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NOTES

APPEALABILITY OF ORDER STRIKING CROSS-COMPLAINT

The California cases involving the appealability of an order striking a cross-complaint may be divided into two categories: 1) the cross-complaint aimed solely at the plaintiff (the two-party situation), and 2) the cross-complaint aimed at some party other than or in addition to the plaintiff (the three-party situation).

The Two Party Situation

The rule in the two-party situation was stated in *Yandell v. City of Los Angeles*,¹ an action against the city to enjoin excessive diversion of percolating waters. The defendant filed a cross-complaint seeking to condemn the plaintiff's land. The plaintiff moved to strike the cross-complaint on the ground that it did not relate to the transaction or affect the property involved within the meaning of section 442 of the Code of Civil Procedure.² The order granting the motion was held to be nonappealable because it did not constitute a final judgment. The defendant was not prejudiced because "the correctness of the order may be reviewed on the appeal from the final judgment."³

The extent to which the courts have applied the rule is illustrated by *Sjoberg v. Hastorf*,⁴ where suit was brought to recover installments due under a construction contract. The defendant contended that the contract contained an arbitration clause, and petitioned the court for an order directing arbitration. The court dismissed the petition, and the defendant appealed. The appellate court stated that the petition was in essence a cross-complaint for specific performance of the provision to arbitrate and dismissed the appeal on the basis that the parties to the contract action and cross-petition were identical. If the defendant had a right to arbitration he could assert it on appeal from the final judgment in the contract action, and "no greater hardship [would] result than in any case where a party is forced to stand trial because of an erroneous ruling of the trial court."⁵

It would appear that more is involved here than "hardship" to the defendant. The normal cross-complaint is simply a separate cause of action which the de-

¹ 214 Cal. 234, 4 P.2d 947 (1931).

² CAL. CODE CIV. PROC. § 442: "Whenever the defendant seeks affirmative relief against any person, whether or not a party to the original action, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

³ 214 Cal. 234, 235, 4 P.2d 947 (1931). The rule is the same where the cross-complaint is aimed at the plaintiff and a third party who is not served and does not appear. The order striking the cross-complaint adjudicates nothing between the cross-complainant and the non-appearing third party and is therefore nonappealable. *Kennedy v. Owen*, 85 Cal. App. 2d 517, 193 P.2d 141 (1948).

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

⁵ *Id.* at 119, 199 P.2d at 670.

fendant has against the plaintiff.⁶ If the two causes are sufficiently related, the defendant is allowed to set up his cause by way of cross-complaint.⁷ Contrary to the rule with regard to a counterclaim,⁸ the relief sought by way of cross-complaint need not affect the relief sought by the complaint.⁹ In *Sjoberg*, however, the cross-complaint attacked the very mode of the plaintiff's proceeding.

An exception to the rule denying appealability in the two-party situation was allowed in *Keenan v. Dean*.¹⁰ An action for unlawful detainer was filed in the municipal court. The defendant filed a cross-complaint for damages in an amount exceeding the jurisdiction of that court. The cause was transferred to the superior court where the plaintiff's motion to strike the cross-complaint was granted. The defendant's appeal was allowed. The court said that since only the original action remained, the superior court would have to return the case to the municipal court. But neither that court nor the appellate department of the superior court had power to review the ruling on the cross-complaint. Therefore, the court said, if it did not then take the appeal the order could never be reviewed.

The same court later disapproved its dictum that the superior court would be forced to return the case to the municipal court.¹¹ Since the dictum was the basis for allowing the exception, it is reasonable to assume that *Keenan* will not be followed. The rule is therefore absolute in California that an order granting a motion to strike a cross-complaint is nonappealable in the two-party situation.

The Three-Party Situation

The distinction between the two-party and three-party situations was first recognized in *Howe v. Key System Transit Co.*¹² This was an action by passengers against two railroads for injuries sustained in a collision. The complaint also named forty fictitious defendants designated as the train crews. Four members of the Key System crew answered under this designation, and filed cross-complaints against the other railroad seeking damages for injuries sustained in the same collision. The plaintiffs' motion to strike the cross-complaint was granted, and these defendants appealed the order. It was held that the order was appealable. The court said that the issues tendered by the cross-complaints were entirely severable from those of the complaints and answers.

⁶ See *Douglas v. Superior Court*, 94 Cal. App. 2d 395, 210 P.2d 853 (1949). The causes of action may, however, be "against any person, whether or not a party to the original action. . . ." CAL. CODE CIV. PROC. § 442.

⁷ CAL. CODE CIV. PROC. § 442. The rationale is that of avoiding circuity of actions. *Eastin v. Roberts, Carpenter & Co.*, 19 Cal. App. 2d 567, 66 P.2d 224 (1937).

⁸ See CAL. CODE CIV. PROC. § 438.

⁹ CAL. CODE CIV. PROC. § 442; see generally, Howell, *Counterclaims and Cross-Complaints in California*, 10 SO. CAL. L. REV. 415 (1937).

¹⁰ 134 Cal. App. 2d 189, 285 P.2d 300 (1955).

¹¹ *Wexler v. Goldstein*, 146 Cal. App. 2d 410, 414, 304 P.2d 41, 43 (1956); as pointed out in *Wexler*, CAL. CODE CIV. PROC. § 396 provides: "Nothing herein shall be construed to require the superior court to transfer any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered by a municipal or justice court in the same county or city and county."

¹² 198 Cal. 525, 246 Pac. 39 (1926).

Further, the practical effect of the order was to dismiss the petition of the cross-complainants for affirmative relief. Hence, it was unreasonable to hold that the cross-complainants must await the final judgments to appeal the order striking their cross-complaints.¹³

This distinction between the two-party situation and the three-party situation contains pitfalls. For example, in *Trask v. Moore*¹⁴ the defendant elected to wait until final judgment to appeal his stricken cross-complaint. Notice of appeal was filed within the time allowed, if measured from the date of the final judgment. However, it exceeded the time period if measured from the date of the order striking the cross-complaint. The cross-complaint was aimed at a co-defendant and therefore came within the three-party rule. Following *Howe*, the court held that the order was independently appealable. Nevertheless, the appeal with respect to the order was dismissed because the notice of appeal was not filed within the time limit.

Conclusion

Denying an appeal from an order striking a cross-complaint in the two-party situation, and allowing such an appeal in the three-party situation, is consonant with the one final judgment rule. Where his stricken cross-complaint is aimed at the plaintiff, the defendant should be required to await final disposition of all issues in the lower court, thereby avoiding multiple appeals in a single action. Where the cross-complaint is aimed at a co-defendant or a new party brought into the action, the proceeding is in effect a separate, collateral one, and the cross-complainant should have his right to immediately appeal the judgment on the separate issues raised by his cross-complaint, thereby avoiding circuitry of action. It is to be regretted, however, that the courts, dazzled by the symmetry of the two- and three-party distinction, have failed to recognize that there may be some two-party cases where the issues raised by the cross-complaint are collateral, as in the arbitration situation.¹⁵

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¹³ *Ibid.* The rule in *Howe* is followed where the cross-complaint is aimed at both the plaintiff and a third party, the third party not being served but appearing voluntarily, *Halterman v. Pacific Gas & Elec. Co.*, 22 Cal. App. 2d 592, 71 P.2d 855 (1937), and where the cross-defendant is brought into the action by permission of the court, *Trask v. Moore*, 24 Cal. 2d 365, 140 P.2d 73 (1944).

¹⁴ 24 Cal. 2d 365, 140 P.2d 73 (1944).

¹⁵ See *Hosiery Mfrs. Corp. v. Goldston*, 238 N.Y. 22, 143 N.E. 779 (1924), where an order to proceed to arbitrate under an arbitration agreement was held to be a final order, since it was the end of a "special proceeding," and therefore appealable.

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