

#71

10/7/70

First Supplement to Memorandum 70-104

Subject: New Topic - Judgment as to Fewer Than All Causes of Action

In connection with our work on joinder of parties and joinder of causes of action, Mr. Elmore forwarded to us suggested revisions of Code of Civil Procedure Section 1048. (See Exhibit I--pink.) Section 1048 presently contains a simple grant of authority to the court to consolidate or to sever actions for trial. Subdivisions (a) and (b) of the revised section would substitute more explicit language based on subdivisions (a) and (b) of Rule 42 of the Federal Rules of Civil Procedure. This substitution would probably work little change in the present practice; however, we have not had time to thoroughly explore the suggestion and have accordingly not recommended any change in this regard.

Subdivisions (c) and (d) of the revised Section 1048 deal with an entirely different problem--under what circumstances, in an action involving multiple parties or causes of action, may a court render a final judgment as to one or more but fewer than all of such causes or parties? Subdivision (c) is based on Rule 54(b) of the Federal Rules; subdivision (d) is based on Rule 13(i). A very cursory examination of the present California law indicates potential conflicts between the changes suggested and the rules developed under Section 579 of the Code of Civil Procedure. Section 579--which has not been amended since its enactment in 1872--provides:

579. In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

The staff believes that revisions based on subdivisions (c) and (d) might be desirable. The approach set forth seems sound and our revisions

as to joinder will perhaps increase the number of occasions when the problem of rendering a partial judgment will arise. However, it seem apparent to us that further work will be necessary and, more important, that this work probably will lead us beyond the present scope of our legislative authority. We accordingly ask whether the Commission wishes to request authority to study this topic. If so, we will prepare for the next meeting a draft request for authority that could be included in our Annual Report. We believe that this problem would be an ideal topic for Commission study. The problem would not require expenditure of any great amount of resources, nor would it require much Commission time. But it would permit the Commission to recommend a significant improvement in a difficult area of the law.

Respectfully submitted,

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EXHIBIT I

Code of Civil Procedure Section 1048. Severance and consolidation of action;  
final judgment as to fewer than all causes of action

Sec. . Section 1048 of the Code of Civil Procedure is amended  
to read:

1048. ~~An action may be severed and actions may be consolidated,  
in the discretion of the court, whenever it can be done without prej-  
udice to a substantial right.~~

(a) When actions involving a common question of law or fact are  
pending before the court, it may order a joint hearing or trial of  
any or all the matters in issue in the actions; it may order all the  
actions consolidated and it may make such orders concerning proceed-  
ings therein as may tend to avoid unnecessary costs or delay.

(b) The court, in furtherance of convenience or to avoid prej-  
udice, or when separate trials will be conducive to expedition and  
economy, may order a separate trial of any cause of action, including  
a cause of action asserted in a cross-complaint, or of any separate  
issue or of any number of causes of action or issues, preserving the  
right of trial by jury required by the constitution of this state or  
of the United States.

(c) When more than one cause of action is presented in an ac-  
tion, whether in a complaint or cross-complaint, or when multiple  
parties are involved, the court may direct the entry of a final judg-  
ment as to one or more but fewer than all of the causes of action or  
parties only upon an express determination that there is no just  
reason for delay and upon an express direction for the entry of judg-  
ment. In the absence of such determination and direction, any order

or other form of decision, however designated, which adjudicates fewer than all the causes of action or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the causes of action and parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the causes of actions and rights and liabilities of all the parties.

(d) If the court orders separate trials as provided in subdivision (b), judgment on a cross-complaint may be rendered in accordance with the terms of subdivision (c) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Comment. Section 1048 is revised in conformity with certain provisions of the federal rules. Subdivisions (a) and (b) are based on subdivisions (a) and (b) of Rule 42 of the Federal Rules of Civil Procedure; subdivision (c) is based on Rule 54(b); subdivision (d) is based on Rule 13(1). These changes make clearer the authority and standards for consolidation and severance of actions for trial and for rendition of judgment in actions involving multiple causes or parties.