#71 3/29/71

Memorandum 71-19

Study 71 - Joinder of Causes of Action and Parties; Counterclaims and Cross-Complaints (Separate Final Judgments)

Summary

This memorandum presents the results of the staff's brief investigation into the feasibility of drafting a provision authorizing entry of partial final judgments in a civil action for presentation as part of the Commission's pleading bill in the current legislative session. The memorandum concludes that such a task is impracticable and recommends that the Commission authorize a full research study on the subject if the Commission concludes legislation appears to be necessary to deal with this problem.

Background

At the March 1971 Commission meeting in San Francisco, the Commission had before it strenuous objections to the pleading bill (Senate Bill 201) on the basis that, although the bill authorized liberal joinder of causes and parties, it did nothing to provide a correlative authorization for entry of separate partial final judgments in potentially bulky actions. Although it was a general feeling among the Commissioners that this problem is present in existing law and that the pleading bill at most will serve to aggravate it only slightly, the Commission nonetheless felt that the problem was significant and should be solved, if possible. The staff was directed to investigate the feasibility of drafting an adequate statute for the April meeting.

Existing law

Whether existing law is actually inadequate to handle problems which might require partial final judgments is unclear because the law itself is unclear. There is some statutory law in the Code of Civil Procedure:

578. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

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.

These statutory provisions, however, are narrow in scope and have not been consistently interpreted or utilized, so that it is not now clear in precisely what situations a party will be able to obtain a separate final judgment. See 3 Cal. Jur.2d Appeal and Error § 40.

The case law relating to entry of separate final judgments is equally unclear and unsatisfactory. The law has basically developed in the context of the "one final judgment" rule for appeals. For an exposition of the one final judgment rule and its exceptions, see the extract from California Civil Appellate Practice §§ 5.4, 5.15-5.26 (Cal. Cont. Ed. Bar 1966), appended as Exhibit I. A significant exception to the one final judgment rule, for example, is that, where there is a final determination of some collateral matter distinct and severable from the general subject of the litigation, a judgment may be entered much as a final judgment in an independent proceeding. See 3 Witkin, California Procedure, Appeal §§ 10-14 (1954) (extract appended as Exhibit II). However, here again, the cases do not adequately indicate what is a "collateral matter" which is "distinct and separate."

It should be noted that one reason for the difficulty in readily ascertaining existing law is that there is a large mass of cases on the subject, which apparently no writer has yet carefully analyzed on the basis of their facts and organized as to holdings. The task of cataloging the cases will be a substantial one.

Policy considerations

Even if the Commission's only action in the area of separate final judgments is to sponsor a study which attempts to state existing law accurately, or merely to codify existing law, its contribution will be significant. To go beyond restatement of the law to reform of the law will require exploration in a largely uncharted area, although there is some information available concerning Federal Rule 54(b), which authorizes multiple judgments in a single action. See 6 Moore's Federal Practice ¶¶ 54.04-54.43.

Because the little that has been written on final judgments has been concerned with the requirement that a judgment be final for purposes of appeal, there has been basically no critical anaylsis of the benefits and disadvantages of the one final judgment rule. The Commission has already identified, at the March meeting, some matters of concern:

1. Is the requirement that there be one judgment per case for appeals purposes necessarily a useful requirement?

2. Are there some instances which need to be identified in which an early appeal is desirable?

3. Are there instances in which a party should be able to obtain a partial final judgment not for appeal purposes but for early collection?

4. Are there instances in which a party should not be granted a partial final judgment because of the possibility of set-off against other obligations established in the litigation?

5. What will be the problems of interpretation and enforcement which invariably arise under a separate final judgment rule?

The Commission will need to know additionally what effects a separate final judgment rule may have upon other aspects of civil litigation. It will

have to examine schemes whereby some of the conflicting policies listed above can be reconciled, as for example, allowing some partial judgments to be final for purposes of appeal but not for collection, and vice versa.

Conclusion

The separate final judgment area needs work. The cases must be organized, rules spelled out by judicial decision or statute, and policy considerations isolated. This will be a difficult task which the staff cannot practically accomplish. The policy question is whether the Commission should commence a full-scale study of the problem or whether it should be left to case development under the new pleading statute. A full research study will require sufficient funds and an available consultant. Like the Commission, the staff does not believe that the new statute significantly increases the problem that exists under present law.

Mr. Elmore reports that he has made a study of the problem and believes that it should be left to judicial development. Accordingly, since the Commission has many priority items on its agenda, we suggest that a study not be made of the separate judgment problem.

Respectfully submitted,

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EXHIBIT I

CALIFORNIA CIVIL APPELLATE PRACTICE (Cal. Cont. Ed. Bar 1966)

A. [§5.4] One Final Judgment Rule

For the obvious and desirable purpose of increasing judicial efficiency by avoiding piecemeal appeals, the legislature has enacted two statutes that are the basis for the fundamental and general principle of appellate procedure that in absence of a statute to the contrary there should be only one appeal in any given case. *Bank of America v Superior Court* (1942) 20 C2d 697, 128 P2d 357.

The first of these statutes is CCP §963(1) which provides:

An appeal may be taken from a superior court in the following cases:

1. From a final judgment entered in an action or special proceeding, commenced in a superior court, or brought into a superior court from another court . . . .

(The comparable statute relating to final judgments in inferior courts, CCP §938, is discussed in §18.4.)

The other statute is CCP §956 which provides among other things that on appeal from a judgment, the appellate court may review any intermediate ruling, proceeding, order or decision that involves the merits or necessarily affects the judgment, or that substantially affects the rights of a party. Section 956, however, specifically provides that it does not authorize the appellate court to review any intermediate decision or order from which an appeal might have been taken. See §§5.48, 5.49.

The one final judgment rule is not universal. The code sections have been interpreted to permit more than one final judgment for purposes of appeal in a case. The exceptions are discussed in §§5.15–5.26.

G. [§5.15] Exceptions

Exceptions to the one final judgment rule are recognized when, because of unusual circumstances, postponement of appeal until final determination of all issues would create serious hardship and inconvenience. *Western Electroplating Co. v Henness* (1959) 172 CA2d 278, 341 P2d 718. Also, practical and policy considerations may argue in favor of immediate review. *Brown v Memorial Nat'l Home Foundation* (1958) 158 CA2d 448, 322 P2d 600 (order appointing receivers appealable, CCP §963, and review of order must be essentially coextensive with a review on the merits of the ultimate issues).

1. [§5.16] MULTIPLE PARTIES

When there are multiple parties with distinct interests, a party whose interest has been finally determined is not required, nor allowed, to wait until the disposition of the entire case to appeal. The judgment or order affecting him is final and appealable. *Howe v Key Sys. Transit Co.* (1926) 198 C 525, 246 P 39. This is so even though there are remaining issues to be determined affecting others.

2. [§5.17] CROSS-ACTIONS

A cross-complaint is not ordinarily considered sufficiently independent to allow a separate final judgment to be entered on it if the parties to the complaint and cross-complaint are identical; an appeal does not lie from a judgment dismissing the cross-complaint. *Smith v Smith* (1962) 209

CA2d 343, 25 CR 837. Dismissal is treated as an interlocutory ruling on the pleadings that can be reviewed only on appeal from the judgment on the complaint. *Sjoberg v Hastorf* (1948) 33 C2d 116, 199 P2d 668.

If the parties to the complaint and cross-complaint are not the same, an order striking a cross-complaint is immediately appealable. *Herrscher v Herrscher* (1953) 41 C2d 300, 259 P2d 901; *Lerner v Ehrlich* (1963) 222 CA2d 168, 35 CR 106. This is so because when the defendant cross-complains against a third party or against a codefendant, dismissal of the cross-complaint is a final adverse adjudication of his cross-complainant's right to proceed against a distinct party, and the order is appealable. *Howe v Key Sys. Transit Co.* (1926) 198 C 525, 246 P 39; *County of Humboldt v Kay* (1943) 57 CA2d 115, 134 P2d 501. When the only parties to the cross-complaint are the defendant and plaintiff, an order striking the cross-complaint can be reviewed on appeal from the final judgment. *Keenan v Dean* (1955) 134 CA2d 189, 285 P2d 300.

a. [§5.18] *Ruling Against Cross-Complaint*

Attorneys often file motions to strike and demurrers at the same time. When a trial court grants a motion to strike and sustains a demurrer to a cross-complaint and then enters a judgment of dismissal after granting a motion to strike an amended cross-complaint, may cross-complainant appeal from judgment of dismissal or must he appeal from the order striking the original cross-complaint?

Assuming that the cross-defendant was a party to the action only by virtue of the cross-complaint (see §5.17), the question turns on the effect of the rulings. If the court did not rule on the demurrer to the cross-complaint and merely ordered the pleading stricken there is no basis for filing an amended cross-complaint, and a motion by respondent to strike the first amended cross-complaint is a proper method of raising the question whether leave had been granted by the court to file it. If leave had not been granted, the order striking the amended pleading would have been justified and respondent's point that an appeal from the order striking the original cross-complaint is required would be valid. See *Harvey v Meigs* (1911) 17 CA 353, 362, 119 P 941, 945.

When the trial court sustains the demurrer but not without leave to amend *and* at the same time grants motion to strike the complaint, the effect of the double ruling is that the cross-complainant has implied leave to file a first amended cross-complaint. CAL RULES OF CT 202(e); *Lavine v Jessup* (1957) 48 C2d 611, 311 P2d 8; *B.F.G. Builders v Weisner & Coover Co.* (1962) 206 CA2d 752, 23 CR 815.

b. [§5.19] *Judgment on Complaint Alone*

Judgment rendered on a complaint alone, unaccompanied by judgment on a pending cross-complaint, is not a final judgment, and appeal from it should be dismissed. *Krug v Meehan* (1951) 106 CA2d 554, 235 P2d 410. Cf. *Nicholson v Henderson* (1944) 25 C2d 375, 153 P2d 945. If the trial court's minute entry orders judgment for plaintiff on the complaint and cross-complainant takes nothing on his cross-complaint, but the judgment itself does not mention the cross-complaint, is it a final judgment? In *Tsarnas v Bailey* (1960) 179 CA2d 332, 3 CR 629, the appellate court raised this question, but because of the relaxation of rules on appeal, it adopted the procedure of *Gombos v Ashe* (1958) 158 CA2d 517, 322 P2d 933 (see §5.10) and ordered judgment on the cross-complaint against cross-complainant. Thus, the appeal was saved only at the discretion of the reviewing court.

3. [§5.20] INTERVENTION OR SUBSTITUTION

Orders allowing intervention or substitution of defendants by interpleader are not appealable. *Taylor v Western States Land & Mortgage Co.* (1944) 63 CA2d 401, 147 P2d 36 (intervention); *Camp v Oakland Mortgage & Fin. Co.* (1928) 205 C 380, 270 P 685 (substitution). However, orders denying intervention or substitution are appealable, on the theory that they are adverse final determinations of the moving party's rights to proceed in the action. *Bowles v Superior Court* (1955) 44 C2d 574, 283 P2d 704 (intervention); *Lopez v Bell* (1962) 207 CA2d 394, 24 CR 626 (intervention); *Majors v County of Merced* (1962) 207 CA2d 427, 24 CR 610 (substitution); *Walsh v Superior Court* (1928) 92 CA 454, 268 P 442 (substitution).

4. [§5.21] DETERMINATION OF COLLATERAL AND SEVERABLE MATTERS

Another exception to the one final judgment rule is recognized when an order makes a final disposition of a severable and collateral issue. The theory underlying this exception is that although there is no express statutory basis for appeal, the order, when it is independent of the action itself, is in effect a final judgment. *Fish v Fish* (1932) 216 C 14, 13 P2d 375 (order settling receiver's account, fixing compensation, and directing sale of receivership property to pay compensation appealable by a party to the main action). Compare *Union Oil Co. v Reconstruction Oil Co.* (1935) 4 C2d 541, 51 P2d 81, a "crooked-hole drilling" trespass case. The trial court, on motions by plaintiff, ordered that the plaintiff should inspect and subsurvey one of the wells worked by defendant on its property and authorized certain experts to make the examination and survey of defendant's well. The appeals from the order were dismissed, the court stating that the orders were neither final orders on a collateral matter nor injunctions.

Ordinarily, the only orders that come within this exception are those directing payment of money or performance of some other act by or against the appellant; *e.g.*, order granting or denying support and costs pending action for declaration of paternity is appealable independently of the final judgment in the case. *Carbone v Superior Court* (1941) 18 C2d 768, 117 P2d 872. See also 2 Stanbury, CALIFORNIA TRIAL AND

APPELLATE PRACTICE §875 (1958). In more recent decisions, however, this limitation to collateral orders directing payment of money or performance of some other act has not always been observed. See Witkin, CALIFORNIA PROCEDURE, 1965 Supp, Appeal at §§11–11A. See also *Meehan v Hopps* (1955) 45 C2d 213, 288 P2d 267; and cf. *Efron v Kalmanovitz* (1960) 185 CA2d 149, 8 CR 107.

Although it is within the authority of the trial court to order payment of attorney's fees in granting or refusing orders on interrogatories (CCP §§2019, 2030) such an order is not classified as a final determination of a collateral matter since the procedure followed is to secure evidence to prove or disprove issues in the action. Identical reasoning and conclusion are applicable to payment orders relating to inspection or other discovery. See *Southern Pac. Co. v Oppenheimer* (1960) 54 C2d 784, 8 CR 657; *Adams v Superior Court* (1957) 49 C2d 427, 317 P2d 983; *Collins v Corse* (1936) 8 C2d 123, 64 P2d 137.

5. [§5.22] NONAPPEALABLE FINAL JUDGMENTS

Some final judgments are not appealable, usually because of express statutory provisions. In such cases, no further litigation is possible unless review can be obtained by an extraordinary writ. The most common examples of nonappealable final judgments are noted in §§5.23–5.26.

a. [§5.23] *Contempt*

The judgments or orders made in contempt proceedings are final and nonappealable. CCP §1222; *John Breuner Co. v Bryant* (1951) 36 C2d 877, 229 P2d 356 (both in adjudication of contempt and in dismissal of contempt proceedings); *Gale v Tuolumne County Water Co.* (1914) 169 C 46, 145 P 532 (judgment of contempt made after final judgment not special order within CCP §963). There is no appeal in cases of direct (CCP §1211) or constructive contempt (CCP §1212) even though the adjudging court acted without jurisdiction. *Gale v Tuolumne County Water Co., supra.*

But review may be available by:

(a) Proceedings in certiorari to challenge the validity of an order or judgment in a contempt matter and to annul proceedings in excess of jurisdiction. CCP §§1067–1077. On the different procedures to be followed by the trial court on direct and indirect contempt, see CCP §§1211–1217; *Arthur v Superior Court* (1965) 62 C2d 404, 42 CR 441. But see the concurring opinion of Chief Justice Gibson in *Chula v Superior Court* (1962) 57 C2d 199, 206, 18 CR 507, 512, suggesting that elements of both direct and indirect contempt may be present in a "hybrid" situation and that the statutory procedure for direct contempt is suitable as long as an appropriate hearing is held on the question of excuse and the procedure for indirect contempt is not required to protect the rights of the accused.

(b) Application for habeas corpus to test commitments ordered in excess of jurisdiction. See Pen C §§1473–1507; 1 CALIFORNIA CRIMINAL LAW PRACTICE §§9.26–9.66 (Cal CEB 1964). The rule requiring actual custody no longer prevails and a petitioner is considered in constructive custody while on bail; this permits application for habeas corpus. See 1 CALIFORNIA CRIMINAL LAW PRACTICE §§9.10–9.18 (Cal CEB 1964).

(c) Prohibition to stay further proceedings. When a void judgment of contempt, although entered, has not yet been carried out or executed,

further proceedings may be stayed by prohibition. *Cosby v Superior Court* (1895) 110 C 45, 42 P 460 (no contempt for refusing to comply with unrecorded direction or provision).

b. [§5.24] *Habeas Corpus*

Until recently, orders granting or denying petitions for writs of habeas corpus, whether in a criminal or a civil case, ordinarily were not appealable. See *In re Bruegger* (1928) 204 C 169, 267 P 101; *In re Croze* (1956) 145 CA2d 492, 302 P2d 595. When a petition for a writ of habeas corpus (see 1 CALIFORNIA CRIMINAL LAW PRACTICE §§9.10–9.66 (Cal CEB 1964)) is denied by the lower court there is no review. But the aggrieved party may make successive applications to any court as long as no writ has been previously granted. Pen C §1475. After a petition has been denied and the petitioner remanded to custody, any successive petition must be filed in a higher court unless it is based on facts that did not exist when the prior petition was filed. Pen C §1475; see 1 CALIFORNIA CRIMINAL LAW PRACTICE §§9.27, 9.136 (Cal CEB 1964).

Under Pen C §1507, enacted in 1959, after an application for a writ of habeas corpus has been made by or on behalf of any person other than a defendant in a criminal case, an appeal may be taken to the district court of appeal from a final order of superior court granting any relief. When the application has been heard and determined in a district court of appeal and the relief has been granted, an application may be made for a hearing in the supreme court. The appeal to the district court of appeal and the application for hearing in the supreme court should follow CAL RULES OF CT 50.

c. [§5.25] *Consent Judgment*

Generally, a consent judgment is not reviewable whether or not a motion to dismiss the appeal is made. *Reed v Murphy* (1925) 196 C 395, 238 P 78; *Tracy v Tracy* (1963) 213 CA2d 359, 28 CR 815; *Brooms v Brooms* (1957) 151 CA2d 351, 311 P2d 567. If only part of a judgment is by consent, the rule against appellate review is confined to that part. *Duncan v Duncan* (1917) 175 C 693, 167 P 141; *Fowler v Fowler* (1954) 126 CA2d 496, 272 P2d 546; *Kentera v Kentera* (1944) 66 CA2d 373, 152 P2d 238. The rule is strictly limited, in any event, to matters clearly agreed to by the parties (*County of Placer v Freeman* (1906) 149 C 738, 87 P 628), and several limitations are recognized.

(a) The rule prohibiting appellate review of consent judgments does not apply to a judgment that adversely affects the rights of a minor or other incompetent person. *Newport v Hatton* (1924) 195 C 132, 231 P 987.

(b) A judgment by consent is subject to appellate review when the appeal raises the question whether the appellant's attorney in the lower court had authority to consent to the judgment. *Clemens v Gregg* (1917) 34 CA 245, 167 P 294, but see *La Societe Francaise D'Epargnes v Beardslee* (1883) 63 C 160.

(c) A judgment by consent is subject to review if it appears from the record that consent was given pro forma to facilitate an appeal with the understanding that the party did not thereby intend to abandon his right to appeal. In *Mecham v McKay* (1869) 37 C 154, the court held the judgment appealable, but took the occasion to admonish counsel to use greater care in framing stipulations so as not to place on appellate courts the burden of interpreting doubtful clauses in them.

(d) The right of review may be based on the theory that the consent given was so far coerced as to render it involuntary. *County of Placer v Freeman, supra; Mecham v McKay, supra.*

See also §§6.28–6.29.

d. [§5.26] *Judgments on Remand*

A directed judgment on remand (CCP §956a) is nonappealable when the appeal would involve the same issues determined by the appellate court on the first appeal. *Lambert v Bates* (1905) 148 C 146, 82 P 767; cf. *McCulloch v Superior Court* (1949) 91 CA2d 641, 205 P2d 689. If the issues on the second appeal would be different, however, the judgment entered in accordance with the appellate decision is subject to attack by motion for new trial or appeal. In many cases a nonappealing respondent who has been unable to bring to the attention of the appellate court errors committed against him is not an aggrieved party entitled to appeal until an appellate court has directed that a judgment against him be entered. Once such judgment has been entered, he is, of course, free to attack it by motion for new trial or appeal or both. *Klauber v San Diego Street Car Co.* (1893) 98 C 105, 32 P 876; *Hudgins v Standard Oil Co.* (1935) 5 CA2d 618, 43 P2d 597; *Boyd v Lancaster* (1942) 53 CA2d 479, 128 P2d 41. For discussion of the application of the doctrine of the law of the case, see §§17.14–17.16.

EXHIBIT II

3 WITKIN, CALIFORNIA PROCEDURE Appeal

1. [§10] One Final Judgment Rule.

An appeal may be taken "From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court." (C.C.P. 963(1); see also C.C.P. 983 [municipal court: "commenced therein or transferred thereto from another court"].) This provision states the *final judgment rule*, or rule of *one final judgment*, a fundamental principle of appellate practice in the United States. The theory is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case. (See *Bank of America v. Superior Court* (1942) 20 C.2d 697, 701, 128 P.2d 357; 33 Harv. L. Rev. 1076; infra, §14.) (For discussions of the similar requirement of finality of state court judgments for purposes of review by the United States Supreme Court, see *Radio Station WOW v. Johnson* (1945) 326 U.S. 120, 65 S.Ct. 1475, 1478; *Republic Nat. Gas Co. v. Oklahoma* (1948) 334 U.S. 62, 68 S.Ct. 972, 976; *Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 67 S.Ct. 1409, 1418; *Gospel Army v. Los Angeles* (1947) 331 U.S. 543, 67 S.Ct. 1428.)

In applying the final judgment rule it is necessary to make two basic distinctions:

First, there must be a *judgment*. There is no appeal from a *verdict* (*Robins v. Weis* (1950) 97 C.A.2d 144, 217 P.2d 156), from *findings* (*Ouzoonian v. Vaughan* (1923) 64 C.A. 369, 374, 221 P. 958), or from *orders preliminary to judgment* (infra, §20).

Second, however labeled, the judgment must be *final* in its effect and not interlocutory. (See infra, §15.)

Keeping these two matters in mind should avoid most premature appeals, and assure the aggrieved party of a timely appeal from a simple appealable judgment in an action involving no severable interests. But in complicated cases the one final judgment rule proves to be a delusion, and appeals from separate final judgments in a single action continue to present the most difficult problems in the field of appellate procedure. (See infra, §§11, 12, 13.)

2. [§11] Judgment Final on Collateral Matter.

A necessary exception to the one final judgment rule is recognized where there is a final determination of some *collateral matter* distinct and severable from the general subject of the litigation. If, e.g., this determination requires the aggrieved party immediately to *pay money or perform some other act*, he is entitled to appeal even though litigation of the main issues continues. Such a determination is substantially the same as a final judgment in an independent proceeding. (See *Fish v. Fish* (1932) 216 C. 14, 13 P.2d 375; *Anglo-Calif. Bank v. Superior Court* (1908) 153 C. 753, 755, 96 P. 803; *Colma Vegetable Assn. v. Superior Court* (1925) 75 C.A. 91, 95, 242 P. 82; *Cline v. Superior Court* (1917) 35 C.A. 150, 152, 169 P. 453; *Leeper v. Superior Court* (1923) 62 C.A. 736, 217 P. 811; see also *Title Ins. & Trust Co. v. Calif. Dev. Co.* (1911) 159 C. 484, 490, 114 P. 838, analyzing the decisions.)

An *order awarding temporary alimony, costs and counsel fees* is a typical illustration. "Although such an application is not a separate suit, it is a proceeding for separate judgment. . . . The application is heard and determined upon a record of its own, and the decision thereon may be made and may be the subject of a direct appeal before the determination of the issues in the action." (*Robbins v. Mulcrevy* (1929) 101 C.A. 300, 301, 281 P. 668; *Stoner v. Superior Court* (1945) 67 C.A.2d 760, 761, 155 P.2d 697; cf. *Cugat v. Cugat* (1951) 102 C.A.2d 760, 228 P.2d 31 [ex parte orders appointing receiver and ordering payment of alimony; appeal from order denying motion to vacate held proper].)

Another example is an *order vacating the appointment of a receiver and directing him to pay over money to the defendant.* This order discharges the receiver and terminates his control over the property. The plaintiff, whose right to a continuance of the receivership is finally determined against him, is entitled to appeal. (*Hibernia S. & L. Soc. v. Ellis Estate Co.* (1932) 216 C. 280, 13 P.2d 929.)

An order that the appellant *pay compensation to a receiver* is also appealable as a final judgment. It may be regarded either as a final determination of a collateral matter (supra), or as a final determination of the rights of a particular party (infra, §12). Any order which requires the payment of money or the doing of an act by the aggrieved party is final in its effect as to him. (*Los Angeles v. Los Angeles City Water Co.* (1901) 134 C. 121, 66 P. 198.)

The limitations on this theory of appealability are illustrated by *Edlund v. Los Altos Builders* (1951) 106 C.A.2d 350, 235 P.2d 28. Plaintiffs brought an action to dissolve a corporation. On an affidavit pursuant to Corp.C. 4655, showing that the directors were evenly divided, they obtained the appointment of a provisional director. *Held*, this order was interlocutory and the appeal by defendant corporation was dismissed. There was no direction for the payment of money or any other act. The order appointing a receiver is similar, and was nonappealable until expressly made appealable by statute (infra, §22).

The court disjinguished *Desert Club v. Superior Court* (1950) 99 C.A.2d 346, 221 P.2d 766, as follows: (1) There the proceeding was brought under Corp.C. 819, by directors unable to agree, for the sole purpose of obtaining the appointment of an impartial director; the order of appointment was an appealable final judgment in a special proceeding (infra, §16). (2) Here the object of the action was dissolution, and the appointment of a director was merely one ancillary step which did not meet the test of a judgment final as to a collateral matter. The remedy of the aggrieved minority shareholders was *intervention* in the action.

3. [§12] Judgment Final as to Party.

(a) *Judgment Against One Party.* A significant breakdown of the one final judgment rule results from the fact that actions brought under liberal rules of joinder of parties and causes may involve many separate interests. Convenience justifies a single trial, but separate judgments are often entered at different times. It is well settled that where parties have distinct interests there can be a separate, final and appealable

judgment for each. "[T]o hold the person bound to wait until the final judgment against the other party before taking an appeal from the judgment . . . already rendered is wholly unreasonable. . . ." (*Rocca v. Steinmetz* (1922) 189 C. 426, 428, 208 P. 964; see also *Aetna Cas. etc. Co. v. Pac. G. & E. Co.* (1953) 41 C.2d 785, 788, 264 P.2d 5.)

(b) *Order Denying Intervention or Substitution.* Ordinarily rulings on pleadings and parties are interlocutory. (See infra, §19.) But an order denying intervention or substitution finally and adversely determines the right of the moving party to proceed in the action, and is appealable by him. (*Dollenmayer v. Pryor* (1906) 150 C. 1, 87 P. 616 [intervention]; *Walsh v. Superior Court* (1928) 92 C.A. 454, 456, 268 P. 442 [substitution of executrix of deceased defendant].)

[§13] Order Striking Out Cross-Complaint.

If the dismissal or striking out of a pleading has the effect of finally determining the issues relating to the pleader's rights or liabilities, the order is a final judgment as to him. In the leading case of *Howe v. Key System Transit Co.* (1926) 198 C. 525, 246 P. 39, plaintiffs, passengers injured in a collision between two trains, sued one railroad company and individual trainmen. Defendants cross-complained against the other railroad company, alleging that it was wholly responsible. On motion of plaintiffs the court struck the cross-complaints from the files. *Held*, defendants could appeal from these orders. Their effect was to dismiss the defendants' claim for affirmative relief against the other company, and this was a final determination of a collateral matter independent of the rest of the action. (See also *Halterman v. Pac. G. & E. Co.* (1937) 22 C.A.2d 592, 71 P.2d 855; *Honan v. Title Ins. & T. Co.* (1935) 9 C.A.2d 675, 677, 50 P.2d 1068; *Young v. Superior Court* (1940) 16 C.2d 211, 105 P.2d 363.)

The scope of the rule of the *Howe* case has been clarified by later decisions establishing the test of *different parties:* An order striking out a cross-complaint is ordinarily no more appealable than any other order dealing with pleadings (infra, §19). Thus, where the defendant cross-complains against the plaintiff, dismissal of the cross-complaint is a nonappealable ruling on pleadings. This is because the action normally proceeds to a single judgment on the issues raised by the complaint and cross-complaint, and there is no need for nor right to a separate final judgment on the cross-complaint. (*Sjoberg v. Hastorf* (1948) 33 C.2d 116, 199 P.2d 668; *Evans v. Dabney* (1951) 37 C.2d 758, 235 P.2d 604; infra, §14.) But if the defendant cross-complains against *a third party* or against a *codefendant*, the dismissal of the cross-complaint is a final adverse adjudication of the cross-complainant's rights against a distinct party, and the order is an appealable judgment. (*Herrscher v. Herrscher* (1953) 41 C.2d 300, 303, 259 P.2d 901 [third parties; "Where the parties to the cross-complaint are not identical with the parties to the original action, the order amounts to a final adjudication between the cross-complainants and cross-defendants and is appealable"]; *Humboldt v. Kay* (1943) 57 C.A.2d 115, 134 P.2d 501 [codefendants]; cf. *Kenney v. Owen* (1948) 85 C.A.2d 517, 520, 193 P.2d 141 [third parties named as additional cross-defendants, but not served and did not appear; cross-complaint therefore treated as against plaintiffs alone, and order striking held nonappealable].)

[§14] Distinction: Partial Determination of Issues.

Sometimes the court or parties are misled by the wrong kind of severability; e.g., they confuse different claims or *issues* of law or fact with distinct, severable *interests* of parties. If the court attempts a piecemeal disposition of each claim or issue by rendering a number of "final judgments," the earlier judgments are premature, void and nonappealable.

(a) *Same Parties: Complaint and Cross-Complaint.* An appeal will be dismissed where a purported final judgment is rendered on a complaint without adjudicating the issues raised by a cross-complaint. (*Nicholson v. Henderson* (1944) 25 C.2d 375, 381, 153 P.2d 945; *Krug v. Meehan* (1951) 106 C.A.2d 554, 235 P.2d 410; cf. *Sjoberg v. Hastorf* (1948) 33 C.2d 116, 199 P.2d 668 [same result where appeal taken from order dismissing cross-complaint].)

(b) *Same Parties: Multiple Causes of Action.* Where the purported judgment is on less than all of the causes of action, it clearly fails to meet the requirements of the one final judgment rule. In *Mather v. Mather* (1936) 5 C.2d 617, 55 P.2d 1174, the complaint set forth three counts or causes of action seeking the same general relief. After the filing of a "Third Amended Third Cause of Action" a demurrer was sustained without leave to amend, and a formal judgment was entered on Jan. 4 that plaintiff take nothing by the third amended cause of action. Plaintiff appealed, and meanwhile the trial proceeded and another judgment was entered on March 14, "that plaintiff take nothing by his complaint, or by the first and second counts thereof." *Held*, neither judgment was final. "It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments." (5 C.2d 618.) The second judgment did not become final merely because it was later in time: "By express terms it was confined to only counts one and two, and erroneously failed to include a recital with respect to the disposition of count three. . . . The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count three in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts one and two." (*Greenfield v. Mather* (1939) 14 C.2d 228, 233, 93 P.2d 100.) (See also *Bank of America v. Superior Court* (1942) 20 C.2d 697, 701, 128 P.2d 357; *Potvin v. Pac. Greyhound Lines* (1933) 130 C.A. 510, 20 P.2d 129; *Wilson v. Wilson* (1950) 96 C.A.2d 589, 216 P.2d 104 [final judgment on counts 2 and 3, but interlocutory on count 1; "no final judgment on any count should have been entered until the first count also was finally disposed of"]; 31 Cal. L. Rev. 90.)

(c) *Different Parties.* In the *Wilson* case, supra, the court pointed out that in the federal practice separate appealable judgments may be rendered on counts which are *separate claims for relief.* (See Fed. Rule 54(b); *Reeves v. Beardall* (1942) 316 U.S. 283, 62 S.Ct. 1085; 31 Cal. L. Rev. 90; 65 Harv. L. Rev. 1245; 3 B. & H. 9.) But the court adds: "In no California decision, however, has such exception been recognized."

(96 C.A.2d 596.) The exception, in limited form, was nevertheless recognized in *Aetna Cas. etc. Co. v. Pac. G. & E. Co.* (1953) 41 C.2d 785, 264 P.2d 5. Plaintiff, insurance carrier of an employer, sued a third party tortfeasor, stating (1) three causes of action on behalf of the employer, and (2) a fourth cause of action on behalf of the injured employee. A demurrer was sustained to the fourth cause without leave to amend, a judgment of dismissal was entered as to that cause, and plaintiff appealed. *Held,* the judgment was appealable.

The court's departure from the strict rule of the *Mather* and similar cases (supra) is apparently grounded on the theory that the different causes of action may give rise to separate appealable judgments where they belong to *different parties.* "The judgment on the fourth cause of action was a final determination of the rights of plaintiff as statutory trustee seeking to recover general damages for the benefit of the injured employee. As a final determination of the rights of plaintiff *in that capacity,* such judgment should be regarded as having the same measure of finality as would a similar judgment in an action in which there were two plaintiffs seeking their respective damages from the same defendant on two severable causes of action: (1) the insurance carrier for recovery of its own compensation expenditures; and (2) the injured employee for recovery of his own general damages." The *Mather* cases, said the court, "involve an entirely different situation in that there each of the successive judgments left undetermined between the same parties in their same individual capacities another alleged cause or causes of action for the same identical relief." (41 C.2d 789.)