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EFFECT ON THE RIGHT TO APPEAL OF REFUSAL TO COMPLY WITH ORDERS OF THE COURT

The California cases are not in harmony on the question whether an appellate court may dismiss or stay an appeal for failure of the appellant to obey the trial court's orders. The problem has arisen most frequently where the appellant has failed to pay various fees, and where he has been guilty of contumacious conduct regarding the custody of children in divorce actions.

The Custody Cases

In the early case of *Vosburg v. Vosburg*¹ a wife brought an action of divorce against her husband. She was granted a divorce and custody of the two younger children and the defendant was granted custody of the eldest son. Prior to the commencement of the action the youth had been taken to New York by the defendant after he promised the plaintiff he would return in the fall. When the defendant failed to fulfill his promise it was decreed that he should bring the boy back to California and keep him within the jurisdiction of the court. The defendant failed to heed this order and the court awarded custody of the eldest child to the respondent and again directed the defendant to return the boy to California. The defendant appealed and the plaintiff filed a motion to dismiss the appeal because of the defendant's failure to obey the orders of the court. The court refused to grant the motion to dismiss, stating that "there is no precedent for dismissing an appeal for the reasons here relied on."² Thus the *Vosburg* decision became the precedent for refusal to dismiss an appeal despite the appellant's disregard of the court's orders.

*MacPherson v. MacPherson*³ also involved an appeal in a divorce action by a father who refused to obey the court's command that he bring his children back into the jurisdiction. Despite the precedent set by *Vosburg* the court dismissed the appeal without mentioning that decision. Apparently concerned with an affront to its dignity, the court reasoned that "a party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in contempt to its legal orders and processes . . ."⁴ The result of the dismissal was in effect an affirmance of the judgment appealed from, since the dismissal was not expressly made without prejudice.⁵ Therefore it seems that the appellant was precluded from pressing a further appeal if he should subsequently purge himself of contempt.⁶

¹ 131 Cal. 628, 63 Pac. 1009 (1901).

² *Id.* at 630, 63 Pac. at 1010.

³ 13 Cal. 2d 271, 89 P.2d 382 (1939).

⁴ *Id.* at 277, 89 P.2d at 385, quoting from *Weeks v. Superior Court*, 187 Cal. 620, 203 Pac. 93 (1921). In *MacPherson*, contrary to *Vosburg*, the defendant had been held in contempt of court. The cases cannot be distinguished on that ground, however, since *Tobin v. Casaus*, 128 Cal. App. 2d 588, 275 P.2d 792 (1954), has held that a dismissal of an appeal without an adjudication of the appellant's contempt is proper.

⁵ CAL. CODE CIV. PROC. § 955.

⁶ No case has been found that allowed an appellant to appeal after his appeal had been dismissed, unless it was dismissed without prejudice.

Neither *Vosburg* nor *MacPherson* reached a desirable result. A party who knows that he can appeal despite his refusal to comply with an adverse judgment will be encouraged to speculate on the result of his appeal by disregarding the lower court's order. On the other hand, a party whose right to appeal has been finally denied will have no incentive to obey an order, such as that in *Vosburg* and *MacPherson*, which cannot be enforced. These considerations make it desirable that the courts resolve the problem by adopting the solution developed in cases involving non-payment of fees: the granting of a stay of appeal to allow the appellant to purge himself of contempt or disobedience.

The Fees Cases

The orders disobeyed most commonly involve the payment of alimony, support, and attorney's fees. In an early Supreme Court case, *Borenstein v. Borenstein*,⁷ the plaintiff moved to dismiss "upon the sole ground that the order allowing attorney's fees and costs has not been complied with . . ."⁸ The court held that a failure to pay the allowed compensation would not merit a dismissal and denied the motion. But the court did allow a stay of the appeal.⁹

However, there are cases which criticize the view that a stay is a suitable redress where fees have not been paid.¹⁰ One case¹¹ pointed to *Tobin v. Casaus*,¹² where a stay was given and the defendant failed to take advantage of the court's generosity,¹³ thereby wasting the court's time by putting off the inevitable dismissal. It seems that the reason behind the dismissal of the appeal is the court's apprehension that if the motion to dismiss were denied it would result in a flagrant abuse of the court's processes.¹⁴ Yet the view more consonant with reason is the granting of a stay of appeal. If the appeal is stayed the appellant is encouraged to obey the orders of the court because he cannot press his appeal until he does so. But if the appeal is dismissed, in all probability the appellant will never pay the delinquent fees and the respondent will be left without the needed compensation.

The Stay of Appeal

Other cases treating a motion for stay of appeal indicate that the courts have developed a doctrine of discretion. In *Pugliese v. Pugliese*¹⁵ respondent moved for a stay of appeal until the appellant paid attorney's fees for the pending appeal as well as the trial, as ordered by the superior court. The refusal of the motion

⁷ 11 Cal. 2d 301, 79 P.2d 388 (1938).

⁸ *Id.* at 302, 79 P.2d at 388.

⁹ See also *Kroc v. Kroc*, 32 Cal. 2d 812, 198 P.2d 510 (1948).

¹⁰ *Kotteman v. Kotteman*, 150 Cal. App. 2d 483, 310 P.2d 49 (1957) (the court said that in less aggravated situations courts have granted a stay but argued that such leniency had failed in its purpose); *Travis v. Travis*, 89 Cal. App. 2d 292, 200 P.2d 843 (1948) (the court said that it would be a flagrant abuse of equity to consider the demands of a party who stands in contempt).

¹¹ *Kotteman v. Kotteman*, *supra* note 10.

¹² 128 Cal. App. 2d 588, 275 P.2d 792 (1954).

¹³ *Id.* at 593.

¹⁴ *Travis v. Travis*, 89 Cal. App. 2d 292, 200 P.2d 843 (1948).

¹⁵ 200 Cal. 652, 254 Pac. 266 (1927).

was grounded upon respondent's failure to show either that the appellant was financially able to comply or that the respondent was not able to defray those expenses herself. It would seem that in such a situation it should be mandatory for the appellant to pay the fees or show cause why he should not. The court was straining when it denied the motion because the respondent failed to allege the appellant's financial status. The appellant was the party in default, not the respondent, and the burden of assessing the appellant's financial status should have rested upon him and not the respondent.

In contrast is *Kopasz v. Kopasz*¹⁶ where on substantially similar facts the court granted a stay until the party appealing complied with the order to pay. The court distinguished *Pugliese*, reasoning that in that case there was no allegation that the respondent could not pay her own fees, while there was such a declaration in this case. What the court did not seem to heed was the assertion by the appellant that he was unable to meet the costs and if forced to pay them he would be precluded from pressing his appeal. The court held it would be better to maintain the status quo by the stay rather than allow an appeal where the respondent could not afford to be adequately represented.

Kopasz was subsequently cited by a respondent in an effort to have an appeal stayed.¹⁷ The court denied the motion and said that *Kopasz* did not apply because the respondent failed to allege inability to satisfy her own costs and thus the case was more like *Pugliese*. In *Hardy v. Hardy*,¹⁸ *Kopasz* was again relied upon for a stay. All the necessary monetary allegations were made, but the court refused to follow *Kopasz*, declaring that the granting of the stay is within the discretion of the appellate court, and that a stay would not benefit the respondent. Since the opening brief had been filed, the court reasoned, it would be better to proceed with the appeal.

The result of the cases utilizing the stay of appeal is that the parties to a cause of action are faced with incomplete distinctions and are placed on unsure footing. On one hand, the courts have said that only if the moving party alleges that he is unable to pay the various fees and also points out that the appellant is able to pay them will the appellant be compelled to indemnify the respondent as ordered by the lower court. On the other hand, the courts have passed over these considerations and held that it is discretionary with the court to grant or deny the stay.

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¹⁶ 34 Cal. 2d 423, 210 P.2d 846 (1949).

¹⁷ *Dimon v. Dimon*, 101 Cal. App. 2d 190, 225 P.2d 282 (1950).

¹⁸ 156 Cal. App. 2d 347, 319 P.2d 380 (1957).

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