirements of a final judgment are not appealable.[56] For example section 1222 of the Code of Civil Procedure provides: "The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive." Thus, no appeal lies from such judgments and orders.[57] Here again, the only way a review may be had is by resort to use of one of the extraordinary writs.[58]

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[52] Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954). (On the question of what constitutes privileged matter, certain points in *Holm* were overruled in Suezaki v. Superior Court, 58 Cal. 2d 166, 373 P.2d 432 (1962). However, the principle for which the case is here cited was in no way affected by that decision.); Franchise Tax Bd. v. Superior Court, 36 Cal. 2d 538, 225 P.2d 905 (1950). See also Comment, *Use of Prohibition to Avoid the Final Judgment Limitation on Appeal,* 41 CALIF. L. REV. 124 (1953).

[53] Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956); Pettie v. Superior Court, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (1960).

[54] See CAL. CODE CIV. PROC. § 1086 (mandamus), § 1103 (prohibition).

[55] 47 Cal. 2d 483, 304 P.2d 1009 (1956).

[56] Listed and discussed in 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 18 (1954).

[57] John Breuner Co. v. Bryant, 36 Cal. 2d 877, 229 P.2d 356 (1951). See also 2 STANBURY, CALIFORNIA TRIAL AND APPELLATE PRACTICE *Appeal* § 891 (1958).

[58] Wilson v. Superior Court, 31 Cal. 2d 458, 189 P.2d 266 (1948); *In re* Chapman, 141 Cal. App. 2d 387, 389, 295 P.2d 573, 575 (1956), where the court quoted *In re* Lake, 65 Cal. App. 420, 423, 224 Pac. 126, 127 (1924): "[S]ection 1222 of the Code of Civil Procedure, declares that the judgment in cases of contempt is final and conclusive. Thus, one who has been adjudged guilty of contempt has but two remedies—*habeas corpus* and *certiorari.*" The rule of nonappealability is equally applicable where the alleged contemner was discharged. John Breuner Co. v. Bryant, *supra* note 57. See also 3 WITKIN, *op. cit. supra* note 56.

Conclusion

Under the one final judgment rule in California an appeal lies only from a final judgment, unless the determination is: (1) subject to an immediate appeal by express statutory provision, or (2) such that it constitutes a final determination of a collateral matter. In a few cases there is no appeal even though there has been a determination that amounts to a final judgment.

An appellate court has no jurisdiction to hear an appeal from a nonappealable order. Moreover, jurisdiction cannot be conferred by waiver or estoppel, and even where the parties consent or are silent upon the issue of appealability an appellate court is required to dismiss the appeal on its own motion.

Thus, in cases where a party cannot afford to await a final judgment he must seek a remedy other than by way of appeal. Since there is no plain, speedy and adequate remedy in the ordinary course of law resort may be had to one of the extraordinary writs, which is in fact the general practice in such cases.

As the procedure for appeal is regulated by statute, little change in the existing rule is foreseeable unless by action of the legislature. It has been said that the courts cannot, or at least should not, through the guise of interpretation make an order appealable that the legislature intended should not be appealable.[59] Of course, with the exception of those cases where the statutes provide that the determination is "final and conclusive,"[60] and thus not appealable, legislative intent is by negative implication only.

Whether there is a need for change is arguable to say the least. Certainly a major consideration should be the adequacy of the remedies available under the present system. In those cases where there is no right to an immediate appeal, is the relief afforded by the extraordinary writs sufficient? Any first-year law student is familiar with the statement that the issuance of a writ is a matter of discretion with the court. It might be argued that therefore the court could arbitrarily refuse to issue the writ, even where the party had no other plain, speedy and adequate remedy in the ordinary course of law. The conclusion, however, would be erroneous. In an early California case the court said, concerning mandamus:

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[59] Efron v. Kalmanovitz, 185 Cal. App. 2d 149, 157, 8 Cal. Rptr. 107, 112 (1960); Peninsula Properties Co. v. Santa Cruz, 106 Cal. App. 2d 669, 677, 235 P.2d 635, 639 (1951).

[60] See CAL. CODE CIV. PROC. § 1222.

> [W]here one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ, or more correctly, in other words, *it would be an abuse of discretion to refuse it.*[61]

However, Witkin suggests that a great deal "can be done to avoid injustice, and to decrease use of extraordinary writs, by adding to the statutory enumeration those judgments and orders which obviously should be reviewable."[62]

In some states an exception to the final judgment rule is recognized where a decree which is in a strict sense interlocutory should be reviewed immediately because of possible injurious consequences.[63] Similarly, in some jurisdictions an appeal may be prosecuted from an order, judgment or decree even though it is intermediate or interlocutory where it affects a substantial right.[64]

In the federal courts an appeal is allowed at the discretion of the appellate court where the trial judge certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ."[65]

While the objectives of the one final judgment rule appear sound, there is certainly some question whether they have been fulfilled. The bulk of cases concerning what is or is not a "final judgment," or what determinations do or do not meet the requirements of the rule, is rather convincing evidence that it has afforded a breeding ground for the very evil it is designed to prevent. It is therefore suggested that a need for further study into the possibilities of additional statutory modification, or *at least clarification,* is indicated.

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[61] Potomac Oil Co. v. Dye, 10 Cal. App. 534, 537, 102 Pac. 677, 679 (1909) (emphasis added). For a similar statement concerning *prohibition* see Havemeyer v. Superior Court, 84 Cal. 327, 401, 24 Pac. 121, 140 (1890).

[62] 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 9 at 2151 (1954).

[63] Montaquila v. Montaquila, 85 R.I. 447, 133 A.2d 119 (1957).

[64] See 4 AM. JUR. 2d *Appeal and Error* § 62 (1962); C.J.S. *Appeal and Error* § 100 (1957).

[65] 28 U. S. C. § 1292 (b) (1958).