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Appealability of Orders on Motions to Intervene

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APPEALABILITY OF ORDERS ON MOTIONS TO INTERVENE

Intervention is a device whereby a person who is not an original litigant but has interests to protect in a proceeding may intervene therein against the plaintiff, defendant or both.[1] Intervention is sought by motion for leave to file a complaint[2] and is granted or denied by order of the court. It is the purpose of this note to examine the appealability of these orders.

It is well settled in all jurisdictions that an order granting intervention is not directly appealable.[3] The courts are agreed that an order granting intervention is an intermediary order, not determining the rights of any party with finality.[4] It is apparent that the courts recognize that the original litigants' rights are adequately protected by granting a review of the order upon an appeal from the final judgment in the cause,[5] though this is rarely brought out in the cases.

Notwithstanding that the California Code of Civil Procedure makes no express provision for the appeal of an order denying a motion to intervene, such an order is appealable.[6] The reason most frequently offered is that an order denying intervention amounts in effect to a final judgment as to the party seeking intervention.[7] If a party is denied intervention he is removed entirely from the litigation and his rights are determined completely and finally. There is nothing left for such party to do but to comply or not comply with the decree, which satisfies the "test" of finality as posited by some courts.[8]

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[1] BLACK, LAW DICTIONARY 956 (4th ed. 1951).

[2] See CAL. CODE CIV. PROC. § 387.

[3] Otten v. Baltimore & O. R.R. Co., 205 F.2d 58 (2d Cir. 1953); Annot., 15 A.L.R.2d 377 (1951).

[4] An order directing appellee to intervene as a defendant was deemed interlocutory, not final in nature, and unappealable in H. M. Rowe Co. v. Rowe, 154 Md. 599, 141 Atl. 334 (1928). To the same effect is Taylor v. Western States Land & Mortgage Co., 63 Cal. App. 2d 401, 147 P.2d 36 (1944); Ray v. Anderson, 117 Ga. 136, 43 S.E. 408 (1903); Ray v. Moore, 19 Ind. App. 690, 49 N.E. 1083 (1898).

[5] Annot., 15 A.L.R.2d 379 (1951). *But see* London P. & A. Bank v. Abrams, 6 Ariz. 87, 53 Pac. 588 (1898), the Arizona Supreme Court holding that intervention is completely within the discretion of the court and the exercise of that discretion cannot be reviewed on appeal from a final judgment in the cause.

[6] Bowles v. Superior Court, 44 Cal. 2d 574, 283 P.2d 704 (1955); Dollenmayer v. Pryor, 150 Cal. 1, 87 Pac. 616 (1906); Lopez v. Bell, 207 Cal. App. 2d 394, 24 Cal. Rptr. 626 (1962); People v. City of Long Beach, 183 Cal. App. 2d 271, 6 Cal. Rptr. 658 (1960). The person whose motion to intervene has been denied is not afforded the privilege of appealing the final judgment in the original action inasmuch as he is not "aggrieved" by the judgment. See CAL. CODE CIV. PROC. § 938. Nor is he a party to the record. *Ex parte* Cutting, 94 U.S. 14 (1877); Braun v. Brown, 13 Cal. 2d 130, 87 P.2d 1009 (1939); Lopez v. Bell, 207 Cal. App. 2d 394, 24 Cal. Rptr. 626 (1962). If a party elects to forego the direct appeal provided him in California, he loses his right to appeal, as he cannot appeal the final judgment in the cause. In the federal courts the person whose motion to intervene has been denied has no right to appeal at any stage of the proceeding when the motion was made under the provisions for permissive intervention. Thompson v. Broadfoot, 165 F.2d 744 (2nd Cir. 1948). A person in this situation apparently has no alternative but to bring his own action, as he has no appeal or mode of review from the order keeping him out of the existing action.

[7] Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 Pac. 244 (1914).

[8] "[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. . . ." Lyon v. Goss, 19 Cal.

The federal courts, on the other hand, draw a distinction between intervention as a matter of right (Federal Rule 24(a)[9]), and "permissive" intervention (Federal Rule 24(b)[10]). The interests in the litigation of the party seeking intervention bring him within the purview of one or the other of these categories. An appeal is allowed from an order denying intervention when the motion is made as a matter of right.[11] Conversely, an order denying intervention when the motion is made under the provisions for permissive intervention is unappealable.[12]

The United States Supreme Court in *Allen Calculators, Inc. v. National Cash Register Co.*[13] stated, however, that a denial of a motion to intervene (when made under Federal Rule 24(b)) is appealable if the party seeking intervention can show a clear abuse of discretion. But the Court emphasized that the exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown, and that it is not ordinarily possible to determine that question except in the light of the whole record.[14] This latter statement would seem to imply that even were there an abuse of discretion it is doubtful the court would entertain an appeal because of the difficulty in ascertaining such an abuse. This view, that an abuse of discretion may provide sufficient grounds for appeal, has been announced by the federal courts generally,[15] but no case exists where a "clear abuse of discretion" formed the basis of an appeal.

The California courts recognize intervention not as a matter of right,[16] but

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2d 659, 670, 123 P.2d 11, 17 (1942); Kneeland v. Ethicon Suture Laboratories, 113 Cal. App. 2d 335, 248 P.2d 447 (1952).

[9] FED. R. CIV. P. 24(a): "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) When the applicant is so situated as to be adversely affected by a distribution of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

[10] *Id.* 24(b): "Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action (1) When a statute of the United States confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its *discretion* the court shall consider *whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.*" (Emphasis added.)

[11] Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1960); Farmland Irr. Co. v. Dopplmaier, 220 F.2d 247 (9th Cir. 1955); Cuthil v. Ortman-Miller Mach. Co., 216 F.2d 336 (2d Cir. 1954).

[12] United States v. California Canneries, 279 U.S. 553 (1928); Thompson v. Broadfoot, 165 F.2d 744 (2d Cir. 1948); Palmer v. Guaranty Trust Co. of New York, 111 F.2d 115 (2d Cir. 1940).

[13] 322 U.S. 137 (1943).

[14] *Id.* at 142.

[15] New York City v. New York Tel. Co., 261 U.S. 312 (1922); Textile Workers Union of America, CIO v. Allendale Co., 226 F.2d 765 (D.C. Cir. 1955).

[16] *In re* Yokohama Specie Bank, 86 Cal. App. 2d 545, 195 P.2d 555 (1948).

as a matter of discretion.[17] Intervention is governed by statute[18] and is permissive, application being made by leave of court.[19] Notwithstanding these frequent references to intervention as a discretionary matter, the California courts allow an appeal from a denial of such motion in all instances. In fact, the well established rule that an appellate court will not disturb the action of a trial court in the exercise of its discretionary power has been declared to be inapplicable when determining appealability.[20] Thus, the rule applied in California differs in part from that applied in the federal courts. Both jurisdictions reach the same result where a party has interests sufficient to qualify him for intervention in the federal courts under Federal Rule 24(a) and he will be granted an appeal in either jurisdiction. The result is different, however, when the party has interests qualifying him for intervention under Federal Rule 24(b). A party in the latter circumstance will be denied an appeal in the federal courts but granted the appeal in California, since the California courts allow an appeal from any order denying intervention.

The rule applied by the federal courts appears to be more practical than the California rule, but only because the code provision governing intervention in the federal courts[21] is more restrictive than the provision in California.[22] Due to the loosely written statutory provision for intervention in California[23] appeal as a matter of right is compelled. To deny an appeal in all cases would prejudice those having substantial interests, and to impose on the courts the task of categorizing interests and formulating a rule of appeal applicable thereto would be highly impractical. Thus the present rule in California is the only just one under the existing statute. However, a more restrictive provision for intervention in California would allow the application of a rule similar to that applied in the federal courts, and this would appear to be a more adequate and practical solution.

There is, of course, the historic idea based on some concept of "fairness" or "justice" that every party should have the benefit of an appeal. There are definitely many situations where the right to appeal is desirable, but by the same token there are those situations where it is not. It appears that an order denying intervention may under certain circumstances be one such situation.

There are three factors weighing heavily against allowing an appeal under these circumstances. First, an appeal is time consuming (currently taking approximately eighteen months[24])—perhaps the strongest argument against it. Secondly, by granting all appeals from orders denying intervention, the courts facilitate the unscrupulous use of this device to effect a desired delay. This evil inheres because in the case of intervention the original action must be stayed

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[17] People v. City of Long Beach, 183 Cal. App. 2d 271, 6 Cal. Rptr. 658 (1960); *In re* Yokohama Specie Bank, 86 Cal. App. 2d 545, 195 P.2d 555 (1948).

[18] CAL. CODE CIV. PROC. § 387.

[19] *In re* Yokohama Specie Bank, 86 Cal. App. 2d 545, 195 P.2d 555 (1948).

[20] Luck v. Luck, 83 Cal. 574, 23 Pac. 1035 (1890).

[21] FED. R. CIV. P. 24.

[22] CAL. CODE CIV. PROC. § 387: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding . . . ."

[23] *Ibid.*

[24] Halpin, *Delay on Appeal*, 38 CAL. S. BAR J. 279, 283 (1963).

until final determination of the appeal;[25] and it is no difficult task for a party to procure another to intervene and then appeal a subsequent denial. A third undesirable incident is apparent even when the motion is made in good faith: the resultant excessive delay in most cases would be harmful to the original litigants.

The federal courts with the aid of Federal Rule 24(a) allow an appeal when the moving party's interests are substantial, and the adoption of a similar scheme in California would provide for the same protection. The legislators could determine what interests should be deemed substantial and the scope of the protection of such interests would be broad or narrow depending on the desired ends.

The adoption of a scheme similar to that applied in the federal courts would not do away with the appeal from an order denying intervention altogether, but only where the moving party's interests are slight. It is urged that such a result would be beneficial. Though appeals from orders denying intervention in the aggregate take up little appellate court time, they take up some, and the savings made here coupled with the even more significant elimination of harmful delay and the possibility of abuse, strongly endorse the desirability of abrogating the appeal under the aforementioned circumstances.

As an alternative to the appeal the legislature could provide for review by writ of mandamus. Such procedure has been increasingly utilized to provide for unappealable orders and has generally enjoyed a more expanded scope in recent times.[26]

The writ is not a matter of right but is discretionary, and may be denied without opinion.[27] For this reason, any intentional abuse of the intervention procedure will have no chance of success, and in legitimate instances an abuse of discretion by the trial court would be substantially precluded. Furthermore, any delay will be minimized.

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[25] CAL. CODE CIV. PROC. § 946.

[26] 32 CAL. JUR. 2d *Mandamus* § 4 (1956); Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California*, 29 CALIF. L. REV. 276 (1941).

[27] 32 CAL. JUR. 2d *Mandamus* § 4 (1956).

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