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THE COLLATERAL ORDER DOCTRINE IN CALIFORNIA

By WILLIAM M. LUKENS*

A CONFLICT between the right to appeal and the policy favoring one final judgment has given rise to what is known as the collateral order doctrine.¹ Fundamentally, the right to appeal from an order, decree or judgment does not vest until the final judgment.² To allow an earlier appeal would result in a piecemeal disposition of the case causing unnecessary delay and expense.³ Hence, an appeal can be taken only from a final judgment.⁴

The Doctrine

There are, however, many interlocutory orders where an immediate appeal is necessary to avoid irreparable injury. For instance, an erroneous interlocutory order dissolving an injunction which prohibited the tearing down of a party's house would result in irremedial loss if such an order were not immediately appealable. In order to prevent such an injury, section 963 of the California Code of Civil Procedure provides that an appeal may be taken not only from a "final judgment entered in an action, or special proceeding,"⁵ but also from specified interlocutory orders.⁶

There are also many interlocutory orders not specified in the statute which cause similar hardships. In order to bring these situations within the statute, courts have broadened the interpretation of final judgment. If final means the last in an action, there can be only one final judgment in an action and thus only one appeal.⁷ Therefore, final is construed to refer to a determination of the rights of the parties in relation to the matter in controversy.⁸ Thus, there may be several final

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¹ See Comment, 70 HARV. L. REV. 555 (1957).

² Pahl v. Ribero, 193 Cal. App. 2d 154, 14 Cal. Rptr. 174 (1961); Scarbery v. Bill Patch Land & Water Co., 170 Cal. App. 2d 368, 338 P.2d 916 (1959); Comment, 15 So. CAL. L. REV. 504 (1942).

³ Bank of America Nat'l Trust and Sav. Ass'n v. Superior Court, 20 Cal. 2d 697, 122 P.2d 316 (1942).

⁴ Nolan v. Smith, 137 Cal. 360, 70 Pac. 166 (1902); David v. Goodman, 89 Cal. App. 2d 162, 200 P.2d 568 (1948).

⁵ CAL. CODE CIV. PROC. § 963(1).

⁶ CAL. CODE CIV. PROC. § 963(2).

⁷ Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court, 20 Cal. 2d 697, 122 P.2d 316 (1942).

⁸ Stockton Combined Harvester & Agricultural Works v. Glen Falls Ins. Co., 98 Cal. 557, 33 Pac. 633 (1893); Potvin v. Pacific Greyhound Lines Inc., 130 Cal. App. 510, 20 P.2d 129 (1933).

judgments in an action because there may be several matters in controversy upon which a decision is rendered.

Under this definition of final, two more requirements are necessary in order that the judgment be final for purposes of appeal: the matter in controversy must be collateral to the main issue,⁹ and the order must direct the payment of money by appellant or the performance of an act by or against him.¹⁰ These elements constitute what is known as the *collateral order doctrine*, and thus, what merely would have been an interlocutory order under the "last in an action" definition of final, has become a final judgment itself. Instead of recognizing an exception to the final judgment rule, courts have applied the word final to such interlocutory decisions in a sense quite foreign to the true sense of the rule;¹¹ hence, the expression "final for purposes of appeal."¹²

The concept of collaterality is not difficult to understand. There are some issues in the course of litigation that are distinct and severable from the main issue.¹³ A decision on such an issue would determine finally the rights of the parties and would leave no further judicial acts to be done by the court in regard to that issue. But if the preliminary order seeks the same overall objective as the main issue, it is not appealable under the collateral order doctrine.¹⁴

As pointed out in *Sjoberg v. Hastorf*,¹⁵ to be appealable "it is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; *it must direct the payment of money by appellant or the performance of an act by or against him.*"¹⁶ This requirement has been the subject of some confusion in California.

⁹ *Edlund v. Los Altos Builders*, 106 Cal. App. 2d 350, 235 P.2d 28 (1951).

¹⁰ *Sjoberg v. Hastorf*, 33 Cal. 2d 116, 199 P.2d 668 (1948); *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375 (1932); *Free Gold Mining Co. v. Spiers*, 135 Cal. 130, 67 Pac. 61 (1901); *City of Los Angeles v. Los Angeles City Water Co.*, 134 Cal. 121, 66 Pac. 198 (1901); *Grant v. Superior Court*, 106 Cal. 324, 39 Pac. 604 (1895); *Efron v. Kalmanovitz*, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960).

¹¹ Comment, 33 HARV. L. REV. 1076 (1920).

¹² *Meehan v. Hopps*, 45 Cal. 2d 213, 217, 288 P.2d 267, 270 (1955).

¹³ 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 11 (1954).

¹⁴ *Bakewell v. Bakewell*, 21 Cal. 2d 224, 130 P.2d 975 (1942); *City of Los Angeles v. Schweitzer*, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962); *People v. Bales*, 180 Cal. App. 2d 16, 4 Cal. Rptr. 205 (1960); *Scarbery v. Bill Patch Land & Water Co.*, 170 Cal. App. 2d 368, 338 P.2d 916 (1959); *Miller v. Stein*, 145 Cal. App. 2d 381, 302 P.2d 403 (1956).

¹⁵ 33 Cal. 2d 116, 199 P.2d 668 (1948).

¹⁶ *Id.* at 119, 199 P.2d at 670. (Emphasis added.)

A Broadening of the Doctrine; an Illusory Trend

Two recent cases seem to indicate a relaxation of the "payment of money or performance of an act" requirement, and therefore a broadening of the collateral order doctrine. But a close analysis indicates that the requirement still remains.

In *Meehan v. Hopps*¹⁷ an appeal was allowed from an order denying a motion to enjoin opposing counsel from participating in the case. The court purported to base appealability on two grounds: first, that section 963(2) expressly provides for an appeal where an injunction is denied; and second, that the collateral order doctrine applied. Thus, the court appeared to apply the collateral order doctrine without requiring a payment of money or some other act by or against the appellant. However, a subsequent case, *Efron v. Kalmanovitz*,¹⁸ explained that the appeal was allowed in *Meehan* solely on the basis of injunction, and that the reference to the collateral order doctrine

. . . was concerned only with the question of collaterality and finality. The briefs of both parties in *Meehan* cited *Sjoberg v. Hastorf*, *supra*, and there is nothing in the opinion in *Meehan* indicating an intent to delimit or overrule *Sjoberg* and its own decisions cited in *Sjoberg* to the effect that not only must the order of a collateral issue be final to be appealable, but that it must also direct the payment of money by appellant or the performance of an act or against him.¹⁹

Other decisions, not led astray by *Meehan*, have relied on *Sjoberg* in holding orders nonappealable which deny motions to reform a fire insurance policy,²⁰ to amend the complaint,²¹ and to correct minutes.²²

However, *Meehan* has been cited as authority for allowing an appeal from one particular order which neither directs the payment of money nor the performance of an act. In *Berry v. Chrome Crankshaft Co.*²³ and in *Getrost v. Lanham*²⁴ an appeal was allowed from an order denying a motion to disqualify defendant's attorney. Since a motion to disqualify an attorney could be framed, as in *Meehan*, as a motion to enjoin the attorney from participating in the case, allowing the appeal in these two cases might be justified under the injunction provision of section

¹⁷ 45 Cal. 2d 213, 288 P.2d 267 (1955).

¹⁸ 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960).

¹⁹ *Id.* at 156, 8 Cal. Rptr. at 111.

²⁰ *Maier Brewing Co. v. Pacific Nat'l Fire Ins. Co.*, 194 Cal. App. 2d 494, 15 Cal. Rptr. 177 (1961).

²¹ *Hixon v. Hixon*, 146 Cal. App. 2d 204, 303 P.2d 607 (1956).

²² *Simmons v. Santa Barbara Ice & Cold Storage Co.*, 162 Cal. App. 2d 23, 327 P.2d 141 (1958).

²³ 159 Cal. App. 2d 549, 324 P.2d 70 (1958).

²⁴ 200 Cal. App. 2d 801, 19 Cal. Rptr. 686 (1962).

963(2). However, the form of the motion appears in neither opinion, and section 963 was cited by neither court. It is therefore unclear whether appealability was based upon an order denying an injunction or upon the collateral order doctrine.

The second case which departed from the *Sjoberg* requirement is *Hersch v. Boston Ins. Co.*²⁵ In that case an order granting a lien upon plaintiff's cause of action was held appealable. The court quoted Witkin,²⁶ who mentions a direction to pay money or perform some other act as an *example* of the collateral order doctrine rather than a *requirement*.

Both Witkin and the court in *Sjoberg* cite *Fish v. Fish*²⁷ as one of their authorities. That case held that an order settling a receiver's account, fixing his compensation, and directing sale of receivership property to pay such compensation was appealable by a party to the main action, since in effect it was an order for the doing of an act against such party. Although the opinion states that orders requiring payment of money by the party complaining or the doing of an act by or against him²⁸ are usually regarded as final against such party and may be appealed by him, the court went on to say that an order would not be appealable if it did not direct the payment of any money or the performance of any act by or against the complaining party. Such an order would lack one of the essential elements of a final judgment.²⁹ Witkin recognized this distinction in his 1961 Supplement wherein he added that a direction for the payment of money or performance of some other act was a necessary element to the collateral order doctrine.³⁰ Nevertheless, Witkin took advantage of the *Hersch* case, as well as the *Meehan* case, to indicate a trend toward the broadening of the collateral order doctrine.³¹ But it is offered that neither *Meehan* nor *Hersch* show a tendency to eliminate the requirement set forth in *Sjoberg*. *Meehan* based appealability on section 963(2) which expressly provides for an appeal from orders refusing to grant an injunction.³² *Hersch*, on the

²⁵ 175 Cal. App. 2d 751, 346 P.2d 796 (1959).

²⁶ 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 11 (1954).

²⁷ 216 Cal. 14, 13 P.2d 375 (1932).

²⁸ *Id.* at 16, 13 P.2d at 375.

²⁹ *Id.* at 17, 13 P.2d at 376.

³⁰ 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 11 (Supp. 1961).

³¹ *Ibid.*

³² *Efron v. Kalmanovitz*, 185 Cal. App. 2d 149, 8 Cal. Rptr. 107 (1960).

other hand, relied upon a statement made in Witkin, *California Procedure*, which has since been revised.³³

Drafting the Motion

Whether or not an appeal will lie depends upon the wording used by the lawyer in drafting the motion. If an attorney moves for an order "*directing*" a receiver to pay money or perform an act against a party to the action, that party may appeal under the collateral order doctrine if the order is granted.³⁴ But if the attorney moves for an order "*authorizing*" the receiver to pay money or perform an act against a party to the action, no appeal will lie if the order is granted because the order has not complied with the requirement that it be a direction to pay money or perform an act.³⁵ The justification is that if an appeal could be taken every time a receiver was authorized to do something, there would be undue delay and expense.³⁶ However, in substance the order is the same whether the receiver is authorized or directed.

Until the Supreme Court of California makes clear the doctrine of *Meehan*, lawyers must word their motions with utmost care. If the lawyer fears that his motion will be denied, he should use words of an injunctive nature so that the denial of his motion will be specifically appealable under section 963(2).³⁷ But if a lawyer is reasonably certain that his motion will be granted, he should word his motion in such language that the order will not direct the payment of money or some other act. If the court still follows the doctrine of *Sjoberg v. Hastorf*,³⁸ then his adversary will be unable to appeal from an order lacking the direction to pay. That an appeal may hinge merely on the wording of a motion is a retrogression to the conditions that resulted in the abolition of the common law forms of action.

Conclusion

The requirement that the order direct the payment of money or performance of some other act by or against the appellant seems to be peculiar to California. The result of this additional restriction has been to preclude an immediate appeal from erroneous orders whose in-

³³ 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 11 (Supp. 1961).

³⁴ *Fish v. Fish*, 216 Cal. 14, 13 P.2d 375 (1932).

³⁵ *Title Ins. & Trust Co. v. California Dev. Co.*, 159 Cal. 484, 114 Pac. 838 (1911); *Free Gold Mining Co. v. Spiers*, 135 Cal. 130, 67 Pac. 61 (1901).

³⁶ *Title Ins. & Trust Co. v. California Dev. Co.*, *supra* note 35, at 492, 114 Pac. at 841.

³⁷ CAL. CODE CIV. PROC. § 963(2).

³⁸ 33 Cal. 2d 116, 199 P.2d 668 (1948).

jurious effects cannot be removed by reversal on appeal from a subsequent "final" judgment.

The collateral order doctrine serves a useful purpose because it acts as a safety valve allowing appeals to be taken immediately from orders not specifically appealable by statute. But there are still many orders where nonappealability would cause undue hardships, which do not fulfill all the requirements of the collateral order doctrine simply because they do not direct the payment of money or the doing of some other act.³⁹ A legislative remedy lies in the adoption of discretionary appeals as has been done in the federal courts⁴⁰ and in many states.⁴¹ This would eliminate the practice of perverting the definition of final judgment that necessarily arises in the application of the collateral order doctrine. However, if the legislature fails to correct the problem, the courts should provide a judicial remedy. A broadening of the present construction of the definition of final judgment by eliminating the requirement that an order must direct the payment of money or some other act would be a long stride in the right direction.

³⁹ Because of *Meehan*, a denial of a motion to disqualify opposing counsel seems to have fallen out of this category. *Getrost v. Lanham*, 200 Cal. App. 2d 801, 19 Cal. Rptr. 686 (1962).

⁴⁰ 28 U.S.C. § 1292.

⁴¹ IOWA R. CIV. PRO. 332; MASS. ANN. LAWS, ch. 231 § 111; MISS. CODE ANN. § 1148; N.J. RULES, 2:2-3; W. Va. CODE ANN. § 5787.