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Witkin California Procedure, Fifth Edition

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CHAPTER XIII - Appeal

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Appeal and Appellate Jurisdiction.

1. In General.

9 Witkin Cal. Proc. Appeal § 1

[§ 1] In General.

At common law, a judgment of a lower court was reviewed by a writ of error, issued by the higher court, and considered a new proceeding to annul the judgment below. (See *Widber v. Superior Court* (1892) 94 C. 430, 431, 29 P. 870.) In 1872, the writ of error was abolished by the adoption of the codes, and the modern method of review by appeal was instituted. (*C.C.P. 901 et seq.*)

Unlike the writ of error, an appeal is a continuation of the action. Thus, an action is deemed pending "until its final determination upon appeal, or until the time for appeal has passed." (*C.C.P. 1049.*) (On distinction between trial and appellate jurisdiction, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §20.)

The rules governing appellate practice and procedure, which may not be inconsistent with the relevant statutory provisions, are prescribed by the Judicial Council. (*C.C.P. 901*; see Judicial Council Form No. APP-001 [Information on Appeal Procedures for Unlimited Civil Cases]; *infra*, §13.)

To relieve case backlogs, several appellate jurisdictions in California and elsewhere have implemented mediation programs. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §486.)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XIII - Appeal

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Appeal and Appellate Jurisdiction.

2. Right to Appeal Is Statutory.

a. Power of Legislature.

9 *Witkin Cal. Proc. Appeal* § 2

[§ 2] Power of Legislature.

(1) *Distinction Between Right to Appeal and Appellate Jurisdiction.* There is no constitutional right to an appeal or other review of a judicial decision; thus, the Legislature has power to change the procedure, limit the right, or even abolish the right altogether. (*Superior Wheeler Cake Corp. v. Superior Court* (1928) 203 C. 384, 385, 264 P. 488; *Skaff v. Small Claims Court* (1968) 68 C.2d 76, 78, 65 C.R. 65, 435 P.2d 825; *Powers v. Richmond* (1995) 10 C.4th 85, 108, 40 C.R.2d 839, 893 P.2d 1160, *infra*, §3, quoting the text; *Bates v. Ransome-Crummey Co.* (1919) 42 C.A. 699, 704, 184 P. 39; *Pacific Gas Radiator Co. v. Superior Court* (1924) 70 C.A. 200, 202, 232 P. 995; *Rucker v. Superior Court* (1930) 104 C.A. 683, 684, 286 P. 732; *Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 154, 8 C.R. 107; *Supple v. Los Angeles* (1988) 201 C.A.3d 1004, 1009, 247 C.R. 554, citing the text; *In re Taya C.* (1991) 2 C.A.4th 1, 6, 2 C.R.2d 810; *Barnes v. Litton Systems* (1994) 28 C.A.4th 681, 682, 33 C.R.2d 562; *Cobb v. University of Southern Calif.* (1995) 32 C.A.4th 798, 801, 38 C.R.2d 543, *infra*, §192; see 4 *Am.Jur.2d* (2007 ed.), *Appellate Review*, §§75, 76.)

On the other hand, because appellate jurisdiction is derived from the California Constitution (see Cal. Const., Art. VI, §11; 2 *Cal. Proc.* (5th), *Courts*, §§335, 337, 339), it cannot be destroyed or abridged by legislative action or inaction. Thus:

(a) If the Legislature has failed to provide a procedure to govern a particular kind of appeal, the appellate court has inherent power to establish rules for that purpose. (*People v. Jordan* (1884) 65 C. 644, 648, 4 P. 683; *Scott v. Larson* (1927) 82 C.A. 46, 51, 255 P. 248.)

(b) The Legislature cannot indirectly destroy or limit the constitutional right by means of a change in procedure. (*In re Sutter-Butte By-Pass Assessment Number Six of the Sacramento & San Joaquin Drainage Dist.* (1923) 190 C. 532, 533, 213 P. 974; see *Byers v. Smith* (1935) 4 C.2d 209, 214, 47 P.2d 705; *In re Shafter-Wasco Irr. Dist.* (1942) 55 C.A.2d 484, 487, 130 P.2d 755; 2 *Cal. Proc.* (5th), *Courts*, §172.) Hence, a statute specifying that appeal of a judgment deciding a newspaper general circulation petition could be heard by the California Supreme Court improperly abridged the appellate jurisdiction constitutionally reserved for the Courts of Appeal. (*In re Establishment of Perris City News* (2002) 96 C.A.4th 1194, 1197, 118 C.R.2d 38.) (See *California Commerce Casino v. Schwarzenegger* (2007) 146 C.A.4th 1406, 1417, 53 C.R.3d 626 [statute providing direct review by Supreme Court of judgments in actions brought

under tribal compact assets securitization provisions was unconstitutional as abridging appellate jurisdiction of Court of Appeal].)

(c) As a matter of statutory construction, where the right to appeal is in doubt, that doubt should be resolved in favor of the right. So where a new special proceeding was established without expressly denying the right of appeal, it was held that, despite its summary character, the general law governed, and appeal was possible. (*People v. Bank of San Luis Obispo* (1907) 152 C. 261, 264, 92 P. 481.)

(2) *Equal Protection*. The legislative power over the right to appeal, though broad, is not unlimited. Thus, arbitrary discrimination in placing conditions on appellate review by a class of appellants violates the Equal Protection Clause. (See *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S.Ct. 862, 863, 31 L.Ed.2d 36, 37.) Nevertheless, *Bankers Life & Cas. Co. v. Crenshaw* (1988) 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62, 8 Summary (10th), *Constitutional Law*, §793, upheld a Mississippi statute imposing a 15% penalty on parties who appeal unsuccessfully from a money judgment. Unlike the statute in *Lindsey*, this one did not single out a narrow class of appellants for discriminatory treatment. The penalty applied both to plaintiffs and defendants, and to all money judgments, as well as to a long list of judgments the money value of which may readily be determined. (108 S.Ct. 1653, 100 L.Ed.2d 75.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Distinction Between Right to Appeal and Appellant Jurisdiction*. Appellant jurisdiction cannot be destroyed by Legislature: See *Hollywood Park Land Co., LLC v. Golden State Trans. Financing Corp.* (2009) 178 C.A.4th 924, 938, 100 C.R.3d 752 [statute providing for direct review of superior court judgment in specified tribal compact bond validation cases by writ petition in Supreme Court was unconstitutional abridgment of appellate jurisdiction of Court of Appeal; however, statute could be reformed to provide that writ review in Court of Appeal, rather than appeal, is exclusive means of review in those cases].



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A. Nature of Appeal and Appellate Jurisdiction.

2. Right to Appeal Is Statutory.

b. No Right to Direct Appeal.

9 *Witkin Cal. Proc. Appeal* § 3

[§ 3] No Right to Direct Appeal.

The distinction, and potential for confusion, between appellate jurisdiction and the right to appeal is illustrated by *In re Taya C.* (1991) 2 C.A.4th 1, 2 C.R.2d 810, which involved a constitutional challenge to former Welf.C. 366.26(k), providing that review of an order setting a hearing under Welf.C. 366.26 may be had only by extraordinary writ. The parents of the minor child contended that subdivision (k) infringed on their alleged constitutional right of appellate review under Cal. Const., Art. VI, §11 (2 *Cal. Proc.* (5th), *Courts*, §335), which provides that the "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction." Holding that the statute was constitutional, the court said: "The parents confuse the jurisdiction of a reviewing court with a litigant's right to appeal a judicial decision. The fact that judgments and some orders of a superior court may be appealed to an intermediate appellate court does not mean every order or finding is appealable. The California Supreme Court and the Courts of Appeal derive their appellate jurisdiction from the California Constitution (art. VI, § 11). The right of a party to appeal, however, is wholly statutory and no judgment or order is appealable unless expressly made so by statute." (2 C.A.4th 6. (On Welf.C. 366.26(l), which permits appeal in certain limited circumstances, see 10 *Summary* (10th), *Parent and Child*, §717.)

In *Powers v. Richmond* (1995) 10 C.4th 85, 40 C.R.2d 839, 893 P.2d 1160, the trial judge denied plaintiffs' petition for a writ of mandamus to compel defendant city to provide them with certain public agency records under the Public Records Act (*Govt.C.* 6250 et seq.). Plaintiffs sought review in the Court of Appeal both by a petition for a writ of mandamus and by direct appeal. The Court of Appeal denied the writ petition summarily and granted defendant's motion to dismiss the appeal as barred under *Govt.C.* 6259(c), providing that superior court decisions in Public Records Act cases are not appealable but instead are "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." *Held*, affirmed. The Court of Appeal properly dismissed the purported appeal in compliance with *Govt.C.* 6259(c). The statute does not violate Cal. Const., Art. VI, §11. There was no claim that the Court of Appeal could not effectively exercise its constitutional power of appellate review by an extraordinary writ proceeding, and thus no reason to conclude that extraordinary writ review was not a sufficient or effective appellate remedy in actions under the Public Records Act.

(a) Plaintiffs contended that Cal. Const., Art. VI, §11, confers on litigants a right of direct appeal (including oral argument, a decision on the merits, and a written opinion) from final orders and judgments in proceedings in which

superior courts exercise original jurisdiction. However, nothing in this provision shows an intention to confer a right of direct appeal on litigants; rather, giving the words their ordinary meaning, the provision serves to establish and allocate judicial authority, not to define or guarantee the rights of litigants. The provision nowhere mentions direct appeals or a "right of appeal." (10 C.4th 91.)

(b) The ordinary and widely accepted meaning of the term "appellate jurisdiction" is simply the power of a reviewing court to correct error in a trial court proceeding. By common understanding, a reviewing court may exercise this power in the procedural context of a direct appeal, a writ petition, or otherwise. Thus, a provision conferring "appellate jurisdiction" does not necessarily or strongly imply a right of litigants to bring direct appeals. To declare that right would violate the cardinal rule that the Constitution is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is declared in definite language than they are to disregard express provisions. (10 C.4th 93.)

(c) The history of Govt.C. 6259(c) shows that it was intended not to impair judicial power, but to make the appellate remedy more effective for litigants seeking disclosure of public records. (10 C.4th 111.) Moreover, the fact that issuance of extraordinary writs is discretionary, whereas direct appeal guarantees a decision on the merits, does not mean that review by extraordinary writ petition is inherently less effective than a remedy by direct appeal. (10 C.4th 113.)

Two justices joined in a lengthy dissent, urging that Cal. Const., Art. VI, §11, confers a "right of appeal," i.e., a right to review on the merits and a written opinion. (10 C.4th 124.) (See *Leone v. Medical Bd. of Calif.* (2000) 22 C.4th 660, 669, 94 C.R.2d 61, 995 P.2d 191 [following *Powers; B. & P.C. 2337*, limiting review in medical disciplinary proceedings to discretionary writ review, even if writ is summarily denied, does not violate constitutional provision granting Courts of Appeal power of appellate jurisdiction, because denial in this situation is necessarily on merits]; *Landau v. Superior Court* (1998) 81 C.A.4th 191, 198, 206, 97 C.R.2d 657 [*B. & P.C. 2337* is constitutional; *Powers* does not require alternative writ or order to show cause in every instance in which writ petition is timely and procedurally sufficient, but apparently meritless].)

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A. Nature of Appeal and Appellate Jurisdiction.

3. Judicial Economy Is Not Ground for Appeal.

9 Witkin Cal. Proc. Appeal § 4

[§ 4] Judicial Economy Is Not Ground for Appeal.

In *Bishop v. Merging Capital* (1996) 49 C.A.4th 1803, 57 C.R.2d 556, defendant argued that a nonappealable order should nevertheless be reviewed in the interests of judicial economy and efficiency. In rejecting this argument, the court said, "[f]or the goal of judicial economy to be realized, it is critical that trial courts rigorously perform their duty to screen out frivolous or vexatious appeals before time and money are spent preparing the record and the briefs for consideration by the appellate courts." (49 C.A.4th 1809, quoting *People v. Panizzon* (1996) 13 C.4th 68, 89, footnote 15, 51 C.R.2d 851, 913 P.2d 1061.) "It is, of course, the corresponding duty of the appellate courts to refuse to decide issues not properly before them." (49 C.A.4th 1809.)

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I. INTRODUCTION

A. Nature of Appeal and Appellate Jurisdiction.

4. Retroactive Legislation.

9 *Witkin Cal. Proc. Appeal* § 5

[§ 5] Retroactive Legislation.

Because the right of appeal is wholly dependent on statute (*supra*, §§2, 3), the Legislature may cut it off by retroactive legislation, and thus destroy an appeal already perfected. (See *Pacific Gas Radiator Co. v. Superior Court* (1924) 70 C.A. 200, 202, 232 P. 995.)

This doctrine, though well recognized, is not often applied. The strong policy against retroactive deprivation of the right is stated in *Jones v. Summers* (1930) 105 C.A. 51, 286 P. 1093: "First, it is within the jurisdiction of the law-making power to cut off the right of appeal by retroactive legislation so as to destroy appeals perfected before the taking effect of such law. Second, to do this obviously works great hardship and apparent injustice upon those who may have waived other remedies allowed by law for the correction of possible errors. Third, therefore, unless the act itself clearly indicates an intention that it shall have a retroactive or retrospective effect, the rule of statutory construction that such statutes are not to be construed as intended to apply retroactively so as to affect pending appeals is fully recognized and well established by the decisions of this state. Fourth, it is well settled that in order that such changes in the law as the termination of appellate jurisdiction may affect pending appeals the amending law must either expressly so declare or an implication that such was the intention of the law-making power must be definite and clear." (105 C.A. 54.) (See *Pignaz v. Burnett* (1897) 119 C. 157, 160, 51 P. 48; *Berg v. Traeger* (1930) 210 C. 323, 324, 292 P. 495; *Blade v. Superior Court* (1929) 102 C.A. 375, 376, 283 P. 81; *In re T.M.* (1988) 206 C.A.3d 314, 316, 253 C.R. 535; 3 Cal. Proc. (5th), Actions, §20; cf. *Hirsch v. All Persons* (1916) 173 C. 268, 269, 159 P. 712 [order made after statute was in effect; appeal dismissed]; *Hester v. McMullan* (1916) 29 C.A. 664, 665, 157 P. 521 [same]; *Martin v. Municipal Court* (1983) 148 C.A.3d 693, 696, 196 C.R. 218, citing the text.)

The fundamental objections to statutes cutting off the accrued right of appeal do not apply to retroactive *procedural changes*. Thus, the manner of taking an appeal (see *infra*, §555 et seq.) may be governed by statutes taking effect after the entry of judgment. (See *Beal v. Superior Court* (1934) 137 C.A. 559, 563, 31 P.2d 223; 17 So. Cal. L. Rev. 297.)

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A. Nature of Appeal and Appellate Jurisdiction.

5. Appellate Practice.

9 *Witkin Cal. Proc. Appeal* § 6

[§ 6] Appellate Practice.

(1) *In General.* There is a substantial body of commentary on the appellate process and appellate practice. (See Aldisert, Opinion Writing; C.E.B., Civil Appellate Practice, 3d; Rutter Group, Civil Appeals and Writs; 29 *Cal. L. Rev.* 615, 778, 831; 50 *Cal. L. Rev.* 180; 65 *Cal. L. Rev.* 531 [A Statistical Analysis of the Workload of the California Supreme Court]; 76 *Harv. L. Rev.* 322, 1695; 15 *Hastings L. J.* 11 [Review of Intermediate Appellate Court Decisions in California]; 45 *Hastings L. J.* 415 [Special Report on California Appellate Justice]; 45 *Hastings L. J.* 597 [Creating an Appetite for Appellate Reform in California]; 4 *Pacific L. J.* 1, 725; 30 *Stanf. L. Rev.* 121 [The Business of State Supreme Courts, 1870-1970]; 7 *U.C.L.A. L. Rev.* 571; 23 *U.C.L.A. L. Rev.* 419 [Symposium: Judges on Appellate Reform]; 61 *Am.Jur. Trials* 1 [Considering Appeals]; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §1 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §231 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), Appeal and Error §1 et seq.) (On A.B.A. Standards of Judicial Administration, Standards Relating to Appellate Courts, see 62 *A.B.A.J.* 1015 [Standards described]; 62 *A.B.A.J.* 1172 [urging implementation of Standards]; 27 *U.S.F. L. Rev.* 301 [A.B.A. time standards, and their relevancy to California courts].)

(2) *Witkin, Manual on Appellate Court Opinions.* This work, published in 1977, mainly deals with the techniques of writing, using illustrative material drawn from many sources. The subjects covered, in 10 chapters, are Appellate Court Administration; Hearing on Appeal; Functions of Appellate Opinion; Mechanics of Drafting Opinions; Content and Form of Opinion; Special Problems of Appellate Review; Style; Concurring and Dissenting Opinions; Shorter Opinions; By the Court and Memorandum Opinions. (See 25 *U.C.L.A. L. Rev.* 893 [review of Witkin Manual].) This work is cited at appropriate places in this chapter.

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A. Nature of Appeal and Appellate Jurisdiction.

6. Major Developments in Appellate Procedure.

9 Witkin Cal. Proc. Appeal § 7

[§ 7] Major Developments in Appellate Procedure.

(1) *Early Procedure.* The reports contain an enormous amount of material on California appellate procedure, much of it now obsolete. It will be helpful to note the chief developments and their dates as a guide to the use of older decisions.

(a) Prior to 1907, the bill of exceptions was the sole method of preparing the record on appeal. The reporter's transcript method was authorized in that year. (See *infra*, §635.)

(b) Prior to 1921, the notice of appeal had to be served as well as filed. Service is no longer required; the clerk notifies the other parties. (See *infra*, §555.)

(c) The undertaking on appeal, to secure costs, was abolished in 1921.

(d) Provision was made in 1915 for the extension of the time to appeal while new trial proceedings are pending. (See *infra*, §587.)

(e) In 1928, under constitutional authority, the Judicial Council adopted rules for the Supreme Court and Courts of Appeal, but only to supplement the statutory procedure. (See 204 C., p. xxxix; 18 C.2d 1.)

(2) *Statutory Changes in 1968.* The statutes governing appeal (former C.C.P. 934 et seq.) were rewritten in 1968. (See C.C.P. 901 et seq.) Unlike the comprehensive revision undertaken by the Rules on Appeal in 1943 (*infra*, §§8, 9), the 1968 legislation was designed primarily to reorganize, rather than substantially alter existing procedures. The State Bar-sponsored measure clarified and rearranged the statutes governing civil appeals, eliminated duplication and inconsistencies, and removed a number of obsolete provisions. The new title was divided into two chapters (replacing the former five) and the individual sections were renumbered, substituting decimal designations for the confusing letters employed in the old provisions.

(3) *Constitutional Amendment of 1984.* Cal. Const., Art. VI, §12, was amended in 1984 to change the procedure of a petition for hearing in the Supreme Court after a decision by the Court of Appeal to review of the Court of Appeal opinion in the Supreme Court. (See *infra*, §913 et seq.)

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I. INTRODUCTION

B. Appellate Rules.

1. Adoption and Subsequent Amendments.

9 Witkin Cal. Proc. Appeal § 8

[§ 8] Adoption and Subsequent Amendments.

(1) Former C.C.P. 961, enacted in 1941 and amended in 1943, gave legislative authority for complete rulemaking power in this field as follows: "The Judicial Council shall have the power to prescribe by rules for practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect." P.C. 1247k, enacted in the same year and still in effect, gives a similar authorization for criminal appeals. (See *17 So. Cal. L. Rev. 80*; *6 Cal. Crim. Law* (3d), *Criminal Appeal*, §2.) Pursuant to this delegation, the Judicial Council adopted Rules on Appeal effective July 1, 1943. (See *22 C.2d 1*; *35 Cal. L. Rev. 477* [drafter's discussion of 4 years of case law on 1943 rules]; *17 So. Cal. L. Rev. 80*, 232 [drafter's exhaustive discussion of changes]; *17 So. Cal. L. Rev. 300* [accomplishments and lessons].)

(2) In 1945, acting on recommendations of the Judicial Council, the Legislature repealed the superseded statutes. (See *17 So. Cal. L. Rev. 299*.) In the same year, rules governing appeals from the municipal court were adopted. (See *infra*, §1002.)

(3) In 1951, amendments to the Rules on Appeal were adopted (see *36 C.2d 1*), and in 1953, amendments to the Municipal Court Civil Appeals Rules were adopted (see *40 C.2d 25*).

(4) In 1956, former Cal. Const., Art. VI, §4c, was amended, and former Cal. Const., Art. VI, §4d, was adopted, to clarify the power of the Supreme Court to transfer and grant hearings, and to relax constitutional time limitations. (The constitutional provisions are now in Cal. Const, Art. VI, §12; see *2 Cal. Proc. (5th), Courts*, §338.)

(5) The Rules on Appeal were amended again in 1956, 1959, and subsequent years. (See *47 C.2d 1*.)

(6) In 1968, C.C.P. 961 was repealed, presumably because the delegated power had been exercised. Henceforth, without a new specific authorization, the Judicial Council rules had to be consistent with statutes (see C.C.P. 901, *supra*, §1). But P.C. 1247k was not repealed.

(7) In 1999, the Judicial Council's Appellate Advisory Committee and Appellate Rules Project Task Force

extensively reviewed and revised the California Rules of Court governing appellate practice. The revision, which made few substantive changes, was intended to simplify wording, eliminate inconsistencies, remove ambiguities and obsolete provisions, and promote clarity. Changes of a substantive nature were explained in Advisory Committee Comments.

(8) In 2006, as part of an extensive reorganization and revision of the California Rules of Court, the appellate rules were placed in Title 8. Although the appellate rules were extensively reorganized, few substantive changes were made. The new rules became effective on January 1, 2007.

(9) Only the Judicial Council may amend the appellate rules, with the exception that the rules governing the publication of appellate opinions may only be amended by the Supreme Court. An amendment must be published in the advance pamphlets of the Official Reports, and takes effect on the date ordered by the Judicial Council. (C.R.C., Rule 8.13; see 2 *Cal. Proc.* (5th), *Courts*, §188.)

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B. Appellate Rules.

2. Current Structure.

9 *Witkin Cal. Proc. Appeal* § 9

[§ 9] Current Structure.

Title 8, entitled *Appellate Rules*, has the following structure:

Division 1. Rules Relating to the Supreme Court and Courts of Appeal. (C.R.C., Rules 8.1 to 8.642.)

Chapter 1. General Provisions. (C.R.C., Rules 8.1 to 8.68.)

Article 1. In General. (C.R.C., Rules 8.1 to 8.23.)

Article 2. Service, Filing, Form, and Number of Documents. (C.R.C., Rules 8.25 to 8.44.)

Article 3. Applications and Motions; Extending and Shortening Time. (C.R.C., Rules 8.50 to 8.68.)

Chapter 2. Civil Appeals. (C.R.C., Rules 8.100 to 8.278.)

Article 1. Taking the Appeal. (C.R.C., Rules 8.100 to 8.116.)

Article 2. Record on Appeal. (C.R.C., Rules 8.120 to 8.163.)

Article 3. Briefs in the Court of Appeal. (C.R.C., Rules 8.200 to 8.224.)

Article 4. Hearing and Decision in the Court of Appeal. (C.R.C., Rules 8.240 to 8.276.)

Chapter 3. Criminal Appeals. (C.R.C., Rules 8.300 to 8.368.)

Article 1. Taking the Appeal. (C.R.C., Rules 8.300 to 8.316.)

Article 2. Record on Appeal. (C.R.C., Rules 8.320 to 8.346.)

Article 3. Briefs, Hearing, and Decision. (C.R.C., Rules 8.360 to 8.368.)

Chapter 4. Habeas Corpus Appeals and Writs. (C.R.C., Rules 8.380 to 8.388.)

Chapter 5. Juvenile Appeals and Writs. (C.R.C., Rules 8.400 to 8.474.)

Article 1. Appeals. (C.R.C., Rules 8.400 to 8.416.)

Article 2. Writs. (C.R.C., Rules 8.450 to 8.456.)

Article 3. Hearing and Decision. (C.R.C., Rules 8.470 to 8.474.)

Chapter 6. Conservatorship Appeals. (C.R.C., Rules 8.480 to 8.482.)

Chapter 7. Miscellaneous Writs. (C.R.C., Rules 8.490 to 8.498.)

Chapter 8. Proceedings in the Supreme Court. (C.R.C., Rules 8.500 to 8.552.)

Chapter 9. Appeals from Judgments of Death. (C.R.C., Rules 8.600 to 8.642.)

Article 1. General Provisions. (C.R.C., Rules 8.600 to 8.605.)

Article 2. Record on Appeal. (C.R.C., Rules 8.610 to 8.625.)

Article 3. Briefs, Hearing, and Decision. (C.R.C., Rules 8.630 to 8.642.)

Division 2. Rules Relating to the Superior Court Appellate Division. (C.R.C., Rules 8.800 to 8.936.)

Chapter 1. General Rules Applicable to Appellate Division Proceedings. (C.R.C., Rules 8.800 to 8.816.)

Chapter 2. Appeals and Records in Limited Civil Cases. (C.R.C., Rules 8.820 to 8.842.)

Article 1. Taking Civil Appeals. (C.R.C., Rules 8.820 to 8.825.)

Article 2. Records in Civil Appeals. (C.R.C., Rules 8.830 to 8.842.)

Chapter 3. Appeals and Records in Misdemeanor Cases. (C.R.C., Rules 8.850 to 8.873.)

Article 1. Taking Appeals in Misdemeanor Cases. (C.R.C., Rules 8.850 to 8.855.)

Article 2. Records in Misdemeanor Appeals. (C.R.C., Rules 8.860 to 8.873.)

Chapter 4. Briefs, Hearing, and Decision in Limited Civil and Misdemeanor Appeals. (C.R.C., Rules 8.880 to 8.891.)

Chapter 5. Appeals in Infraction Cases. (C.R.C., Rules 8.900 to 8.929.)

Article 1. Taking Appeals in Infraction Cases. (C.R.C., Rules 8.900 to 8.904.)

Article 2. Records in Infraction Appeals. (C.R.C., Rules 8.910 to 8.923.)

Article 3. Briefs, Hearing, and Decision in Infraction Appeals. (C.R.C., Rules 8.925 to 8.929.)

Chapter 6. Writ Proceedings. (C.R.C., Rules 8.930 to 8.936.)

Division 3. Trial of Small Claims Cases on Appeal. (C.R.C., Rules 8.950 to 8.966.)

Division 4. Transfer of Appellate Division Cases to the Court of Appeal. (C.R.C., Rules 8.1000 to 8.1018.)

Division 5. Publication of Appellate Opinions. (C.R.C., Rules 8.1100 to 8.1125.)

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B. Appellate Rules.

3. Scope: Practice and Procedure.

9 Witkin Cal. Proc. Appeal § 10

[§ 10] Scope: Practice and Procedure.

(1) *Power of Judicial Council.* The "complete" rulemaking power granted to the Judicial Council by former C.C.P. 961 was considerably less than complete. The power was restricted to "practice and procedure on appeal." (See *supra*, §8.) Accordingly, the rules cover all aspects of filing the appeal, the record on appeal, briefs, and proceedings in the reviewing court. But, the following limitations apply:

(a) The rules do not cover the subjects considered wholly or partly substantive, such as appealable judgments and orders, parties and right to appeal, stay of execution on appeal, scope of review, and powers of appellate courts. (See *17 So. Cal. L. Rev.* 82.)

(b) In their coverage of original proceedings, the rules supplement and do not supersede the statutory procedure. (See *17 So. Cal. L. Rev.* 294.)

(2) *Power of Legislature To Enact New Laws.* The grant of power in former C.C.P. 961 (*supra*, §8) was to supersede existing legislation; it was not a permanent grant of exclusive authority in the field of appellate procedure. Consequently, the Legislature may enact statutes that have the effect of amending existing rules. (*Stockton Theatres v. Palermo* (1956) 47 C.2d 469, 476, 304 P.2d 7.)

(3) *Scope of Rules.* Division 1 of the appellate rules (C.R.C., Rule 8.100 et seq.) applies to (a) appeals from the superior courts, (b) original proceedings, motions, applications, and petitions in the Courts of Appeal and the Supreme Court, and (c) proceedings for transferring cases within the appellate jurisdiction of the superior court to the Court of Appeal for review, unless C.R.C., Rules 8.1000-8.1018 (transfer of appellate division cases to the Court of Appeal) provide otherwise. (C.R.C., Rule 8.4.) Division 2 of the appellate rules (C.R.C., Rule 8.700 et seq.) applies to appeals to the appellate division of the superior court. (See C.R.C., Rule 8.4(1).)

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SUPPLEMENT: [This section is current through the latest supplement]



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B. Appellate Rules.

4. Construction and Definitions.

a. In General.

9 Witkin Cal. Proc. Appeal § 11

[§ 11] In General.

(1) *Construction.* The Rules of Court "must be liberally construed to ensure the just and speedy determination of the proceedings that they govern." (C.R.C., Rule 1.5(a); see C.R.C., Rule 8.7 [headings of divisions, chapters, articles, rules, and subdivisions are substantive]; *17 So. Cal. L. Rev.* 298.)

(2) *Definitions.* The Rules of Court specify the terminology and definitions of the basic terms used in the rules, and they should be examined before making extensive use of the other provisions. Some of the primary terms include the following:

(a) "Appellant" is the appealing party, "respondent" is the adverse party, and "party" includes the party's attorney of record. (C.R.C., Rule 8.10(1), (2), (3).)

(b) Each gender (masculine, feminine, or neuter) and each tense (past, present, or future) includes the others. Each number (singular or plural) includes the other. (C.R.C., Rule 1.5(d)(1), (d)(2), (d)(3).)

(c) "Judgment" encompasses any judgment or order that may be appealed. (C.R.C., Rule 8.10(4).)

(d) "Must" is mandatory; and "may" is permissive. "May not" is equivalent to "is not permitted to." "Will" refers to a future contingency or predicts action by a court or person in the ordinary course of events, but does not signify a mandatory duty. "Should" refers to a preference or a nonbinding recommendation. (C.R.C., Rule 1.5(b)(1), (b)(2), (b)(3), (b)(4), (b)(5).)

(e) "Superior court" refers to the court from which an appeal is taken. (C.R.C., Rule 8.10(5).)

(f) "Reviewing court" refers to the Supreme Court or the Court of Appeal to which an appeal is taken, in which an original proceeding is begun, or to which an appeal or original proceeding is transferred. (C.R.C., Rule 8.10(6).)

(g) "Briefs" include petitions for rehearing, petitions for review, and answers to these petitions. Petitions for extraordinary relief in original proceedings are not briefs. (C.R.C., Rule 8.10(7).)

(h) "Chief justice" includes the acting chief justice; "presiding judge" includes the acting presiding judge or the judicial officer designated by the presiding judge; "judge" includes, as applicable, a judge of the superior court, a commissioner, or a temporary judge. (C.R.C., Rule 1.6(10), (11), (12).)

(i) "Temporary judge" means an active or inactive member of the State Bar who serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate court appointment for each period of service or each case heard. (C.R.C., Rule 1.6(13).)

(j) "Party" is a person appearing in an action and may be self-represented or represented by an attorney of record. Other designations of "party" include "plaintiff," "People of the State of California," "applicant," "petitioner," "defendant," "respondent," and "other parent." (C.R.C., Rule 1.6(15).)

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4. Construction and Definitions.

b. Serve and File.

9 Witkin Cal. Proc. Appeal § 12

[§ 12] Serve and File.

(1) *Service*. Before filing a document in a court, a party must serve, by any method permitted by the Code of Civil Procedure, one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule. The party must attach proof of service to the document presented for filing. The proof must name each party represented by each attorney served. (C.R.C., Rule 8.25(a).)

(2) *Filing*. A document is deemed filed on the date the clerk receives it. A filing is ordinarily not timely unless the clerk receives the document before the time to file it expires. However (except in an original proceeding), a brief, a petition for rehearing, an answer to a petition for rehearing, a petition for review, an answer to a petition for review, or a reply to an answer to a petition for review is timely if the time to file it has not expired on the date of (a) its mailing by priority or express mail as shown on the postmark or the postal receipt, or (b) its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. (C.R.C., Rule 8.25(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Service*. The Judicial Council has approved the following forms related to service:

Form No. APP-009 [Proof of Service (Court of Appeal)].

Form No. APP-009-INFO [Information Sheet for Proof of Service (Court of Appeal)].

Form No. APP-109 [Proof of Service (Appellate Division)].

Form No. APP-109-INFO [What Is Proof of Service?].



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C. Judicial Council Forms.

9 Witkin Cal. Proc. Appeal § 13

[§ 13] Judicial Council Forms.

The Judicial Council has approved the following forms for appellate practice:

APP-001 [Information on Appeal Procedures for Unlimited Civil Cases].

APP-002 [Notice of Appeal/Cross-Appeal (Unlimited Civil Case)].

APP-003 [Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)].

APP-004 [Civil Case Information Statement (Appellate)].

APP-005 [Abandonment of Appeal (Unlimited Civil Case)].

APP-006 [Application for Extension of Time to File Brief (Civil Case)].

APP-007 [Request for Dismissal of Appeal (Civil Case)].

APP-008 [Certificate of Interested Entities or Persons].

SUPPLEMENT: [This section is current through the latest supplement]

The Judicial Council has approved the following forms for appellate practice:

Form No. APP-009 [Proof of Service (Court of Appeal)].

Form No. APP-009-INFO [Information Sheet for Proof of Service (Court of Appeal)].

Form No. APP-015 [Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)].

Form No. APP-016 [Order on Court Fee Waiver (Court of Appeal or Supreme Court)].

Form No. APP-101-INFO [Information on Appeal Procedures for Limited Civil Cases].

Form No. APP-102 [Notice of Appeal/Cross-Appeal (Limited Civil Case)].

Form No. APP-103 [Notice Designating Record on Appeal (Limited Civil Case)].

Form No. APP-104 [Proposed Statement on Appeal (Limited Civil Case)].

Form No. APP-105 [Order Concerning Appellant's Notice Proposed Statement on Appeal (Limited Civil Case)].

Form No. APP-106 [Abandonment of Appeal (Limited Civil Case)].

Form No. APP-109 [Proof of Service (Appellate Division)].

Form No. APP-109-INFO [What Is Proof of Service?].

Form No. APP-150-INFO [Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases].

Form No. APP-151 [Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)].



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I. INTRODUCTION

D. Decision on Request by Court of Another Jurisdiction.

1. Procedure.

9 Witkin Cal. Proc. Appeal § 14

[§ 14] Procedure.

(1) *In General.* Former C.R.C., Rule 29.5 established a procedure by which courts of other jurisdictions could "certify" questions of law to the California Supreme Court for an authoritative answer. The current rule (C.R.C., Rule 8.548) authorizes a request to the Supreme Court by a formal order of the other court. (See C.E.B., 27 Civil Litigation Reporter 132 ["certified" questions to California Supreme Court]; 36 *Santa Clara L. Rev.* 935 [proposal for California Supreme Court to accept questions of state law certified by federal appellate courts].)

(2) *Conditions.* On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if both of the following requirements are met:

(a) The decision could determine the outcome of a matter pending in the requesting court. (C.R.C., Rule 8.548(a)(1).)

(b) There is no controlling precedent. (C.R.C., Rule 8.548(a)(2).) (See *Los Angeles Alliance for Survival v. Los Angeles* (2000) 22 *C.4th* 352, 362, 93 *C.R.2d* 1, 993 *P.2d* 334 [Supreme Court's answer to certified question is not improper advisory opinion if court addresses only truly contested issues presented on factual record, and if opinion will be res judicata].)

(3) *Form of Request.* The request must take the form of an order of the requesting court containing the following:

(a) The title and number of the case, the names and addresses of counsel and any unrepresented party, and a designation of the party to be deemed the petitioner if the request is granted. (C.R.C., Rule 8.548(b)(1).)

(b) The question to be decided, with a statement that the requesting court will accept the decision. (C.R.C., Rule 8.548(b)(2).)

(c) A statement of the relevant facts prepared by the requesting court or prepared by the parties and approved by that court. (C.R.C., Rule 8.548(b)(3).)

(d) An explanation of how the request satisfies the requirements of C.R.C., Rule 8.548(a). (C.R.C., Rule 8.548(b)(4).)

(4) *Supporting Materials.* Copies of all relevant briefs must accompany the request. At any time, the Supreme Court may ask the requesting court to furnish additional record materials, including transcripts and exhibits. (C.R.C., Rule 8.548(c).)

(5) *Service and Filing.* The requesting court clerk must file an original and 10 copies of the request in the Supreme Court with a certificate of service on the parties. (C.R.C., Rule 8.548(d).)

(6) *Letters in Support or Opposition.* Within 20 days after the request is filed, a party or other person or entity supporting or opposing the request may send a letter to the Supreme Court, with service on the parties and on the requesting court. Within 10 days after service of the letter, a party may send a reply letter to the Supreme Court, with service on the other parties and the requesting court. A letter or reply asking the court to restate the question must propose new wording. (C.R.C., Rule 8.548(e).)

(7) *Proceedings in Supreme Court.* In exercising its discretion to grant or deny the request, the Supreme Court may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate. (C.R.C., Rule 8.548(f)(1).) At any time, the Supreme Court may restate the question or ask the requesting court to clarify the question. (C.R.C., Rule 8.548(f)(5).)

An order granting the request must be signed by at least four justices. An order denying the request may be signed by the Chief Justice alone. (C.R.C., Rule 8.548(f)(2).) If the court grants the request, the rules on review and decision in the Supreme Court govern further proceedings in the Supreme Court. (C.R.C., Rule 8.548(f)(3).)

(8) *Notice To File.* If, after granting the request, the court determines that a decision on the question may require an interpretation of the California Constitution or a decision on the validity or meaning of a California law affecting the public interest, the court must direct the clerk to send the Attorney General a copy of the request and the order granting it. However, this rule does not apply if the Attorney General represents a party to the litigation. (C.R.C., Rule 8.548(f)(4).)

(9) *Copies of Decision.* After filing the opinion, the clerk must promptly send file-stamped copies to the requesting court and the parties. The clerk must notify that court and the parties when the decision is final. (C.R.C., Rule 8.548(f)(6).)

(10) *Precedential Effect of Decision.* Supreme Court decisions pursuant to this rule are published in the Official Reports and have the same precedential effect as the court's other decisions. (C.R.C., Rule 8.548(f)(7).)

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2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 15

[§ 15] Illustrations.

Decisions on requests by courts of other jurisdictions have been rendered in several cases, including the following:

Los Angeles Alliance for Survival v. Los Angeles (2000) 22 C.4th 352, 360, 93 C.R.2d 1, 993 P.2d 334 [question regarding proper standard under Liberty of Speech Clause (Cal. Const., Art. I, §2) for analyzing constitutionality of ordinances on public solicitation of funds].

Asmus v. Pacific Bell (2000) 23 C.4th 1, 6, 96 C.R.2d 179, 999 P.2d 71 [question whether, after employer's unilaterally adopted policy requiring employees to be retained so long as specified condition did not occur had become part of employment contract, employer could unilaterally terminate policy, even though specified condition had not occurred].

Ventura Group Ventures v. Ventura Port Dist. (2001) 24 C.4th 1089, 1097, 104 C.R.2d 53, 16 P.3d 717 [question whether California Constitution prohibits county from levying property taxes in excess of one percent to pay money judgment].

Blue Ridge Ins. Co. v. Jacobsen (2001) 25 C.4th 489, 502, 106 C.R.2d 535, 22 P.3d 313, 2 *Summary* (10th), *Insurance*, §269 [question whether insurer defending personal injury action under reservation of rights may recover settlement payments made over objection of insured when it is later determined that underlying claims are not covered by policy].

Vu v. Prudential Property & Cas. Ins. Co. (2001) 26 C.4th 1142, 1150, 113 C.R.2d 70, 33 P.3d 487, 3 *Cal. Proc.* (5th), *Actions*, §776 [question regarding extent to which insured may rely on insurer's loss investigation in claiming that insurer is estopped from asserting statute of limitations defense].

Great Western Shows v. Los Angeles (2002) 27 C.4th 853, 873, 118 C.R.2d 746, 44 P.3d 120, 1 *Cal. Crim. Law* (3d), *Introduction to Crimes, Supp.*, §57 [question whether state statutes preempt county ordinances regulating sale of ammunition or firearms on county property].

Nordyke v. King (2002) 27 C.4th 875, 883, 118 C.R.2d 761, 44 P.3d 133 [companion case; similar question with

respect to possession of ammunition or firearms on county property].

Myers v. Philip Morris Cos. (2002) 28 C.4th 828, 839, 123 C.R.2d 40, 50 P.3d 751, 6 Summary (10th), Torts, §1536 [question whether California statute repealing statutory immunity for tobacco companies in certain product liability lawsuits applies retroactively].

Cadence Design Systems v. Avant! Corp. (2002) 29 C.4th 215, 222, 127 C.R.2d 169, 57 P.3d 647, 13 Summary (10th), Equity, §88 [question whether claim for trade secret infringement under California's Uniform Trade Secrets Act (C.C. 3426 et seq.) arises only once, when initial misappropriation occurs, or with each subsequent misuse of trade secret].

Southern Calif. Edison Co. v. Peevey (2003) 31 C.4th 781, 798, 3 C.R.3d 703, 74 P.3d 795, 9 Cal. Proc. (5th), Administrative Proceedings, §12 [question whether stipulated judgment entered into by Public Utilities Commission and utility violated state laws, including laws requiring open public meetings involving utility rates].

Tipton-Whittingham v. Los Angeles (2004) 34 C.4th 604, 608, 21 C.R.3d 371, 101 P.3d 174 [question whether California adheres to catalyst theory as basis for attorneys' fee award].

The Supreme Court refused to accept a question certified by the Ninth Circuit in the case of *In re KF Dairies & Affiliates* (9th Cir. 1999) 179 F.3d 1226, on whether a property owner's comprehensive general liability policy provides coverage if the damage occurs within the policy period but the insured purchases the property after the policy period. The Ninth Circuit then proceeded to answer the question itself in *KF Dairies v. Fireman's Fund Ins. Co.* (9th Cir. 2000) 224 F.3d 922, noting that the California Supreme Court's refusal to accept certification was not an expression of that court's opinion on the merits. (224 F.3d 995, footnote 3.)

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E. Extending Time Because of Public Emergency.

9 Witkin Cal. Proc. Appeal § 16

[§ 16] Extending Time Because of Public Emergency.

(1) *Authorized Orders.* If an extension of time is made necessary by the occurrence or danger of an earthquake, fire, or other public emergency, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council (Chief Justice) may make one of the following orders:

(a) An order extending by no more than 14 additional days the time to do any act required or permitted under the rules. (C.R.C., Rule 8.66(a)(1).)

(b) An order authorizing specified courts to extend by no more than 30 additional days the time to do any act required or permitted under the rules. (C.R.C., Rule 8.66(a)(2).)

The order must specify the length of the authorized extension. (C.R.C., Rule 8.66(b)(2).)

(2) *Additional Extensions.* If an extension is made necessary by the nature or extent of the public emergency, the Chair may extend or renew an order so issued for an additional period as follows:

(a) No more than 14 days for an order under C.R.C., Rule 8.66(a)(1). (C.R.C., Rule 8.66(c)(1).)

(b) No more than 30 days for an order under C.R.C., Rule 8.66(a)(2). (C.R.C., Rule 8.66(c)(2).)

(3) *Applicability of Order.* An order must specify whether it applies throughout the state, only to specified courts, or only to courts or attorneys in specified geographic areas, or applies in some other manner. (C.R.C., Rule 8.66(b)(1).)

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II. EFFECT OF TAKING APPEAL

A. Jurisdiction Vested in Appellate Court.

1. In General.

9 Witkin Cal. Proc. Appeal § 17

[§ 17] In General.

Subject to a number of exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." (C.C.P. 916.)

Thus, generally speaking, taking or "perfecting" an appeal (by filing a notice of appeal; see *infra*, §555), deprives the trial court of jurisdiction of the cause. That court may not vacate or amend a judgment or order valid on its face, or do any other act that would affect the rights of the parties or the condition of the subject matter. (*Vosburg v. Vosburg* (1902) 137 C. 493, 496, 70 P. 473; *Parkside Realty Co. v. MacDonald* (1914) 167 C. 342, 346, 139 P. 805; *Kinard v. Jordan* (1917) 175 C. 13, 164 P. 894; *Takahashi v. Fish & Game Com.* (1947) 30 C.2d 719, 725, 185 P.2d 805 [amendment of judgment, although by consent of parties, is void]; *Sacks v. Superior Court* (1948) 31 C.2d 537, 540, 190 P.2d 602 [court cannot proceed in defiance of its own order being reviewed on appeal]; *Estate of Sherman* (1956) 46 C.2d 534, 536, 297 P.2d 425; *Gold v. Superior Court* (1970) 3 C.3d 275, 281, 90 C.R. 161, 475 P.2d 193 [order that conservator pay attorneys' fees was stayed by conservator's appeal; contempt for failure to pay was void]; *Varian Med. Systems v. Delfino* (2005) 35 C.4th 180, 191, 25 C.R.3d 298, 106 P.3d 958, 5 Cal. Proc. (5th), Pleading, §1029 [appeal from denial of anti-SLAPP motion automatically stayed trial on merits; appellate reversal could result in dismissal of action, which outcome would be irreconcilable with judgment for plaintiff, and proceeding to merits would be inherently inconsistent with appeal, which sought to avoid that proceeding]; *Swan v. Riverbank Canning Co.* (1947) 81 C.A.2d 555, 558, 184 P.2d 686 [court cannot vacate its own judgment]; *Kalmus v. Kalmus* (1951) 103 C.A.2d 405, 420, 230 P.2d 57 [motion to vacate under C.C.P. 473 does not lie]; *Agnew v. Superior Court* (1953) 118 C.A.2d 230, 233, 156 C.R. 285, 257 P.2d 661 [juvenile court's order transferring cause to municipal court; appeal deprived juvenile court of jurisdiction to enforce its order of transfer]; *Diesel Const. Equipment Co. v. Neveils* (1963) 214 C.A.2d Supp. 877, 30 C.R. 163; *Estate of Gibson* (1965) 233 C.A.2d 125, 127, 43 C.R. 302 [appeal from order appointing administrator suspends his or her powers]; *Valvo v. University of Southern Calif.* (1977) 67 C.A.3d 887, 897, 136 C.R. 865, citing the text; *Mallick v. Superior Court* (1979) 89 C.A.3d 434, 438, 152 C.R. 503, citing the text; *Holloway v. Scripps Memorial Hosp.* (1980) 111 C.A.3d 719, 723, 168 C.R. 782, citing the text [annulling orders temporarily relieving parents as guardians ad litem of successful plaintiff and relieving her attorney for supposed conflict of interest]; *Elsea v. Saberi* (1992) 4 C.A.4th 625, 629, 5 C.R.2d 742; *Betz v. Pankow* (1993) 16 C.A.4th 931, 938, 20 C.R.2d 841 [pending appeal

from judgment confirming arbitration award, trial judge lacked jurisdiction to rule on motion to vacate based on arbitrator's bias[.])

However, the trial court does not lose jurisdiction with respect to a part of the judgment not appealed from. (See *Dow v. Superior Court* (1956) 140 C.A.2d 399, 411, 297 P.2d 30 [appeal from part of judgment; trial court properly proceeded on part not appealed from but acted without jurisdiction in enforcing part under review on appeal]; *In re Marriage of Askmo* (2000) 85 C.A.4th 1032, 1037, 102 C.R.2d 662 [in marital dissolution proceeding, trial judge did not err in granting wife's motion for spousal support and attorneys' fees during pendency of husband's appeal from order granting wife's motion for relief from default judgment]; *Novartis Vaccines & Diagnostics v. Stop Huntingdon Animal Cruelty USA* (2006) 143 C.A.4th 1284, 1302, 50 C.R.3d 27 [during pendency of defendant's appeal from denial of its motion to strike pleading under anti-SLAPP statute, trial court had jurisdiction to grant injunction in favor of plaintiff because preliminary injunction was not adjudication on merits].) (On whether trial judge has power to vacate conditional judgment for noncompliance with conditions, see *Williams v. Linville* (1937) 9 C.2d 256, 259, 70 P.2d 485 [question left open].)

In *Navarro v. Lippold* (1948) 86 C.A.2d 677, 195 P.2d 543, defendants, pursuant to stipulation, deposited \$ 1,980.70 with respondent superior court clerk to be held until further order of the court. Plaintiff had judgment, and defendants appealed without bond (execution was not stayed). After return of execution unsatisfied, plaintiff obtained an order of the superior court directing respondent clerk to pay over the money and credit it on the judgment. Held, the order was void and respondent clerk correctly refused to comply with it. The court had no jurisdiction to make an order destroying the subject of the appeal or placing funds on deposit beyond the control of a final judgment. (86 C.A.2d 678.)

In re Marriage of Varner (1998) 68 C.A.4th 932, 80 C.R.2d 628, involved an attempt by the trial court to modify spousal support by terminating jurisdiction over support while an appeal from denial of a motion to set aside a judgment dividing community property was pending. Construing the phrases "embraced therein" and "affected thereby" in P.C. 916(a), the court said: "The trial court cannot make any order which will lessen the effectiveness of the appellate court's opinion. The reversal of a judgment dividing community property and the reallocation of those assets upon remand constitute changed circumstances which may justify a modification of spousal support obligations. ... If the trial court has, during the pendency of the appeal, ordered the termination of its jurisdiction over spousal support, then any modification of that support upon remand is impossible, and the effect of the appellate decision is diminished." (68 C.A.4th 937.)

West's Key Number Digest, Appeal and Error 436, 454 et seq.

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A. Jurisdiction Vested in Appellate Court.

2. Transfer of Dependency Case After Appeal Is Perfected.

9 Witkin Cal. Proc. Appeal § 18

[§ 18] Transfer of Dependency Case After Appeal Is Perfected.

In re Lisa E. (1986) 188 C.A.3d 399, 232 C.R. 799, involved three children residing in Fresno County who were found to be dependent by the referee and placed in the custody of the Department of Social Services. The mother, who resided in Los Angeles County, appealed; 2 months after her appeal was perfected, the referee transferred the cases to Los Angeles. *Held*, despite the transfer, the Court of Appeal of the Fifth District (Fresno) retained jurisdiction of the appeal.

(a) Any transfer of this action to the Second Appellate District would cause further delay of the appeal because, before the transfer could occur, this court would have to petition the Supreme Court for transfer (see *infra*, §766). That delay would be counter to the unequivocal policy of the Juvenile Court Law favoring an expeditious resolution of issues. (188 C.A.3d 405.)

(b) Although a transfer of venue to the Second District would still leave this case on a priority status there, the transferred appeal would nevertheless be further delayed, i.e., it would not even reach that court's priority list until the Supreme Court had ruled on this court's motion to change venue. (188 C.A.3d 405.)

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A. Jurisdiction Vested in Appellate Court.

3. Distinction: Using Writ of Prohibition To "Vacate" Appealed Judgment.

9 Witkin Cal. Proc. Appeal § 19

[§ 19] Distinction: Using Writ of Prohibition To "Vacate" Appealed Judgment.

Although the trial court cannot vacate a judgment valid on its face after an appeal is taken, the appellate court may accomplish the same effect by a writ of prohibition. In *Lee v. Superior Court* (1961) 196 C.A.2d 161, 16 C.R. 268, H and S were sued for wrongful death, and H admitted liability. After verdict for plaintiff, S moved for a new trial. Although H did not join in the motion and did not participate in the proceeding, the trial judge granted the new trial as to both defendants. H petitioned for prohibition, an alternative writ issued, and then all parties appealed from the order granting the new trial. *Held*, prohibition issued against the void order as to H; the appeal did not preclude relief by extraordinary writ. "Before the proceedings in prohibition brought by [H] could be terminated his time to appeal from the order would have elapsed and he was justified in preserving his right of appeal because the scope of appellate review is broader than that in prohibition." But the remedy by appeal was neither speedy nor adequate, and it was therefore proper to give prompt relief by the writ. (196 C.A.2d 164.)

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II. EFFECT OF TAKING APPEAL

B. Jurisdiction Retained by Trial Court.

1. Jurisdiction Over Collateral Matters.

9 Witkin Cal. Proc. Appeal § 20

[§ 20] Jurisdiction Over Collateral Matters.

Despite pendency of an appeal, "the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." (*C.C.P.* 916(a).) Applications of this rule fall into no particular pattern, but the following are illustrative:

(1) *Incidents of Attachment*. In *Hallam Cooley Agency v. Superior Court* (1938) 30 C.A.2d 20, 85 P.2d 457, the trial court discharged an attachment on the ground that the action did not authorize it. Petitioner appealed and filed an undertaking to preserve the attachment pending appeal. Defendant moved to release \$ 700 as exempt from attachment. *Held*, the trial judge had jurisdiction to order its release. The appeal was concerned with the right to attach in the particular case; the collateral order was concerned with property not subject to attachment in any case. The release of the exempt funds was a matter entirely distinct from, and unaffected by, the appeal from the main order. (30 C.A.2d 22.) (See *Palmer v. Fix* (1928) 205 C. 472, 271 P. 749 [trial court had jurisdiction to extend lien of attachment]; 6 Cal. Proc. (5th), *Provisional Remedies*, §183.)

(2) *Satisfaction of Judgment*. "[M]atters concerned with the satisfaction of judgment would appear not to be matters as to which the trial court's power is suspended pending appeal." (*Huskey v. Berini* (1955) 135 C.A.2d 613, 618, 288 P.2d 43 [unsuccessful defendant, despite appeal, may pay amount of judgment into court, and trial judge has power to order payment to proper parties].)

(3) *Expungement of Lis Pendens*. The statute authorizing expungement of a wrongfully recorded lis pendens or a good lis pendens on furnishing bond (see 3 Cal. Proc. (5th), *Actions*, §389 et seq.) may be invoked by motion in the trial court despite pendency of an appeal from the judgment in the main action. (See *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 385, 88 C.R. 551, 3 Cal. Proc. (5th), *Actions*, §392.)

(4) *Attorneys' Fees*. Pending appeal, the trial court retains jurisdiction to determine matters related to attorneys' fees. (See *Sherry H. v. Thomas B.* (1988) 203 C.A.3d 1500, 1502, 250 C.R. 830 [defendant's appeal from judgment of paternity does not deprive trial court of jurisdiction to award plaintiff attorneys' fees on appeal]; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 C.A.4th 1168, 1172, 102 C.R.2d 770, 6 Cal. Proc. (5th), *Provisional Remedies*, §297 [under C.C.P. 916(a), trial court retained jurisdiction to enjoin former attorneys from seeking fees for

services rendered in class action that, with new attorneys, had proceeded to settlement and was on appeal].)

(5) *Contempt*. A court can punish for contempt for violation of an injunction where the contempt order was rendered prior to appeal. (*Associated Lumber & Box Co. v. Superior Court* (1947) 79 C.A.2d 577, 581, 180 P.2d 389.)

(6) *Miscellaneous Matters*. Other incidental matters not vitally affecting the merits of the case, and subject to the trial court's power during pendency of an appeal, are considered elsewhere, including the following:

(a) Power to allow or refuse to compel taking of deposition of party or witness pending appeal. (See *Hays v. Superior Court* (1940) 16 C.2d 260, 105 P.2d 975.)

(b) Perpetuation of testimony while appeal is pending. (See C.C.P. 2036.010 et seq., 2 Cal. Evidence (4th), Discovery, §215 et seq.)

(c) Power to order substitution of parties under C.R.C., Rule 8.36(a). (See *infra*, §25.)

(d) Power to permit intervention in class action. (See *Mallick v. Superior Court* (1979) 89 C.A.3d 434, 437, 152 C.R. 503, 4 Cal. Proc. (5th), Pleading, §224.)

(e) Voluntary dismissal of appeal before record is transmitted to reviewing court, by filing written abandonment or stipulation with lower court clerk. (See *infra*, §731 et seq.)

(f) Vacation and correction of judgment. (See *infra*, §23.)

(g) Stay of injunction pending appeal. (See 6 Cal. Proc. (5th), Provisional Remedies, §403.)

(h) Motions for new trial and judgment notwithstanding the verdict. (See *infra*, §23.)

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(6) *Miscellaneous Matters*.(i) *(New) Consolidating causes of action*. (See *Gridley v. Gridley* (2008) 166 C.A.4th 1562, 1587, 83 C.R.3d 715 [order of permanent judge consolidating all causes of action was collateral to appeals challenging temporary judge's authority, because permanent judge would have concluded that plaintiffs were entitled to have all claims resolved in one place regardless of outcome of dispute over temporary judge's authority].)



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B. Jurisdiction Retained by Trial Court.

2. Jurisdiction Over Merits.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 21

[§ 21] In General.

(1) *Appeal on Collateral Matter*. If the appeal itself is on a collateral matter, the court may have jurisdiction to proceed to trial on the merits. This is true, e.g., where the appeal is taken from an order granting or refusing to issue a temporary restraining order. The order is merely designed to preserve the subject of the litigation pending a determination on the merits. (*Gray v. Bybee* (1943) 60 C.A.2d 564, 571, 141 P.2d 32; see 6 Cal. Proc. (5th), *Provisional Remedies*, §402.)

(2) *Distinct Steps in Probate*. Steps in probate are generally independent, and an appeal from one order does not stop the administration proceedings. (See *Klement v. Superior Court* (1937) 21 C.A.2d 456, 69 P.2d 869 [appeal from order dismissing cross-complaint did not deprive court of jurisdiction to proceed with trial]; *Estate of Kennedy* (1948) 87 C.A.2d 795, 797, 197 P.2d 844 [appeal from orders confirming special administrator's sale did not deprive probate court of jurisdiction to determine will contest]; 14 *Summary* (10th), *Wills and Probate*, §401.)

(3) *Forcible Entry or Unlawful Detainer*. In a proceeding in forcible entry or unlawful detainer, litigation of a new cause of action on the same real property rental agreement is permitted despite an appeal "by any party." (*C.C.P.* 1176(b); see 5 Cal. Proc. (5th), *Pleading*, §639.)

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2. Jurisdiction Over Merits.

b. Spousal Support.

9 *Witkin Cal. Proc. Appeal* § 22

[§ 22] Spousal Support.

In re Marriage of Horowitz (1984) 159 C.A.3d 377, 205 C.R. 880, explores the law and policy considerations involved in trial court jurisdiction over spousal support pending appeal. Sarah's petition for dissolution of her marriage to Seymour resulted in an interlocutory judgment of dissolution filed September 5, 1980, with provisions for spousal support of \$ 500 a month and child support of \$ 250 per month for each of two children. Both parties appealed, and, while the appeals were pending, Sarah obtained a wage assignment because of Seymour's arrearages in spousal and child support. Seymour did not post an appeal bond; hence, enforcement of his support obligation was not stayed (see *infra*, §230). However, on February 10, 1982, the trial judge, on the basis of changed circumstances, entered an order modifying Seymour's spousal support obligation by ordering that it cease October 1, 1981, but retained jurisdiction over the issue. Sarah appealed from this order, contending that, under *C.C.P. 916(a)*, the appeal from the dissolution judgment deprived the court of jurisdiction to modify the spousal support provision in that judgment. The issue, therefore, was "whether, upon changed circumstances, a modifiable spousal support obligation is a matter 'embraced' in or 'affected' by an interlocutory judgment ordering payment of spousal support." (159 C.A.3d 381.) *Held*, order affirmed.

(a) The purpose of the rule depriving the trial court of jurisdiction pending appeal is to protect the jurisdiction of the appellate court; i.e., the rule prevents the trial court from rendering the appeal futile by changing the judgment into something different. Accordingly, whether a matter is "embraced" in or "affected" by a judgment depends on whether the postjudgment proceedings on the matter would have any effect on the "effectiveness" of the appeal. (159 C.A.3d 381; see *supra*, §17.)

(b) In the present case, modification of the spousal support provisions did not alter the effectiveness of the appeal from the judgment, for the same result could have been achieved through other means without having any effect on the appeal, e.g., posting a bond to stay the spousal support provisions. (159 C.A.3d 382, citing the text.) Thereafter, on Sarah's motion for temporary support pending appeal, the court could have ordered a reduced amount or none at all on a finding of changed circumstances. If the appellate court subsequently affirmed the judgment--thereby renewing the efficacy of the permanent spousal support provisions throughout the pendency of the appeal--the trial court could still refuse to enforce the stayed order for the period after the change of circumstances, thus in effect retaining the reduction.

(159 C.A.3d 382.) If the appellate court reversed the support provisions and remanded the cause for a redetermination of the issue, on remand the trial court could consider change of circumstances in ordering future support, if any; again the same result would be achieved. (159 C.A.3d 382.)

(c) "Thus, modification of Seymour's spousal support obligation, with the trial court retaining jurisdiction over the issue, had no greater effect on the effectiveness of the appeals from the interlocutory judgment than there would have been had Seymour posted an appeal bond and litigated the change of circumstances issue in temporary support proceedings. Deprivation of trial court jurisdiction to modify the amount of the permanent spousal support order would provide no greater protection to the appellate court's jurisdiction, as the same result could be achieved below through other means. Further, to require the party seeking modification to follow the more complicated alternative procedure rather than simply obtaining direct modification of the permanent support order pending appeal would contravene the general rule that 'in the absence of compelling analogous case law or persuasive language in the statutes, the rule should be adopted which best serves the efficient and proper administration of the courts.' " (159 C.A.3d 383.)

(d) There are serious inequities in a rule that would deprive the trial court of jurisdiction to modify:

(1) The purpose of C.C.P. 916 is to preserve the status quo pending appeal; on rendition of a spousal support order, the status quo includes a *modifiable* money judgment; if the trial court lacked jurisdiction to modify the order pending appeal, the appeal would alter the order, making it nonmodifiable until after the resolution of the appeal. It could not be modified retroactively after rendition of the appellate judgment, for the trial court could not entertain a motion for modification until after the appeal ended, and would be precluded by statute from modifying as to any amounts accrued. Hence, it could never redress inequities resulting from changed needs of the supported spouse or changed ability of the supporting spouse. (159 C.A.3d 383.)

(2) In the present case, the appeals were not fully briefed until almost 2 years after filing of the notices of appeal, and the appellate court's backlog delayed determination for an additional 2 years. Temporary support proceedings pending appeal would have been needlessly expensive; Seymour would have had no reason to initiate them because he would have had to post a bond (probably a cash bond) staying the support provisions of the interlocutory judgment, only to find that a judge awarding temporary support pending appeal would probably have fixed it at the same amount as the trial judge, in order to avoid providing a reward or a penalty for the party who appealed. (159 C.A.3d 384.)

(3) If Seymour inherited a large sum and Sarah's needs increased while the appeal was pending, Sarah should have been able to seek a modification; or if Seymour became totally disabled with no income while the appeal was pending, he should have been able to seek a modification. (159 C.A.3d 384.)

(4) In action on a motion for modification of support while the issue is on appeal (or even while property issues are on appeal), the trial court should not terminate jurisdiction over these issues; for in the event of a reversal requiring a retrial, the trial court must retain jurisdiction to make a new determination based on the facts and circumstances at the time of retrial, and, as in this case, to redetermine the modification of support pending appeal. (159 C.A.3d 384.) (See *In re Marriage of Askmo* (2000) 85 C.A.4th 1032, 1037, 102 C.R.2d 662 [under Family C. 3600 (10 Summary (10th), Parent and Child, §385), allowing trial court to make support order during pendency of dissolution proceeding, trial court had jurisdiction to grant wife's motion for support and attorneys' fees, even though husband was appealing from order granting wife relief from default].)

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3. Vacation or Correction of Judgment.

9 *Witkin Cal. Proc. Appeal* § 23

[§ 23] Vacation or Correction of Judgment.

(1) *Vacation of Void Judgment or Order.* If a judgment or order is void on its face, so as to be subject to collateral attack, it may be set aside at any time, despite the pendency of an appeal. (*Svistunoff v. Svistunoff* (1952) 108 C.A.2d 638, 641, 239 P.2d 650; *Lovret v. Seyfarth* (1972) 22 C.A.3d 841, 854, 101 C.R. 143, citing the text; see 5 A.L.R.5th 422 [filing of notice of appeal as affecting trial court's jurisdiction to consider motion to vacate judgment]; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §12; cf. *Sacks v. Superior Court* (1948) 31 C.2d 537, 540, 190 P.2d 602 [probate court was without power to ignore order, correctness of which was issue on appeal].)

This rule may have unfortunate consequences for an appellant who invokes both methods of attack. In *People v. West Coast Shows* (1970) 10 C.A.3d 462, 467, 89 C.R. 290, appellants succeeded in getting the trial judge to set aside void orders, but nevertheless wanted to prosecute their appeal in order to have a determination of the issues on the merits. If they had not prevailed on the trial judge to act, they could have maintained the appeal (void order appealable, see *infra*, §93); but, with no order remaining there was nothing to appeal from, and the appeal was dismissed. The Court of Appeal, however, following a then growing practice of questionable validity, rendered an opinion on dismissal that discussed all of the issues. (See *Andrisani v. Saugus Colony Ltd.* (1992) 8 C.A.4th 517, 523, 524, 10 C.R.2d 444, citing the text [setting aside void order renders appeal moot and subject to dismissal; trial court may then hold new hearing and issue new order after jurisdiction has been properly obtained]; *infra*, §§759, 760.)

(2) *Correction of Clerical Error.* The trial court retains jurisdiction over its records, and may exercise its power to correct clerical error in the record or judgment even though an appeal has been taken from the judgment. (See *Jackson v. Dolan* (1922) 58 C.A. 372, 374, 208 P. 315; *Boylan v. Marine* (1951) 104 C.A.2d 321, 322, 231 P.2d 92; 7 *Cal. Proc.* (5th), *Judgment*, §67.)

(3) *Motion for New Trial.* A motion for new trial is regarded as collateral to the judgment (see *supra*, §20), and the trial court has jurisdiction to hear the motion after a notice of appeal has been filed. (*Neff v. Ernst* (1957) 48 C.2d 628, 311 P.2d 849; *Weisenburg v. Molina* (1976) 58 C.A.3d 478, 486, 129 C.R. 813.)

(4) *Judgment Notwithstanding the Verdict.* A motion for judgment notwithstanding the verdict is collateral to the judgment and may be determined after an appeal has been filed. (*Foggy v. Ralph F. Clark & Associates* (1987) 192

C.A.3d 1204, 1213, 238 C.R. 130, 7 Cal. Proc. (5th), Trial, §441.)

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A. Appellant Must Be Party.

1. Party to Action.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 24

[§ 24] In General.

"Any party aggrieved" may appeal. The appealing party is known as the "appellant," and an adverse party is known as the "respondent." (C.C.P. 902; C.R.C., Rule 8.10(1), (2); see C.E.B., 1 Civil Appellate Practice 3d, §4.1 et seq.; Rutter Group, 1 Civil Appeals and Writs §2:235 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §231 et seq.; 42 *U.C.L.A. L. Rev.* 717 [effect of consolidation on parties to federal appeals].)

Ordinarily, the appellant is a party to the action below, who may be named in the original pleadings or brought into an existing action or proceeding by an order to show cause. (*Anglo-Californian Bank, Ltd. v. Superior Court* (1908) 153 C. 753, 756, 96 P. 803; *Pacific States Savings & Loan Co. v. Mortimer* (1945) 70 C.A.2d 811, 814, 161 P.2d 684; cf. *McClearen v. Superior Court* (1955) 45 C.2d 852, 856, 291 P.2d 449, *infra*, §143 [party to motion proceeding was entitled to appeal from order denying motion, even though it failed to become party to main action].) However, nonnamed class members who timely object to approval of a class action settlement at a fairness hearing have power to appeal without first intervening in the action. (*Devlin v. Scardelletti* (2002) 536 U.S. 1, 122 S.Ct. 2005, 2011, 153 L.Ed.2d 27, 34 [because nonnamed class members are "parties" in sense of being bound by settlement, they have power to appeal]; *Wershba v. Apple Computer* (2001) 91 C.A.4th 224, 235, 110 C.R.2d 145 [same]; *Consumer Cause v. Mrs. Gooch's Natural Food Markets* (2005) 127 C.A.4th 387, 395, 25 C.R.3d 514 [same]; see 116 *Harv. L. Rev.* 332 [Devlin].)

The following persons have no right to appeal:

(1) Persons who were parties, but by dismissal ceased to be parties. (*Butchart v. Moorhead* (1929) 101 C.A. 659, 282 P. 23 [defendants were named in original complaint, but amended complaint omitted their names]; *Rogers v. Transamerica Corp.* (1935) 6 C.A.2d 340, 44 P.2d 635; *Bates v. John Deere Co.* (1983) 148 C.A.3d 40, 53, 195 C.R. 637, citing the text.)

(2) Parties to an action who were not parties to a cross-complaint filed in it, as to portions of the judgment that dispose of issues presented solely by the cross-complaint. (*Stanley v. Robert S. Odell & Co.* (1950) 97 C.A.2d 521, 523, 218 P.2d 162; *Shearer v. United Calif. Theatres* (1955) 133 C.A.2d 720, 722, 284 P.2d 934.)

(3) Nonparties not affected by an injunction against a named defendant, except to the extent that it covers that defendant's agents and employees. (*People v. Arthur Murray* (1965) 238 C.A.2d 333, 338, 47 C.R. 700, citing the text.)

People v. Muhammad (2003) 108 C.A.4th 313, 133 C.R.2d 308, held that the court that issued a sanction order involving the improper use of peremptory challenges was not a "party" to the appeal of that order. However, because the court, rather than the litigants, had an interest in its sanctioning power, the court's "respondent's" brief was treated as an amicus curiae brief. (108 C.A.4th 320.)

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A. Appellant Must Be Party.

1. Party to Action.

b. Substitution of Parties.

9 *Witkin Cal. Proc. Appeal* § 25

[§ 25] Substitution of Parties.

(1) *Party*. Upon the death of a party or the transfer of an interest during a trial, the personal representative or transferee of a party may be substituted by proper proceedings in the trial court. (See 4 *Cal. Proc.* (5th), *Pleading*, §237 et seq.) A substitution of parties during the pendency of an appeal is made by serving and filing a motion in the reviewing court. The clerk of that court must then notify the superior court of any ruling on the motion. (C.R.C., Rule 8.36(a); see *Erickson v. Boothe* (1949) 90 C.A.2d 457, 203 P.2d 122; 17 So. Cal. L. Rev. 293.)

(2) *Attorney*. A party may substitute attorneys by serving and filing in the reviewing court a substitution signed by the party and the new attorney. In all appeals and in original proceedings related to superior court proceedings, the party must serve the superior court. (C.R.C., Rule 8.36(b); see 1 *Cal. Proc.* (5th), *Attorneys*, §78.)

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A. Appellant Must Be Party.

2. Party to Record After Judgment.

a. Procedure for Becoming Party.

1. Motion To Vacate.

9 Witkin Cal. Proc. Appeal § 26

[§ 26] Motion To Vacate.

A person not a party to the action as originally commenced or tried may make himself or herself party to the *record*, subsequent to judgment in the action, by moving to vacate. The person thereby gains the right to appeal from an order denying this motion.

In *Luckenbach v. Laer* (1923) 190 C. 395, 212 P. 918, plaintiff, an unpaid judgment creditor, obtained an order appointing a receiver for the debtor corporation, and a further order that the receiver sue four directors on their alleged statutory liability. The directors moved to vacate these orders, and appealed from the denial of their motions. *Held*, they were entitled to appeal if aggrieved; "they have followed the procedure allowed by our practice to one whose rights or interests are injuriously affected by any appealable order made in an action to which he is not a party through the process of making themselves parties by moving to set those orders aside." (190 C. 398.) (See *Estate of Baker* (1915) 170 C. 578, 583, 150 P. 989 [administrator of deceased contestant of will, not previously substituted, moved to vacate order dismissing contest]; *Pacific States Savings & Loan Co. v. Harwell* (1928) 204 C. 370, 371, 268 P. 341; *Greif v. Dullea* (1944) 66 C.A.2d 986, 991, 153 P.2d 581; *Estate of Gray* (1948) 89 C.A.2d 478, 481, 201 P.2d 392 [motion to dismiss and other procedural steps]; *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 C.A.3d 534, 541, 122 C.R. 315, citing the text; *Alameda v. Lackner* (1978) 79 C.A.3d 274, 281, 144 C.R. 840; *Simac Design v. Alciati* (1979) 92 C.A.3d 146, 152, 154 C.R. 676, citing the text; *People v. Hy-Lond Enterprises* (1979) 93 C.A.3d 734, 745, 155 C.R. 880; *Estate of Haviside* (1980) 102 C.A.3d 365, 367, 368, 162 C.R. 393, citing the text; *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1516, 59 C.R.3d 64, citing the text [in action to enjoin criminal street gang, persons described in complaint, but not named as defendants, became parties with standing to appeal, when their motion to set aside injunction was denied]; C.E.B., 2 Civil Appellate Practice 3d, §4.2 et seq.; Rutter Group, 1 Civil Appeals and Writs §2:275 et seq.)

In *Alameda v. Carleson* (1971) 5 C.3d 730, 97 C.R. 385, 488 P.2d 953, plaintiff counties sued defendant Director of Social Welfare for a declaration of invalidity of departmental regulations on eligibility for AFDC grants (to needy families with children). CWRO (an association engaged in bringing class suits for welfare recipients) sought to intervene, alleging a direct pecuniary interest in the amount of the grants. The trial judge denied intervention (although

allowing the association to appear as amicus curiae). CWRO appealed from the order denying intervention. Then the trial judge gave judgment against defendant director, issuing mandamus to compel him to revise his regulations in accordance with the counties' demands. CWRO moved to vacate the judgment and also to intervene, and both motions were denied. Defendant director did not appeal from the judgment, but CWRO did. *Held*, CWRO had standing to appeal. (a) The association and its members were legally "aggrieved," i.e., they had an immediate, pecuniary interest in the judgment relating to their AFDC benefits. (5 C.3d 737; see *infra*, §33.) (b) Their motion to vacate was properly made under C.C.P. 663, i.e., to a judgment based on erroneous legal conclusions from facts properly found. (5 C.3d 738, citing the text.) (See *Shaw v. Hughes Aircraft Co. (2000) 83 C.A.4th 1336, 1342, 100 C.R.2d 446* [rule of *Alameda v. Carleson* extended to nonparty parent corporation that filed motions for judgment notwithstanding verdict and for new trial; parent corporation was aggrieved by adverse judgment against its subsidiary, because it had assumed obligation to pay judgment].)

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2. Party to Record After Judgment.

a. Procedure for Becoming Party.

2. Motion for New Trial.

9 Witkin Cal. Proc. Appeal § 27

[§ 27] Motion for New Trial.

In *Lippman v. Los Angeles* (1991) 234 C.A.3d 1630, 286 C.R. 406, PAC, a project area committee, sought mandamus to compel defendant city and its redevelopment agency to consult with it on implementation of a redevelopment plan. The trial judge denied the writ, and PAC appealed. On the same day L and EPOH, strangers to the action, sought to intervene by filing notice of intent to move for a new trial and to vacate the judgment. The trial judge denied both motions and they appealed. *Held*, judgment affirmed.

(a) The cases have established a nonstatutory form of intervention by a person legally aggrieved by a judgment: The person may become a party to the record and obtain a right to appeal by moving to vacate the judgment. (234 C.A.3d 1633, citing *Alameda v. Carleson* (1971) 5 C.3d 730, 97 C.R. 385, 488 P.2d 953, *supra*, §26.) This avenue was not open to L and EPOH, because on the day that they filed their motion to vacate, PAC filed its notice of appeal, thereby depriving the court of jurisdiction to vacate the judgment. (234 C.A.3d 1634.)

(b) However, "[a]lthough we have found no cases directly on point we see no reason why, if an aggrieved person can become a party to the record by moving to vacate the judgment, he or she cannot accomplish the same result by moving for a new trial. ... The advantage of such a procedure to the person aggrieved by a judgment is that, unlike the motion to vacate, the trial court does not lose jurisdiction to grant a motion for new trial when a notice of appeal is filed." (234 C.A.3d 1634, citing *Neff v. Ernst* (1957) 48 C.2d 628, 311 P.2d 849.) "[M]otions to vacate the judgment have much in common with motions for new trial. Expanding nonstatutory intervention to include a motion for new trial eliminates the possibility a person who, by definition, must have an 'immediate, pecuniary, and substantial' interest in the judgment will be denied the right to appeal because of an event totally outside his or her control." (234 C.A.3d 1634.)

Having declared and explained this new procedural right, the court nevertheless affirmed the dismissal of the intervenors' appeal because they had failed to show a sufficient interest. (234 C.A.3d 1634.)

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A. Appellant Must Be Party.

2. Party to Record After Judgment.

b. Necessity of Motion.

1. General Rule: Motion Is Required.

9 *Witkin Cal. Proc. Appeal* § 28

[§ 28] General Rule: Motion Is Required.

Ordinarily, a nonparty must follow some such procedure as a motion to vacate (*supra*, §26). Otherwise, even though aggrieved, a nonparty will not become a party to the record and cannot appeal from the original judgment or order. (See *Elliott v. Superior Court* (1904) 144 C. 501, 506, 77 P. 1109; *Braun v. Brown* (1939) 13 C.2d 130, 133, 87 P.2d 1009; *Eggert v. Pacific States Savings & Loan Co.* (1942) 20 C.2d 199, 201, 124 P.2d 815; *Estate of Thomas* (1946) 74 C.A.2d 389, 390, 168 P.2d 773 [mere appearance at hearing as *amicus curiae*]; *Burlingame v. San Mateo* (1951) 103 C.A.2d 885, 891, 230 P.2d 375; *Rose v. Rose* (1952) 110 C.A.2d 812, 813, 243 P.2d 578; *Estate of Partridge* (1968) 261 C.A.2d 58, 61, 67 C.R. 433, *infra*, §31; *Bates v. John Deere Co.* (1983) 148 C.A.3d 40, 53, 195 C.R. 637, citing the text.)

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A. Appellant Must Be Party.

2. Party to Record After Judgment.

b. Necessity of Motion.

2. Exception.

9 *Witkin Cal. Proc. Appeal* § 29

[§ 29] Exception.

In *Burrow v. Pike* (1987) 190 C.A.3d 384, 235 C.R. 408, 2 Summary (10th), *Workers' Compensation*, §13, a state employee sued the owner and operator of a truck that hit him while he was working. The state, after filing and then dismissing a petition to intervene, filed a notice of lien claim against any judgment awarded to plaintiff for reimbursement for \$ 66,000 in workers' compensation benefits it had paid to plaintiff. The trial judge granted defendants' motion for judgment on the pleadings as to the state's claim of lien. After the jury rendered a verdict for plaintiff for \$ 75,000, the trial judge entered judgment on the verdict in the reduced amount of \$ 25,000, based on a stipulation between plaintiff and defendants that the workers' compensation credit was \$ 50,000. The state appealed. *Held*, it had standing to appeal even though it had not filed a motion to vacate the judgment.

(a) There was no legal basis for the order granting the motion for judgment on the pleadings, because the state was not a party to the action. And the stipulation as to the amount of the workers' compensation credit provided no basis for reduction of the verdict, because the state was not a party to the stipulation even though the stipulation directly affected its ability to enforce its claim of lien. (190 C.A.3d 390.)

(b) *Bates v. John Deere Co.* (1983) 148 C.A.3d 40, 195 C.R. 637, and *Alameda v. Carleson* (1971) 5 C.3d 730, 97 C.R. 385, 488 P.2d 953, *supra*, §26, required a nonparty to file a motion to vacate in order to have standing to appeal from the original judgment; however, these decisions involved nonparty appellants that had been affected only indirectly by the judgment appealed from. (190 C.A.3d 391.) The present case is closer to the facts involved in *Slaughter v. Edwards* (1970) 11 C.A.3d 285, 90 C.R. 144, *infra*, §34, which held that a nonparty could appeal if its interest in the subject matter of the judgment was immediate, pecuniary, and substantial. Here, the reduced judgment, which was the res against which the State asserted its claim of lien for reimbursement, was substantially less than the amount of the asserted lien. (190 C.A.3d 390.) And the state's lien interest was lost when the trial judge erroneously granted defendants' motion for judgment on the pleadings. (190 C.A.3d 392.)

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c. Intervention by Attorney General.

9 Witkin Cal. Proc. Appeal § 30

[§ 30] Intervention by Attorney General.

The Attorney General is entitled to notice of entry of a judgment declaring a state statute or regulation unconstitutional. (See *C.C.P. 664.5(e)*.) In these cases, the Attorney General is entitled to intervene and participate in the appeal, regardless of whether he or she participated in the case in the trial court. However, the Attorney General has no direct right to appeal. If the Attorney General elects not to intervene and participate in the appeal, he or she must file a statement with the Legislature and the Judicial Council stating the reason for this decision. (*C.C.P. 902.1*.)

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3. Distinctions.

a. Probate Proceeding.

9 Witkin Cal. Proc. Appeal § 31

[§ 31] Probate Proceeding.

Probate proceedings are in rem (see 14 *Summary* (10th), *Wills and Probate*, §406), and the strict requirements of party to the action or to the record have been relaxed in a few situations.

(1) *Persons Represented*. In *Estate of Torrance* (1957) 154 C.A.2d 350, 316 P.2d 94, an executor filed a petition to determine heirship, which mentioned the claims of appellants, and made it unnecessary for them to file their own claims. *Held*, appellants, though not formal parties, were represented and could appeal from an unfavorable declaration. (154 C.A.2d 355.)

(2) *Beneficiaries of Estate*. A beneficiary of an estate or testamentary trust has an immediate, direct, and vested interest, frequently in the specific subject matter of the order. A beneficiary may therefore appeal from an order without taking steps to make himself or herself a party to the record. (See *Estate of Sloan* (1963) 222 C.A.2d 283, 291, 35 C.R. 167 [remainder interest holders of testamentary trust were entitled to appeal from order adversely affecting their interests, despite their failure to participate in lower court proceedings or to move to vacate]; *Estate of Armstrong* (1966) 241 C.A.2d 1, 6, 50 C.R. 339.)

(3) *Creditors*. A mere creditor of an estate does not have the direct and immediate interest of a beneficiary, and cannot appeal without making himself or herself a party to the record. In *Estate of Partridge* (1968) 261 C.A.2d 58, 67 C.R. 433, wills were admitted to probate after several contests, and the court allowed substantial fees for extraordinary services to two law firms. C, claiming huge damages based on the decedent's alleged fraud, filed a creditor's claim in an amount over the appraised value of the estate. While this was pending, C appealed from the order awarding fees and directing the executor to pay the fees from funds of the estate. *Held*, appeal dismissed. C was interested in the order, and could have protected itself by appearing in the lower court to object or by moving to set the order aside. But to allow creditors to appeal from a probate order without appearance or participation would frustrate the expeditious administration of estates. (261 C.A.2d 60.)

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3. Distinctions.

b. Res Judicata Effect on Nonparty.

9 Witkin Cal. Proc. Appeal § 32

[§ 32] Res Judicata Effect on Nonparty.

In *Marsh v. Mountain Zephyr* (1996) 43 C.A.4th 289, 50 C.R.2d 493, defendant deposed plaintiff's expert witness and, pursuant to former C.C.P. 2034(i) (now C.C.P. 2034.410 et seq.), obtained an order setting the fee to be paid to him. The witness, who desired his higher, customary fee, appealed from this order. *Held*, the witness had standing to appeal.

(a) Although the witness was a nonparty who did not become a party of record by moving to vacate the order (see *supra*, §26 et seq.), there is an exception to the "party of record" requirement where a judgment or order has res judicata effect on a nonparty. Because the witness was bound by the order fixing the fee, the order clearly had res judicata effect in this case. (43 C.A.4th 295.)

(b) Furthermore, the witness was "aggrieved" (see *infra*, §33 et seq.) by the order. By setting the fee at a lower rate than the witness' customary fee, the injurious effect of the order on him was immediate, pecuniary, and substantial. (43 C.A.4th 295.)

(c) Also, the statutory procedure appears to make the witness a "party" to the motion, although not a party to the underlying action. When a fee is challenged, an expert witness must be given notice of the motion, must be allowed to produce evidence on the matter, and is subject to sanctions for unsuccessfully opposing the motion. Thus, as a "party" to this motion proceeding, if not to the underlying action, it is reasonable to conclude that the witness had standing to appeal the order resulting from the motion. (43 C.A.4th 296.) (See *People v. Stark* (2005) 131 C.A.4th 184, 200, 31 C.R.3d 669 [nonparty, unsuccessful bidder at auction for sale of assets by court-appointed receiver, had standing to appeal orders concerning later sale of same assets; bidder had not merely inchoate interest, but purchase agreement with receiver; under doctrine of res judicata, nonparty was bound by court's orders].)

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1. Necessity of Interest Injuriouly Affected.

a. Nature of Requirement.

1. In General.

9 Witkin Cal. Proc. Appeal § 33

[§ 33] In General.

"Under our decisions any person having an interest recognized by law in the subject matter of the judgment, which interest is injuriouly affected by the judgment, is a party aggrieved and entitled to be heard upon appeal." (*Estate of Colton* (1912) 164 C. 1, 5, 127 P.2d 643; see *C.C.P.* 902, supra, §24; *Alameda v. Carleson* (1971) 5 C.3d 730, 737, 97 C.R. 385, 488 P.2d 953, supra, §26; *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 10, 270 C.R. 796, 793 P.2d 2; *Buffington v. Ohmert* (1967) 253 C.A.2d 254, 255, 61 C.R. 360; *Slaughter v. Edwards* (1970) 11 C.A.3d 285, 290, 90 C.R. 144; *Burrow v. Pike* (1987) 190 C.A.3d 384, 392, 235 C.R. 408, supra, §29; *Hensley v. Hensley* (1987) 190 C.A.3d 895, 898, 899, 235 C.R. 684; *Holt v. Booth* (1991) 1 C.A.4th 1074, 1079, 1080, 1082, 2 C.R.2d 727; *In re Executive Life Ins. Co.* (1995) 32 C.A.4th 344, 393, 398, 38 C.R.2d 453; C.E.B., 1 Civil Appellate Practice 3d, §§4.1, 4.11 et seq.; Rutter Group, 1 Civil Appeals and Writs §2:282 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §242 et seq.; 11 *A.L.R.4th* 399 [right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance]; on parent as aggrieved party in dependency proceeding, see 10 *Summary* (10th), *Parent and Child*, §700.)

A party may be aggrieved and entitled to appeal even though, by failure to appear at the trial, the party may have waived the right to attack certain kinds of errors. (*Redevelopment Agency of Berkeley v. Berkeley* (1978) 80 C.A.3d 158, 166, 143 C.R. 633 [party was entitled to challenge trial court's exercise of jurisdiction].)

If the party is not aggrieved, he or she cannot appeal. (See *Winter v. Gnaizda* (1979) 90 C.A.3d 750, 754, 152 C.R. 700; *infra*, §36 et seq.)

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1. Necessity of Interest Injuriouly Affected.

a. Nature of Requirement.

2. Illustrations of Aggrieved Parties.

aa. In General.

9 Witkin Cal. Proc. Appeal § 34

[§ 34] In General.

In *Ribero v. Callaway* (1948) 87 C.A.2d 135, 196 P.2d 109, plaintiff creditor obtained an order charging an alleged debtor partner's interest in a partnership. The debtor did not appeal. The other partners, who were made parties to the proceeding by service of notice of motion, and denied that the debtor was in fact a partner, were entitled to appeal to protect their claimed sole interests. (87 C.A.2d 138.)

In *Slaughter v. Edwards* (1970) 11 C.A.3d 285, 90 C.R. 144, plaintiffs obtained a fraud judgment against defendant licensed real estate broker, and filed an application in the action for an order directing payment out of the Real Estate Education and Recovery Fund (see 3 Summary (10th), *Agency and Employment*, §67 et seq.). The order was made, and defendant Real Estate Commissioner did not appeal from the order, but defendant broker did. *Held*, he was an aggrieved party, despite the fact that the statute entrusts the defense to the Commissioner and the proceeding is against the Fund and not the licensee; because the order of payment is followed by automatic suspension of the license, it injuriously affects the licensee. (11 C.A.3d 291.)

In *Knight v. McMahon* (1994) 26 C.A.4th 747, 31 C.R.2d 832, appellant, an indigent disabled person, was awarded retroactive in-home supportive services benefits by an administrative law judge. When the judge refused to award her interest on the retroactive benefits, appellant filed a petition for administrative mandamus, seeking both an award of interest and a holding by the trial court that interest is properly awarded in hearings before administrative law judges. The trial court entered judgment awarding the interest requested, but ruled that it lacked jurisdiction to determine whether administrative law judges can award interest. Appellant appealed from this ruling, and respondents filed a motion to dismiss, contending that because the judgment was in appellant's favor, she was not an aggrieved party. *Held*, appellant had standing to appeal.

(a) The administrative record established that appellant had had other administrative hearings, and the administrative law judge's decision in issue indicated that appellant was not foreclosed from further hearings on her claims. Thus, it was very likely that appellant would be involved with further administrative hearings regarding her

benefits. "Where issues on appeal affect the general public interest and the future rights of the parties, and there is a reasonable probability that the same question will be litigated again and appealed, an appellate court may adjudicate the issue involved even though the appeal would otherwise be subject to dismissal." (26 C.A.4th 753.)

(b) "As appellant states, she is locked into a perpetual relationship with the respondents and is subject to their refusal to award interest at the administrative level. She is dependent on the respondents to properly pay her what she is entitled to receive. She was given half a loaf. It left her unsatisfied. She was, and is, a party 'aggrieved' by the trial court's judgment." (26 C.A.4th 753.)

In *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 C.A.4th 981, 47 C.R.2d 362, plaintiff was injured in an automobile accident and was assigned the insured tortfeasor's rights against defendant insurer. The insured joined in the action, alleging bad faith and malpractice. A default judgment was entered against defendant, and both plaintiffs appealed from an order vacating the judgment. *Held*, both plaintiffs had standing to appeal. Defendant argued that only the plaintiff injured in the automobile accident had standing to appeal, because only that plaintiff had obtained a judgment against defendant. This contention is without merit. The default judgment also provided that defendant had a duty to defend and indemnify the insured, and thus, the insured also obtained a judgment against defendant. Moreover, the rights assigned being at issue in this appeal, joinder of the insured was necessary to prevent a splitting of the cause of action, and was also in the interest of judicial economy. (40 C.A.4th 988.)

In *Howard Contracting v. G.A. MacDonald Const. Co.* (1998) 71 C.A.4th 38, 83 C.R.2d 590, a general contractor sued defendant city on a public works contract, and the trial court found that the project delays were caused by defendant's breach. A subcontractor appealed from that portion of a judgment in favor of the general contractor that precluded the contractor from recovering delay damages on the subcontractor's behalf on a pass-through claim. *Held*, the subcontractor had standing to appeal. The judgment adversely affected the subcontractor's right to obtain a monetary recovery under its contract with the general contractor. Under the rationale of *Slaughter v. Edwards*, *supra*, the subcontractor was an aggrieved party. Its interest was immediate, pecuniary, and substantial (it claimed losses in excess of \$ 300,000). (71 C.A.4th 58.)

The following have also been held to be aggrieved parties:

(1) *Corporate defendant appealing order appointing receiver*: See *Pratt v. Robert S. Odell & Co.* (1942) 49 C.A.2d 550, 554, 122 P.2d 684 [authorization from receiver was not necessary].

(2) *Nonparty expert witness*: See *Marsh v. Mountain Zephyr* (1996) 43 C.A.4th 289, 50 C.R.2d 493, *supra*, §32 [nonparty expert witness was aggrieved by order setting fee].

(3) *Employer of attorney-employee*: See *20th Century Ins. Co. v. Choong* (2000) 79 C.A.4th 1274, 1278, 94 C.R.2d 753 [attorney's employer had right to appeal sanctions imposed on attorney while he was acting within scope of employment; employer was "aggrieved party" because, under Labor Code provision, he was obligated to reimburse attorney].

(4) *Parent corporation*: See *Shaw v. Hughes Aircraft Co.* (2000) 83 C.A.4th 1336, 1342, 100 C.R.2d 446 [parent corporation obligated to pay judgment against subsidiary is aggrieved party].

(5) *Plaintiff whose standing is questioned*: See *United Investors Life Ins. Co. v. Waddell & Reed* (2005) 125 C.A.4th 1300, 1303, 23 C.R.3d 387 [plaintiff was aggrieved party and thus had standing to appeal order dismissing its statutory unfair competition action, notwithstanding statutory amendment while appeal was pending that raised issue of plaintiff's standing to sue]; *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1516, 59 C.R.3d 64 [four men served with permanent injunction against street gang, but who did not admit gang membership, were aggrieved by injunction; each was alleged to be gang member, injunction imposed limitations on otherwise lawful activity, and men were liable for contempt under injunction].

(6) *Class member*: See *Consumer Cause v. Mrs. Gooch's Natural Food Markets* (2005) 127 C.A.4th 387, 395, 25 C.R.3d 514, supra, §24 [class member was aggrieved by order denying his request for attorneys' fees].

(7) *Publicly funded entity*: See *In re Jasmine S.* (2007) 153 C.A.4th 835, 841, 63 C.R.3d 593 [publicly funded center providing legal services to children in dependency proceedings had standing to challenge juvenile court's order disqualifying one of center's units from representing one of two children in dependency case; center was contractually obligated to provide conflict-free representation to children, and thus had immediate and concrete stake in litigation].

SUPPLEMENT: [This section is current through the latest supplement]

Aggrieved parties:

(5) *Plaintiff whose standing is questioned*: See *Serrano v. Stefan Merli Plastering Co.* (2008) 162 C.A.4th 1014, 1026, 76 C.R.3d 559 [personal injury plaintiffs had standing to appeal order determining liability for costs of deposition transcript]. (8) *(New) Pawnbroker*: See *People v. Hernandez* (2009) 172 C.A.4th 715, 720, 91 C.R.3d 604 [pawnbrokers were aggrieved parties with standing to appeal ex parte order requiring them to release unconditionally property stolen in residential burglaries, even though they were nonparties to criminal action; order was binding and its injurious effect on pawnbrokers was "immediate, pecuniary, and substantial"].

(9) *(New) Nonparty shareholder*: See *In re FairWageLaw* (2009) 176 C.A.4th 279, 285, 97 C.R.3d 652 [nonparty shareholder was aggrieved by judgment in voluntary dissolution proceeding and thus had standing to appeal, where judgment adjudicated value of his shareholder interest, offset corporation's litigation expenses against his interest, and held him liable to corporation for sizable deficiency].



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1. Necessity of Interest Injuriouly Affected.

a. Nature of Requirement.

2. Illustrations of Aggrieved Parties.

bb. Guardianship and Dependency Cases.

9 Witkin Cal. Proc. Appeal § 35

[§ 35] Guardianship and Dependency Cases.

(1) *Guardianship*. In *Guardianship of Pankey* (1974) 38 C.A.3d 919, 113 C.R. 858, the mother of four children died, and the father was unable to care for them. Guardianship petitions were filed by maternal aunts, and objections were filed by the paternal grandmother. The trial court appointed the maternal aunts guardians, and the objecting grandmother appealed. *Held*, she had standing to appeal.

(a) She was not originally a party to the record, but merely a relative named in the guardianship petitions. However, she appeared as a party to file objections, and, when those objections were overruled, she became both a party to the record and a person aggrieved. (38 C.A.3d 925.)

(b) Respondents contended that she was not aggrieved because she did not demand custody in herself, but only sought to protect the custodial right of her son (the father). However, the fact that the statute requires notice to relatives of a minor indicates that they may have some interest in the matter; and, on the analogy of cases dealing with guardianship of incompetents, "[o]nce the right to appear is established, the right to appeal an adverse decision should follow." (38 C.A.3d 927.) (See *Guardianship of Gilman* (1944) 23 C.2d 862, 864, 147 P.2d 530 [alleged incompetent may personally appeal from decree adjudging him incompetent; general rule that person under disability must ordinarily appear by guardian or guardian ad litem did not apply, because very question involved was validity of order of guardianship itself].)

(2) *Dependency*. In *re Lauren P.* (1996) 44 C.A.4th 763, 52 C.R.2d 170, was a dependency proceeding in which the Department of Social Services filed a petition alleging that a father had abused his child. The petition was dismissed for lack of sufficient evidence. The child's mother then appealed from this dismissal. *Held*, the mother had standing to appeal as an aggrieved party.

(a) Technically, the mother was not a party to the proceeding, because the petition may be filed only by the department. However, a parent or other person may apply to the department, showing facts that would support

dependency jurisdiction. Furthermore, once a petition has been filed, both parents are entitled to notice and the opportunity to be heard at all subsequent proceedings. Thus, any parent who argues that dependency jurisdiction is warranted is aggrieved by dismissal of the petition. In other words, if a parent is permitted to present evidence and to argue against dismissal, that parent should be allowed to appeal from a dismissal on the merits. (44 C.A.4th 770.)

(b) The state's exclusive power to initiate a dependency proceeding does not mean that it has an exclusive interest in the outcome. A parent's interest in the well-being of his or her children ranks among the most basic of civil rights, a conclusion not changed by the fact that some parents fail to fulfill their parental responsibilities. Thus, the mother in this case had a natural interest in protecting her daughter against future sexual abuse, and dismissal of the petition injuriously affected this interest. (44 C.A.4th 770.) (See *In re Rauch* (1951) 103 C.A.2d 690, 694, 230 P.2d 115 [father, though previously deprived of custody of child by guardianship order, had fundamental interest that entitled him to appeal from order declaring child ward of juvenile court].)

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B. Appellant Must Be Aggrieved.

1. Necessity of Interest Injuriouly Affected.

b. No Interest in Subject Matter.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 36

[§ 36] In General.

If the appellant had previously assigned his or her interest, or disclaims any present interest, or the record fails in other respects to show any substantial interest, the appellant has no standing on appeal. (See *Williams v. Savings & Loan Soc.* (1901) 133 C. 360, 65 P. 822; *Deiter v. Kiser* (1912) 162 C. 315, 316, 122 P. 469; *United States v. Ackerman* (1931) 211 C. 408, 409, 295 P. 811; *Globe Discount Co. v. Ostergard* (1936) 5 C.2d 673, 55 P.2d 1169; *Mono County Irr. Co. v. California* (1916) 32 C.A. 184, 185, 167 P. 199; *Wechsler v. United States* (1976) 56 C.A.3d 574, 582, 128 C.R. 619 [disclaimer; rule applied to United States]; *Verreos v. San Francisco* (1976) 63 C.A.3d 86, 95, 133 C.R. 649 [city board of supervisors, though named as defendant in taxpayer's suit challenging exercise of power by mayor, was not injuriously affected by judgment upholding mayor's action; plaintiff and taxpayers that he represented were only aggrieved parties]; *Kunza v. Gaskell* (1979) 91 C.A.3d 201, 206, 154 C.R. 101 [no ownership of land involved]; *Estate of Cahoon* (1980) 101 C.A.3d 434, 438, 161 C.R. 651 [unsuccessful bidder at probate sale cannot appeal from order confirming sale]; *In re Pac. Standard Life Ins. Co.* (1992) 9 C.A.4th 1197, 1200, 12 C.R.2d 50 [discussing and applying reasoning in *Estate of Cahoon*]; *Decker v. U.D. Registry* (2003) 105 C.A.4th 1382, 1391, 129 C.R.2d 892 [where consumer credit reporting agency's motion to strike action against it as SLAPP suit was denied, agency's president, who merely joined in motion, lacked standing to appeal; notice of joinder does not constitute motion]; *In re Paul W.* (2007) 151 C.A.4th 37, 58, 60 C.R.3d 329 [mother lacked standing to appeal from juvenile court's habeas ruling sought by father claiming ineffective assistance of counsel in dependency proceeding, inasmuch as she was not aggrieved by challenged habeas ruling; habeas proceeding did not operate as dismissal of dependency, and habeas ruling did not affect mother's custody or other interests]; cf. *Solis v. Vallar* (1999) 76 C.A.4th 710, 713, 90 C.R.2d 677 [unsuccessful bidder who was also one-half owner of property had standing to appeal order confirming sale; distinguishing *Estate of Cahoon*, *supra*, where unsuccessful bidder had no ownership interest]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §242.)

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1. Necessity of Interest Injuriouly Affected.

b. No Interest in Subject Matter.

2. Debtor in Bankruptcy.

9 *Witkin Cal. Proc. Appeal* § 37

[§ 37] Debtor in Bankruptcy.

When a party to a cause of action declares bankruptcy, his or her assets, including any interest in the cause of action, pass to the trustee in bankruptcy. Because an appeal is merely a continuation of the cause of action (see *supra*, §1), the trustee in bankruptcy is the party entitled to appeal. If the trustee does not appeal, the bankrupt's remedy is to petition the bankruptcy court either to compel the trustee to do so or to authorize the bankrupt to file an appeal on his or her own behalf. (*People v. Kings Point Corp.* (1986) 188 C.A.3d 544, 549, 233 C.R. 227.) (See *Bostanian v. Liberty Savings Bank* (1997) 52 C.A.4th 1075, 1080, 61 C.R.2d 68, 4 Cal. Proc. (5th), *Pleading*, §262 [debtors lacked standing to appeal unless claim was abandoned by trustee].)

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b. No Interest in Subject Matter.

3. Former Attorney Requesting Fees.

9 *Witkin Cal. Proc. Appeal* § 38

[§ 38] Former Attorney Requesting Fees.

In re Marriage of Tushinsky (1988) 203 C.A.3d 136, 249 C.R. 611, involved an attorney who had represented a party in a dissolution proceeding, but who was no longer representing that party when the judgment was entered. The issue was whether the attorney had standing to appeal from a further judgment on reserved issues that granted in part and denied in part the attorney's requests for attorneys' fees and costs under former C.C. 4370 (now *Family C. 2030*). Although noting that the attorney was not entitled to appeal as a party to the dissolution proceeding, the court nevertheless addressed the issue whether the attorney was an aggrieved party. *Held*, he was not.

(a) The right to attorneys' fees under the statute belongs to the client spouse and accrues to the attorney's benefit only indirectly. This is so even if fees and costs are made directly payable to the attorney. Hence, an attorney is not a party aggrieved within the meaning of *C.C.P. 902* with respect to a ruling on a request for statutory attorneys' fees that is encompassed in a final judgment in a dissolution proceeding. (203 C.A.3d 142.)

(b) The attorney's right to recover fees cannot be invoked in the dissolution proceeding itself. Rather, the attorney's remedy is to institute an independent action against the client to recover fees on his or her own behalf. (203 C.A.3d 142.)

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b. No Interest in Subject Matter.

4. Attorney Potentially Liable for Malpractice.

9 *Witkin Cal. Proc. Appeal* § 39

[§ 39] Attorney Potentially Liable for Malpractice.

In *Life v. Los Angeles* (1990) 218 C.A.3d 1287, 267 C.R. 557, plaintiff sued both a county hospital for medical malpractice and plaintiff's former attorney for legal malpractice in failing to file a timely claim against the county. The hospital obtained a summary judgment based on failure to file a claim, and defendant attorney appealed. *Held*, defendant lacked standing.

(a) Under *In re Marriage of Tushinsky* (1988) 203 C.A.3d 136, 249 C.R. 611, *supra*, §38, fees sought by an attorney did not give him an immediate, pecuniary, and substantial interest in the judgment. It follows that defendant's potential pecuniary liability for malpractice would be a nominal or remote consequence of the summary judgment for the county. (218 C.A.3d 1293.)

(b) Defendant's claim that she was aggrieved by the summary judgment because it would be *res judicata* in plaintiff's action against her is unpersuasive. While the judgment barred plaintiff's claim against the county for want of a timely claim, it made no determination whether defendant's conduct fell below the applicable standard of care for an attorney or whether plaintiff had a meritorious claim that was lost due to defendant's negligence. (218 C.A.3d 1294.) Because the judgment did not dispose of defendant's potential defenses to the legal malpractice action, it did not lead to the inequity of her being wholly bound by the decision without any right to review. (218 C.A.3d 1295.)

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c. Judgment Affecting Other Parties.

9 *Witkin Cal. Proc. Appeal* § 40

[§ 40] Judgment Affecting Other Parties.

(1) *Joint or Concurrent Tortfeasors*. A defendant who is individually liable is not aggrieved by the exoneration of a codefendant. (See *Click v. Southern Pac. Co. (1931) 113 C.A. 528, 298 P. 839* [concurrently negligent tortfeasors, jointly and severally liable; neither was entitled to appeal from judgment erroneously absolving the other from liability].) Although the right of contribution between tortfeasors is established by statute, it arises only after a money judgment has been rendered jointly against them. (See 5 *Summary* (10th), *Torts*, §§105, 106.)

(2) *Distinction: Joint Debtors*. The right of contribution exists between joint contract debtors without any condition of money judgment against them. (C.C. 1432; see 1 *Summary* (10th), *Contracts*, §113.) Hence, one debtor held liable is aggrieved by a judgment in favor of the other, and is entitled to appeal. (See *Buffington v. Ohmert (1967) 253 C.A.2d 254, 255, 61 C.R. 360*.)

West's Key Number Digest, Appeal and Error 151(6)

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d. Judgment in Favor of Appellant.

1. General Rule: Not Appealable.

9 Witkin Cal. Proc. Appeal § 41

[§ 41] General Rule: Not Appealable.

Ordinarily, if the judgment or order is in favor of a party, the party is not aggrieved and cannot appeal. (See *Maxwell Hardware Co. v. Foster* (1929) 207 C. 167, 170, 277 P. 327; *Ruben v. Los Angeles* (1959) 51 C.2d 857, 864, 337 P.2d 825, citing the text; *Griffin v. Los Angeles* (1933) 134 C.A. 763, 765, 26 P.2d 655; *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 762, 157 P.2d 868; *Forkner v. Forkner* (1950) 96 C.A.2d 363, 369, 215 P.2d 482; *Cicinelli v. Iwasaki* (1959) 170 C.A.2d 58, 64, 338 P.2d 1005, citing the text; *Moore v. Younger* (1976) 54 C.A.3d 1122, 1126, 127 C.R. 171 ["Plaintiffs' real grievance is that defendant did not appeal and that they therefore do not have an appellate opinion to vindicate their position"]; *Hensley v. Hensley* (1987) 190 C.A.3d 895, 899, 235 C.R. 684, citing the text; *In re Marriage of Brockman* (1987) 194 C.A.3d 1035, 1042, 240 C.R. 96 [wife was not entitled to set aside judgment of dissolution on basis of erroneous forfeiture provision in settlement that worked only to wife's advantage]; *Zarrah v. Zarrah* (1988) 205 C.A.3d 1, 4, 252 C.R. 20, citing the text; *Rogers v. Silverman* (1989) 216 C.A.3d 1114, 1127, 265 C.R. 286, citing the text; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §§243, 244.)

In *Soldate v. Fidelity Nat. Financial* (1998) 62 C.A.4th 1069, 72 C.R.2d 404, the judgment provided that plaintiff was to recover costs and attorneys' fees "in an amount not yet determined." Plaintiff filed a notice of cross-appeal from this judgment. Approximately a month later, the court fixed the fees and costs at an amount about \$ 90,000 less than the amount that plaintiff requested. Plaintiff did not file a separate notice of appeal from this ruling. *Held*, the ruling fixing fees and costs was not reviewable.

(a) The decision to award attorneys' fees to plaintiff, although in an unspecified amount, was a judgment favorable to her. "Where, as here, a party files a notice of appeal from a favorable judgment, which also awards to that party attorney fees in an unspecified amount, a subsequent post-trial order setting the amount of fees--itself an appealable order--is not reviewable on appeal, unless the post-trial order setting the fees is expressly specified in a notice of appeal." (62 C.A.4th 1073.)

(b) *Grant v. List & Lathrop* (1992) 2 C.A.4th 993, 3 C.R.2d 654, *infra*, §187, is distinguishable. In that case, the judgment made an award of costs and fees but left the amount blank, and the court held that a separate notice of appeal

from the order setting the amount was unnecessary. Here, by contrast, plaintiff filed her notice of appeal before she had any grievance with the ruling regarding attorneys' fees (because at the time that she filed notice, the trial court had acknowledged that it would later grant costs and fees in an unspecified amount, an order that would accordingly remain separate from the judgment). (62 *C.A.4th* 1074.)

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d. Judgment in Favor of Appellant.

2. Exceptions.

9 Witkin Cal. Proc. Appeal § 42

[§ 42] Exceptions.

There are two exceptions or qualifications to the rule that a party cannot appeal from a judgment in his or her favor (see *supra*, §41):

(1) *Judgment for Less Than Demand*. A party who is awarded less than he or she has demanded may appeal from the unfavorable part of the judgment. (*Spencer v. Nelson* (1947) 30 C.2d 162, 164, 180 P.2d 886 [plaintiff, whose motion for new trial was granted by limited order, appealed seeking complete new trial]; *Liodas v. Sahadi* (1977) 19 C.3d 278, 285, 137 C.R. 635, 562 P.2d 316 [party seeking new trial on all issues is aggrieved by order granting partial new trial]; *Estate of Hughes* (1947) 80 C.A.2d 550, 555, 182 P.2d 253 [wife, who obtained interlocutory divorce decree, appealed from part of decree determining property rights]; *Sturgeon v. Leavitt* (1979) 94 C.A.3d 957, 959, footnote 1, 156 C.R. 687; *In re Marriage of Schultz* (1980) 105 C.A.3d 846, 852, 164 C.R. 653, citing the text; *Knight v. McMahon* (1994) 26 C.A.4th 747, 752, 31 C.R.2d 832, *supra*, §34 [trial court awarded appellant interest on retroactive welfare benefits, but held that it lacked power to determine whether administrative law judges could award interest; appeal from latter part of judgment was proper]; *infra*, §§57, 58; cf. *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 762, 157 P.2d 868 [defendant could not appeal from plaintiff's voluntary dismissal, despite contention that demurrer to complaint was improperly overruled].)

(2) *Judgment Apparently in Party's Favor*. A party may appeal from a judgment apparently in his or her favor that is actually against the party. In *Quint v. McMullen* (1894) 103 C. 381, 37 P. 381, plaintiff sued to quiet title. Defendant denied any claim to the land except through purchase at a tax sale and receipt of a certificate of sale. The trial judge found that plaintiff was the owner in fee, and that defendant had no rights except through purchase, which rights could not be determined in the action. *Held*, plaintiff could appeal. He was entitled to a judgment without reservations, either refusing or granting his demand; and to quiet his title, leaving open the question of validity of the tax sale, was a fruitless victory. "Theoretically the judgment was in his favor; practically it decided nothing, for, after the judgment of the trial court, he knew no more as to the *status* of his realty than he did before he brought this action." (103 C. 383.) (See *Corridan v. Rose* (1955) 137 C.A.2d 524, 528, 290 P.2d 939, quoting the text; *Garcia v. San Gabriel Ready Mix* (1959) 173 C.A.2d 355, 357, 343 P.2d 327.)

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e. Judgment by Consent.

1. General Rule: Not Appealable.

9 *Witkin Cal. Proc. Appeal* § 43

[§ 43] General Rule: Not Appealable.

A judgment rendered with the consent of the appellant is not appealable. (*Hibernia Savings & Loan Soc. v. Waymire* (1907) 152 C. 286, 92 P. 645; *Reed v. Murphy* (1925) 196 C. 395, 398, 238 P. 78 [judgment pursuant to stipulation]; *Morrow v. Learned* (1926) 76 C.A. 538, 539, 245 P. 442; *Adams v. Southern Pac. Co.* (1930) 109 C.A. 728, 731, 293 P. 681; *Christina v. R.Z. Adams Co.* (1936) 16 C.A.2d 139, 60 P.2d 186; *Sorensen v. Lascy* (1941) 42 C.A.2d 606, 607, 109 P.2d 713; *Robertson v. Maroevich* (1941) 42 C.A.2d 610, 613, 109 P.2d 708; *Wilson v. Los Angeles* (1958) 156 C.A.2d 776, 777, 320 P.2d 93 [demurrer sustained by stipulation, and plaintiff failed to amend]; *Atchison, Topeka & Santa Fe Ry. Co. v. Hildebrand* (1965) 238 C.A.2d 859, 861, 48 C.R. 339 [judgment by stipulation]; *Adoption of Matthew B.* (1991) 232 C.A.3d 1239, 1267, 284 C.R. 18 [stipulated judgment of paternity]; *In re Marriage of Hinman* (1992) 6 C.A.4th 711, 717, 8 C.R. 245; see 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §§579, 610.)

A typical situation is where a stay bond is furnished, the surety agreeing to pay if the judgment is affirmed. The subsequent entry of judgment against the surety after affirmance is by previous consent and not appealable. (*Hood v. Verdugo Lumber Co.* (1933) 219 C. 558, 560, 27 P.2d 897; *Duerr v. Sloan* (1920) 50 C.A. 512, 516, 195 P. 475; *Roberts v. Fitzgerald* (1928) 94 C.A. 747, 748, 271 P. 1110; *People v. Aymar* (1929) 98 C.A. 1, 5, 276 P. 595.)

In *Delagrange v. Sacramento Savings & Loan Assn.* (1976) 65 C.A.3d 828, 135 C.R. 614, citing the text, plaintiff's complaint set forth three causes of action. After a demurrer to the second and third was sustained, the parties stipulated to dismissal of these counts, the trial on the first count resulted in judgment for defendant, and the judgment included a dismissal of the second and third counts. Plaintiff appealed from the judgment, but attacked only the dismissal part. *Held*, appeal dismissed. Plaintiff's consent to dismissal was a partial abandonment of the appeal, and he was not entitled to review that part of the judgment. (65 C.A.3d 831.)

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e. Judgment by Consent.

2. Exceptions.

aa. In General.

9 Witkin Cal. Proc. Appeal § 44

[§ 44] In General.

If the consent is based on a previous agreement or stipulation, the judgment must be entered in substantial conformity with the agreement. If it is different from or goes beyond the terms of the stipulation, it is not really a consent judgment and is appealable. (See *Hawley v. Gray Bros. Artificial Stone Paving Co.* (1900) 127 C. 560, 561, 60 P. 437 [premature entry]; *Harris v. Spinali Auto Sales* (1962) 202 C.A.2d 215, 218, 219, 20 C.R. 586 [fact that judgment entered did not dispose of all issues supports conclusion that parties did not agree to final judgment]; *People v. Investors Diversified Services* (1968) 262 C.A.2d 367, 370, 68 C.R. 663 [stipulation in condemnation action as to amount of damages under trial court's theory of valuation; theory was challenged as error of law].)

In *Reed v. Murphy* (1925) 196 C. 395, 238 P. 78, the court said: "It has been suggested, though never decided, in this state, so far as we are advised, that the rule requiring dismissal of appeals from consent judgments is subject to two exceptions, the first being in cases where the lower court did not have jurisdiction of the subject matter of the action, and the second in cases where the complaint is fatally defective." (196 C. 399.) (See *Robertson v. Maroevich* (1941) 42 C.A.2d 610, 613, 109 P.2d 708 [similar comment as to lack of jurisdiction]; *Atchison, Topeka & Santa Fe Ry. Co. v. Hildebrand* (1965) 238 C.A.2d 859, 861, 48 C.R. 339 [noting suggested exceptions but finding it unnecessary to discuss them].)

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bb. Judgment Void on Constitutional Grounds.

9 *Witkin Cal. Proc. Appeal* § 45

[§ 45] Judgment Void on Constitutional Grounds.

A judgment that is void on constitutional grounds exceeds the court's jurisdiction and is subject to attack at any time. In *Glendale v. George* (1989) 208 C.A.3d 1394, 256 C.R. 742, defendants consented to a judgment restricting alleged commercial activity in their residence, and shortly thereafter moved to vacate it on the ground that it violated their First Amendment rights of expression and association. On denial of the motion, they appealed. Plaintiff city contended that the order was nonappealable because defendants waived their First Amendment rights by consenting to the judgment. *Held*, the appeal could be maintained. A court will closely scrutinize waivers of constitutional rights, and the record did not disclose a clear understanding by appellants that their constitutional rights would be waived by consent to the judgment. Hence, they were free to move to vacate, and the order of denial was appealable. (208 C.A.3d 1398.)

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cc. Consent Given To Facilitate Appeal.

9 Witkin Cal. Proc. Appeal § 46

[§ 46] Consent Given To Facilitate Appeal.

In *Building Industry Assn. of Southern Calif. v. Camarillo* (1986) 41 C.3d 810, 226 C.R. 81, 718 P.2d 68, the voters of defendant city enacted a growth control ordinance by the initiative process, and plaintiff building association filed an action challenging the validity of the ordinance. Under *Ev.C. 669.5*, the burden of proving that the ordinance was in the public interest would normally be on the governmental entity. However, in granting a nonappealable partial summary judgment, the trial judge ruled that *Ev.C. 669.5* did not apply to ordinances enacted by the initiative process. Plaintiff conceded that because it now had the burden of proof it could not prevail on the one remaining issue, i.e., whether the ordinance bore a reasonable relation to the general welfare. The parties thus stipulated to a final judgment in favor of defendant stating that its sole purpose was to permit plaintiff to appeal the trial court's ruling. The parties agreed that if the appellate court reversed the trial court's ruling concerning *Ev.C. 669.5*, a trial on the merits would then be required.

In the Court of Appeal, a concurring justice contended that parties should not be allowed by stipulation to avoid the effect of the one final judgment rule, and that no appeal should be allowed from a judgment to which the plaintiff consented. On review, the Supreme Court approved the answer of the Court of Appeal majority.

(a) It would be "wasteful of trial court time" to require the plaintiff to undergo a probably unsuccessful court trial merely to obtain an appealable judgment. (41 C.3d 817.)

(b) The plaintiff did not really consent to the judgment, but merely acknowledged that it could not win the case if it had the burden of proof; and in this situation there is an exception to the rule against appeal from a consent judgment: "If consent was merely given to facilitate an appeal following adverse determination of a critical issue, the party will not lose his right to be heard on appeal." (41 C.3d 817.)

Building Industry was followed in *Dong v. Board of Trustees of Leland Stanford Junior University* (1987) 191 C.A.3d 1572, 236 C.R. 912. Plaintiff sued for libel, and defendants made motions in limine seeking to exclude certain documentary evidence to be offered by plaintiff. After the motions were granted, plaintiff's counsel expressed the

opinion that nonsuit would now be the likely result, and he suggested that, to obtain a proper record for appellate review, the trial judge should grant a nonsuit on counsel's opening statement. Defense counsel agreed, and the judge said: "It's stipulated then in light of the Court's rulings and only because of the Court's rulings on the motions in limine that Counsel stipulate that a nonsuit would be granted, given the offer of proof of the opening statement of plaintiff. ... Based upon that the Court grants a nonsuit to each of the defendants." (191 C.A.3d 1576.) The Court of Appeal, observing that "[t]his case reaches us by an irregular route" (191 C.A.3d 1576), nevertheless held that the appeal would be entertained in conformity with the exception declared in *Building Industry* (191 C.A.3d 1577).

A number of other decisions are in accord. (See *Norgart v. Upjohn Co.* (1999) 21 C.4th 383, 399, 87 C.R.2d 453, 981 P.2d 79 [stipulated summary judgment was appealable, where it was clear that stipulation was made to hasten appeal, rather than to settle dispute; following *Building Industry*]; *Chavez v. Carpenter* (2001) 91 C.A.4th 1433, 1438, 111 C.R.2d 534 [appeal to determine whether plaintiffs had standing to sue for their son's wrongful death; because issue was of primary importance and consent judgment was entered to facilitate appeal, rather than to settle dispute fully and finally, judgment was appealable]; *Upland Police Officers Assn. v. Upland* (2003) 111 C.A.4th 1294, 1299, 4 C.R.3d 629 [preliminary injunction prohibited police department from interrogating officer if representative was unavailable; consent judgment making injunction permanent was appealable; following *Norgart*].)

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See *Harrington-Wisely v. California* (2007) 156 C.A.4th 1488, 1496, 68 C.R.3d 209 [exception of *Norgart v. Upjohn Co.* (1999) 21 C.4th 383, 87 C.R.2d 453, 981 P.2d 79, text, p. 107, could not be invoked where stipulated judgment failed to dispose of all claims between parties]; *Monticello Ins. Co. v. Essex Ins. Co.* (2008) 162 C.A.4th 1376, 1383, 76 C.R.3d 848 [stipulated judgment to facilitate appeal was proper where it would have been idle act for contractor's insurer to proceed to trial following denial of its motion for summary adjudication; insurer anticipated that it would not be able to prove by preponderance of evidence that subcontractor's work actually caused consequential property damage]; *Magana Cathcart McCarthy v. CB Richard Ellis* (2009) 174 C.A.4th 106, 120, 94 C.R.3d 109 [for exception of *Norgart* to apply, there must be properly filed motion for appellate court to review; thus, court could not review merits of summary judgment motion that was never made and that was in direct contravention of rules of procedure].



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f. Judgment by Default.

9 *Witkin Cal. Proc. Appeal* § 47

[§ 47] Judgment by Default.

A judgment by default may result from inadvertence or neglect instead of consent, and may be defective in various ways. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §177.) Accordingly, the defaulting party may appeal from it. (See *Luz v. Lopes* (1960) 55 C.2d 54, 59, footnote 2, 10 C.R. 161, 358 P.2d 289; *J.M. Wildman v. Stults* (1959) 176 C.A.2d 670, 673, 1 C.R. 651; *Lee v. Ski Run Apartments Associates* (1967) 249 C.A.2d 293, 294, 57 C.R. 496; on scope of review, see *infra*, §361.)

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2. Persons in Representative Capacity.

a. Executors, Administrators, Trustees, and Guardians.

1. In General.

9 Witkin Cal. Proc. Appeal § 48

[§ 48] In General.

(1) *Judgment Adverse to Estate*. An executor, administrator, guardian, trustee, or receiver, having a duty to protect the estate, may appeal from a judgment that could deplete the assets or embarrass its proper administration. (*In re Heydenfeldt* (1897) 117 C. 551, 553, 49 P. 713 ["He not only may, but it is his duty to, defend the estate from all unjust and illegal attacks made upon it which affect the interests of heirs, devisees, legatees or creditors"]; *Estate of Colton* (1912) 164 C. 1, 5, 127 P. 643; see 6 A.L.R.2d 147 [right of trustee of express trust to appeal from order or judgment not affecting own personal interest]; *infra*, §50.)

An executor or administrator may appeal from an allegedly excessive award of extraordinary fees to an attorney representing the beneficiary of a testamentary trust. "Such an allowance made during the course of administration and before the entry of a decree of final distribution may be extravagant or otherwise improper, and therefore improperly reduce the funds necessary for the payment of the claims of creditors, the usual costs of administration, or state inheritance and federal estate taxes." (*Estate of Kessler* (1948) 32 C.2d 367, 371, 196 P.2d 559.) (See *Estate of Lagersen* (1962) 210 C.A.2d 788, 792, 26 C.R. 783 [question whether representative is precluded from appealing from order awarding extraordinary fees that are allegedly inadequate in amount was raised, but not decided].)

In *Shaw v. Johnson* (1935) 4 C.2d 99, 47 P.2d 698, decedent left an estate heavily indebted, and a trust. Beneficiaries of the trust sued and obtained an adjudication that certain money was part of the trust assets. The executor appealed, seeking to establish the funds as part of the estate, claiming that he acted at the demand of creditors. *Held*, he was entitled to appeal. (4 C.2d 100.)

(2) *Statutory Representative*. In *Guardianship of Copsey* (1936) 7 C.2d 199, 60 P.2d 121, the guardian of an incompetent war veteran filed an account, which the court approved, allowing large sums for attorneys' fees. The entire estate consisted of money derived from the federal Government. The federal administrator of veterans' affairs, who had not previously appeared, took an appeal. *Held*, the ward was aggrieved, and the administrator, under federal law, was a representative of the ward with a sufficient interest in the estate to entitle him to appeal. (7 C.2d 202.)

In *Estate of Marshall* (1953) 120 C.A.2d 747, 262 P.2d 42, the decree in an heirship proceeding adversely affected the interest of a child as a beneficiary of trusts. S Bank, the guardian of her estate, did not appeal. *Held*, L, the guardian of her person, was entitled to appeal; the estate guardian should not be permitted to sacrifice the ward's interests by inaction. (120 C.A.2d 751.)

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a. Executors, Administrators, Trustees, and Guardians.

2. Exercise of Decedent's Right To Appeal.

9 Witkin Cal. Proc. Appeal § 49

[§ 49] Exercise of Decedent's Right To Appeal.

In the usual situation, the executor or administrator is asserting his or her right to appeal as an aggrieved party from a judgment or order adverse to the estate and taken in proceedings in the lower court in which the executor or administrator participated as a representative (see *supra*, §48). A distinct problem arises where the decedent was a party to a proceeding in the lower court and had a right to appeal from an adverse judgment but died before he or she could file a notice of appeal. If the decedent survives long enough to file the notice, the appeal would be perfected, and, on the decedent's death, the representative would be substituted as the appellant. (See *supra*, §25.) However, if the decedent does not survive, either the executor or administrator or the decedent's attorney of record may file the notice. (*C.C.P.* 903; see *infra*, §53.)

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3. Rights of Beneficiaries.

9 Witkin Cal. Proc. Appeal § 50

[§ 50] Rights of Beneficiaries.

(1) *General Rule Denying Representative Standing.* A number of cases have stated the rule that, if the judgment or order is not adverse to the estate, but simply a determination of the rights of various beneficiaries among themselves, e.g., a decree of distribution or an order disposing of funds, the representative is ordinarily not aggrieved and not entitled to appeal. (See *Estate of Murphy* (1904) 145 C. 464, 467, 78 P. 960; *Estate of Ross* (1918) 179 C. 358, 360, 182 P. 303; *Estate of Murphey* (1936) 7 C.2d 712, 716, 62 P.2d 374; *Estate of Baird* (1987) 196 C.A.3d 957, 964, 242 C.R. 246; 16 A.L.R.3d 1274 [right of executor or administrator to appeal from order granting or denying distribution].)

(2) *Exception Where Rights of Representative Are Affected.* A decree seemingly determining the rights of beneficiaries alone is nevertheless appealable by the representative where the issue relates to the proper exercise of his or her duties, or the representative acts to protect the estate or fund. (*In re Heydenfeldt* (1897) 117 C. 551, 553, 49 P. 713; *Estate of Colton* (1912) 164 C. 1, 5, 127 P. 643; *Estate of Ferrall* (1948) 33 C.2d 202, 205, 200 P.2d 1 [appeal was properly taken by trustee from order modifying trust terms to increase payments to a beneficiary]; *Estate of Bunn* (1949) 33 C.2d 897, 899, 206 P.2d 635 [heirs attacked testamentary trust for uncertainty; trustee could appeal from order holding it void]; *District Bond Co. v. Cannon* (1937) 20 C.A.2d 659, 664, 67 P.2d 1090.) (On application of exception to no contest clause, see *infra*, §51.)

In re Welch (1895) 106 C. 427, 39 P. 805, involved an order directing a special administrator to pay accrued family allowance, and a decree of partial distribution. Upholding his right to appeal, the court said: "Whenever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it, wherever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it and personal liability may attach, the right of the officer to appeal is recognized and upheld." (106 C. 429.)

In *Estate of Hubbell* (1932) 121 C.A. 38, 8 P.2d 530, a beneficiary of a trust sued to terminate it, and the trustee resisted. *Held*, he could appeal. This was not a mere contest between beneficiaries, but an attack on the existence of the trust and the trustor's fundamental plan. It was the duty of the trustee to protect the estate and the rights of other possible

beneficiaries not represented. (121 C.A. 40.)

In *Stanton v. Preis* (1955) 138 C.A.2d 104, 291 P.2d 118, several beneficiaries sought modification of a trust. The individual trustee consented; the corporate trustee offered opposition by pleading in the trial court, and appealed from the order. *Held*, on this question of first impression in California, the appeal was proper. Under *Estate of Ferrall, supra*, trustees may appeal to protect the trust and plan of the trustor. "That reasoning applies, we think, to each trustee individually as well as to the trustees as a group." (138 C.A.2d 107.)

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2. Persons in Representative Capacity.

a. Executors, Administrators, Trustees, and Guardians.

4. No Contest Clause.

9 *Witkin Cal. Proc. Appeal* § 51

[§ 51] No Contest Clause.

In *Smith v. Esslinger* (1994) 26 C.A.4th 579, 31 C.R.2d 673, M and P were beneficiaries under two trusts, one of which contained a no contest clause. M filed a petition in probate court for an accounting and other remedies, alleging that the trustees, who were three of P's children, had violated the terms of the trusts. Included in the petition was an application under *Prob.C. 21320(a)* (authorizing declaratory relief on the issue whether a particular act by the beneficiary would violate the no contest clause; see 12 *Summary* (10th), *Wills and Probate*, §§561, 562) requesting a determination whether the petition would constitute a contest. The probate court found that the petition was not a contest of the trust, and the trustees appealed. *Held*, the trustees were not aggrieved parties, and hence lacked standing to appeal.

Smith v. Esslinger was disapproved in *Estate of Goulet* (1995) 10 C.4th 1074, 43 C.R.2d 111, 898 P.2d 425. A beneficiary petitioned under *Prob.C. 21320* for an order determining whether filing a creditor's claim against the estate, to enforce her purported rights under a premarital agreement with decedent, would constitute a contest within the meaning of the no contest clauses of the will and trust. The trial judge held that the proposed filing would not constitute a contest, and the Court of Appeal dismissed the trustee's appeal on the ground that he lacked standing. *Held*, Court of Appeal judgment reversed.

(a) When a probate court erroneously determines under *Prob.C. 21320* that a proposed claim by a trust beneficiary would not violate the trust's no contest clause, there may be no other beneficiary who is both "aggrieved" within the meaning of *C.C.P. 902* (aggrieved party has right to appeal; see *supra*, §§24, 33) and who is financially or otherwise motivated or situated to pursue an appeal. Because appealing an erroneous determination may be risky or expensive or both, aggrieved beneficiaries may choose not to appeal, even though they have standing to do so. (10 C.4th 1080.) Thus, if the trustee is not permitted to appeal, the settlor's intent is left undefended. (10 C.4th 1081.)

(b) The trustee is, in reality, a "party aggrieved" for purposes of *C.C.P. 902*. Similar to a personal representative, the trustee owes fiduciary duties that require him or her to defend the trust corpus against unwarranted diminution until it is distributed to the beneficiaries. Here, the proposed creditor's claim might substantially diminish the funds to be

distributed. (10 C.4th 1082.)

(c) Because the trustee, in fulfilling his or her fiduciary duty to defend the trust, is entitled to oppose a beneficiary's *Prob.C. 21320* application, to deny the trustee the right to appeal an adverse ruling is anomalous. (10 C.4th 1082.)

(d) Forbidding trustees to appeal adverse *Prob.C. 21320* determinations, by decreasing the likelihood that erroneous determinations will be corrected on appeal, would militate in some degree against the enforceability of no contest clauses, which, however, are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. (10 C.4th 1084, 1085.)

(e) Permitting trustees to appeal adverse *Prob.C. 21320* determinations accords with legislative intent. The statutory requirement of *Prob.C. 21322* that the trustee or personal representative be notified when a *Prob.C. 21320* application is filed evidences the Legislature's intent that fiduciaries be involved in litigation of these applications. The statutory scheme contains no limitation on the fiduciary's participation at the appeal stage or at any other point. If the Legislature had meant for any limitation to exist, it presumably could have said so. (10 C.4th 1085.)

(f) Here, permitting the trustee to appeal would not, ultimately, deprive the beneficiary of the opportunity to advance her claim. Regardless of whether the trustee's appeal is successful, the beneficiary will retain the option in appropriate proceedings to advance and attempt to prove her claim on the merits. (10 C.4th 1086.) (See 23 *Pepperdine L. Rev.* 1435 [*Estate of Goulet*].)

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Prob.C. 21320 and *21322* were repealed in 2008. The use of declaratory relief in no contest clause litigation is no longer authorized by statute. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.)



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b. Shareholder in Derivative Suit.

9 *Witkin Cal. Proc. Appeal* § 52

[§ 52] Shareholder in Derivative Suit.

Shareholders who bring a derivative suit on behalf of a corporation (see 4 *Cal. Proc.* (5th), *Pleading*, §§209, 269) may be entitled to appeal from a judgment adverse to the corporation. (*Eggers v. National Radio Co.* (1929) 208 C. 308, 281 P. 58.) However, if the corporation or its receiver actually enters the litigation as a party, the original shareholders are not aggrieved parties and cannot appeal. (*Loeb v. Berman* (1933) 217 C. 716, 720, 20 P.2d 685.)

West's Key Number Digest, Appeal and Error 141, 150(3), 151(3)

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2. Persons in Representative Capacity.

c. Attorney or Representative After Client's Death.

9 Witkin Cal. Proc. Appeal § 53

[§ 53] Attorney or Representative After Client's Death.

(1) *Right of Attorney or Representative.* If a party aggrieved by a judgment or order dies before the party can exercise his or her right to appeal, some method should be provided to safeguard the right, i.e., a method of getting the notice of appeal filed on time and thereafter making it possible for the executor or administrator to be substituted as the appellant.

Former C.C.P. 941 provided that the attorney of record for the decedent could take the appeal "at any time *before* the appointment of an executor or an administrator." This statute was defective in two respects: The attorney's right to file the notice terminated on appointment of the representative, and the representative had no right to file. (See *Deiter v. Kiser* (1910) 158 C. 259, 262, 110 P. 921 [attorney gave notice of appeal after administrator was appointed; appeal dismissed].)

C.C.P. 903 solved the problem as follows: "In the event of the death of any person who would, if still alive, have a right of appeal, either the attorney of record representing the decedent in the court in which the judgment was rendered, or the executor or administrator of the estate of the decedent, may file a notice of appeal therefrom within the time within which the decedent could have filed such a notice if he had survived."

(2) *Decedent as Aggrieved Party.* The attorney or representative acting under the statute is exercising the decedent's right of appeal. It must appear, therefore, that the decedent was a party aggrieved. In *Estate of Harris* (1932) 123 C.A. 506, 11 P.2d 667, M was appointed administrator of the estate of G, a distributee of the estate of H. She never qualified and died pending probate of the estate of H. Her attorney attempted to appeal on her behalf from the decree of distribution. *Held*, the statute had no application; because she had not qualified as administrator, the purported appellant did not exist. (123 C.A. 507.)

(3) *Distinction: Client Under Disability.* Both the old and the new statute deal with a decedent; if a client merely becomes insane or incompetent, his or her attorney has no authority to take an appeal. Even where the judgment is that which establishes incompetency and appoints a guardian, the attorney cannot appeal without authorization by the incompetent. (*Sullivan v. Dunne* (1926) 198 C. 183, 192, 244 P. 343; *Guardianship of Gilman* (1944) 23 C.2d 862, 864, 147 P.2d 530; *McClure v. Donovan* (1947) 82 C.A.2d 664, 667, 186 P.2d 718.)

West's Key Number Digest, Appeal and Error 141, 150(3), 151(3)

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2. Persons in Representative Capacity.

d. Representative Who Is Both Appellant and Respondent.

9 Witkin Cal. Proc. Appeal § 54

[§ 54] Representative Who Is Both Appellant and Respondent.

In *Estate of Christiansen* (1967) 248 C.A.2d 398, 56 C.R. 505, H, the son and the guardian of the estate of his incompetent mother, petitioned for instructions, seeking authority to make gifts to her children and grandchildren, to reduce taxes, and to permit their enjoyment of the property during her lifetime. The judge denied the request. H appealed personally (as a child interested in a possible gift); i.e., he was the appellant, and also, in his capacity as guardian, the respondent. *Held*, the appeal was good, for, by order of the probate court H, as guardian, was authorized to retain independent counsel to represent the estate, and did so. Thus, the technical defect in the procedure (see 4 Cal. Proc. (5th), *Pleading*, §68) was cured. "Prudence might have dictated the appointment of a guardian ad litem to represent the interests of the incompetent in resisting the appeal, taken in his individual capacity, by the same person who was her general guardian. Nevertheless, since the aims of such appointment--to procure proper representation of the interests of the ward and to prevent a collusive judgment--have been attained, the procedure followed is approved, and the appeal will be entertained." (248 C.A.2d 402.)

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3. Court or Administrative Agency.

9 Witkin Cal. Proc. Appeal § 55

[§ 55] Court or Administrative Agency.

If a judgment of the trial court limits or controls the jurisdiction of an administrative agency, the agency so affected is an aggrieved party and entitled to appeal. This principle was often applied in cases where the superior court issued a writ, such as mandamus or prohibition, against an inferior trial court, or annulled its judgment or order on certiorari. (See *Mendoza v. Small Claims Court* (1958) 49 C.2d 668, 670, 321 P.2d 9.)

In *Koehn v. State Bd. of Equalization* (1958) 50 C.2d 432, 435, 326 P.2d 502, the Alcoholic Beverage Control Department ordered suspension of a liquor license; the Appeals Board set aside the order; the superior court, on review, found this erroneous and issued mandamus to compel the Appeals Board to vacate its order. *Held*, the Appeals Board was entitled to appeal. "The judgment of the superior court commands the appeals board to do something it claims it is not legally required to do, i.e., to set aside the decision which that board asserts it made properly and within its jurisdiction. ... When, as here, the appeals board has acted within the scope of the functions assigned to it by the Constitution, it has a vital interest in maintaining its integrity and seeing that it is not required to discharge its judicial duties contrary to law. It is prejudiced and aggrieved by any writ which has the effect of improperly controlling its functioning as a quasi judicial body, and it has a right to appeal for the purpose of testing the correctness of the judgment." (50 C.2d 437.)

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C. Partial Appeal.

1. Appeal by Fewer Than All Parties.

9 Witkin Cal. Proc. Appeal § 56

[§ 56] Appeal by Fewer Than All Parties.

There may be an appeal by one or more of several parties. "An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from the portion of the judgment ... adverse to their interests, unless the reversal or modification of the whole judgment is essential to protect the interests of the appealing defendants." (*Lake v. Superior Court* (1921) 187 C. 116, 119, 200 P. 1041; cf. *Osborn v. Osborn* (1954) 42 C.2d 358, 366, 267 P.2d 333, *infra*, §331; for exception where judgment is not severable, see *infra*, §59.)

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2. Appeal From Part of Severable Judgment.

a. General Rule.

9 *Witkin Cal. Proc. Appeal* § 57

[§ 57] General Rule.

C.R.C., Rule 8.100(a) refers to an appeal from a "judgment." However, the Advisory Committee Comment points out that the reference to judgment is intended to include part of a judgment, and the cases clearly establish that a party may appeal from part of a severable judgment. (On requirement of severability, see *infra*, §59.) This principle is a well-established exception to the one final judgment rule (*infra*, §95 et seq.). (*In re Marriage of Fink* (1976) 54 C.A.3d 357, 362, 126 C.R. 626, *infra*, §60.)

The effect of an appeal from part of a severable judgment is that only the part appealed from is brought up for review. The rest of the judgment becomes final, the appellate court has no jurisdiction to review it, and an order of reversal, though general in terms, will be construed to apply only to the part appealed from. (See *Whalen v. Smith* (1912) 163 C. 360, 362, 125 P. 904, *infra*, §58; *G. Ganahl Lumber Co. v. Weinsveig* (1914) 168 C. 664, 667, 143 P. 1025; *Lake v. Superior Court* (1921) 187 C. 116, 119, 200 P. 1041; *Glassco v. El Sereno Country Club* (1932) 217 C. 90, 91, 17 P.2d 703 [language of notice of appeal was held determinative]; *Shepardson v. McLellan* (1963) 59 C.2d 83, 89, 27 C.R. 884, 378 P.2d 108; *Dow v. Superior Court* (1956) 140 C.A.2d 399, 403, 297 P.2d 30; *Burgermeister Brewing Corp. v. Superior Court* (1961) 195 C.A.2d 368, 372, 15 C.R. 751; *Culbertson v. Cizek* (1964) 225 C.A.2d 451, 471, 37 C.R. 548; *Degnan v. Morrow* (1969) 2 C.A.3d 358, 364, 82 C.R. 557 [dissolution of partnership; appeal was treated as taken from appealable interlocutory judgment of partition, not from nonappealable interlocutory judgment for accounting]; *ReadyLink Healthcare v. Cotton* (2005) 126 C.A.4th 1006, 1015, 24 C.R.3d 720 [former employee's appeal from injunction enjoining him from (a) soliciting employer's employees and customers, and (b) using or disclosing trade secrets was limited to soliciting, notwithstanding that brief attacked both portions, where notice of appeal referred only to first portion, and two portions were not so intimately connected that reversal of first part required reconsideration of whole case]; 41 *Cal. L. Rev.* 277; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §590.) (On judgment of dissolution of marriage, see *infra*, §60 et seq.)

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2. Appeal From Part of Severable Judgment.

b. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 58

[§ 58] Illustrations.

In *Whalen v. Smith* (1912) 163 C. 360, 125 P. 904, decedent left a will giving part of his estate to descendants of his brother and sisters. In a proceeding to determine rights under the will, the court decided (a) that plaintiffs were entitled as such successors, and (b) that they should receive one-fourth of the property. They appealed from the latter portion of the judgment, and the appellate court reversed it, holding that they were entitled to one-half. The reversal was in general terms, and the lower court attempted to take further evidence on whether there were other descendants entitled to share. *Held*, this was beyond its jurisdiction. No appeal had been taken from that part of the judgment declaring that plaintiffs were the persons entitled as descendants, and the question whether other descendants existed was therefore finally determined in the negative by the judgment. A different view might have been taken if this judgment had been a decree of distribution of the estate, instead of a special proceeding to determine, in advance of distribution, the persons entitled to succeed and the amounts that they would take. (163 C. 362.)

In *Estate of Brissel* (1963) 218 C.A.2d 841, 32 C.R. 458, decedent's will left a number of charitable gifts with a gift over to L in the event of failure. In a petition by the executor to determine those entitled to distribution, although the prayer sought a determination of all interests, its allegations related only to one charity and L. The trial court found in favor of the charity and reserved jurisdiction to determine other interests on a petition for distribution or other subsequent proceeding. L. appealed from the determination in favor of the one charity, and the charity moved to dismiss on the ground that the decree determining its interest was interlocutory because of the reserved jurisdiction to determine other interests. *Held*, the judgment was final as to the interests determined in it, and thus was immediately appealable. (218 C.A.2d 844.)

In *Gonzales v. R.J. Novick Const. Co.* (1978) 20 C.3d 798, 144 C.R. 408, 575 P.2d 1190, defendant N was a general contractor and defendant V was its subcontractor. Plaintiff, an employee of V, was injured in a fall from a scaffold. He sued N as a third-party tortfeasor (see 2 *Summary* (10th), *Workers' Compensation*, §69), and N cross-complained against V for indemnity. In a "trifurcated" trial: (a) the jury found in favor of plaintiff against N; (b) the jury answered special interrogatories finding that N and V were both negligent, and the judge stated his intention to rule in favor of N and against V on the cross-complaint for indemnity; (c) the issue of damages was then tried, and the jury returned a verdict for plaintiff for \$ 111,500. After deducting the amount of workers' compensation benefits (\$ 12,578), the judge

entered judgment on the complaint in favor of plaintiff against N, and in favor of N against V, in the net amount of \$ 98,922 plus interest and costs. V appealed from the judgment against it on the cross-complaint, and N cross-appealed from the judgment against it on the complaint, with the statement that the cross-appeal should be deemed abandoned if the judgment in its favor on the cross-complaint should be affirmed. *Held*, judgment on the cross-complaint affirmed, cross-appeal dismissed.

(a) *Valid partial appeal from severable judgment.* The suggestion was made that the court should first consider the underlying issue of N's negligence, because an erroneous judgment in favor of plaintiff against N should not be allowed to stand simply because N can recover from V. This is unsound: (1) N stated its intention to abandon its cross-appeal if it prevailed on the indemnity issue; (2) V could have appealed from the entire judgment, but instead limited its appeal to that part of the judgment on the cross-complaint for indemnity. It had the right to do so, under a long line of authorities. (20 C.3d 804.)

(b) *Nonseverable judgment exception is not applicable.* A purported partial appeal from a nonseverable judgment will be treated as an appeal from the entire judgment. (20 C.3d 805; see *infra*, §59.) But this exception is not applicable here. Although N's liability on the complaint for negligence and V's liability on the cross-complaint for indemnity are linked "in the sense that a positive determination on the former is a condition precedent to any determination on the latter" and although a reversal of the judgment as to N's liability might entail a reversal of the judgment on indemnity, "a separate disposition of the judgment as to indemnity can have no effect on the underlying determination as to the indemnitee's liability to the injured plaintiff." V, by limiting its appeal to the indemnity issues, effectively chose not to bring plaintiff into the appeal at all, contenting itself with a challenge to the trial court's determination as to who should pay the judgment. (20 C.3d 806.)

(c) *Effect of protective cross-appeal.* N's cross-appeal did not bring plaintiff into the appeal, for it was to be abandoned in the event of affirmance of the judgment against V. V, having limited its appeal in such a way as to exclude plaintiff as a respondent, should not be "allowed to rely on protective action by the respondent it did name in order to justify an examination of issues which will not become relevant to the appellate proceedings unless it prevails on the issues it did raise." (20 C.3d 806.)

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C. Partial Appeal.

3. No Partial Appeal Where Judgment Is Not Severable.

9 Witkin Cal. Proc. Appeal § 59

[§ 59] No Partial Appeal Where Judgment Is Not Severable.

Where the portion of the judgment appealed from is so connected with or dependent on the remainder that a separate appeal is impracticable, a partial appeal is not permitted. In other words, if the determination of the issues involved in the portion of the judgment appealed from will necessarily be affected by the remaining portion of the judgment, no severance is possible, and the reviewing court will treat the appeal as one from the entire judgment. (*American Enterprise v. Van Winkle* (1952) 39 C.2d 210, 217, 246 P.2d 935; *Kelly v. Sparling Water Co.* (1959) 52 C.2d 628, 634, 343 P.2d 257; *Everly Enterprises v. Altman* (1960) 54 C.2d 761, 765, 8 C.R. 455, 356 P.2d 199; *M.H. Golden Const. Co. v. El Centro Properties* (1952) 112 C.A.2d 435, 439, 246 P.2d 942; see 41 Cal. L. Rev. 282.)

The same is true where the partial appeal is an appeal by one of several parties (see *supra*, §56). The rule that the judgment remains final as to a nonappealing party despite its reversal "is not applied where portions of a judgment adverse to a nonappealing party are so interwoven with the whole that appeal from a part affects the other parts; in such a situation the appellate court can reverse the entire judgment if it is necessary to do justice." (*Blache v. Blache* (1951) 37 C.2d 531, 538, 233 P.2d 547; see *Osborn v. Osborn* (1954) 42 C.2d 358, 366, 267 P.2d 333, *infra*, §331; *Estate of Sanderson* (1960) 183 C.A.2d 740, 743, 6 C.R. 893 [will contest, probate denied; appeal by one beneficiary and reversal is for benefit of all distributees].)

In *Weil v. Superior Court* (1950) 97 C.A.2d 373, 217 P.2d 975, a wife was awarded a divorce, together with an order requiring her former husband to pay her attorney \$ 6,000. Later, she appealed from the judgment, asserting that she had been coerced into dropping a cross-complaint for separate maintenance. While the appeal was pending, her attorney sought to enforce the fee order. *Held*, the divorce and the award of attorneys' fees were inseparable parts of the judgment. The attorney's right was purely derivative, and a reversal of the judgment would nullify the award of fees. (97 C.A.2d 377.)

Weil was followed in *Fontana v. Superior Court* (1977) 72 C.A.3d 159, 139 C.R. 851. The trial judge gave an interlocutory judgment of dissolution of marriage, under the terms of which the husband was ordered to pay spousal support, attorneys' fees, and costs. The wife filed a notice of appeal from the entire judgment. Thereafter, she sought to hold the husband in contempt for failure to pay the monthly installments of spousal support and the amounts awarded for fees and costs. *Held*, contempt order annulled: An appellant cannot enforce a judgment pending his or her appeal

from it. (72 C.A.3d 163.)

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4. Judgment of Dissolution of Marriage.

a. Where Dissolution and Property Issues Are Severable.

1. Case Law Background.

9 Witkin Cal. Proc. Appeal § 60

[§ 60] Case Law Background.

In *Harrold v. Harrold* (1954) 43 C.2d 77, 271 P.2d 489, the court held that an appeal may be taken from that part of an interlocutory decree of divorce (now dissolution of marriage) that determines property rights, without appealing from the part that dissolves the marriage. (43 C.2d 83; see 42 Cal. L. Rev. 876; 2 U.C.L.A. L. Rev. 271.)

In *re Marriage of Stuart* (1972) 27 C.A.3d 834, 104 C.R. 395, restated the *Harrold* rule, and held that a final judgment of dissolution may be entered despite an appeal from the determination of other issues. (27 C.A.3d 847.) In *re Marriage of Higgason* (1973) 10 C.3d 476, 110 C.R. 897, 516 P.2d 289, reached a different result on distinguishable facts: The husband appealed from an interlocutory judgment, no motion was made to dismiss the appeal from the part dealing with dissolution, and no remittitur was issued directing entry of final judgment on that part. *Held*, the trial court lacked jurisdiction to enter a final judgment of dissolution during pendency of the husband's appeal from the interlocutory judgment. (10 C.3d 489.) (See 11 Summary (10th), *Husband and Wife*, §111.)

In *re Marriage of Fink* (1976) 54 C.A.3d 357, 126 C.R. 626, explored the problem more fully and attempted to state the effect of the Family Law Act and Judicial Council Rules in establishing this significant exception to the one final judgment rule (see *infra*, §95 et seq.). The husband commenced a dissolution proceeding in January 1972, after a 31-year marriage. He moved for a separate and early trial of the dissolution issue, stating that the dissolution hearing would be brief, and that the issues of property division, spousal support, and attorneys' fees would require extensive discovery and a long trial. In March 1974, the lower court granted the motion to bifurcate, held a hearing on dissolution, and granted an interlocutory judgment of dissolution, expressly reserving jurisdiction as to all other issues. The wife appealed from the order allowing bifurcation and from the interlocutory judgment. She did not, however, challenge the finding of irreconcilable differences; the purpose of her appeal was to test the validity and effect of the interlocutory judgment, i.e., to avoid the possibility that allowing that judgment to become final without an award of spousal support might bar any future award. *Held*, appeal from bifurcation order dismissed, interlocutory judgment affirmed.

(a) The order bifurcating the issues and setting the dissolution contest for a separate trial was a nonappealable intermediate order. (54 C.A.3d 360; see *infra*, §§159, 169.)

(b) The interlocutory judgment of dissolution of marriage was appealable. This was the law prior to the Family Law Act; i.e., the interlocutory decree of divorce was recognized as the final judgment determining the issues; and the same statutory rule now refers to the interlocutory judgment of dissolution. (54 C.A.3d 360, 361.)

(c) Where the appeal from the interlocutory judgment does not cover all of the issues, the one final judgment rule (infra, §95 et seq.) presents a problem. Here, e.g., there could be three final judgments: the interlocutory judgment entered, a final judgment, and a future judgment resolving the economic issues. Nevertheless, the separate judgments and separate appeals are proper:

(1) The doctrine of "divisible divorce" permits separate initiation of actions dealing with (a) divorce, and (b) the issues of property, support, and custody. (See 11 *Summary* (10th), *Husband and Wife*, §§133, 134.) Each action results in a single final appealable judgment. (54 C.A.3d 362.)

(2) Under an established exception to the one final judgment rule, an appeal may be taken from a part of any severable judgment. (54 C.A.3d 362; see supra, §57.)

(3) Under the reasoning of the *Stuart* case, supra, there may be separate appeals in marriage dissolution cases. The Family Law Act "embodied a legislative intent that the dissolution of marriage should not be postponed merely because issues relating to property, support, attorney fees or child custody were unready for decision." (54 C.A.3d 363.)

(4) The statutes and Rules of Court sanction this departure from the one final judgment rule. (a) Former C.C. 4800(a) (now *Family C. 2556*) expressly provides that the court in its interlocutory judgment of dissolution may expressly reserve jurisdiction to make a later division of property. (See 11 *Summary* (10th), *Community Property*, §241.) (b) The Family Law Rules broadly sanction the use of "any suitable process or mode of proceeding" (former C.R.C., Rule 1249, now C.R.C., Rule 5.140; see 5 *Cal. Proc.* (5th), *Pleading*, §885). (54 C.A.3d 365.)

(d) "All of these circumstances point to the conclusion that the Family Law Act, as augmented and interpreted by the Judicial Council rules, authorizes a trial court, in its discretion, not only to bifurcate the trial, but to enter a separate interlocutory judgment of dissolution before other issues have been litigated. We therefore conclude that the judgment appealed from is a proper interlocutory judgment of dissolution of marriage, which is appealable ... and that the trial court did not err in reserving jurisdiction for later determination of issues relating to property division, spousal support and attorney fees." (54 C.A.3d 366.)

In thus approving a separate appealable judgment of dissolution, the court necessarily approved at least one additional appealable judgment on the reserved issues. But it expressly left open the question whether there could be more than one additional separate appealable judgment, e.g., on property division, support, and custody. (54 C.A.3d 366.) (See *In re Marriage of Lusk* (1978) 86 C.A.3d 228, 232, 150 C.R. 63 [following *Fink*].)

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C. Partial Appeal.

4. Judgment of Dissolution of Marriage.

a. Where Dissolution and Property Issues Are Severable.

2. Codification of Partial Appeal Rule.

9 Witkin Cal. Proc. Appeal § 61

[§ 61] Codification of Partial Appeal Rule.

The partial appeal rule was codified in 1979. *Family C. 2341(b)* now provides as follows:

(1) Filing an appeal (or a motion for new trial) "does not stay the effect of a judgment insofar as it relates to the dissolution of the marriage status and restoring the parties to the status of unmarried persons."

(2) This rule is applicable "unless the appealing or moving party specifies in the notice of appeal or motion for new trial an objection to the termination of the marriage status." The objection, however, cannot be made unless it was also made "at the time of trial."

C.C.P. 904.1(a)(10) authorizes an appeal in an unlimited civil case from an order made appealable by the Family Code.

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4. Judgment of Dissolution of Marriage.

b. Where Jurisdiction Over Property Issues Is Reserved.

9 Witkin Cal. Proc. Appeal § 62

[§ 62] Where Jurisdiction Over Property Issues Is Reserved.

In re Marriage of Van Sickle (1977) 68 C.A.3d 728, 137 C.R. 568, involved the troublesome situation where jurisdiction to divide property is reserved. An interlocutory judgment was entered granting dissolution and awarding child custody and support. The items of community property were also determined, but no valuation or division was made because of a pending lawsuit by a third party. Jurisdiction to divide was reserved, and jurisdiction over spousal support was also reserved. Both parties appealed. *Held*, appeals from that part of the judgment dealing with community property dismissed.

(a) A trial may be bifurcated so that the dissolution issue can be promptly resolved and an immediate appeal may be taken from the interlocutory judgment of dissolution. (68 C.A.3d 736, citing *In re Marriage of Fink* (1976) 54 C.A.3d 357, 126 C.R. 626, *supra*, §60.) And if a severable collateral matter is finally resolved in the interlocutory judgment, an appeal may be taken from that part of the judgment. (68 C.A.3d 736, citing *In re Marriage of Stuart* (1972) 27 C.A.3d 834, 847, 104 C.R. 395, *supra*, §60.) But no appeal may be taken from a preliminary ruling on a severable collateral matter where the judge reserves jurisdiction to decide it at a later time, even though that ruling is embodied in the interlocutory judgment of dissolution. (68 C.A.3d 737.)

(b) Here, the determination of what is community property and the denial of spousal support on the ground that the wife will ultimately receive community property of great value are preliminary decisions on collateral matters that can be the subject of a later appeal. (68 C.A.3d 737, 738.)

(c) *In re Marriage of Brown* (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, 11 Summary (10th), *Community Property*, §60, is distinguishable. A judgment awarding each spouse an appropriate portion of a nonvested pension payment if and as it becomes due is a final judgment; the retention of jurisdiction to see that the order is carried out is purely administrative. (68 C.A.3d 738, 739.)

(d) The husband's contention, that the determination of community property should be immediately reviewable without waiting for its actual division because the decision would have gift tax consequences, is unsound. "Practical considerations do not make a nonappealable order appealable." (68 C.A.3d 741.)

(e) The procedure adopted in *Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 C.A.3d 276, 101 C.R. 820, *infra*, §128, in which a premature appeal was treated as a petition for an extraordinary writ, could not be invoked. In that case, the lower court's ruling precluded a review on the merits of a substantial portion of the party's cause; here, the judge, prior to a final division of the community property, may change his position on its character and extent and thereby cure any possible error. (68 C.A.3d 742.)

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D. Waiver or Forfeiture of Right.

1. Express Waiver.

9 *Witkin Cal. Proc. Appeal* § 63

[§ 63] Express Waiver.

A party may stipulate to waive the right to appeal. (*Elliott & Ten Eyck Partnership v. Long Beach* (1997) 57 C.A.4th 495, 504, 67 C.R.2d 140, quoting the text.) The most serious problems that arise in this connection are as follows:

(1) The authority of an attorney to waive the right on behalf of the client. (See *Fowlkes v. Ingraham* (1947) 81 C.A.2d 745, 747, 185 P.2d 379; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith* (1985) 176 C.A.3d 480, 488, 222 C.R. 228, citing the text; 21 So. Cal. L. Rev. 272; 1 Cal. Proc. (5th), *Attorneys*, §257.)

(2) The effect of improper coercion by the trial judge. (See *Wuest v. Wuest* (1942) 53 C.A.2d 339, 344, 128 P.2d 934; *McConnell v. Merrill Lynch, supra*, 176 C.A.3d 488; 1 Cal. Proc. (5th), *Attorneys*, §257.)

(3) The form of the stipulation. (See *Harrold v. Harrold* (1950) 100 C.A.2d 601, 605, 224 P.2d 66 [claim of informal waiver rejected]; *Reisman v. Shahverdian* (1984) 153 C.A.3d 1074, 1088, 201 C.R. 194 [form of agreement to binding arbitration recited: "No appeal or further proceedings will be possible after the arbitration award is made"; checking form was not waiver of right to appeal from trial court judicial action on award]; *Lovett v. Carrasco* (1998) 63 C.A.4th 48, 53, 73 C.R.2d 496 [counsel's promise to be bound by trial court's decision without need for "further litigation" was not express waiver; ambiguous phrase could refer either to separate action or to appeal in present action]; *Pratt v. Gurse, Schneider & Co.* (2000) 80 C.A.4th 1105, 1108, 95 C.R.2d 695 [upholding waiver reading: "[T]he right to appeal from the arbitrator's award or any judgment ... or any order ... is expressly waived"; distinguishing *Reisman* and *Lovett*]; *Guseinov v. Burns* (2006) 145 C.A.4th 944, 954, 51 C.R.3d 903 [provision governing right to appeal arbitration award was insufficiently clear to constitute waiver of right to appeal trial court judgment entered on arbitration award; although provision recited that parties "waive any right to appeal the arbitral award" it also stated that they would "retain the right to seek judicial assistance" and that California law, presumably including statute authorizing appeal of judgment entered on arbitration award, would be controlling]; 1 Cal. Proc. (5th), *Attorneys*, §266 et seq.)

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2. Compliance With Judgment.

a. In General: Voluntary Compliance or Satisfaction.

9 Witkin Cal. Proc. Appeal § 64

[§ 64] In General: Voluntary Compliance or Satisfaction.

A party who voluntarily complies with the terms of a judgment, or who satisfies it by a voluntary payment or otherwise, impliedly waives the right to appeal from it. (See *Bank of Martinez v. Jahn* (1894) 104 C. 238, 239, 38 P. 41 [appellant paid \$ 200 and obtained release from judgment]; *Hellman Commercial Trust & Savings Bank v. Alden* (1929) 206 C. 592, 599, 275 P. 794; *Miller v. Cabral* (1970) 13 C.A.3d 503, 506, 91 C.R. 776, *infra*, §65; *A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank* (1986) 182 C.A.3d 356, 359, 227 C.R. 308, citing the text [rule was applied where defendant-appellant paid plaintiff in full before judgment was actually entered, and appeal was taken solely to challenge calculation of interest]; *Ryan v. California Interscholastic Federation* (2001) 94 C.A.4th 1033, 1039, 114 C.R.2d 787, citing the text [party is deemed to have waived right to appeal from those portions of writ of mandamus with which it voluntarily complied]; *Rancho Solano Master Assn. v. Amos & Andrews* (2002) 97 C.A.4th 681, 688, 119 C.R.2d 100 [in action against defendant general contractor for remediation, defendant, by settling entire judgment for plaintiff, waived right to appeal from the judgment and to relitigate liability of two codefendant homebuilders]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §578 et seq.; 39 *A.L.R.2d* 153 [defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring right to appeal].)

Voluntary payment by a joint obligor without the co-obligor's consent may not, however, destroy the co-obligor's right of appeal if he or she is independently aggrieved by the judgment. (See *Estate of Merrill* (1946) 29 C.2d 520, 524, 175 P.2d 819; cf. *Metcalf v. Drew* (1946) 75 C.A.2d 711, 721, 171 P.2d 488 [broker's right to appeal, and right to contest charges made against him by Real Estate Commissioner, were not lost by codefendant's satisfaction of judgment].)

A satisfaction that is compelled does not constitute a waiver of the right to appeal. (See *infra*, §66.) However, the mere fact that a party may find it more profitable to comply with a judgment than to suffer the losses incident to an appeal does not make the compliance compulsory. (*Mt. Shasta Power Corp. v. Dennis* (1924) 66 C.A. 186, 191, 225 P. 877.)

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2. Compliance With Judgment.

b. Where Restitution After Reversal Is Not Practical.

9 *Witkin Cal. Proc. Appeal* § 65

[§ 65] Where Restitution After Reversal Is Not Practical.

Payment of a money judgment merely to avoid the cost of an appeal bond, with knowledge that restitution after reversal of the amount paid would be practically impossible, may be deemed a waiver of the right to appeal. In *Miller v. Cabral* (1970) 13 C.A.3d 503, 506, 91 C.R. 776, plaintiff, the 7-year-old son of a farm laborer employed by defendants, was injured when his father asked him to see what was wrong with a machine. He sued defendants on the theory that he was an invitee. Defendants contended that he was an employee, but the jury found otherwise and brought in a \$ 20,000 verdict for plaintiff. Defendants paid the full amount and appealed on the issue of employment. *Held*, appeal dismissed. Defendants argued for strict application of the enforced satisfaction distinction, pointing out that they had no intention of compromising or waiving their right to appeal. But the following additional facts undermined this position: Under *Prob.C. 1510*, the lower court directed reimbursement to the parent or guardian of medical and other expenses, and payment of attorneys' fees and costs, out of the judgment. The sum of \$ 9,750.21 was accordingly paid out, and the minor, then 8 years old, would obviously be unable to restore this large sum in the event of reversal of the judgment. "Where, as here, the judgment can be satisfied only by payment of part of the minor's judgment money to third parties by order of the court, an admixture of equity and pragmatism impels us to hold that either an estoppel or an implied waiver of the right to appeal arises upon satisfaction of the judgment." (13 C.A.3d 507.)

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2. Compliance With Judgment.

c. Distinction: Enforced Satisfaction.

9 *Witkin Cal. Proc. Appeal* § 66

[§ 66] Distinction: Enforced Satisfaction.

A waiver of the right to appeal by satisfaction or compliance is implied only if the satisfaction or compliance is by way of compromise, or is coupled with an agreement not to appeal. Where it is compelled or coerced, e.g., by the threat of forfeiture or seizure of property under execution, there is no waiver. (*Kenney v. Parks* (1898) 120 C. 22, 24, 52 P. 40; *Warner Bros. Co. v. Freud* (1901) 131 C. 639, 640, 63 P. 1017; *Burgess v. California Mut. Bldg. & Loan Assn.* (1930) 210 C. 180, 184, 290 P. 1029; *Alamitos Land Co. v. Shell Oil Co.* (1933) 217 C. 213, 215, 17 P.2d 998; *Reitano v. Yankwich* (1951) 38 C.2d 1, 3, 237 P.2d 6; *Levin v. Saroff* (1921) 54 C.A. 285, 292, 201 P. 961; *Hartke v. Abbott* (1930) 106 C.A. 388, 391, 289 P. 206; *Moreno v. Mihelis* (1962) 207 C.A.2d 449, 452, 24 C.R. 582; *Selby Constructors v. McCarthy* (1979) 91 C.A.3d 517, 521, 154 C.R. 164, quoting the text; *Coldwell Banker & Co. v. Department of Ins.* (1980) 102 C.A.3d 381, 401, 162 C.R. 487, quoting the text; *Security Pac. Nat. Bank v. Lyons* (1994) 25 C.A.4th 706, 710, 30 C.R.2d 623, citing the text; see 15 *Hastings L. J.* 42.)

Other types of involuntary satisfaction that do not destroy the right of appeal have been recognized. (See *Berylwood Inv. Co. v. Graham* (1941) 43 C.A.2d 659, 671, 111 P.2d 467 [co-obligor defendant who pays or compromises judgment and is substituted as plaintiff to enforce right to contribution may appeal modification of judgment eliminating one obligor from all responsibility]; *Everts v. Matteson* (1941) 46 C.A.2d 14, 115 P.2d 207 [judgment creditor refused to levy execution on excessive sum attached; debtor paid in order to release excess]; *Erickson v. Boothe* (1947) 79 C.A.2d 266, 270, 179 P.2d 611 [surrender of premises by appealing lessee even though successful lessor had not yet obtained writ of restitution]; *Mackay v. Whitaker* (1952) 112 C.A.2d 112, 117, 245 P.2d 521 [satisfaction by delivery of possession made under compulsion of restitution and contempt proceedings].)

In *Haddad v. Pazar* (1958) 156 C.A.2d 695, 320 P.2d 207, plaintiff sued for personal injuries and received a judgment for \$ 8,000. P Indemnity Co., intervenor, was awarded \$ 2,000, but contended that it was entitled to over \$ 7,000, and appealed. Defendants therefore deposited in court \$ 10,000 plus accrued interest and costs, to prevent execution and to stop the running of interest, and moved for an order to enter satisfaction of both judgments, which was granted. Defendants also took a precautionary appeal to protect themselves in the event that the intervenor established a right to a greater amount than the total judgment against defendants. *Held*, there was no waiver of the right of appeal. Payment of a judgment is regarded as compulsory unless it is by way of compromise and settlement, or under an

agreement not to appeal, or leaving only a moot question. In the event of reversal of the judgment, the trial judge would be required to set aside the satisfaction. (156 C.A.2d 699.)

In *Schmidt v. Retirement Bd. of San Francisco City & County Employees* (1995) 37 C.A.4th 1204, 1209, 44 C.R.2d 297, a municipal employees retirement board denied plaintiff a continuation of her deceased husband's retirement benefits. The trial judge granted a petition for mandamus to compel defendant to set aside its decision, based on an ex parte order obtained by plaintiff establishing the date of her marriage. The trial judge gave the board 120 days from the date of judgment to seek to have the ex parte order either vacated or modified, and the board tried, unsuccessfully, to set aside the order. Plaintiff contended that the board thereby waived its right to appeal because it "voluntarily complied" with the judgment and "accepted the benefit" of it. *Held*, there was no waiver.

(a) It is well settled that a party who voluntarily complies with the terms of a judgment impliedly waives the right to appeal. Compliance with a judgment must be shown by way of compromise or an agreement not to appeal. (37 C.A.4th 1209.) Here, however, defendant's unsuccessful motion to set aside the ex parte order clearly did not constitute voluntary compliance with the judgment. In seeking to set aside the order, defendant was not acting voluntarily but under compulsion of having to pay plaintiff a continuation allowance. The record fails to disclose that this motion was made by way of compromise or an agreement not to appeal. (37 C.A.4th 1210.)

(b) As in the case of voluntary compliance, voluntary acceptance of the benefit of the judgment bars an appeal from that judgment. Acceptance, however, must be unconditional, voluntary, and absolute. Furthermore, where the benefits accepted are those to which the appellant would be entitled even in the event of reversal, acceptance of them does not bar prosecution of the appeal. (37 C.A.4th 1209.) Here, it can hardly be said that defendant's unsuccessful motion to set aside the ex parte order constituted acceptance of the benefits of the judgment. The opportunity to pursue this motion was not a benefit conferred by the judgment, but one to which defendant was already entitled. (37 C.A.4th 1210.)

(c) Lastly, defendant made it abundantly clear in its memorandum of points and authorities in support of its motion that it was not waiving its right to appeal. (37 C.A.4th 1210.)

In *Norco Delivery Service v. Owens-Corning Fiberglas* (1998) 64 C.A.4th 955, 75 C.R.2d 456, plaintiff lessee, as a condition to a lease renewal, purchased a settlement between the lessor and a third party and took an assignment of the lessor's rights and interests. In an appeal in which plaintiff challenged the good faith of the settlement, the third party claimed that plaintiff had waived the right to appeal by accepting the benefits of the settlement (see *infra*, §67 et seq.). *Held*, there was no waiver. By purchasing the settlement, which was not paid by the third party, plaintiff did not voluntarily and unconditionally accept the benefits, because there was, in effect, a gun to its head, namely, the condition that it purchase the settlement if it wished to renew the lease. (64 C.A.4th 962.)

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3. Acceptance of Benefits.

a. General Rule of Waiver.

1. Acceptance of Benefits of Judgment.

9 Witkin Cal. Proc. Appeal § 67

[§ 67] Acceptance of Benefits of Judgment.

Ordinarily, a party cannot accept the benefits of a judgment, in whole or in part, and then attack it by appeal. The party's conduct in taking any of a judgment's advantages while seeking to reverse it is inconsistent, and the result is a waiver of the right. "He has the option to proceed with his appeal or to accept what the judgment may award him and forego his appeal. If he does accept the fruits of the judgment his election so to do estops him from further prosecution of the appeal. It is, in effect, his affirmance of the validity of the judgment against him." (*Turner v. Markham* (1907) 152 C. 246, 247, 92 P. 485.)

Many cases apply this rule. (See *Storke v. Storke* (1901) 132 C. 349, 352, 64 P. 578; *San Bernardino v. Riverside* (1902) 135 C. 618, 619, 67 P. 1047, *infra*, §70; *Estate of Ayers* (1917) 175 C. 187, 190, 165 P. 528; *Union Lithograph Co. v. Bacon* (1918) 179 C. 53, 57, 175 P. 464; *Preluzsky v. Pacific Cooperative Cafeteria Co.* (1925) 195 C. 290, 293, 232 P. 970; *Sun Oil Co. of Calif. v. Union Drilling & Petroleum Co.* (1929) 208 C. 114, 119, 280 P. 535; *Giometti v. Etienne* (1936) 5 C.2d 411, 414, 55 P.2d 216; *Schubert v. Reich* (1950) 36 C.2d 298, 299, 223 P.2d 242, *infra*, §70; *Lee v. Brown* (1976) 18 C.3d 110, 114, 132 C.R. 649, 553 P.2d 1121, *infra*, §77, citing the text; *Guho v. San Diego* (1932) 124 C.A. 680, 681, 13 P.2d 387; *Ray v. Freeman* (1940) 37 C.A.2d 656, 662, 100 P.2d 332; *Bulpitt v. Bulpitt* (1951) 107 C.A.2d 550, 551, 237 P.2d 539 [appellant's necessitous financial condition was not an excuse]; *M.H. Golden Const. Co. v. El Centro Properties* (1952) 112 C.A.2d 435, 438, 246 P.2d 942; *Kirk v. Rutherford* (1955) 137 C.A.2d 681, 682, 290 P.2d 883; *Oliver v. Schene* (1960) 182 C.A.2d 473, 477, 6 C.R. 461, *infra*, §70; *Levine v. Chandler* (1963) 212 C.A.2d 250, 252, 27 C.R. 831; *McConaghy v. McConaghy* (1966) 239 C.A.2d 601, 604, 48 C.R. 845; *Trollope v. Jeffries* (1976) 55 C.A.3d 816, 822, 824, 128 C.R. 115; *A.J. Vela & Associates v. Glendora Unified School Dist.* (1982) 129 C.A.3d 766, 769, 181 C.R. 330, citing the text; *Schmidt v. Retirement Bd. of San Francisco City & County Employees* (1995) 37 C.A.4th 1204, 1209, 44 C.R.2d 297, *supra*, §66 [stating general rule but finding it inapplicable]; C.E.B., 1 Civil Appellate Practice 3d, §4.20; Rutter Group, 1 Civil Appeals and Writs §2:327 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §587 et seq.; 15 *Hastings L. J.* 41; 29 *A.L.R.3d* 1167 [remarriage as affecting right to appeal from divorce decree]; 29 *A.L.R.3d* 1184 [acceptance of support or property settlement payments as affecting right to appeal from divorce decree].)

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3. Acceptance of Benefits.

a. General Rule of Waiver.

2. Acceptance of Arbitration Award.

9 *Witkin Cal. Proc. Appeal* § 68

[§ 68] Acceptance of Arbitration Award.

In *Trollope v. Jeffries* (1976) 55 C.A.3d 816, 824, 128 C.R. 115, plaintiff and defendant, partners, agreed to arbitration of their differences. The arbitrator made his decision and award, calling for payment of \$ 128,000 to defendant, on October 8, 1970. Defendant accepted the check on November 6, 1970. The award was confirmed by judgment on November 16, 1970. Further proceedings followed, and a modified order reducing the amount payable to defendant to \$ 122,000 was made in February 1973 and confirmed in November 1973. Defendant appealed from the resulting judgment, asserting fraud in procurement of the award. *Held*, appeal dismissed.

Defendant sought to escape from the waiver rule by the technical argument that it applies only to acceptance of benefits of a judgment, and that no judgment but only an award existed at the time he accepted the check. The award, though not a judgment until confirmed, is a final and conclusive determination of the issues submitted to the arbitrator; raising it to the status of a judgment by confirmation is for the purpose of making it enforceable. (55 C.A.3d 823.) Thus, the essential adjudication in an arbitration proceeding is the award, and the theory of waiver by acceptance of benefits of a judgment properly applies to acceptance of benefits of an award. (55 C.A.3d 824.) (See *Louise Gardens of Encino Homeowners' Assn. v. Truck Ins. Exchange* (2000) 82 C.A.4th 648, 661, 98 C.R.2d 378, citing *Trollope* [plaintiff filed action to enforce arbitration award and 1 month later accepted defendant's payment of balance due].)

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3. Acceptance of Benefits.

a. General Rule of Waiver.

3. Acceptance of Benefits of Settlement.

9 *Witkin Cal. Proc. Appeal* § 69

[§ 69] Acceptance of Benefits of Settlement.

In *Epstein v. DeDomenico* (1990) 224 C.A.3d 1243, 274 C.R. 521, plaintiff purchasers filed suit against defendant seller in connection with the sale of an apartment building. A settlement was reached that included the return of a \$ 75,000 deposit that plaintiffs had posted as security for an injunction prohibiting defendant from foreclosing on the property. Thereafter, plaintiffs obtained an order returning the deposit, but then became dissatisfied with the settlement, claiming that it had been coerced by their attorney threatening to abandon the case. The trial judge granted defendant's motion under C.C.P. 664.6 to enforce the settlement (see 7 *Cal. Proc.* (5th), *Judgment*, §52), and entered judgment. Plaintiffs appealed. *Held*, by accepting the benefits of the settlement, plaintiffs waived their right to appeal.

(a) It is not important that plaintiffs obtained return of the deposit before entry of the judgment. A judgment entered under C.C.P. 664.6 does nothing more than put into effect the determination of the rights and duties made by the settlement. Hence, acceptance of the benefits of the settlement before entry of the judgment should waive the right to appeal from the judgment. (224 C.A.3d 1248.)

(b) There is an exception to the waiver rule where the appellant's right to the accepted portion of the judgment is based on a severable provision that is not disputed on appeal, i.e., where reversal of the disputed portion of the judgment will have no effect on the right to the benefit previously accepted (see *infra*, §72). This exception is not applicable here, for reversal of the judgment and vacation of the settlement would force plaintiffs to either redeposit the security or take equivalent steps to prevent execution on the property. (224 C.A.3d 1247.)

(c) *Menges v. Robinson* (1933) 132 C.A. 647, 23 P.2d 526, *infra*, §73, is distinguishable, because the benefit accepted there was merely speculative. Here, plaintiffs received a considerable financial benefit in that they recovered their deposit in 1989 and have had the use of it since then. It is not important that they would have recovered the deposit had they succeeded in their action; they recovered it when they did by virtue of the judicially enforced settlement. (224 C.A.3d 1247.)

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b. Illustrations.

9 Witkin Cal. Proc. Appeal § 70

[§ 70] Illustrations.

In *San Bernardino v. Riverside* (1902) 135 C. 618, 67 P. 1047, a default judgment was rendered against defendant, and it moved under C.C.P. 473 to set the judgment aside. The court made a conditional order vacating the judgment on condition that defendant pay plaintiff's costs of \$ 250, and, after payment, a final order was made setting the judgment aside. Plaintiff appealed from the orders. *Held*, its acceptance of the costs was a waiver of the right. "The rule and the principle upon which the rule rests are the same whether such judgment be the final determination of the cause or an intermediate order made in the course of the procedure. A party cannot accept the benefit or advantage given him by an order and then seek to have it reviewed. After receiving the money which the court has directed to be paid to him, he will not be heard to say that the court erred in making such order, and if by the order a right or favor is given to the other party as the consideration for making such payment, the party receiving the money will be held to have assented to a granting of the favor or right. Accordingly, it is held that where an order is made upon the condition of payment of costs, an acceptance of such costs is the waiver of the right to appeal from the order." (135 C. 620.)

In *Schubert v. Reich* (1950) 36 C.2d 298, 223 P.2d 242, plaintiff's motion for a new trial was granted on condition of paying \$ 75 in attorneys' fees to defendant. Defendant's acceptance was held a waiver of his right to appeal. Defendant's subsequent offer to repay the \$ 75 did not help him: "[W]here the acceptance of money or property would otherwise operate as a waiver of appeal or a release of errors, an offer to return or a tender back of the money or property is of no avail to restore the rights lost." (36 C.2d 300.)

In *Wilson v. Wilson* (1958) 159 C.A.2d 330, 323 P.2d 1017, a divorce decree divided community property. The husband accepted the part awarded to him, with certain immunity from liability for obligations, but sought to appeal from the portions in favor of plaintiff wife. *Held*, acceptance of part of this connected and nonseverable judgment was a waiver of the right of appeal. (159 C.A.2d 333.)

In *Oliver v. Schene* (1960) 182 C.A.2d 473, 6 C.R. 461, plaintiff lessors sued their lessees, seeking a declaration that the lease was void because of violation of the rule against perpetuities. The trial judge found the lease valid, awarded the amount of rental due, and denied attorneys' fees. Plaintiffs accepted payment of the full amount of rent awarded, then appealed. *Held*, appeal dismissed.

(a) Plaintiffs contended that they were entitled to the reasonable value of use of premises even under a void lease, hence they could accept the money and appeal from the declaration of validity. But there were no findings on reasonable value, and it might have been smaller than the amount accepted; what they took, therefore, was rent under a valid lease. "Stated otherwise, the plaintiffs are barred from now contending that the court erred in determining that the lease was not void or had not been terminated because they have enforced a part of the judgment in their favor which was based on that determination. A party may not accept findings of fact and conclusions of law to support that part of a judgment in his favor and reject them insofar as they support that part of a judgment against him." (182 C.A.2d 480.)

(b) Plaintiffs advanced the further contention that they could not be estopped to assert the illegal nature of the transaction. "What the plaintiffs have done by accepting a part of the judgment based on the findings is to waive their right to have the determination of the trial court reviewed on appeal and not their right to raise, in a proper proceeding, an objection to the lease on the ground that it violates such rule." (182 C.A.2d 480.)

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1. Appeal Seeking Greater Recovery.

9 Witkin Cal. Proc. Appeal § 71

[§ 71] Appeal Seeking Greater Recovery.

If the answer admits or the judgment clearly establishes the plaintiff's right to recover, but the amount awarded is less than the plaintiff demands, the plaintiff may accept it and nevertheless appeal, claiming the larger recovery. (*United States v. Hougham* (1960) 364 U.S. 310, 312, 81 S.Ct. 13, 16, 5 L.Ed.2d 8, 12; *Coffman v. Bushard* (1913) 164 C. 663, 665, 130 P. 425; *Browning v. Browning* (1929) 208 C. 518, 525, 282 P. 503; *Estate of Hubbell* (1932) 216 C. 574, 577, 15 P.2d 503 [acceptance of principal of legacy, appeal claiming additional amount as interest]; *Clarke v. Angelus Memorial Assn.* (1936) 14 C.A.2d 750, 751, 58 P.2d 974; *People v. Roath* (1944) 62 C.A.2d 241, 246, 144 P.2d 648; *Greenspot Desert Inns v. Roy* (1944) 63 C.A.2d 54, 59, 146 P.2d 39; *Harrold v. Harrold* (1950) 100 C.A.2d 601, 604, 224 P.2d 66; *Cohen v. Cohen* (1951) 102 C.A.2d 624, 625, 228 P.2d 54; *Royat v. Roberts* (1951) 107 C.A.2d 447, 448, 237 P.2d 25; *Ariana v. Parker* (1966) 239 C.A.2d 524, 529, 48 C.R. 834; *Heacock v. Ivorette-Texas* (1993) 20 C.A.4th 1665, 1670, 26 C.R.2d 257 [acceptance of reduced punitive damages and \$ 1 compensatory damages; appeal claiming original award of punitive damages and more than mere nominal compensatory damages].)

This exception ordinarily does not apply unless the appeal is limited to a specific and severable portion of the judgment, so that the portion of the judgment appealed from can be reversed without affecting the right of the appellant to retain the fruits that he or she has already received and retained from the other portions of the judgment not appealed from. (*Preluzsky v. Pacific Cooperative Cafeteria Co.* (1925) 195 C. 290, 294, 232 P. 970.)

In *Preluzsky*, defendant agreed to assign a lease to plaintiff for \$ 25,000. Plaintiff sued for specific performance, tendering \$ 24,900, the balance due. The court gave judgment ordering assignment upon payment of that sum. On defendant's refusal, the court enforced the assignment, the sheriff placed plaintiff in possession, and defendant accepted the tendered \$ 24,900. Defendant then appealed from the whole judgment, claiming \$ 1,000 more. *Held*, the right was waived. The judgment was not severable. Defendant was not entitled to the money unless plaintiff got the property, but reversal of the judgment appealed from would destroy plaintiff's right to the property, thereby disintitling defendant to the sum that he had already received. Hence, defendant cannot seek to destroy the entire judgment while retaining the benefit. (195 C. 294.) (For decisions involving judgments that were severable, see *infra*, §72.) (Cf. *Walnut Irr. Dist. v. Burke* (1910) 158 C. 165, 167, 110 P. 517 [successful defendants accepted costs but appealed; held improper if

judgment should be reversed, but proper if judgment should be merely modified, in which case defendants' right to keep costs would become absolute].)

In *Hill v. Hill* (1947) 79 C.A.2d 368, 180 P.2d 378, plaintiff husband received a divorce, but defendant wife was awarded \$ 5,690 as attorneys' fees, and plaintiff forwarded a check for that sum to her. Defendant wife appealed, and her attorney made a motion in the appellate court for directions as to effect of receiving attorney's fees pending an appeal. He asserted that he suspected entrapment, i.e., a loss of the right to appeal if the check were accepted. The motion was denied on the ground that appellant was seeking an advisory opinion. "We have not been cited to any case and we know of none that authorizes an appellate court to inform the litigants what the opinion of the court is upon a question that has not been raised in the action, or what its decision would be if the question should be presented." (79 C.A.2d 370.) The court's position is doubtless technically correct, but it hardly seems a practical answer to appellant's request. The effect of the decision is that a respondent may raise the question of waiver by a motion to dismiss after the money is accepted, but an appellant can raise it only by risking acceptance and waiver.

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2. Severable Judgment.

9 Witkin Cal. Proc. Appeal § 72

[§ 72] Severable Judgment.

Where the judgment contains distinct and severable provisions on independent issues or causes of action, and a reversal on one will not disturb the determination of others, it is proper to accept the benefits of the determination on one issue and appeal from another severable part of the judgment. (*Gudelj v. Gudelj* (1953) 41 C.2d 202, 214, 259 P.2d 656; *Copeland v. Rabing* (1951) 104 C.A.2d 98, 99, 230 P.2d 649; *Nuclear Electronic Laboratories v. William C. Cornell Co.* (1965) 239 C.A.2d 8, 13, 48 C.R. 416, citing the text; see 5 Am.Jur.2d (2007 ed.), Appellate Review §590; supra, §§57, 58.)

In *Wold v. League of the Cross of Archdiocese of San Francisco* (1930) 107 C.A. 344, 347, 290 P. 460, plaintiffs sued in separate causes of action for rent and damages. The trial court found against plaintiffs on the first cause and for them on the second. Plaintiffs accepted costs and satisfied the judgment on the second cause by execution, but appealed from the adverse judgment on the first cause. *Held*, the appeal was proper; the exception to the general rule is equally applicable where there are separate causes of action and where there are separable issues under one cause of action. (107 C.A. 347.)

In *Duncan v. Duncan* (1917) 175 C. 693, 167 P. 141, plaintiff husband sued for divorce and defendant wife claimed all the property as separate. The court gave defendant the divorce, and, on stipulation of the parties, found one parcel separate and the other community. Plaintiff appealed, attacking only the determination as to the divorce. Pending the appeal, he accepted from the wife one-half the rents, and she paid one-half the charges on the community property. *Held*, acquiescence in the disposition of the property and acceptance of the benefits did not affect the right to appeal from the independent determination that defendant was entitled to the divorce. (175 C. 695.)

In *Hansen v. Hansen* (1965) 233 C.A.2d 575, 43 C.R. 729, citing the text, plaintiff wife received judgment of divorce with an award of property, but no alimony. She filed a notice of appeal from the whole of the judgment, but challenged only the denial of alimony and the determination that certain property was held in joint tenancy. *Held*, the failure to assign error in respect of the other portions of the judgment was an "abandonment" of her appeal as to that part, and the appeal could be treated as partial. (233 C.A.2d 580; see infra, §731.)

In *Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 C.2d 461, 72 C.R. 344, 446 P.2d 152, citing the text, the action was for compensatory and punitive damages, and the jury verdict was for \$ 110,738.56. To avoid an order granting a new trial, plaintiff consented to a reduction to \$ 67,000, and judgment was entered in that sum. Defendant appealed from the judgment, and plaintiff also appealed, asserting error in the failure of the judge to instruct on punitive damages. *Held*, plaintiff was entitled to appeal on that severable issue. The principle applies equally to acceptance and enjoyment of benefits (the usual case) and written remission (this case). (69 C.2d 469.) "Indeed, in a case such as the instant one in which defendant appeals from the judgment, the remitting plaintiff not only faces continued litigation at the appellate and, perhaps, trial stages, a result he may have sought to avoid by his consent, but also ordinarily does not enjoy, pending determination of the appeal, the fruits of the judgment awarded him." (69 C.2d 469, footnote 5.)

In re Marriage of Fonstein (1976) 17 C.3d 738, 131 C.R. 873, 552 P.2d 1169, involved an appeal from a severable part of a judgment dividing community property. The appellant wife challenged the trial judge's valuation of the husband's interest in a law partnership. *Held*, acceptance of the family residence, spousal and child support, attorneys' fees, and community shares of stock did not constitute a waiver of the right to appeal. (17 C.3d 744.) (See *In re Marriage of Brockman* (1987) 194 C.A.3d 1035, 1044, 240 C.R. 96 [following *In re Marriage of Fonstein*; severance of support and property settlement issues].)

In *Lovett v. Carrasco* (1998) 63 C.A.4th 48, 73 C.R.2d 496, a common fund was created when a vehicle driver recovered for a traffic accident. The claimants were lienholders who had treated the driver for injuries. After the trial court fixed the amount to be recovered, the claimants sought unsuccessfully to have the order reconsidered. The claimants then appealed, and the driver claimed that they had waived the right to appeal by accepting payment in accordance with the trial court's order. *Held*, there was no waiver. The claimants' *right* to payment, as opposed to the amount, was not affected by the appeal from the order setting the amount. Accordingly, this case came within the exception that acceptance of benefits is not a waiver where the appellant is entitled to the accepted benefits, and the right to them is unaffected by the outcome of the appeal. (63 C.A.4th 53.)

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See *Satchmed Plaza Owners Assn. v. UWMC Hosp. Corp.* (2008) 167 C.A.4th 1034, 1045, 84 C.R.3d 585 [portion of judgment that holders of leasehold interests in medical offices were not required to offer to sell interests to owners association was not severable from portion that owners of medical offices were required to offer to sell offices to association under right of first refusal, and thus was not separately appealable; certain grounds that could have supported trial court's conclusions on leased offices would have required reversal of trial court's conclusions on owned offices].



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3. No Substantial Benefit Received.

aa. In General.

9 Witkin Cal. Proc. Appeal § 73

[§ 73] In General.

In *Menges v. Robinson* (1933) 132 C.A. 647, 23 P.2d 526, plaintiff sued for \$ 5,000 on a promissory note. Defendants denied liability. Plaintiff received judgment for \$ 1,000 but appealed, seeking a greater recovery. Thereafter, he recorded an abstract of the judgment to obtain a judgment lien. *Held*, there was no waiver. Because defendants contested the whole claim and the judgment was not severable, plaintiff could not accept any part of the *recovery* without losing his right to appeal. But the recordation of the abstract was not an acceptance of recovery; it merely established a lien as security for any future recovery. Though it was in a sense inconsistent to seek this means of securing a judgment that was being attacked on appeal, appellant received no direct financial benefit, and therefore could not be considered as having accepted "the fruits of the judgment" within the meaning of the rule. (132 C.A. 651.)

In *American Alternative Energy Partners II v. Windridge* (1996) 42 C.A.4th 551, 49 C.R.2d 686, citing the text, defendant contended that plaintiffs had waived their right to appeal by accepting the benefits of the judgment. After defendant obtained a judgment awarding certain property to it, plaintiffs notified the county tax collector, with the result that defendant, rather than plaintiffs, thereafter paid the property taxes. *Held*, there was no waiver of the right to appeal. The judgment, rather than expressly conferring any benefit on plaintiffs, denied them all relief, with the result that defendant did not pay or transfer anything of value to plaintiffs pursuant to the judgment. The judgment did not involve any property tax issue, and plaintiffs' nonpayment of property taxes following it was merely an incidental consequence. It was not a benefit expressly provided for by the judgment. (42 C.A.4th 557.)

A number of other decisions have held that no substantial benefit was received. (See *Miller v. Lobdell* (1952) 109 C.A.2d 628, 241 P.2d 30 [appealing vendors merely took possession of property to preserve it after abandonment by respondent purchasers; no waiver]; *Schmidt v. Retirement Bd. of San Francisco City & County Employees* (1995) 37 C.A.4th 1204, 1210, 44 C.R.2d 297, *supra*, §66 [opportunity to pursue motion to set aside order on which judgment based was not benefit conferred by judgment]; *Kacha v. Allstate Ins. Co.* (2006) 140 C.A.4th 1023, 1037, 45 C.R.3d 92 [party relying on waiver theory must demonstrate clear acquiescence in judgment and voluntary and unconditional acceptance of fruits of judgment; thus, insured homeowner did not waive challenge to appraisal concerning fire damage

by taking possession of two checks from insurer, where insured did not cash checks and made timely application to appraisal panel for reconsideration and timely petition to court for order vacating award]; *22 Cal. L. Rev. 444.*)

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bb. Deposit in Trust Account.

9 Witkin Cal. Proc. Appeal § 74

[§ 74] Deposit in Trust Account.

In *Phillips v. Isham* (1951) 105 C.A.2d 608, 233 P.2d 637, plaintiff-appellants were adjudged the owners of land, subject to defendant's right to obtain title by paying \$ 250. Defendant's counsel sent the money in currency by mail to appellants' counsel, who replied that he would deposit it in his trustee account pending the appeal, which he did. *Held*, there was no waiver of his clients' right to appeal. "He ought, perhaps, to have returned the money in some businesslike way, but we think that his statement that he would hold it in his trust account pending the outcome of the appeal was fair notice that he was not accepting the same as a benefit deriving to his clients from the order of the court." (105 C.A.2d 611.)

In *H.D. Arnaiz, Ltd. v. San Joaquin* (2002) 96 C.A.4th 1357, 118 C.R.2d 71, involving an option to lease property from defendant county, plaintiff moved to vacate, on the basis of mistake, a prior voluntary dismissal of an action alleging that defendant had breached its obligations under the contract. The trial judge granted plaintiff's motion on the condition that he pay defendant \$ 81,457, and defendant appealed. Plaintiff contended that by accepting the money, defendant waived the right to appeal. *Held*, there was no waiver; defendant received no benefit, because the money was deposited into a trust account.

(a) The evidence established that the money, instead of being deposited in the county's general fund, was held until a trust account was established and was not used for other purposes. The fact that other money in the trust account was used to pay tax refunds is not dispositive. This practice, at most, shows that defendant may use a single trust account for various purposes. (96 C.A.4th 1364.)

(b) "While we do not approve of the County's failure to notify [plaintiff] that it did not accept the \$ 81,457, its actions in holding the check until the board of supervisors established a trust account in which the funds were to be deposited and retained 'until such time as a higher court renders its decision,' does not show a clear and unmistakable acquiescence in the trial court's order. We find the County did not waive its right to appeal." (96 C.A.4th 1364, citing *Phillips*.)

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4. Statute or Agreement Preserving Right To Appeal.

9 *Witkin Cal. Proc. Appeal* § 75

[§ 75] Statute or Agreement Preserving Right To Appeal.

The right to appeal despite the acceptance of benefits may be guaranteed by statute. Thus, *C.C.P. 1255.470* provides that a condemnation plaintiff taking immediate possession under a court order does not thereby abandon or waive the right to appeal from the judgment. (See 8 *Summary* (10th), *Constitutional Law*, §1216.)

An express agreement may have the same effect. In *Estate of Poisl* (1957) 48 *C.2d* 334, 309 *P.2d* 817, the probate court awarded appellant \$ 1,000 in extraordinary fees. He appealed, contending that the compensation was far too low. He accepted two payments amounting to \$ 1,000, in each case expressly stating that this was "without prejudice" to his contemplated appeal, and his affidavit asserted that this was "agreed" to by the executor. *Held*, an agreement that an appeal is not barred by the acceptance of benefits (as distinguished from a unilateral reservation by the appellant) preserves the right. (48 *C.2d* 338.)

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5. Conditional New Trial Order.

9 *Witkin Cal. Proc. Appeal* § 76

[§ 76] Conditional New Trial Order.

In *Miller v. National Amer. Life Ins. Co.* (1976) 54 C.A.3d 331, 126 C.R. 731, plaintiff insured sued defendant insurer for fraud inducing the making of an insurance contract, and the jury returned a verdict for \$ 9,203.34 general damages and \$ 125,000 punitive damages. The judge granted a conditional motion for new trial on punitive damages unless plaintiff would remit \$ 85,000. Plaintiff filed the remittitur, which stated that the waiver was without prejudice to his raising legal issues in any appeal from the judgment. Defendant paid the compensatory damages but appealed from the judgment for punitive damages, and plaintiff cross-appealed from the conditional new trial order, and thus from that portion of the judgment entered pursuant to the remittitur, i.e., the portion reducing punitive damages. Defendant contended that plaintiff's right to appeal had been waived by acceptance of the reduced award. *Held*, there was no waiver.

(a) The common law rule, followed almost without exception, is that acceptance of the remittitur is an election and precludes an appeal. (54 C.A.3d 342; see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §116.) This rule rests on the principle that a party cannot accept the benefits of a judgment, in whole or in part, and then take an appeal. (54 C.A.3d 343, citing the text.) Hence, when the plaintiff has consented to a remittitur, he or she cannot thereafter appeal on any unseverable issue. The plaintiff has accepted the benefit of avoiding new trial, delay, and uncertainty on appeal, and cannot contest the very order by which the benefit was conferred. (54 C.A.3d 343.)

(b) *Templeton Feed & Grain v. Ralston Purina Co.* (1968) 69 C.2d 461, 72 C.R. 344, 446 P.2d 152, *supra*, §72, held that acceptance of a remittitur as to compensatory damages did not preclude an appeal as to the severable issue of punitive damages. (54 C.A.3d 342.)

(c) The present case involves the distinct situation of a main appeal by the defendant; and *Templeton*, without expressly ruling on this point, mentioned the Wisconsin rule allowing the plaintiff to appeal on the issue of damages when the defendant has first appealed from the judgment. The Wisconsin court pointed out that the object of the reduction in an award is avoidance of a defendant's appeal; but if this object is unrealized, and the plaintiff is forced to undergo an appeal, the plaintiff should be entitled to a review of the trial judge's determination that the award to him or

her was excessive. (54 C.A.3d 343.) A number of other states, by judicial decision or statute, follow this rule. (54 C.A.3d 344.)

(d) The Wisconsin approach, in the light of the language in *Templeton*, is correct. Where the defendant's appeal has deprived the plaintiff of the benefits he or she has sought by consent to the remittitur, the plaintiff has not waived the right to appeal. (54 C.A.3d 345.)

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6. Policy Exception for Homestead Exemption.

9 Witkin Cal. Proc. Appeal § 77

[§ 77] Policy Exception for Homestead Exemption.

An exception to the waiver rule was declared in *Lee v. Brown* (1976) 18 C.3d 110, 132 C.R. 649, 553 P.2d 1121. Plaintiff recovered judgment against defendants in the sum of \$ 42,366.54, and levied execution on defendants' homesteaded property. The trial judge found that the value of the property was \$ 93,096, the liens amounted to \$ 26,486.17, and the homestead exemption was \$ 15,000. Because the value exceeded the total amount of liens and exemption, the judge ordered a sale on execution (see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §144 et seq.). Defendants appealed from the judgment ordering the execution sale, but were unable to furnish an undertaking to stay execution, and the sale was held, at which plaintiff purchased the property for \$ 84,000. Under former C.C. 1256, the sheriff tendered defendants the amount of their homestead exemption (\$ 15,000), and they accepted it. Before defendants' appeal could be heard, plaintiff moved for its dismissal. *Held*, motion denied.

(a) *Forfeiture exception is applicable here.* The rule of waiver by voluntary compliance is subject to an exception where compliance is under compulsion of risk of forfeiture. (18 C.3d 116, citing the text.) This exception has particular application here. The law favors the homestead right (18 C.3d 113), and the debtor should not be forced to sacrifice that right in order to preserve his or her right to appeal (18 C.3d 116). This sacrifice may occur because the homestead exemption extends to the proceeds of the sale for only 6 months. Because the appeal usually consumes more than 6 months, the homestead protection of the appealing defendant would have lapsed and other creditors would have had access to the funds. The result would be that, contrary to the statutory objective, the debtor would be denied the opportunity to convert the funds into another residence with similar homestead protection. (18 C.3d 116.)

(b) *Turner v. Markham is distinguishable.* In *Turner v. Markham* (1907) 152 C. 246, 92 P. 485, supra, §67, the rule of waiver by acceptance of benefits was applied where the judgment debtor accepted the proceeds of a homestead exemption. The debtor who had accepted the exemption proceeds was insolvent, and the homesteaded property had been sold to a third party. If the debtor prevailed on appeal, the purchaser would have been entitled to recover from the judgment creditor the money paid to the debtor; hence, the *Turner* court concluded that the debtor's election had changed the position of the creditor to his injury. Here, the creditor's position has not been irrevocably changed, for he may be made whole in the event the debtor prevails on appeal. (18 C.3d 117.)

(c) *Payments by defendants to plaintiff if judgment is reversed.* To make plaintiff whole, defendants must not only return the \$ 15,000 exemption proceeds, but also must reimburse plaintiff for the amount paid by her to the lien creditors (\$ 25,437.33). This latter expenditure by plaintiff was necessary to complete her execution, and only on such repayment can she be restored to prejudgment status. (18 C.3d 118.)

A dissenting opinion of two justices finds fault with the law laid down and the interpretation of the facts: (a) The policy supporting homesteads has nothing to do with the point involved; an appeal right may be waived in any kind of case. (18 C.3d 119.) (b) *Turner v. Markham* is squarely in point: "Yet the majority neither overrule *Turner* nor disapprove of any of its language. They are all at once in agreement with the precedent but unhappy with its results." (18 C.3d 119.) (c) The majority's reliance on the forfeiture exception misconceives the facts. Defendants could have allowed the exemption funds to remain with the court pending the appeal, and the 6-month period would not run until payment to them. (18 C.3d 121.) (d) The attempted distinction of *Turner* is not supported by the record in the present case; defendants, whose property was heavily encumbered and had no money to furnish a bond on appeal, were clearly insolvent. (18 C.3d 122.) (e) The result reached is inequitable. Defendants remained in possession of the property during the redemption period (12 months), and also had the use of the \$ 15,000, while inconsistently attacking the execution sale. (18 C.3d 123.)

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d. Executing Satisfaction of Judgment.

9 Witkin Cal. Proc. Appeal § 78

[§ 78] Executing Satisfaction of Judgment.

Even if one of the exceptions to the waiver rule applies (*supra*, §71 et seq.), executing a satisfaction of judgment will preclude an appeal. "If it be assumed that this appellant had the right to accept the amount paid and thereafter appeal from the judgment, we think he waived his right by accepting such payment upon condition that he satisfy the judgment and by executing and authorizing to be filed, a full and complete satisfaction thereof. ... The judgment having been satisfied of record, nothing remained from which to appeal." (*Guho v. San Diego* (1932) 124 C.A. 680, 684, 13 P.2d 387.)

In *Mathys v. Turner* (1956) 46 C.2d 364, 294 P.2d 947, plaintiff appealed from a \$ 1,500 judgment, seeking a larger sum. After affirmance in the Court of Appeal and before a hearing was granted in the Supreme Court, plaintiff accepted \$ 1,655 and delivered a satisfaction of judgment. *Held*, appeal dismissed. (46 C.2d 366.)

The *Mathys* and *Guho* cases were distinguished in *Heacock v. Ivorette-Texas* (1993) 20 C.A.4th 1665, 26 C.R.2d 257, on the following grounds:

(a) Unlike the present case, *Mathys* was a case in which the exception to the general rule precluding appeal upon acceptance of benefits did not apply. The *Mathys* case never suggested "that mere satisfaction of the judgment, in and of itself, would bar an otherwise permissible appeal." (20 C.A.4th 1671.)

(b) In *Guho*, the satisfaction was executed in exchange for payment of the judgment. Here, however, plaintiff executed on the judgment and was thus required under C.C.P. 724.010 to file an acknowledgment of satisfaction (see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §388). A rule that mere acknowledgment of satisfaction serves to waive any appeal would completely eliminate those cases that allow an appeal where the acceptance of the benefits of the judgment is not inconsistent with arguing on appeal that the judgment should be increased (see *supra*, §71). (20 C.A.4th 1672.)

West's Key Number Digest, Appeal and Error 158 et seq.

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4. Loss of Right as Penalty.

a. Failure of Corporation To Pay Taxes.

9 *Witkin Cal. Proc. Appeal* § 79

[§ 79] Failure of Corporation To Pay Taxes.

A corporation that has failed to pay its franchise or state income taxes, to file a return, or to give timely notice to the Franchise Tax Board of its annual accounting period may lose the right to invoke legal remedies, including the right to appeal. (Rev.C. 23301, 23301.5; see *Boyle v. Lakeview Creamery Co.* (1937) 9 C.2d 16, 18, 68 P.2d 968; *Ocean Park Bath House & Amusement Co. v. Pacific Auto Park Co.* (1940) 37 C.A.2d 158,160, 98 P.2d 1068; *Fidelity Metals Corp. v. Risley* (1946) 77 C.A.2d 377, 383, 175 P.2d 592; *Gar-Lo v. Prudential Savings & Loan Assn.* (1974) 41 C.A.3d 242, 244, 116 C.R. 389; *Kaufman & Broad Communities v. Performance Plastering* (2006) 136 C.A.4th 212, 217, 39 C.R.3d 33; 9 *Summary* (10th), *Corporations*, §222 et seq.; 4 *Cal. Proc.* (5th), *Pleading*, §§89, 90.)

This rule, however, will seldom apply to a stockholder's derivative suit. It would be inequitable to allow allegedly dishonest directors or officers to use the taxing statute as a shield, and the complaining stockholders do not ordinarily have access to the corporate records and are not in a position to make a return or compute the tax. Accordingly, in *Reed v. Norman* (1957) 48 C.2d 338, 309 P.2d 809, a motion to dismiss by defendant directors and officers was denied. In view of the belated motion (made more than 4 years after suspension of the corporation), the plaintiff should be given an opportunity to pay the taxes and reinstate the corporation. (48 C.2d 344.)

Another distinction was made in *Laurel Crest v. Vaughn* (1969) 272 C.A.2d 363, 364, 77 C.R. 538, citing the text. Plaintiff corporation (the delinquent corporation) had alleged that it and C Corp. were joint venturers doing business under the fictitious name of W Co., and appeals were filed by all of them. Defendants' motion to dismiss plaintiff's appeal was granted, but defendants contended that the other two appeals should also be dismissed because dismissal as to plaintiff rendered the others moot. The court rejected this argument. It was not alleged that C Corp. had not paid its corporate taxes, and hence it should be allowed to appeal in accordance with the policy favoring appeals. If it should later appear that plaintiff would indirectly gain an advantage by allowing the other appellants to remain, another motion to dismiss could then be made. But the showing made on the present motion was not sufficiently comprehensive to permit such a conclusion. Hence, the motion as to these appellants was denied without prejudice to its later renewal. (272 C.A.2d 365.)

The corporation may, by the subsequent payment of taxes and penalties, secure a certificate of revivor, restoring its

capacity to maintain an action or appeal; and the revival and validation of prior acts may take place after judgment and even after filing of the notice of appeal. (*Peacock Hill Assn. v. Peacock Lagoon Const. Co.* (1972) 8 C.3d 369, 373, 105 C.R. 29, 503 P.2d 285, 4 Cal. Proc. (5th), Pleading, §90.)

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b. Party in Contempt.

9 Witkin Cal. Proc. Appeal § 80

[§ 80] Party in Contempt.

Several cases, all involving alimony or the custody of children, have declared that one who persistently and flagrantly defies the legal orders or process of the court is not entitled to its aid, and have accordingly dismissed appeals taken by the party in contempt. (See *Knoob v. Knoob* (1923) 192 C. 95, 96, 218 P. 568; *MacPherson v. MacPherson* (1939) 13 C.2d 271, 277, 89 P.2d 382 [appellant husband removed children from state in defiance of custody award, evaded service, and was adjudged in contempt by lower court]; *Soderberg v. Soderberg* (1923) 63 C.A. 492, 493, 219 P. 82; *Travis v. Travis* (1948) 89 C.A.2d 292, 295, 200 P.2d 843 ["The rationale upon which relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes"]; *Stone v. Bach* (1978) 80 C.A.3d 442, 444, 145 C.R. 599, *infra*, §81, citing the text; 53 *Harv. L. Rev.* 328; 59 *Harv. L. Rev.* 1307; 15 *Hastings L. J.* 114; 2 *Cal. Proc.* (5th), *Jurisdiction*, §393.)

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c. Misconduct Without Contempt Adjudication.

1. In General.

9 Witkin Cal. Proc. Appeal § 81

[§ 81] In General.

Although in most of the cases dismissing appeals there was an actual adjudication of contempt (see *supra*, §80), the same principle applies to wilful disobedience or obstructive tactics without an adjudication.

In *Tobin v. Casaus* (1954) 128 C.A.2d 588, 275 P.2d 792, a \$ 187,500 personal injury judgment for battery was rendered against defendant. He appealed without staying execution and became a fugitive from justice. After his failure to appear for supplemental examination and to surrender on a bench warrant, plaintiff moved to dismiss the appeal. Defendant's counsel contended that no such penalty could be inflicted unless the appellant was actually adjudged in contempt or sought affirmative relief of some kind. This contention was rejected. The court's procedure ("purely as a matter of sufferance") was to order dismissal 30 days after filing of the opinion unless the appellant "responds unequivocally to the process of the court below." In the event of failure or resort to dilatory tactics, "the motion to dismiss is to be granted without further hearing or opinion." (128 C.A.2d 593.) (See *Kottemann v. Kottemann* (1957) 150 C.A.2d 483, 487, 310 P.2d 49 [appellant secreted himself, ignoring court orders and inquiries made by plaintiff's counsel; appeal dismissed without alternative permitted in *Tobin*].)

In *Estate of Scott* (1957) 150 C.A.2d 590, 310 P.2d 46, appellant, reputedly the husband of T, was indicted for felonies in connection with her property, released on bail, forfeited bail, and failed to appear in the criminal proceeding. In the present proceeding for appointment of a trustee of the estate of T (as a missing person), appellant claimed the right to appeal on the theory that contempt in the prior criminal proceeding was not a basis for dismissal of the appeal in the distinct civil proceeding. *Held*, on a review of the cases, dismissal was proper, because appellant was in contempt of the superior court. Although both matters were in the Los Angeles superior court, the opinion seems to stand for a broad rule applicable to the superior court of any county (and perhaps other California courts as well). "It is contrary to the principles of justice to permit one who has flaunted the orders of the courts to seek judicial assistance." (150 C.A.2d 594.)

In *Stone v. Bach* (1978) 80 C.A.3d 442, 145 C.R. 599, a judgment was entered dissolving the partnership of plaintiff and defendant, and defendant was ordered either to deposit partnership funds in a trust account or to pay over half to

plaintiff. Defendant knowingly violated the order and was found in contempt on two occasions, but the trial judges did not impose any penalty. Defendant opposed the motion to dismiss his appeal on the ground that he was entitled to a formal judgment of contempt with a penalty imposed, so that he could test the validity of the finding by habeas corpus. *Held*, under *Tobin v. Casaus*, and *National Union of Marine Cooks & Stewards v. Arnold* (1954) 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46, the appeal should be dismissed. (80 C.A.3d 444, 446.) Defendant's conduct was a deliberate effort to achieve a stay of execution of the money judgment against him without complying with the legal procedures for a stay. (80 C.A.3d 448.) The court added: "Prior to expiration of our jurisdiction, [plaintiff] may seek partial or total relief from this dismissal, based upon compliance with the spirit of our opinion; any such request will be given due consideration." (80 C.A.3d 448.) (See *TMS v. Aihara* (1999) 71 C.A.4th 377, 380, 83 C.R.2d 834, citing the text [defendant judgment debtors wilfully refused to comply with order directing them to answer postjudgment interrogatories; appeal dismissed]; *Guardianship of Melissa W.* (2002) 96 C.A.4th 1293, 1298, 118 C.R.2d 42 [order requiring minor to be returned to her father was disobeyed; appeal dismissed].)

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2. No Denial of Due Process.

9 Witkin Cal. Proc. Appeal § 82

[§ 82] No Denial of Due Process.

The decision by the United States Supreme Court in *National Union of Marine Cooks & Stewards v. Arnold* (1954) 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46, sustains the constitutionality of using the loss of appeal as a penalty. Here, 95 respondents obtained a total judgment of \$ 475,000 in the Washington trial court against petitioner, a labor union. Petitioner appealed without a stay bond, and supplemental proceedings disclosed no substantial assets in Washington but \$ 298,000 of United States bonds in California. The Washington trial court ordered them delivered to its receiver pending disposition of the appeal, and, on petitioner's refusal, dismissed the appeal. *Held*, this was not a denial of due process. The court distinguished *Hovey v. Elliott* (1897) 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, where, as a punishment for failure to deliver funds to a receiver, the court struck out defendant's answer. There, the constitutional right to a fair trial was denied; here, the dismissal merely cut off the statutory (not constitutional) right to appellate review after a fair trial. And the Washington court was not attempting to satisfy the judgment out of these assets but merely to safeguard them from dissipation pending the appeal. Thus, the procedure was reasonable and the penalty was an exercise of inherent power to use court processes to induce compliance with an order in aid of execution. "Petitioner's failure to deliver the specified out-of-state property to the court's receiver frustrated the state court much as the escape of a prisoner would frustrate it in attempting to review his conviction. Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." (75 S.Ct. 96, 99 L.Ed. 52.)

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c. Misconduct Without Contempt Adjudication.

3. Trial Judge May Not Impose Penalty.

9 *Witkin Cal. Proc. Appeal* § 83

[§ 83] Trial Judge May Not Impose Penalty.

The sanction of dismissal of the appeal can only be imposed by the appellate court; the trial judge has no such power. In *MacDonald v. Superior Court* (1977) 75 C.A.3d 692, 141 C.R. 667, a money judgment was obtained against defendants. They appealed, and thereafter the successful plaintiffs served postjudgment interrogatories. Defendants failed to answer, and the trial court entered an order that, unless answers were filed within 60 days, "the defendants will be barred from prosecuting the appeal further." *Held*, mandamus issued to compel the trial court to vacate the order. (75 C.A.3d 696.)

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d. Stay in Marital Proceeding.

9 *Witkin Cal. Proc. Appeal* § 84

[§ 84] Stay in Marital Proceeding.

A somewhat similar situation arises in actions for dissolution of marriage where one spouse is awarded a decree and an order for costs and attorneys' fees on the other spouse's appeal. If the appealing spouse, with ability to pay, fails to do so, the respondent spouse is entitled, on motion, to a stay of proceedings on appeal, under the same theory that authorizes a stay of trial proceedings on such a default. "The reasons, however, for staying trial until the moving party is able to pay the necessary costs of litigation are equally applicable when the losing party in the trial court is seeking to have the judgment reversed on appeal. An appellate court is in no better position to protect an unrepresented respondent than a trial court is to protect an unrepresented defendant." (*Kopasz v. Kopasz* (1949) 34 C.2d 423, 425, 210 P.2d 846; see *Krog v. Krog* (1948) 32 C.2d 812, 816, 198 P.2d 510 [dismissal of appeal is improper because stay is appropriate remedy]; C.E.B., 1 Civil Appellate Practice 3d, §4.23; cf. *Dimon v. Dimon* (1950) 101 C.A.2d 190, 225 P.2d 282 [motion was denied where wife's inability to proceed without payment was doubtful, and determination of long delayed litigation would benefit all parties].) (On motion of party in military service, see *Briner v. Briner* (1943) 60 C.A.2d 473, 474, 140 P.2d 995; *Levin v. Levin* (1944) 64 C.A.2d 298, 299, 148 P.2d 714; on continuance, see 7 *Cal. Proc.* (5th), *Trial*, §30.)

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IV. APPEALABLE JUDGMENTS AND ORDERS

A. In General.

1. Statutory Classes Are Exclusive.

9 Witkin Cal. Proc. Appeal § 85

[§ 85] Statutory Classes Are Exclusive.

C.C.P. 904.1 is the principal section covering appealable judgments and orders of the superior court, other than those in limited civil cases. (*C.C.P. 904.1(a)*; on appeals in limited civil cases, see *C.C.P. 904.2*, *infra*, §1004.) The three main classifications listed in *C.C.P. 904.1* are:

- (1) Final judgments. (See *infra*, §95 *et seq.*)
- (2) Specified appealable orders, including certain kinds of interlocutory judgments, orders, and decrees. (See *infra*, §170 *et seq.*)
- (3) Orders made appealable by the Probate Code. (See *infra*, §203 *et seq.*)

However, the main statute does not give the complete picture. Provisions creating appealable interlocutory orders (see *infra*, §138) or allowing appeals from peculiar types of judgments are found in various places in the codes.

Because the right of appeal is wholly statutory (see *supra*, §2), no judgment or order is appealable unless expressly so declared, i.e., unless it comes within one of the classes enumerated in the main statute or is made appealable by a specific statute. (See *Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 C. 484, 486, 114 P. 838; *Collins v. Corse* (1936) 8 C.2d 123, 124, 64 P.2d 137; *People v. Keener* (1961) 55 C.2d 714, 720, 12 C.R. 859, 361 P.2d 587, citing the text; *Edlund v. Los Altos Builders* (1951) 106 C.A.2d 350, 354, 235 P.2d 28; *Peninsula Properties Co. v. Santa Cruz* (1951) 106 C.A.2d 669, 675, 235 P.2d 635; *Woodman v. Ackerman* (1967) 249 C.A.2d 644, 649, 57 C.R. 687, citing the text; *Draus v. Alfred M. Lewis* (1968) 261 C.A.2d 485, 489, 68 C.R. 154, citing the text; *Jasper Const. v. University Casework Systems* (1974) 39 C.A.3d 582, 585, 114 C.R. 143, *infra*, §173, citing the text; 15 So. Cal. L. Rev. 506; C.E.B., 1 Civil Appellate Practice 3d, §3.3; Rutter Group, 1 Civil Appeals and Writs §2:16 *et seq.*; cf. *Meehan v. Hopps* (1955) 45 C.2d 213, 288 P.2d 267, *infra*, §106 [appealable order created by analogy]; *Keenan v. Dean* (1955) 134 C.A.2d 189, 190, 285 P.2d 300, *infra*, §115 [appeal permitted because of practical necessity].)

In a few instances, a determination that meets all the tests of a final judgment is not appealable, usually by express statutory provision. The effect is either that review must be had by an extraordinary writ (see *infra*, §91) or that no

further review is possible. Examples are adjudications of contempt (see *infra*, §147), and judgments entered pursuant to appellate reversal with directions (see *infra*, §882).

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A. In General.

2. Appeal Dismissed on Court's Own Motion.

9 Witkin Cal. Proc. Appeal § 86

[§ 86] Appeal Dismissed on Court's Own Motion.

Because an appealable judgment or order is essential to appellate jurisdiction, the parties cannot by any form of consent make a nonappealable order appealable. The court must, on its own motion, dismiss an appeal from such an order. (*Olson v. Cory* (1983) 35 C.3d 390, 398, 197 C.R. 843, 673 P.2d 720, *infra*, §132 [all parties urged review, but, "since the question of appealability goes to our jurisdiction, we are duty-bound to consider it on our own motion"]; *Jennings v. Marralle* (1994) 8 C.4th 121, 126, 32 C.R.2d 275, 876 P.2d 1074; *David v. Goodman* (1948) 89 C.A.2d 162, 165, 200 P.2d 568; *Wilson v. Wilson* (1950) 96 C.A.2d 589, 596, 216 P.2d 104; *Corbett v. Petroleum Maintenance Co.* (1953) 119 C.A.2d 21, 22, 258 P.2d 1077; *Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 152, 8 C.R. 107 [court is "without appellate jurisdiction"]; *Olmstead v. West* (1960) 177 C.A.2d 652, 654, 2 C.R. 443; *Woodman v. Ackerman* (1967) 249 C.A.2d 644, 646, 57 C.R. 687, citing the text; *Draus v. Alfred M. Lewis* (1968) 261 C.A.2d 485, 490, 68 C.R. 154, citing the text; *Caruso v. Snap-Tite* (1969) 275 C.A.2d 211, 213, 79 C.R. 642, quoting the text; *Horton v. Jones* (1972) 26 C.A.3d 952, 956, 103 C.R. 399, quoting the text; *Lemaire v. All City Employees Assn.* (1973) 35 C.A.3d 106, 110, 110 C.R. 507; *In re Marriage of Van Sickle* (1977) 68 C.A.3d 728, 734, 741, 743, 137 C.R. 568, *supra*, §62; *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 430, 160 C.R. 899; *Winter v. Rice* (1986) 176 C.A.3d 679, 682, 222 C.R. 340, *infra*, §572, citing the text; *Kinoshita v. Horio* (1986) 186 C.A.3d 959, 962, 231 C.R. 241, citing the text; *In re Marriage of Loya* (1987) 189 C.A.3d 1636, 1638, 235 C.R. 198, quoting the text; *Supple v. Los Angeles* (1988) 201 C.A.3d 1004, 1009, 247 C.R. 554, citing the text; *Munoz v. Florentine Gardens* (1991) 235 C.A.3d 1730, 1732, 1 C.R.2d 609, quoting the text; *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 C.A.4th 631, 638, 53 C.R.2d 50 [stipulation making judgment confirming arbitration award reviewable by Court of Appeal was invalid]; *Forsyth v. Jones* (1997) 57 C.A.4th 776, 780, 67 C.R.2d 357, *infra*, §569 [court on own initiative addressed issue of appealability from order sustaining demurrer].)

There are, however, several methods by which a judgment or order that is apparently nonappealable may be treated as appealable:

- (1) Acquiescence in appellate jurisdiction. (See *infra*, §87.)
- (2) Saving the appeal by amendment of the judgment. (See *infra*, §124 et seq.)

(3) Consideration of the appeal in the court's discretion. (See *infra*, §133.)

(4) Allowance of the appeal in a severed trial. (See *infra*, §134.)

(5) Saving a defective appeal by treating it as a writ application. (See *infra*, §128 et seq.)

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A. In General.

3. Appellate Jurisdiction by Acquiescence.

9 Witkin Cal. Proc. Appeal § 87

[§ 87] Appellate Jurisdiction by Acquiescence.

The fundamental principles that subject matter jurisdiction cannot be created by consent and that appellate jurisdiction is wholly dependent on the existence of a judgment or order made appealable by statute (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §13; supra, §§85, 86) are occasionally forgotten when the parties do not raise the issue. Theoretically, the court should always dismiss an appeal from a nonappealable order, on its own motion, without determining the merits, for lack of appellate jurisdiction. (See supra, §86.) But it does not always do so. Sometimes the court first determines the merits in an advisory opinion that becomes a precedent, then dismisses the appeal. (See infra, §345.) Sometimes it simply accepts (i.e., creates) appellate jurisdiction because it seems desirable to do so.

Conaway v. Conaway (1963) 218 C.A.2d 427, 32 C.R. 890, illustrates the latter practice. Plaintiff wife sought to recover unpaid alimony under a California judgment based on an Iowa decree. She moved for the appointment of a receiver in aid of execution, and appealed from the denial of the motion. The statute does not specify this as an appealable order, and the court could not characterize it as an order staying execution so as to make it an appealable order after final judgment. But it did not dismiss. "Although it is questionable whether the order is appealable, we prefer to consider the question raised on its merits, thus obviating a possible future time-wasting petition for an original writ to test such question." (218 C.A.2d 428.) The opinion cites the text on the practice of considering matters unnecessary to the actual decision (infra, §344). (218 C.A.2d 428.) But the situations are fundamentally different, for one involves policy only, while the other involves jurisdiction. A court may depart from normal practice and write an expansive opinion full of useful though unnecessary law; it cannot decide anything in a purported appeal of which it has no appellate jurisdiction.

The United States Supreme Court seems to be subject to the same temptation. In *Gillespie v. United States Steel Corp.* (1964) 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199, an order was made dismissing one count of a complaint. This nonappealable order could have been reviewed under the discretionary appeal statute (infra, §88), but the trial judge, exercising his discretion, refused to certify it. Hence, the appeal was premature, under the basic final judgment rule. But the court observed that there are "marginal cases" in the "twilight zone" that call for a "practical rather than a technical construction." The Court of Appeals had decided the merits and thus had "properly implemented" the policy of the discretionary appeal statute by "treating this obviously marginal case as final and appealable." (85 S.Ct. 311, 312, 13 L.Ed.2d 203, 204.)

The dissent in *Gillespie* seems unanswerable: "The fact that Congress has provided some flexibility in the final judgment rule hardly lends support to the Court's attempt to obviate jurisdictional restrictions whenever a court of appeals erroneously entertains a nonappealable order and hardship may result if the substantive questions are not then decided here." (85 S.Ct. 319, 13 L.Ed.2d 212.) (See dissenting opinion in *Hudson Distributors v. Eli Lilly & Co.* (1964) 377 U.S. 386, 84 S.Ct. 1273, 1283, 12 L.Ed.2d 394, 404 [asserting that nonfinal judgment was reviewed because court failed to dismiss it earlier: "I am at a loss to understand why the Court chooses to compound the original error, rather than to correct it"]; *Horton v. Jones* (1972) 26 C.A.3d 952, 956, 103 C.R. 399, quoting the text ["We do not deem it desirable to attempt to create appellate jurisdiction in this case"].)

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A. In General.

4. Discretionary Appeal.

9 Witkin Cal. Proc. Appeal § 88

[§ 88] Discretionary Appeal.

(1) *In General.* The suggestion has been made that some unhappy results of California's strict classification could be alleviated by providing for a discretionary appeal, allowed from a nonappealable order or decree by permission of the appellate court on an application showing good cause. (See *15 So. Cal. L. Rev. 504.*)

(2) *Federal Law.* Congress took this step in 1958 by the enactment of a discretionary appeal statute for federal courts. (*28 U.S.C., §1292.*) The statute modifies the one final judgment rule (*infra*, §95 et seq.) by allowing an appeal where an order "involves a controlling question of law as to which there is substantial ground for difference of opinion," and where the immediate appeal "may materially advance the ultimate termination of the litigation." These general conditions are invoked and determined by a double-screening process: (a) The trial judge must certify to this effect, and (b) on application, the Court of Appeals may, in its discretion, allow the appeal. (*28 U.S.C., §1292(b)*; see *Tidewater Oil Co. v. United States* (1972) 409 U.S. 151, 93 S.Ct. 408, 421, 34 L.Ed.2d 375, 391 [*28 U.S.C., §1292(b)* does not establish jurisdiction of Court of Appeals to review interlocutory orders in civil antitrust cases governed by *15 U.S.C., §29*]; 2 Federal Procedure, L.Ed., §3:202 et seq.; 16 Federal Practice & Procedure (Wright & Miller) §3929 et seq.; 72 Harv. L. Rev. 584; 74 Harv. L. Rev. 997; 88 Harv. L. Rev. 607 [interlocutory appeals under *28 U.S.C., §1292(b)*]; 15 U.S.F. L. Rev. 321 [use of interlocutory appeals under *28 U.S.C., §1292(b)* in class actions]; 4 Am.Jur.2d (2007 ed.), Appellate Review §§69 et seq., 110 et seq.; 5 Am.Jur.2d (2007 ed.), Appellate Review §297 et seq.; 32A Am.Jur.2d (2007 ed.), Federal Courts §1339; 18 A.L.R.3d 400, 414 [discretionary appeal from order staying action because of pendency of another action].)

In *Yamaha Motor Corp., U.S.A. v. Calhoun* (1996) 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed.2d 578, the district court entered an order that federal maritime law displaced state remedies where a jet ski accident occurred in territorial waters. In certifying the order for appeal, the court stated that the specific question had to do with the extent of recoverable damages. The Third Circuit Court of Appeals never reached this question, however, holding that state remedies remained controlling in accidents of this sort. *Held*, the Court of Appeals had jurisdiction to render this holding. Under *28 U.S.C., §1292(b)*, the appellate court may consider any issue fairly included in the certified order, because it is the *order* that is appealable, not the question specified by the district court. Thus, the appellate court may review the entire order, either to consider a question that is different from the one that was certified as controlling or to decide the case despite the lack of any controlling question. (116 S.Ct. 623, 133 L.Ed.2d 584.)

(3) *California Law*. Whether any necessity existed for such a provision in California was debatable, because some relaxation of the strict rule had been accomplished indirectly in two ways:

(a) By the great expansion of the concept of excess of jurisdiction, allowing the prompt prevention of some unwarranted orders by writ of prohibition. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§285, 298; *infra*, §91.)

(b) By permitting review of nonappealable orders by writ of mandamus. (See *infra*, §91.)

Nevertheless, the Legislature followed the federal lead in 2002. On a written request by a party or his or her counsel or at the judge's discretion, a trial judge may indicate in an interlocutory order "a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." Neither denial of a request nor an objection to it is grounds for a writ or appeal. (*C.C.P.* 166.1.) (On appealable interlocutory orders, see *infra*, §138.)

Furthermore, it would seem that more can be done to avoid injustice, and to decrease the use of extraordinary writs, by adding to the statutory enumeration those judgments and orders that obviously should be reviewable. Very little is gained, for example, by making contempt adjudications nonappealable, when the same review is obtained by certiorari or habeas corpus. (See *infra*, §147.)

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IV. APPEALABLE JUDGMENTS AND ORDERS

B. Review of Nonappealable Judgment or Order.

1. Appeal From Subsequent Appealable Judgment or Order.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 89

[§ 89] In General.

(1) *Distinction Between Directly Appealable and Reviewable.* Many orders are nonappealable, i.e., not reviewable on a direct appeal (see *infra*, §152 et seq.); and some judgments, regarded as interlocutory and not final, are similarly not directly appealable (see *infra*, §136). But virtually all judicial rulings are reviewable, either by extraordinary writ (see *infra*, §91) or on appeal from a final judgment or appealable order later entered.

Review on the appeal from a final judgment or appealable order is the normal method. (*C.C.P.* 906.) Numerous cases illustrate this principle:

Estate of Patterson (1934) 220 C. 370, 371, 31 P.2d 197 [nonappealable order determining will contest before probate is reviewable on appeal from order admitting or refusing to admit will to probate].

Litvinuk v. Litvinuk (1945) 27 C.2d 38, 42, 162 P.2d 8 [propriety of order denying new trial motion was reviewable on appeal from judgment].

De Lao v. Superior Court (1951) 37 C.2d 711, 712, 234 P.2d 961 [where ruling sought to be reviewed is not appealable, certiorari is not available if petitioner has adequate remedy by appeal from subsequent judgment or order].

Jennings v. Marralle (1994) 8 C.4th 121, 128, 32 C.R.2d 275, 876 P.2d 1074 [on appeal from judgment on arbitration award, court could review order denying motion to amend complaint to assert claim for wrongful termination in violation of public policy].

Wetsel v. Garibaldi (1958) 159 C.A.2d 4, 8, 323 P.2d 524 [propriety of order to arbitrate is reviewable on appeal from final order confirming arbitrators' award or from judgment entered on it].

Highland Dev. Co. v. Los Angeles (1985) 170 C.A.3d 169, 178, 215 C.R. 881 [nonappealable order allowing intervention was reviewable in connection with appealable order granting intervenor injunctive relief].

Jade K. v. Viguri (1989) 210 C.A.3d 1459, 1466, 258 C.R. 907, citing the text [in action by former patient against

physician, order made before entry of judgment denying physician's motion to vacate default was not appealable, but would be reviewable on timely appeal from judgment].

In re Marriage of Lloyd (1997) 55 C.A.4th 216, 220, 64 C.R.2d 37 [nonappealable order appointing guardian ad litem for children at custody proceeding was reviewable on appeal of custody order].

Premium Commercial Services Corp. v. National Bank of Calif. (1999) 72 C.A.4th 1493, 1497, 86 C.R.2d 65 [order setting aside C.C.P. 998 settlement is reviewable on appeal from final judgment as one affecting judgment and rights of party].

Gackstetter v. Frawley (2006) 135 C.A.4th 1257, 1267, 38 C.R.3d 333 [denial of attorneys' motion for summary judgment in case involving trustee's tort claims based on attorneys' services was appealable following final judgment for trustee, where summary judgment motion was based on claim that trustee's action was barred by determination in earlier case that attorneys' settlement of action by trust beneficiaries was in good faith; under these circumstances, denial of summary judgment motion was not harmless error].

Santa Clara v. Atlantic Richfield Co. (2006) 137 C.A.4th 292, 312, 40 C.R.3d 313 ["If a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action ... , no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment. It is only where the plaintiff amends the cause of action to which the demurrer was sustained that any error is waived"].

(2) *No Review Where No Appeal Is Taken From Appealable Order.* An appealable order from which no appeal was taken cannot be reviewed on an appeal from the final judgment. (C.C.P. 906.) (See *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 C.A.4th 212, 239, 26 C.R.3d 798 [notice of appeal from judgment alone does not encompass other judgments and separately appealable orders; thus, Court of Appeal lacked jurisdiction to consider plaintiffs' challenge to new trial order, where notice of appeal specified only separately appealable judgment and failed to mention new trial order]; *Machado v. Superior Court* (2007) 148 C.A.4th 875, 882, 55 C.R.3d 902 [appealable order disqualifying litigant's counsel, which litigant did not appeal, was not reviewable on appeal from final judgment]; 79 A.L.R.2d 1352 [reviewability of separately appealable interlocutory order on appeal from final judgment].)

In re Marriage of Weiss (1996) 42 C.A.4th 106, 49 C.R.2d 339, involved an appeal from a judgment on reserved issues in a custody battle. The appeal included appeals from two pendente lite attorneys' fees orders that were entered against plaintiff approximately a year before and that were immediately appealable as orders on a collateral matter (see *infra*, §99 et seq.). *Held*, plaintiff, by not appealing earlier and by allowing the orders to become final, had waived the right to appeal from these orders after the judgment on reserved issues. (42 C.A.4th 118.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Distinction Between Directly Appealable and Reviewable.* See *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 C.A.4th 333, 342, 84 C.R.3d 38 [in bank's action for unjust enrichment, denial of borrower's motion for summary adjudication based on statute of limitations defense was reviewable on direct appeal of judgment after trial, where, because trial was limited by stipulation to issue of amount of bank's damages, court did not decide applicability of defense; writ petition is not exclusive means to seek review of order denying motion for summary judgment or summary adjudication]; *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group* (2009) 171 C.A.4th 35, 44, 89 C.R.3d 473 [following *Santa Clara v. Atlantic Richfield Co.* (2006) 137 C.A.4th 292, 40 C.R.3d 313, text, p. 151; where demurrer to cause of action is sustained with leave to amend and plaintiff chooses not to amend, plaintiff is entitled to have determination reviewed on appeal and need not allege that cause of action in amended complaints in order to preserve right to appeal].



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IV. APPEALABLE JUDGMENTS AND ORDERS

B. Review of Nonappealable Judgment or Order.

1. Appeal From Subsequent Appealable Judgment or Order.

b. Review of Nonappealable Order on Appeal of Dismissal Requested by Coparty.

9 Witkin Cal. Proc. Appeal § 90

[§ 90] Review of Nonappealable Order on Appeal of Dismissal Requested by Coparty.

In *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 C.A.4th 750, 62 C.R.2d 778, petitioner school districts sought mandamus to prevent certain community college districts from operating adult education programs and to compel the Chancellor and the Board of Governors of California Community Colleges to cease budgetary calculations and certifications based on these courses. The trial judge sustained the community college respondents' demurrers without leave to amend but did not, at that time, dismiss the action as to those respondents. Two months later, the trial judge granted a motion for judgment on the pleadings brought by the chancellor and board of governors, and at the same time dismissed the action as to "all remaining respondents." Petitioners timely appealed from this order. The community college respondents argued that, because the earlier order sustaining their demurrers implicitly dismissed them from the action, the appeal was not timely as to that order. The later order dismissing "all remaining respondents," they asserted, applied only to the state respondents. *Held*, the order granting the demurrers was reviewable.

An order sustaining a demurrer is not appealable (see *infra*, §154). It may be reviewed only on appeal from a subsequent order of dismissal. While an appellate court may save a premature appeal by deeming an order sustaining a demurrer to incorporate a judgment of dismissal (citing *Nowlon v. Koram Ins. Center* (1991) 1 C.A.4th 1437, 1440, 2 C.R.2d 683), this device may not be used to *defeat* an appeal. Here, there was only one order dismissing parties from the action, i.e., the order granting the motion for judgment on the pleadings and dismissing from the matter "all remaining respondents." It matters not that the state respondents requested this dismissal; inasmuch as the community college districts still were respondents at that point, the order applied to them. Accordingly, petitioners' appeal is timely as to the sustaining of the demurrers. (54 C.A.4th 756.)

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B. Review of Nonappealable Judgment or Order.

2. Review by Extraordinary Writ.

9 Witkin Cal. Proc. Appeal § 91

[§ 91] Review by Extraordinary Writ.

(1) *Certiorari*. If there is no review on appeal from a subsequent order or judgment (see *supra*, §§89, 90), certiorari will lie to review the nonappealable order or judgment for jurisdictional defects. This remedy is used to review contempt adjudications (see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §35; *infra*, §147) and some probate orders (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §323; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §36).

But the availability of certiorari in ordinary actions and special proceedings is extremely limited. (a) If the nonappealable order is reviewable on appeal from a subsequent order or judgment, certiorari will not lie. (See *supra*, §§89, 90; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §46.) (b) Void orders after final judgment, formerly considered nonappealable and reviewable by certiorari, are now held appealable. (See *infra*, §93.)

It should also be remembered that the scope of review in certiorari is restricted to defects considered jurisdictional; insufficiency of evidence and errors of law within jurisdiction are not reviewable. (See *Estate of Kay* (1947) 30 C.2d 215, 218, 181 P.2d 1; *Kramer v. Superior Court* (1950) 36 C.2d 159, 162, 222 P.2d 874; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§287, 292 et seq.)

(2) *Prohibition*. Even if a judgment or order is appealable, prohibition may be granted where the remedy by appeal is inadequate; and it is obviously appropriate to prevent acts in excess of jurisdiction where no appeal is possible. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§53, 58.)

(3) *Mandamus*. Sometimes the court makes an order that is, in effect, a refusal to perform a nondiscretionary duty, and it may be effectively reviewed and in practical effect "reversed" by mandamus to compel the required act. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§101, 103.) This writ has now become the authorized and appropriate means of review of several important types of orders, including the following:

(a) Orders denying a motion to quash service of summons. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §224.)

(b) Orders granting or denying a motion for change of venue. (See 3 *Cal. Proc.* (5th), *Actions*, §919; *infra*, §170.)

(c) Orders dealing with discovery. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §109; 2 *Cal. Evidence* (4th), §§71,

248; *infra*, §158.)

(d) Orders determining good faith of settlement. (See *Main Fiber Products v. Morgan & Franz Ins. Agency* (1999) 73 C.A.4th 1130, 1135, 1136, 87 C.R.2d 108 [aggrieved party may not forgo writ review and seek review for first time on appeal from final judgment arising out of trial of plaintiff's claims against nonsettling defendants]; *O'Hearn v. Hillcrest Gym & Fitness Center* (2004) 115 C.A.4th 491, 498, 9 C.R.3d 342 [if appellant could await appeal from final judgment to attack earlier order approving good faith settlement, settling defendant would be in precarious situation, because, if appeal resulted in reversal, settling defendant would be drawn back in but would not have engaged in discovery].)

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3. Distinction: No Review on Appeal of Dismissal for Failure To Prosecute.

9 Witkin Cal. Proc. Appeal § 92

[§ 92] Distinction: No Review on Appeal of Dismissal for Failure To Prosecute.

In *Vernon v. Great Western Bank* (1996) 51 C.A.4th 1007, 59 C.R.2d 350, plaintiff alleged three causes of action, two of which were resolved against her by an order for summary adjudication, which was not appealable (see *infra*, §145). Plaintiff then failed to diligently prosecute her case to completion, and it was dismissed. She appealed, contending that the dismissal was an abuse of discretion and that the summary adjudication order was erroneous. *Held*, the order of dismissal for failure to prosecute is affirmed and, as a result, the summary adjudication order is not subject to review.

(a) Had plaintiff proceeded to trial on her remaining cause of action and lost, she could have obtained review of the nonappealable summary adjudication order on appeal from the judgment entered after trial. However, because this court upholds the dismissal for failure to prosecute, a decision that the summary adjudication motion was wrongly decided would accomplish nothing; the case would remain dismissed. Had this court reversed the order of dismissal, the issue would still not be reviewable, because a reversal of the dismissal would mean that plaintiff could try her third cause of action on the merits, after which a final judgment would be entered, and earlier nonappealable orders, including the summary adjudication order, would merge into that judgment and be subject to review. To permit review here would reward plaintiff for her dilatory tactics by giving her an interlocutory appeal of the nonappealable summary adjudication order. (51 C.A.4th 1013.)

(b) Although no California cases address this issue of appellate review, several federal courts have resolved the issue this way. (51 C.A.4th 1014, citing cases.)

Vernon was distinguished in *Rail Services of America v. State Comp. Ins. Fund* (2003) 110 C.A.4th 323, 1 C.R.3d 700. Because plaintiffs actively participated in the prosecution of the case, refusing to comply with discovery orders only as a tactic to move the case forward by creating a final appealable judgment, review of interlocutory orders that preceded the final dismissal order was proper. (110 C.A.4th 332.)

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IV. APPEALABLE JUDGMENTS AND ORDERS

C. Void Judgment or Order.

1. General Rule: Appealable.

9 Witkin Cal. Proc. Appeal § 93

[§ 93] General Rule: Appealable.

(1) *Where Statutory Test of Appealability Is Satisfied.* If a judgment or order meets the statutory test of appealability (i.e., final judgment, or order expressly made appealable), an appeal lies even though it is void. Obviously, the appellant is as much aggrieved by a wholly void judgment or order as he or she is by one that is merely erroneous; and thus the appellant should have the right to use, and should be encouraged to use, the normal method of review by appeal, instead of certiorari, motion or action for equitable relief, or collateral attack.

This general principle of appealability of a void judgment is well established. (See *Merced Bank v. Rosenthal* (1893) 99 C. 39, 43, 31 P. 849, 33 P. 732 [judgment signed by judge whose term had expired]; *Ewing v. Richvale Land Co.* (1917) 176 C. 152, 153, 167 P. 876 [clerk without authority entered deficiency judgment]; *Phelan v. Superior Court* (1950) 35 C.2d 363, 366, 217 P.2d 951; *Griset v. Fair Political Practices Com.* (2001) 25 C.4th 688, 701, 107 C.R.2d 149, 23 P.3d 43, *infra*, §853 [where appeal is from void judgment, reviewing court's jurisdiction is limited to reversing trial court's void acts]; *Petroleum Midway Co. v. Zahn* (1944) 62 C.A.2d 645, 652, 145 P.2d 371; *Conservatorship of Romo* (1987) 190 C.A.3d 279, 283, 235 C.R. 377, quoting the text; *Viejo Bancorp v. Wood* (1989) 217 C.A.3d 200, 205, 265 C.R. 620, citing the text; 81 A.L.R.2d 537 [appealability of void judgment or of order granting or denying motion to vacate void judgment].)

Occasionally, an appellate court overlooks the principle and concludes that, if the trial court had no jurisdiction over the cause, the appellate court lacks appellate jurisdiction and should dismiss the appeal. (See *Costa v. Banta* (1950) 98 C.A.2d 181, 182, 219 P.2d 478.) Because dismissal constitutes an *affirmance* of the judgment (see *infra*, §762), this is improper in practice as well as unsound in theory. The correct procedure is to reverse the void judgment, and, if the jurisdictional defect is incurable, the reversal should be with directions to the trial court to dismiss the action. (See *Petroleum Midway Co. v. Zahn*, *supra*; *Burke v. San Francisco* (1952) 111 C.A.2d 314, 316, 244 P.2d 708; *Avery v. Associated Seed Growers* (1963) 211 C.A.2d 613, 630, 27 C.R. 625; *Adohr Milk Farms v. Love* (1967) 255 C.A.2d 366, 371, 63 C.R. 123, citing the text; 2 Cal. Proc. (5th), *Jurisdiction*, §21; *infra*, §878; cf. *Doty v. Doty* (1975) 52 C.A.3d 672, 678, 125 C.R. 153, citing the text [defect curable and appeal entertained].)

(2) *Where Invalidity Results From Failure To Comply With Formal Requirements.* As the rule developed in the earlier cases, the "void" judgment or order was one that met the formal requirements of appealability; i.e., it was a

judgment or order, final in form, and was invalid because the court that rendered it acted without or in excess of jurisdiction. If the invalidity results from the failure to comply with the formal requirements of entry of a final judgment or order, it is more properly characterized as a preliminary order or purported judgment that is not a final judgment at all. Sometimes there is an appealable judgment in existence at the time the reviewing court considers the matter, and in this event the notice of appeal can be construed to refer to that judgment and the appeal will be saved. (See *infra*, §153.) But if there is no appealable judgment on which, by construction or otherwise, the notice of appeal may rest, there can be no appellate jurisdiction to reverse; the reviewing court can only determine that no appeal is pending and that the purported appeal must be dismissed. (See *Trani v. R.G. Hohman Enterprises* (1975) 52 C.A.3d 314, 315, 125 C.R. 34; *infra*, §153.)

Nevertheless, some cases have extended the rule of appealability to this kind of "void order," with no discussion of the distinction. (See *Estate of Hewitt* (1958) 160 C.A.2d 584, 588, 325 P.2d 113, citing the text; *Mellinger v. Municipal Court* (1968) 265 C.A.2d 843, 847, 71 C.R. 535 [judgment ineffective for failure to make findings]; *Covina-Azusa Fire Fighters Union v. Azusa* (1978) 81 C.A.3d 48, 57, 146 C.R. 155 [failure to make findings; following *Mellinger*]; cf. *Adohr Milk Farms v. Love*, *supra*, citing the text [ambiguous order, either void because of lack of power or because of failure to put it in written form].)

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C. Void Judgment or Order.

2. Void Orders After Final Judgment.

9 Witkin Cal. Proc. Appeal § 94

[§ 94] Void Orders After Final Judgment.

Suppose a trial judge, acting without authority under *C.C.P.* 473 or any other statute governing direct attack, makes an order vacating or modifying the judgment or granting a new trial. The order is void, but how is it to be attacked?

In *Stanton v. Superior Court* (1927) 202 C. 478, 261 P. 1001, the court announced the novel doctrine that the classification of appealable special orders after final judgment (see *infra*, §185) was intended to include only such orders as were authorized by law. An unauthorized order vacating the judgment, an order granting a new trial in an unauthorized proceeding or on nonstatutory grounds, and other complete departures from statutory procedure were conceived to be nonappealable. On its surface this rule appeared to be a harsh construction of the appeal statute; its actual effect, however, was to liberalize the use of the extraordinary writ of certiorari to accomplish the same result as an appeal. (See discussion and cases cited in *Phelan v. Superior Court* (1950) 35 C.2d 363, 367, 368, 217 P.2d 951.)

But this liberalizing of certiorari carried with it a serious hazard. The many ramifications of the concept of jurisdiction often make it difficult to determine whether a judgment is void for excess of jurisdiction, or merely erroneous for gross judicial error. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §287 et seq.) And if the aggrieved party guessed wrong, and failed to pursue both methods of review simultaneously, either the appeal or the certiorari proceeding might prove futile. (See *Phelan v. Superior Court*, *supra*, 35 C.2d 369; 31 *Cal. L. Rev.* 576.)

The solution to this problem was to overrule *Stanton*, abandon the restricted concept of special orders after final judgment, and return to the basic rule making appealable any such order, whether valid or void. This step was finally taken in *Phelan v. Superior Court*, where the court said: "The *Stanton* case clearly constituted a departure from the general rule that an appeal may be taken from a void order or judgment, and the criticism which the decision has received seems justified. Both final judgments and special orders after final judgment are made appealable by similar language in section 963 of the *Code of Civil Procedure* [now *C.C.P.* 904.1], and no condition that the trial court must have jurisdiction to act is set forth with respect to the appealability of either type of decision." (35 C.2d 369.) "We hold that a special order after final judgment is appealable regardless of whether it is void and regardless of whether it is provided for by any of the prescribed methods of procedure." (35 C.2d 370.) (See 38 *Cal. L. Rev.* 931.)

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V. FINAL JUDGMENT: ONE FINAL JUDGMENT RULE

A. In General.

1. Appeal From Judgment.

9 *Witkin Cal. Proc. Appeal* § 95

[§ 95] Appeal From Judgment.

Under *C.C.P. 904.1(a)*, an appeal, except in a limited civil case (see *infra*, §1002 et seq.), may be taken "from a judgment" except when the "judgment" is one of the following:

- (1) An interlocutory judgment (other than as provided in *C.C.P. 904.1(a)(8)*, (a)(9), or (a)(11); see *infra*, §138).
- (2) A judgment of contempt made final and conclusive by *C.C.P. 1222* (see *infra*, §147).

C.C.P. 904.2(a), on appeal in a limited civil case, also refers to appeal from a "judgment" other than an interlocutory judgment or judgment of contempt. (See *infra*, §1004.)

The federal courts have a similar rule. (See *Baltimore Contractors v. Bodinger* (1955) 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §77 et seq.; 15A Federal Practice & Procedure (Wright & Miller) §3905; 2 Federal Procedure, L.Ed., §3:125 et seq.; 72 *Harv. L. Rev.* 584 [discretionary appeal]; 75 *Harv. L. Rev.* 351; 77 *Harv. L. Rev.* 85.)

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V. FINAL JUDGMENT: ONE FINAL JUDGMENT RULE

A. In General.

2. Judgment Must Be Final.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 96

[§ 96] In General.

Although the statutory language avoids the familiar term "final judgment" (see *supra*, §95), it conveys the same meaning by excepting an "interlocutory judgment." The intent of the language is to codify 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; *Knodel v. Knodel* (1975) 14 C.3d 752, 760, 762, 122 C.R. 521, 537 P.2d 353, citing the text [series of orders, culminating in final dispositive order, were construed by court as appealable judgment]; *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 741, footnote 9, 29 C.R.2d 804, 872 P.2d 143, *infra*, §120; *Murphy v. Fong Shuck* (1957) 151 C.A.2d 64, 65, 311 P.2d 80 [rule is jurisdictional and may be invoked on appellate court's own motion]; *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 455, 322 P.2d 600, quoting the text; *Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 154, 8 C.R. 107, quoting the text; *Shank v. Los Gatos Associates* (1961) 193 C.A.2d 824, 825, 14 C.R. 726, citing the text; *Maier Brewing Co. v. Pacific Nat. Fire Ins. Co.* (1961) 194 C.A.2d 494, 495, 15 C.R. 177; *In re O'Brien Machinery* (1964) 224 C.A.2d 563, 571, 36 C.R. 782, citing the text; *Turner v. Los Angeles Realty Bd.* (1965) 233 C.A.2d 755, 758, 43 C.R. 919, citing the text; *Spencer v. Spencer* (1967) 252 C.A.2d 683, 688, 60 C.R. 747, citing the text; *Caruso v. Snap-Tite* (1969) 275 C.A.2d 211, 214, 79 C.R. 642, citing the text; *Gosney v. California* (1970) 10 C.A.3d 921, 928, 929, 89 C.R. 390, citing the text; *Fleuret v. Hale Const. Co.* (1970) 12 C.A.3d 227, 230, 90 C.R. 557; *Horton v. Jones* (1972) 26 C.A.3d 952, 957, 103 C.R. 399, quoting the text; *Lemaire v. All City Employees Assn.* (1973) 35 C.A.3d 106, 110, 110 C.R. 507 [restating reasons for rule]; *In re Marriage of Schultz* (1980) 105 C.A.3d 846, 851, 164 C.R. 653, quoting the text [trial judge cannot, by "reservation of jurisdiction," preclude appellate review of order that is final]; *Kinoshita v. Horio* (1986) 186 C.A.3d 959, 962, 967, 231 C.R. 241, 7 *Cal. Proc.* (5th), *Judgment*, §15, citing the text; *In re Debra M.* (1987) 189 C.A.3d 1032, 1036, 234 C.R. 739, quoting the text; *American Nat. Bank v. Stanfill* (1988) 205 C.A.3d 1089, 1095, 252 C.R. 861, citing the text; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 C.A.3d 925, 941, 266 C.R. 231, citing the text; *UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 C.A.3d 1028, 1034, 285 C.R. 856, citing the text; *In re Marriage of Griffin* (1993) 15 C.A.4th 685, 687, 19 C.R.2d 94, quoting the text; *In re Brittany S.* (1993) 17 C.A.4th 1399, 1404, 22 C.R.2d 50, quoting the text; *Brun v. Bailey* (1994) 27 C.A.4th 641, 648, 32 C.R.2d 624, *infra*, §107, quoting the text; *Cuevas v. Truline Corp.* (2004) 118

C.A.4th 56, 59, 12 *C.R.3d* 706, citing the text [one final judgment rule does not prohibit separate or partial judgments against fewer than all defendants]; C.E.B., 1 Civil Appellate Practice 3d, §3.14; Rutter Group, 1 Civil Appeals and Writs §2:22; 15 *Hastings L. J.* 93; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §81.)

The determination whether an adjudication is final and appealable is not based on the form, but on substance and effect. *Griset v. Fair Political Practices Com.* (2001) 25 *C.4th* 688, 107 *C.R.2d* 149, 23 *P.3d* 43, *infra*, §853, states the test as follows: "[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, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." (25 *C.4th* 698.) (See *Warmington Old Town Associates, L.P. v. Tustin Unified School Dist.* (2002) 101 *C.A.4th* 840, 848, 124 *C.R.2d* 744 [appeal was properly taken where no further judicial action was required to determine rights of parties; quoting *Griset*]; *Enrique M. v. Angelina V.* (2004) 121 *C.A.4th* 1371, 1377, 18 *C.R.3d* 306 [court order establishing that father and mother would share joint legal custody and that father's physical custody rights would gradually increase over time constituted appealable final judgment as to custody; hence, order denying request to modify parenting schedule was appealable].) Thus, there is a difference between an order granting a motion to dismiss and the order of dismissal itself. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 *C.A.4th* 1349, 1359, 128 *C.R.2d* 200.)

Under *C.C.P.* 1287.4 (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §566), a judgment imposed after confirmation of an arbitration award is treated as one entered in an ordinary civil action; thus, the requirement of finality before an appeal may proceed is applicable to these judgments. (*Rubin v. Western Mut. Ins. Co.* (1999) 71 *C.A.4th* 1539, 1547, 84 *C.R.2d* 648 [judgment confirming appraisal award was not appealable where all four of plaintiff's causes of action against insurer remained unresolved].)

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A. In General.

2. Judgment Must Be Final.

b. Judgment Contingent on Interim Ruling.

9 Witkin Cal. Proc. Appeal § 97

[§ 97] Judgment Contingent on Interim Ruling.

In *Entertainment v. Arthur J. Gallagher & Co.* (2005) 125 C.A.4th 1022, 23 C.R.3d 258, plaintiff insureds filed an action against defendant insurer for failure to defend and against defendant insurance broker through whom they bought the policy. The trial judge granted summary judgment for defendant broker based on the judge's interim ruling that defendant insurer had a duty to defend. Plaintiffs appealed. *Held*, appeal dismissed; the summary judgment violated the one final judgment rule.

(a) The sole ground for defendant broker's summary judgment motion was the trial judge's ruling that defendant insurer had a duty to defend. The judgment in favor of the broker was entirely contingent on that ruling, which had not been reduced to a judgment. Under those circumstances, entry of judgment in defendant broker's favor was premature and violated the one final judgment rule. (125 C.A.4th 1025.)

(b) If the trial judge was wrong in ruling that defendant insurer had a duty to defend, plaintiffs would have a good case for reversal of the judgment in favor of defendant broker. However, the duty to defend ruling was not entered as a judgment and was not appealed. Moreover, defendant insurer was not a party to this appeal. (125 C.A.4th 1025.)

(c) There was nothing improper in defendant broker's summary judgment motion. The trial judge had previously ruled that defendant insurer had a duty to defend, which indicated that defendant broker had no liability, and under these circumstances, it was natural that the broker would have no wish to remain in the case while the other parties tried the issues outstanding between them. Equally, the trial judge was free to rule on the motion for summary judgment. However, he should have then ruled that his order would not be reduced to a separate judgment, but instead would be incorporated into a single final judgment against both defendants when all the issues between plaintiffs and defendant insurer were resolved. The matter would then have come up on appeal in a rational manner, which would have allowed the case to be heard and decided on the merits. (125 C.A.4th 1026.)

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A. In General.

3. Distinctions.

9 *Witkin Cal. Proc. Appeal* § 98

[§ 98] Distinctions.

In applying the one final judgment rule (see *supra*, §§96, 97), it is necessary to make several basic distinctions:

(1) *Judgment Is Required*. There must be a judgment. There is no appeal from the following:

(a) A verdict. (*Robins v. Weis* (1950) 97 C.A.2d 144, 217 P.2d 156.)

(b) Findings (now statement of decision). (*Ouzoonian v. Vaughan* (1923) 64 C.A. 369, 374, 221 P. 958; *Gosney v. California* (1970) 10 C.A.3d 921, 928, 89 C.R. 390.)

(c) Orders preliminary to judgment. (See *infra*, §160.)

(2) *Final Judgment*. However labeled, the judgment must be final in its effect and not interlocutory. (See *infra*, §136.)

(3) *Defective Judgment*. Although a judgment final in form and content may be appealable even though void (see *supra*, §93), a purported judgment may be so defective in form and content as not to amount to a final judgment. (See *Ferrara v. Jordan* (1955) 134 C.A.2d Supp. 917, 919, 286 P.2d 589 [judgment that defendants recover costs, failure to recite that plaintiff recover nothing]; 73 A.L.R.2d 250 [formal requirements of judgment or order as regards appealability].)

(4) *Superseded Judgment*. The judgment must be subsisting; a superseded judgment is not appealable. Thus, in *Rutledge v. Rutledge* (1953) 119 C.A.2d 112, 259 P.2d 78, plaintiff brought an action for partition. After trial, the judge signed and filed the interlocutory decree (appealable: see *infra*, §138), and defendant filed notice of appeal. Thereafter, plaintiff moved for a new trial, and, on denial of the motion, the trial judge filed amended findings of fact, conclusions, and an amended interlocutory decree of partition, making material changes in the original findings, conclusions, and decree, under C.C.P. 662 (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §97). *Held*, defendant's appeal from the original judgment dismissed; the material departure made the second judgment the final judgment. (See *Neff v. Ernst* (1957) 48 C.2d 628, 634, 311 P.2d 849 [similar situation; following *Rutledge*]; *Kelly v. Sparling Water Co.* (1959) 52 C.2d 628, 632, 343 P.2d 257 [same].)

(5) *Reviewable Record*. Simply because a judgment is final does not necessarily entitle a party to appellate review. Thus, no appeal lies from a judgment pursuant to a *C.C.P.* 998 settlement, because there can be no record to review. (*Pazderka v. Caballeros Dimas Alang* (1998) 62 *C.A.4th* 658, 665, 73 *C.R.2d* 242.)

Keeping these matters in mind should avoid most premature appeals, and assure the aggrieved party (see *supra*, §33 et seq.) 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 *Schonfeld v. Vallejo* (1975) 50 *C.A.3d* 401, 417, 123 *C.R.* 669, *infra*, §120, quoting the text; 13 *Southwestern U. L. Rev.* 87; *infra*, §§99 et seq., 109 et seq.) (For distinction between two aspects of the rule, and a theory of discretionary departure from it, see *Guntert v. Stockton* (1974) 43 *C.A.3d* 203, 208, 209, 117 *C.R.* 601, *infra*, §133.)

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B. Judgment Final on Collateral Matter.

1. Nature of Exception.

9 Witkin Cal. Proc. Appeal § 99

[§ 99] Nature of Exception.

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, that party is entitled to appeal even though litigation of the main issues continues. The determination is substantially the same as a final judgment in an independent proceeding. (See *Anglo-Californian Bank, Ltd. v. Superior Court* (1908) 153 C. 753, 755, 96 P. 803; *Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 C. 484, 490, 114 P. 838; *Fish v. Fish* (1932) 216 C. 14, 16, 13 P.2d 375; *Cline v. Superior Court* (1917) 35 C.A. 150, 152, 169 P. 453; *Leeper v. Superior Court* (1923) 62 C.A. 736, 739, 217 P. 811; *Colma Vegetable Assn. v. Superior Court* (1925) 75 C.A. 91, 95, 242 P. 82; *Burt v. Irvine Co.* (1965) 237 C.A.2d 828, 867, 47 C.R. 392, citing the text; *Spencer v. Spencer* (1967) 252 C.A.2d 683, 690, 60 C.R. 747, *infra*, §106, citing the text; *Stockton v. Rattner* (1972) 22 C.A.3d 965, 968, 99 C.R. 787; *Spence v. Omnibus Industries* (1975) 44 C.A.3d 970, 976, 119 C.R. 171; *United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 C.A.3d 925, 941, 266 C.R. 231, quoting the text; *Brun v. Bailey* (1994) 27 C.A.4th 641, 648, 32 C.R.2d 624, *infra*, §107, quoting the text; *Don Jose's Restaurant v. Truck Ins. Exchange* (1997) 53 C.A.4th 115, 117, 61 C.R.2d 370, *infra*, §121); *Morgan Hill v. Brown* (1999) 71 C.A.4th 1114, 1128, 84 C.R.2d 361, quoting the text; *In re Marriage of Eben-King & King* (2000) 80 C.A.4th 92, 114, 95 C.R.2d 113; *Yeboah v. Progeny Ventures* (2005) 128 C.A.4th 443, 449, 27 C.R.3d 150, quoting the text; 15 *Hastings L. J.* 100, 105; 13 *Southwestern U. L. Rev.* 104; on "collateral order" doctrine in federal courts, see 70 *Harv. L. Rev.* 555; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §105; 9 *Federal Practice & Procedure* (Wright & Miller) §2392; 2 *Federal Procedure*, L.Ed., §3:340 et seq.

The test for determining whether an order is collateral is whether it is important and essential to the correct determination of the main issue. If the answer is in the affirmative, the order is not collateral to the main action and is not appealable. (*Steen v. Fremont Cemetery Corp.* (1992) 9 C.A.4th 1221, 1227, 1228, 11 C.R.2d 780, quoting the text [order directing that notice of class action be given to class members was necessary step to allow action to continue, and thus was not collateral].)

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See *Mercury Interactive Corp. v. Klein* (2007) 158 C.A.4th 60, 75, 70 C.R.3d 88 [order granting motion to unseal complaint and exhibits that had been filed under seal pursuant to stipulated protective order was appealable collateral order; order was final determination of collateral matter directing performance of act of unsealing]; *Serrano v. Stefan Merli Plastering Co.* (2008) 162 C.A.4th 1014, 1026, 76 C.R.3d 559 [order determining liability for costs of deposition transcript was appealable under collateral matter doctrine]; cf. *San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 C.A.4th 296, 299, 77 C.R.3d 470 [order granting motion for genetic testing of alleged father in paternity and support action was not appealable under collateral matter doctrine, even though proposed statement of decision provided that it would become court's judgment; issue of genetic testing was not severable from litigation's general subject matter of paternity and support]; *Lima v. Vouis* (2009) 174 C.A.4th 242, 250, 94 C.R.3d 183 [order denying minor's motion to extinguish Medicaid lien asserted by Department of Health Services on amount of settlement of medical malpractice claim was appealable as final collateral order directing payment of money].



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2. Illustrations.

a. Support Orders.

9 *Witkin Cal. Proc. Appeal* § 100

[§ 100] Support Orders.

An order awarding temporary spousal support, costs, and attorneys' fees is a typical example of a final judgment on a collateral matter. "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; see *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 was proper].)

An order reducing temporary alimony is also appealable. (*Greene v. Superior Court* (1961) 55 C.2d 403, 405, 10 C.R. 817, 359 P.2d 249; *In re Marriage of Skelley* (1976) 18 C.3d 365, 368, 134 C.R. 197, 556 P.2d 297, citing the text [disapproving *In re Marriage of Harbach* (1975) 49 C.A.3d 405, 407, 122 C.R. 518].)

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2. Illustrations.

b. Receivers.

9 *Witkin Cal. Proc. Appeal* § 101

[§ 101] Receivers.

An order vacating the appointment of a receiver and directing the receiver to pay over money to the defendant is a final judgment on a collateral matter. This order discharges the receiver and terminates his or her control over the property. The plaintiff, whose right to a continuance of the receivership is finally determined, is entitled to appeal. (*Hibernia Savings & Loan Soc. v. Ellis Estate Co.* (1932) 216 C. 280, 281, 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*, §99), or as a final determination of the rights of a particular party (*infra*, §109). Any order that requires the payment of money or the doing of an act by the aggrieved party is final in its effect as to that party. (*Los Angeles v. Los Angeles City Water Co.* (1901) 134 C. 121, 122, 66 P. 198; *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 458, 322 P.2d 600 [order approving report and account of receiver, fixing compensation, and ordering payment].)

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2. Illustrations.

c. Monetary Sanctions.

1. Former Law.

9 *Witkin Cal. Proc. Appeal* § 102

[§ 102] Former Law.

Prior to 1989, most orders imposing monetary sanctions were appealable as a final determination of a collateral matter. (See *I.J. Weinrot & Son v. Jackson* (1985) 40 C.3d 327, 331, 220 C.R. 103, 708 P.2d 682; *Wisniewski v. Clary* (1975) 46 C.A.3d 499, 502, 120 C.R. 176; *Ellis v. Roshei Corp.* (1983) 143 C.A.3d 642, 645, footnote 3, 192 C.R. 57; *Lieppman v. Lieber* (1986) 180 C.A.3d 914, 919, 225 C.R. 845; *Caldwell v. Samuels Jewelers* (1990) 222 C.A.3d 970, 975, 272 C.R. 126.) However, the collateral order exception to the one final judgment rule was not applied to monetary sanctions imposed for abuse of the discovery process. (See *Lund v. Superior Court* (1964) 61 C.2d 698, 709, 39 C.R. 891, 394 P.2d 707; *Kibrej v. Fisher* (1983) 148 C.A.3d 1113, 1115, 196 C.R. 454; *Slemaker v. Woolley* (1989) 207 C.A.3d 1377, 1382, 255 C.R. 532.) The reasoning was explained in *Hanna v. BankAmerica Business Credit* (1993) 16 C.A.4th 913, 20 C.R.2d 430: "[D]iscovery orders in a single lawsuit can be numerous and ongoing and consequently provide limitless fodder for interim appeals. ... To discourage multiple appeals in a single action, all discovery orders, including orders imposing sanctions, have traditionally been classified as interim, nonappealable orders." (16 C.A.4th 915.)

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c. Monetary Sanctions.

2. Nature of Statutory Revision.

9 *Witkin Cal. Proc. Appeal* § 103

[§ 103] Nature of Statutory Revision.

(1) *Statutory Limit.* Former C.C.P. 904.1(k), added in 1989, authorized appeals from superior court judgments directing the payment of monetary sanctions by a party or attorney if the amount exceeded \$ 750. The amount was raised to \$ 5,000 in 1993. (See 25 *Pacific L. J.* 469.)

(2) *Sanctions Over \$ 5,000.* The statute now provides that an appeal, other than in a limited civil case, may be taken from an interlocutory judgment or order directing the payment of a monetary sanction by a party or attorney if the amount exceeds \$ 5,000. (C.C.P. 904.1(a)(11), (a)(12); on rule against aggregation of multiple sanctions to meet statutory threshold, see *infra*, §105.)

(3) *Sanctions of \$ 5,000 or Less.* Sanction orders or judgments of \$ 5,000 or less may be reviewed on an appeal by the sanctioned party after entry of final judgment in the main action, or, at the discretion of the Court of Appeal, may be reviewed on a petition for an extraordinary writ. (C.C.P. 904.1(b); see *Eichenbaum v. Alon* (2003) 106 C.A.4th 967, 973, 131 C.R.2d 296 ["final judgment" requirement of C.C.P. 904.1(b) was satisfied by plaintiff's voluntary dismissal after defendant's motion for sanctions was filed].)

In *Butt v. Richmond* (1996) 44 C.A.4th 925, 52 C.R.2d 232, plaintiff petitioned for mandamus directing defendant city to allow him to inspect certain public records. Judgment was entered denying the petition; and, because the trial judge found his request frivolous, plaintiff was ordered to pay defendant's attorneys' fees and costs of \$ 3,991. Plaintiff then appealed from this portion of the judgment only. However, under *Govt.C. 6259(c)*, superior court orders involving the disclosure of public records are reviewable only by extraordinary writ. Thus, defendant argued that the appellate court lacked jurisdiction to hear the appeal. *Held*, the appellate court had jurisdiction.

(a) *Govt.C. 6259(c)* is concerned with speeding review when the right to inspect public records is involved. Here, the part of the judgment appealed from did not involve that right. And, there is nothing in the legislative history of the statute to indicate that the Legislature was also interested in affording quick review of the type of sanctions involved here. (44 C.A.4th 929.)

(b) On the contrary, the legislative intent regarding review of sanction orders is shown by *C.C.P. 904.1*, making all appeals of sanctions under \$ 5,000 reviewable only by appeal from the final judgment. If defendant's position were accepted, review of an order of costs or sanctions entered after a judgment involving the disclosure of public records would only be by extraordinary writ, in opposition to the rule that orders entered after final judgment are generally appealable (see *supra*, §96 et seq.). (*44 C.A.4th 930.*)

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3. Appealability of Discovery Sanctions.

9 Witkin Cal. Proc. Appeal § 104

[§ 104] Appealability of Discovery Sanctions.

It was clear that the 1989 revision (see *supra*, §103) restricted the appealability of nondiscovery orders requiring the payment of money. These orders were appealable only if they exceeded \$ 750. (See *Monterey v. Mahabir* (1991) 231 C.A.3d 1650, 1652, 282 C.R. 924; *Imuta v. Nakano* (1991) 233 C.A.3d 1570, 1584, 285 C.R. 681.)

However, there was a split of authority as to the impact of the revision on *orders* imposing monetary sanctions for abuse of discovery. Some courts, reasoning that the word "judgment" in former C.C.P. 904.1(k) included "orders," held that discovery sanction orders were appealable if they exceeded \$ 750. (See *Kohan v. Cohan* (1991) 229 C.A.3d 967, 970, 280 C.R. 474; *Greene v. Amante* (1992) 3 C.A.4th 684, 690, 4 C.R.2d 571.) Other decisions, emphasizing that the purpose of the statute was to restrict rather than expand the right to appeal from sanction orders, interpreted the word "judgment" to include only judgments and those final orders on collateral matters that historically had been considered to be a necessary exception to the final judgment rule, i.e., sanction orders *not* directed towards abuse of the discovery process (see *supra*, §102). (See *Rao v. Campo* (1991) 233 C.A.3d 1557, 1566, 285 C.R. 691; *Ghanooni v. Super Shuttle* (1992) 2 C.A.4th 380, 389, 3 C.R.2d 43; *Russell v. General Motors Corp.* (1992) 3 C.A.4th 1114, 1119, 4 C.R.2d 750; *Hanna v. BankAmerica Business Credit* (1993) 16 C.A.4th 913, 918, 20 C.R.2d 430; *Peterson v. General Motors Corp.* (1993) 19 C.A.4th 1330, 1333, 23 C.R.2d 768; *Ballard v. Taylor* (1993) 20 C.A.4th 1736, 1739, 25 C.R.2d 384; *Green v. GTE Calif.* (1994) 29 C.A.4th 407, 409, 34 C.R.2d 517, *infra*, §132) [irrespective of amount, orders imposing monetary discovery sanctions are not appealable]; cf. *Barton v. Ahmanson Dev.* (1993) 17 C.A.4th 1358, 1361, 22 C.R.2d 56 [attorney who had been replaced with another attorney could appeal discovery sanctions imposed against him, because his rights and liabilities had been finally adjudicated].)

By making *all* interlocutory judgments or orders imposing sanctions appealable, while increasing the appellate threshold to an amount in excess of \$ 5,000 (see *supra*, §103), the 1993 amendment to C.C.P. 904.1 was intended to be a compromise of the discovery sanction issue. (*Rail-Transport Employees Assn. v. Union Pac. Motor Freight* (1996) 46 C.A.4th 469, 473, 54 C.R.2d 713.)

A discovery sanction for \$ 5,000 or less can be reviewed only in the appeal from the final judgment in the main

action (see *supra*, §103). Thus, if the appeal from the main judgment is untimely, the sanction order is not reviewable, even if the trial court later confirms its sanctions award in a postjudgment order from which there is a timely appeal. In order to be appealable, a postjudgment order must raise an issue different from those embraced in the judgment (see *infra*, §183), because otherwise the postjudgment order would give a party two chances to appeal the same ruling and thus circumvent the time limit on appealing from the judgment. (*Guillemin v. Stein* (2002) 104 C.A.4th 156, 161, 128 C.R.2d 65.)

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c. Monetary Sanctions.

4. No Aggregation of Sanctions To Meet Statutory Threshold.

9 Witkin Cal. Proc. Appeal § 105

[§ 105] No Aggregation of Sanctions To Meet Statutory Threshold.

In the situation where multiple sanctions are imposed, none of which meets the appealability monetary threshold, the courts have declined to aggregate the sanctions to satisfy that threshold. (See *Rao v. Campo* (1991) 233 C.A.3d 1557, 1569, 285 C.R. 691; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 C.A.4th 39, 42, 24 C.R.2d 337.)

Some courts have suggested that there may be situations where aggregation of multiple sanctions is proper. (See *Champion/L.B.S. Associates Dev. Co. v. E-Z Serve Petroleum Marketing* (1993) 15 C.A.4th 56, 59, 18 C.R.2d 726; *Imuta v. Nakano* (1991) 233 C.A.3d 1570, 1585, footnote 20, 285 C.R. 681.) However, in *Calhoun v. Vallejo City Unified School Dist.*, *supra*, the court rejected the implications of these cases, and held that "multiple sub-\$ 750 sanctions may not be aggregated under any circumstances to meet the appealability threshold." (20 C.A.4th 45.)

(a) Before 1990, all monetary sanction orders, regardless of amount, were appealable as final orders on a collateral matter. C.C.P. 904.1(k) was added to restrict the number of appeals by imposing a \$ 750 threshold of appealability. To allow aggregation of multiple sub-\$ 750 sanction orders to create appealability would derogate this restriction of the right to appeal. (20 C.A.4th 44.)

(b) Moreover, the standards for aggregation suggested by *Champion/L.B.S.* and by *Imuta* are too vague and unwieldy to be of practical value. For example, *Champion/L.B.S.* would ask whether the "same conduct" is being subjected to multiple sanctions. However, the example given in that case, i.e., multiple sanctions after opposition to a motion to compel further discovery upon three discovery requests, illustrates the difficulty involved in applying such a standard: is there a single course of misconduct in opposing the motion to compel, or instead, are there multiple instances of misconduct in failing to satisfy the three discovery requests? On the other hand, *Imuta* would inquire into whether the sanctions are "separate" by examining such factors as whether the sanctions are requested by separate motions, involve separate acts or different statutory authority, or are payable to different persons. However, the present case, where the sanctions were requested in separate opposing documents, were payable to different defendants, and involved varying statutory authority but involved the same act (a motion to change venue), illustrates the difficulty involved in that approach. Indeed, it is a close question whether the sanctions imposed here are "separate" within the

meaning of *Imuta*. (20 C.A.4th 44.)

(c) "Such standards for aggregation would inject an unwelcome dose of uncertainty into the appellate process. The Legislature intended to create a \$ 750 "bright line" threshold for appealability of monetary sanction orders ... A rule permitting aggregation of "same conduct" or "nonseparate" sanctions would blur that bright line. In close cases, such as the present one, the sanctioned party would be unsure whether to proceed by appeal or by writ petition. The wrong decision could prove to be procedurally fatal." (20 C.A.4th 45.) Hence, "[w]e endorse a bright line rule that a sanction order is nonappealable if it does not impose any sanction exceeding \$ 750, and thus an order requiring payment of multiple sanctions, none of which exceed \$ 750, is nonappealable even if the total aggregated sanctions exceed \$ 750." (20 C.A.4th 45.)

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B. Judgment Final on Collateral Matter.

3. Where No Act Is Ordered.

a. Limitation Disregarded.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 106

[§ 106] In General.

The earlier cases that established the exception to the one final judgment rule for orders final on a collateral matter required something more than a final collateral order; i.e., not all final collateral orders were appealable, but only those that directed the payment of money or the performance of some other act. (See *Edlund v. Los Altos Builders* (1951) 106 C.A.2d 350, 354, 235 P.2d 28, *infra*, §108.) In later decisions, this limitation was not always observed, perhaps partly because more than one theory of appealability was loosely invoked and discussed.

This uncertainty in choice of theory is well illustrated by *Meehan v. Hopps* (1955) 45 C.2d 213, 288 P.2d 267. Plaintiff, the receiver of an insurance company, and the California Insurance Commissioner sued H and others for an accounting on behalf of policyholders and creditors. H, contending that plaintiff's counsel were former counsel for him, moved to enjoin these attorneys from further participating in the case or disclosing confidential information. The motion was denied. *Held*, the order of denial was appealable on two theories:

(a) H could have sought an injunction in an independent action (see *Wutchumna Water Co. v. Bailey* (1932) 216 C. 564, 15 P.2d 505, 1 Cal. Proc. (5th), *Attorneys*, §132), but "his timely motion to the court having jurisdiction over the pending cause was equally appropriate." (45 C.2d 216.) Hence, because the language of the motion and order met the test of an injunction, and the refusal to grant an injunction is an appealable order (see *infra*, §174), this order was likewise appealable. (45 C.2d 216.) In effect, therefore, the court departed from the fundamental rule that the right of appeal is wholly statutory (see *supra*, §85), and created an appealable order by analogy.

(b) The motion raised a collateral issue unrelated to the main controversy. Because the order denying H's motion "left nothing further of a judicial nature for a final determination of his rights regarding opposing counsel, the order was final for purposes of appeal." (45 C.2d 217.) This seems a much safer ground for the result, although the court had to dissipate the effect of a number of prior decisions holding such an order reviewable on appeal from the final judgment thus impliedly holding it not directly appealable; see *supra*, §§89, 90. (45 C.2d 217, 218.) (See *Kraus v. Davis* (1970) 6 C.A.3d 484, 487, 85 C.R. 846 [motion treated as one to enjoin attorney from participating; order of denial was appealable].)

In *Hersch v. Boston Ins. Co.* (1959) 175 C.A.2d 751, 346 P.2d 796, the court, citing the text, held that an order granting a creditor's motion for a lien on plaintiff's cause of action was appealable as a final judgment on a collateral matter. (175 C.A.2d 753; see *infra*, §143.)

In *Spencer v. Spencer* (1967) 252 C.A.2d 683, 60 C.R. 747, a divorce action, Mr. and Mrs. S agreed to a property division under which a \$ 22,000 savings and loan deposit was to go to Mr. S. The account, however, was in the joint names of the attorneys for the parties, and Attorney T, who had previously represented Mrs. S, and had been discharged, refused to relinquish the passbook, claiming a common law retainer lien for his fee. On an order to show cause, he voluntarily relinquished all but \$ 7,500, and the lower court, agreeing that he had a lien even though the value of his services was yet to be determined, refused to order delivery of that balance. Mr. S obtained a second order to show cause, contending that T, by filing an action against Mrs. S for the reasonable value of services, and an affidavit for attachment, waived any lien. The lower court again denied relief, and Mr. S appealed from the order. *Held*, the appeal was good. Where a stranger is made a party to the action on an issue collateral to, independent of, and severable from the issues of the main action, a decision that finally determines rights is appealable though it may not technically direct the performance of an act. (252 C.A.2d 690.) Here, the judge finally determined T's right to assert a retaining lien, with no further judicial act to be performed in the divorce action with regard to the lien issue. The order was therefore appealable, even though the judge did not determine the reasonable value of T's services--a proper subject of a separate action. (252 C.A.2d 691.)

In a number of other decisions, the limitation has been disregarded. (See *Henneberque v. Culver City* (1985) 172 C.A.3d 837, 841, footnote 3, 218 C.R. 704, citing the text [order denying plaintiff's motion for attorneys' fees and back pay]; *Trimble v. Steinfeldt* (1986) 178 C.A.3d 646, 649, 650, 224 C.R. 195 [denial of motion to expunge third party's lien on plaintiff's recovery]; *In re Marriage of Lechowick* (1998) 65 C.A.4th 1406, 1410, 77 C.R.2d 395 [minute order in marital dissolution proceeding that denied plaintiff's request to unseal court records and to open further proceedings to public was appealable as final order on collateral matter]; *In re Marriage of Dupre* (2005) 127 C.A.4th 1517, 1523, 26 C.R.3d 328 [unsigned minute order, denying mother's request for sanctions against father's attorney for alleged false sexual molestation accusation, was appealable; following *Lechowick*].)

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3. Where No Act Is Ordered.

a. Limitation Disregarded.

2. Discovery Cases.

9 *Witkin Cal. Proc. Appeal* § 107

[§ 107] Discovery Cases.

In *Brun v. Bailey* (1994) 27 C.A.4th 641, 32 C.R.2d 624, appellant chiropractor was deposed by defendant in a personal injury action involving an automobile accident. Following the deposition, appellant moved for a protective order requiring the payment of an expert witness fee. The motion was denied, and appellant appealed. *Held*, the order was appealable as an order on a collateral matter finally adjudicating the rights of the parties to that matter.

(a) "The fee issue is a collateral matter distinct and severable from the general subject of the underlying litigation. The decision of the superior court denying the motion for payment of the fee finally determined the rights of the parties to that collateral matter, leaving no further judicial action to be performed. Appellant's pursuit of this appeal from the denial of the motion can have no effect on the course of the underlying litigation." (27 C.A.4th 650.)

(b) It is generally the rule that discovery orders, which are usually designed to prove or disprove the issues directly involved in the action, are not appealable as orders on collateral matters (see *infra*, §158). The rationale for this rule is that in most cases the delay due to interim review is likely to result in harm to the judicial process by reason of protracted delay, and discovery orders may be reviewed on appeal from a final judgment on the merits. However, this rationale is inapplicable here. The motion for this protective order was not designed to compel evidence or to prove or disprove the issues in the underlying action. Review of the order will result in no delay to the underlying action. And if the appellate court should hold that appellant was not a party to the proceeding on his motion for an expert witness fee, and thus lacked standing to appeal, he would then have no right, on appeal from the final judgment in the underlying action, to seek review of the superior court's denial of his motion. (27 C.A.4th 651.)

In *Marsh v. Mountain Zephyr* (1996) 43 C.A.4th 289, 50 C.R.2d 493, 2 Cal. Evidence (4th), Discovery, §191, plaintiff's expert witness was deposed by defendant and received a fee that was less than what he usually received. Pursuant to former C.C.P. 2034(i) (now C.C.P. 2034.410), defendant moved to set the fee at a certain amount. In response, plaintiff claimed that the expert was entitled to his customary, higher fee, and the witness then appealed from the order setting the fee. *Held*, the order was appealable.

(a) Although, as an exception to the one final judgment rule, the order appealed from did not meet the requirement of directing the witness to pay money or perform an act, the matter would have been submitted to the trial court for a hearing had the expert refused to be deposed without receiving his regular fee. And at that hearing, the fee would have been fixed, and the witness could have been ordered to pay sanctions. Thus, the fee-setting order and the sanctions could have directly required the payment of money or the performance of an act, thereby satisfying this element for an exception to the one final judgment rule. (43 C.A.4th 297.)

(b) The fact that the witness, instead of refusing to be deposed, proceeded voluntarily with the deposition, subject to a later determination of the fee, does not deprive him of the right to immediately appeal from the order setting the fee. No policy would be served by requiring the witness, in order to obtain immediate appeal, to refuse to be deposed, possibly incurring sanctions, or to wait until there was a final judgment in the underlying action before appealing the order setting the fee. The witness' particular problem was ripe for determination, and no purpose would be served by delaying its resolution. (43 C.A.4th 298.) (On right of nonparty to appeal, see *supra*, §§31, 32.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Muller v. Fresno Community Hosp. & Med. Center* (2009) 172 C.A.4th 887, 904, 91 C.R.3d 617 [in medical negligence action, trial court's order denying patient's motion for sanctions for alleged discovery abuses, although not directing payment of money or performance of act, was appealable as collateral order after trial court granted new trial for patient, because sanctions would have no relevance to proceedings on remand, and issue of sanctions was independent of negligence cause of action].



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3. Where No Act Is Ordered.

b. Limitation Observed.

9 Witkin Cal. Proc. Appeal § 108

[§ 108] Limitation Observed.

The conventional approach denying the right to appeal was followed in *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 under former Corp.C. 4655 (now Corp.C. 1802), 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.

(a) 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*, §177). (106 C.A.2d 355.)

(b) *Desert Club v. Superior Court* (1950) 99 C.A.2d 346, 221 P.2d 766, is distinguishable: (1) There, the proceeding was brought under former Corp.C. 819 (now Corp.C. 308) 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*, §139). (2) Here, the object of the action was dissolution, and the appointment of a director was merely one ancillary step that 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. (106 C.A.2d 355.)

The argument that *Meehan v. Hopps* (1955) 45 C.2d 213, 288 P.2d 267, *supra*, §106, had abandoned the limitation that a collateral order must direct the payment of money or the performance of some other act was challenged in *Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 154, 8 C.R. 107, a shareholder's derivative action. The trial judge denied defendants' motion for security under former Corp.C. 834 (now Corp.C. 800), and they appealed. *Held*, appeal dismissed. The court reviewed prior decisions, quoted *Sjoberg v. Hastorf* (1948) 33 C.2d 116, 199 P.2d 668, and the text, and distinguished *Meehan v. Hopps* by explaining the result in terms of the first theory (appealability of injunction). In effect, the *Efron* court refused to accept the second theory: "A careful reading of the *Meehan* decision convinces us that as to the second ground upon which the court found appealability, it was concerned only with the question of collaterality and finality. The briefs of both parties in *Meehan* cited *Sjoberg v. Hastorf*, *supra*, and there is nothing in the opinion in *Meehan* indicating an intent to delimit or overrule *Sjoberg* and its own decisions cited in *Sjoberg* to the effect that not only must the order ... be final to be appealable, but that it must also direct the payment of money by appellant or the performance of an act by or against him." (185 C.A.2d 156.) (See 15 *Hastings L. J.* 107.)

In *Woodman v. Ackerman* (1967) 249 C.A.2d 644, 57 C.R. 687, another shareholders' derivative action, the trial judge granted defendants' motions that plaintiffs be required to furnish security under former Corp.C. 834 (now Corp.C. 800). Plaintiffs appealed from the orders. *Held*, the orders were not appealable; an appeal lies only from the judgment of dismissal that follows nonposting of the security.

(a) Under the general principle that review of a prior appealable order cannot be had on a later appeal, if (as the cases indicate) an appeal lies from the judgment of dismissal for failure to comply, it does not lie from the earlier order. (249 C.A.2d 648.)

(b) The collateral matter exception applies only where nothing judicial remains to be done; here, the statute provides further action in the event of noncompliance, e.g., increase of amount, stay of principal action. (249 C.A.2d 650.) Also, the collateral matter exception applies to unconditional orders requiring the payment of money, while here no payment was required unless plaintiffs elected to continue the action. (249 C.A.2d 651.)

In a number of other decisions, the limitation has been observed. (See *Samuel v. Stevedoring Services* (1994) 24 C.A.4th 414, 417, 29 C.R.2d 420 [order denying motion to dismiss was not appealable under collateral matter doctrine, even though motion was based on defendant's alleged immunity as governmental agent]; *Conservatorship of Rich* (1996) 46 C.A.4th 1233, 1235, 54 C.R.2d 459 [order denying conservatee's motion for substitution of attorneys, though collateral, was not appealable; citing *Efron v. Kalmanovitz*]; *Ponce-Bran v. Trustees of Calif. State University & Colleges* (1996) 48 C.A.4th 1656, 1661, 56 C.R.2d 358 [order denying indigent's motion to appoint counsel under 42 U.S.C., §2000e-5(f)(1) was not appealable]; *Lester v. Lennane* (2000) 84 C.A.4th 536, 562, 101 C.R.2d 86 [temporary custody order was not appealable under *Sjoberg v. Hastorf*; it merely established terms for custody and visitation, rather than directing payment of money or performance of act].)

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1. General Rule.

9 *Witkin Cal. Proc. Appeal* § 109

[§ 109] General Rule.

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 *Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 C.2d 785, 788, 264 P.2d 5; *Stafford v. Yerge* (1956) 139 C.A.2d 851, 853, 294 P.2d 721; *Tinsley v. Palo Alto Unified School Dist.* (1979) 91 C.A.3d 871, 880, 154 C.R. 591, citing the text; *Nguyen v. Calhoun* (2003) 105 C.A.4th 428, 436, 129 C.R.2d 436, citing the text; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §78.)

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2. Order Denying Intervention or Substitution.

9 Witkin Cal. Proc. Appeal § 110

[§ 110] Order Denying Intervention or Substitution.

Ordinarily, rulings on pleadings and parties are interlocutory. (See *infra*, §154 et seq.) 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. (*Dollenmayer v. Pryor* (1906) 150 C. 1, 3, 87 P. 616 [intervention]; *Bowles v. Superior Court* (1955) 44 C.2d 574, 582, 283 P.2d 704 [order denying leave to file complaint in intervention by person claiming to be member of class on whose behalf representative action was being prosecuted]; *Walsh v. Superior Court* (1928) 92 C.A. 454, 456, 268 P. 442 [substitution of executor of deceased defendant]; *Majors v. Merced* (1962) 207 C.A.2d 427, 432, 24 C.R. 610 [denial of motion to substitute plaintiff as administrator]; *In re Veterans' Industries* (1970) 8 C.A.3d 902, 916, 88 C.R. 303 [denial of leave to intervene]; *Timberidge Enterprises v. Santa Rosa* (1978) 86 C.A.3d 873, 878, 150 C.R. 606 [order striking complaint in intervention]; *Bame v. Del Mar* (2001) 86 C.A.4th 1346, 1363, 104 C.R.2d 183 [order denying intervention was appealable]; *Noya v. A.W. Coulter Trucking* (2006) 143 C.A.4th 838, 841, 49 C.R.3d 584 [despite ex parte nature of motion to intervene, where plaintiffs filed response and trial court ruled on merits in denying motion, order was appealable]; cf. *McClearen v. Superior Court* (1955) 45 C.2d 852, 853, 291 P.2d 449, *infra*, §143); see 15 *Hastings L. J.* 117 [intervention]; 4 *Am.Jur.2d* (2007ed.), Appellate Review §§148, 149; 15 *A.L.R.2d* 336 [intervention]; 16 *A.L.R.2d* 1057 [substitution].

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3. Order Striking Special Answer by Third-Party Defendant.

9 Witkin Cal. Proc. Appeal § 111

[§ 111] Order Striking Special Answer by Third-Party Defendant.

Where a defendant files a cross-complaint against a third party seeking indemnity against the third party, the latter may file a special answer to the complaint itself. (*C.C.P.* 428.70; see 5 *Cal. Proc.* (5th), *Pleading*, §1176.) An order striking that answer is analogous to an order striking a complaint in intervention (see *supra*, §110), and is likewise appealable. (*Administrative Management Services v. Fidelity & Deposit Co.* (1982) 129 C.A.3d 484, 490, 181 C.R. 141.)

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4. Order Denying Certification of Class Action.

9 *Witkin Cal. Proc. Appeal* § 112

[§ 112] Order Denying Certification of Class Action.

(1) *In General.* An order, whatever its form, that has the effect of denying certification as a class action disposes of that action and is an appealable final judgment. (*Morrissey v. San Francisco* (1977) 75 C.A.3d 903, 907, 142 C.R. 527 [reviewing cases and holding that failure to appeal from order precludes review of ruling on appeal from subsequent final judgment against plaintiff]; *Guenther v. Lomas & Nettleton Co.* (1983) 140 C.A.3d 460, 464, 189 C.R. 470; *Prince v. CLS Trans.* (2004) 118 C.A.4th 1320, 1322, footnote 2, 13 C.R.3d 725 [order sustaining demurrer to class action certification was appealable final judgment].)

(2) *Distinction: Order Certifying Partial Class Is Not Appealable.* An order certifying a limited or restricted class was held nonappealable in *Shelley v. Los Angeles* (1995) 36 C.A.4th 692, 42 C.R.2d 529. Plaintiff, whose car had been towed for allegedly parking in a "no parking" zone, brought a class action, asserting that defendant city's hearing procedures were in violation of the city's municipal code. The trial judge issued an order certifying a class but limiting the class to "those persons who requested a hearing and who did not receive a hearing required by [the municipal code] and who did not prevail at the hearing nor obtain recovery of their towing and storage charges." Plaintiff appealed, claiming that the class should have consisted of all persons whose vehicles had been towed during the relevant time, whether or not they requested a hearing. *Held*, appeal dismissed. An order denying a class certification motion in its entirety is appealable, because the order constitutes a "death knell" for the entire action by making further proceedings impracticable. The purpose of the doctrine is to allow an appeal where it appears that, if the propriety of the disposition cannot immediately be reviewed, it can never be reviewed. (36 C.A.4th 696, citing *General Motors Corp. v. Superior Court* (1988) 199 C.A.3d 247, 244 C.R. 776.) Nothing in the record in this case suggests that the trial judge's order sounded a "death knell" or that the litigation would not go forward under the present class configuration. (36 C.A.4th 697.)

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5. Order Striking Out Cross-Complaint.

a. Third Party or Codefendant: Appealable.

9 *Witkin Cal. Proc. Appeal* § 113

[§ 113] Third Party or Codefendant: Appealable.

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 or her. In the leading case of *Howe v. Key System Transit Co.* (1926) 198 C. 525, 534, 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 *Young v. Superior Court* (1940) 16 C.2d 211, 214, 105 P.2d 363; *Honan v. Title Ins. & Trust Co.* (1935) 9 C.A.2d 675, 677, 50 P.2d 1068; *Halterman v. Pacific Gas & Elec. Co.* (1937) 22 C.A.2d 592, 593, 71 P.2d 855; 15 *Hastings L. J.* 112.)

The scope of the rule of the *Howe* case has been clarified by later decisions establishing the test of different parties. 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, 116, 134 P.2d 501 [codefendants]; *Atherley v. MacDonald, Young & Nelson* (1955) 135 C.A.2d 383, 385, 287 P.2d 529 [codefendant]; *B.F.G. Builders v. Weisner & Coover Co.* (1962) 206 C.A.2d 752, 753, 23 C.R. 815 [third party]; *Lerner v. Ehrlich* (1963) 222 C.A.2d 168, 170, 35 C.R. 106, citing the text [third party]; *Cummins v. Gates* (1965) 235 C.A.2d 532, 547, 45 C.R. 417, quoting the text; *Jones v. Ford* (1967) 247 C.A.2d 725, 727, 56 C.R. 18, citing the text [codefendant]; *People v. Clausen* (1967) 248 C.A.2d 770, 776, 57 C.R. 227 [third party].)

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5. Order Striking Out Cross-Complaint.

b. Plaintiff or Third Party Not Served: Not Appealable.

9 *Witkin Cal. Proc. Appeal* § 114

[§ 114] Plaintiff or Third Party Not Served: Not Appealable.

(1) *Cross-Complaint Against Plaintiff*. An order striking out a cross-complaint is ordinarily no more appealable than any other order dealing with pleadings (*infra*, §154 et seq.). 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, 117, 199 P.2d 668; *Evans v. Dabney* (1951) 37 C.2d 758, 760, 235 P.2d 604; *Lemaire v. All City Employees Assn.* (1973) 35 C.A.3d 106, 110, 110 C.R. 507, quoting the text; *Miller v. Silver* (1986) 181 C.A.3d 652, 658, 226 C.R. 479, quoting the text; *Daon Corp. v. Place Homeowners' Assn.* (1989) 207 C.A.3d 1449, 1456, 255 C.R. 448; see 15 *Hastings L. J.* 111; *infra*, §117.)

(2) *Cross-Complaint Against Third Party Not Served*. The same rule of nonappealability applies where the third-party cross-defendant is never served and does not appear. The reasons for the exception (*supra*, §113) are no longer present. (See *Kennedy v. Owen* (1948) 85 C.A.2d 517, 520, 193 P.2d 141 [third parties were named as additional cross-defendants but were not served and did not appear; cross-complaint was therefore treated as against plaintiffs alone, and order striking it was not appealable]; *Mason v. Day* (1960) 187 C.A.2d 307, 308, 9 C.R. 531 [following *Kennedy*].)

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5. Order Striking Out Cross-Complaint.

c. Distinction: Determination of Jurisdiction.

9 *Witkin Cal. Proc. Appeal* § 115

[§ 115] Distinction: Determination of Jurisdiction.

Practical necessity has developed another theory of appealability of an order striking a cross-complaint, and placed a further strain on the doctrine that appealability is wholly statutory (*supra*, §85). In *Keenan v. Dean* (1955) 134 C.A.2d 189, 285 P.2d 300, plaintiff brought an unlawful detainer proceeding in the municipal court. Defendant cross-complained for \$ 50,000 damages for an alleged libel against him and some Does, and the action was then properly transferred to the superior court (demand beyond municipal court jurisdiction). No Does appeared, and the superior court granted a motion to strike the cross-complaint as improper. *Held*, the order was appealable.

(a) Normally, such an order is merely interlocutory and not appealable unless the defendant cross-complains against a third party or codefendant. (134 C.A.2d 191, citing the text; see *supra*, §113). Here, because the cross-complaint named only the plaintiff, it did not come within this exception. But if no appeal were taken, the cross-complaint would be eliminated. The case would then be within the municipal court's exclusive jurisdiction, and the superior court would have to retransfer it. And the municipal court, on the retransfer, would have no jurisdiction to review the correctness of the superior court's order striking the pleading, nor could the appellate department do so on appeal from any municipal court judgment. (134 C.A.2d 191.)

(b) "Thus in a very real sense the order striking the cross-complaint was a final order or judgment. The superior court has finally determined that it has no jurisdiction of the proceeding. Unless the propriety of that order can be reviewed on this appeal its propriety cannot be reviewed at all. The order to strike was tantamount to a dismissal of the action on the cross-demand. ... Since the propriety of such judgment cannot otherwise be reviewed it is necessarily a final judgment and therefore appealable." (134 C.A.2d 192.) (See *Davis v. Taliaferro* (1962) 206 C.A.2d 764, 766, 24 C.R. 197, citing the text; cf. *Wexler v. Goldstein* (1956) 146 C.A.2d 410, 414, 416, 304 P.2d 41, 2 Cal. Proc. (5th), *Jurisdiction*, §409 [disapproving *Keenan* theory that superior court has mandatory duty to retransfer].)

The *Keenan* reasoning was applied in a similar situation in *Uptain v. Duarte* (1988) 206 C.A.3d 1258, 254 C.R. 150. The complaint was in two causes of action: (a) breach of contract causing damages of \$ 2,000; (b) bad faith breach (by denial of the contract's existence), with a prayer for punitive damages of \$ 30,000. The trial court granted partial judgment on the pleadings as to the second count, in effect dismissing that cause of action. Because the remaining cause

of action was within the municipal court's jurisdiction, the trial court ordered the matter transferred to the municipal court. *Held*, the order granting partial judgment on the pleadings was appealable.

"Since an appeal from a judgment on the breach of contract cause of action rendered in the municipal court would be taken to the appellate department of the superior court, which does not have the power to review the propriety of the superior court's order granting partial judgment on the pleadings ... , that superior court order must be reviewed on this appeal or it will not be reviewed at all. As in *Keenan*, '[t]he superior court has finally determined that it has no jurisdiction of the proceeding.' ... Thus, in effect, the order granting partial judgment on the pleadings was a final judgment of dismissal as to the second cause of action for bad faith breach of contract. That order is therefore appealable." (206 C.A.3d 1262.) (Cf. *Eckhart v. Genuine Parts Distributors* (1997) 53 C.A.4th 1340, 1344, 62 C.R.2d 487 [partial dismissal order, despite transfer of remainder of case to municipal court, remained nonappealable until incorporated in a final judgment; disagreeing with *Uptain*].)

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5. Order Striking Out Cross-Complaint.

d. Distinction: Cross-Complainant Not Named in Action.

9 *Witkin Cal. Proc. Appeal* § 116

[§ 116] Distinction: Cross-Complainant Not Named in Action.

Even though the cross-complaint is against the plaintiff, an order striking it may be final and appealable where the cross-complainant was not named in the complaint. In *Miller v. Silver* (1986) 181 C.A.3d 652, 226 C.R. 479, plaintiff doctor sued defendant wife, his patient, for fees. Defendant wife and her husband cross-complained for medical malpractice. Plaintiff's motion for summary judgment against the cross-complainants was granted, and they appealed. *Held*, both were entitled to appeal.

(a) The summary judgment against cross-complainant husband, who was not a named defendant in the action, was final as to him. (181 C.A.3d 658.)

(b) Ordinarily, dismissal of a cross-complaint by a defendant against the plaintiff is a nonappealable ruling on pleadings (181 C.A.3d 658, citing the text), and cross-complainant wife cannot appeal from the summary judgment against her. Here, however, the wife's cause of action for malpractice "is inextricably intertwined with her husband's claim for loss of consortium," and "judicial economy dictates that her appeal as well is properly before us." (181 C.A.3d 658.)

West's Key Number Digest, Appeal and Error 78(2), 87(3), 91(6)

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6. Partial Determination of Issues.

a. General Rule: Partial Judgment Is Not Appealable.

1. Complaint and Cross-Complaint.

9 *Witkin Cal. Proc. Appeal* § 117

[§ 117] Complaint and Cross-Complaint.

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 not appealable.

Thus, 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; *Sjoberg v. Hastorf* (1948) 33 C.2d 116, 199 P.2d 668 [same result where appeal was taken from order dismissing cross-complaint]; *Tsarnas v. Bailey* (1960) 179 C.A.2d 332, 337, 3 C.R. 629 [recognizing the rule, citing the text, but finding a way to save the appeal; see *infra*, §126]; *Crocker-Anglo Nat. Bank v. Kuchman* (1961) 194 C.A.2d 589, 596, 15 C.R. 230; *Verdier v. Verdier* (1962) 203 C.A.2d 724, 731, 22 C.R. 93; *Fleuret v. Hale Const. Co.* (1970) 12 C.A.3d 227, 230, 90 C.R. 557 [same result where appeal was taken from judgment entered on cross-complaint before determination of issues raised by complaint]; *Wilson v. Wilson* (1978) 78 C.A.3d 226, 230, 144 C.R. 180; *American Nat. Bank v. Stanfill* (1988) 205 C.A.3d 1089, 1095, 252 C.R. 861, citing the text; *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 C.A.3d 49, 59, 271 C.R. 410, citing the text [trial judge has no authority to sever complaint from cross-complaint remaining to be tried merely to permit plaintiff to immediately appeal from order dismissing complaint]; *American Alternative Energy Partners II v. Windridge* (1996) 42 C.A.4th 551, 556, 49 C.R.2d 686, citing the text; *ECC Const. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 C.A.4th 994, 1002, 19 C.R.3d 340 [in action by construction company against homeowners association, defendant could not appeal from judgment on cross-complaint while proceedings remained pending on complaint]; cf. *Krug v. Meehan* (1951) 106 C.A.2d 554, 555, 235 P.2d 410 [no appeal could be taken until issues raised by cross-complaint and answer to it were determined, notwithstanding that original complaint was dismissed]; *Stubblefield Const. Co. v. San Bernardino* (1995) 32 C.A.4th 687, 702, footnote 8, 38 C.R.2d 413 [technical presence of cross-complaint did not violate one final judgment rule where it appeared that cross-complaint was tried with cause of action submitted to jury, was necessarily abandoned or decided adversely to respondent, and was inadvertently omitted from judgment].)

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a. General Rule: Partial Judgment Is Not Appealable.

2. Multiple Causes of Action.

9 *Witkin Cal. Proc. Appeal* § 118

[§ 118] Multiple Causes of Action.

If the purported judgment is on fewer than all of the causes of action, it clearly fails to meet the requirements of the one final judgment rule. This strict rule was applied in the two *Mather* cases: *Mather v. Mather* (1936) 5 C.2d 617, 618, 55 P.2d 1174, and *Greenfield v. Mather* (1939) 14 C.2d 228, 233, 93 P.2d 100. 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 January 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.

(a) "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." (*Mather v. Mather, supra*, 5 C.2d 618.)

(b) 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, supra*, 14 C.2d 233.)

In *Crofoot v. Crofoot* (1955) 132 C.A.2d 794, 283 P.2d 283, plaintiff sued on two causes of action for separate maintenance, a third for fraud in procuring a property settlement, and a fourth for money lent. Defendant pleaded estoppel based on a Mexican divorce. In a trial of this special issue under C.C.P. 597, it was determined in favor of defendant, judgment was entered accordingly, and plaintiff appealed. *Held*, appeal dismissed. Both parties were under the impression that the decision under C.C.P. 597 was an appealable judgment. But this is so only where the defense goes to the entire case of the plaintiff. Where it merely goes to some issues or causes of action, the correct procedure is to enter a minute order and then proceed to trial of the remaining issues. (See 7 Cal. Proc. (5th), Trial, §152.) Here, the

decision was only that the first two causes were barred, and there could be no final appealable judgment until trial and determination of the issues raised by the third and fourth causes of action. (132 C.A.3d 798.)

A number of decisions have applied the *Mather* rule, resulting in dismissal of the appeals. (See *Wilson v. Wilson* (1950) 96 C.A.2d 589, 590, 596, 216 P.2d 104 [final judgment on counts 2 and 3, but interlocutory judgment on count 1; "no final judgment on any count should have been entered until the first count also was finally disposed of"]; *Murphy v. Fong Shuck* (1957) 151 C.A.2d 64, 69, 311 P.2d 80 [nonsuit on some counts, jury verdict and "judgment" on others; neither nonsuit orders nor judgment were final judgments]; *King v. Goldberg* (1958) 159 C.A.2d 543, 544, 323 P.2d 1035 [after verdict and judgment on both counts, judge granted new trial on damages of second count; held, new trial order set aside entire judgment]; *Johnson v. Master Fan Corp.* (1960) 181 C.A.2d 569, 571, 5 C.R. 187 [personal injuries, negligence (count 1) and violation of safety order (count 2); judgment on demurrer on count 2 was improper and appeal from it was dismissed]; *Shank v. Los Gatos Associates* (1961) 193 C.A.2d 824, 825, 14 C.R. 726; *Plunkett v. Hill* (1962) 209 C.A.2d 85, 87, 25 C.R. 816 [trial of special defense under C.C.P. 597, judgment dismissing one count]; *Turner v. Los Angeles Realty Bd.* (1965) 233 C.A.2d 755, 758, 43 C.R. 919, citing the text; *McMillin v. Ventura Savings & Loan Assn.* (1971) 15 C.A.3d 588, 589, 93 C.R. 359; *U.S. Financial v. Sullivan* (1974) 37 C.A.3d 5, 11, 112 C.R. 18, *infra*, §128, citing the text [dismissal on demurrer of some but not all counts should be by minute order; purported final judgment is premature and not appealable]; *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 435, 160 C.R. 899, citing the text; *Don Jose's Restaurant v. Truck Ins. Exchange* (1997) 53 C.A.4th 115, 116, 61 C.R.2d 370, *infra*, §121 [stipulation to dismiss some causes of action without prejudice; no final judgment]; *Eckhart v. Genuine Parts Distributors* (1997) 53 C.A.4th 1340, 1344, 62 C.R.2d 487 [partial dismissal order, despite transfer of remainder of case to municipal court, remained nonappealable until incorporated in final judgment]; see 31 Cal. L. Rev. 90; cf. *People v. Rodoni* (1966) 243 C.A.2d 771, 774, 52 C.R. 857 [applying theory of multiple counts to order in condemnation action dismissing complaint as to only one of several parcels and directing trial as to others].)

Despite this formidable list of cases, the *Mather* rule has lost most of its sting, as a result of several ingenious theories approved in later cases:

(a) The reviewing court in a proper case may itself amend the judgment to make it a final determination of all the issues or causes. (See *infra*, §124.)

(b) The reviewing court may, in its discretion, give the equivalent of appellate review of the partial determination by issuing mandamus on the ground that the aggrieved party has no adequate remedy by appeal. (See *Vasquez v. Superior Court* (1971) 4 C.3d 800, 807, 94 C.R. 796, 484 P.2d 964, 8 Cal. Proc. (5th), *Extraordinary Writs*, §135.) And even though no writ is sought, the court may treat the record on appeal as a petition for mandamus. (See *infra*, §128.)

(c) The reviewing court may, in its discretion, consider the appeal when appellate jurisdiction depends on a court-made policy rule and its enforcement would result in injustice, a waste of time, or economic hardship. (See *infra*, §133.)

(d) The reviewing court may consider the appeal where the judge orders a severance for trial. (See *infra*, §134.)

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3. Order in Bifurcated Trial.

9 Witkin Cal. Proc. Appeal § 119

[§ 119] Order in Bifurcated Trial.

C.C.P. 598 allows a bifurcation of issues for trial (see 7 *Cal. Proc.* (5th), *Trial*, §§154, 156), and a determination of the issue first tried is not an appealable order while other issues remain to be tried; the appeal is taken from the final judgment, which is entered "in the same manner and with the same effect as if all the issues in the case had been tried at one time" (*C.C.P. 598*). (See *Plaza Tulare v. Tradewell Stores* (1989) 207 *C.A.3d* 522, 524, 254 *C.R.* 792; on discretionary appeal allowable in family law cases, see *infra*, §134.)

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a. General Rule: Partial Judgment Is Not Appealable.

4. Appeal in Severed Trial.

9 *Witkin Cal. Proc. Appeal* § 120

[§ 120] Appeal in Severed Trial.

(1) *Former Theory: Appeal Allowed.* In *Schonfeld v. Vallejo* (1975) 50 C.A.3d 401, 123 C.R. 669, plaintiff sued defendant city and its former city manager on separate causes of action for fraud, breach of contract, and declaratory relief. In a pretrial order, the trial judge severed the first cause of action (fraud) from the fourth (declaratory relief). He then sustained demurrers to the first cause and entered judgment of dismissal on that cause, without any determination of the fourth cause. *Held*, the judgment was appealable.

(a) The problem in this case was whether the severance statute (C.C.P. 1048; see 4 Cal. Proc. (5th), *Pleading*, §377) justifies the recognition of a new exception to the one final judgment rule under appropriate circumstances; it does. Under the severance statute, the trial judge had broad discretion to sever causes of action; and his discretion was not abused when he severed the declaratory relief cause that raised issues separate and independent from the fraud issue. (50 C.A.3d 418.)

(b) Because the first two causes of action were properly severed, "a final judgment resulted, even though the independent fourth cause of action is still pending between the same parties." (50 C.A.3d 419.) This is "the more reasonable and efficient solution," particularly because both parties preferred to have the matter determined on the merits. (50 C.A.3d 419, footnote 15.)

(c) "The test is whether the circumstances here presented are so unusual that postponement of the appeal until the final judgment on [the] fourth cause of action would cause so serious a hardship and inconvenience as to require us to augment the number of existing exceptions." (50 C.A.3d 418.)

Later decisions interpreted this statement as requiring that the severed cause of action be separate and independent from the remaining causes of action in order for judgment on it to be immediately appealable. (See, e.g., *Armstrong Petroleum Corp. v. Superior Court* (1981) 114 C.A.3d 732, 736, 170 C.R. 767.)

(2) *Severance Theory Rejected.* The severance theory enunciated in *Schonfeld*, and limited by later Court of Appeal

decisions, was totally rejected by the Supreme Court in *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 29 C.R.2d 804, 872 P.2d 143. Plaintiff property owners applied for a permit to build a residence on their undersized parcel. When defendant county denied their application on the ground that plaintiffs could combine their parcel with adjoining parcels, plaintiffs commenced the present action, alleging separate causes of action for (a) mandamus, (b) damages for inverse condemnation, (c) damages for violation of civil rights, (d) declaratory relief, and (e) injunctive relief. The first, fourth, and fifth causes of action were ordered severed and tried separately, and the trial judge filed a judgment as to those causes of action. Defendant appealed. *Held*, the judgment was not appealable, although the court would nevertheless review the merits of the controversy by treating the appeal as a writ application due to unusual circumstances (see *infra*, §128).

(a) In announcing its new exception to the one final judgment rule for judgments entered on severed causes of action, *Schonfeld v. Vallejo* purported to follow the examples of other judicially created exceptions, i.e.: (1) a judgment determining all issues as to one or more parties may be treated as final even though issues remain to be resolved between other parties; and (2) the order appealed from may be amended so as to convert it into a judgment encompassing actual determinations of all remaining issues. However, those examples are consistent with the codification of the one final judgment rule in *C.C.P. 904.1(a)*, which authorizes appeal from judgments, except interlocutory judgments. In other words, "[j]udgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, have the finality required by section 904.1, subdivision (a). A judgment that disposes of *fewer* than all of the causes of action framed by the pleadings, however, is necessarily 'interlocutory' ... and not yet final, as to any parties between whom another cause of action remains pending." (7 C.4th 741.)

(b) Before *Schonfeld*, the settled rule in California was that a judgment disposing of fewer than all causes of action between the parties was not appealable even if those causes of action were separate from those remaining to be tried. *Schonfeld* attempted to justify its departure from the settled rule on the ground that no case had dealt with application of the one final judgment rule to a cause of action severed under *C.C.P. 1048*. However, that section was not intended to affect finality for purposes of appeal. (7 C.4th 741.)

(c) *Schonfeld* also relied on *F.R. Civ. P., Rule 54(b)*, which provides that separate appealable judgments may be rendered on counts that present separate claims for relief. However, the federal experience under that rule prior to its amendment in 1948 demonstrates the drawbacks of a rule that simply declares judgments on separate claims to be appealable, i.e., difficulty in determining which of several multiple claims are sufficiently separate from the others to qualify for appealability. As a result, losing parties were forced to appeal immediately to avoid waiving rights to appellate review. This same problem arises under the *Schonfeld* holding, which based appealability on whether postponement of appeal until final disposition of the entire matter would result in "serious hardship and inconvenience." (7 C.4th 742.)

(d) The California judicial system provides another, more efficient method for obtaining a preliminary determination whether there are unusual circumstances that make appellate review of an interlocutory judgment appropriate, i.e., petition for mandamus (see *infra*, §128). (7 C.4th 742.)

(e) "Accordingly, we hold that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining. Statements to the contrary in *Schonfeld* ... and its progeny are disapproved. A petition for a writ, not an appeal, is the authorized means for obtaining review of judgments and orders that lack the finality required by" *C.C.P. 904.1(a)*. (7 C.4th 743, disapproving contrary statements in *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 160 C.R. 899; *James Talcott v. Short* (1979) 100 C.A.3d 504, 161 C.R. 63; *Highland Dev. Co. v. Los Angeles* (1985) 170 C.A.3d 169, 215 C.R. 881; *National Auto. & Cas. Ins. Co. v. Frankel* (1988) 203 C.A.3d 830, 250 C.R. 236; *Bank of the Orient v. Tiburon* (1990) 220 C.A.3d 992, 269 C.R. 690; *Korean United Presbyterian Church v. Presbytery of the Pac.* (1991) 230 C.A.3d 480, 281 C.R. 396; *Day v. Papadakis* (1991) 231 C.A.3d 503, 282 C.R. 548; *Garat v. Riverside* (1991) 2 C.A.4th 259, 276, 3

C.R.2d 504.) (See *Nerhan v. Stinson Beach County Water Dist.* (1994) 27 *C.A.4th* 536, 540, 33 *C.R.2d* 10, *infra*, §148 [under *Morehart*, order denying petition for mandamus was not appealable while action for damages was still pending between parties]; *Cohan v. Thousand Oaks* (1994) 30 *C.A.4th* 547, 554, 35 *C.R.2d* 782 [appeal from order denying petition for mandamus, which was defective because other causes of action remained unresolved, was treated as petition for mandamus on finding of unusual circumstances; citing *Morehart* and distinguishing *Nerhan*]; cf. *Cobb v. University of Southern Calif.* (1995) 32 *C.A.4th* 798, 802, 38 *C.R.2d* 543, *infra*, §192 [distinguishing *Morehart*; order partially granting new trial was appealable despite unresolved issues].)

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5. Stipulation To Dismiss Some Causes of Action Without Prejudice.

9 Witkin Cal. Proc. Appeal § 121

[§ 121] Stipulation To Dismiss Some Causes of Action Without Prejudice.

In *Don Jose's Restaurant v. Truck Ins. Exchange* (1997) 53 C.A.4th 115, 61 C.R.2d 370, the trial judge granted defendant's motion for summary adjudication of 2 of 11 causes of action. The parties stipulated to a dismissal of the remaining causes of action, without prejudice and with a waiver of the applicable statutes of limitations. The parties further agreed that if plaintiffs' subsequent appeal of the judgment granting defendant's motion for summary adjudication was successful and the matter was remanded, the action would proceed on all the causes of action set forth in the latest complaint, but if plaintiff's appeal was not successful, plaintiffs would dismiss their remaining causes with prejudice. Plaintiffs then appealed. *Held*, appeal dismissed.

(a) Under the one final judgment rule, an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately or may be characterized as "separate and independent" from those remaining. (53 C.A.4th 116.) This is not a case in which the judgment has substantively finally disposed of all issues and the appellate court may be willing to overlook the absence of a formal piece of paper embodying that disposition. Nor does this case fit the collateral judgment exception to the one final judgment rule; here, the two causes of action disposed of were integral to plaintiffs' entire case and necessary to a correct determination of the remaining causes of action. (53 C.A.4th 117.)

(b) In addressing the problem of a disposition of less than all causes of action, the Supreme Court has indicated, albeit indirectly, that there will be no exceptions when parties craft stipulations that allow remaining causes of action to survive to trial. Thus, the court has noted an exception to the one final judgment rule "in cases in which the trial court's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial." (53 C.A.4th 118, quoting *Tenhet v. Boswell* (1976) 18 C.3d 150, 154, 133 C.R. 10, 554 P.2d 330.) The stipulation here "virtually exudes an intention to retain the remaining causes of action for trial." (53 C.A.4th 118.)

(c) The one final judgment rule does not allow contingent causes of action to exist in a kind of "appellate

netherworld." The substance of this case is that there was a disposition of only 2 of 11 causes of action, with the remaining causes of action left for trial. It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists. (53 C.A.4th 118.)

The holding in *Don Jose* was followed in *Jackson v. Wells Fargo Bank* (1997) 54 C.A.4th 240, 62 C.R.2d 679. The trial court granted defendant's motion for summary judgment or summary adjudication as to all causes of action except one for malicious prosecution; the parties stipulated to a dismissal of the malicious prosecution cause of action without prejudice, with the conditions that plaintiff would retain the right to file a new complaint for malicious prosecution and any cause of action found viable by the appellate court and that defendant would waive any statute of limitations; and a so-called final judgment was entered. *Held*, appeal dismissed for lack of finality. The "final judgment" is patently no such thing by the very terms of the stipulation. Plaintiff still has his malicious prosecution cause of action, and he still has his right of appellate review regarding his other seven causes of action at the appropriate time. (54 C.A.4th 244.)

In *Four Point Entertainment v. New World Entertainment, Ltd.* (1997) 60 C.A.4th 79, 70 C.R.2d 82, a summary adjudication of part of the issues was deemed to be a "final judgment," which was then appealed while the remaining causes of action were dismissed pursuant to a stipulation that the appeal would not prejudice either party's future right to prosecute the dismissed causes of action. The court, following *Don Jose* and *Jackson*, condemned the procedure as an improper method of skirting the one final judgment rule and conferring appellate jurisdiction where none exists. (60 C.A.4th 82, stating that *Building Industry Assn. of Southern Calif. v. Camarillo* (1986) 41 C.3d 810, 226 C.R. 81, 718 P.2d 68, *supra*, §46, had been implicitly overruled by *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 29 C.R.2d 804, 872 P.2d 143, *supra*, §120.) (See *Hoveida v. Scripps Health* (2005) 125 C.A.4th 1466, 1469, 23 C.R.3d 667 [Court of Appeal lacked jurisdiction to hear appeal of summary adjudications related to physician's breach of contract action, where action itself was dismissed without prejudice pursuant to stipulation to permit immediate appeal of summary adjudications; following *Don Jose*]; on effect of dismissal with prejudice, see *infra*, §135.)

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b. Exceptions to Rule: Partial Judgment Is Appealable.

1. Different Parties.

9 *Witkin Cal. Proc. Appeal* § 122

[§ 122] Different Parties.

In *Wilson v. Wilson* (1950) 96 C.A.2d 589, 596, 216 P.2d 104, the court pointed out that, in the federal practice, separate appealable judgments may be rendered on counts that are separate claims for relief. (See *F.R. Civ. P., Rule 54(b)*; *Reeves v. Beardall* (1942) 316 U.S. 283, 62 S.Ct. 1085, 1086, 86 L.Ed. 1478, 1479; *Sears, Roebuck & Co. v. Mackey* (1956) 351 U.S. 427, 76 S.Ct. 895, 900, 100 L.Ed. 1297, 1306; *Cold Metal Process Co. v. United Engineering & Foundry Co.* (1956) 351 U.S. 445, 76 S.Ct. 904, 909, 100 L.Ed. 1311, 1318; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §78; 10 *Federal Practice & Procedure* (Wright & Miller) §2656; 2 *Federal Procedure*, L.Ed., §3:146 et seq.; 31 *Cal. L. Rev.* 90; 44 *Cal. L. Rev.* 952; 65 *Harv. L. Rev.* 1245; 70 *Harv. L. Rev.* 141; 71 *Harv. L. Rev.* 978; 2 *U.C.L.A. L. Rev.* 545.) But the court in *Wilson* added: "In no California decision, however, has such exception been recognized." (96 C.A.2d 596.)

The exception, in limited form, was recognized in *Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 C.2d 785, 264 P.2d 5. Plaintiff, the insurance carrier of an employer, sued a third-party tortfeasor, stating (a) three causes of action on behalf of the employer and (b) 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 *Mather v. Mather* (1936) 5 C.2d 617, 55 P.2d 1174, *Greenfield v. Mather* (1939) 14 C.2d 228, 93 P.2d 100, and similar cases (*supra*, §118) was apparently grounded on the theory that 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 "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.) (See 1 U.C.L.A. L. Rev. 593.)

In *Wilson v. Sharp* (1954) 42 C.2d 675, 268 P.2d 1062, the principle underlying appealability of an order striking out a cross-complaint (supra, §113) was applied to an order striking out one count of a complaint. Plaintiff's complaint was in two counts, and only in the second was recovery claimed against defendant K. K's motion to strike that count was granted, and plaintiff appealed from the order. *Held*, because the order removed the only cause of action alleged against K and left no issues to be determined between K and plaintiff, it was appealable as a final judgment. (42 C.2d 677.) (See *Justus v. Atchison* (1977) 19 C.3d 564, 568, 139 C.R. 97, 565 P.2d 122, citing *Wilson*; *Dominguez v. Alhambra* (1981) 118 C.A.3d 237, 241, 173 C.R. 345, citing the text; *Kuperman v. Great Republic Life Ins. Co.* (1987) 195 C.A.3d 943, 947, 241 C.R. 187 [order striking third amended complaint left no issue against one defendant].)

When there is a judgment on a cross-complaint resolving all causes of action against the plaintiff and the cross-defendant in their individual capacities, the pendency of a complaint raising solely derivative causes of action does not prevent that judgment from being final and thus appealable. (*First Sec. Bank of Calif. v. Paquet* (2002) 98 C.A.4th 468, 472, 119 C.R.2d 787 [minority shareholders sued bank in derivative shareholder action, and bank cross-complained against plaintiffs in their individual capacities].)

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9 Witkin Cal. Proc. Appeal § 123

[§ 123] Appeal in Case Consolidated for Trial.

In *Stubblefield Const. Co. v. San Bernardino* (1995) 32 C.A.4th 687, 38 C.R.2d 413, the one final judgment rule, as construed in *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 29 C.R.2d 804, 872 P.2d 143, supra, §120, was held not to bar appeal from a judgment on a cause of action that had been consolidated with another cause of action for trial purposes only. Plaintiffs' consolidation motion requested that the two cases be consolidated for trial, and the consolidation order specified that the consolidation was for trial only. Separate findings and judgments were therefore required in each case. Also, the two causes of action were ordered to be tried together only insofar as the cause from the second case related to plaintiffs' damages in the cause from the first case, and the trial judge severely limited plaintiffs' use of evidence on the second cause of action. (32 C.A.4th 701.)

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aa. In General.

9 *Witkin Cal. Proc. Appeal* § 124

[§ 124] In General.

(1) *Nature of Rule.* A highly desirable solution to the problem set forth in *Mather v. Mather* (1936) 5 C.2d 617, 55 P.2d 1174, and *Greenfield v. Mather* (1939) 14 C.2d 228, 93 P.2d 100, supra, §118, was reached in *Gombos v. Ashe* (1958) 158 C.A.2d 517, 322 P.2d 933. Plaintiffs sued for personal injuries arising out of an automobile accident. The first and second causes sought compensatory damages for personal injuries to the wife, injuries to the husband's car, and loss of consortium; the third sought punitive damages based on defendant's drunken driving. As in the *Mather* cases, the trial judge sustained a demurrer to the third cause, the clerk entered judgment of dismissal as to it, plaintiffs appealed from that judgment, and the case then went to trial, resulting in judgment for plaintiffs on the first and second causes (with satisfaction entered and no appeal taken). *Held*, there was no final judgment.

(a) The appeal *could* be dismissed with instructions to the trial judge to amend the interlocutory judgment on the first two causes to include a disposition of the third cause, following which plaintiffs might appeal from the severable amended portion and review the order sustaining the demurrer to that third cause. But this procedure would be time-wasting and would necessitate rebriefing. (158 C.A.2d 521.)

(b) A better, fairer solution is available on appeal. "[I]n the interests of justice and to prevent unnecessary delay we order that the judgment ... be and it is amended by adding thereto a paragraph dismissing the third cause of action based on the sustaining of the demurrer without leave to amend." (158 C.A.2d 524.) This supplied the missing element and gave a final judgment on all counts. The remaining defect--notice of appeal filed before entry of judgment but after the trial judge's intended ruling was announced--was curable under the liberal rule on premature appeals (see *infra*, §620 et seq.).

Tsarnas v. Bailey (1960) 179 C.A.2d 332, 3 C.R. 629, *infra*, §126, by placing emphasis on certain facts, implied that the curative step may not be uniformly taken. The opinion pointed out that the defect was raised by the appellate court on its own motion, and that the *Gombos* procedure was adopted "because the court expressed its decision in its order, because the findings and conclusions of law clearly show that the court's decision was in favor of the cross-defendant,

because the matter of the cross-complaint has been briefed on this appeal and no motion to dismiss has been made." (179 C.A.2d 337.) It would hardly seem that the creation of appellate jurisdiction by appellate revision of a nonappealable judgment should be contingent on inaction of the respondent; inaction can neither confer a nonexistent jurisdiction nor divest one that exists. (See 2 Cal. Proc. (5th), *Jurisdiction*, §13 et seq.)

(2) *Application*. Later cases applied the *Gombos* rule with no qualifications, as a routine procedure. (See *Shepardson v. McLellan* (1963) 59 C.2d 83, 89, 27 C.R. 884, 378 P.2d 108, citing the text; *Tenhet v. Boswell* (1976) 18 C.3d 150, 154, 133 C.R. 10, 554 P.2d 330 ["This method of preserving appeals has been routinely followed in subsequent cases"]; *Varjabedian v. Madera* (1977) 20 C.3d 285, 289, footnote 1, 142 C.R. 429, 572 P.2d 43; *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 921, 167 C.R. 831, 616 P.2d 813; *Sullivan v. Delta Air Lines* (1997) 15 C.4th 288, 309, 63 C.R.2d 74, 935 P.2d 781, *infra*, §125 [amendments were directed to take effect nunc pro tunc as of date judgment was purportedly rendered]; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 C.A.2d 212, 219, footnote 1, 64 C.R. 915; *California State Emp. Assn. v. California* (1973) 32 C.A.3d 103, 106, footnote 1, 108 C.R. 60, citing the text; *Nystrom v. First Nat. Bank of Fresno* (1978) 81 C.A.3d 759, 763, 146 C.R. 711; *Donald J. v. Evna M.* (1978) 81 C.A.3d 929, 935, 147 C.R. 15 ["In accordance with standard practice we will amend the trial court's judgment to reflect the dismissal of these two matters"]; *National Indem. Co. v. Demanes* (1978) 86 C.A.3d 155, 161, 150 C.R. 117, quoting the text; *Wilson v. Household Finance Corp.* (1982) 131 C.A.3d 649, 651, 182 C.R. 590, citing the text; *Easton v. Strassburger* (1984) 152 C.A.3d 90, 110, 199 C.R. 383, citing the text; *Randle v. San Francisco* (1986) 186 C.A.3d 449, 454, 230 C.R. 901; *Swain v. California Cas. Ins. Co.* (2002) 99 C.A.4th 1, 5, 120 C.R.2d 808, citing the text [summary judgment order stating "judgment shall be entered forthwith" was amended to state that judgment is entered nunc pro tunc on plaintiff's complaint and that judgment is entered on defendant's cross-complaint].)

The *Gombos* theory has been frequently applied in two situations involving the partial determination of issues: multiple causes of action (*supra*, §118 and *infra*, §125) and complaint and cross-complaint (*supra*, §117 and *infra*, §126). And in *Fraser-Yamor Agency v. Del Norte* (1977) 68 C.A.3d 201, 137 C.R. 118, the rule was applied where a purported final judgment failed to dispose of a complaint in intervention. Citing *Gombos*, *Tsarnas*, and *Shepardson*, *supra*, the court said: "We do not deem it advisable, however, to dismiss the appeal on that basis because it is apparent from the orders of the trial court that it determined that the auditor was not to take anything by his complaint in intervention. The parties have not made a point of the omission to dispose of the complaint in intervention but have presented the issues on appeal under the assumption that the auditor was denied any relief on his complaint in intervention. Accordingly, in the interests of justice and to prevent unnecessary delay we order ... that the 'final judgment' be amended by including therein an order that the auditor is entitled to no relief on his complaint in intervention." (68 C.A.3d 208.)

(3) *Distinction Where Order Does Not Contemplate Final Determination*. Exercise of power under the *Gombos* theory is obviously inappropriate where no final determination of the rights of the parties was contemplated. In *Gibson v. Savings & Loan Commr.* (1970) 6 C.A.3d 269, 85 C.R. 799, the judge made orders summarily denying an alternative writ of administrative mandamus and a temporary stay without prejudice, making it clear that petitioner could amend his petition and seek relief by ordinary mandamus or by a statutory remedy. Thus, the judge kept the petition before him for possible further action, and to amend the order to make it a final judgment, thereby permitting an appeal by petitioner, would be contrary to the judge's expressed intention. (6 C.A.3d 272.)

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bb. Multiple Causes of Action.

9 *Witkin Cal. Proc. Appeal* § 125

[§ 125] Multiple Causes of Action.

In *Sullivan v. Delta Air Lines* (1997) 15 C.4th 288, 63 C.R.2d 74, 935 P.2d 781, the court applied the theory of *Gombos v. Ashe* (1958) 158 C.A.2d 517, 322 P.2d 933, *supra*, §124, where the trial judge's failure to address all the causes of action in the judgment was either inadvertent or waived. Plaintiff filed an action against his employer on multiple legal theories arising from his termination. The jury returned special verdicts for plaintiff on three of the causes of action, awarding damages for emotional distress totaling \$ 275,000. In addition, the trial judge granted defense motions for summary judgment on seven causes of action, and the jury returned special verdicts for the defendant on three causes of action. The jury deadlocked on the remaining cause of action, regarding which the trial judge declared a mistrial. The trial judge then rendered judgment on the three verdicts in plaintiff's favor, but failed to render judgment either on the defense verdicts or on its orders for summary judgment. He granted plaintiff's motion for a new trial on the cause of action on which the jury deadlocked. Defendant appealed from the judgment, from the new trial order, and from denial of its motion for judgment notwithstanding the verdict. Pending appeal plaintiff died and his special administrator was substituted as plaintiff. The Court of Appeal reversed on the ground that the award of damages for pain and suffering did not survive. *Held*, in proceeding to the merits, dismissal of the appeal is not required. The trial court judgment's lack of finality may be cured by amending that judgment.

(a) A judgment that disposes of fewer than all the causes of action framed by the complaint is not final in the fundamental sense as to any parties between whom another cause of action remains pending. (15 C.4th 307, citing *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 741, 29 C.R. 804, 872 P.2d 143, *supra*, §120.) This is such a case. The judgment purportedly rendered by the trial judge did not dispose of the 10 causes of action on which defendant prevailed by jury verdicts or summary judgment, nor did it dispose of the cause of action that was set for retrial and thus remained pending between the parties. (15 C.4th 307.)

(b) An appeal from a judgment that is not final violates the one final judgment rule and must therefore be dismissed, unless the violation can be cured by amending the judgment. Here it can be so cured. When the trial judge's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the

remaining causes of action for trial, the appellate court has discretion to preserve the appeal by amending the judgment to reflect the manifest intent of the trial judge. (15 C.4th 307.)

(c) The trial judge did not deliberately reserve for future determination the 10 causes of action on which defendant prevailed; on the contrary, the judge entertained and ruled on defense motions for summary judgment as to seven causes of action and submitted the remaining three to the jury. Failure to address these 10 causes of action in the ensuing judgment was thus plainly the result of inadvertence. Nor is there any doubt what the judgment would have provided on these causes of action. The trial judge sustained the seven defense motions for summary judgment in question, and the jury returned defense verdicts on the remaining three causes of action. The omission of these 10 causes of action may therefore be cured by directing the judgment to be amended to reflect the rendition of judgment for defendant on each. (15 C.4th 308.)

(d) A different disposition is appropriate for the cause of action on which the jury deadlocked. At the time the retrial was ordered, plaintiff could have voluntarily dismissed that cause of action with prejudice. Acting in his stead, his special administrator now does so in her reply brief in this court, by waiving any right to a retrial. When a party expressly waives on appeal the right to litigate an unresolved cause of action that deprived the judgment as entered of finality, the appellate court may give effect to the waiver by amending the judgment to reflect a dismissal of that cause of action with prejudice. (15 C.4th 308.)

(e) None of the foregoing omissions from the judgment, moreover, affect the sole issue addressed by the Court of Appeal and before this court for review, i.e., whether the award of damages for pain and suffering survives the death of the decedent. That issue has been fully briefed and argued, and it is ready for decision. Under the circumstances, it is appropriate for the court to exercise its discretion to direct that the judgment be amended in the foregoing respects in the interests of justice and to avoid unnecessary delay, and that these amendments take effect nunc pro tunc as of the date that the judgment was purportedly rendered. (15 C.4th 309.)

The *Gombos* theory was also applied in *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 342 P.2d 987. Plaintiffs sued on four counts. The jury brought in verdicts against them on the first, and the trial judge granted nonsuits on the second, third, and fourth. Plaintiffs appealed, and both parties assumed that the appeal was proper until the question was raised at oral argument. It then appeared that the only judgment actually entered was on the verdicts, and the notice of appeal referred only to the judgment, and not to the minute order granting nonsuits. The court pointed out that there was no final judgment, because the judgments on the verdicts did not purport to embrace a final disposition of the entire cause, being confined expressly to the first count and not reciting any disposition of the second, third, and fourth. However, "we order that the judgments of August 3, 1956, be and they are amended by adding thereto a paragraph dismissing the second, third and fourth causes of action based upon the orders granting nonsuits thereto." (172 C.A.2d 703.) The notice of appeal was then treated as a notice of appeal from the judgments as thus amended. (172 C.A.2d 703.) (See *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 921, 167 C.R. 831, 616 P.2d 813; *Kennedy v. Bank of America* (1965) 237 C.A.2d 637, 643, 47 C.R. 154; *Davies v. Krasna* (1966) 245 C.A.2d 535, 539, 54 C.R. 37; *Oakes v. Suelynn Corp.* (1972) 24 C.A.3d 271, 281, 100 C.R. 838; *Lostritto v. Southern Pac. Trans. Co.* (1977) 73 C.A.3d 737, 750, 140 C.R. 905; *Prichard v. Liberty Mut. Ins. Co.* (2000) 84 C.A.4th 890, 901, 101 C.R.2d 298.)

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cc. Complaint and Cross-Complaint.

9 *Witkin Cal. Proc. Appeal* § 126

[§ 126] Complaint and Cross-Complaint.

The theory of *Gombos v. Ashe* (1958) 158 C.A.2d 517, 322 P.2d 933, supra, §124, has also been applied to save an ineffectual appeal in the complaint and cross-complaint situations (supra, §117). In *Tsarnas v. Bailey* (1960) 179 C.A.2d 332, 3 C.R. 629, the trial judge made a minute order for judgment for plaintiff on the complaint, and further ordered that defendant cross-complainant take nothing on his cross-complaint. Then he made and signed findings and conclusions of law against the cross-complainant. But the judgment did not mention the cross-complaint. In deciding the appeal, the court said: "[W]e order judgment on the cross-complaint in favor of the cross-defendants and against cross-complainant on the cross-complaint." (179 C.A.2d 337.) Thus, an appealable judgment was created, and the court added that the premature notice of appeal "is declared to be a notice of appeal from the judgment as so amended." (179 C.A.2d 341.) (See *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 246, 40 C.R. 189; *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 C.A.2d 212, 219, footnote 1, 64 C.R. 915; *Roy Bros. Drilling Co. v. Jones* (1981) 123 C.A.3d 175, 180, 176 C.R. 449 [with consent of parties, judgment was amended to dispose of cross-complaint as abandoned and judgment as so amended was final and appealable]; *Easton v. Strassburger* (1984) 152 C.A.3d 90, 110, 199 C.R. 383, citing the text [following *Tsarnas*]; *American Nat. Bank v. Stanfill* (1988) 205 C.A.3d 1089, 1096, 252 C.R. 861; *Holt v. Booth* (1991) 1 C.A.4th 1074, 1081, 2 C.R.2d 727 [following *Tsarnas*].)

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dd. Theory Criticized and Rejected.

9 *Witkin Cal. Proc. Appeal* § 127

[§ 127] Theory Criticized and Rejected.

Despite the long acceptance of the theory of *Gombos v. Ashe* (1958) 158 C.A.2d 517, 322 P.2d 933, as "standard practice" (see supra, §124), some later decisions have criticized the theory and rejected it. In *Cohen v. Equitable Life Assur. Soc.* (1987) 196 C.A.3d 669, 242 C.R. 84, the court said:

(a) "We are wearying of 'appeals' from clearly nonappealable orders. ... The case before us presents a particularly egregious example of this practice because the attorney for the 'appellant' is a recidivist. In this same case, he attempted to appeal from an order granting a motion for summary judgment in favor of other cross-defendants sued by [Equitable] even though such an order is not appealable unless judgment has been entered. ... In a footnote to our unreported opinion in that matter we pointed out to counsel an appeal will only lie from an appealable order or judgment. ... We proceeded to construe the order to incorporate a judgment 'in the interests of justice and to avoid delay.' ... Obviously, counsel did not get the message or he got the wrong message. Our patience with counsel in past cases ... was intended to be educative not an indication we would condone continuing blunders of this sort." (196 C.A.3d 671.)

(b) "We will save this 'appeal' as we have done all too often in the past by deeming the order sustaining the demurrer to incorporate a judgment of dismissal and treat Equitable's notice of appeal as applying to the dismissal. ... However, we hereby give notice to the bar that henceforth we will no longer bail out attorneys who ignore the statutory limitations on appealable orders." (196 C.A.3d 671.) (See *Olson v. Volkswagen of America* (1988) 201 C.A.3d 1437, 1439, 247 C.R. 719 [court reminded bar of its notice in *Cohen*, but saved this appeal, which had been taken 5 months prior to *Cohen* pronouncement]; *Munoz v. Florentine Gardens* (1991) 235 C.A.3d 1730, 1732, 1 C.R.2d 609 [following *Cohen*].)

In *Yancey v. Fink* (1991) 226 C.A.3d 1334, 277 C.R. 415, appellant, who failed to obtain an order dismissing a declaratory relief action, requested the Court of Appeal to deem the order sustaining the demurrer to include an order of dismissal. The court informed him that it was its practice to require an order of dismissal, and it directed him to serve and file a certified copy of such an order. Instead, plaintiff voluntarily dismissed the action. "By failing to obtain a

properly appealable order, and then by divesting us of whatever jurisdiction we might have had by voluntarily dismissing the entire action, the purchaser has left us with no alternative but to dismiss his appeal from the order sustaining the demurrer in the declaratory relief action." (226 C.A.3d 1343.) The dismissal was "not as draconian as it first sounds," because the primary issue presented by the appeal, i.e., whether property purchased at a foreclosure sale was subject to any right of redemption, was also raised in an appeal from another, properly appealable order in the foreclosure action. (226 C.A.3d 1343, footnote 5.)

The strict approach of *Cohen* was again followed, with stern warnings to counsel, in *Modica v. Merin* (1991) 234 C.A.3d 1072, 285 C.R. 673, in which an appeal from a nonappealable order granting summary judgment (see *infra*, §160) was dismissed.

(a) "It is not that we are insensitive to the plight of plaintiff's counsel but it is a plight not of our making. Nor is the problem here one that occurs only infrequently. Despite persistent efforts by the appellate courts to educate the bar, attempts to appeal from nonappealable orders of this nature continue unabated in substantial numbers. In 1973, this court created the fiction that a nonappealable order incorporated a judgment of dismissal. We did this not to 'amend' *Code of Civil Procedure section 904.1* to render orders such as this appealable, an act beyond our constitutional powers (see Cal. Const., art. III, § 3), but to further the interests of justice and prevent unnecessary delay. ... This court indulged that fiction in a number of cases thereafter in the hope that focusing attention on the problem in this way would effect a painless solution. Alas, this practice had the unintended and lamentable consequence that counsel came increasingly to rely upon the court's indulgence rather than to take the procedural steps necessary to perfect an appeal." (234 C.A.3d 1074.)

(b) "Some years ago, this court amended its form of settlement conference statement expressly to note that orders granting summary judgment or sustaining demurrers are not appealable and cited authority for that principle. ... Alas, counsel in significant numbers either ignore or fail to comprehend our settlement conference statement admonition and submit completed statements in which the 'appeal' is said to be, and in fact is, from an order granting summary judgment or sustaining demurrer." (234 C.A.3d 1074.)

(c) "Even before the Court of Appeal in the Second District, Division Seven, publicly declared its exasperation with this dolorous state of affairs ... this court had abandoned its policy of tolerance. We have long since determined the proper role of an appellate court is to adhere to and apply *Code of Civil Procedure section 904.1*, not to devise and employ strategies for its wholesale avoidance. As a practical matter, experience teaches that far from solving the problem, the latter approach only exacerbates it." (234 C.A.3d 1075.)

Finally, in *Hill v. Long Beach* (1995) 33 C.A.4th 1684, 40 C.R.2d 125, it was the fault of the plaintiff that was again emphasized in holding that an order was not appealable. Plaintiff was removed from his position with defendant city. In this action against the city and individual city officials involving contract, tort, and civil rights claims, demurrers were sustained to the noncontract causes of action against the city and all causes of action against the individual defendants. However, no order dismissing the individual defendants or the noncontract causes of action was entered. Defense counsel twice submitted orders of dismissal, once before trial, and again after the jury reached its verdict against the city on the contract claims, but each time, the court refused to enter the dismissal. The record did not explain why the law and motion judge who ruled on the demurrers refused to enter the pretrial dismissal, but it did show that plaintiff objected to entry of the post-trial dismissal. The final judgment, prepared and submitted by plaintiff, mentioned only the jury's verdict against the city on the contract actions and entirely omitted the noncontract actions or the individual defendants. Defendant city appealed the judgment, and plaintiff cross-appealed the order sustaining the demurrers. *Held*, plaintiff's cross-appeal dismissed without reaching the merits; the order was not appealable.

(a) Orders sustaining demurrers are not appealable. An appeal may be taken after entry of the order only after the trial court enters an order of dismissal. Here, no dismissal of the noncontract causes of action or of the individual defendants was ever entered. Accordingly, the Court of Appeal has no statutory authority to entertain plaintiff's cross-appeal. (33 C.A.4th 1695.)

(b) It is within the court's discretion to save plaintiff's cross-appeal by modifying the trial court's judgment to reflect dismissal of plaintiff's noncontract causes of action and of the individual defendants. But plaintiff does not have an appealable order because he objected to its entry. While the court's discretion might be properly exercised when an appellant finds himself without an appealable order because of simple inadvertence or mistake, extricating plaintiff from a problem of his own making is not a proper exercise of its discretion. (33 C.A.4th 1695.) Moreover, if the court were to exercise its discretion, it would be doing so contrary to the trend in this district and elsewhere to be less indulgent of parties who fail to perfect their rights of appeal. (33 C.A.4th 1696.)

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4. Appeal Saved by Treating It as Writ Application.

aa. Stipulation and Court's Discretion.

9 Witkin Cal. Proc. Appeal § 128

[§ 128] Stipulation and Court's Discretion.

In *U.S. Financial v. Sullivan* (1974) 37 C.A.3d 5, 112 C.R. 18, the trial judge entered a purported final judgment of dismissal on some but not all counts. The judgment was clearly premature and not appealable (see *supra*, §118), but the case was complex, and compelling a trial on some counts where an erroneous ruling on the others would almost certainly result in an appeal and reversal would be undesirable. Accordingly, the parties at oral argument stipulated that the record on appeal might be treated as a petition for mandamus; and, "[a]lthough we would not accept the stipulation under ordinary circumstances," these were sufficient. (37 C.A.3d 12.)

The same approach was employed in *Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 C.A.3d 276, 101 C.R. 820. The lower court (a) dismissed plaintiff's complaint on the ground that it was barred under the compulsory counterclaim (now cross-complaint) statute by failure to set it up in a prior action; and (b) granted defendant's motion for partial summary judgment on its cross-complaint. Plaintiff appealed from both orders. The Court of Appeal pointed out that the appeals were premature and that the defect was jurisdictional and could not be waived. (25 C.A.3d 281.) However, the case dealt with a 1966 accident and the appeal had been pending about 2 years with both parties seeking a final decision; hence, the theory of *Vasquez v. Superior Court* (1971) 4 C.3d 800, 807, 94 C.R. 796, 484 P.2d 964, 8 Cal. Proc. (5th), *Extraordinary Writs*, §135, could be invoked: Because an appeal would violate the final judgment rule, the appellant had no remedy by appeal and was entitled to mandamus. In *Vasquez*, the party petitioned for mandamus; here, no mandamus petition was filed. However, "we accept the stipulation of counsel, treat the record as being a petition for a writ of mandate and dispose of the matter in what we deem to be a practical manner in the interests of justice." (25 C.A.3d 282.)

Later cases treat this innovation as a routine method of accepting review jurisdiction. (See *Olson v. Cory* (1983) 35 C.3d 390, 401, 197 C.R. 843, 673 P.2d 720, *infra*, §132; *Branham v. State Farm Mut. Auto. Ins. Co.* (1975) 48 C.A.3d 27, 32, 121 C.R. 304 [appeal from nonappealable order to arbitrate was treated as petition for mandamus]; *Estate of Hearst* (1977) 67 C.A.3d 777, 781, 136 C.R. 821 [order of probate court was not appealable but reviewable on certiorari: "We therefore treat Trustees' appeal as an application for writ of certiorari to review the instant proceedings,

and we grant the writ because it involves a question of public importance appropriate for resolution"]; *People v. Cimarusti* (1978) 81 C.A.3d 314, 320, 146 C.R. 421, 2 Cal. Proc. (5th), *Jurisdiction*, §311 [absence of superior court as party (it normally would be in certiorari) was not an obstacle to treating appeal as petition for writ of certiorari]; *Schultz v. Regents of Univ. of Calif.* (1984) 160 C.A.3d 768, 788, 206 C.R. 910, citing the text [defendant's appeal from summary judgment was treated as petition for writ of mandamus commanding trial judge to enter summary judgment for defendant, where defendant's right to judgment was clear]; *Southern Pac. Land Co. v. Westlake Farms* (1987) 188 C.A.3d 807, 826, 233 C.R. 794; *Poe v. Diamond* (1987) 191 C.A.3d 1394, 1398, 237 C.R. 80, citing the text; *Mounger v. Gates* (1987) 193 C.A.3d 1248, 1254, 239 C.R. 18, citing the text; *H.D. Arnaiz, Ltd. v. San Joaquin* (2002) 96 C.A.4th 1357, 118 C.R.2d 71, *infra*, §195 [appeal of nonappealable order to vacate voluntary dismissal was treated as petition for mandamus; citing *Olson*]; *Szetela v. Discover Bank* (2002) 97 C.A.4th 1094, 1097, 118 C.R.2d 862 [use of discretion under unusual facts to treat appeal from order compelling arbitration as petition for mandamus]; *In re Marriage of Ellis* (2002) 101 C.A.4th 400, 404, 124 C.R.2d 719 [appeal from nonappealable order that there was community interest in postretirement participation in health plan was treated as writ petition; it was economical to bifurcate this issue (similar to liability) from that of valuation (similar to damages), and both parties wanted to do so]; *In re Marriage of Doherty* (2002) 103 C.A.4th 895, 898, 126 C.R.2d 919 [nonappealable interlocutory order characterizing but not dividing mortgage subsidy could be treated as petition for extraordinary writ; issues of existence of community property and its valuation were bifurcated, and parties each requested that court consider merits of appeal].)

SUPPLEMENT: [This section is current through the latest supplement]



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9 *Witkin Cal. Proc. Appeal* § 129

[§ 129] Distinction: Late Appeal.

The discretion to treat a defective appeal as a writ application (*supra*, §128) may be exercised where there is an attempted appeal from a nonappealable order. But where an order or judgment is appealable, but the notice of appeal is not filed within the jurisdictional time to appeal, it cannot be treated as a petition for a writ. (*In re Marriage of Patscheck* (1986) 180 C.A.3d 800, 805, 225 C.R. 787, *infra*, §618.)

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cc. Jurisdiction Declined: In General.

9 *Witkin Cal. Proc. Appeal* § 130

[§ 130] Jurisdiction Declined: In General.

U.S. Financial v. Sullivan (1974) 37 C.A.3d 5, 112 C.R. 18, supra, §128, makes it clear that salvaging a defective appeal by treating it as a writ application is entirely within the court's discretion, and that the stipulation will not be accepted "under ordinary circumstances." And the same qualification is stated in *Olson v. Cory* (1983) 35 C.3d 390, 197 C.R. 843, 673 P.2d 720, infra, §132: "Though we thus have power to treat the purported appeal as a petition for writ of mandate, we should not exercise that power except under unusual circumstances." (35 C.3d 401.) Thus, an appellate court may refuse to employ this procedure where there is no compelling showing of unusual circumstances.

In *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 160 C.R. 899, the court said: "We have no verified petition supporting appellant's stated claim that '[s]hould jurisdiction of this appeal not be taken, it will be next to impossible for him to go through a trial of this matter merely to perfect appellate jurisdiction.' Moreover, we consider it important to discourage any belief that appeals from such 'premature' and 'improvident' judgments ... pursuant to stipulation will obviate the necessity to establish extraordinary grounds for the issuance of a writ of mandate. Accordingly, we decline to assume jurisdiction by entertaining the appeal as an extraordinary writ matter." (100 C.A.3d 437.)

In *Mid-Wilshire Associates v. O'Leary* (1992) 7 C.A.4th 1450, 9 C.R.2d 862, the court's initial reasons for declining to assume jurisdiction by treating the defective appeal as a writ petition were that the appellant had not expressly requested that relief and that a direct appeal from the judgment was an adequate remedy. (7 C.A.4th 1455.) But the court then declared that the interests of justice would not be served by exercising the power in this case:

(a) "The record reflects appellant deliberately appealed from the order denying its motion to vacate or correct so that it could prevent entry of a confirmation judgment. We will not engage in speculation as to appellant's motivations for so doing, but appellant must live with the consequences of its trial court strategy." (7 C.A.4th 1455.) The premature appeal "appears to be the result of a calculated effort to block confirmation of the award and entry of judgment, not of counsel's inadvertence or neglect." (7 C.A.4th 1455, footnote 3.)

(b) "Strong policy reasons underpin the one final judgment rule, and the guidelines for 'saving' appeals from nonappealable orders. The interests of clients, counsel, and the courts are best served by maintaining, to the extent possible, bright-line rules which distinguish between appealable and nonappealable orders. To treat the instant appeal as a writ application would obliterate the bright line and encourage parties to knowingly appeal from nonappealable orders. ... We cannot condone or encourage such practice." (7 C.A.4th 1455.)

In *Bishop v. Merging Capital* (1996) 49 C.A.4th 1803, 57 C.R.2d 556, defendant was ordered to comply with a subpoena for the production of evidence. Instead of doing so, defendant appealed, and when the order was held to be nonappealable (see *infra*, §158), he attempted to have the appeal treated as a petition for a writ of mandamus. *Held*, jurisdiction declined. The ground on which defendant relied is that he lacked an adequate remedy at law. This ground is not applicable; when defendant refused to comply with the subpoena, nothing happened. Thus, any opinion by the appellate court would be advisory only, i.e., if the ruling were in favor of plaintiff, it would merely advise defendant that any contempt order would be affirmed; conversely, a decision in favor of defendant would advise plaintiff that any contempt proceedings would ultimately prove pointless. (49 C.A.4th 1808.) (See *Lemaire v. All City Employees Assn.* (1973) 35 C.A.3d 106, 110, 110 C.R. 507 ["Although the parties have requested it, we elect not to treat the matter before this court as a petition for writ of mandate"]; *Wells Properties v. Popkin* (1992) 9 C.A.4th 1053, 1055, 11 C.R.2d 845 [circumstances were not sufficiently unusual to justify departure from one-judgment rule]; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 C.A.4th 39, 42, 24 C.R.2d 337 [appellant failed to give exigent reasons why review of order denying change of venue motion should not await rendition of final judgment]; *Ponce-Bran v. Trustees of Calif. State University & Colleges* (1996) 48 C.A.4th 1656, 1662, 56 C.R.2d 358 [determination of issue--whether plaintiff had made colorable claim sufficient to justify appointment of counsel for him--would enmesh appellate court in merits before factual determinations had been made].)

SUPPLEMENT: [This section is current through the latest supplement]

See *San Joaquin County Dept. of Child Support Services v. Winn* (2008) 163 C.A.4th 296, 300, 77 C.R.3d 470 [before final judgment in paternity action, Court of Appeal would not save alleged father's purported appeal from order to submit to genetic testing by treating it as writ petition, without evidence that unusual situation gave rise to questions of general importance to trial courts and profession].



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dd. Jurisdiction Declined: Request in Juvenile Dependency Proceeding.

9 Witkin Cal. Proc. Appeal § 131

[§ 131] Jurisdiction Declined: Request in Juvenile Dependency Proceeding.

In re Ricky H. (1992) 10 C.A.4th 552, 12 C.R.2d 578, involved appeals from nonappealable orders terminating reunification services and setting the matter for a permanency planning hearing under Welf.C. 366.26. After noting that these orders are made reviewable by extraordinary writ under Welf.C. 366.26(k) (now Welf.C. 366.26(l)) so that the matter would likely be decided before the 366.26 hearing was held, the court made the following observation on the practice of treating an improper appeal as a writ proceeding:

(a) "We recognize that, if all the conditions necessary for the issuance of a writ of mandate are otherwise present, an appellate court has the discretionary power to treat an unauthorized appeal as a petition for an extraordinary writ." (10 C.A.4th 563, citing the text.) "However, counsel practicing before this court should be aware of when that discretion is likely to be exercised. Accordingly, we hold that when a party has appealed from an order which is rendered nonappealable by section 366.26, subdivision (k), this court will generally decline to treat that appeal as a petition for an extraordinary writ unless (1) the notice of appeal was filed prior to the date scheduled for the 366.26 hearing, *and* (2) the appellant notifies this court of its request that the appeal be treated as a petition for an extraordinary writ, *and* (3) that notification is made sufficiently early (a) to permit this court's adjudication of the issues raised in the appeal before the 366.26 hearing has been held, or at least (b) to stay the commencement of the 366.26 hearing until that adjudication can occur." (10 C.A.4th 564.)

(b) Here, the first request was not made until the mother's opening brief was filed, 4 months after the 366.26 hearing had been decided, and the request "was buried within the opening brief, virtually guaranteeing that it would not even be seen until briefing was complete months later." (10 C.A.4th 564.)

SUPPLEMENT: [This section is current through the latest supplement]



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ee. Jurisdiction Accepted.

9 *Witkin Cal. Proc. Appeal* § 132

[§ 132] Jurisdiction Accepted.

The considerations influencing the reviewing court to treat a defective appeal as a mandamus proceeding were explored in *Olson v. Cory* (1983) 35 C.3d 390, 197 C.R. 843, 673 P.2d 720. Plaintiff judges and judicial pensioners brought an action against the state controller for a declaration that the 1976 amendment to the Judges' Retirement Law was unconstitutional, and that they were entitled to salary and pension increases in accordance with *Govt.C. 68203* prior to the amendment. The action was successful (*Olson v. Cory* (1980) 27 C.3d 532, 178 C.R. 568, 636 P.2d 532), and in the trial court, plaintiffs filed a motion for partial summary judgment under C.C.P. 437c(f), seeking an order determining that they were entitled to recover interest on the retroactive salary and pension payments due them under the Supreme Court decision. The trial judge denied the motion and plaintiffs appealed from the order of denial. *Held*, the order was not appealable (35 C.3d 400), but the appeal should be treated as a petition for mandamus.

(a) To require the parties to wait for resolution of plaintiffs' interest claim until disposition of all matters yet to be resolved by the trial court "might lead to unnecessary trial proceedings since, for example, the award of attorney fees might well be influenced by final determination of the interest claim." (35 C.3d 400.) "Thus, the record sufficiently demonstrates the lack of adequate remedy at law necessary for issuance of the writ." (35 C.3d 401.)

(b) The record and briefs include in substance the elements necessary to a mandamus proceeding: the Appellant's Appendix in Lieu of Clerk's Transcript, and the Rules of Court provisions for sanctions designed to assure its accuracy are the "functional equivalent" of the verification required by C.C.P. 1086 and former C.R.C., Rule 56(a) (now C.R.C., Rule 8.490(b)(4)). (35 C.3d 401.) The fact that the trial court is not a party is unimportant. There is no indication that the court would become more than a nominal party. (35 C.3d 401.)

(c) Unusual circumstances are present here. "Though we have concluded that the trial court's ruling was not appealable, the reasoning that led us to that conclusion demonstrates that the issue of appealability was far from clear in advance. Moreover, even though the ruling appears from its statutory basis and procedural history to have been made in anticipation of a subsequent trial and judgment, we are assured by plaintiffs, and by counsel speaking for most of the

county defendants, that all issues in this litigation have now been resolved except for the one now presented to this court--that of plaintiffs' right to interest. That issue has been thoroughly briefed and argued, and all parties strongly urge that we decide it rather than dismiss the appeal. To dismiss the appeal rather than exercising our power to reach the merits through a mandate proceeding would, under the unusual circumstances before us, be 'unnecessarily dilatory and circuitous.' " (35 C.3d 401.)

In re Albert B. (1989) 215 C.A.3d 361, 263 C.R. 694, holding an order terminating parental rights nonappealable, granted mandamus on the following showing:

(a) Matters involving child dependency are normally given expeditious treatment, and the delay incident to filing a petition for a writ would have a detrimental impact on the minors. (215 C.A.3d 373.)

(b) The records and briefs submitted on the appeal included the necessary elements of a petition for mandamus; and the fact that the trial court was not joined as a party "does not defeat this court's jurisdiction to treat the appeal as a petition for a writ of mandate." (215 C.A.3d 373.)

(c) The issue of appealability of the order was the subject of conflicting decisions, and this court had previously held orders of this type appealable. "This case presents an unusual circumstance in that the right to appeal has been taken away retroactively." (215 C.A.3d 373.)

In *G.E. Hetrick & Associates v. Summit Const. & Maintenance Co.* (1992) 11 C.A.4th 318, 13 C.R.2d 803, the court concluded that an appeal from the summary judgment in favor of one defendant (insurer) was appealable as a final judgment, but that the appeal from the summary judgment in favor of other defendants was not. (11 C.A.4th 325.) "Since we must resolve this single-issue of appeal as to Insurer, the interests of judicial economy will be better served by resolving the issues as to all parties at this time, and defendants did not originally contest our jurisdiction, we will treat this appeal as a petition for writ of mandate as to all defendants except Insurer." (11 C.A.4th 325.)

In *Green v. GTE Calif.* (1994) 29 C.A.4th 407, 34 C.R.2d 517, there was a request to review a nonappealable discovery sanctions order entered when plaintiff's counsel, who had had difficulties with defense counsel in the past, attempted to videotape defense counsel during plaintiff's deposition. The Court of Appeal, in treating the attempted appeal as a writ petition, stated that "[n]o court should have to review these facts again." (29 C.A.4th 408.) (See *Mounger v. Gates* (1987) 193 C.A.3d 1248, 1254, 239 C.R. 18; *In re Carina C.* (1990) 218 C.A.3d 617, 622, 267 C.R. 205; *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 C.A.3d 49, 60, 271 C.R. 410; *Cohan v. Thousand Oaks* (1994) 30 C.A.4th 547, 554, 35 C.R.2d 782; *Jacobs-Zorne v. Superior Court* (1996) 46 C.A.4th 1064, 1072, 54 C.R.2d 385, 14 Summary (10th), *Wills and Probate*, §572; *Board of Dental Examiners v. Superior Court* (1998) 66 C.A.4th 1424, 1430, 78 C.R.2d 653; *Angell v. Superior Court* (1999) 73 C.A.4th 691, 698, 86 C.R.2d 657; *Conlan v. Shewry* (2005) 131 C.A.4th 1354, 1364, 32 C.R.3d 667.)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.490(b)(4) was renumbered C.R.C., Rule 8.486(a)(4) in 2008.



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5. Appeal Considered in Court's Discretion.

9 Witkin Cal. Proc. Appeal § 133

[§ 133] Appeal Considered in Court's Discretion.

In *Guntert v. Stockton* (1974) 43 C.A.3d 203, 117 C.R. 601, plaintiff leased waterfront business property from defendant city under a clause permitting termination by the lessor on 18 months' notice if it decided to accept a development offer conforming to described conditions. The city accepted an offer, and gave notice of termination. Plaintiff sued for an injunction and damages, alleging that the city had acted arbitrarily and without good faith in failing to inquire into the bona fides of the offer. The trial judge granted a permanent injunction against dispossession of the lessee, and directed a future trial on damages. The city appealed. *Held*, the appeal would be considered on the merits.

(a) An appeal from the determination of only one of the issues in a bifurcated trial is premature and will ordinarily be dismissed. (43 C.A.3d 208; see *supra*, §118.)

(b) A distinction should be made, however, between two aspects of the one final judgment rule: (1) When the appeal is from an interlocutory or other nonappealable order, the rule is statutory: *C.C.P. 904.1(a)* prevents the appeal. (43 C.A.3d 208, citing the text.) (2) Where the appeal is from an appealable order (here an injunction), the rule is one of appellate policy, designed only to prevent piecemeal appeals. (43 C.A.3d 208.)

(c) Some decisions have indulged in procedural devices to escape from the one final judgment rule. (43 C.A.3d 209, citing the text.) But: "When appellate jurisdiction depends on a court-made policy rule and not on statute, appellate discretion supplies a firmer conceptual base than procedural fictions. In cumulative effect, the decisions temper the rule to the point of justifying an exception in unusual cases when its enforcement would result in injustice or more waste than saving of the time and energies of court and counsel." (43 C.A.3d 209.)

(d) Here, plaintiff had requested and obtained advancement on the calendar, on a showing of financial losses suffered by reason of the uncertainty of its occupancy. But the damages trial then took place, with another judgment against the city, and the city took another appeal and sought consolidation of the two appeals. Plaintiff opposed consolidation on the ground that further delay for briefing would intensify the economic hardship, and consolidation was refused. Thus, the issues involved in the merits of the action could be determined in the present appeal, even though

the amount of damages could not be. And, to avoid additional economic hardship to plaintiff from further appellate delay, "[i]n the exercise of discretion, we withhold application of the nonstatutory one-final-judgment rule." (43 C.A.3d 209.) (See *McClure v. San Diego* (1987) 191 C.A.3d 807, 811, 236 C.R. 653, citing the text [appeal from issuance of writ of mandamus in unfair labor practice action also seeking declaratory relief; "all parties would be well served by a speedy resolution of the writ issue"]; for criticism of *Guntert*, see *Art Movers v. Ni West* (1992) 3 C.A.4th 640, 4 C.R.2d 689, *infra*, §176.)

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6. Order in Bifurcated Family Law Case.

9 *Witkin Cal. Proc. Appeal* § 134

[§ 134] Order in Bifurcated Family Law Case.

(1) *Former Law: No Appeal.* *In re Marriage of Loya* (1987) 189 C.A.3d 1636, 235 C.R. 198, was a dissolution of marriage proceeding in which the issue of the validity of an antenuptial agreement was bifurcated. The trial judge ruled that the agreement was invalid, and the proponent of the agreement appealed. No judgment was entered on any issue in the case. *Held*, the ruling was not appealable.

(a) A thorough review of C.C.P. 904.1, other statutes dealing with appealability, and case law disclose no legislation that creates appellate jurisdiction over a mere ruling on a bifurcated issue. (189 C.A.3d 1638.)

(b) There is no merit to the argument that *In re Marriage of Noghrey* (1985) 169 C.A.3d 326, 215 C.R. 153, stands for the proposition that an appeal lies immediately when there is bifurcation in a family law case. The *Noghrey* case involved a matter that had been transferred on order of the Supreme Court. And considering the length of time that the matter had been pending and the importance of the decision to the remaining issues in the case, the *Noghrey* court declined to address the issue of appealability. However, "[w]e view the *Noghrey* decision as an act in excess of jurisdiction. We hold that this court is without jurisdiction to entertain an appeal of the trial court's interim ruling on a bifurcated issue as sought in this appeal." (189 C.A.3d 1639.)

(2) *Legislative Response: Discretionary Review.* The 1988 Legislature, in apparent response to *In re Marriage of Loya*, authorized discretionary review in family law cases. "Notwithstanding any other provision of law, if the court has ordered an issue or issues bifurcated for separate trial or hearing in advance of the disposition of the entire case, a court of appeal may order an issue or issues transferred to it for hearing and decision when the court that heard the issue or issues certifies that the appeal is appropriate." (*Family C. 2025*; see 11 *Summary* (10th), *Husband and Wife*, §123.)

(3) *Judicial Council Rules.* C.R.C., Rule 5.180 sets forth the procedure (a) for making a motion for a certificate of probable cause for immediate review of an order deciding a bifurcated issue, and (b) if the certificate is granted, for making a motion to appeal from the decision on the bifurcated issue. (See C.R.C., Rule 5.180(b), (d); *In re Marriage of Griffin* (1993) 15 C.A.4th 685, 688, 19 C.R.2d 94 [appeal in derogation of rule]; on review of decision on bifurcation

issue by extraordinary writ, see C.R.C., Rule 5.180(g), 11 *Summary* (10th), *Husband and Wife*, §123.)

A certificate of probable cause must specify the reason why immediate appellate review is desirable, such as a statement that final resolution of the issue (a) is likely to lead to settlement of the entire case; (b) will simplify remaining issues; (c) will conserve the courts' resources; or (d) will benefit the well-being of a child of the marriage or the parties. (C.R.C., Rule 5.180(c).)

None of the following circumstances precludes review of the decision on the bifurcated issue on appeal of the final judgment:

- (a) A party's failure to move for certification for immediate appeal. (C.R.C., Rule 5.180(h)(1).)
- (b) The trial court's denial of a certification motion. (C.R.C., Rule 5.180(h)(2).)
- (c) A party's failure to move to appeal from the decision on the bifurcation issue. (C.R.C., Rule 5.180(h)(3).)
- (d) The Court of Appeal's denial of a motion to appeal. (C.R.C., Rule 5.180(h)(4).)

C.R.C., Rule 5.180 "does not apply to appeals from the court's termination of marital status as a separate issue, or to appeals from other orders that are separately appealable." (C.R.C., Rule 5.180(a).)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Stipulation To Dismiss With Prejudice.

9 *Witkin Cal. Proc. Appeal* § 135

[§ 135] Stipulation To Dismiss With Prejudice.

In *Tudor Ranches v. State Comp. Ins. Fund* (1998) 65 C.A.4th 1422, 77 C.R.2d 574, plaintiff employer sued its workers' compensation insurer on multiple causes of action in connection with maintaining excessive reserves and mismanaging plaintiff's claims files. After the trial court made its rulings on numerous motions in limine to exclude evidence, plaintiff, feeling that the rulings prevented it from adequately presenting its case, stipulated to a "final" judgment in defendant's favor so that plaintiff could file an immediate appeal. The stipulation decided certain causes of action in defendant's favor and dismissed those remaining. Originally, the stipulation stated that the dismissal was to be "without prejudice," but the quoted words were deleted by the trial court. *Held*, the judgment was appealable.

(a) Ordinarily, a judgment entered pursuant to a stipulation is not appealable. However, *Building Industry Assn. of Southern Calif. v. Camarillo* (1986) 41 C.3d 810, 226 C.R. 81, 718 P.2d 68, supra, §46, created an exception where the stipulation is made to facilitate an appeal following adverse determination of a critical issue. And although *Four Point Entertainment v. New World Entertainment, Ltd.* (1997) 60 C.A.4th 79, 70 C.R.2d 82, supra, §121, stated that *Building Industry Assn. of Southern Calif.* had been impliedly overruled by *Morehart v. Santa Barbara* (1994) 7 C.4th 725, 29 C.R.2d 804, 872 P.2d 143, supra, §120, the overruling applied only when the stipulation did not dispose of all claims between the parties, as where the dismissal was "without prejudice." (65 C.A.4th 1428.)

(b) *Arciniega v. Bank of San Bernardino* (1997) 52 C.A.4th 213, 60 C.R.2d 495, held that a dismissal that does not mention whether it is with or without prejudice is with prejudice, lacking a contrary contention by the plaintiff. There was no such contention here, and moreover, by taking the position that the stipulated judgment was a final, appealable disposition of all its claims, plaintiff unequivocally confirmed its consent to the dismissal of the adjudicated claims with prejudice. (65 C.A.4th 1430.)

(c) The exception in favor of appealability requires "adverse determination of a critical issue," and defendant argued that the in limine rulings did not satisfy this requirement, because the trial court had specified that they were without prejudice and subject to renewal. This position is unpersuasive. In limine rulings are by their nature tentative. However, no case states or implies a requirement that an in limine ruling not be subject to further consideration before

the parties may stipulate to an appealable final judgment. Theoretically, this means that a party could obtain immediate appellate review of any in limine ruling, no matter how inconsequential, provided that both parties stipulated to a judgment finally disposing of all claims. However, limiting an appeal to situations where the ruling truly makes it impossible as a practical matter for the plaintiff to proceed with the case is a task for the *Supreme Court*. (65 C.A.4th 1430.) (On effect of dismissal without prejudice, see *supra*, §121.)

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D. Interlocutory and Final Judgments.

1. Nonappealable Interlocutory Judgment.

9 *Witkin Cal. Proc. Appeal* § 136

[§ 136] Nonappealable Interlocutory Judgment.

A judgment rendered after a trial and determination of most of the issues may nevertheless leave some judicial act yet to be done. If so, regardless of its formal appearance or designation as a final judgment, it is interlocutory only, and not appealable unless it comes within the statutory classes of appealable interlocutory judgments. (See *infra*, §138.)

The nature and types of interlocutory judgments, and the tests for determining finality, have already been discussed. (See 7 *Cal. Proc.* (5th), *Judgment*, §12 et seq.) A number of cases hold that interlocutory judgments are not appealable. (See *Lyon v. Goss* (1942) 19 C.2d 659, 669, 123 P.2d 11; *Bakewell v. Bakewell* (1942) 21 C.2d 224, 225, 130 P.2d 975; *Lacey v. Bertone* (1949) 33 C.2d 649, 653, 203 P.2d 755; *In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 857, 257 P.2d 1; *Western Gulf Oil Co. v. Title Ins. & Trust Co.* (1946) 77 C.A.2d 217, 219, 75 P.2d 56; *Brown v. Trophy-Craft Co.* (1948) 85 C.A.2d 246, 247, 192 P.2d 779; *David v. Goodman* (1948) 89 C.A.2d 162, 163, 200 P.2d 568; *Craig of Calif. v. Green* (1949) 89 C.A.2d 829, 830, 202 P.2d 104; *Most Worshipful Sons of Light Grand Lodge, Ancient Free & Accepted Masons, Jurisdiction of Calif. v. Sons of Light Lodge Number 9* (1949) 91 C.A.2d 582, 583, 205 P.2d 722; *Nesbitt v. Bruce Eells & Associates* (1951) 105 C.A.2d 370, 371, 233 P.2d 183; *Shirley v. Cook* (1953) 119 C.A.2d 220, 221, 259 P.2d 25; *Maier Brewing Co. v. Pacific Nat. Fire Ins. Co.* (1961) 194 C.A.2d 494, 497, 15 C.R. 177; *Lincoln Nat. Life Ins. Co. v. Mitchell* (1974) 41 C.A.3d 16, 19, 115 C.R. 723, citing the text; *Committee for Responsible Planning v. Indian Wells* (1990) 225 C.A.3d 191, 198, 275 C.R. 57; *Connell v. Superior Court* (1997) 59 C.A.4th 382, 392, 69 C.R.2d 231; cf. *Walton v. Magno* (1994) 25 C.A.4th 1237, 1240, 30 C.R.2d 815 [appeal from order granting plaintiff's motion for judgment notwithstanding verdict was, in effect, appeal from nonappealable interlocutory judgment of liability, where trial on issue of damages had not yet been held]; see 22 *So. Cal. L. Rev.* 507.)

The test of effect instead of label is applied in cases such as those listed above, in which the trial court often designates the judgment as final. The situation is different, however, where the designation is legislative. In *Peninsula Properties Co. v. Santa Cruz* (1951) 106 C.A.2d 669, 235 P.2d 635, an action was brought to test the validity of tax deeds. Two Revenue Code sections provided for "interlocutory" decrees, somewhat similar in nature, but only one was expressly made appealable. *Held*, the legislative intention was that the other not be appealable, and it would be inappropriate to go behind the statutory language. The Legislature must determine "whether an order shall be deemed interlocutory or final, whether an interlocutory order shall be appealable, and at what stage of the proceedings it should become appealable." (106 C.A.2d 677.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Corona* (2009) 172 C.A.4th 1205, 1218, 92 C.R.3d 17 [postjudgment order confirming arbitrator's award in marital dissolution proceeding was interlocutory and not appealable, where order also appointed referee to select accountant to perform accounting pursuant to arbitration; order contemplated further judicial proceedings to adopt referee's findings after accounting].



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D. Interlocutory and Final Judgments.

2. Final Judgment Mislabeled Interlocutory.

9 Witkin Cal. Proc. Appeal § 137

[§ 137] Final Judgment Mislabeled Interlocutory.

In rare cases, the court or parties make the mistake of labeling and treating as interlocutory a judgment that is in effect final and appealable. (See *Eldridge v. Burns* (1978) 76 C.A.3d 396, 404, 142 C.R. 845, citing the text.)

In *Caminetti v. Imperial Mut. Life Ins. Co.* (1942) 54 C.A.2d 514, 129 P.2d 432, plaintiff insurance commissioner was appointed the conservator of defendant insurance company, and took over the business. Later defendant, pursuant to statute, applied for an order restoring possession. The court entered an "interlocutory judgment," reciting that the ground for taking over did not now exist, terminating the appointment and dissolving the conservatorship, and ordering that defendant company have immediate possession of its properties. It further provided that the court retained jurisdiction for the purpose of entering a final judgment on motion or on its own motion, to make a final disposition of the proceeding, or to make any further order amending or vacating the interlocutory judgment. *Held*, this so-called interlocutory judgment was final and appealable, and the court's purported reservation of jurisdiction was ineffective. The only issue was the right of the commissioner to retain control; the judgment ordering him to give up control completely exhausted the court's jurisdiction, and it could not, by its purported reservation, either retain judicial control over the business or deprive the commissioner of his right to appeal. The opinion makes this distinction: (a) an order that property be delivered to a receiver or other custodian may reserve judicial control; (b) an order that property be returned to its private owner may not. (54 C.A.2d 517.)

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3. Appealable Interlocutory Judgments.

9 Witkin Cal. Proc. Appeal § 138

[§ 138] Appealable Interlocutory Judgments.

By statute, some interlocutory judgments or decrees in unlimited civil cases are expressly made appealable. Important examples are the following:

(1) In an action to redeem real or personal property from a mortgage or lien, an interlocutory judgment, order, or decree determining the right to redeem and directing an accounting. (*C.C.P. 904.1(a)(8)*; see *Grey v. Brennan* (1905) 147 C. 355, 356, 81 P. 1014 [statute was not applicable in action to enforce constructive trust].)

(2) In an action for partition, an interlocutory judgment determining the rights and interests of parties and directing that partition be made. (*C.C.P. 904.1(a)(9)*; see *Williams v. Wells Fargo Bank* (1941) 17 C.2d 104, 106, 109 P.2d 649 [appeal lies regardless of whether partition is directed in kind or by sale of property and division of proceeds].)

(3) An interlocutory judgment directing payment of monetary sanctions by a party or his attorney, if the amount exceeds \$ 5,000. (*C.C.P. 904.1(a)(11)*; on appeal from an *order* directing payment of monetary sanctions, see *supra*, §103.)

(4) In a prior trial of special issues, an interlocutory judgment sustaining the defense of another action pending. (*C.C.P. 597*; see *San Bernardino Valley Mun. Water Dist. v. Gage Canal Co.* (1964) 226 C.A.2d 206, 209, 37 C.R. 856; 7 Cal. Proc. (5th), Trial, §152.)

In appropriate circumstances, the trial court may recommend appeal of an interlocutory order. (See *supra*, §88.)

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E. Judgments in Special Proceedings.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 139

[§ 139] In General.

Former C.C.P. 963 expressly allowed an appeal to be taken from a "final judgment entered in an action, or special proceeding." C.C.P. 904.1 refers only to appeal from "a judgment" (see *supra*, §95), but the meaning is the same: Unless the particular statute provides otherwise, final judgments in special proceedings are appealable. (*Morton v. Broderick* (1897) 118 C. 474, 483, 50 P. 644; *People v. Bank of San Luis Obispo* (1907) 152 C. 261, 264, 92 P. 481 [statutory proceeding for involuntary liquidation of bank]; *People v. Wilcox* (1960) 53 C.2d 651, 654, 655, 2 C.R. 754, 349 P.2d 522 [bail forfeiture proceeding, order granting or denying motion to set aside forfeiture]; *Keane v. Smith* (1971) 4 C.3d 932, 937, 95 C.R. 197, 485 P.2d 261 [judgment in election contest]; *Knoll v. Davidson* (1974) 12 C.3d 335, 343, 116 C.R. 97, 525 P.2d 1273, 8 Cal. Proc. (5th), *Extraordinary Writs*, §87 [proceeding under former Elec.C. 6403 (now Elec.C. 13314) to compel election official to perform duties]; *Ruddell v. Warne* (1946) 73 C.A.2d 907, 908, 167 P.2d 811 [order directing sale of homesteaded property was appealable, not as special order after final judgment, but as final judgment in special proceeding]; *Embree Uranium Co. v. Liebel* (1959) 169 C.A.2d 256, 258, 337 P.2d 159 [judgment in third-party claim proceeding]; *Peer v. California Industries for the Blind* (1979) 95 C.A.3d 945, 947, 157 C.R. 464 [proceeding before Labor Commissioner under Lab.C. 98 of employee compensation complaint; appeal from superior court judgment after trial de novo under Lab.C. 98.2]; *Millan v. Restaurant Enterprises Group* (1993) 14 C.A.4th 477, 485, 18 C.R.2d 198 [order compelling production of documents pursuant to administrative subpoena]; *Evans v. Pillsbury, Madison & Sutro* (1998) 65 C.A.4th 599, 603, 76 C.R.2d 679 [order overruling demurrer for noncompliance with C.C. 1714.10, requiring court's permission to file civil action against attorney; see 3 Cal. Proc. (5th), *Actions*, §§211, 212]; cf. *Bishop v. Merging Capital* (1996) 49 C.A.4th 1803, 1806, 57 C.R.2d 556 [order compelling production of evidence is not appealable; rejecting *Millan*].)

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See *California v. Pet Food Express Ltd.* (2008) 165 C.A.4th 841, 849, 81 C.R.3d 486 [superior court order directing retailer to comply with administrative subpoena by disclosing data on sales of allegedly unregistered products was appealable, because order was tantamount to superior court judgment on mandamus, and administrative hearing might never be requested on underlying matter]; *People v. U.S. Financial Management* (2009) 169 C.A.4th 1502, 1511, 87

C.R.3d 615 [order compelling compliance with administrative subpoena was appealable final judgment, because it constituted final determination of parties' rights, notwithstanding possibility that further proceedings might be required to enforce compliance with order].



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2. Orders in Arbitration Proceeding.

a. Order Directing Arbitration: Not Appealable.

9 *Witkin Cal. Proc. Appeal* § 140

[§ 140] Order Directing Arbitration: Not Appealable.

(1) *In General.* An order directing parties to arbitrate is interlocutory; it does not decide any issues, it does not compel payment of money or any other act, and an appeal would delay and defeat the purpose of the statute. (See *Sjoberg v. Hastorf* (1948) 33 C.2d 116, 117, 199 P.2d 668 [dictum]; *Jardine, Matheson & Co. v. Pacific Orient Co.* (1929) 100 C.A. 572, 573, 280 P. 697; *Corbett v. Petroleum Maintenance Co.* (1953) 119 C.A.2d 21, 22, 258 P.2d 1077; *Wetsel v. Garibaldi* (1958) 159 C.A.2d 4, 8, 323 P.2d 524; *Maddy v. Castle* (1976) 58 C.A.3d 716, 719, 130 C.R. 160; *State Farm Fire & Cas. v. Hardin* (1989) 211 C.A.3d 501, 507, 259 C.R. 433 [order directing appraisal, similar to order directing arbitration; no unusual circumstances justified treating notice of appeal as petition for mandamus]; *Vivid Video v. Playboy Entertainment Group* (2007) 147 C.A.4th 434, 440, 54 C.R.3d 232 [order denying motion to compel arbitration of whether it was for court or arbitrators to decide arbitrability of claims of party to agreement was not appealable; ruling contemplated further proceedings in trial court, because order merely determined that trial court would determine what issues were arbitrable]; 30 *So. Cal. L. Rev.* 445; 6 *A.L.R.4th* 652 [appealability of state court's order or decree compelling or refusing to compel arbitration].)

An order directing arbitration is not rendered appealable by the Federal Arbitration Act provision (9 U.S.C., §16(a)(3)) calling for immediate appeal; that provision is not binding on state courts. (*Muao v. Grosvenor Properties* (2002) 99 C.A.4th 1085, 1088, 122 C.R.2d 131, 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §526.)

A party does not waive his or her right to attack the order by proceeding to arbitration; the order is reviewable on appeal from a judgment confirming the award. (*C.C.P.* 1294, 1294.2; see *Lesser Towers v. Roscoe-Ajax Const. Co.* (1969) 271 C.A.2d 675, 692, 77 C.R. 100; *Wheeler v. St. Joseph Hosp.* (1976) 63 C.A.3d 345, 353, 133 C.R. 775, citing the text.)

(2) *Improper Use of Writ Procedure.* An attempt to circumvent the rule against nonappealability by utilizing the writ procedure was rejected in *International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 C.A.3d 699, 199 C.R. 690. Petitioner IFI filed a petition for a writ of prohibition to prevent the commencement of arbitration proceedings, and appealed from the order denying the writ. The court observed that "[p]rocedurally this case is a mirror image of the usual case in which the party desiring arbitration seeks judicial intervention to *compel* his or her

opponent to submit to arbitration. Here, IFI won the race to the courthouse by filing its petition to *prevent* arbitration." (152 C.A.3d 703.) *Held*, appeal dismissed.

(a) A judgment granting or denying a petition for an extraordinary writ is normally appealable (*supra*, §139) under C.C.P. 904.1. And prohibition has been used to restrain enforcement of an order compelling arbitration if the matters involved are outside the scope of the arbitration agreement. Here, however, there was no judicial act in excess of jurisdiction, and the writ will not lie to restrain acts of an arbitrator. (152 C.A.3d 703, 704.)

(b) The formerly recognized right to review intermediate rulings of municipal or justice courts by petitioning for mandamus or prohibition in the superior court and appealing from the order of denial was terminated by the 1982 amendment of C.C.P. 904.1 (see 8 Cal. Proc. (5th), *Extraordinary Writs*, §218; *infra*, §148). The same policy considerations apply to arbitration proceedings. The preferred procedure is to proceed with the arbitration and attack the intermediate rulings on a petition to vacate or confirm the award or on an appeal from the judgment confirming. Hence, the order denying prohibition was not appealable. (152 C.A.3d 706.) (See *United Firefighters of Los Angeles v. Los Angeles* (1991) 231 C.A.3d 1576, 1582, 283 C.R. 8, quoting the text.)

(3) *Order Refusing To Enjoin Arbitration*. An order refusing to enjoin arbitration is tantamount to an order compelling arbitration, and is not appealable. (*Melchor Inv. Co. v. Rolm Systems* (1992) 3 C.A.4th 587, 591, 592, 4 C.R.2d 343 [following *International Film Investors*].)

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2. Orders in Arbitration Proceeding.

b. Order Denying Arbitration: Appealable.

9 *Witkin Cal. Proc. Appeal* § 141

[§ 141] Order Denying Arbitration: Appealable.

At one time, where an action was brought on a contract with an alleged arbitration clause, and the defendant petitioned for an order directing arbitration, denial or dismissal of the petition was not appealable. The petition was regarded as essentially a cross-complaint for specific performance of a contract to arbitrate, and its denial or dismissal did not terminate the main action on the contract. (*Sjoberg v. Hastorf* (1948) 33 C.2d 116, 118, 199 P.2d 668 [action for breach of contract, defendants' petition for order directing arbitration was dismissed]; see *supra*, §117.) However, if no action was brought on the contract, and one party petitioned the court for an order directing arbitration, a special proceeding was initiated. Hence, an order denying the petition was a final judgment in that special proceeding, and was appealable as such. (*Squire's Dept. Store v. Dudum* (1953) 115 C.A.2d 320, 330, 252 P.2d 418.)

This distinction no longer has practical significance. An order dismissing or denying a petition to compel arbitration is now made appealable by C.C.P. 1294(a), enacted in 1961 as part of the revision of the Arbitration Act (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §524 et seq.). (See *Mercury Ins. Group v. Superior Court* (1998) 19 C.4th 332, 348, 79 C.R.2d 308, 965 P.2d 1178 ["petition" in C.C.P. 1294(a) includes motion, where action is already pending; motion seeking separate judicial arbitration and contractual arbitration was, in effect, motion seeking contractual arbitration and therefore its denial was appealable]; *Fireman's Fund Ins. Cos. v. Younesi* (1996) 48 C.A.4th 451, 456, 55 C.R.2d 671 [under C.C.P. 1294, order denying arbitration is appealable, whether arbitration is authorized by contract or statute]; *Porter v. United Services Auto. Assn.* (2001) 90 C.A.4th 837, 839, 108 C.R.2d 860 [order "advising" parties to arbitrate in New Jersey was order denying petition to compel arbitration in California, and was appealable]; *Sanders v. Kinko's* (2002) 99 C.A.4th 1106, 1109, 121 C.R.2d 766, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §526 [order that had effect of staying any arbitration until after class certification was appealable, because ruling, even without prejudice, defeated benefits provided by arbitration agreement; order staying arbitration is functional equivalent of order denying arbitration]; 6 A.L.R.4th 652 [appealability of order or judgment compelling or refusing to compel arbitration].)

On an appeal under C.C.P. 1294, any intermediate ruling that necessarily affects the order appealed from or substantially affects the right of a party may be reviewed. (C.C.P. 1294.2.) Hence, an interlocutory order denying a stay is reviewable on appeal from the order denying arbitration. (*Berman v. Renart Sportswear Corp.* (1963) 222 C.A.2d

385, 388, 35 C.R. 218; cf. *Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 C.A.4th 759, 767, 28 C.R.3d 752 [appellate court lacked ancillary jurisdiction to consider purchasers' appeal of order granting vendor's motion to compel arbitration of purchasers' fraud action, despite exercise of jurisdiction to consider real estate broker's appeal of order denying its motion to compel arbitration in same action; trial court's two orders were logically separate and not intermediate, and thus C.C.P. 1294.2 did not apply].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Otay River Constructors v. San Diego Expressway* (2008) 158 C.A.4th 796, 803, 70 C.R.3d 434 [order denying arbitration is final and appealable even though more litigation is contemplated in separate action].



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2. Orders in Arbitration Proceeding.

c. Orders After Arbitration: Appealable.

9 *Witkin Cal. Proc. Appeal* § 142

[§ 142] Orders After Arbitration: Appealable.

(1) *In General.* C.C.P. 1294 makes the following appealable:

- (a) An order dismissing a petition to confirm, correct, or vacate an arbitration award. (C.C.P. 1294(b).)
- (b) An order vacating an arbitration award unless a rehearing in arbitration is ordered. (C.C.P. 1294(c).)
- (c) A judgment entered pursuant to the Arbitration Act (C.C.P. 1280 et seq.). (C.C.P. 1294(d).)
- (d) A special order after final judgment. (C.C.P. 1294(e).)

A number of decisions are instructive. (See *Maddy v. Castle* (1976) 58 C.A.3d 716, 720, 130 C.R. 160 [appeal from order of confirmation]; *Carpenters 46 Northern Calif. Counties Conference Bd. v. David D. Bohannon Organization* (1980) 102 C.A.3d 360, 363, 161 C.R. 296 [appeal from order dismissing petition to confirm]; *Elliott & Ten Eyck Partnership v. Long Beach* (1997) 57 C.A.4th 495, 501, 67 C.R.2d 140 [decision by judge acting as arbitrator pursuant to parties' agreement, but also in official capacity as judicial officer trying case, was appealable, whether viewed as appeal from judgment or from order denying motion to vacate arbitration award].)

(2) *Orders Similar in Effect.* The cases dealing with the predecessor statute, former C.C.P. 1293, construed its language liberally to allow appeals from orders not identical to those recited but similar in effect. Thus, where there was no proceeding to confirm, an order denying a motion to vacate the award was held equivalent to an order confirming it. (See *Glesby v. Balfour, Guthrie & Co.* (1943) 63 C.A.2d 414, 417, 147 P.2d 60; *Jordan v. Pacific Auto. Ins. Co.* (1965) 232 C.A.2d 127, 129, 42 C.R. 556.) (On appeal from order denying or dismissing motion for confirmation, formerly held equivalent to order vacating award, see *Robinson v. Superior Court* (1950) 35 C.2d 379, 382, 218 P.2d 10; *Pleaters & Stitchers Assn. v. Superior Court* (1931) 114 C.A. 35, 36, 299 P. 555.) However, a later decision refused to treat an order denying a petition to correct or vacate (not appealable) as an order dismissing a petition to confirm or vacate (appealable under C.C.P. 1294(b)). (See *Mid-Wilshire Associates v. O'Leary* (1992) 7 C.A.4th 1450, 1454, 9 C.R.2d 862, citing *Glesby* and *Jordan*.)

(3) *Inconsistent Orders*. Difficulty arose from inconsistent orders in *Long Beach Iron Works v. International Molders & Allied Workers Union of North America, Local 3* (1972) 26 C.A.3d 657, 103 C.R. 200. In a labor arbitration, plaintiff moved to vacate the award and defendant petitioned to confirm it. The judge, after hearing both motions together, made an order denying the motion to confirm and vacating the award for resubmission to a different arbitrator. Defendant appealed from the apparently appealable order denying (i.e., "dismissing") its petition to confirm (C.C.P. 1294(b)). Plaintiff moved to dismiss the appeal on the ground that an order vacating the award is not appealable if a rehearing in arbitration is ordered (C.C.P. 1294(c)). *Held*, appeal dismissed. Construing the statutory provisions together, the legislative intent was clearly to preclude an appeal from an intermediate ruling where the judge ordered further proceedings in arbitration. (26 C.A.3d 659.) The court added that the trouble would have been avoided, i.e., no appeal would have been attempted, if the judge, after vacating the award, had treated the motion to confirm as moot and simply put it off calendar without ruling on it. (26 C.A.3d 660.)

(4) *Distinction: Where Record Supports Interlocutory Nature of Order*. Where the record shows that an order denying a petition to confirm an initial arbitration award is interlocutory, it is not appealable. Thus, it may be considered on an appeal from a judgment confirming a subsequent award. (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 C.A.4th 1334, 1344, 83 C.R.2d 340 [after denying petition to confirm, trial court ordered matter returned to panel with directions to conduct further proceedings; court also noted that referees were not bound by initial arbitration award].)

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E. Judgments in Special Proceedings.

3. Motion as Special Proceeding.

9 *Witkin Cal. Proc. Appeal* § 143

[§ 143] Motion as Special Proceeding.

The final determination of any suit, whether classified as an action or special proceeding (see 3 *Cal. Proc.* (5th), *Actions*, §§62, 64), is an appealable judgment. But some independent special proceedings grow out of or relate to a main action (e.g., writ proceedings, *infra*, §148), and the statutory definition of "special proceeding" ("every other remedy") is broad enough to include any proceeding by motion within a main action or special proceeding. Thus, the class of appealable orders may be greatly expanded by categorizing particular motions as special proceedings.

This appears to be the effect, although not the express holding, of *McClearen v. Superior Court* (1955) 45 *C.2d* 852, 291 *P.2d* 449. M sued his employer in the justice court on a claim for wages. The state moved under former C.C.P. 688.1 (now *C.C.P.* 708.410 et seq.) for an order granting it a lien as a judgment creditor for delinquent sales taxes owed by M. The justice court denied the motion and the state appealed. *Held*, the order was appealable as a final judgment. The creditor may, though he or she need not, intervene in the main action, and the rule laid down in the intervention cases "is equally applicable in any situation where the statute expressly authorizes the proceeding and the order finally disposes of the rights of the party." (45 *C.2d* 856.)

Thus, the opinion seems to hold that the order was appealable as a judgment final as to a party (*supra*, §109). The difficulty is that the state did not intervene and therefore did not become a party to the main action so as to bring it within this principle. The only other theory would seem to be that the statutory motion initiated a special proceeding independent of the main action, and the determination of the motion was a final judgment. The following language of the opinion, though avoiding the term "special proceeding," is consistent with this analysis: "A lien claimant is obviously a party to the proceeding on this motion for a lien, even though he does not seek by intervention to become a party to the main action, and his failure to pursue the optional remedy of intervention cannot be considered as having any adverse effect upon his right to appeal from a denial of his motion." (45 *C.2d* 856.)

Hersch v. Boston Ins. Co. (1959) 175 *C.A.2d* 751, 346 *P.2d* 796, deals with the same motion, and likewise does not clearly stand for a single theory of appealability. This time the motion of the judgment creditor was granted and plaintiff appealed. *Held*: (a) The theory of judgment final as to a party (*supra*, §109) could not apply, for, as to plaintiff, this was merely one interlocutory order in the course of his unfinished litigation with defendant. (b) The special proceeding theory could apply: "[W]e see no difference between an order *denying* such a motion and an order *granting* it." (175

C.A.2d 754.) (c) The appropriate theory, however, is that the judgment is final on a collateral matter (*supra*, §99). "Particularly is this so when the establishment of such lien prevents any settlement of the main action without consideration of the lien. There is no further action to be taken by the court as between the lienor and the lienee. The court's action is a final judgment as to them." (*175 C.A.2d 753.*)

Thus, the *Hersch* court approves in principle the special proceeding theory, which finds support in *McClearen*; but its actual reliance on the collateral matter theory brings it in conflict with the rule requiring a compelled payment of money or other act (*supra*, §99). (See *Trimble v. Steinfeldt* (1986) 178 C.A.3d 646, 650, 224 C.R. 195 [following *Hersch* and *McClearen* on collateral matter theory]; *In re Molz* (2005) 127 C.A.4th 836, 842, 26 C.R.3d 131 [order denying motion to vacate modification of decree was appealable as final determination in special proceeding; order functioned as final judgment, and Legislature's failure to expressly state that order denying motion was appealable did not evidence legislative intent that order not be appealable].)

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F. Dismissal and Nonsuit.

9 *Witkin Cal. Proc. Appeal* § 144

[§ 144] Dismissal and Nonsuit.

(1) *Involuntary Dismissal and Nonsuit.* Orders of dismissal (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §280 et seq.) and nonsuit (see 7 *Cal. Proc.* (5th), *Trial*, §406 et seq.) have the effect of final judgments in terminating an action and are appealable as final judgments. They must, however, be properly entered:

(a) Under former law, these orders were normally evidenced by minute entries, and the minute entry was the appealable judgment. (See *Brown v. Sterling Furniture Co.* (1917) 175 C. 563, 564, 166 P. 322; *Southern Pac. R. Co. v. Willett* (1932) 216 C. 387, 390, 14 P.2d 526; *Costa v. Regents of Univ. of Calif.* (1951) 103 C.A.2d 491, 492, 229 P.2d 867; *White v. Ostly* (1959) 173 C.A.2d 636, 639, 343 P.2d 937.)

(b) In 1963, C.C.P. 581d was amended to state that all dismissals ordered by the court must be in the form of a written order, signed and filed, and that these orders when filed constitute judgments. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§305, 366; 7 *Cal. Proc.* (5th), *Trial*, §419; 7 *Cal. Proc.* (5th), *Judgment*, §48.) The amendment makes a minute entry ineffectual and nonappealable; no appeal can be taken except from the order signed and filed. (See *Palazzi v. Air Cargo Terminals* (1966) 244 C.A.2d 190, 192, 52 C.R. 817 [nonsuit]; *Adohr Milk Farms v. Love* (1967) 255 C.A.2d 366, 369, 63 C.R. 123, citing the text [order granting motion to strike complaint]; *Graski v. Clothier* (1969) 273 C.A.2d 605, 607, 78 C.R. 447 [dismissal for failure to amend pleading within time allowed]; *In re Lauren P.* (1996) 44 C.A.4th 763, 768, 52 C.R.2d 170, supra, §35 [in dependency proceeding, dismissal for insufficient evidence was appealable, even though dismissal was "without prejudice," where dismissal followed trial on merits, and was thus *res judicata*].)

There is a distinction between an order granting a motion to dismiss and an order of dismissal. The former is not appealable; the latter is appealable. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 C.A.4th 1349, 1359, 128 C.R.2d 200.)

(2) *Transfer Equivalent to Involuntary Dismissal.* In *Daar v. Yellow Cab Co.* (1967) 67 C.2d 695, 63 C.R. 724, 433 P.2d 732, 4 *Cal. Proc.* (5th), *Pleading*, §288, plaintiff brought a class action in the superior court. The judge sustained a demurrer without leave to amend and ordered a transfer to the municipal court, thus wholly demolishing the class action and reducing the suit to plaintiff's small court claim for individual damages. The order was therefore in effect a dismissal of the class action, and appealable under the principles laid down in cases involving judgments final as to a

party (*supra*, §109 et seq.). (67 C.2d 699.) (See 54 A.L.R.3d 595 [order denying right to proceed in class action].)

(3) *Exception: Nonsuit in Condemnation Action.* A practical exception to the rule of appealability in condemnation cases was declared in *Santa Cruz v. MacGregor* (1960) 178 C.A.2d 45, 2 C.R. 727. A lessee codefendant claimed an apportionment of any award to his codefendant lessor. A nonsuit was granted against the lessee. *Held*, if the nonsuit were the final judgment, he would have to appeal from it; and he could not thereafter appeal from the later judgment fixing the value of the property, nor could he further litigate his claim against his codefendant. Hence, the order of nonsuit was not appealable, and his appeal was properly taken from the subsequently entered final judgment. (178 C.A.2d 49.)

(4) *Distinction: Voluntary Dismissal.* An entry of dismissal at the request of the plaintiff is an odd form of determination, initiated by a private document instead of a court order. Though final in effect, it has been held nonappealable, partly because it is not a judicial act, and partly because the defendant is not an aggrieved party. (See *Cook v. Stewart McKee & Co.* (1945) 68 C.A.2d 758, 762, 157 P.2d 868.) However, a voluntary dismissal with prejudice is treated as an appealable order if it is entered after an adverse ruling by the trial court in order to expedite the appeal of the ruling. (*Stewart v. Colonial Western Agency* (2001) 87 C.A.4th 1006, 1012, 105 C.R.2d 115 [voluntary dismissal with both parties stipulating that appeal from order imposing sanctions was to follow]; *Gutkin v. University of Southern Calif.* (2002) 101 C.A.4th 967, 974, 125 C.R.2d 115 [even though trial judge refused to enter judgment following plaintiff's voluntary dismissal of complaint, orders sustaining demurrers without leave to amend, combined with dismissal, had effect of appealable judgment].)

A voluntary dismissal terminates an action for all time and affords the appellate court no jurisdiction to review motions made prior to the dismissal. Although the dismissal of claims with prejudice may have the legal effect of a final judgment and can serve to expedite an appeal (see *supra*), by voluntarily dismissing the action without, rather than with, prejudice, a plaintiff loses his or her ability to challenge the trial court's interim orders. (*Gutkin v. University of Southern Calif.*, *supra*, 101 C.A.4th 975.)

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G. Summary Judgment.

9 *Witkin Cal. Proc. Appeal* § 145

[§ 145] Summary Judgment.

(1) *Motion for Summary Judgment Granted.* Although a motion for summary judgment is similar to a motion for nonsuit in its objects, the statutory procedure is different. There are two steps: an order granting the motion (nonappealable preliminary order), and a judgment entered thereunder (final judgment, appealable as in other cases). (*C.C.P.* 437c(m)(1); see *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 9, 270 C.R. 796, 793 P.2d 2; *Kelly v. Liddicoat* (1939) 31 C.A.2d 75, 76, 87 P.2d 398; *Integral Land Corp. v. Anderson* (1944) 62 C.A.2d 770, 772, 145 P.2d 364; *Anmaco v. Bohlken* (1993) 13 C.A.4th 891, 897, 16 C.R.2d 675; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §161; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §249 et seq.)

(2) *Motion for Partial Summary Judgment Granted.* The statute expressly prohibits appellate review of an order granting partial summary judgment. It provides that, when that order is made, the causes of action, affirmative defenses, claims for damages, and issues of duty as to which the motion has been granted are deemed to be established at the trial of the action, which then proceeds as to the remaining causes of action, affirmative defenses, claims for damages, and issues. (*C.C.P.* 437c(n)(1).) "Except when a separate judgment may properly be awarded in the action, no final judgment may be entered on a motion for summary judgment prior to the termination of the action." (*C.C.P.* 437c(k).) (See *Field Research Corp. v. Superior Court* (1969) 71 C.2d 110, 111, 77 C.R. 243, 453 P.2d 747 [no appellate remedy and order denied petitioners right to trial on issue of damages, mandamus was granted to compel vacating of order]; *DeGrandchamp v. Texaco* (1979) 100 C.A.3d 424, 437, 160 C.R. 899; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§256, 267.)

A practical exception is recognized where there are multiple parties and the order granting partial summary judgment disposes of all issues involving the appealing party. (*Etienne v. DKM Enterprises* (1982) 136 C.A.3d 487, 489, 186 C.R. 321.)

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H. Habeas Corpus.

9 *Witkin Cal. Proc. Appeal* § 146

[§ 146] Habeas Corpus.

(1) *Criminal Cases: No Appeal by Defendant.* An order denying a defendant's petition for habeas corpus is not appealable. The remedy is a new application to another court. (See 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §§78, 79.)

(2) *Criminal Cases: Appeal by People.* The People may appeal from a final order of a superior court "discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases." (P.C. 1506; see 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §§80, 81.)

(3) *Civil Cases.* Habeas corpus is occasionally used as a means of obtaining custody of a child, in a proceeding essentially civil in nature. (See 3 *Cal. Proc.* (5th), *Actions*, §73.) The determination was formerly held nonappealable, partly on the ground that the object of the writ--speedy and summary relief--would be defeated by an appeal. (*In re Bruegger* (1928) 204 C. 169, 171, 267 P. 101.) Because much the same review could be had in a new writ proceeding brought directly in the appellate court, it was argued that the correct approach was to recognize that habeas corpus to obtain child custody is merely an equitable proceeding and that the determination should be appealable as a final judgment. (See *In re Croze* (1956) 145 C.A.2d 492, 501, 302 P.2d 595 [dissenting opinion].) The determination is now appealable by statute.

A final order of the superior court granting relief to "any person other than a defendant in a criminal case" is appealable. A petition for hearing (now review) in the Supreme Court is permitted after determination by the Court of Appeal, either on an appeal from the superior court or in an original writ proceeding in the appellate court. The appeal and petition for hearing are governed by Judicial Council rules, and either the court that made the order or the court in which the appeal or petition for hearing is pending may stay execution. (P.C. 1507.)

(4) *Procedure.* Under C.R.C., Rule 8.388, the procedure in criminal appeals applies to all habeas corpus proceedings, criminal or civil.

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I. Contempt.

9 *Witkin Cal. Proc. Appeal* § 147

[§ 147] Contempt.

Judgments and orders in contempt proceedings are "final and conclusive." (*C.C.P.* 1222.) However, as such, they are specifically made nonappealable. (*C.C.P.* 904.1(a)(1)(B).) And this is so whether dealing with direct or constructive contempt, and whether the order is an adjudication of contempt or a refusal to hold the party in contempt. (See *Gale v. Tuolumne County Water Co.* (1914) 169 C. 46, 50, 145 P. 532 [violation of injunction; held guilty]; *John Breuner Co. v. Bryant* (1951) 36 C.2d 877, 878, 229 P.2d 356; *Thomas v. Thomas* (1935) 4 C.A.2d 317, 318, 40 P.2d 581 [refusal to pay alimony; held not guilty]; *Smith v. Habegger* (1963) 213 C.A.2d 183, 184, 28 C.R. 646 [appeal dismissed]; *Butler v. Butler* (1967) 255 C.A.2d 132, 135, 62 C.R. 825 [wife obtained order to show cause, husband moved to dismiss and court granted motion; wife's appeal dismissed]; see 24 *A.L.R.3d* 650 [appealability of acquittal from or dismissal of charge of contempt of court].)

In *Gue v. Dennis* (1946) 28 C.2d 616, 170 P.2d 887, an unsuccessful attempt was made to circumvent this rule. Appellant, ordered to obey a subpoena duces tecum or be adjudged in contempt, took an appeal. *Held*, the order directing compliance was not appealable, not because it was a contempt order, but because it was intermediate and preliminary (interlocutory). (28 C.2d 617.)

The following distinctions, however, should be noted:

(1) Review of contempt orders may be had on certiorari or habeas corpus, in about the same manner as in a review on appeal. (See *Gue v. Dennis*, *supra*; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§409, 410); 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §362; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §35.)

(2) An order refusing to hold a party in contempt may likewise be reviewed on certiorari. (*Taylor v. Superior Court* (1942) 20 C.2d 244, 245, 125 P.2d 1.)

The absolute nature of the nonappealability of judgments and orders in contempt proceedings was questioned by *In re Baroldi* (1987) 189 C.A.3d 101, 234 C.R. 286, a habeas corpus proceeding challenging a contempt order for a jurisdictional defect. Although the court granted the writ, thus freeing the petitioner despite substantial evidence to support an adjudication of contempt (see 7 *Cal. Proc.* (5th), *Trial*, §177), it voiced strong objection to the statutory rule: "Because the order is final and conclusive, neither a trial court nor an appellate court can amend it for any reason, and

an appellate court cannot remand a contempt cause in which the order has been declared void and annulled to the superior court to reinstitute contempt proceedings. ... We urge the Legislature to review the purpose of *section 1222, Code of Civil Procedure*, and the ramifications of the finality of such judgments and orders, and appropriately amend the statute to permit appellate remand to the trial court for a new hearing of a contempt case in instances in which the appellate court has voided the contempt order and deems it proper." (189 C.A.3d 111.)

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J. Order Granting or Denying Writ.

1. General Rule: Order Appealable.

9 *Witkin Cal. Proc. Appeal* § 148

[§ 148] General Rule: Order Appealable.

(1) *In General.* A petition in the superior court for an extraordinary writ of certiorari, mandamus, or prohibition is a special proceeding (*C.C.P. 1063 et seq.*; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §217), and a judgment in a special proceeding is appealable (see *supra*, §139). Hence, a superior court order either granting or denying the petition is appealable, and this rule applies even if the order is not accompanied by a separate, formal judgment. (*Public Defenders' Organization v. Riverside* (2003) 106 C.A.4th 1403, 1409, 132 C.R.2d 81; on order granting, see *Healdsburg Police Officers Assn. v. Healdsburg* (1976) 57 C.A.3d 444, 456, 129 C.R. 216; on order denying, see *Beaumont v. Samson* (1907) 4 C.A. 701, 703, 89 P. 137; *Ingold v. Municipal Court* (1948) 85 C.A.2d 651, 652, 193 P.2d 808; *Elmore v. Imperial Irr. Dist.* (1984) 159 C.A.3d 185, 191, 205 C.R. 433; *Breslin v. San Francisco* (2007) 146 C.A.4th 1064, 1073, 55 C.R.3d 14, citing the text [order denying mandamus, which sought dismissal of charges pending against police officers before city police commission on ground that charges were time-barred, was appealable even though it did not rule on officers' actions for administrative mandate and declaratory relief; order resolved statute of limitations issue essential to all causes of action such that officers could not prevail on any of them]; *Bettencourt v. San Francisco* (2007) 146 C.A.4th 1090, 1098, 53 C.R.3d 402 [same]; *People v. Karriker* (2007) 149 C.A.4th 763, 773, 57 C.R.3d 412 [order directing public conservator to file Lanterman-Petris-Short petition (3 *Cal. Proc.* (5th), *Actions*, §80 et seq.) was appealable; order finally disposed of single issue raised in what court treated as petition for mandamus, i.e., whether to require conservator to file petition].)

(2) *Distinction: Where Other Cause Is Pending.* *Nerhan v. Stinson Beach County Water Dist.* (1994) 27 C.A.4th 536, 33 C.R.2d 10, raised the question whether an appeal from a judgment dismissing a petition for mandamus can be maintained while a complaint for damages is still pending between the parties. *Held*, under *Morehart v. Santa Barbara* (1994) 7 C.A.4th 725, 29 C.R.2d 804, 872 P.2d 143. *supra*, §120, the judgment is not appealable.

(a) A line of cases, including *California Teachers Assn. v. Board of Education* (1980) 109 C.A.3d 738, 167 C.R. 429, and *Elmore v. Imperial Irr. Dist.* (1984) 159 C.A.3d 185, 191, 205 C.R. 433, holds that even where there are issues that remain to be tried, a trial court's decision on a petition for mandamus is appealable. (27 C.A.4th 539.)

(b) However, even though these cases are not mentioned in *Morehart*, that decision must be read as impliedly disapproving them. In part, *Morehart* held that a judgment that disposes of only part of the causes of action between the

parties is not appealable even though such causes may be characterized as separate and independent from those remaining. Hence, "[a]lthough a petition for writ of mandate is a special proceeding, and '[a] judgment in a special proceeding is the final determination of the rights of the parties therein', ... we conclude *Morehart* holds that absent unusual circumstances, the denial of a petition for writ of mandate is not appealable if other causes of action remain pending between the parties." (27 C.A.4th 540.) (See *Griset v. Fair Political Practices Com.* (2001) 25 C.4th 688, 696, 107 C.R.2d 149, 23 P.3d 43, *infra*, §853 [allowing appeal of order denying writ of mandamus where petition has been joined with other cause of action would violate one final judgment rule].)

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J. Order Granting or Denying Writ.

2. Judgment Directed at Superior Court.

9 Witkin Cal. Proc. Appeal § 149

[§ 149] Judgment Directed at Superior Court.

(1) *Prohibition or Mandamus.* At one time, *C.C.P. 904.1* provided that no appeal could be taken from a judgment "granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a ... superior court" and relating to a matter pending in the superior court. The judgment was reviewable only on a petition for an extraordinary writ. In 2007, this provision was deleted.

(2) *Certiorari.* In *Bermudez v. Municipal Court* (1992) 1 *C.4th* 855, 4 *C.R.2d* 609, 823 *P.2d* 1210, plaintiff, a deputy public defender, was found in contempt for arriving late at a hearing in the municipal court. He petitioned for certiorari in the superior court, and the court denied the petition and affirmed the contempt order. He then petitioned for mandamus in the Court of Appeal, challenging the superior court's disposition. The Court of Appeal summarily denied the petition, and the Supreme Court denied review of the order of denial. Plaintiff then filed an appeal in the Court of Appeal from the superior court judgment denying certiorari and affirming the contempt order, and the Court of Appeal dismissed the appeal. The Supreme Court then granted review, reinstated the appeal, and remanded the matter to the Court of Appeal for consideration of the merits.

(a) *Constitutional provisions and former statute.*

(1) Under Cal. Const., Art VI, §11, the Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction. And Cal. Const., Art. VI, §10, states that the superior courts have original jurisdiction in proceedings in the nature of mandamus, certiorari, and prohibition. (1 *C.4th* 857.)

(2) Prior to 1983, *C.C.P. 904.1* stated that an appeal may be taken from a superior court judgment except a judgment of contempt made final by *C.C.P. 1222* or a judgment on appeal from a municipal court. But this provision did not preclude an appeal from a superior court order denying an extraordinary writ. Accordingly, a superior court judgment denying mandamus or prohibition was appealable as a matter of statutory right. (1 *C.4th* 858.) And without specifically addressing the issue of appealability, the Courts of Appeal routinely entertained appeals from superior court denials of certiorari following a municipal court contempt order. (1 *C.4th* 858, listing many cases, and quoting the text.)

(b) *Burrus and Gilbert Cases.* In *Burrus v. Municipal Court* (1973) 36 *C.A.3d* 233, 111 *C.R.* 539, 8 *Cal. Proc.*

(5th), *Extraordinary Writs*, §218, the court described the existing rule as "a loophole in our appellate system," in view of the policy expressed in the Constitution and statute that litigation arising in the municipal court will not go beyond the superior court except under very limited circumstances. (1 C.4th 859.) The court also pointed out that this right of appeal, with its "awkward" delay of proceedings in the lower court, is unnecessary. If the issue is of such significance as to justify use of a prerogative writ, the litigant may file an original petition in the Court of Appeal or Supreme Court after denial in the superior court; and original petitions are far less burdensome than appeals, because those that obviously lack merit can be screened out by summary denial. (1 C.4th 859.) In response to *Burrus*, the Judicial Council in 1976 proposed an amendment to former C.C.P. 904.1(a) to preclude such appeals. In *Gilbert v. Municipal Court* (1977) 73 C.A.3d 723, 140 C.R. 897, the court issued a renewed call for legislative action. (1 C.4th 860.)

(c) *Statutory amendment.* The 1982 Legislature enacted former C.C.P. 904.1(a)(4) (later renumbered and subsequently repealed). It added an additional exception to appealability, precluding appeal from a judgment granting or denying mandamus or prohibition directed to a municipal court, and providing that an appellate court may review the judgment on petition for an extraordinary writ. (1 C.4th 860.)

(d) *Appeal from denial of certiorari.*

(1) Because the 1982 amendment did not mention certiorari, *McCann v. Municipal Court* (1990) 221 C.A.3d 527, 270 C.R. 640, following long-established precedent and without discussing the issue of appealability, entertained an appeal from denial of certiorari. But the Court of Appeal in the present case reasoned that, where the legal issue underlying the petition for certiorari is an order of contempt issued by a municipal court, the general rule permitting appeal from the superior court's judgment on certiorari does not apply. The court declared that the effect and substance of the judgment should determine its appealability, and that it is the contempt order that is being appealed. (1 C.4th 861.)

(2) This reasoning does not survive scrutiny. If the Court of Appeal view were correct, then the decisions that highlighted the "appellate loophole" and triggered the legislative response were both wrong and unnecessary, for the underlying orders were not appealable. Review by certiorari is not allowed if appeal is possible; hence, there is no class of cases in which the order challenged is both appealable and subject to certiorari review. "Accordingly, we reject the suggestion that the substance of the underlying order determines the appealability of a superior court judgment on a petition for a writ of certiorari." (1 C.4th 862.) The right to appeal from a superior court judgment denying certiorari in municipal court contempt cases has not been questioned since creation of the municipal court. (1 C.4th 862, citing the text.)

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K. Agricultural Labor Relations Board Enforcement Judgment.

9 *Witkin Cal. Proc. Appeal* § 150

[§ 150] Agricultural Labor Relations Board Enforcement Judgment.

In *Agricultural Lab. Rel. Bd. v. Tex-Cal Land Management* (1987) 43 C.3d 696, 238 C.R. 780, 739 P.2d 140, the Agricultural Labor Relations Board (ALRB) found that Tex-Cal had violated the Agricultural Labor Relations Act (see 3 *Summary* (10th), *Agency and Employment*, §656 et seq.), and ordered it to cease and desist from violations, reinstate employees, and compensate them for their economic losses. The order became final, the board petitioned the superior court for enforcement, and the superior court issued a judgment of enforcement reciting the remedial provisions imposed by the board. Tex-Cal did not comply, and appealed from the superior court judgment. The board, contending that the enforcement judgment was not appealable, moved to dismiss the appeal, and also petitioned the superior court for a contempt order. The superior court declined to hold Tex-Cal in contempt, ruling that the judgment was automatically stayed by the appeal. The board then sought mandamus from the Court of Appeal, which consolidated the appeal and mandamus proceeding, and (a) denied the motion to dismiss; (b) affirmed the enforcement judgment; and (c) granted part of the petition for mandamus on a finding that portions of the enforcement judgment had not been stayed. *Held*, judgments of Court of Appeal affirmed and its opinion ordered published (see *infra*, §951).

(a) The operative effect of a superior court judgment ordering enforcement where review of an ALRB decision was not sought or was denied "is exactly the same as that of a Court of Appeal judgment for enforcement after review." (43 C.3d 702.) And, with limited statutory exceptions, superior court judgments in mandamus are appealable (see *supra*, §95). (43 C.3d 702.)

(b) The board's arguments against appealability are not persuasive:

(1) A judgment or decree that leaves nothing for further determination between the parties except the fact of compliance or noncompliance with its terms is final, not interlocutory. (43 C.3d 703.) *Gue v. Dennis* (1946) 28 C.2d 616, 170 P.2d 887, *supra*, §147 is distinguishable. It applies only when the enforcement order specifically states that further proceedings in contempt are contemplated. "Were this limitation not recognized, the *Gue* holding might quickly swallow large portions of the rule of appealable final judgments. Contempt is the sanction for refusal to comply with any injunction or writ of mandate or prohibition. If this fact alone made *Gue* applicable, all such orders and judgments would be nonappealable." (43 C.3d 703.)

(2) Nothing in *Lab.C. 1160.8* (8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§12, 13) suggests any departure from the

normal rule that injunctions and final judgments that form the basis for contempt sanctions are appealable. (43 C.3d 704.) And *Lab.C. 1160.9*, making the procedures under *Lab.C. 1160.8* the "exclusive method of redressing unfair labor practices," does not contravene the general principles of appealability. (43 C.3d 704.) The statutory right of appeal from final judgments and orders extends even to special proceedings intended to be summary in nature, unless the Legislature has prohibited an appeal in the particular case. (43 C.3d 705; see *supra*, §139.) Hence, "we can find no principled way to characterize a section 1160.8 enforcement judgment which would take it outside normal rules of appealability." (43 C.3d 705.) *Agricultural Lab. Rel. Bd. v. Abatti Produce* (1985) 168 C.A.3d 504, 214 C.R. 283, to the extent inconsistent, is disapproved. (43 C.3d 705.)

(3) "The Board perceives a disturbing anomaly in the result we reach. It notes that, under section 1160.8, a party has *no right* to judicial review of the *merits* of an ALRB order; a petition for review to the Court of Appeal may be denied summarily ... , as may a subsequent petition for review to this court. ... Why, then, the Board asks, should one have an *appeal of right* from a superior court enforcement order, which can only be entered after the merits of the ALRB order are beyond attack? Perhaps the Legislature could have devised a more logical review procedure, and it may amend the process as it sees fit. But our conclusions seem to us inescapable when section 1160.8, as currently written, is construed in light of the rules which apply generally to extraordinary writs, and which govern review of the final judgments of superior courts and courts of appeal respectively." (43 C.3d 705, footnote 7.)

(c) The issues on appeal from a superior court enforcement judgment are limited to procedural regularity and refusal to comply; and, if a Court of Appeal determines that the appeal is frivolous it may exercise its power to dismiss and, after proper notice and hearing, to award damages against the appealing party. (43 C.3d 706.)

(d) The board contended that the enforcement procedure is a "special proceeding" and therefore the final order is not automatically stayed; but, applying the test of *Tide Water Associated Oil Co. v. Superior Court* (1955) 43 C.2d 815, 279 P.2d 35, the proceeding to enjoin under *Lab.C. 1160.8* is an action, not a special proceeding. (43 C.3d 707, 708.) "In an adversarial setting, the ALRB prosecutes a farmer or union to enforce agricultural workers' rights, and to prevent and redress unfair labor practices. Enforcement is by traditional legal and equitable remedies, 'injunction or other proper process' tantamount to mandate. ... It matters not that the 'action' thus instituted concerns rights and wrongs defined only by statute and unknown to the common law." (43 C.3d 708.) The ALRB's purposes are not unduly frustrated by this conclusion. Prohibitory portions of an order are not automatically stayed, and if affirmative injunctive relief is necessary to preserve the status quo pending appeal, it can be obtained from the reviewing court. (43 C.3d 708.)

Three justices dissented, arguing that to allow the noncomplying party to take an appeal from the superior court's action will thwart one of the Legislature's purposes--the speedy resolution of agricultural labor disputes.

SUPPLEMENT: [This section is current through the latest supplement]



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V. FINAL JUDGMENT: ONE FINAL JUDGMENT RULE

L. Appeal in Sterilization Case.

9 Witkin Cal. Proc. Appeal § 151

[§ 151] Appeal in Sterilization Case.

(1) *Nature and Scope of Rule.* C.R.C., Rule 8.482 governs appeals from judgments "authorizing a conservator to consent to the sterilization of a developmentally disabled adult conservatee." (C.R.C., Rule 8.482(a), (b).) The rules governing criminal appeals are applicable unless C.R.C., Rule 8.482 provides otherwise. (C.R.C., Rule 8.482(a).)

(2) *Notice.* The appeal "is taken automatically, without any action by the conservatee, when the judgment is rendered." (C.R.C., Rule 8.482(b).) After entering the judgment, the clerk must immediately mail certified copies to the Court of Appeal and the Attorney General. (C.R.C., Rule 8.482(c)(2).)

(3) *Transcript and Record.* Immediately after entering the judgment, the clerk must begin preparing the clerk's transcript and notify the reporter to prepare the reporter's transcript. (C.R.C., Rule 8.482(c)(1).) (For contents of clerk's transcript and reporter's transcript, see C.R.C., Rule 8.482(d), (e).) The original and two copies of each transcript are required. *Prob.C. 1963* governs the cost of preparing the record on appeal. (C.R.C., Rule 8.482(f).)

(4) *Confidential Material.* Written reports of physicians, psychologists, and clinical social workers, and any other material marked confidential by the court may be inspected "only by court personnel, the parties and their counsel, the district appellate project, and other persons designated by the court." The material must be sent to the reviewing court in a sealed envelope marked "Confidential--May Not Be Examined Without Court Order." (C.R.C., Rule 8.482(g).)

(5) *Trial and Appellate Counsel.* To expedite preparation and certification of the record, the conservatee's trial counsel must continue to represent the conservatee until appellate counsel is retained or appointed. (C.R.C., Rule 8.482(h).) If not retained for the conservatee, appellate counsel must be appointed by the reviewing court. (C.R.C., Rule 8.482(i).)

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VI. NONAPPEALABLE ORDERS

A. In General.

1. Theory of Nonappealability.

9 Witkin Cal. Proc. Appeal § 152

[§ 152] Theory of Nonappealability.

Under the basic theory of the one final judgment rule (see *supra*, §§96, 97), orders are appealable only when expressly made appealable by statute (see *supra*, §§138, 144, and *infra*, §170 et seq.), or when they are in effect final judgments (see *supra*, §§109 et seq., 144).

The result is that there are relatively few appealable orders; the almost innumerable rulings, before and during trial, on pleadings, parties, evidence, and trial procedure, are reviewable only on appeal from the judgment (see *supra*, §§89, 90), or, in rare cases, by extraordinary writ (see *supra*, §91). (See *Jasper Const. v. University Casework Systems (1974) 39 C.A.3d 582, 585, 114 C.R. 143*, *infra*, §173, citing the text; C.E.B., 1 Civil Appellate Practice 3d, §§3.3, 3.26 et seq.; Rutter Group, 1 Civil Appeals and Writs §2:270 et seq.)

West's Key Number Digest, Appeal and Error 66 et seq., 95 et seq.

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VI. NONAPPEALABLE ORDERS

A. In General.

2. Where Appealable Judgment Is Entered.

9 Witkin Cal. Proc. Appeal § 153

[§ 153] Where Appealable Judgment Is Entered.

(1) *In General.* An appeal from a nonappealable order is not always fatal. If there is no appealable judgment or order in existence at the time of filing the notice of appeal, or at the time the reviewing court must determine the matter, the purported appeal will be dismissed. (See *supra*, §86 and *infra*, §572.) But if there is, or can be, an appealable judgment or order at either of those times, the supposedly ineffectual appeal from the nonappealable order can be regarded as merely a mistake in the notice of appeal, curable in the reviewing court.

(2) *Judgment Already Entered.* If the mistake is in appealing from a nonappealable order instead of from the existing judgment, the notice of appeal may be construed as referring to the judgment itself. (See *Shonkoff v. Dant Inv. Co.* (1968) 258 C.A.2d 101, 65 C.R. 463 [appeal from nonappealable order denying new trial; notice was deemed to constitute appeal from judgment]; *infra*, §564 et seq.)

(3) *Judgment Subsequently Entered.* Even where there is no existing judgment to which the notice of appeal could be directed at the time it is filed, if an appealable judgment is subsequently entered, the notice can be similarly interpreted as referring to it. (See *infra*, §564.) The fact that the notice preceded the entry of judgment merely makes the appeal premature, and this may be excused. (See *infra*, §620 et seq.)

(4) *Judgment Entered by Reviewing Court.* Where the defect is appealing from a partial determination of the issues, the reviewing court may cure its lack of appellate jurisdiction by amending the judgment to supply the missing element. (See *supra*, §124.)

(5) *Order Treated as Containing Judgment.* If the only impediment to appealability is the parties' oversight in failing to ensure that the trial judge entered a judgment on an order, the court may treat the order as including an appealable judgment and consider the appeal as being from that judgment. (*Basinger v. Rogers & Wells* (1990) 220 C.A.3d 16, 21, 269 C.R. 332 [order directing that judgment be entered nunc pro tunc was treated as containing appealable judgment].)

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VI. NONAPPEALABLE ORDERS

B. Pleading and Parties.

1. Demurrer and Judgment on Pleadings.

9 *Witkin Cal. Proc. Appeal* § 154

[§ 154] Demurrer and Judgment on Pleadings.

The following orders are not appealable:

(1) Order overruling a demurrer. (See *Harmon v. De Turk* (1917) 176 C. 758, 759, 169 P. 680.)

(2) Order sustaining a demurrer without leave to amend. (See *Lavine v. Jessup* (1957) 48 C.2d 611, 613, 311 P.2d 8; *Braren v. Reliable Carpet Works* (1932) 125 C.A. 489, 490, 13 P.2d 972; *Christensen v. Lucerne Holding Co.* (1933) 134 C.A. 215, 217, 25 P.2d 261; *Couch v. McGregor* (1937) 19 C.A.2d 633, 634, 66 P.2d 159; *Kennedy v. Owen* (1948) 85 C.A.2d 517, 519, 193 P.2d 141; *Wood v. Metzenbaum* (1949) 90 C.A.2d 533, 534, 203 P.2d 105; *Futlick v. F.W. Woolworth Co.* (1957) 149 C.A.2d 296, 298, 308 P.2d 405; *Tellefsen v. Key System Transit Lines* (1960) 187 C.A.2d 44, 45, 9 C.R. 299, citing the text; *Cornutt v. Holk* (1962) 203 C.A.2d 6, 7, 21 C.R. 224; *Beazell v. Schrader* (1962) 205 C.A.2d 673, 674, 23 C.R. 189, citing the text; *Yancey v. Fink* (1991) 226 C.A.3d 1334, 1342, 277 C.R. 415, supra, §127; *Hill v. Long Beach* (1995) 33 C.A.4th 1684, 1695, 40 C.R.2d 125, supra, §127; *Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 C.A.4th 750, 756, 62 C.R.2d 778, supra, §90; *Forsyth v. Jones* (1997) 57 C.A.4th 776, 780, 67 C.R.2d 357, infra, §569; 56 A.L.R.2d 1238 [appealability of order sustaining demurrer to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action].)

(3) Order sustaining a demurrer with leave to amend. (See *Jeffers v. Screen Extras Guild* (1951) 107 C.A.2d 253, 254, 237 P.2d 51; *Carley v. Santa Rosa* (1957) 154 C.A.2d 214, 216, 315 P.2d 905, citing the text; *Sousa v. Capital Co.* (1962) 202 C.A.2d 221, 223, 20 C.R. 598, citing the text.)

(4) Order granting a motion for judgment on the pleadings (appeal should be from judgment entered). (See *Budrow v. Wheatcraft* (1953) 115 C.A.2d 517, 519, 252 P.2d 637; *Stevens v. Key Resistor Corp.* (1960) 186 C.A.2d 325, 326, 8 C.R. 908.)

(5) Order sustaining an objection to the introduction of any evidence. This objection has the same purpose as a motion for judgment on the pleadings (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §199), and an order sustaining it is not appealable. (*Fraser-Yamor Agency v. Del Norte* (1977) 68 C.A.3d 201, 207, 137 C.R. 118.)

West's Key Number Digest, Appeal and Error 70(2), 70(3), 78(3), 102, 103

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VI. NONAPPEALABLE ORDERS

B. Pleading and Parties.

2. Motion To Strike.

9 *Witkin Cal. Proc. Appeal* § 155

[§ 155] Motion To Strike.

An order granting or denying a motion to strike out a pleading or part of a pleading is not appealable. (*Yandell v. Los Angeles* (1931) 214 C. 234, 235, 4 P.2d 947 [striking out defendant's cross-complaint]; *Merchants Nat. Bank of Los Angeles v. Clark-Parker Co.* (1929) 97 C.A. 757, 758, 276 P. 387 [striking out defendant's counterclaim]; *Couch v. McGregor* (1937) 19 C.A.2d 633, 634, 66 P.2d 159 [striking out demurrer and parts of answer]; *Hill v. Wrather* (1958) 158 C.A.2d 818, 821, 323 P.2d 567 [striking out defendant's cross-complaint and parts of amended answer and counterclaim]; *Mason v. Day* (1960) 187 C.A.2d 307, 309, 9 C.R. 531 [striking out defendant's cross-complaint]; *Shank v. Los Gatos Associates* (1961) 193 C.A.2d 824, 825, 14 C.R. 726 [striking out parts of amended complaint]; *Davis v. Taliaferro* (1963) 218 C.A.2d 120, 122, 32 C.R. 208 [striking out defendant's cross-complaint]; see 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §§152, 153; 1 *A.L.R.2d* 422 [appealability of order entered on motion to strike pleading]; 86 *A.L.R.3d* 944 [appealability of order dismissing counterclaim]; *supra*, §113 et seq.)

West's Key Number Digest, Appeal and Error 70(3), 78(3), 103

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B. Pleading and Parties.

3. Amendment of Pleading and Substitution of Parties.

9 *Witkin Cal. Proc. Appeal* § 156

[§ 156] Amendment of Pleading and Substitution of Parties.

The following orders are not appealable:

(1) Order granting or denying an application for leave to file an amended pleading. (*Long v. Lester* (1931) 112 C.A. 595, 596, 297 P. 564 [denying]; *Vallera v. Vallera* (1944) 64 C.A.2d 266, 270, 148 P.2d 694 [granting]; *Randall v. Beber* (1950) 101 C.A.2d 179, 180, 225 P.2d 291 [denying]; *Figueroa v. Northridge Hosp. Med. Center* (2005) 134 C.A.4th 10, 12, 35 C.R.3d 677 [denying].)

(2) Order substituting parties defendant or denying leave to amend to substitute the true names of fictitiously named defendants. (*Camp v. Oakland Mortg. & Finance Co.* (1928) 205 C. 380, 381, 270 P. 685 [substituting parties]; *Randall v. Beber*, *supra* [denying leave to amend to substitute names].)

West's Key Number Digest, Appeal and Error 70(1), 78(2), 87(3), 91(6), 95

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B. Pleading and Parties.

4. Class Certification.

9 *Witkin Cal. Proc. Appeal* § 157

[§ 157] Class Certification.

"California appellate courts have generally granted review of an intermediate order relating to class certification, although the procedures for seeking review have varied and the opinions have presented seemingly inconsistent views." (*Rosack v. Volvo of America Corp.* (1982) 131 C.A.3d 741, 747, 182 C.R. 800; see 22 A.L.R. Fed 2d 303 [appealability of determination regarding confirmation of action as class action under *F.R. Civ. P.*, Rule 23].) The inconsistency arises from the fact that the order may or may not dispose of the entire action.

In *Daar v. Yellow Cab Co.* (1967) 67 C.2d 695, 63 C.R. 724, 433 P.2d 732, the trial court concluded that plaintiff's class action was not maintainable, sustained defendant's demurrer, and transferred plaintiff's individual action to the municipal court. *Held*, although the order sustaining the demurrer was not appealable, the effect of the transfer was to dismiss the action as to all members of the class except plaintiff; hence, the legal effect of the order was that of a final judgment, which was appealable. (67 C.2d 699.) (See *Kennedy v. Baxter Healthcare Corp.* (1996) 43 C.A.4th 799, 806, 50 C.R.2d 736 [order sustaining demurrer on ground that action was not amenable to class certification was appealable; although order left action intact as to individual plaintiff, it effectively terminated action as to other class members]; *Figueroa v. Northridge Hosp. Med. Center* (2005) 134 C.A.4th 10, 13, 35 C.R.3d 677 [denial of motion to file amended complaint to convert two of six claims into class action claims was not appealable; although orders that prevent further class proceedings may be immediately appealable, here plaintiff was attempting to amend complaint to transform it into class action].)

In *Morrissey v. San Francisco* (1977) 75 C.A.3d 903, 142 C.R. 527, the court declared that, in accordance with the *Daar* rationale, "it has now been consistently held that an order, whatever form it may take, which has the effect of denying certification as a class action, is an appealable order." (75 C.A.3d 907.)

If, however, the order denying certification does not dispose of all of the causes of action, the one final judgment rule precludes an appeal. (*Vasquez v. Superior Court* (1971) 4 C.3d 800, 806, 94 C.R. 796, 484 P.2d 964; *Green v. Obledo* (1981) 29 C.3d 126, 149, footnote 18, 172 C.R. 206, 624 P.2d 256; *Rosack v. Volvo of America Corp.*, *supra*, 131 C.A.3d 749.)

The court in *Rosack* pointed out that review of an intermediate order on class certification is usually obtained by

writ of mandamus. (131 C.A.3d 749.) And, where an appeal is mistakenly taken from an order that cannot be viewed as a final judgment, the court may follow the practice of treating the nonmaintainable appeal as a proceeding in mandamus. (131 C.A.3d 750.) (See *Miller v. Woods* (1983) 148 C.A.3d 862, 871, footnote 9, 196 C.R. 69 ["whether the order is directly appealable or we treat this as a petition for writ of mandate, the issue of the class certification order is and should be before us"].) (On treating appeal as proceeding in mandamus, see *supra*, §128.)

In *General Motors Corp. v. Superior Court* (1988) 199 C.A.3d 247, 251, 244 C.R. 776, a class action against an automobile manufacturer and two dealers alleging that a particular make of car was defective, plaintiff purchasers filed a motion seeking certification of a national class of all purchasers of the make against all three defendants. The trial judge certified the class on a statewide basis against the manufacturer only, and plaintiffs appealed. *Held*, appeal dismissed. The certification order, which defined a class of 21,000 purchasers and certified a class action as to all causes of action against the manufacturer, lacks the "death knell" effect of making further proceedings impracticable because of denial of class action status. (199 C.A.3d 251.) Hence, appealability is governed by the rule of *Vasquez v. Superior Court*. (199 C.A.3d 251.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Farwell v. Sunset Mesa Property Owners Assn.* (2008) 163 C.A.4th 1545 1550, 78 C.R.3d 666 [in homeowners' action against owners association and purported class of homeowners, order sustaining demurrer with leave to amend on basis that association board members could not serve as class action representatives was not order denying certification of class, and thus was not appealable under death knell doctrine]; *Haro v. Rosemead* (2009) 174 C.A.4th 1067, 1078, 94 C.R.3d 874 [under death knell doctrine, order denying city employees' motion for class certification in action under Fair Labor Standards Act was not appealable; employees were not entitled to class certification as matter of law, substantive merits of class certification were not addressed, and denial of class certification did not preclude employees from going forward].



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C. Evidence and Discovery.

9 *Witkin Cal. Proc. Appeal* § 158

[§ 158] Evidence and Discovery.

No appeal lies from a ruling on the admissibility of evidence or the qualifications of a witness. (See *Watson v. Pryor* (1920) 49 C.A. 554, 557, 193 P. 797 [in supplemental proceedings, ruling confining examination to property acquired by judgment debtor since prior examination]; *Hamilton v. Carpenter* (1942) 52 C.A.2d 449, 126 P.2d 397 [ruling on admissibility of evidence in hearing on motion to set aside foreclosure sale was not special order after final judgment].)

The same is true of orders enforcing the discovery or production of evidence. (See *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1935) 4 C.2d 541, 544, 51 P.2d 81 [order authorizing subsurface survey of oil well]; *Collins v. Corse* (1936) 8 C.2d 123, 124, 64 P.2d 137 [order under former law granting right to inspect documents]; *Ahrens v. Evans* (1941) 42 C.A.2d 738, 740, 109 P.2d 991 [in supplemental proceedings, orders denying motions to quash subpoena duces tecum and order requiring appearance]; *Bishop v. Merging Capital* (1996) 49 C.A.4th 1803, 1806, 57 C.R.2d 556 [order requiring custodian to comply with subpoena for production of evidence].) (On review of discovery rulings by writ, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §109; 2 *Cal. Evidence* (4th), *Discovery*, §242; on appealability of order imposing monetary sanctions for abuse of discovery, see *supra*, §104; on appealability of order denying motion for protective order requiring payment of expert witness fee, see *supra*, §107.)

An exception to the rule of nonappealability exists where the discovery order is not appealable in California. In *Warford v. Medeiros* (1984) 160 C.A.3d 1035, 207 C.R. 94, plaintiffs' application for an order to show cause why certain nonparty witnesses should not be compelled to give depositions and produce documents for use in a Hawaiian civil action was denied. *Held*, the order denying the application was appealable. Because no review of the order would take place in California, the order was final here, and the general rule against appealability of discovery orders was thus not applicable. (160 C.A.3d 1041.) (See *H.B. Fuller Co. v. Doe* (2007) 151 C.A.4th 879, 885, 60 C.R.3d 501 [despite rule against appealability of discovery orders, order denying anonymous defendant's motion to quash subpoena duces tecum directed to third party for information regarding defendant's identity was appealable, where order was ancillary to litigation in another state and discovery question presented by defendant's motion to quash was whole end and purpose of discovery proceeding in California].)

West's Key Number Digest, Appeal and Error 70(4), 87(5), 104

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D. Orders at Trial.

9 Witkin Cal. Proc. Appeal § 159

[§ 159] Orders at Trial.

The following are important examples of nonappealable orders made during trial:

(1) Order at the outset of trial denying a request for a jury trial. (*Schmidt v. Townsend* (1951) 103 C.A.2d 185, 186, 229 P.2d 488; see 4 Am.Jur.2d (2007 ed.), Appellate Review §141.)

(2) Order granting a mistrial. (*Reimer v. Firpo* (1949) 94 C.A.2d 798, 802, 212 P.2d 23; *Estate of Bartholomae* (1968) 261 C.A.2d 839, 842, 68 C.R. 332.)

(3) Order granting a motion for a directed verdict or for judgment notwithstanding the verdict. (See *infra*, §160.)

(4) Order granting a motion for partial judgment notwithstanding the verdict. (*Cobb v. University of Southern Calif.* (1995) 32 C.A.4th 798, 803, 38 C.R.2d 543, *infra*, §192.)

(5) Order denying a motion for nonsuit, dismissal, or a directed verdict. (*Perry v. Magneson* (1929) 207 C. 617, 620, 279 P. 650 [refusal to dismiss]; *Estate of Roberson* (1952) 114 C.A.2d 267, 268, 250 P.2d 179; *Samuel v. Stevedoring Services* (1994) 24 C.A.4th 414, 417, 29 C.R.2d 420 [motion to dismiss].) An order granting nonsuit or dismissal is an appealable judgment. (See *supra*, §144.)

(6) Order denying a motion for summary judgment. (*Nevada Constructors v. Mariposa Public Util. Dist.* (1952) 114 C.A.2d 816, 818, 251 P.2d 53; *Stanton v. Andrews* (1959) 170 C.A.2d 269, 270, 338 P.2d 529; see 4 Am.Jur.2d (2007 ed.), Appellate Review §161.)

(7) Order in a prior trial of special defenses under C.C.P. 597. (See *Woodhouse v. Pacific Elec. Ry. Co.* (1952) 112 C.A.2d 22, 23, 245 P.2d 701; *Sproul v. Cuddy* (1953) 121 C.A.2d 197, 198, 263 P.2d 92; *Crofoot v. Crofoot* (1955) 132 C.A.2d 794, 798, 283 P.2d 283, *supra*, §118; *Plunkett v. Hill* (1962) 209 C.A.2d 85, 87, 25 C.R. 816; 7 Cal. Proc. (5th), Trial, §§152, 153.) However, if the defense is that there is another action pending, an interlocutory judgment is entered, and this is appealable. (C.C.P. 597; see 7 Cal. Proc. (5th), Trial, §152; 18 A.L.R.3d 400 [appealability of order staying, or refusing to stay, action because of pendency of another action].)

(8) Order in a separate trial of an issue under C.C.P. 598 (precedence of issues) not resulting in judgment. (See

Lauderdale v. U & I Equipment Co. (1969) 271 C.A.2d 140, 142, 76 C.R. 483; *Menchaca v. Farmers Ins. Exchange* (1976) 59 C.A.3d 117, 124, 130 C.R. 607; 7 Cal. Proc. (5th), Trial, §154 et seq.)

(9) Order denying a motion for judgment under C.C.P. 630(f) (jury discharged without rendering verdict) where a directed verdict should have been granted. (See *Stiles v. American Trust Co.* (1955) 137 C.A.2d 472, 476, 290 P.2d 614; 7 Cal. Proc. (5th), Trial, §428.)

(10) Order of consolidation. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1956) 47 C.2d 428, 432, 304 P.2d 13; see 4 Am.Jur.2d (2007 ed.), Appellate Review §136; 77 A.L.R.3d 1082 [appealability of order granting or denying consolidation, severance, or separate trials].)

West's Key Number Digest, Appeal and Error 70(6), 87(5), 91(7), 106

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E. Steps Preliminary to Final Judgment.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 160

[§ 160] In General.

A frequent cause of dismissal of appeals has been the failure to distinguish a preliminary step or order from the final judgment, which follows it as a matter of course. The typical nonappealable preliminary steps are the following:

(1) Order sustaining a demurrer; the appeal should be from the subsequent final judgment of dismissal. (*Jeffers v. Screen Extras Guild* (1951) 107 C.A.2d 253, 254, 237 P.2d 51; see *supra*, §154.)

(2) Order granting a motion for judgment on the pleadings; the appeal should be from the judgment entered. (See *supra*, §154.)

(3) Order granting a motion for summary judgment; the appeal should be from the judgment entered. (See *Integral Land Corp. v. Anderson* (1944) 62 C.A.2d 770, 772, 145 P.2d 364; *Modica v. Merin* (1991) 234 C.A.3d 1072, 1073, 285 C.R. 673, *supra*, §127; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §161; *supra*, §145.)

(4) Order granting a motion for directed verdict or for judgment notwithstanding the verdict; the appeal should be from the judgment entered on the verdict. (*Costa v. Regents of Univ. of Calif.* (1951) 103 C.A.2d 491, 495, 229 P.2d 867; *Walton v. Magno* (1994) 25 C.A.4th 1237, 1240, 30 C.R.2d 815; *Cobb v. University of Southern Calif.* (1995) 32 C.A.4th 798, 799, 38 C.R.2d 543, *infra*, §192 [motion for partial judgment notwithstanding verdict].)

(5) In an action for an accounting, an order approving a final account; unlike probate orders approving accounts (*infra*, §211), this is merely preliminary to a judgment. (*Douglas v. Westfall* (1952) 113 C.A.2d 107, 108, 248 P.2d 68.)

West's Key Number Digest, Appeal and Error 70(8), 108

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E. Steps Preliminary to Final Judgment.

2. Order for Judgment.

9 *Witkin Cal. Proc. Appeal* § 161

[§ 161] Order for Judgment.

(1) *General Rule.* An "order for judgment" is merely the trial judge's oral statement indicating which party shall prevail, or the opinion of the trial judge indicating how judgment should be rendered. It is not an appealable judgment, but merely the basis for a judgment to be made. (See *Estate of Pieper* (1964) 224 C.A.2d 670, 675, 37 C.R. 46, citing the text ["Memorandum Decision" was announcement of intended decision not entered but merely authorizing subsequent judgment]; *Estate of Russ* (1965) 231 C.A.2d 917, 918, 42 C.R. 471 ["Memorandum of Opinion" was filed but not entered as a judgment].)

Sometimes, however, an "opinion" may contain language of decision, and may amount to a judgment. (See 7 *Cal. Proc.* (5th), *Judgment*, §10.) Thus, in *Martino v. Concord Community Hosp. Dist.* (1965) 233 C.A.2d 51, 43 C.R. 255, plaintiff sought mandamus. The trial judge filed a "Memorandum of Decision," finding that plaintiff had failed to exhaust his administrative remedies, and closing with a statement that the application "is denied." *Held*, although an informal opinion or decision normally does not constitute an appealable judgment or order, it may be treated as such where it is signed and filed and constitutes a final judicial determination of the merits. (233 C.A.2d 55, citing the text.)

Similarly, in *Estate of Lock* (1981) 122 C.A.3d 892, 176 C.R. 358, the court held that the probate court's decision denying settlement and distribution and disallowing gift tax disbursements was a final determination on the petition, couched in terms of an order, which should be treated as final and appealable notwithstanding its label. (122 C.A.3d 897.)

(2) *In Trial by Court.* On the trial of an issue of fact by the court, "the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk." (C.R.C., Rule 3.1590(a).) This merely starts the time running on a request for a statement of decision, and the tentative decision "does not constitute a judgment and is not binding on the court." It is a preliminary order only and is not appealable. (C.R.C., Rule 3.1590(b); see C.E.B., 3 Civil Proc. During Trial 3d, §24.30 et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §9; 7 *Cal. Proc.* (5th), *Trial*, §394.)

In *Jordan v. Malone* (1992) 5 C.A.4th 18, 6 C.R.2d 454, the trial was held, and the judge issued a written decision that concluded as follows: "Judgment should enter for defendant that plaintiff take nothing and for defendant's costs of

suit. Defendant will prepare, serve and submit a form judgment." Plaintiff filed a notice of appeal on the theory that the judge's "decision" constituted the rendition of judgment and that, under the Rules of Court, the premature appeal should be deemed filed immediately after entry of judgment (see *infra*, §620). *Held*, appeal dismissed.

(a) "The principal fallacy in plaintiff's threshold claim--that he is appealing from a judgment that should be deemed final because he filed his notice of appeal after rendition yet before entry of judgment--is the absence of even a rendition of judgment. ... The court's statement was the *tentative decision*." (5 C.A.4th 21.)

(b) "Even though defendant was the party directed to prepare, serve and submit the judgment, the apparent failure of defendant to do so does not relieve plaintiff from the requirement of appealing from an appealable order." It would have been helpful for the court to have labeled its decision as a "tentative decision," or to have put some specific time frame on the preparation of the proposed judgment. "Nevertheless, the ultimate responsibility rests with the appealing party; plaintiff could have requested the trial court to compel defendant to prepare the judgment or requested permission to prepare and file the judgment himself to perfect his appeal rights." (5 C.A.4th 21.)

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E. Steps Preliminary to Final Judgment.

3. Minute Order.

9 *Witkin Cal. Proc. Appeal* § 162

[§ 162] Minute Order.

(1) *In General.* Where findings of fact (now a statement of decision) or some other type of formal evidence of the judgment or order is required, an appeal does not lie from a minute order. (*Larson v. Thoresen* (1951) 36 C.2d 666, 670, 226 P.2d 571 [findings required]; *Herrscher v. Herrscher* (1953) 41 C.2d 300, 304, 259 P.2d 901 [order dismissing cross-complaint, with instruction to defendant to prepare, serve, and file formal order]; *Hirschberg v. Oser* (1947) 82 C.A.2d 282, 286, 186 P.2d 53; *Estate of Dow* (1949) 91 C.A.2d 420, 423, 205 P.2d 698; *Sproul v. Cuddy* (1953) 121 C.A.2d 197, 201, 263 P.2d 92, 7 Cal. Proc. (5th), Trial, §152; *Heller v. Heller* (1964) 230 C.A.2d 679, 681, 41 C.R. 177, citing the text [merged in formal order; latter held appealable order]; *Covina-Azusa Fire Fighters Union v. Azusa* (1978) 81 C.A.3d 48, 57, 146 C.R. 155; *Bailey v. El Dorado* (1984) 162 C.A.3d 94, 98, 210 C.R. 237; see *infra*, §612; for appeal as lying from verdict or statement of decision rather than from judgment, see *supra*, §98; for rule making minute entry of dismissal or nonsuit ineffectual, and requiring written order, see *supra*, §144.)

Dismissals of appeals in these cases seem unfortunate and unnecessary. Usually the judgment is entered in due course shortly after the preliminary order. There is no substantial violation of the one final judgment rule, but merely a premature appeal, defective in form. Many of these appeals can be saved if (a) the curative provision on premature notice (C.R.C., Rule 8.104(e)) applies, and (b) the notice is so worded, or so construed, as to refer to the later judgment rather than the nonappealable order. (See *Conservatorship of Starr* (1989) 215 C.A.3d 1390, 1393, 264 C.R. 80, citing the text [applying policy of liberal construction and rule on premature notice to hold notice adequate]; *infra*, §§564 et seq., 621.)

(2) *Inconsistent Orders.* Inconsistent orders of the trial judge gave rise to a difficult problem in *Lavine v. Jessup* (1957) 48 C.2d 611, 311 P.2d 8. After a defective fifth amended complaint was filed, the court on November 10 entered minute orders granting motions to strike and dismiss for sham, and also sustaining demurrers without leave to amend. A formal judgment of dismissal was signed and entered November 28. *Held*, the notice of appeal from this judgment, filed January 19, was timely. The court did not expressly decide whether an order of dismissal for sham is appealable. Instead, it viewed the several orders as inconsistent and ambiguous, requiring interpretation to reflect the true judicial action and avoid absurd results. Accordingly, the confusion was resolved by holding that, for the purpose of determining appealability, the several orders would be treated as though they were orders sustaining general demurrers without leave to amend (hence, not appealable) (see *supra*, §§154, 160).

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4. Notice of Ruling.

9 *Witkin Cal. Proc. Appeal* § 163

[§ 163] Notice of Ruling.

In *Shpillar v. Harry C's Redlands* (1993) 13 C.A.4th 1177, 16 C.R.2d 814, the court announced a policy requiring strict application of the rule against appeals from steps preliminary to a judgment or order (see *supra*, §160).

(a) "For many years, this court, and most, if not all appellate courts, have repeatedly admonished appellants about the failure to make the preliminary and fundamental determination that what they are appealing from is, in fact, an appealable order or judgment." Former C.R.C., Rule 13 (now C.R.C., Rule 8.204(a)(2)(B)) requires that every opening brief contain "either a statement that the appeal is from a judgment that finally disposes of all issues between the parties or a statement explaining why the order or nonfinal judgment is appealable." (13 C.A.4th 1179; see *infra*, §705.)

(b) A notice of ruling under C.C.P. 583.410 and 583.420 (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §§438, 451) is not an order; it must be followed by an order of dismissal from which an appeal may be taken. (13 C.A.4th 1178, 1179.)

(c) Despite the rule, parties continue to appeal from documents that are not orders or judgments. To end this practice, this court (Fourth Appellate District, Division Two) adopted a local rule requiring all appellants to file a documenting statement within 10 days after filing their notices of appeal. The statement requires appellants to attach either (1) a file-stamped copy of the "order" or "judgment" or (2) a copy of the clerk's minutes if no written, signed order was prepared. "This procedure assists the court at the earliest stage to determine if there is an order from which the appeal is noted and if it is appealable." (13 C.A.4th 1179.)

(d) "In the past, we have 'saved' such erroneous appeals by ordering the appellant to obtain and supply to us, on or before a certain date, a certified copy of the appealable order or judgment. Our use of this procedure is entirely discretionary. In keeping with a general trend among intermediate appellate courts of this state to reaffirm that the responsibility to perfect appeals is firmly on the shoulders of appellants, it is no longer the court's policy to 'save' erroneous appeals." (13 C.A.4th 1180.)

(e) The new practice, set forth in the local rule, is to notify counsel that the court has no jurisdiction to review the nonappealable ruling, and to allow 15 or 20 days for the appellant to file a file-stamped copy of an appealable ruling or

to contest the dismissal of the appeal by a motion to vacate the dismissal and reinstate the appeal. However, the appellant will have to file a new notice of appeal and pay another filing fee once the appealable judgment or order is filed in the superior court. (13 C.A.4th 1180.) (See Fourth Appellate District, Division Two, Internal Operating Practices and Procedures IV, citing *Shpillar* [court will not construe nonappealable ruling to include language of judgment or dismissal, or allow appellant to belatedly obtain appealable ruling to save appeal].)

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F. Order Denying New Trial.

9 *Witkin Cal. Proc. Appeal* § 164

[§ 164] Order Denying New Trial.

(1) *In General.* An order denying a new trial is not appealable. (*Marr v. Southern Calif. Gas Co.* (1924) 194 C. 332, 336, 228 P. 534; *Hughes v. De Mund* (1924) 195 C. 242, 247, 233 P. 94; *Hamasaki v. Flotho* (1952) 39 C.2d 602, 608, 248 P.2d 910; *Rodriguez v. Barnett* (1959) 52 C.2d 154, 156, 338 P.2d 907 ["The appeal was dismissed from the bench with an admonition from the Chief Justice to counsel and to members of the State Bar generally to cease appealing from such an obviously nonappealable order"]; *Confar v. Whelan* (1935) 8 C.A.2d 101, 104, 46 P.2d 991; *Fogo v. Cutter Laboratories* (1977) 68 C.A.3d 744, 748, 137 C.R. 417, quoting the text.)

(2) *Order of Dismissal.* An order dismissing the motion is the equivalent of an order denying it and equally not appealable. (*Hughes v. De Mund*, *supra*, 195 C. 247; *Hughes v. De Mund* (1924) 70 C.A. 265, 267, 233 P. 93; *Scales v. Federal Escrow Service* (1961) 189 C.A.2d 84, 85, 10 C.R. 660.) And in *Swan v. Riverbank Canning Co.* (1947) 81 C.A.2d 555, 184 P.2d 686, a purported motion to amend was made under C.C.P. 473, the purpose of which was to pave the way for a second motion for new trial. *Held*, the order of denial "was in the nature of an order denying a new trial," and the appeal from it was dismissed. (81 C.A.2d 558.)

(3) *Order of Modification.* An order modifying the judgment under C.C.P. 662 is not an appealable order granting a new trial (*infra*, §192), for the power is exercised only on denial of the motion for new trial. (*Western Electroplating Co. v. Henness* (1959) 172 C.A.2d 278, 281, 341 P.2d 718; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §97.)

(4) *Distinction: Death or Disability of Reporter.* In the exceptional case of a new trial for death or disability of the reporter (*infra*, §674), an order of denial is appealable as an order after final judgment. This order cannot be reviewed on an appeal from the judgment (as is done in the usual case), because the very reason for the motion is the inability to prepare a record on appeal from the judgment. (*Conlin v. Coyne* (1936) 15 C.A.2d 569, 59 P.2d 884.)

West's Key Number Digest, Appeal and Error 70(9), 76(3), 78(6), 87(6), 110

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G. Order Denying Motion for Reconsideration.

9 *Witkin Cal. Proc. Appeal* § 165

[§ 165] Order Denying Motion for Reconsideration.

With respect to whether an order denying a motion for reconsideration is appealable, *Blue Mountain Dev. Co. v. Carville* (1982) 132 C.A.3d 1005, 183 C.R. 594, held that the answer depends on whether the order on which reconsideration is sought is itself appealable. If that order is merely a nonappealable order, the order denying reconsideration is also not appealable. However, if the original order is an appealable order or judgment and the motion for reconsideration is based on new or different facts, the order denying reconsideration may be appealable as "an order made after a judgment" (*infra*, §183) under C.C.P. 904.1(a)(2). (132 C.A.3d 1010.) (See *Rabbit v. Vincente* (1987) 195 C.A.3d 170, 174, 240 C.R. 524; cf. *Alioto Fish Co. v. Alioto* (1994) 27 C.A.4th 1669, 1679, 34 C.R.2d 244 [even if *Blue Mountain Dev. Co.* rationale is accepted, denial of motion to reconsider was not appealable where motion was not based on new or different facts].)

In *Rojas v. Riverside General Hosp.* (1988) 203 C.A.3d 1151, 250 C.R. 435, the same court that decided *Blue Mountain Dev. Co.* held that the better ruling is that a denial of a motion for reconsideration is a nonappealable order, regardless of whether the original order was appealable. An order denying a motion for new trial is not appealable (203 C.A.3d 1160, citing the text), and an order denying a motion to vacate a prior judgment or order is not appealable if the prior judgment or order was appealable and the grounds on which vacation is sought existed before entry of judgment (203 C.A.3d 1161; see *infra*, §197). "The same policy reasons ... are applicable to denials of motions for reconsideration: namely, to eliminate the possibilities that (1) a nonappealable order or judgment would be made appealable, (2) a party would have two appeals from the same decision, and (3) a party would obtain an unwarranted extension of time to appeal." (203 C.A.3d 1161.) (See *Lavrischeff v. Blumer* (1978) 77 C.A.3d 406, 409, 143 C.R. 567; *Messih v. Lee Drug* (1985) 174 C.A.3d 312, 315, 220 C.R. 43 [where order granting attorney's motion to withdraw is not appealable, order denying motion to reconsider previous order is also not appealable]; *Estate of Simoncini* (1991) 229 C.A.3d 881, 891, 280 C.R. 393; *Hufft v. Horowitz* (1992) 4 C.A.4th 8, 12, footnote 1, 5 C.R.2d 377; *Hughey v. Hayward* (1994) 24 C.A.4th 206, 210, 30 C.R.2d 678; *Crotty v. Trader* (1996) 50 C.A.4th 765, 768, 57 C.R.2d 818; *In re Marriage of Burgard* (1999) 72 C.A.4th 74, 80, 84 C.R.2d 739 [even assuming that order denying motion for reconsideration may be appealed under some circumstances, order denying motion to reconsider sanction order was not appealable, where time to appeal sanction order had expired and where allegedly new evidence had been in appellant's possession at all times]; *Reese v. Wal-Mart Stores* (1999) 73 C.A.4th 1225, 1242, 87 C.R.2d 346; *Estate of Stoddart* (2004) 115 C.A.4th 1118, 1125, 9 C.R.3d 770; *Annette F. v. Sharon S.* (2005) 130 C.A.4th 1448, 1458, 30 C.R.3d 914.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Association for Los Angeles Deputy Sheriffs v. Los Angeles* (2008) 166 C.A.4th 1625, 1632, 83 C.R.3d 494 [order denying motion for reconsideration is not appealable order, and Court of Appeal lacks jurisdiction to consider appeal to extent appeal challenges order, even if order raises new facts or law; following *Rojas v. Riverside General Hosp.* (1988) 203 C.A.3d 1151, 250 C.R. 435, text, p. 241].



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H. Order Made Nonappealable by Waiver.

9 *Witkin Cal. Proc. Appeal* § 166

[§ 166] Order Made Nonappealable by Waiver.

In *Southern Pac. Co. v. Oppenheimer* (1960) 54 C.2d 784, 8 C.R. 657, 356 P.2d 441, defendant claimed wages from plaintiff for a day's employment in 1955. Plaintiff brought this suit to enjoin any action on the claim. Defendant submitted numerous interrogatories to which plaintiff objected. The judge entered an order that (a) sustained the objections and ordered the interrogatories stricken, and (b) exercised his power to protect against improper discovery by imposing attorneys' fees of \$ 100. Defendant appealed. *Held*, dismissed. The first part of the order--an interlocutory order dealing with discovery--was clearly not appealable (although reviewable by mandamus) (see 2 *Cal. Evidence* (4th), *Discovery*, §248). The second part directed the payment of money, and thus came within the class of judgments final as to a collateral matter. (54 C.2d 786, citing the text.) However, at oral argument plaintiff expressly waived any right to the attorneys' fees award, and moved to dismiss the appeal with that provision deleted from the order. The issue as to attorneys' fees became moot and the order consequently became nonappealable. (54 C.2d 785.)

This odd case has two significant implications: One is that any kind of interlocutory proceeding or step in which the judge has power to award costs or attorneys' fees may involve an appealable judgment when the judge exercises that power. The other is that where an order is capable of being separated into appealable and nonappealable parts, the respondent can destroy its appealability at any time by waiving his or her rights in the appealable part. This last is, at first glance, startling: A waiver, effectively made in the trial court, would leave no proper subject for appeal; but once a good appeal is taken and appellate jurisdiction has vested, it is difficult to see how that jurisdiction can be divested by this unilateral act. A more conventional handling of the present case would have been to treat the waived issue as moot, and then, in view of the general policy against review of interlocutory orders and the existence of the remedy of mandamus for abuse of discretion, dismiss the appeal as frivolous, or summarily affirm on this ground (see *infra*, §747).

West's Key Number Digest, Appeal and Error 153 et seq.

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I. Order Dealing With Jurisdictional Reclassification.

9 Witkin Cal. Proc. Appeal § 167

[§ 167] Order Dealing With Jurisdictional Reclassification.

Civil cases are classified as either limited or unlimited. (See *C.C.P.* 85 et seq.; 2 *Cal. Proc.* (5th), *Courts*, §§241, 242.) A case improperly classified as either a limited or unlimited civil case may be reclassified, and *C.C.P.* 403.010 et seq. specify the procedures to be followed. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §411 et seq.) A party aggrieved by an order granting or denying a reclassification motion may petition the Court of Appeal for a writ of mandamus requiring proper classification. (*C.C.P.* 403.080; see *Garau v. Torrance Unified School Dist.* (2006) 137 *C.A.4th* 192, 198, 40 *C.R.3d* 108 [reclassification order was not appealable final judgment; *C.C.P.* 403.080 is exclusive appellate remedy].)

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J. Placement Order for Dependent Child After Parental Rights Have Been Terminated.

9 Witkin Cal. Proc. Appeal § 168

[§ 168] Placement Order for Dependent Child After Parental Rights Have Been Terminated.

After parental rights have been terminated under Welf.C. 366.26 (see 10 *Summary* (10th), *Parent and Child*, §680 et seq.), an order that a dependent child is to reside in, be retained in, or be removed from a specific placement is not appealable unless (1) a petition for extraordinary writ review was filed in a timely manner, (2) the petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record, and (3) the petition was summarily denied or otherwise not decided on the merits. This provision does not affect the right of a parent, a legal guardian, or the child to appeal any order issued at the hearing to terminate parental rights that is otherwise appealable. (Welf.C. 366.28.)

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K. Miscellaneous Orders.

9 *Witkin Cal. Proc. Appeal* § 169

[§ 169] Miscellaneous Orders.

The following orders or judgments, which fit into no particular classification, have been deemed nonappealable:

(1) Order directing parties to arbitrate. (*Corbett v. Petroleum Maintenance Co.* (1953) 119 C.A.2d 21, 22, 258 P.2d 1077; see *supra*, §140 et seq.)

(2) Order denying petition to confirm initial arbitration award. (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 C.A.4th 1334, 1345, 83 C.R.2d 340, *supra*, §142.)

(3) Order under C.C.P. 473 vacating clerk's entry of default, where no default judgment has been entered. (*Hughson v. Superior Court* (1932) 120 C.A. 658, 659, 8 P.2d 227; *Velicescu v. Pauna* (1991) 231 C.A.3d 1521, 1522, 282 C.R. 832.)

(4) Order granting motion to set aside default, where no judgment has been entered. (*Davis v. Taliaferro* (1963) 218 C.A.2d 120, 122, 32 C.R. 208, citing the text.)

(5) Order denying motion to set aside clerk's entry of default. (*Winter v. Rice* (1986) 176 C.A.3d 679, 682, 222 C.R. 340; *First Amer. Title Co. v. Mirzaian* (2003) 108 C.A.4th 956, 960, 134 C.R.2d 206.)

(6) Clerk's entry of default. (*First Amer. Title Co. v. Mirzaian*, *supra*.)

(7) Order setting aside summary order approving court commissioner's findings, prior to exceptions and hearing on them. (*Ellsworth v. Ellsworth* (1954) 42 C.2d 719, 723, 269 P.2d 3.)

(8) Order denying motion to furnish security in derivative suit under Corp.C. 800 (see 3 *Cal. Proc.* (5th), *Actions*, §361). (*Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 156, 157 8 C.R. 107 [but if motion is granted and security is not furnished, judgment of dismissal is appealable as final judgment].)

(9) Order appointing provisional director under Corp.C. 308 (see 9 *Summary* (10th), *Corporations*, §89). (*In re O'Brien Machinery* (1964) 224 C.A.2d 563, 571, 36 C.R. 782, citing the text [order under former Corp.C. 819].)

(10) Order denying motion to disqualify judge. (*Reichert v. General Ins. Co. of America* (1968) 68 C.2d 822, 825, footnote 1, 69 C.R. 321, 442 P.2d 377; *Estate of Cuneo* (1963) 214 C.A.2d 381, 384, 29 C.R. 497.) Under C.C.P. 170.3(d), the order may be reviewed only by mandamus. (See 2 Cal. Proc. (5th), Courts, §160.)

(11) Order granting permission to public agency under C.C.P. 1245.030 to enter and explore land for the purpose of determining suitability for condemnation. (*Los Angeles v. Schweitzer* (1962) 200 C.A.2d 448, 452, 19 C.R. 429 [order under former C.C.P. 1242.5].)

(12) Order appointing referee. (*Providence Baptist Church of San Francisco v. Superior Court* (1952) 40 C.2d 55, 59, 251 P.2d 10; see 75 A.L.R.2d 1007 [appealability of order regarding reference].)

(13) Order granting plaintiff relief from late filing of claim against county. (*Church v. Humboldt* (1967) 248 C.A.2d 855, 857, 57 C.R. 79 [denial of relief determines claimant's rights and is judgment final as to a party (supra, §109 et seq.), but granting is prelude to further proceedings].)

(14) Order denying motion to compel clerk to enter judgment pursuant to offer to compromise under C.C.P. 998 (dispute over whether offer was accepted). (*Draus v. Alfred M. Lewis* (1968) 261 C.A.2d 485, 489, 68 C.R. 154 [decided under former C.C.P. 997].)

(15) Order denying free transcript to indigent appellant. (*Leslie v. Roe* (1974) 41 C.A.3d 104, 106, 116 C.R. 386.)

(16) Order granting attorney's motion to withdraw. (*Messih v. Lee Drug* (1985) 174 C.A.3d 312, 314, 220 C.R. 43 [order is appealable only if it includes fee award to attorney, thereby becoming final order on collateral matter directing payment of money].)

(17) Order appointing guardian ad litem. (*In re Marriage of Lloyd* (1997) 55 C.A.4th 216, 219, 64 C.R.2d 37.)

(18) Order denying postjudgment reconsideration motion. (*Ramon v. Aerospace Corp.* (1996) 50 C.A.4th 1233, 1238, 58 C.R.2d 217 [order is nonappealable because trial judge no longer has authority to rule on motion].)

(19) Order denying leave to add new cause of action. (*Neubauer v. Goldfarb* (2003) 108 C.A.4th 47, 53, 133 C.R.2d 218 [order was not appealable where new cause was based on same primary right as previously settled claim; refusal to apply general rule of appealability enunciated in *Stewart v. Colonial Western Agency* (2001) 87 C.A.4th 1006, 105 C.R.2d 115, supra, §144].)

(20) Judgment of appellate division of superior court granting or denying petition for mandamus or prohibition directed to superior court in limited civil case. However, the judgment may be reviewed, in the appellate court's discretion, on petition for extraordinary writ. (C.C.P. 904.3, infra, §1005, on appeal in limited civil cases generally, see infra, §1002 et seq.)

West's Key Number Digest, Appeal and Error 70 et seq., 87 et seq., 91 et seq., 102 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(21) (New) Order granting continuance of hearing on motion to compel arbitration. (*Century 21 Chamberlain & Associates v. Haberman* (2009) 173 C.A.4th 1, 11, 92 C.R.3d 249.)



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VII. ORDERS APPEALABLE UNLESS APPEAL IS PROHIBITED

A. Orders Dealing With Venue.

9 *Witkin Cal. Proc. Appeal* § 170

[§ 170] Orders Dealing With Venue.

(1) *Limited Civil Case: Appeal.* An order in a limited civil case "changing or refusing to change the place of trial" is appealable. (*C.C.P.* 904.2(c); see 3 *Cal. Proc.* (5th), *Actions*, §919.)

(2) *Unlimited Civil Case: Mandamus.* *C.C.P.* 400 authorizes review by mandamus of an order of the superior court granting or denying a motion to change the place of trial. (See *Hennigan v. Boren* (1966) 243 C.A.2d 810, 815, 52 C.R. 748; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 C.A.4th 39, 42, 24 C.R.2d 337; 3 *Cal. Proc.* (5th), *Actions*, §919.)

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B. Orders Dealing With Process.

9 *Witkin Cal. Proc. Appeal* § 171

[§ 171] Orders Dealing With Process.

(1) *Order Granting Motion To Quash: Appeal.* Formerly, no order dealing with process was expressly made appealable. But an order quashing service of summons may have the effect of a judgment final as to the particular defendant who is thus released from the court's jurisdiction in the pending action, and there is good reason to make it appealable. (See *Kneeland v. Ethicon Suture Laboratories* (1952) 113 C.A.2d 335, 336, 248 P.2d 447; cf. *Fielding v. Superior Court* (1952) 111 C.A.2d 490, 492, 244 P.2d 968.) An order, other than in a limited civil case, granting a motion to quash service of summons is appealable. (C.C.P. 904.1(a)(3); for comparable provision permitting appeals in limited civil case, see C.C.P. 904.2(d), *infra*, §1004.)

(2) *Order Granting Motion To Stay or Dismiss: Appeal.* The doctrine of inconvenient forum acts as a limitation on harsh and unfair application of the modern expanded jurisdiction over persons. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §374.) If the defendant, in an unlimited civil case, invokes the doctrine by a motion to stay or dismiss the action, the order granting it has an effect similar to that of an order quashing summons. An appeal may be taken from an order granting a motion to stay or from an order of dismissal following an order granting a motion to dismiss on the ground of inconvenient forum. (C.C.P. 904.1(a)(3); for comparable provision permitting appeals in limited civil case, see C.C.P. 904.2(d), *infra*, §1004.)

(3) *Order Denying Motion: Mandamus.* An order denying a motion to quash summons is not appealable. (See *Saroff v. Saroff* (1944) 66 C.A.2d 330, 331, 152 P.2d 333; *Kneeland v. Ethicon Suture Laboratories*, *supra*, 113 C.A.2d 337.) The defendant seeks review by mandamus. (C.C.P. 418.10(c); see 2 *Cal. Proc.* (5th), *Jurisdiction*, §224.)

An order denying a motion to stay or dismiss on the ground of inconvenient forum is also not appealable and is reviewable by mandamus. (C.C.P. 418.10(c); see 2 *Cal. Proc.* (5th), *Jurisdiction*, §380.)

West's Key Number Digest, Appeal and Error 70(1), 78(2), 91(6), 95

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C. Order on Special Motion To Strike SLAPP Suit.

9 *Witkin Cal. Proc. Appeal* § 172

[§ 172] Order on Special Motion To Strike SLAPP Suit.

C.C.P. 425.16 provides for a special motion to strike actions brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition, i.e., so-called SLAPP suits (Strategic Lawsuits Against Public Participation). (See 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.) Generally, an appeal may be taken, other than in a limited civil case, from an order either granting or denying such a motion. (*C.C.P. 904.1(a)(13)*.) However, an appeal is not authorized from an order denying the motion on the ground that the action is exempt under *C.C.P. 425.17*, which makes prescribed types of actions not subject to these motions. (*C.C.P. 425.17(e)*.) Moreover, *C.C.P. 904.1(a)(13)* does not apply to a special motion to strike a "SLAPPback," i.e., a cause of action for malicious prosecution or abuse of process arising from filing or maintaining a prior cause of action that has been dismissed under *C.C.P. 425.16*. (*C.C.P. 425.18(c)*.) (See *Johnston v. Corrigan* (2005) 127 *C.A.4th* 553, 555, 25 *C.R.3d* 657 [cross-complainant's appeal was from appealable order granting cross-defendants attorneys' fees under anti-SLAPP statute, rather than from court's earlier denial of attorneys' fees; notice of appeal explicitly stated that it was from order awarding fees]; *Fontani v. Wells Fargo Inv., LLC* (2005) 129 *C.A.4th* 719, 734, 28 *C.R.3d* 833 [order overruling employer's demurrer to former employee's claims was not appealable, despite appealability of order in same action denying employer's motion to strike employee's additional claims for defamation and interference with prospective advantage as SLAPP suit; order overruling demurrer had no bearing on validity of order overruling anti-SLAPP motion]; *Doe v. Luster* (2006) 145 *C.A.4th* 139, 146, 51 *C.R.3d* 403 [interlocutory order declining to award attorneys' fees under anti-SLAPP statute to plaintiff who had successfully opposed anti-SLAPP motion was not immediately appealable; anti-SLAPP statute did not authorize immediate appeal from award or denial of attorneys' fees to prevailing moving party or from denial of attorneys' fees to prevailing opposing party].)

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See *Melbostad v. Fisher* (2008) 165 *C.A.4th* 987, 995, 81 *C.R.3d* 354 [order granting anti-SLAPP motion constituted dismissal of entire action and was appealable judgment; thus, appeal of fee award nearly 1 year later was untimely].



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1. Attachment.

9 *Witkin Cal. Proc. Appeal* § 173

[§ 173] Attachment.

The following orders involving attachment are appealable:

(1) *Order Discharging or Refusing To Discharge Attachment*. An order discharging or refusing to discharge an attachment. (C.C.P. 904.1(a)(5); see *Risdon Iron & Locomotive Works v. Citizens' Traction Co. of San Diego* (1898) 122 C. 94, 95, 54 P. 529 [statute applies to order releasing particular property as exempt from attachment]; *Fay Sec. Co. v. Bowering* (1929) 106 C.A. Supp. 771, 773, 288 P. 41 [statute applies to order releasing money as exempt from attachment]; *Lohr v. Superior Court* (1952) 111 C.A.2d 231, 234, 244 P.2d 5; 19 A.L.R.2d 640 [appealability, before final judgment, of order discharging or vacating attachment or refusing to do so]; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §178.)

(2) *Order Granting Right To Attach Order*. An order granting a right to attach order. (C.C.P. 904.1(a)(5); see 14 *Pacific L. J.* 460.)

(3) *Contractor's Stop Notice*. A stop notice under the Mechanics' Lien Law (see 3 *Cal. Proc.* (5th), *Actions*, §217 et seq.) is a garnishment, and an order refusing to vacate it is appealable under C.C.P. 904.1(a)(5). (*Fredericksen v. Harney* (1962) 199 C.A.2d 189, 193, 18 C.R. 562.)

The *Fredericksen* case was distinguished in *Jasper Const. v. University Casework Systems* (1974) 39 C.A.3d 582, 114 C.R. 143. Plaintiff subcontractor on a *public* construction job filed a stop notice, and the state withheld from the prime contractor \$ 271,230.58 due under the contract. Under C.C. 3196, the prime contractor filed a surety bond to obtain release of the money, and also commenced a summary proceeding under C.C. 3197 et seq. to decrease the amount of the bond. The judge reduced the bond and the subcontractor appealed. *Held*, the order was not appealable.

(a) The trial judge's decision in this summary proceeding is not made appealable by express statute. (39 C.A.3d 585, 587.)

(b) In *Fredericksen*, by analogy, stop notices in private projects have been treated as the equivalent of garnishment or attachment and orders connected with them have been held appealable. But the present statutes dealing with stop

notices and bonds on public projects disclose a legislative objective of summary determination, which would be frustrated by allowing an appeal from the order made. (39 C.A.3d 586, 587.)

(c) The aggrieved party may, on a proper showing, seek review of the order by extraordinary writ. (39 C.A.3d 587, citing the text.)

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2. Injunction.

a. In General.

9 Witkin Cal. Proc. Appeal § 174

[§ 174] In General.

Except in a limited civil case (see *infra*, §§1004, 1005), an order "granting or dissolving an injunction, or refusing to grant or dissolve an injunction" is appealable. (*C.C.P. 904.1(a)(6)*.) (See *18 A.L.R.3d 400, 413* [appealability of order staying action because of pendency of another action, where complaint in action stayed sought injunction]; *19 A.L.R.3d 403* [order granting, extending, or refusing to dissolve temporary restraining order]; *19 A.L.R.3d 459* [order refusing to grant or dismissing temporary restraining order]; *42 Am.Jur.2d (2000 ed.)*, *Injunctions* §324 et seq.) (For federal rule, see *28 U.S.C., §1292(a)(1)* [order granting, continuing, modifying, refusing or dissolving injunction or refusing to dissolve or modify injunction is appealable]; *1A Federal Practice & Procedure (Wright & Miller)* §2962; *19 Federal Procedure, L.Ed., §47:154 et seq.*; *77 Harv. L. Rev.* 1535 [appealability of unexplained dismissal without prejudice of intervenor's counterclaim seeking injunction].)

Although there is some authority holding that *C.C.P. 904.1(a)(6)* does not apply to orders dismissing a cause of action for permanent injunctive relief (see *infra*, §176), the term "injunction" has generally been broadly interpreted to include not only preliminary injunctions and temporary restraining orders, but also permanent injunctions. (See *Meehan v. Hopps (1955) 45 C.2d 213, 215, 288 P.2d 267*, *supra*, §106; *Laam v. McLaren (1915) 28 C.A. 632, 634, 153 P. 985*; *Luitwieler v. Superior Court (1921) 54 C.A. 528, 530, 202 P. 165*; *Brydon v. Hermosa Beach (1928) 93 C.A. 615, 620, 270 P. 255* ["the intent of the statute is that all orders granting or refusing injunctions, whether temporary or permanent or provisional pending appeal, shall be appealable"]; *Western Electroplating Co. v. Henness (1959) 172 C.A.2d 278, 283, 341 P.2d 718*; *Bailey v. Fosca Oil Co. (1962) 211 C.A.2d 307, 309, 27 C.R. 454* [order was interpreted as injunction to make it appealable]; *In re Glacier General Ins. Co. (1991) 234 C.A.3d 1549, 1553, 286 C.R. 262* [appeal from order denying dissolution of injunction]; *Natomas Union School Dist. v. Grant Joint Union High School Dist. (1993) 14 C.A.4th 350, 355, footnote 2, 17 C.R.2d 547*, citing the text; *In re Cassandra B. (2004) 125 C.A.4th 199, 208, 22 C.R.3d 686* [restraining order issued in juvenile dependency proceeding is directly appealable to same extent as restraining order granted in civil action].)

However, if a permanent injunction is later granted, an appeal from the order granting or refusing to dissolve the preliminary injunction will be dismissed as moot. (*Peoples Ditch Co. v. Foothill Irr. Dist. (1930) 103 C.A. 321, 325, 284 P. 514*; see *People v. Gordon (1951) 105 C.A.2d 711, 725, 234 P.2d 287* [same holding where appeal was taken

from temporary restraining order after preliminary injunction was granted and appeal was taken therefrom]; *infra*, §753; *cf. American Ins. Co. v. Gernand* (1968) 262 C.A.2d 300, 305, 68 C.R. 810, citing the text [failure to appeal from preliminary injunction did not preclude appeal from later permanent injunction].)

West's Key Number Digest, Appeal and Error 41(3), 71(3), 100 et seq.

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See *Luckett v. Panos* (2008) 161 C.A.4th 77, 90, 73 C.R.3d 745 [prefiling order requiring vexatious litigant to obtain permission before filing further litigation is injunction; thus, order denying motion to lift prefiling order is appealable as order refusing to dissolve injunction].



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2. Injunction.

b. Order Modifying Injunction.

9 *Witkin Cal. Proc. Appeal* § 175

[§ 175] Order Modifying Injunction.

In *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 256 C.R. 194, 6 Cal. Proc. (5th), *Provisional Remedies*, §318, defendants attempted to use an order amending an injunction as a springboard to launch an appeal from an earlier order granting a preliminary injunction against them. The modifying order added three additional paragraphs to the original preliminary injunction, but made no change to the paragraphs that defendants wished to challenge on appeal. *Held*, the appeal was improper.

(a) An order modifying a preliminary injunction is appealable as an order granting an injunction. Thus, the provisions added by the modification are clearly a proper subject of defendants' appeal. However, by filing this appeal, defendants seek to review provisions of the original injunction that could have been reviewed on appeal had they filed a timely notice of appeal. Defendants may not now use the present appeal to circumvent their earlier failure to appeal from an appealable order. (208 C.A.3d 251.)

(b) Ordinarily, an appeal may be taken from an order entered after an appealable judgment. However, when a motion to set aside a judgment under C.C.P. 473 is denied, the order is not appealable if it raises matters that could have been reviewed on appeal from the judgment itself. (208 C.A.3d 252, citing the text; see *infra*, §197.)

(c) This rule applies here; to allow defendants to challenge the paragraphs of the earlier preliminary injunction would allow two appeals on identical grounds. Moreover, it would theoretically allow wholesale challenges to a preliminary injunction many years after its entry whenever the court modified the injunction in some insignificant manner. (208 C.A.3d 252.)

(d) California courts have entertained appeals from orders modifying injunctions where "(1) the later orders have modified an injunction 'in important particulars' ... and the appeal challenges the modifications ... or (2) the appeal may have been timely even if taken from the original injunction ... or (3) the appellant contested the *procedures* to which the injunction was modified." (208 C.A.3d 253.)

(e) *American Ins. Co. v. Gernand* (1968) 262 C.A.2d 300, 68 C.R. 810, held that a failure to appeal from a

preliminary injunction did not preclude later review of a subsequent permanent injunction. But entry of a permanent injunction involves different procedures and requires new review. A preliminary injunction is designed to preserve the status quo pending a determination on the merits; it is governed by rules peculiar to the provisional remedy, and does not ordinarily entail final adjudication of the ultimate rights in controversy. When the court, after a hearing on the merits, enters a permanent injunction, it is in the nature of a judgment from which an appeal may be taken to contest the conduct of the trial and the adjudication of the merits of the dispute. (208 C.A.3d 253, citing the text.) (See 6 Cal. Proc. (5th), *Provisional Remedies*, §274 et seq.)

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2. Injunction.

c. Interlocutory Order Denying Permanent Injunction.

9 Witkin Cal. Proc. Appeal § 176

[§ 176] Interlocutory Order Denying Permanent Injunction.

In *Art Movers v. Ni West* (1992) 3 C.A.4th 640, 4 C.R.2d 689, the action arose out of a dispute over the parties' respective duties and liabilities concerning toxic and hazardous waste dumped on leased commercial property. Appellants Art Movers leased plaintiffs' property and, after taking possession, discovered that the soil was contaminated. They claimed constructive eviction and stopped paying rent. Plaintiffs filed a complaint for breach of the lease, and defendant-appellants filed a cross-complaint against plaintiffs and others, setting forth many causes of action, including one for injunctive relief requiring cross-defendant to decontaminate the property. The trial judge granted summary adjudication in favor of cross-defendant on the injunctive relief cause, and cross-complainants appealed, asserting appellate jurisdiction under former C.C.P. 904.1(f) (now C.C.P. 904.1(a)(6)). *Held*, appeal dismissed.

(a) The statute states an exception to the one final judgment rule: An order granting or dissolving an injunction or refusing to grant or dissolve an injunction is immediately and separately appealable. The statute refers to an "injunction," and makes no distinction between preliminary injunctions, temporary restraining orders, stays pending appeal, and permanent injunctions. However, the better view is that an order dismissing a cause of action for permanent injunctive relief is not separately appealable, but may be reviewed on appeal from the final judgment. (3 C.A.4th 645.)

(b) In granting or denying a *preliminary injunction*, the trial court determines whether the status quo of the parties should be maintained pending the litigation or the appeal from the judgment. The order does not determine the merits of the controversy and is reviewed on appeal for an abuse of discretion. A permanent injunction is an equitable remedy for certain wrongful acts of a defendant where a damage remedy is inadequate; it is a final judgment that determines the merits and is reviewed on appeal for sufficiency of the evidence to support the judgment. (3 C.A.4th 646.)

(c) "An interpretation of [the statute] which limits its applicability to pendente lite injunctions is consistent with the manifest differences between pendente lite and permanent injunctions. Immediate appeal is necessary to review orders granting or denying pendente lite injunctions, because such orders cannot be reviewed on an appeal from the final judgment. If the orders are not reviewed pendente lite, the issues become moot upon entry of final judgment and plaintiff may suffer substantial and irreparable harm, unredressable by appellate review. A plaintiff denied permanent injunctive relief, on the other hand, suffers no immediate harm, and the denial of injunctive relief may be more easily

reviewed in conjunction with the final judgment. A permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established." (3 C.A.4th 646.)

(d) A number of cases have refused to find interlocutory orders denying permanent injunctions to be appealable. (3 C.A.4th 647, citing *McCarty v. Macy & Co.* (1957) 153 C.A.2d 837, 315 P.2d 383; *Carley v. Santa Rosa* (1957) 154 C.A.2d 214, 315 P.2d 905; *Engle v. Oroville* (1965) 238 C.A.2d 266, 47 C.R. 630, 6 Cal. Proc. (5th), *Provisional Remedies*, §343.) *Guntert v. Stockton* (1974) 43 C.A.3d 203, 117 C.R. 601, supra, §133, recognized an exception to the general rule where application of it would produce hardship. (3 C.A.4th 648.) Other cases purporting to allow appeals from interlocutory denials of permanent injunctions have usually done so in connection with some other basis for appeal. The appellate opinions that have clearly reached this issue have uniformly concluded that the statute was not intended to apply to such orders. The opinions indicating that immediate appeal is appropriate have done so "without discussion, often in footnotes, and in cases in which an additional basis for appellate review is also present." (3 C.A.4th 649.)

(e) "The value of this appellate policy is clearly demonstrated in the case at bench. This complex litigation concerns toxic and hazardous waste dumping which occurred over many years and involved many parties. Respondent, only one of numerous parties, filed a motion for summary adjudication of issues as to the ten causes of action in appellants' cross-complaint. The trial court granted summary adjudication of issues as to the three causes of action which seek equitable relief. Even appellants concede that the order is not appealable to the extent it granted summary adjudication of the two declaratory relief causes of action. One declaratory relief cause of action seeks a judicial declaration concerning the injunctive relief which is at issue in this appeal. Thus, not reviewable at this time are all the causes of action of the complaint and nine out of ten causes of action of the cross-complaint. The summary adjudication does not terminate the litigation as to respondent. Respondent remains a cross-defendant in the action." (3 C.A.4th 649.)

(f) "More importantly, the order denying appellants permanent injunctive relief is not properly reviewable at this time. Review can only be intelligently accomplished when the merits of the litigation have been determined. The remedy of injunctive relief is totally dependent on a determination that respondent is liable to appellants for some tort or other wrongful act. Appellants have not requested any pendente lite injunction. Appellants have not requested that the status quo be preserved pending litigation. Appellants have, however, indicated their concerns that the denial of permanent injunctive relief in some manner precludes a request for pendente lite injunctive relief, if that relief is necessitated by new information or circumstances. Such concerns are speculative and meritless. There is nothing in the trial court's [denial] of appellants' cause of action for permanent injunctive relief which precludes appellants from [moving to amend their complaint to request] a preliminary injunction based on an appropriate state of facts. As noted previously, pendente lite injunctions and permanent injunctions are entirely different proceedings, with entirely different purposes." (3 C.A.4th 650.) (See *Bishop Creek Lodge v. Scira* (2000) 82 C.A.4th 631, 633, 98 C.R.2d 398 [although C.C.P. 904.1(a)(6) permits appeal from order refusing to grant preliminary injunction, order refusing to grant permanent injunction is not appealable; because trial court may revisit its interlocutory decision to deny permanent injunction at any time until final judgment, order is not sufficiently definite to come within C.C.P. 904.1(a)(6)].)

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D. Orders Dealing With Provisional Remedies.

3. Receivers.

a. Appointment and Vacating Appointment.

9 *Witkin Cal. Proc. Appeal* § 177

[§ 177] Appointment and Vacating Appointment.

(1) *Appointment*. Except in limited civil cases (see *infra*, §§1004, 1005), an order appointing a receiver is appealable. (*C.C.P.* 904.1(a)(7).) Since the enactment of the prior statute in 1897, numerous cases have denied applications for prohibition, the appeal with a stay by undertaking being deemed an adequate remedy. (*Jacobs v. Superior Court* (1901) 133 C. 364, 365, 65 P. 826; *Campbell v. Superior Court* (1924) 67 C.A. 728, 730, 228 P. 354; *Pacific Broadcasting Co. v. Superior Court* (1929) 100 C.A. 649, 650, 280 P. 991; *Sunset Farms v. Superior Court* (1935) 9 C.A.2d 389, 394, 50 P.2d 106; *Santa Ynez Mercury Corp. v. Superior Court* (1938) 26 C.A.2d 279, 280, 79 P.2d 185; *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 456, 322 P.2d 600; see 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §191; 72 *A.L.R.2d* 1009 [appealability of order appointing receiver].)

If, however, the appointment is *pendente lite*, it ends with the rendition of judgment, and an appeal from the order of appointment will then be dismissed as moot. (*Mayo v. Mayo* (1936) 8 C.2d 9, 11, 63 P.2d 822; see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §449.) And if an *ex parte* order is superseded by a permanent appointment, the propriety of the first order becomes immaterial and the only effective appeal must be from the permanent order. (*People v. Christ's Church of the Golden Rule* (1947) 79 C.A.2d 858, 862, 181 P.2d 49.)

(2) *Refusal To Appoint*. An order refusing to appoint is not mentioned in the statute and should be held nonappealable. (See *San Francisco v. Shers* (1995) 38 C.A.4th 1831, 1836, 46 C.R.2d 57, *infra*, §189 [order is not appealable]; cf. *Conaway v. Conaway* (1963) 218 C.A.2d 427, 428, footnote 1, 32 C.R. 890 ["it is questionable whether the order is appealable"].) (See 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §192; 72 *A.L.R.2d* 1009, 1065 [appealability of order appointing, or refusing to appoint, receiver].)

(3) *Vacating Appointment*. The theory that an order discharging a receiver sometimes constitutes a final judgment on a collateral matter (*supra*, §99) apparently furnishes a means of obtaining an appeal from an order vacating an appointment. (See *San Francisco v. Shers*, *supra*, 38 C.A.4th 1836 [order discharging receiver is appealable "when it has the effect of being a final judgment"].) (See 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §193; 72 *A.L.R.2d* 1075 [appealability of order discharging, or vacating appointment of, receiver].)

In *Hibernia Savings & Loan Soc. v. Ellis Estate Co.* (1932) 216 C. 280, 13 P.2d 929, plaintiff sued to foreclose a mortgage, and obtained an ex parte order appointing a receiver on an affidavit asserting insufficient value of the property to cover the debt. Defendants moved to vacate the order as improvidently entered. At the hearing, the court granted the motion, vacated the appointment, and ordered the receiver to pay over to defendants funds collected. Plaintiff appealed. *Held*, this order had the effect of discharging the receiver and was of such finality on that phase of the case as to be an appealable judgment. (216 C. 282.)

(4) *Refusal To Vacate*. The refusal to vacate a prior appointment, like other orders refusing to vacate, is ordinarily not appealable. (*Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 C. 484, 486, 114 P. 838; *Meis v. Collins* (1934) 1 C.A.2d 433, 435, 36 P.2d 662; *San Francisco v. Shers*, *supra*; see 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §193; 72 *A.L.R.2d* 1075 [appealability of order refusing to discharge, or vacate appointment of, receiver]; *infra*, §197.)

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3. Receivers.

b. Accounts and Discharge.

9 *Witkin Cal. Proc. Appeal* § 178

[§ 178] Accounts and Discharge.

Orders in connection with accounts or discharge are not expressly covered by the statutory provision referring to receivers, but may be appealable under other rules. Thus:

(1) An order settling or confirming a final account, directing payment of compensation to the receiver and ordering the sale of receivership property and discharge of the receiver, is appealable as a final judgment on a collateral matter. (*Fish v. Fish* (1932) 216 C. 14, 16, 13 P.2d 375; *Macmorris Sales Corp. v. Kozak* (1967) 249 C.A.2d 998, 1002, 58 C.R. 92; cf. *Rochat v. Gee* (1891) 91 C. 355, 27 P. 670 [no appeal from order confirming intermediate account]; *Schwartz v. Schwartz* (1970) 5 C.A.3d 133, 139, 85 C.R. 45 [interim order directing payment of attorneys' fees was not appealable].)

(2) An order made subsequent to final judgment, discharging the receiver and directing him or her to turn over money or property, is appealable as an order after final judgment. (*Julian v. Schwartz* (1934) 1 C.2d 269, 271, 34 P.2d 487; *Coley v. Superior Court* (1928) 89 C.A. 330, 335, 264 P. 1110; see *infra*, §189.)

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E. Orders in Tax Refund Cases.

9 *Witkin Cal. Proc. Appeal* § 179

[§ 179] Orders in Tax Refund Cases.

In tax refund cases, an order directing a county assessment appeals board to apply a different valuation methodology is appealable, even though the matter is remanded for further proceedings and a judgment will not be entered until the board redetermines value and the trial court reviews the board's findings. (*Exxon Mobil Corp. v. Santa Barbara* (2001) 92 C.A.4th 1347, 1351, 112 C.R.2d 751 [substance and effect of order, not its label, controls].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Canandaigua Wine Co. v. Madera* (2009) 177 C.A.4th 298, 302, 99 C.R.3d 264 [partial summary adjudication of mandamus action was not appealable, where it left two causes of action pending between parties on writ petition, and where two complaints for tax refund also remained; distinguishing *Exxon Mobil Corp. v. Santa Barbara* (2001) 92 C.A.4th 1347, 112 C.R.2d 751, text, p. 256, on ground that only legal issues remained].



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F. Orders After Verdict or Judgment.

1. Orders Affecting Final Judgment.

a. General Rule: Appealable.

9 Witkin Cal. Proc. Appeal § 180

[§ 180] General Rule: Appealable.

In cases other than limited civil cases (see *infra*, §§1004, 1005), an appeal may be taken from an order made after a judgment made appealable by *C.C.P. 904.1(a)(1)* (see *supra*, §95 et seq.). (*C.C.P. 904.1(a)(2)*; see *Jonathan Neil & Associates v. Jones* (2006) 138 C.A.4th 1481, 1487, 42 C.R.3d 350 [although renewal of judgment is not appealable, because it is ministerial act and does not constitute separate event, order denying motion to vacate renewed judgment is appealable as order after judgment; order involves adjudication of any ground asserted by judgment debtor that would be defense to action on judgment].) However, if a statute provides that a particular order must be incorporated into the judgment for purposes of appeal, the general rule of *C.C.P. 904.1(a)(2)* does not apply, and the appeal from the order must be dismissed. (*Tetra Pak v. State Bd. of Equalization* (1991) 234 C.A.3d 1751, 1762, 286 C.R. 529 [in action for tax refund, order after judgment denying attorneys' fees was not appealable in view of Rev.C. 7156(e), requiring incorporation into judgment of orders granting or denying litigation costs].)

The theory behind *C.C.P. 904.1(a)(2)* is that, on an appeal from the judgment only the record prior to judgment is brought up, and orders after judgment cannot be reviewed in that appeal. (See *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 651, 25 C.R.2d 109, 863 P.2d 179, *infra*, §182; *Magee v. Superior Court* (1909) 10 C.A. 154, 161, 101 P. 532.) Taken literally, the provision covers a large field. However, there are several limitations, established by the case law, that cut down the appealability of orders after judgment. (See *infra*, §181 et seq.)

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1. Order Must Affect Judgment or Relate to Enforcement.

aa. In General.

9 Witkin Cal. Proc. Appeal § 181

[§ 181] In General.

To be appealable, the order "must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution." (*Lake v. Harris* (1926) 198 C. 85, 89, 243 P. 417; *Olson v. Cory* (1983) 35 C.3d 390, 400, 197 C.R. 843, 673 P.2d 720, citing the text [declaratory judgment containing no enforceable provision directing any payment]; *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 652, 25 C.R.2d 109, 863 P.2d 179, *infra*, §182; *Watson v. Pryor* (1920) 49 C.A. 554, 558, 193 P. 797; *Hohnemann v. Pacific Gas & Elec. Co.* (1938) 29 C.A.2d 551, 552, 85 P.2d 151; *McCord Co. v. Plotnick* (1951) 104 C.A.2d 495, 496, 31 P.2d 880; *LePleux v. Applegate* (1958) 164 C.A.2d 9, 10, 330 P.2d 65; *Lubetzky v. Friedman* (1991) 228 C.A.3d 35, 45, 278 C.R. 706, quoting the text; *San Francisco v. Shers* (1995) 38 C.A.4th 1831, 1837, 46 C.R.2d 57, *infra*, §189 [stating criteria].)

In *Hixson v. Hixson* (1956) 146 C.A.2d 204, 303 P.2d 607, a final divorce decree provided for the apportionment of income tax liabilities. After the time for appeal had passed, the parties orally agreed that they would amend the decree and separately deal with the Government. Each then settled the tax claims, but defendant husband refused to go through with the agreement to amend the judgment, and the trial court denied plaintiff wife's motion to amend. She appealed, and the appeal was dismissed, for the order denying the motion left the judgment intact. If it had been granted, there would have been a material change in the obligations of the judgment, and the order would have been appealable. (146 C.A.2d 206.)

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bb. When Order Affects Judgment or Relates to Enforcement.

9 Witkin Cal. Proc. Appeal § 182

[§ 182] When Order Affects Judgment or Relates to Enforcement.

(1) *Standard.* *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 25 C.R.2d 109, 863 P.2d 179, after exhaustively reviewing the cases, enunciated a standard for determining whether a postjudgment order affects the judgment or relates to its enforcement. Plaintiff sued defendants for negligence and intentional infliction of emotional distress in connection with a vehicle accident. Pursuant to former C.C.P. 2033 (now C.C.P. 2033.010 et seq.; see 2 Cal. Evidence (4th), Discovery, §157), plaintiff requested that defendants admit that a collision had occurred between the parties' vehicles, but defendants refused to do so. After a trial and judgment for plaintiff, plaintiff made a motion pursuant to former C.C.P. 2033(o) (now C.C.P. 2033.420) for an award of attorneys' fees incurred in proving facts that defendants had refused to admit. The trial judge denied the motion, and plaintiff appealed. The Court of Appeal dismissed the appeal on the ground that the order was not appealable because it did not affect the judgment or relate to its enforcement. *Held*, reversed; the order was appealable.

(a) The Court of Appeal reasoned that the order in question did not affect the judgment or relate to its enforcement because it left the judgment intact, i.e., it neither added to it nor subtracted from it. This reasoning is incomplete. Although the "neither adds nor subtracts" standard has been widely used to measure whether a postjudgment order affects the preceding judgment or relates to its enforcement, the standard has never been an exclusive statement of the necessary relationship between a judgment and an appealable postjudgment order. "Although the standard can be useful in some circumstances, the effect on, or relationship to, the judgment required to make a postjudgment order appealable is not limited to a simple mathematical calculation. To conclude otherwise would mean that a postjudgment order *awarding* attorney fees--thereby adding to the judgment--was appealable, while a postjudgment order *denying* attorney fees--neither adding to nor subtracting from the judgment--was not. This is not the law." (6 C.4th 653.)

(b) Postjudgment orders that have been held not to affect the judgment or relate to its enforcement, and thus to be nonappealable, fall into two main categories: (1) orders that, although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal; and (2) orders that pertain to the preparation of a record for use in a future appeal. (6 C.4th 652.) On the other hand,

postjudgment orders that make a final determination of rights or obligations of parties have been held to be appealable even though they do not necessarily add to or subtract from the judgment. (6 C.4th 653.)

(c) The present order resembles the postjudgment orders that have been held to be appealable. The order here, denying an award of attorneys' fees requested pursuant to former C.C.P. 2033(o), "is a postjudgment order that affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, it is appealable." (6 C.4th 656.)

(d) Defendants attempt to distinguish postjudgment orders pertaining to attorneys' fees requested under former C.C.P. 2033(o) (now C.C.P. 2033.420) from other postjudgment orders pertaining to attorneys' fees held to be appealable, e.g., orders awarding attorneys' fees pursuant to contract or orders awarding attorneys' fees under C.C.P. 1021.5. "It is true that the substantive issues arising under those and other theories on which attorney fees can be based may differ from the substantive issues arising from a request for the kind of attorney fees here in issue. We see no reason, however, to erect unique procedural barriers to recovery of the latter. To do so would thwart the Legislature's intent in enacting the statutory scheme that makes them available in the first place." (6 C.4th 655.)

(2) *Illustrations*. The following decisions have applied the *Lakin* standard:

(a) *Order appealable*. (See *Shelton v. Rancho Mortg. & Inv. Corp.* (2002) 94 C.A.4th 1337, 1343, 115 C.R.2d 82 [order denying request for sanctions is appealable, because it is final determination of parties' rights and liabilities, and there is no future judgment from which the order might be appealed]; *In re Marriage of Dupre* (2005) 127 C.A.4th 1517, 1524, 26 C.R.3d 328 [minute order denying sanctions was appealable; order was final determination of rights and liabilities of parties]; *Day v. Collingwood* (2006) 144 C.A.4th 1116, 1123, 50 C.R.3d 903 [postjudgment order denying motion for sanctions, whether pursuant to C.C.P. 128.5 or C.C.P. 128.7, is appealable; following *Shelton*].)

(b) *Order not appealable*. (See *In re Marriage of Levine* (1994) 28 C.A.4th 585, 589, 33 C.R.2d 559 [order entered after judgment of dissolution and relating to wife's guarantee that husband would receive specified amount from sale of assets was not sufficiently final to be appealable]; *Barnes v. Litton Systems* (1994) 28 C.A.4th 681, 684, 33 C.R.2d 562 [order taxing costs entered after reversal was not sufficiently final to be appealable where case was awaiting trial]; *In re Marriage of Lloyd* (1997) 55 C.A.4th 216, 220, 64 C.R.2d 37 [order must be one that "is not preliminary to later proceedings, and will not become subject to appeal after some future judgment"; order appointing guardian ad litem in contemplation of future hearings and orders on custody and visitation were not appealable]; *In re Marriage of Ellis* (2002) 101 C.A.4th 400, 403, 124 C.R.2d 719 [although made after judgment of dissolution, order determining that trial court has authority to divide medical subsidy was not appealable, because it was preliminary to judgment actually doing so]; *Roden v. AmerisourceBergen Corp.* (2005) 130 C.A.4th 211, 215, 29 C.R.3d 810 [after judgment allowing former corporate president to collect cash and benefits from former employer, postjudgment discovery order permitting him to unveil amount of benefits owing to him was not appealable; rather than enforcing or staying execution, order anticipated, and was preliminary to, further proceedings].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations*.

(a) *Order appealable*. See *Melbostad v. Fisher* (2008) 165 C.A.4th 987, 998, 81 C.R.3d 354 [at hearing on plaintiff's motion for attorneys' fees under SLAPP statute after complaint was struck as SLAPP, order preventing plaintiff from conducting discovery was appealable, because order raised issues different from those arising from judgment striking complaint, and order was final determination of plaintiff's right to discovery].

(b) *Order not appealable*. See *In re Marriage of Corona* (2009) 172 C.A.4th 1205, 1218, 92 C.R.3d 17 [postjudgment order confirming arbitrator's award in marital dissolution proceeding was interlocutory and not appealable, where order also appointed referee to select accountant to perform accounting pursuant to arbitration; order

contemplated further judicial proceedings to adopt referee's findings after accounting].



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2. Order Must Raise Different Issues.

9 Witkin Cal. Proc. Appeal § 183

[§ 183] Order Must Raise Different Issues.

If the appeal from the order after judgment would present the same questions as an appeal from the judgment itself, the order is not appealable. (See *infra*, §197.) However, depending on the overlap of issues, an order may be partially appealable. Thus, in *McConnell v. Merrill Lynch, Pierce, Fenner & Smith* (1985) 176 C.A.3d 480, 222 C.R. 228, the judgment in a class action approved a settlement agreement under which defendant agreed to pay \$ 10 million to class members in amounts determined by the trial judge, and the parties waived the right to appeal the judge's determination. Defendant did not appeal from this judgment. Thereafter, the judge entered an order increasing payments to class claimants, and defendant appealed. *Held*, the order was appealable as to the issue whether the judge abused his discretion by increasing the amount to be paid to the claimants, but not as to the issue whether the judge erred by inappropriately inserting himself into the negotiation for a settlement agreement or whether the judge had jurisdiction to require defendant to waive its right to appeal as a condition of approving the settlement agreement. The later issues could have been raised on an appeal from the judgment, and hence cannot now be reviewed. (176 C.A.3d 487, citing the text.) (See *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 651, 25 C.R.2d 109, 863 P.2d 179, *supra*, §182 [appeal from order denying attorneys' fees pursuant to former C.C.P. 2033(o) (now C.C.P. 2033.420) clearly raised issues different from those arising from judgment in personal injury case]; *In re Marriage of Lloyd* (1997) 55 C.A.4th 216, 220, 64 C.R.2d 37.)

A postjudgment order need not decide new issues to be appealable when the underlying judgment is void. (See *Carlson v. Eassa* (1997) 54 C.A.4th 684, 691, 62 C.R.2d 884.)

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3. Judgment Must Be Final.

9 *Witkin Cal. Proc. Appeal* § 184

[§ 184] Judgment Must Be Final.

The "judgment" that the order follows must be a final judgment in the sense of finality in the trial court. (See *Lakin v. Watkins Associated Industries* (1993) 6 C.4th 644, 651, footnote 3, 25 C.R.2d 109, 863 P.2d 179, supra, §182; *Potvin v. Pacific Greyhound Lines* (1933) 130 C.A. 510, 512, 20 P.2d 129; *Stein v. Simpson* (1950) 96 C.A.2d 642, 644, 216 P.2d 117; *Neilsen v. Saylor* (1956) 146 C.A.2d 139, 140, 303 P.2d 781, infra, §195; *Clark v. Rancho Santa Fe Assn.* (1989) 216 C.A.3d 606, 622, 265 C.R. 41.) This limitation is codified by the statutory requirement that the judgment must be appealable under C.C.P. 904.1(a)(1). (See *Olson v. Cory* (1983) 35 C.3d 390, 399, 197 C.R. 843, 673 P.2d 720, supra, §132.)

Orloff v. Orloff (1956) 144 C.A.2d 541, 301 P.2d 293, presented a problem of appealability that illustrates the uncertainty in the principles and the overlapping of tests. Plaintiff wife was awarded an interlocutory divorce decree. Just before the then 1-year period expired, defendant husband, on motion, obtained an order staying further proceedings and prohibiting entry of a final decree. *Held*, this order was appealable, for two reasons: (a) Because the interlocutory decree was a final judgment for purposes of appeal, the present order, which affected the rights of the appellant wife thereunder, was an appealable order after final judgment. (144 C.A.2d 543.) (b) By preventing entry of a final decree, it terminated the action and therefore was in effect an appealable final judgment. (144 C.A.2d 544.)

That the same order may be classified as both (or either) a final judgment and an appealable order after final judgment seems odd, and perhaps unnecessary. The order had no substantial characteristics of a final judgment, because it seemingly contemplated some later judicial action--the stay could not continue indefinitely. And the order closely resembled a common appealable order after final judgment--an order granting a motion to vacate (see infra, §194); like the order vacating, the present order temporarily nullified the divorce decree and the only means of review was by a direct appeal. (See *Williams v. Thomas* (1980) 108 C.A.3d 81, 84, 166 C.R. 141 [reciting the three limitations (supra, §181 et seq.), and holding that all were met]; *Cabrera v. Plager* (1987) 195 C.A.3d 606, 610, 241 C.R. 731 [same]; *Yancey v. Fink* (1991) 226 C.A.3d 1334, 1344, 277 C.R. 415 [same]; *Solis v. Vallar* (1999) 76 C.A.4th 710, 712, 90 C.R.2d 677 [order confirming partition is appealable as order after judgment; fact that underlying judgment is appealable does not destroy appealability of order issued thereafter].)

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c. Orders Dealing With Enforcement.

9 *Witkin Cal. Proc. Appeal* § 185

[§ 185] Orders Dealing With Enforcement.

Orders made to enforce a judgment or to prevent its enforcement are appealable. The principle is that an order that affects enforcement of the judgment is appealable whether it favors the judgment creditor or the judgment debtor. (*Baum v. Baum* (1959) 51 C.2d 610, 614, 335 P.2d 481; *Lovret v. Seyfarth* (1972) 22 C.A.3d 841, 852, 101 C.R. 143, quoting the text.) There must, however, be a judicial act. A judgment creditor cannot appeal from the act of the clerk in entering satisfaction of a judgment of record. If the entry is erroneous, the remedy is to move in the case for an order canceling it or to commence an independent action in equity. (*Anderson v. Joseph* (1956) 146 C.A.2d 450, 452, 303 P.2d 1053.)

The following are illustrations of appealable orders dealing with enforcement:

(1) Order directing that execution issue. (*Belt Cas. Co. v. Superior Court* (1933) 129 C.A. 642, 643, 19 P.2d 25; *Crowley v. Superior Court* (1936) 17 C.A.2d 52, 54, 61 P.2d 372; *Lovret v. Seyfarth*, *supra*, 22 C.A.3d 852.)

(2) Order denying motion to recall or quash execution. (*Macario v. Macario* (1929) 208 C. 601, 602, 283 P. 291; *Jones v. World Life Research Institute* (1976) 60 C.A.3d 836, 839, 131 C.R. 674.)

(3) Order denying motion to vacate or set aside sale under execution. (*First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1937) 19 C.A.2d 103, 105, 64 P.2d 977.)

(4) Order charging the interest of a debtor partner or order denying the application for a charging order. (*Baum v. Baum*, *supra*, 51 C.2d 615.)

(5) Judgment in the special proceeding for claim of exemptions from attachment or execution. (*C.C.P. 703.600.*)

(6) Judgment in a third-party claim proceeding under C.C.P. 720.390. The theory is that it is a final judgment in a special proceeding (see *supra*, §139) or that it is an order directly bearing on and affecting the enforcement of the judgment. (*Embree Uranium Co. v. Liebel* (1959) 169 C.A.2d 256, 258, 337 P.2d 159 [decided under former statute].)

(7) Order quashing and recalling a writ of execution. (*Stegge v. Wilkerson* (1961) 189 C.A.2d 1, 4, 10 C.R. 867; *Lovret v. Seyfarth*, *supra*, 22 C.A.3d 853.) (See 59 A.L.R.2d 692 [ruling on motion to quash].)

(8) Order denying motion for judgment against surety on appeal bond. (*Merritt v. J.A. Stafford Co.* (1968) 68 C.2d 619, 627, 68 C.R. 447, 440 P.2d 927.)

(9) Order dealing with a receiver. (See *infra*, §189.)

(10) Order directing the defendant to pay sums provided for in integrated property settlement agreement incorporated into an interlocutory decree of dissolution granted to the plaintiff. (*Heller v. Heller* (1964) 230 C.A.2d 679, 682, 41 C.R. 177 [proceeding commenced with order to show cause seeking contempt adjudication, but court found defendant not in contempt and order was simply one directing payment of money].)

(11) Order denying interest on judgment. (*Redevelopment Agency of San Francisco v. Goodman* (1975) 53 C.A.3d 424, 429, 125 C.R. 818, citing the text [defendant condemnees appealed from trial court's order denying their motion for order determining interest on condemnation judgment against them; order related to enforcement of judgment and was also similar to order determining costs].)

(12) Judgments on residential and homestead exemptions. (See C.C.P. 704.710 et seq., 8 Cal. Proc. (5th), *Enforcement of Judgment*, §215 et seq.)

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1. In General.

9 *Witkin Cal. Proc. Appeal* § 186

[§ 186] In General.

After judgment in the trial court, an order determining costs is appealable. (*Hennessey v. Superior Court* (1924) 194 C. 368, 372, 228 P. 862; *Le Cyr v. Dow* (1938) 26 C.A.2d 459, 460, 79 P.2d 777; *Harpke v. Lankershim Estate* (1950) 101 C.A.2d 49, 50, 224 P.2d 899; *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 C.A.4th 204, 23 C.R.3d 803 [order denying attorneys' fees was made appealable by order that judgment be entered nunc pro tunc].)

After reversal on appeal the cause is at large for retrial, with no final judgment. If the successful appellant files a cost bill, and procures an order of the superior court allowing costs incurred in the trial or the appeal, it has been argued that the order is not appealable because there is no final judgment, and the award of costs is not an appealable order after final judgment. (See *In re Kling* (1920) 48 C.A. 739, 741, 192 P. 453.) If this argument were accepted, the result could be that the respondent would have to pay costs without any recourse, e.g., if no retrial took place. Accordingly, it was held in *Markart v. Zeimer* (1925) 74 C.A. 152, 239 P. 856, that "final judgment" includes a judgment or determination by an appellate court; hence, the order is one after final judgment and is appealable. (See *Monson v. Fischer* (1933) 219 C. 290, 26 P.2d 6.)

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2. No Separate Appeal Is Required.

9 Witkin Cal. Proc. Appeal § 187

[§ 187] No Separate Appeal Is Required.

In *Grant v. List & Lathrop* (1992) 2 C.A.4th 993, 3 C.R.2d 654, judgment was rendered in favor of defendants, with costs and attorneys' fees, the amounts not specified. Plaintiffs filed a notice of appeal challenging the judgment. Thereafter, on plaintiffs' motion to tax costs, the trial judge held a hearing, determined the amount of costs and fees awarded, and entered an order accordingly. Plaintiffs did not file a notice of appeal from this order. *Held*, the prior notice of appeal was sufficient to cover both the original judgment and the order after judgment.

(a) "When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. ... After the parties file their memoranda of costs and any motions to tax, a postjudgment hearing is held and the trial court makes its determination of the merits of the competing contentions. When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc. ... The question raised here is whether the notice of appeal subsumes the later order setting the amount of costs or whether a separate appeal is required for review of the later order." (2 C.A.4th 996.)

(b) "Allowing review after a separate appeal from an order awarding costs and fees provides litigants with the option of seeking review on the matter of costs and fees even when there is no desire or ability to challenge the original judgment." (2 C.A.4th 997.) But requiring a separate appeal from the order, when the judgment expressly awards costs or fees, serves no apparent purpose. The notice of appeal itself challenges the appropriateness of awarding fees and costs, and long before the appellate court in the present case was called upon to consider issues on appeal, the award amounts became a part of the judgment. "If we were to follow respondents' restrictive approach, we could review only part of the judgment from which the appeal was taken and in essence rule upon a judgment containing *blanks*." (2 C.A.4th 997.)

(c) Normally, an appeal reviews the correctness of a judgment at the time it is rendered, and matters occurring later are irrelevant. (2 C.A.4th 998, citing the text.) Here, however, the fact that the court determined the amounts of fees and costs awarded is not in dispute; and in considering the postjudgment matters this court is not usurping the trial judge's fact-finding function. (2 C.A.4th 998.) "We hold that when a judgment awards costs and fees to a prevailing party and

provides for a later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (2 C.A.4th 998.)

In *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 C.A.4th 1047, 120 C.R.2d 98, defendant in a civil action filed a cross-complaint for indemnity. The trial judge denied the indemnity claim and ruled that cross-defendant was entitled to attorneys' fees. After a postjudgment motion by cross-defendant, the judge awarded it a certain amount of attorneys' fees, and defendant appealed. *Held*, the order setting the amount was appealable as an order made after judgment.

(a) The judgment determining that cross-defendant was entitled to attorneys' fees, but not setting the amount, was not final and not appealable. (98 C.A.4th 1053.)

(b) However, in an appeal from a postjudgment order awarding attorneys' fees, the court may, as in *Grant*, review both the entitlement to and the amount of the fees awarded. (98 C.A.4th 1055.) (Cf. *R.P. Richards v. Chartered Const. Corp.* (2000) 83 C.A.4th 146, 158, 99 C.R.2d 425 [under C.C.P. 904.1(a)(2), supra, §180, postjudgment order awarding attorneys' fees is separately appealable; result is opposite where judgment awards attorneys' fees but does not determine amount]; *DeZerega v. Meggs* (2000) 83 C.A.4th 28, 43, 99 C.R.2d 366 [where initial judgment did not cover attorneys' fees, and appeal was expressly from first judgment, Court of Appeal lacked jurisdiction over fee award not separately appealed, even though amended judgment included attorneys' fees]; *Colony Hill v. Ghamaty* (2006) 143 C.A.4th 1156, 1171, 50 C.R.3d 247 [separate appeal was required where judgment stated that attorneys' fees were to be determined by application at later date; distinguishing *Grant* on ground that its judgment awarded attorneys' fees to particular party, leaving only amount to be determined].)

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3. Distinction: Separate Appeal Is Required for Discretionary Cost Award.

9 Witkin Cal. Proc. Appeal § 188

[§ 188] Distinction: Separate Appeal Is Required for Discretionary Cost Award.

Grant v. List & Lathrop (1992) 2 C.A.4th 993, 3 C.R.2d 654, supra, §187, was distinguished in *Fish v. Guevara* (1993) 12 C.A.4th 142, 15 C.R.2d 329. Here, after plaintiffs filed notice of appeal from a judgment for defendants, the trial judge awarded defendants their expert witness fees pursuant to C.C.P. 998 (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §82 et seq.). Plaintiffs did not file a separate notice of appeal from that award, claiming, on the basis of *Grant*, that their earlier notice of appeal from the judgment carried with it appellate jurisdiction over the subsequent fee award. *Held*, this was incorrect. *Grant* held only that a costs award that is *incidental to the judgment* can be challenged on appeal from that judgment. The judgment in *Grant* awarded costs and attorneys' fees to the prevailing party as a matter of right. The subsequent order there merely set the amount of those costs and fees. On the other hand, an award of expert witness fees pursuant to C.C.P. 998 is not incidental to the judgment but is instead a separately litigated issue. Prevailing parties do not recover their expert witness fees as a matter of right, but in the court's discretion when the opposing party has rejected a settlement offer and fails to obtain a more favorable judgment. "Because expert witness fees are not incidental to the judgment, the propriety of a postjudgment award of expert witness fees cannot be reviewed on an appeal from the judgment. An award of expert witness fees must be challenged by a timely notice of appeal therefrom." (12 C.A.4th 148.) (See *Roth v. Parker* (1997) 57 C.A.4th 542, 551, 67 C.R.2d 250 [discretionary award of expert witness fees was not reviewable on appeal from judgment where notice of appeal from that judgment, filed prior to award, "does not expressly or by implication" state that appellant appeals from that award]; *Gouskos v. Aptos Village Garage* (2001) 94 C.A.4th 754, 764, 114 C.R.2d 558, citing *Grant* and *Fish* [if prevailing party is not entitled to attorneys' fees as matter of right ("costs may be awarded"), appeal from postjudgment order must be filed, but not if award is mandatory ("costs shall be awarded")].)

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F. Orders After Verdict or Judgment.

1. Orders Affecting Final Judgment.

e. Orders Dealing With Receiver.

9 *Witkin Cal. Proc. Appeal* § 189

[§ 189] Orders Dealing With Receiver.

A receiver may be appointed after judgment (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §310), and orders relating to his or her acts that affect the enforcement of the judgment are appealable. In *Raff v. Raff* (1964) 61 *C.2d* 514, 39 *C.R.* 366, 393 *P.2d* 678, the trial judge gave an interlocutory decree of divorce to both parties, with alimony to plaintiff wife and provision for a receiver to sell community property and distribute it. The receiver took possession, and in subsequent proceedings in the trial court, a number of orders were made:

(a) The receiver sought instructions on making payments for alimony and attorneys' fees. The judge made a minute order authorizing him to make payments in his discretion. *Held*, appealable. If consistent with the interlocutory judgment of divorce, it was an order enforcing it; if viewed as inconsistent with the judgment (i.e., judgment called for immediate payment, order called for payment in receiver's discretion), it was an order staying its execution. In either case, it was appealable. (61 *C.2d* 518.)

(b) Defendant moved to remove the receiver on grounds of not acting impartially, incurring unnecessary expenses, and acting beyond his authorization. The motion was denied. *Held*, appealable. Defendant did not seek to have the order of appointment set aside, but rather to have the receiver replaced for improper conduct; and the order that the receiver continue affected enforcement of the judgment. (61 *C.2d* 518.)

(c) An order was made instructing the receiver as to payments to be made in specified amounts, for attorneys' fees, costs, and receiver's fees. *Held*, appealable, as affecting enforcement of the judgment. (61 *C.2d* 519.)

(d) However, an order authorizing the receiver to employ additional counsel was not appealable. Whether the legal services were to be performed by original counsel employed with court approval or by counsel later approved did not affect enforcement of the judgment. (61 *C.2d* 519.)

A postjudgment order appointing a successor receiver was held appealable in *San Francisco v. Shers* (1995) 38 *C.A.4th* 1831, 46 *C.R.2d* 57. In this action by plaintiff city against defendant property owners to obtain compliance with the municipal code, the trial judge entered a postjudgment order appointing a receiver. Defendants appealed, and the

appellate court affirmed the order. When the original receiver resigned, the trial judge granted plaintiff's motion for an order appointing a successor receiver, and defendants appealed. *Held*, the order was appealable to the extent the appeal was limited to those issues specifically encompassed by the new order and did not extend to things subsumed in prior orders, such as the appropriateness of the receivership.

(a) *Not appealable as order appointing receiver.* The order was not appealable under *C.C.P. 904.1(a)(7)* (*supra*, §177), which allows an appeal from an order appointing a receiver. The right to appeal is wholly statutory, and an order appointing a successor receiver is not specified in that subsection. (*38 C.A.4th 1835.*)

(b) *Appealable as postjudgment order.* Following the reasoning in *Raff v. Raff, supra*, however, an order appointing a successor receiver may be appealed if it meets the requirements of a postjudgment order under *C.C.P. 904.1(a)(2)*. (*38 C.A.4th 1837.*) To be appealable under this subsection, a postjudgment order that follows a final appealable judgment must meet two requirements: (1) the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment, and (2) the order must either affect the judgment or relate to it by enforcing it or staying its execution. In this case, the trial judge's decision to appoint a successor receiver did not raise the same issues as the underlying judgment, which concerned the condition of the property in relation to the municipal code, not the identity of the person enforcing the judgment. Also, the order related to the enforcement of the underlying judgment by specifying who would administer the receivership. (*38 C.A.4th 1838.*)

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f. Order Awarding Attorneys' Fees on Appeal.

9 Witkin Cal. Proc. Appeal § 190

[§ 190] Order Awarding Attorneys' Fees on Appeal.

"The question presented is whether, following affirmance of an order for a limited new trial, an order which in effect fixes the amount of attorneys' fees incurred by the parties prevailing on the appeal but which makes the actual award and recovery of those fees contingent on future events, is, in the absence of those contingencies, appealable. We hold that the order is not appealable." (*Nimmagadda v. Krishnamurthy* (1992) 3 C.A.4th 1505, 5 C.R.2d 351.)

This case arose out of the breakup of a partnership. Plaintiffs' complaint and defendants' cross-complaint resulted in substantial jury verdicts for plaintiffs. Plaintiffs argued that the damages awarded were inadequate, and the trial judge granted their motion for a partial new trial on the issue of damages. The Court of Appeal, in affirming the new trial order, stated that plaintiffs "shall recover their costs of appeal." Plaintiffs then noticed a motion for attorneys' fees as costs on appeal, based on an attorneys' fees provision in the partnership agreement. The trial judge granted the motion, awarding \$ 22,085, but added: "Plaintiffs may make no effort to collect these fees ... until entry of final judgment in the case. Plaintiffs will have to elect between their contract remedy, which would allow them recovery of attorneys' fees, but not punitive damages, and their tort remedy, which would allow no attorneys' fees but recovery of punitive damages, prior to entry of final judgment." Defendants appealed from the order granting plaintiffs' motion. *Held*, appeal dismissed.

(a) An award of costs on appeal is a complete judgment in itself, which originates in an affirmance or reversal of a lower court judgment. The judgment itself is created when the successful party files a cost bill and the costs are taxed. (3 C.A.4th 1508, quoting the text.)

(b) If the order is thus deemed to constitute a judgment, it is subject to the one final judgment rule. (3 C.A.4th 1508, citing the text.) The order here does not meet this test; it makes recovery subject to three conditions: The limited retrial must be completed, plaintiffs must elect to proceed on their contract remedy, and a final judgment must be entered. With so much left for future consideration, "the order/judgment is interlocutory in nature." (3 C.A.4th 1509.)

(c) There is a separate and independent ground for dismissal. If plaintiffs elect to proceed in tort at the retrial, the stayed award of attorneys' fees might end up as irrelevant; and this element of possible mootness means that defendants

are not at present injuriously affected by the order and are not "aggrieved" parties with the right to appeal. (3 C.A.4th 1509, citing *Winter v. Gnaizda* (1979) 90 C.A.3d 750, 152 C.R. 700.)

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g. Miscellaneous Orders.

9 *Witkin Cal. Proc. Appeal* § 191

[§ 191] Miscellaneous Orders.

(1) *Orders on Motion To Correct Judgment.* An order granting a motion to correct or amend a judgment (see 7 *Cal. Proc.* (5th), *Judgment*, §74) is not appealable, because it may be reviewed on appeal from the corrected or amended judgment. (*Hood v. Verdugo Lumber Co.* (1933) 219 C. 558, 559, 27 P.2d 897.) The same should normally be true of an order denying relief. (See *Simmons v. Santa Barbara Ice & Cold Storage Co.* (1958) 162 C.A.2d 23, 28, 327 P.2d 141.) But in *Hilliker v. Board of Trustees* (1928) 91 C.A. 521, 267 P. 367, the judgment recited that it was by stipulation. Counsel unsuccessfully moved that the court amend it, under its inherent power, to correct this alleged misstatement. *Held*, the order of denial was appealable, for otherwise the appeal from the judgment would be frustrated by the recital of consent. (91 C.A. 526.)

(2) *Orders Dealing With Record on Appeal.* Unauthorized motions dealing with the record, made in disregard of the established procedures, do not result in appealable orders. In *People v. Gross* (1955) 44 C.2d 859, 285 P.2d 630, defendant, appealing from a redetermination of sexual psychopathy, made a motion in the trial court to correct and amend the transcript, which was treated as a request for correction under the Rules of Court and denied. *Held*, the order of denial was not appealable, because it did not affect the judgment or bear any relation to its enforcement. Defendant's remedy where the record is deficient is to apply to the reviewing court for augmentation under the Rules of Court (see *infra*, §683). (44 C.2d 861.) (See *Harmon v. Harmon* (1960) 184 C.A.2d 248, 250, 7 C.R. 280.)

(3) *Orders in Juvenile Court Proceedings.* Numerous postjudgment orders in juvenile court proceedings are appealable. The subject of juvenile court appeals is covered extensively in 10 *Summary* (10th), *Parent and Child*, §913 et seq.

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2. Order Granting New Trial.

9 *Witkin Cal. Proc. Appeal* § 192

[§ 192] Order Granting New Trial.

Formerly, an appeal was allowed from an order granting a new trial only in an action or proceeding where a jury trial was a matter of right, i.e., in legal but not in equitable actions. This pointless distinction was eliminated in 1945, and now any order granting a new trial, other than in a limited civil case (see *infra*, §§1004, 1005), is appealable. (*C.C.P.* 904.1(a)(4).) (On appeal from order granting new trial where motion for judgment notwithstanding the verdict was granted or denied, see *C.C.P.* 629; 7 *Cal. Proc.* (5th), *Trial*, §§445, 446.)

In *Cobb v. University of Southern Calif.* (1995) 32 *C.A.4th* 798, 38 *C.R.2d* 543, an action for breach of contract, the trial judge granted defendant's motion for judgment notwithstanding the verdict as to plaintiff's noneconomic damages and ordered a new trial as to the remaining breach of contract issues. Plaintiff appealed both orders, and defendant moved to dismiss the appeal. *Held*, motion to dismiss plaintiff's appeal from the order granting a new trial denied; motion to dismiss plaintiff's appeal from the order granting partial judgment notwithstanding the verdict granted. (On order for partial judgment notwithstanding verdict, see *supra*, §159.) With respect to the appeal of the new trial order, the court stated (a) that this was an order partially granting a new trial, which is appealable under *C.C.P.* 904.1 (see *Spencer v. Nelson* (1947) 30 *C.2d* 162, 164, 180 *P.2d* 886), and (b) that *Morehart v. Santa Barbara* (1994) 7 *C.4th* 725, 29 *C.R.2d* 804, 872 *P.2d* 143, *supra*, §120, holding that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties, was not applicable under the facts presented. (32 *C.A.4th* 802, 803.)

However, in *Cobb v. University of Southern Calif.* (1996) 45 *C.A.4th* 1140, 53 *C.R.2d* 71, the court, emphasizing that the jury had reached a verdict on plaintiff's breach of contract cause of action but had deadlocked on his discrimination cause of action, and that defendant's motions for judgment notwithstanding the verdict and for a new trial had both been granted, reexamined its previous decision and reached the opposite conclusion. In determining that the order granting a new trial was not appealable under these circumstances, the court relied on two different theories:

(a) An order granting a new trial is appealable, as provided by *C.C.P.* 904.1(a)(4), only to the extent that it contemplates a new judgment. Here, due to the hung jury on the discrimination claim, there could be no final determination of plaintiff's action until retrial of that claim. Thus, the order granting a new trial was premature and is not appealable. This situation must be distinguished from the grant of a partial new trial after determination of *all issues*

in a matter (as where a new trial is granted on the issue of damages but not of liability). In that case, any party aggrieved by the order may appeal. (45 C.A.4th 1143.)

(b) Under C.C.P. 629 (7 Cal. Proc. (5th), Trial, §446 et seq.), when motions for judgment notwithstanding the verdict and new trial are both granted, the latter is not appealable until the former has been reversed on appeal, and is moot if it is affirmed on appeal. In other words, the order for a new trial is not yet ripe for appeal, because it was granted on a contingency that may never occur (reversal of the judgment notwithstanding the verdict). Plaintiff cannot be aggrieved by that order and is thus not an aggrieved party within the meaning of C.C.P. 902 (see supra, §33 et seq.). (45 C.A.4th 1145; on conditional vacating order, see infra, §196.)

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See *Ricketts v. McCormack* (2009) 177 C.A.4th 1324, 1337, 99 C.R.3d 817 [party who did not appeal from order granting motion for new trial was not entitled to review of that determination on appeal from judgment ultimately entered in case where successful summary judgment motion resolved all party's claims; distinguishing *Cobb v. University of Southern Calif.* (1996) 45 C.A.4th 1140, 53 C.R.2d 71, text, p. 270].



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3. Order Denying Judgment Notwithstanding Verdict.

9 *Witkin Cal. Proc. Appeal* § 193

[§ 193] Order Denying Judgment Notwithstanding Verdict.

(1) *In General.* In other than a limited civil case (see *infra*, §§1004, 1005), an order denying a motion for judgment notwithstanding the verdict is appealable. (*C.C.P. 904.1(a)(4)*.) Where the motion is combined with a motion for a new trial, the order denying judgment notwithstanding the verdict is appealable, regardless of whether the motion for a new trial is granted or denied. (See *C.C.P. 629*; 7 *Cal. Proc. (5th)*, *Trial*, §§444, 445.)

(2) *Final Judgment Is Required.* The broad language of *C.C.P. 904.1(a)(4)* was limited in *Horton v. Jones* (1972) 26 *C.A.3d* 952, 103 *C.R.* 399, to bring it into conformity with the basic one final judgment rule (*supra*, §95). Plaintiffs sued for damages for flooding caused by alleged diversion of water. The trial was bifurcated under *C.C.P. 598*, the liability issue was tried before a jury, and the verdict was for plaintiffs. A purported judgment was entered by the clerk, and defendant moved to vacate, for new trial, and for judgment notwithstanding the verdict. The first motion, to vacate, was properly granted because the judgment was prematurely entered before determination of all the issues. But defendant appealed from denial of the motion for judgment notwithstanding the verdict. *Held*, appeal dismissed. "It does not appear reasonable the Legislature would have intended a *losing defendant*" in a bifurcated trial "to have the benefit of two possible appeals--one on the issue of liability and a second on the issue of damages--in a proceeding primarily designed to avoid the waste of trial time and litigants' money." (26 *C.A.3d* 958.)

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4. Order Granting Motion To Vacate.

a. General Rule: Appealable.

9 *Witkin Cal. Proc. Appeal* § 194

[§ 194] General Rule: Appealable.

If the court grants a motion to vacate under either *C.C.P.* 473 or 663 (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§139, 144), the prior judgment is nullified, and the only way to review the vacating order is by a direct appeal from it. Hence, it is treated as an order after final judgment, and is appealable. (*Harth v. Ten Eyck* (1939) 12 *C.2d* 709, 710, 87 *P.2d* 693; *Colby v. Pierce* (1936) 15 *C.A.2d* 723, 725, 59 *P.2d* 1046; *Casner v. Superior Court* (1937) 23 *C.A.2d* 730, 732, 74 *P.2d* 298; *Stegge v. Wilkerson* (1961) 189 *C.A.2d* 1, 4, 10 *C.R.* 867, citing the text; *Rogers v. Silverman* (1989) 216 *C.A.3d* 1114, 1127, 265 *C.R.* 286, citing the text; *Elsea v. Saberi* (1992) 4 *C.A.4th* 625, 628, 5 *C.R.2d* 742; see *C.C.P.* 663a ["An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment"]; 8 *A.L.R.3d* 1272 [order setting aside default judgment].)

The same necessity for an appeal exists, and the same rule applies, where the vacating order is made by the court on its own motion, without statutory authority or grounds. (*Phelan v. Superior Court* (1950) 35 *C.2d* 363, 370, 217 *P.2d* 951.) And an order granting *coram nobis* and setting aside a prior final judgment against the moving plaintiff is likewise appealable. (*Page v. Insurance Co. of North America* (1969) 3 *C.A.3d* 121, 127, 83 *C.R.* 44.)

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b. Exception: Order Vacating Nonappealable Order.

9 *Witkin Cal. Proc. Appeal* § 195

[§ 195] Exception: Order Vacating Nonappealable Order.

A vacating order is not appealable unless it vacates a prior appealable judgment. (See *C.C.P. 904.1(a)(2)*, *supra*, §§96, 180.)

In *Neilsen v. Saylors* (1956) 146 C.A.2d 139, 303 P.2d 781, plaintiff sued to recover a balance due for merchandise sold. Admitting certain liability, defendants C and N cross-complained and deposited in court the amount owed. The trial judge then ordered interpleader under *C.C.P. 386*. Later, cross-complainants moved to vacate the order in interpleader on a showing that they did not, in fact, owe the sum deposited; the judge granted the motion and directed repayment of the amount they had deposited. Plaintiff appealed from the order vacating the order in interpleader. *Held*, this order was not appealable because the original order in interpleader, which merely substitutes defendants, is not a final judgment. (146 C.A.2d 140.)

In *H.D. Arnaiz, Ltd. v. San Joaquin* (2002) 96 C.A.4th 1357, 118 C.R.2d 71, plaintiff entered into an option to lease certain property from defendant county. Before exercising the option, plaintiff sued defendant for breach of contract. He then exercised the option and, finding that the lawsuit interfered with negotiations to develop the property, voluntarily dismissed the action. After defendant sent him notice that the lease was terminated, plaintiff obtained an order vacating the voluntary dismissal, and defendant appealed. *Held*, the order was not appealable.

(a) Plaintiff contended that the order was not appealable, because it did not follow a final appealable judgment. This contention is correct. A voluntary dismissal by written request to the clerk is not a final judgment, as no judgment, final or otherwise, is necessary to the dismissal. This type of dismissal is a ministerial, not a judicial, act and is not appealable. (96 C.A.4th 1365, rejecting, without explanation, an argument that the order was appealable as one made after judgment.)

(b) *Basinger v. Rogers & Wells* (1990) 220 C.A.3d 16, 269 C.R. 332, *supra*, §153, which reached the opposite conclusion, ignores the requirements of a statutory basis for appealability and of the need for an appealable order to render a vacating order likewise appealable, and is not followed. (96 C.A.4th 1366.) (See *Concerned Citizens Coalition of Stockton v. Stockton* (2005) 128 C.A.4th 70, 79, 26 C.R.3d 735 [mandamus was granted to parties challenging city's

contract to "privatize" water operations; order granting city's motion for new trial was order vacating judgment and was not appealable; order was intended to reopen case to consider applicability of statute, and party dissatisfied with decision could appeal from reinstated judgment or new judgment allowing contract].)

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4. Order Granting Motion To Vacate.

c. Conditional Vacating Order.

9 *Witkin Cal. Proc. Appeal* § 196

[§ 196] Conditional Vacating Order.

Frequently, an order granting relief from default under *C.C.P. 473* is made subject to conditions, such as the payment of costs. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §183.) The test of appealability is simple:

(1) If the order conditionally granting relief contemplates a second order unconditionally vacating the judgment after compliance is shown, the first order is only interlocutory.

(2) If, however, as is usual, the order is self-executing, so that on compliance with the conditions the first order is effective and the judgment is deemed vacated without further order, the first order is appealable. (See *Reeves v. Hutson* (1956) 144 *C.A.2d* 445, 450, 301 *P.2d* 264 [ambiguously phrased order was interpreted as appealable; hence, where no appeal was taken, the order was not reviewable on appeal from later order of dismissal for lack of prosecution]; *Yarbrough v. Yarbrough* (1956) 144 *C.A.2d* 610, 613, 301 *P.2d* 426 [simple self-executing order was appealable].)

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F. Orders After Verdict or Judgment.

5. Order Denying Motion To Vacate.

a. General Rule: Nonappealable.

9 *Witkin Cal. Proc. Appeal* § 197

[§ 197] General Rule: Nonappealable.

The denial of a motion to vacate a prior judgment or order is an order after final judgment that affects the judgment and therefore can be appealable under certain special circumstances. (See *infra*, §198 et seq.) However, these circumstances are rare; most of the orders are not appealable for compelling reasons:

(1) If the prior judgment or order was appealable, and the grounds on which vacation is sought existed before entry of judgment, the correctness of the judgment should be reviewed on an appeal from the judgment itself. To permit an appeal from the order refusing to vacate would give the aggrieved party two appeals from the same decision or, if the party failed to take a timely appeal from the judgment, an unwarranted extension of time starting from the subsequent order. (See *Bell v. Solomons* (1912) 162 C. 105, 109, 121 P. 377; *Estate of Baker* (1915) 170 C. 578, 582, 150 P. 989 [stating rule, but applying exception]; *Litvinuk v. Litvinuk* (1945) 27 C.2d 38, 44, 162 P.2d 8; *Nagelmann v. McIntyre* (1938) 27 C.A.2d 621, 622, 81 P.2d 466; *First Nat. Bank v. Turnbull* (1950) 99 C.A.2d 764, 766, 222 P.2d 494; *Simmons v. Santa Barbara Ice & Cold Storage Co.* (1958) 162 C.A.2d 23, 27, 327 P.2d 141; *Efron v. Kalmanovitz* (1960) 185 C.A.2d 149, 152, 8 C.R. 107; *Gion v. Stroud* (1961) 191 C.A.2d 277, 280, 12 C.R. 540, dictum citing the text; *Daley v. Butte* (1964) 227 C.A.2d 380, 388, 38 C.R. 693, dictum citing the text; *Estate of Virgl* (1975) 49 C.A.3d 590, 595, 122 C.R. 677, citing the text; *Lamb v. Holy Cross Hosp.* (1978) 83 C.A.3d 1007, 1011, 148 C.R. 273, quoting the text; *Forman v. Knapp Press* (1985) 173 C.A.3d 200, 203, 218 C.R. 815, citing the text.)

(2) If the prior judgment or order was not appealable, an appeal from the order refusing to vacate would in practical effect make the nonappealable judgment or order appealable. (*Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 C. 484, 487, 114 P. 838 ["Where the original judgment or order is not the subject of appeal it cannot be made reviewable by the device of moving to set it aside and appealing from the order denying the motion"]; see *Christensen v. Lucerne Holding Co.* (1933) 134 C.A. 215, 216, 25 P.2d 261 [motion to vacate prior order sustaining demurrer without leave to amend]; *Remington v. Davis* (1951) 108 C.A.2d 251, 238 P.2d 662 [motion under C.C.P. 663 to vacate interlocutory judgment].)

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See *Payne v. Rader* (2008) 167 C.A.4th 1569, 1576, 85 C.R.3d 174 [order denying motion to vacate judgment of dismissal following sustaining of demurrer without leave to amend was not appealable; appeal from order tendered only issues that could have been raised on appeal from judgment, i.e., propriety of trial court's ruling sustaining demurrer].



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5. Order Denying Motion To Vacate.

b. Exceptions.

1. No Effective Appeal From Judgment.

9 Witkin Cal. Proc. Appeal § 198

[§ 198] No Effective Appeal From Judgment.

If the prior judgment or order was final and appealable (thus avoiding the objection of allowing an appeal from a nonappealable judgment or order by indirection), and the circumstances were such that the appellant could not have taken an effective appeal from it, the order denying the motion to vacate is appealable. (See *Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 C. 484, 488, 114 P. 838; *Estate of Baker* (1915) 170 C. 578, 582, 150 P. 989.) Thus, the original appealable judgment or order may have been made ex parte, or after constructive service, so that the aggrieved party had no actual knowledge of it in time to appeal; or the circumstances may have been such that he or she could not have raised the present grounds of objection on an appeal from the prior judgment or order. In any of these situations, the aggrieved party may obtain review by an appeal from the denial of a motion to vacate.

Appeals from orders refusing to set aside default judgments (C.C.P. 473) or judgments rendered without personal service (C.C.P. 473.5) are illustrations of this principle (see *infra*, §200), but there are other situations. (See *De La Montanya v. De La Montanya* (1896) 112 C. 101, 118, 44 P. 345; *Pignaz v. Burnett* (1897) 119 C. 157, 163, 51 P. 48; *In re Yoder* (1926) 199 C. 699, 702, 251 P. 205; *Spanach v. Superior Court* (1935) 4 C.2d 447, 450, 50 P.2d 444; *Helbush v. Superior Court* (1929) 99 C.A. 501, 505, 278 P. 1062 [final divorce decree entered ex parte; wife could move to set decree aside and could appeal if motion was denied]; *In re Hancock* (1949) 92 C.A.2d 481, 485, 207 P.2d 61 [motion after 20 years, based on new facts, to vacate decree establishing newspaper as one of general circulation]; *Valentin v. Valentin* (1949) 93 C.A.2d 588, 592, 209 P.2d 654; *MacLeod v. Tribune Publishing Co.* (1958) 157 C.A.2d 665, 669, 321 P.2d 881 [order denying plaintiff's motion to vacate order for attorneys' fees and costs to defendant; only way plaintiff could object to timeliness of cost bill]; *Daley v. Butte* (1964) 227 C.A.2d 380, 389, 38 C.R. 693, *infra*, §200; *Cope v. Cope* (1964) 230 C.A.2d 218, 228, 40 C.R. 917; *Cabrera v. Plager* (1987) 195 C.A.3d 606, 610, 241 C.R. 731 [appeal from order denying motion to vacate judgment entered on arbitration award; appeal from judgment was prohibited by C.C.P. 1141.23].)

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b. Exceptions.

2. Appellant Not an Original Party.

9 *Witkin Cal. Proc. Appeal* § 199

[§ 199] Appellant Not an Original Party.

If the appellant was not originally a party to the action or proceeding, but is aggrieved by the judgment or order, he or she may move to vacate. Because a party could not appeal from the judgment, the only means of review is an appeal from the order denying the motion to vacate, and this is allowed. (*Estate of Baker* (1915) 170 C. 578, 582, 150 P. 989; *Luckenbach v. Laer* (1923) 190 C. 395, 398, 212 P. 918; *Pacific States Savings & Loan Co. v. Harwell* (1928) 204 C. 370, 372, 268 P. 341; *supra*, §26.)

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3. Statutory Motions.

9 *Witkin Cal. Proc. Appeal* § 200

[§ 200] Statutory Motions.

(1) *In General.* A motion to vacate the judgment and enter a different judgment (C.C.P. 663) raises the same points as could be raised on an appeal from the judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §139.) Under the general principle mentioned above (*supra*, §197), it is difficult to see any more reason for allowing an appeal from an order denying vacation than from an order denying a new trial. This is particularly true because C.R.C., Rule 8.108(c) gives an extension of time to appeal from the judgment after denial of a motion to vacate. (See *infra*, §§595, 596.)

However, despite early conflict in the decisions, it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable judgment or order, i.e., from denial of a motion made under C.C.P. 473, 473.5, or 663. (*California Delta Farms v. Chinese Amer. Farms* (1927) 201 C. 201, 203, 255 P. 1097 ["notwithstanding the obvious fact that on appeal from a judgment which the court below refuses to set aside, the very same matters may be reviewed ... it seems definitely settled that our law gives a separate appeal" from the order]; *Funk v. Campbell* (1940) 15 C.2d 250, 251, 100 P.2d 762; *Rounds v. Dippolito* (1949) 34 C.2d 59, 61, 206 P.2d 1083; *Socol v. King* (1949) 34 C.2d 292, 296, 209 P.2d 577; *Spellens v. Spellens* (1957) 49 C.2d 210, 229, 317 P.2d 613, citing the text; *Bice v. Stevens* (1958) 160 C.A.2d 222, 325 P.2d 244, citing the text; *Fitzsimmons v. Jones* (1960) 179 C.A.2d 5, 11, 3 C.R. 373, quoting the text; *Palmese v. Superior Court* (1961) 193 C.A.2d 600, 14 C.R. 453; *Eveleth v. American Brass & Iron Foundry, Plastics Div.* (1962) 203 C.A.2d 41, 44, 21 C.R. 95; *In re Marriage of Simmons* (1975) 49 C.A.3d 833, 836, 123 C.R. 213; *Martin v. Johnson* (1979) 88 C.A.3d 595, 604, 151 C.R. 816; *Ventura v. Tillett* (1982) 133 C.A.3d 105, 110, 183 C.R. 741 [motion to vacate judgment as void for lack of jurisdiction]; *Los Angeles v. Thompson* (1985) 172 C.A.3d 18, 20, 218 C.R. 101, citing the text [motion to vacate stipulated judgment of paternity on ground that it was obtained unconstitutionally]; *In re Marriage of Goodarzirad* (1986) 185 C.A.3d 1020, 1030, 1031, 230 C.R. 203, 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §132 [motion to vacate stipulated judgment for termination of parental rights void for lack of jurisdiction]; *Howard v. Lufkin* (1988) 206 C.A.3d 297, 301, 253 C.R. 422, quoting the text; *Jade K. v. Viguri* (1989) 210 C.A.3d 1459, 1469, 258 C.R. 907, citing the text [motion under C.C.P. 473 to vacate default judgment]; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 C.A.4th 1384, 1394, 72 C.R.2d 188

[denial of motion under C.C.P. 473 was appealable under C.C.P. 904.1(a)(2) as special order after judgment]; *Pazderka v. Caballeros Dimas Alang* (1998) 62 C.A.4th 658, 668, 73 C.R.2d 242 [order under C.C.P. 473 denying motion to vacate judgment entered after C.C.P. 998 settlement is appealable]; cf. *Carver v. Platt* (1960) 179 C.A.2d 140, 142, 3 C.R. 687 [because more than one motion under C.C.P. 473 is allowed, order denying second motion is also appealable]; see 8 A.L.R.3d 1272 [order refusing to set aside default judgment].)

Most of the cases cited above deal with motions under C.C.P. 473, and a practical explanation of appealability of orders denying relief under that statute is set forth in *Daley v. Butte* (1964) 227 C.A.2d 380, 38 C.R. 693. The action was dismissed under former C.C.P. 583 for lack of prosecution. The dismissal was a final judgment, but plaintiff did not appeal. Instead he moved to vacate under C.C.P. 473, and appealed from the order denying relief. *Held*, the appeal was proper. The trial judge, in ruling on the motion to dismiss, had no knowledge of the facts of attorney neglect on which plaintiff relied (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §170 et seq.), and an appeal from the judgment of dismissal would not have brought those facts before the appellate court for review. "Under these circumstances, where a direct appeal from the dismissal is relatively ineffectual, the order refusing to vacate the dismissal is appealable." (227 C.A.2d 389.) (See *Los Angeles v. Gleneagle Dev. Co.* (1976) 62 C.A.3d 543, 553, 133 C.R. 212, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §463 [appeal from judgment of dismissal was treated as if it were appeal from denial of motion to vacate, in order that reviewing court could consider matters occurring after judgment and not contained in dismissal record]; *Peltier v. McCloud River R. Co.* (1995) 34 C.A.4th 1809, 1814, 41 C.R.2d 182 [motion under C.C.P. 473 to vacate discretionary dismissal for lack of prosecution; following *Daley*].)

(2) *Motion Arising Under Federal Law*. In *Winslow v. Harold G. Ferguson Corp.* (1944) 25 C.2d 274, 153 P.2d 714, the motion to vacate was made under the federal Soldiers' and Sailors' Civil Relief Act. *Held*, the order of denial was appealable. Where the law expressly provides for a motion to vacate, an order denying the motion is regarded as a "special order made after final judgment." The situation is the same where appellant, in moving to vacate the order, "was undertaking to avail himself of a remedy expressly provided by federal statute." (25 C.2d 282.)

(3) *Contrary Dicta*. In *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 871, 890, 151 C.R. 285, 587 P.2d 1098, the Supreme Court, without discussion or citation of authority, characterized an order denying a motion under C.C.P. 663 as nonappealable, and dismissed the appeal. The procedural step had no significant effect, for the issues involved were fully reviewed on an appeal from the judgment and from an order granting a limited new trial. But the court's statement was contrary to the long line of authorities cited above, and it has not been followed in later decisions. (See *Forman v. Knapp Press* (1985) 173 C.A.3d 200, 218 C.R. 815, citing the text [describing *Clemmer* pronouncement as "incongruous," and noting that rule of appealability was cited with approval in *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 663, 125 C.R. 757, 542 P.2d 1349]; *Howard v. Lufkin*, *supra*, 206 C.A.3d 302, citing the text [characterizing *Clemmer* statement as dicta].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Shisler v. Sanfer Sports Cars* (2008) 167 C.A.4th 1, 5, 83 C.R.3d 771 [because plaintiffs specified that motion was motion to vacate under C.C.P. 473(d) and argued only that attorneys' fees order was void on its face, motion was properly considered motion to vacate, rather than motion for reconsideration, and order denying statutory motion to vacate is appealable]; *Doppes v. Bentley Motors* (2009) 174 C.A.4th 1004, 1008, 94 C.R.3d 797 [denial of motion under C.C.P. 473 to set aside judgment awarding prejudgment interest as void on its face was appealable, even though issue whether award of prejudgment interest was error could have been reviewed on appeal from judgment, where motion contended that trial court lacked jurisdiction to award prejudgment interest].



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4. Motion To Vacate Void Judgment.

9 *Witkin Cal. Proc. Appeal* § 201

[§ 201] Motion To Vacate Void Judgment.

An appeal may be taken from an order denying a motion to vacate a void judgment. This is so even though the judgment itself is not appealed. In *Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 C.A.4th 1801, 41 C.R.2d 123, defendant water district moved to vacate a judgment halting its connection of new water service as void for lack of subject matter jurisdiction. The trial judge denied the motion. *Held*, the order was appealable. "A judgment is void on its face if the court rendering it lacked subject matter jurisdiction. ... If the judgment is void, it is subject to collateral attack by means of a postjudgment motion to vacate or set aside the judgment as void. ... An order denying such a motion is a special order made after entry of judgment that may be directly attacked on appeal." (34 C.A.4th 1805, citing C.C.P. 904.1(a)(2), *supra*, §§96, 180.) "This appeal is allowed because an order giving effect to a void judgment is also void and appealable. ... Thus, when an appellant attacks an order on the ground that it gives effect to a judgment that is void for lack of jurisdiction, the order may be appealed even if the underlying judgment was also appealable." (34 C.A.4th 1805.) (See *Carlson v. Eassa* (1997) 54 C.A.4th 684, 690, 62 C.R.2d 884 [order denying mother's motion to vacate stipulated judgment for child support arrearages, void because district attorney improperly settled her claim without her consent, was appealable; following *Residents for Adequate Water v. Redwood Valley County Water Dist.*]; *Carr v. Kamins* (2007) 151 C.A.4th 929, 933, 60 C.R.3d 196 [order denying motion to vacate default judgment that was allegedly invalid because of lack of personal service and ineffective service by publication was appealable as special order made after entry of judgment].)

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1. In General.

a. Statutory Framework.

9 *Witkin Cal. Proc. Appeal* § 202

[§ 202] Statutory Framework.

Appealable orders in probate proceedings (see 14 *Summary* (10th), *Wills and Probate*, §401 et seq.) are governed by *Prob.C. 1300* et seq. as follows:

- (1) *Prob.C. 1300* (all proceedings under the Probate Code). (See *infra*, §208 et seq.)
- (2) *Prob.C. 1301* (guardianships and conservatorships). (See *infra*, §218.)
- (3) *Prob.C. 1302* (powers of attorney). (See *infra*, §220.)
- (4) *Prob.C. 1302.5* (advance health care directives). (See *infra*, §220.)
- (5) *Prob.C. 1303* (decedents' estates). (See *infra*, §212 et seq.)
- (6) *Prob.C. 1304* (trusts and trustees). (See *infra*, §219.)

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b. Probate Code Provisions Are Exclusive.

9 *Witkin Cal. Proc. Appeal* § 203

[§ 203] *Probate Code Provisions Are Exclusive.*

Prob.C. 1300 et seq. list appealable orders in probate proceedings. The statutory list is much narrower in scope than *C.C.P. 904.1* (supra, §85), and it has long been settled that the statutory list is exclusive. Thus, there is no right to appeal from orders in probate except those specified in the Probate Code. (*Estate of Mailhebuau* (1927) 201 C. 664, 666, 258 P. 378; *Estate of Patterson* (1934) 220 C. 370, 371, 31 P.2d 197; *Estate of O'Dea* (1940) 15 C.2d 637, 638, 104 P.2d 368; *Estate of Brady* (1948) 32 C.2d 478, 479, 196 P.2d 881; *Estate of Herrington* (1947) 79 C.A.2d 389, 391, 179 P.2d 650; *Estate of Hart* (1949) 92 C.A.2d 691, 692, 208 P.2d 59; *Estate of Bartholomae* (1968) 261 C.A.2d 839, 841, 68 C.R. 332, citing the text; *Estate of Muller* (1969) 2 C.A.3d 259, 262, footnote 1, 82 C.R. 531, citing the text; *Conservatorship of Smith* (1970) 9 C.A.3d 324, 327, 88 C.R. 119 [principal reason is to avoid delay in distribution of estates]; *Estate of Weber* (1991) 229 C.A.3d 22, 24, 280 C.R. 22; *Gertner v. Superior Court* (1993) 20 C.A.4th 927, 929, 25 C.R.2d 47.)

The provision in *C.C.P. 904.1(a)(2)* for appeal from an order made after an appealable judgment (see supra, §§96, 180) has no counterpart in *Prob.C. 1300* et seq. (*Estate of Allen* (1917) 175 C. 356, 357, 165 P. 1011; *Estate of Grussing* (1936) 15 C.A.2d 11, 13, 59 P.2d 152; *Guardianship of Morro* (1940) 36 C.A.2d 623, 627, 98 P.2d 552.) And there is no general exception that allows an appeal from an order merely because a party litigant has an interest adversely affected by it. (*Estate of Schechtman* (1955) 45 C.2d 50, 56, 286 P.2d 345 [no right to appeal from order made under discovery provisions of Probate Code]; *Estate of Windiate* (1961) 197 C.A.2d 560, 564, 17 C.R. 297, citing the text.)

West's Key Number Digest, Appeal and Error 40, 69(2), 77(2), 87(2)

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c. Denial of Appealable Order.

9 Witkin Cal. Proc. Appeal § 204

[§ 204] Denial of Appealable Order.

The primary Probate Code statutes governing appeals provide that an appeal may be taken from the making or refusal to make (*Prob.C. 1300*), from the grant or refusal to grant (*Prob.C. 1301, 1303*), or from the grant or denial (*Prob.C. 1304*) of the specified orders. By virtue of these provisions, the denial of any motion for an appealable Probate Code order is appealable. (See *Estate of Plumb* (1918) 177 C. 300, 301, 170 P. 609; *Bauer v. Willis* (1925) 195 C. 375, 376, 233 P. 342; *Estate of Smead* (1932) 215 C. 439, 441, 10 P.2d 462; *Estate of Exterstein* (1934) 2 C.2d 13, 14, 38 P.2d 151; *Estate of Alfrey* (1938) 12 C.2d 255, 256, 83 P.2d 291; *Estate of Merrill* (1946) 29 C.2d 520, 523, 175 P.2d 819; *Attorney General of Calif. v. Superior Court* (1953) 41 C.2d 249, 251, 259 P.2d 1; *Estate of Hart* (1953) 119 C.A.2d 310, 312, 259 P.2d 703; *Estate of Cuneo* (1963) 214 C.A.2d 381, 383, 29 C.R. 497; *Estate of Muller* (1969) 2 C.A.3d 259, 262, 82 C.R. 531.)

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d. Nonappealable Orders.

9 *Witkin Cal. Proc. Appeal* § 205

[§ 205] Nonappealable Orders.

Illustrative of the many kinds of preliminary rulings outside the terms of *Prob.C. 1300* et seq. (*supra*, §203) are the following:

(1) Order denying motion for change of venue in proceeding to revoke probate of will. (*Estate of Hart* (1949) 92 C.A.2d 691, 696, 208 P.2d 59 ["there is as much necessity for an appeal ... as there is from such an order made in a civil action or in a special proceeding"; remedy, however, is with Legislature].)

(2) Order affecting or determining a contest of will before probate, e.g., sustaining a demurrer without leave to amend, dismissing the contest, or granting a nonsuit. (*Estate of Stierlen* (1926) 199 C. 140, 141, 248 P. 509; *Estate of Patterson* (1934) 220 C. 370, 371, 31 P.2d 197; *Estate of Rawson* (1924) 66 C.A. 144, 146, 225 P. 474; *Estate of Bearns* (1946) 77 C.A.2d 221, 222, 175 P.2d 283.) But an order dismissing a will contest *after probate* is a final judgment and appealable as such. (*Estate of Emery* (1962) 199 C.A.2d 22, 24, 18 C.R. 86; see *infra*, §212.)

(3) Order allowing or rejecting a claim in whole or in part. (See *Estate of Cuneo* (1963) 214 C.A.2d 381, 382, 29 C.R. 497, citing the text; *Mcdonald v. Structured Asset Sales, LLC* (2007) 154 C.A.4th 1068, 1072, 65 C.R.3d 366 [relief sought was order approving probate claim (not appealable), not order directing or allowing payment of debt (appealable)].) But an order directing or authorizing payment of a claim previously allowed is made appealable by *Prob.C. 1303(k)*. (See *infra*, §209.)

(4) Interlocutory order of partition of property before distribution, under *Prob.C. 11956*. (*Estate of Murphy* (1940) 36 C.A.2d 653, 655, 98 P.2d 523.)

(5) Order overruling objections or exceptions to account. (See *Estate of O'Connor* (1927) 200 C. 646, 647, 254 P. 269 [dictum].)

(6) Order striking out opposition to account and petition for distribution. (*Estate of Miyagishima* (1935) 7 C.A.2d 343, 345, 45 P.2d 822.)

(7) Order postponing consideration of petition for decree of distribution, or refusing to postpone decree. (*Johnson v. Superior Court* (1929) 102 C.A. 178, 179, 283 P. 331.)

(8) Minute order for distribution, preliminary to the decree of distribution itself. (*Estate of Olsen* (1935) 9 C.A.2d 374, 375, 50 P.2d 70; *Estate of Evanis* (1955) 130 C.A.2d 64, 65, 278 P.2d 506.)

(9) Order giving respondent permission to file a mechanic's lien against estate property and to foreclose it. (*Estate of Mailhebau* (1927) 201 C. 664, 665, 258 P. 378 [order was held not an order in equitable proceeding, but mere consent to future suit].)

(10) Order denying petition of executor to compel former special administrator to account for portion of commissions, under *Prob.C. 8547*. (*Estate of Olmstead* (1932) 216 C. 585, 586, 15 P.2d 495.)

(11) Order denying motion to surcharge executor's account. (*Estate of Reed* (1935) 9 C.A.2d 94, 96, 48 P.2d 177.)

(12) Order granting or denying petition to file late creditor's claim. (*Gertner v. Superior Court* (1993) 20 C.A.4th 927, 929, 25 C.R.2d 47.)

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e. Order on Motion for New Trial.

9 *Witkin Cal. Proc. Appeal* § 206

[§ 206] Order on Motion for New Trial.

(1) *Order Granting New Trial*. In certain probate proceedings, such as will contests, a party may move for a new trial. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §22.) An order granting a new trial in ordinary actions and proceedings is appealable. (See *supra*, §192.) The order is not, however, one of the appealable orders listed in the Probate Code, and, if the theory governing appeals in probate were strictly followed, it would not be appealable. Nevertheless, at an early date appeal was permitted, and the adoption of the Probate Code was held not to change this rule. (*Estate of Armstrong* (1937) 8 *C.2d* 204, 208, 64 *P.2d* 1093; *Estate of Green* (1944) 25 *C.2d* 535, 545, 154 *P.2d* 692; cf. *Estate of Bartholomae* (1968) 261 *C.A.2d* 839, 68 *C.R.* 332 [distinguishing mistrial; order granting motion for mistrial is not appealable].)

(2) *Order Denying New Trial*. An order denying a new trial is not appealable either in ordinary actions or in probate. (*Estate of Frazer* (1941) 43 *C.A.2d* 324, 327, 110 *P.2d* 702; see *supra*, §164.)

West's Key Number Digest, Appeal and Error 87(2), 110

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f. Order on Motion To Vacate.

9 *Witkin Cal. Proc. Appeal* § 207

[§ 207] Order on Motion To Vacate.

(1) *General Rule: Not Appealable.* The general rule allowing appeals from orders granting or denying statutory motions to vacate (*supra*, §§194, 200) does not apply in probate, and these orders are not appealable. (On order denying relief under *C.C.P.* 473, see *Estate of O'Dea* (1940) 15 C.2d 637, 639, 104 P.2d 368; *Estate of Sanders* (1924) 70 C.A. 127, 128, 232 P. 733 [denial of motion to vacate order refusing to revoke probate is not appealable]; *Estate of Grussing* (1936) 15 C.A.2d 11, 12, 59 P.2d 152; *Estate of Middleton* (1963) 215 C.A.2d 324, 328, 30 C.R. 155; on order granting relief, see *Lilienkamp v. Superior Court* (1939) 14 C.2d 293, 297, 93 P.2d 1008; *Bryant v. Superior Court* (1936) 16 C.A.2d 556, 562, 61 P.2d 483; *Estate of Herrington* (1947) 79 C.A.2d 389, 390, 179 P.2d 650; cf. *Estate of Wilhelm* (1957) 152 C.A.2d 803, 313 P.2d 161 [order denying application for coram nobis to vacate portion of final decree of distribution is not appealable]; *Estate of Bartholomae* (1968) 261 C.A.2d 839, 841, 68 C.R. 332 [order vacating special verdict as incomplete is not appealable].)

(2) *Distinctions and Exceptions.* A distinction is made where the order, though in form one vacating a prior order, is in substance and effect a distinct appealable order. (*Estate of West* (1912) 162 C. 352, 354, 122 P. 953 [order setting aside prior order of confirmation of sale was order refusing to direct sale or conveyance].) And an exception is recognized where the motion to vacate is the only way in which an aggrieved party can protect his or her rights; denial of the motion in such a case is appealable. (*Estate of Baker* (1915) 170 C. 578, 582, 150 P. 989 [motion to vacate ex parte order dismissing will contest]; *Estate of Cahoon* (1980) 101 C.A.3d 434, 438, 161 C.R. 651, quoting the text.)

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2. All Probate Code Proceedings.

a. Property Transactions.

9 *Witkin Cal. Proc. Appeal* § 208

[§ 208] Property Transactions.

An appeal may be taken from an order directing or authorizing various property transactions, i.e., sale, purchase, lease, conveyance, exchange, or grant of an option. (*Prob.C. 1300(a)*; see *Estate of Smead* (1938) 12 C.2d 20, 26, 82 P.2d 182.) An order vacating an order confirming a sale is not appealable; but when the order further directs a forfeiture of the bidder's downpayment, the bidder may appeal from it as an aggrieved party. (*Estate of Mesner* (1950) 99 C.A.2d 319, 320, 221 P.2d 740.)

In *Estate of Martin* (1999) 72 C.A.4th 1438, 86 C.R.2d 37, the probate court issued an order denying a beneficiary's request to void a sale of stock shares after the probate court had initially approved the sale and then vacated the order. The beneficiary appealed. *Held*, the order was appealable under *Prob.C. 1300(a)*.

(a) An order that merely declines to vacate a prior order confirming a sale is generally not appealable. This rule suggests (although the point is not decided) that an order that merely declines to vacate a nonconfirmed sale is also not appealable. (72 C.A.4th 1442.)

(b) Here, the order went beyond denying a request to void a sale. Instead, the order determined that the sale should not be voided, and limited the remedy for any impropriety concerning the sale to a surcharge on the executor. Thus, the legal effect of the order was to approve the underlying sale, while withholding a determination on some of the sale's terms, especially the value placed on the shares. As such, the order was appealable as one authorizing or approving the sale of shares within the meaning of *Prob.C. 1300(a)*. (72 C.A.4th 1442.)

An appeal may be taken from an order adjudicating the merits of a claim made under *Prob.C. 850* et seq. (conveyance of property claimed to belong to decedent or other person). (*Prob.C. 1300(k)*; see 84 A.L.R.4th 269 [appealability of orders allowing or disallowing claims against estate]; 14 *Summary* (10th), *Wills and Probate*, §354 et seq.)

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2. All Probate Code Proceedings.

b. Payment and Priority of Debts.

9 *Witkin Cal. Proc. Appeal* § 209

[§ 209] Payment and Priority of Debts.

In all Probate Code proceedings, an appeal may be taken from the following:

(1) An order directing or allowing payment of a debt, claim, or cost. (*Prob.C. 1300(d)*.)

(2) An order fixing, authorizing, allowing, or directing payment of compensation or expenses of an attorney. (*Prob.C. 1300(e)*.)

(3) An order fixing, directing, authorizing, or allowing payment of the compensation or expenses of a fiduciary. (*Prob.C. 1300(f)*; see *Estate of Merrill* (1946) 29 C.2d 520, 523, 175 P.2d 819 [refusal to order payment of attorneys' fee]; *Estate of Kessler* (1948) 32 C.2d 367, 369, 196 P.2d 559 [attorneys' fee].)

Two kinds of nonappealable orders should be distinguished:

(a) An order of the judge merely approving or allowing a claim; the statute makes appealable an order directing or authorizing payment of a claim. (*Miller v. California Trust Co.* (1936) 15 C.A.2d 612, 616, 59 P.2d 1035 [decided under former statute]; *Estate of Cole* (1951) 106 C.A.2d 823, 825, 236 P.2d 206 [same]; see *supra*, §205.)

(b) An order rejecting a claim in whole or in part; the remedy is an action under *Prob.C. 9354*. (*Estate of Girard* (1951) 105 C.A.2d 102, 103, 233 P.2d 56; *Estate of Wood* (1953) 117 C.A.2d 132, 134, 254 P.2d 940; *Estate of Cuneo* (1963) 214 C.A.2d 381, 383, 29 C.R. 497, citing the text; see *supra*, §205; on *Prob.C. 9354*, see 14 *Summary* (10th), *Wills and Probate*, §647.)

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c. Instructions.

9 *Witkin Cal. Proc. Appeal* § 210

[§ 210] Instructions.

An appeal may be taken from an order authorizing, instructing, or directing a fiduciary, or confirming his or her acts. (*Prob.C. 1300(c)*; see *Howaldt v. Superior Court* (1941) 18 C.2d 114, 115, 114 P.2d 333; *Estate of Lucas* (1943) 23 C.2d 454, 463, 144 P.2d 340 [order instructing or directing representative to compromise claim against estate]; *Estate of Ferrall* (1948) 33 C.2d 202, 204, 200 P.2d 1; *Estate of Hart* (1953) 119 C.A.2d 310, 312, 259 P.2d 703 [order refusing to direct]; *Dow v. Superior Court* (1956) 140 C.A.2d 399, 408, 297 P.2d 30 [order instructing on duty to make payments and distribute property]; 14 *Summary* (10th), *Wills and Probate*, §469.)

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d. Settlement of Accounts.

9 *Witkin Cal. Proc. Appeal* § 211

[§ 211] Settlement of Accounts.

An appeal may be taken from an order settling an account of a fiduciary. (*Prob.C. 1300(b)*); see *Estate of McPhee* (1908) 154 C. 385, 392, 97 P. 878 [administrator does not lose right of appeal by revocation of letters]; *Estate of Smead* (1932) 215 C. 439, 440, 10 P.2d 462 [order refusing settlement was appealable]; *Estate of Maron* (1986) 183 C.A.3d 707, 711, 712, 228 C.R. 402 [order that in legal effect is part of settlement of account is appealable].)

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a. Admitting Will or Revoking Probate.

9 *Witkin Cal. Proc. Appeal* § 212

[§ 212] Admitting Will or Revoking Probate.

(1) *Order Admitting or Revoking*. An order admitting a will to probate or revoking the probate of a will is appealable. (*Prob.C. 1303(b)*.) (See *Estate of Jamison* (1951) 107 C.A.2d 483, 484, 237 P.2d 546 [order admitting]; *Estate of Warner* (1958) 162 C.A.2d 799, 801, 329 P.2d 79 [order revoking]; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §183.)

(2) *Denial of Order*. Under the "refusal" provision (*supra*, §204), either a refusal to revoke probate or the dismissal of a proceeding for such revocation is appealable. (*Estate of Plumb* (1918) 177 C. 300, 301, 170 P. 609; *Estate of Weber* (1991) 229 C.A.3d 22, 23, 280 C.R. 22.)

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b. Issuing or Revoking Letters.

9 *Witkin Cal. Proc. Appeal* § 213

[§ 213] Issuing or Revoking Letters.

(1) *Order Granting or Revoking*. An order granting or revoking letters to a personal representative is appealable. (*Prob.C. 1303(a)*.) (See *Estate of Johnson* (1937) 20 C.A.2d 735, 736, 67 P.2d 1079; 4 Am.Jur.2d (2007 ed.), *Appellate Review* §185; 37 A.L.R.2d 751 [right of appeal from order on application for removal of personal representative].)

(2) *Denial of Order*. Under the "refusal" provision (*supra*, §204), an appeal may be taken from an order refusing to grant letters (*Estate of Alfrey* (1938) 12 C.2d 255, 257, 83 P.2d 291) or refusing to revoke letters (*Bauer v. Willis* (1925) 195 C. 375, 376, 233 P. 342 [refusal to remove executor was in effect refusal to revoke letters]; *Estate of Exterstein* (1934) 2 C.2d 13, 14, 38 P.2d 151; *Estate of Cuneo* (1963) 214 C.A.2d 381, 382, 29 C.R. 497 [same]; *Estate of Muller* (1969) 2 C.A.3d 259, 261, 82 C.R. 531).

(3) *Exception: Special Administrator*. In view of the fact that a special administrator is appointed only in an emergency, i.e., when the circumstances require the immediate appointment of a personal representative (see *Prob.C. 8540*), orders granting or revoking "letters of special administration or letters of special administration with general powers" are not appealable. (*Prob.C. 1303(a)*; see *Estate of Windiate* (1961) 197 C.A.2d 560, 563, 17 C.R. 297 [order denying petition to revoke letters of special administration]; *Estate of Hughes* (1978) 77 C.A.3d 899, 902, 143 C.R. 858 [appeal from order refusing to remove special administrator; following *Estate of Windiate*].)

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c. Existence of Will Contest.

9 *Witkin Cal. Proc. Appeal* § 214

[§ 214] Existence of Will Contest.

(1) *Order Is Appealable*. An appeal may be taken from an order in a declaratory relief action under *Prob.C. 21320* et seq. to determine whether a specific action constitutes a contest under a no contest clause. (*Prob.C. 1303(j)*); on no contest clauses, see 14 *Summary* (10th), *Wills and Probate*, §560 et seq.)

(2) *Distinction: Summary Adjudication After Action*. In *Jacobs-Zorne v. Superior Court* (1996) 46 C.A.4th 1064, 54 C.R.2d 385, 14 *Summary* (10th), *Wills and Probate*, §572, a widow filed a petition under former *Prob.C. 9860* (now *Prob.C. 850*; see 14 *Summary* (10th), *Wills and Probate*, §§355, 356), seeking to have the nature of certain bank accounts determined to be held in joint tenancy and not subject to probate. Defendants objected, claiming that this action violated the will's no contest clause. The trial judge granted the widow's motion for summary adjudication of this issue and determined that the no contest clause had not been violated. Defendants appealed. *Held*, the order granting summary adjudication was not appealable. Under the one final judgment rule (*supra*, §95 et seq.), the order granting summary adjudication was a nonappealable, interlocutory order. Former *Prob.C. 7240(q)* (now *Prob.C. 1303(j)*) does not provide otherwise. That section contemplates motions filed pursuant to *Prob.C. 21320* et seq., which are motions filed *before* the taking of a particular action to ascertain whether that action violates the no contest clause. Here, the summary adjudication was sought *after* taking of the action that potentially constituted a will contest. (46 C.A.4th 1072.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Order Is Appealable*. *Prob.C. 21320* et seq. were repealed in 2008. The use of declaratory relief in no contest clause litigation is no longer authorized by statute, except with respect to instruments that became irrevocable before January 1, 2001. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.) In 2009, *Prob.C. 1303(j)* was amended to specify that appeals may be taken under former *Prob.C. 21320* et seq.

(2) *Distinction: Summary Adjudication After Action*. *Prob.C. 21320* et seq. were repealed in 2008. The use of declaratory relief in no contest clause litigation is no longer authorized by statute. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.)



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d. Administration of Estate.

9 *Witkin Cal. Proc. Appeal* § 215

[§ 215] Administration of Estate.

With respect to the administration of a decedent's estate, an appeal may be taken from the following:

(1) An order determining that property passes to, or confirming that property belongs to, the surviving spouse under *Prob.C. 13656* (14 *Summary* (10th), *Wills and Probate*, §829 et seq.). (*Prob.C. 1303(h)*.)

(2) An order authorizing a personal representative to invest or reinvest surplus money under *Prob.C. 9732* (14 *Summary* (10th), *Wills and Probate*, §483). (*Prob.C. 1303(i)*.)

(3) An order determining the priority of debts under *Prob.C. 11440* et seq. (14 *Summary* (10th), *Wills and Probate*, §655). (*Prob.C. 1303(k)*.)

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e. Small Estates and Exemptions.

9 *Witkin Cal. Proc. Appeal* § 216

[§ 216] Small Estates and Exemptions.

An appeal may be taken from the following:

(1) An order setting aside a small estate under *Prob.C. 6609* (\$ 20,000 or less). (*Prob.C. 1303(c)*; see 14 *Summary* (10th), *Wills and Probate*, §784.)

(2) An order setting apart a probate homestead or property claimed to be exempt from enforcement of a money judgment. (*Prob.C. 1303(d)*; see 14 *Summary* (10th), *Wills and Probate*, §767 et seq.)

(3) An order granting, modifying, or terminating a family allowance. (*Prob.C. 1303(e)*; see *Estate of Hoffman* (1963) 213 C.A.2d 635, 640, 29 C.R. 60; *Estate of Murphy* (1964) 225 C.A.2d 224, 228, 37 C.R. 205; 14 *Summary* (10th), *Wills and Probate*, §779.)

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f. Heirship and Distribution.

9 *Witkin Cal. Proc. Appeal* § 217

[§ 217] Heirship and Distribution.

(1) *Appealable Orders*. An appeal may be taken from the following:

(a) An order "[d]etermining heirship, succession, entitlement, or the persons to whom distribution should be made." (*Prob.C. 1303(f)*; see *Attorney General of Calif. v. Superior Court* (1953) 41 C.2d 249, 251, 259 P.2d 1 [order denying Attorney General's petition to determine heirship for lack of standing to petition was refusal to make order and was appealable as such]; *Estate of Katz* (1942) 49 C.A.2d 82, 83, 120 P.2d 896 [order dismissing contest of heir with prejudice]; *Estate of McPherson* (1949) 90 C.A.2d 17, 18, 202 P.2d 565 [order approving or disapproving assignment of interest in estate]; *Estate of Richter* (1993) 12 C.A.4th 1361, 1365, 16 C.R.2d 108 [order under *Prob.C. 21320* to determine whether proposed action would violate no contest clause is order determining heirship, and thus is appealable]; *Estate of Miramontes-Najera* (2004) 118 C.A.4th 750, 754, 13 C.R.3d 240 [order denying surviving spouse's petition, under *Prob.C. 5021*, to set aside transfers of his or her community property interest in pay-on-death accounts, is appealable]; see 14 *Summary* (10th), *Wills and Probate*, §719 et seq.)

(b) An order distributing property, i.e., a decree of distribution of all or part of the property. (*Prob.C. 1303(g)*; see *Estate of Yorba* (1917) 176 C. 166, 171, 167 P. 854 [refusing distribution]; *Estate of O'Connor* (1927) 200 C. 646, 649, 254 P. 269 [decree of distribution]; *Estate of Maron* (1986) 183 C.A.3d 707, 711, 712, 228 C.R. 402 [where attorneys' fees were offset against amount distributed, order directing payment of such fees, though denominated separate order, was part of final distribution, and hence was appealable].)

(c) Any final order under *Prob.C. 20100* et seq. (proration of estate taxes) or *20200* et seq. (proration of generation-skipping transfer taxes). (*Prob.C. 1303(l)*.)

(2) *Distinction: Postponement of Distribution*. In *Estate of Keuthan* (1968) 268 C.A.2d 177, 73 C.R. 651, a petition was filed for distribution and discharge of the administrator. The judge denied the petition without prejudice pending determination of an heirship proceeding. *Held*, this was not an appealable order refusing distribution, but only a postponement: the "without prejudice" language eliminated any binding effect. (268 C.A.2d 180.) (See *Johnson v. Superior Court* (1929) 102 C.A. 178, 191, 283 P. 331 [postponement of distribution pending determination of action to

declare plaintiff to be adopted child].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appealable Orders*.

(a) *Order determining heirship, etc.*: *Prob.C. 21320* was repealed in 2008. The use of declaratory relief in no contest clause litigation is no longer authorized by statute. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.)



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G. Probate Orders and Decrees.

4. Guardianships and Conservatorships.

9 *Witkin Cal. Proc. Appeal* § 218

[§ 218] Guardianships and Conservatorships.

In guardianship, conservatorship, and other protective proceedings, an appeal may be taken from the grant or refusal to grant the following orders:

(1) Granting or revoking of letters, except letters of temporary guardianship or temporary conservatorship. (*Prob.C. 1301(a).*)

(2) Granting permission to the guardian or conservator to fix the residence of the ward or conservatee at a place not within California. (*Prob.C. 1301(b).*)

(3) Directing, authorizing, approving, or modifying payments, whether for support, maintenance, or education of the ward or conservatee or for a person legally entitled to those items from the ward or conservatee. (*Prob.C. 1301(c).*)

(4) Granting or denying a petition under *Prob.C. 2423* (payment of surplus income to conservatee's relatives) or under *Prob.C. 2580* et seq. (substituted judgment). (*Prob.C. 1301(d).*)

(5) Affecting the legal capacity of the conservatee under *Prob.C. 1870* et seq. (capacity to bind estate). (*Prob.C. 1301(e).*)

(6) Adjudicating the merits of a claim under *Prob.C. 2500* et seq. (compromise of claims). (*Prob.C. 1301(f).*)

(7) Granting or denying a petition under *Prob.C. 3100* et seq. (proceeding for particular transaction). (*Prob.C. 1301(g).*)

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5. Trusts and Trustees.

9 *Witkin Cal. Proc. Appeal* § 219

[§ 219] Trusts and Trustees.

With respect to a trust, the grant or denial of the following orders is appealable:

(1) Any final order under *Prob.C. 17200* et seq. (proceedings concerning trusts), except the following:

(a) Compelling a trustee to submit an account or report acts as trustee. (*Prob.C. 1304(a)(1)*.)

(b) Accepting the resignation of a trustee. (*Prob.C. 1304(a)(2)*.)

(2) Any final order under *Prob.C. 19020* et seq. (approval and settlement of claims against deceased settlor). (*Prob.C. 1304(b)*.)

(3) Any final order under *Prob.C. 20100* et seq. (proration of estate taxes) or *Prob.C. 20200* et seq. (proration of taxes on generation-skipping transfer). (*Prob.C. 1304(c)*.)

(4) Determining whether an action constitutes a contest under *Prob.C. 21320* et seq. (*Prob.C. 1304(d)*.) (See *Scharlin v. Superior Court* (1992) 9 C.A.4th 162, 167, 11 C.R.2d 448.)

A purported charging order against interests in a trust was not final and not appealable, where the amount to be charged remained to be fixed. (*Northern Trust Bank v. Pineda* (1997) 58 C.A.4th 603, 605, 68 C.R.2d 357.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Determining whether action constitutes contest:* *Prob.C. 21320* et seq. were repealed in 2008. The use of declaratory relief in no contest clause litigation is no longer authorized by statute, except with respect to instruments that became irrevocable before January 1, 2001. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.) In 2009, *Prob.C. 1304(d)* was amended to specify that appeals may be taken under former *Prob.C. 21320* et seq.



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6. Powers of Attorney and Health Care Directives.

9 *Witkin Cal. Proc. Appeal* § 220

[§ 220] Powers of Attorney and Health Care Directives.

(1) *Powers of Attorney*. With respect to a power of attorney governed by the Power of Attorney Law (*Prob.C. 4000 et seq.*; see 14 *Summary* (10th), *Wills and Probate*, §839 et seq.), an appeal may be taken from the following:

(a) A final order under *Prob.C. 4541* (purposes for petition; see 14 *Summary* (10th), *Wills and Probate*, §874), except an order under *Prob.C. 4541(c)* (compelling account or report). (*Prob.C. 1302(a).*)

(b) An order dismissing a petition or denying a motion to dismiss under *Prob.C. 4543* (see 14 *Summary* (10th), *Wills and Probate*, §875). (*Prob.C. 1302(b).*)

(2) *Health Care Directives*. With respect to an advance health care directive governed by the Health Care Decisions Law (*Prob.C. 4600 et seq.*; see 14 *Summary* (10th), *Wills and Probate*, §876 et seq.), an appeal may be taken from the following:

(a) A final order under *Prob.C. 4766* (purposes for petition; see 14 *Summary* (10th), *Wills and Probate*, §898). (*Prob.C. 1302.5(a).*)

(b) An order dismissing a petition or denying a motion to dismiss under *Prob.C. 4768* (see 14 *Summary* (10th), *Wills and Probate*, §899). (*Prob.C. 1302.5(b).*)

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VIII. STAY OF ENFORCEMENT

A. In General.

1. Methods of Staying Enforcement.

9 Witkin Cal. Proc. Appeal § 221

[§ 221] Methods of Staying Enforcement.

A stay of enforcement is the suspension of the right to enforce the judgment by execution or other means. (See generally *C.C.P.* 916 et seq.; *Dulin v. Pacific Wood & Coal Co.* (1893) 98 C. 304, 306, 33 P. 123; C.E.B., 1 Civil Appellate Practice 3d, Chap. 6; 40 *Cal. L. Rev.* 249, 274 [careful examination of former outmoded and complicated California law, suggesting needed legislative changes]; Rutter Group, 1 Civil Appeals and Writs, Chap. 7; Cal. Civil Practice, 5 Procedure, Chap. 36; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §398 et seq.; 2 *Am.Jur.* P.P. Forms (2000 ed.), *Appeal and Error*, §227 et seq.; *F.R. Civ. P.*, *Rule 62(d)*; 1 *Federal Practice & Procedure* (Wright & Miller) §2902 et seq.; 2A *Federal Procedure*, L.Ed., §3:305 et seq.)

The following points should be noted:

(1) Some judgments may only be stayed on appeal by an undertaking. (See *infra*, §230 et seq.)

(2) Some judgments are stayed by the appeal alone without an undertaking. (See *infra*, §269 et seq.)

(3) Other judgments are not stayed either by the appeal or an undertaking, but may, in unusual circumstances, be stayed by a writ of supersedeas issued by the reviewing court. (See *infra*, §276 et seq.)

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A. In General.

2. Effect of Stay.

9 *Witkin Cal. Proc. Appeal* § 222

[§ 222] Effect of Stay.

(1) *In General.* A stay, obtained by any method, prevents any further proceedings to enforce the judgment or order. (See *C.C.P.* 916(a); *Estate of Dabney* (1951) 37 C.2d 402, 407, 232 P.2d 481; *Stewart v. Whitmyre* (1961) 192 C.A.2d 327, 329, 13 C.R. 235, citing the text; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §398.) But a stay obtained by one of several appellants does not prevent enforcement of the judgment or order against the others. (See *Halsted v. First Savings Bank* (1916) 173 C. 605, 608, 160 P. 1075; *Cullinan v. Mercantile Trust Co. of Calif.* (1924) 193 C. 562, 563, 226 P. 4; *Kentfield v. Kentfield* (1935) 4 C.2d 585, 587, 51 P.2d 94; *Nuckolls v. Bank of California* (1936) 7 C.2d 574, 577, 61 P.2d 927.)

(2) *Effect of Stay on Property Levied Upon.* If the respondent objects to an undertaking that is determined to be insufficient and a sufficient undertaking is not given within the required time, enforcement of the judgment or order appealed from is no longer stayed, and property levied upon under execution issued on that judgment is not released from levy. (*C.C.P.* 922.)

(3) *Jurisdiction Retained by Trial Court.* Despite the stay, the trial court has jurisdiction to act as follows:

(a) It may proceed on "any other matter embraced in the action and not affected by the judgment or order" appealed from. (*C.C.P.* 916(a), (b); see *Hennessy v. Superior Court* (1924) 194 C. 368, 371, 228 P. 862 [trial court may hear and determine motion to tax costs]; *Hoover Community Hotel Dev. Corp. v. Thomson* (1985) 168 C.A.3d 485, 487, 214 C.R. 264 [after summary judgment and filing of notice of appeal, trial judge retained jurisdiction to award costs and attorneys' fees pursuant to contract]; *supra*, §20.)

(b) It has jurisdiction of "proceedings related to the enforcement of the judgment" when proceedings other than enforcement have been stayed. (*C.C.P.* 916(b).)

(4) *Illustrations.* The scope of the trial court's jurisdiction is illustrated by bankruptcy and probate cases.

(a) *Bankruptcy.* Although proceedings on appeal are stayed during pendency of a defendant's bankruptcy proceedings (see 11 U.S.C., §362(a)(1)), the stay is effective only as to the party in bankruptcy. In other words, the trial

court retains jurisdiction with respect to the nonbankrupt defendant. (*Freiberg v. Mission Viejo* (1995) 33 C.A.4th 1484, 1489, 39 C.R.2d 802.)

(b) *Probate*. In probate cases, notwithstanding an appeal, the trial court, for the purpose of preventing injury or loss to a person or property, may direct the exercise of the powers of the personal representative or may appoint a special administrator to exercise the powers, from time to time, as though no appeal were pending. An appeal of the directions does not stay them. (*Prob.C. 1310(b)*.)

West's Key Number Digest, Appeal and Error 484 et seq.

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A. In General.

3. Stay by Trial Judge.

9 *Witkin Cal. Proc. Appeal* § 223

[§ 223] Stay by Trial Judge.

The trial judge may stay the enforcement of any judgment or order, whether or not an appeal will be taken and whether or not a notice of appeal has been filed. (*C.C.P. 918(a)*, (c); see *C.E.B.*, 2 Debt Collection Practice 2d, §9.43 et seq.; *Cal. Civil Practice*, 5 Procedure, §36:57 [application for temporary stay], §36:58 [supporting declaration]; Rutter Group, 1 Civil Appeals and Writs §7:61 et seq.; 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §162; cf. *F.R. Civ. P.*, Rule 62; 11 Federal Practice & Procedure (Wright & Miller) §2901 et seq.; 2A Federal Procedure, L.Ed., §3:650 et seq.) However, if enforcement would be stayed only by giving an undertaking, the trial judge does not have the power, without the adverse party's consent, to stay enforcement for longer than 10 days beyond the last date on which a notice of appeal could be filed. (*C.C.P. 918(b)*.)

The trial judge has no inherent power to give a stay pending appeal, except to the extent permitted by statute. (*Mannix v. Superior Court* (1910) 157 C. 730, 731, 109 P. 264; see *First Nat. Bank of San Pedro v. Stansbury* (1931) 214 C. 190, 191, 5 P.2d 11.)

The power of the trial judge to grant a stay in the following special circumstances is discussed elsewhere:

(1) Stay of judgment, under *C.C.P. 918.5*, where judgment debtor has another action pending against judgment creditor. (See 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §162.)

(2) Power to suspend operation of injunction pending appeal. (See 6 *Cal. Proc. (5th)*, *Provisional Remedies*, §403; cf. *F.R. Civ. P.*, Rule 62(c); 11 Federal Practice & Procedure (Wright & Miller) §2904.)

(3) Power to grant stay pending appeal in child custody cases. (See *infra*, §225.)

(4) Requirement that trial judge must direct stay of enforcement in forcible entry or unlawful detainer actions. (See *infra*, §245.)

West's Key Number Digest, Appeal and Error 476 et seq.

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B. Child Custody and Dwelling Exclusion Orders.

1. Statutory Development.

9 *Witkin Cal. Proc. Appeal* § 224

[§ 224] Statutory Development.

(1) *Former Law of Automatic Stay.* Prior to 1955, an appeal from an order awarding custody or modifying a former award suspended the trial judge's power and left custody where it was at the time of appeal. (See *Lerner v. Superior Court* (1952) 38 C.2d 676, 680, 242 P.2d 321 [order authorizing "temporary removal" was in excess of jurisdiction]; *In re Barr* (1952) 39 C.2d 25, 27, 243 P.2d 787; *In re Lukasik* (1951) 108 C.A.2d 438, 443, 239 P.2d 492; *Kentera v. Superior Court* (1952) 109 C.A.2d 827, 829, 241 P.2d 590; 40 Cal. L. Rev. 270.) The only way to effect an immediate change was to make a direct application to the reviewing court, which had the power but rarely exercised it. (See *Gantner v. Gantner* (1952) 38 C.2d 691, 692, 242 P.2d 329 [jurisdiction was affirmed but application was denied for lack of showing of extraordinary circumstances].)

(2) *Enactment of Discretionary Stay.* A practical solution to this problem was reached in 1955. The rule of automatic stay was eliminated, and a discretionary stay by the trial judge was substituted. (See *Faulkner v. Faulkner* (1957) 148 C.A.2d 102, 105, 306 P.2d 585 [legislative committee report quoted on purpose of statute]; *Sanchez v. Sanchez* (1960) 178 C.A.2d 810, 812, 3 C.R. 501 [same]; *Mancini v. Superior Court* (1964) 230 C.A.2d 547, 552, 41 C.R. 213, *infra*, §229; 44 Cal. L. Rev. 141; 29 So. Cal. L. Rev. 113.) In 1957, the statute (former C.C.P. 949a) was extended to dwelling exclusion orders. In 1968, it was renumbered C.C.P. 917.7. (See *infra*, §225.)

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B. Child Custody and Dwelling Exclusion Orders.

2. Discretionary Stay by Trial Judge.

9 *Witkin Cal. Proc. Appeal* § 225

[§ 225] Discretionary Stay by Trial Judge.

(1) *No Stay by Appeal*. "The perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding, or the provisions of a judgment or order for the temporary exclusion of a party from a dwelling, as provided in the Family Code." (*C.C.P.* 917.7.)

This language appears to be broadly designed to cover all proceedings that result in appealable judgments or orders, including guardianship of a minor. (*Faulkner v. Faulkner* (1957) 148 C.A.2d 102, 107, 306 P.2d 585 [quoting legislative committee report]; see *In re Christy L.* (1986) 187 C.A.3d 753, 757, 232 C.R. 184, citing the text [judgment terminating visitation rights]; *In re Natasha A.* (1996) 42 C.A.4th 28, 39, 49 C.R.2d 332 [under *C.C.P.* 917.7, appeal from dependency order affecting custody and visitation rights did not stay subsequent review hearings required by *Welf.C.* 364]; *In re Nicholas H.* (2003) 112 C.A.4th 251, 259, 5 C.R.3d 261 [juvenile court had jurisdiction to dismiss child dependency proceedings even though prior appeals in case were pending, where those appeals were from orders awarding, changing, or otherwise affecting custody of minor child and thus, under *In re Natasha A.*, were not stayed]; 44 *Cal. L. Rev.* 143.)

(2) *Stay by Trial Judge*. *C.C.P.* 917.7 continues: "However, the trial court may in its discretion stay execution of these provisions pending review on appeal or for any other period or periods that it may deem appropriate." (See *Cal. Civil Practice*, 5 Procedure, §36:62.)

(3) *Limited Automatic Stay in Child Removal Cases*. *C.C.P.* 917.7 contains a further proviso: "[I]n the absence of a writ or order of a reviewing court providing otherwise, the provisions of the judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of seven calendar days from the entry of the judgment or order by a juvenile court in a dependency hearing, or for a period of 30 calendar days from the entry of judgment or order by any other trial court." These periods are subject to further stays as ordered by the trial court or by the juvenile court pursuant to *C.C.P.* 917.7.

C.C.P. 917.7 excludes from these automatic stay provisions judgments brought pursuant to any of the following:

(a) The Uniform Child Custody Jurisdiction and Enforcement Act (*Family C. 3400* et seq.; see 10 *Summary* (10th), *Parent and Child*, 157 et seq.).

(b) The Parental Kidnapping Prevention Act of 1980 (*28 U.S.C.*, §1738A; see 10 *Summary* (10th), *Parent and Child*, §191).

(c) The Hague Convention on the Civil Aspects of International Child Abduction, implemented pursuant to the International Child Abduction Remedies Act (*42 U.S.C.*, §11601 et seq.; see 10 *Summary* (10th), *Parent and Child*, §192).

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3. Stay by Supersedeas.

a. In General.

9 Witkin Cal. Proc. Appeal § 226

[§ 226] In General.

Former C.C.P. 949a (now C.C.P. 917.7), as enacted in 1955, was designed to provide for an initial stay only in the judge's discretion, but for review of that discretion by application to the appellate court for a stay by writ of supersedeas. (See *15 Hastings L. J. 199*; *7 Santa Clara Lawyer 228*.) Although the statute was amended in 1965 and the provision expressly authorizing appellate courts to issue writs of supersedeas in custody cases was deleted, this did not affect the inherent power of appellate courts to issue the writ in such cases. (See *infra*, §279.) To safeguard the rights of both parties, the court must "hold a hearing before it may issue a writ staying an order that awards or changes the custody of a minor." (C.R.C., Rule 8.112(d)(2).)

In the cases decided shortly after the enactment of the statute, the appellate courts, denying supersedeas, indicated that the discretion of the trial judge would seldom be successfully challenged. (See *Faulkner v. Faulkner (1957) 148 C.A.2d 102, 105, 306 P.2d 585*; *Saltonstall v. Saltonstall (1957) 148 C.A.2d 109, 110, 306 P.2d 492* [father's petition for stay denied by judge, and supersedeas denied]; *Rude v. Rude (1957) 148 C.A.2d 793, 798, 307 P.2d 679*; *15 Hastings L. J. 200*; *7 Santa Clara Lawyer 229*.)

It has also been held that the writ will not issue to stay an order that has already been executed. (*Superior Court v. District Court of Appeal (1966) 65 C.2d 293, 295, 54 C.R. 119, 419 P.2d 183* [child removed by county Bureau of Adoptions 27 days before "stay"].)

Subsequently the writ was issued in several cases. (See *Sanchez v. Sanchez (1960) 178 C.A.2d 810, 3 C.R. 501*, *infra*, §227; *Adoption of Cox (1962) 58 C.2d 434, 441, 442, 24 C.R. 864, 374 P.2d 832*; *Milne v. Goldstein (1961) 194 C.A.2d 552, 559, 560, 15 C.R. 243*; *Denham v. Martina (1962) 206 C.A.2d 30, 34, 23 C.R. 757*.)

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3. Stay by Supersedeas.

b. Relevant Factors.

9 *Witkin Cal. Proc. Appeal* § 227

[§ 227] Relevant Factors.

In *Sanchez v. Sanchez* (1960) 178 C.A.2d 810, 3 C.R. 501, the reviewing court exercised its independent judgment to overturn the trial judge's determination. Two younger children were given to the mother and the older boy to the father. In a modification proceeding about 31/2 years later, this was reversed: the younger children were given to the father and the older boy was given to the mother. The mother appealed. The trial judge denied a stay pending appeal and also denied a stay pending the mother's petition for supersedeas. She petitioned the Court of Appeal for supersedeas on November 24, 1959. That court, on November 27, 1959, stayed the orders pending a ruling on the petition, and on January 28, 1960, granted the writ of supersedeas, staying the orders until decision on the appeal. This opinion attempts to state the nature of the appellate function and the factors that may be considered on the application:

(a) *Power of the appellate court.* The grant of dual jurisdiction to the trial and appellate courts did not reduce the historic power of an appellate court to issue the writ in its own discretion. (178 C.A.2d 813, 818, citing the text.)

(b) *Special importance of supersedeas in child custody cases.* "The welfare of the child nevertheless presents a more vital problem to this court than the disposition of money or property. Since normally no counsel represents the child as such and since he must therefore depend upon the presentation of either the father or the mother, we feel a direct obligation to protect his interests." Hence, abuse of discretion is weighed "in a more delicate and sensitive scale." (178 C.A.2d 813.)

(c) *Test of a stay.* It is not, as the trial judge thought, whether the welfare of the child would be adversely affected by a change, but rather whether the immediate change is for his or her best interests. The appellate court must therefore "decide whether the continuation of the existing custody is in the best interests of the child." (178 C.A.2d 814.)

(d) *Application of the test.* The significant factors that support the conclusion that "the mother's continued custody of the children during the pendency of appeal does not injure, endanger or adversely affect them but is to their best interest" (178 C.A.2d 818) are as follows:

(1) *Parents.* The mother has a background of instability, alcoholism, and neglect of children, but a recent marriage

has improved her conduct, and there is no finding of unfitness. There is hope that she will conduct herself properly, and "we believe she should be accorded the opportunity at least for the interim period." (178 C.A.2d 816.)

(2) *Schooling*. The younger children are beginning to show improvement, and "[e]ven a temporary dislocation in schooling, marring the children's present progress, should be avoided if possible." (178 C.A.2d 817.)

(3) *Home*. There is no manifest danger in the mother's present home, as the trial judge indicated by the modification awarding her custody of the older boy. (178 C.A.2d 817, 818.)

(4) *Social relations*. The younger girl does not want the change, which might result in losing her friends and her association with the younger boy. "The dissolution of these desirable relationships pending appeal is highly questionable." (178 C.A.2d 817.)

(5) *The interim stay*. The appellate court's stay has been in effect from November 27, 1959, to the hearing of January 26, 1960, and, having preserved the status quo for that period, it should not be altered prior to the determination of the appeal. "The court is loath to compound the too frequent changes in the residence of the children that have already occurred." (178 C.A.2d 817.)

(6) *Inconsistency in trial judge's order*. The inconsistency in the judge's conclusion that the children's welfare demands the change when he awarded the older boy to the mother is another factor making refusal of a stay arbitrary. (178 C.A.2d 818.)

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3. Stay by Supersedeas.

c. Avoidance of Conflicting Rulings by Courts of Concurrent Jurisdiction.

9 Witkin Cal. Proc. Appeal § 228

[§ 228] Avoidance of Conflicting Rulings by Courts of Concurrent Jurisdiction.

In re Marriage of Dover (1971) 15 C.A.3d 675, 93 C.R. 384, involved a wife's petition for dissolution of marriage and custody of a 4-year-old child, in Merced County. The husband filed a response also seeking dissolution and custody. The probation department recommended against custody in the wife. Before the hearing, she moved for a change of venue to Orange County. On denial of the motion she commenced a new proceeding in Orange County, and filed a request for voluntary dismissal of the Merced action. The husband objected on the ground that he had demanded affirmative relief in that action, but the Merced judge entered judgment of dismissal, and the Orange judge set a hearing on an order to show cause for custody. The husband appealed from the judgment of dismissal and asked for supersedeas. *Held*, supersedeas and prohibition granted.

(a) Although issuance of supersedeas is not a determination of the merits of the appeal, the likelihood of reversal is a factor to be considered (see *infra*, §279). And here the appellant husband is virtually certain to prevail, for his demand for affirmative relief precluded a voluntary dismissal (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§288, 289). (15 C.A.3d 678.)

(b) If the Orange County court hears the motion for custody, and the husband prevails on his appeal from the Merced County court's judgment of dismissal, two courts will have exercised jurisdiction over the issues, and this conflict should be avoided. (15 C.A.3d 679.)

(c) Pending the appeal, the husband has no forum in which to seek appropriate orders *pendente lite* on custody, support, and visitation, for the Merced court considers the action no longer pending there, and he cannot seek relief on the merits in the Orange court while challenging its jurisdiction of the subject matter. (15 C.A.3d 679.) Nor is C.C.P. 917.7 of any help. It provides for the *continuing effect* of orders on custody and visitation while an appeal is pending (see *supra*, §226), but does not authorize *making* such orders pending appeal from a judgment of dismissal. (15 C.A.3d 675.)

(d) The proper court to make such *pendente lite* orders is the Merced court, and to preserve the status quo pending appeal, the authority of that court should be maintained. (15 C.A.3d 680.)

(e) Accordingly: (1) Prohibition should issue to prevent the Orange court from further proceeding in the case. (2) But prohibition alone would leave the husband with no forum, so long as the Merced court's dismissal judgment remained in effect. Hence, supersedeas should issue to stay the judgment of dismissal. (15 C.A.3d 681.) (3) Even this would not be enough; the writ of supersedeas as issued was in part a writ of mandamus to compel exercise of jurisdiction, "ordering such court [Merced] to take such proceedings, hear the evidence, and make such orders pendente lite as may be necessary and proper in said case and for the best interests and protection of the minor child of the parties with regard to his care, custody, control, support, and visitation during the pendency of this appeal." (15 C.A.3d 681.)

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4. Modification of Custody Order.

9 *Witkin Cal. Proc. Appeal* § 229

[§ 229] Modification of Custody Order.

C.C.P. 917.7 specifically gives the trial judge authority to stay a custody order pending appeal. In *Mancini v. Superior Court* (1964) 230 C.A.2d 547, 41 C.R. 213, the court held that the statute, broadly interpreted to carry out the legislative purposes, also gives authority to modify the order.

The wife received an interlocutory divorce decree, but custody of a minor son was awarded to neither party. Instead, the court ordered him enrolled in a boarding school, with visitation rights in each parent, and each to pay half the costs. The wife appealed. Pending the appeal, the husband failed to pay costs, the school refused to keep the boy, and he, now 14, elected to reside with his mother. The wife then moved to modify the decree. The judge, over objection of lack of jurisdiction, heard the matter and made the order of modification giving the wife custody. The husband sought mandamus in the appellate court to compel vacation of the order of modification. *Held*, the order was within jurisdiction and not an abuse of discretion. A stay "is in itself an exercise of the trial court's authority to regulate the affairs of the child during review." Because it concurrently limits or modifies what has been ordered, it is immaterial whether the exercise of power is a stay or modification. "We are sensitive to the fact that the manner in which we interpret [the statute] may render one or more appeals taken from custody orders moot before they are heard, and there is also implicit in our holding that more than one modification might be made pending appeal." (230 C.A.2d 555.)

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C. Stay by Undertaking.

1. When Undertaking Is Required.

a. Judgment Directing Payment of Money.

1. Judgments Covered.

aa. Money or Payment of Money.

9 Witkin Cal. Proc. Appeal § 230

[§ 230] Money or Payment of Money.

An undertaking is required to stay enforcement of a judgment or order that is for "[m]oney or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action." (*C.C.P. 917.1(a)(1)*; see *Dowling v. Zimmerman* (2001) 85 C.A.4th 1400, 1427, 103 C.R.2d 174 [SLAPP plaintiff's appeal from judgment awarding costs and fees under *C.C.P. 425.16(c)* (5 Cal. Proc. (5th), *Pleading*, §1040 et seq.) to SLAPP defendant does not automatically stay enforcement; SLAPP plaintiff must provide bond or undertaking under money judgment exception to automatic stay rule].)

There was formerly some uncertainty as to the classification of a judgment determining rights in a special fund. If the money were capable of identification and segregation, the judgment might conceivably be considered one for the delivery of "personal property" under *C.C.P. 917.2*. (See *McCallion v. Hibernia Savings & Loan Soc.* (1893) 98 C. 442, 445, 33 P. 329; 40 Cal. L. Rev. 259.) But there was little practical justification for distinguishing between types of money judgments based upon such fortuitous circumstances, and the matter was resolved by the 1968 revision expressly covering a special fund. (*C.C.P. 917.1(a)(1)*.)

An interlocutory decree of condemnation is a final judgment in the sense that it determines the amount of the award and is appealable (see 7 Cal. Proc. (5th), *Judgment*, §21; supra, §138). Hence, *C.C.P. 917.1* clearly applies. But there is some uncertainty as to the application of the statute to a judgment in an inverse condemnation action (5 Cal. Proc. (5th), *Pleading*, §689 et seq.). (See *Luce v. Clear Lake Water Co.* (1968) 266 C.A.2d 123, 124, 71 C.R. 665 [judge required deposit by appellant water company; held proper, either under *C.C.P. 917.1*, or as exercise of discretion under *C.C.P. 917.9*, or as exercise of inherent power to devise suitable ancillary procedure for inverse condemnation].)

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1. When Undertaking Is Required.

a. Judgment Directing Payment of Money.

1. Judgments Covered.

bb. Costs Awarded Against Party Rejecting Compromise.

9 Witkin Cal. Proc. Appeal § 231

[§ 231] Costs Awarded Against Party Rejecting Compromise.

In *Bank of San Pedro v. Superior Court* (1992) 3 C.4th 797, 12 C.R.2d 696, 838 P.2d 218, defendant served plaintiff with an offer to compromise under C.C.P. 998 (6 Cal. Proc. (5th), *Proceedings Without Trial*, §82), which plaintiff failed to accept within the statutory period. The trial resulted in a nonsuit in favor of defendant, which then moved to recover its expert witness fees under C.C.P. 998(c). The trial judge awarded defendant fees in the requested amount, together with costs. Plaintiff appealed from this order, but did not file an undertaking, and defendant moved for an order to issue a writ of execution on its award of expert witness fees. The trial court denied the motion; the Court of Appeal granted defendant's petition for mandamus, and the Supreme Court affirmed the judgment of the Court of Appeal, holding that the judgment was not automatically stayed.

(a) C.C.P. 917.1 provides that perfecting an appeal does not stay enforcement of a judgment or order directing the payment of money. On its face, the order here is within the literal language of the statute. (3 C.4th 800.)

(b) A judgment for costs, however, is different: Under C.C.P. 1032, the prevailing party is entitled to costs as a matter of right; hence, the judgment for costs alone is stayed without an undertaking. (3 C.4th 800.) But in the decisions of the Supreme Court to this effect, the costs were of a routine nature under C.C.P. 1032; and no California court has decided that the same rule applies to an award of expert witness fees under C.C.P. 998. (3 C.4th 801.)

(c) The trial judge relied on *Vadas v. Sosnowski* (1989) 210 C.A.3d 471, 258 C.R. 374, *infra*, §235. However, the Court of Appeal held that *Vadas* involved only routine costs, and relied instead on *Chamberlin v. Dale's R.V. Rentals* (1986) 188 C.A.3d 356, 232 C.R. 785, *infra*, §239 for the principle that a different rule applies to nonroutine costs such as fees awarded under C.C.P. 998. (3 C.4th 802.)

(d) This is the correct view. "A judgment directing the payment of expert witness fees is--by any practical or semantic measure--a judgment directing the payment of money" consistent with C.C.P. 917.1(a). "A judgment within the plain language of the statute is presumptively within the Legislature's intent absent a showing to the contrary." (3

C.4th 804.)

(e) The policy behind *C.C.P. 998(c)* is to encourage settlement by providing a strong financial disincentive to a party--whether plaintiff or defendant--who fails to achieve a better result than could have been achieved by acceptance of the opponent's settlement offer. And the statute provides a financial incentive to the putative settler to make reasonable settlement offers. (*3 C.4th 804.*)

(f) "A *defendant* against whom a money judgment is entered must provide an undertaking to obtain a stay of enforcement pending appeal, and the amount of that undertaking includes any award against defendant under section 998. ... This result maintains, perhaps even increases, the defendant's incentive to accept a section 998 settlement offer. When, as in this case, a money judgment reflecting an award of expert witness fees is against *the plaintiff* as a result of section 998, we see no reason why the opposite result should obtain. Allowing the plaintiff to avoid the need for an undertaking would diminish the plaintiff's incentive to settle and therefore would thwart the policy of section 998. An evenhanded application of the requirement for an undertaking on appeal best effectuates the policy of encouraging settlements under section 998." (*3 C.4th 804.*)

In *Bank of San Pedro, supra*, the court disapproved *Pecsok v. Black* (1992) 7 C.A.4th 456, 9 C.R.2d 12, to the extent that it rejected any distinction between routine and nonroutine costs. The *San Pedro* court's analysis thereby raised the possibility that, in determining whether enforcement is automatically stayed by appeal, trial courts would first be required to determine the nature of costs, i.e., whether they are routine in nature (stay automatic) or nonroutine (undertaking required).

C.C.P. 917.1(a)(2), added in 1993, requires an undertaking to stay enforcement of a judgment or order for costs awarded under *C.C.P. 998* that otherwise would not have been awarded as costs under *C.C.P. 1033.5* (see 7 *Cal. Proc.* (5th), *Judgment*, §117). In other words, if the costs would have been awarded under *C.C.P. 1033.5*, the stay should be automatic without the necessity of a determination whether those costs are routine. And because costs to cover expert witness fees are not among the costs listed in *C.C.P. 1033.5*, the legislation appears to have codified the holding in the *San Pedro* case that a judgment awarding expert witness fees is not automatically stayed. (See 25 *Pacific L. J.* 469.)

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1. When Undertaking Is Required.

a. Judgment Directing Payment of Money.

1. Judgments Covered.

cc. Costs Awarded Against Party Demanding Trial De Novo After Arbitration.

9 *Witkin Cal. Proc. Appeal* § 232

[§ 232] Costs Awarded Against Party Demanding Trial De Novo After Arbitration.

In cases involving judicial arbitration, *C.C.P. 1141.21* provides for an award of costs against a party demanding a trial de novo where the subsequent judgment is not more favorable than the arbitration award (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §626 et seq.) This situation is similar to that involving costs awarded under *C.C.P. 998* against a party who rejects an offer of compromise and fails to obtain a more favorable judgment (*supra*, §231), and the rule regarding the need for an undertaking to stay enforcement is the same. Thus, an undertaking is required to stay enforcement of a judgment or order for costs awarded under *C.C.P. 1141.21* that otherwise would not have been awarded as costs under *C.C.P. 1033.5*. (*C.C.P. 917.1(a)(3)*.)

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a. Judgment Directing Payment of Money.

1. Judgments Covered.

dd. Attorneys' Fees Awarded as Sanction.

9 Witkin Cal. Proc. Appeal § 233

[§ 233] Attorneys' Fees Awarded as Sanction.

In *Banks v. Manos* (1991) 232 C.A.3d 123, 283 C.R. 318, the trial judge disposed of the case by two orders in favor of defendant: (a) summary judgment, with an order that defendant recover costs and reasonable attorneys' fees because the controversy was based on a contract; (b) an order imposing sanctions of \$ 3,000 on plaintiff and her counsel for a frivolous action under C.C.P. 128.5 (see 7 Cal. Proc. (5th), Trial, §227 et seq.). Plaintiff and her attorney appealed from both orders, and sought supersedeas from the appellate court on the ground that they were entitled to an automatic stay of execution on appeal. (232 C.A.3d 127.) Held, they were required to post bond to stay execution; the order imposing sanctions was analogous to a money judgment under C.C.P. 917.1.

(a) A judgment for costs alone is a mere incident of the main judgment and need not be bonded (see *infra*, §235); but, under *Chamberlin v. Dale's R.V. Rentals* (1986) 188 C.A.3d 356, 357, 232 C.R. 785, *infra*, §239, a judgment for damages plus attorneys' fees is not a routine part of most judgments and must be bonded. In *Nielsen v. Stumbos* (1990) 226 C.A.3d 301, 276 C.R. 272, *infra*, §236, the court held that a judgment for contractual attorneys' fees and costs, without damages, was automatically stayed, because C.C. 1717 indicates the legislative intent that these fees be treated like other costs. (232 C.A.3d 127, 128.)

(b) The present case differs from *Nielsen* in that the attorneys' fees were awarded not only as provided by an underlying contract but also as provided by the sanctions statute. "Such sanctions are more closely analogous to judgments for money damages, since they represent damages for abusive legal tactics and are discretionary, than they are to costs, which are routinely awarded, or to contractual attorney's fees, which are similarly routinely awarded and which are statutorily identified as costs in [C.C.P.] 1033.5." (232 C.A.3d 128.)

(c) The judgment here consists of sanctions, which must be bonded, and attorneys' fees under contract, which *Nielsen* holds need not be bonded, as well as costs. However, if part of the judgment must be bonded, the entire judgment must be bonded, as a consequence of C.C.P. 917.1, directing that costs awarded in the trial court be included when calculating the amount of the bond required to stay execution pending appeal. The statute clearly implies a

legislative intent to accomplish that result. "If a judgment for money damages (bondable) and costs (not bondable) must be bonded in its entirety, so also must a judgment for sanctions (bondable) and costs and fees (not bondable)." (232 C.A.3d 129.)

(d) Also, the sanctions here were imposed against a nonparty, the attorney, as well as against the losing plaintiff. The statute defining recovery of costs uses the term "prevailing party" and mentions "plaintiff and defendant," not a third party. (232 C.A.3d 129.)

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aa. In General.

9 Witkin Cal. Proc. Appeal § 234

[§ 234] In General.

C.C.P. 917.1(a)(1) applies only to judgments directing payment of a specific sum of money, and not to the following:

(1) *Alternative Judgment*. Judgment in the alternative, e.g., calling for delivery of personal property or, if this is not done, its value in money. (*United States Fidelity & Guaranty Co. v. More* (1909) 155 C. 415, 416, 101 P. 302; *Baar v. Smith* (1927) 201 C. 87, 88, 103, 255 P. 827.) Alternative judgments are governed by *C.C.P. 917.2* (see *infra*, §240).

(2) *Ancillary Money Judgment*. Money judgment merely ancillary or incidental to other mandatory directions of the judgment. (*Baar v. Smith*, *supra*, 201 C. 104.) For example, a judgment may contain a provision for money recovery, but when it is coupled with a decree of foreclosure or sale of certain property and application of those proceeds to the debt, with provision for a deficiency judgment for the balance, the decree as a whole may be considered one for the sale of property and the money judgment only incidental. (*Kreling v. Kreling* (1897) 116 C. 458, 460, 48 P. 383; *Owen v. Pomona Land & Water Co.* (1899) 124 C. 331, 333, 57 P. 71; *Freeman v. Donohoe* (1922) 188 C. 170, 172, 204 P. 593.)

(3) *Actual or Constructive Custody*. Cases "where the money to be paid is in the actual or constructive custody of the court" are governed by *C.C.P. 917.2* (see *infra*, §240). (*C.C.P. 917.1(b)*; see 13 *Pacific L. J.* 616.)

(4) *Guardianship or Conservatorship Proceeding*. Appealable judgments, orders, and decrees in guardianship and conservatorship proceedings, as outlined in *Prob.C. 1300* et seq., are stayed on appeal without the necessity of a bond. (*Prob.C. 1310*; see *Gold v. Superior Court* (1970) 3 C.3d 275, 281, 90 C.R. 161, 475 P.2d 193.)

But, an appeal in a guardianship or conservatorship proceeding does not stay the operation and effect of a judgment for money or an order directing payment of money, unless (a) bond is posted as provided in *C.C.P. 917.1*, or (b) the payment is to be made from a decedent's estate being administered under *Prob.C. 7000* et seq. or from the estate of a person who is subject to a guardianship or conservatorship of the estate under *Prob.C. 1400* et seq. (see 14 *Summary*

(10th), *Wills and Probate*, §903 et seq.). However, the court has discretion to require a bond. (*Prob.C. 1310(e)*.)

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bb. Judgment for Costs Alone.

9 Witkin Cal. Proc. Appeal § 235

[§ 235] Judgment for Costs Alone.

(1) *In General.* A judgment for costs alone is not considered a judgment directing the payment of money within the meaning of *C.C.P. 917.1(a)(1)*; hence, enforcement of the judgment is automatically stayed pending appeal. (*McCallion v. Hibernia Savings & Loan Soc.* (1893) 98 C. 442, 445, 33 P. 329 [rejecting contrary view: "If such were the fact, a stay bond would be required in almost every conceivable case"]; *Imperial Beverage Co. v. Superior Court* (1944) 24 C.2d 627, 631, 150 P.2d 881; *Bank of San Pedro v. Superior Court* (1992) 3 C.4th 797, 800, 12 C.R.2d 696, 838 P.2d 218, *supra*, §231; *California Standard Finance Corp. v. Cornelius Cole, Ltd.* (1933) 132 C.A. 105, 108, 22 P.2d 520; *Estate of Neilson* (1960) 181 C.A.2d 769, 772, 5 C.R. 542, *infra*, §282; *Pecsok v. Black* (1992) 7 C.A.4th 456, 459, 9 C.R.2d 12; *Ziello v. Superior Court* (1999) 75 C.A.4th 651, 654, 89 C.R.2d 398 [defendant paid damages portion of judgment and appealed only from order imposing fees and costs; no undertaking was required to stay enforcement].)

(2) *Effect of Including Costs in Calculating Amount of Undertaking.* *C.C.P. 917.1(d)* provides that costs are to be included in the judgment for the purpose of determining the amount of the undertaking. (See *infra*, §§238, 239.) In *Vadas v. Sosnowski* (1989) 210 C.A.3d 471, 258 C.R. 374, the court held that the statute does not affect the established rule that a judgment for costs alone is stayed without a bond.

(a) The cases decided before enactment of the statute reasoned that, if a bond were required to stay execution on a judgment for costs, almost every appealed judgment would have to be bonded, because costs are routinely included in nearly all judgments. *C.C.P. 917.1(d)* provides that costs be part of the judgment for the purpose of determining the amount of the undertaking. However, this subdivision contains no reference to a judgment for costs alone, and no reported decision deals with the question whether such a judgment is still subject to the automatic statutory stay on appeal. (210 C.A.3d 473.)

(b) "[T]here are practical differences between a judgment consisting of both a damages award and costs, and a judgment for costs alone. The former represents a victory in the trial court securing affirmative relief against the appellant in redress of some wrong done the respondent. The price of the appeal then is the provision by appellant of

some security to the respondent for the ultimate collection of that affirmative award which makes the respondent whole. But a judgment for costs alone does not represent an award of affirmative relief against the appellant for some past wrong done the respondent; rather, it is a denial of affirmative relief to the former coupled with an affirmative award to the respondent compensating him for the expenses of the lawsuit. The difference is subtle but could form the basis of a legislative intent to provide less security in the latter case. Accordingly treating the two kinds of judgments differently is not necessarily an arbitrary or irrational choice." (210 C.A.3d 474.)

(c) In the light of legislative history and policy, the former law is unchanged and a judgment for costs alone is automatically stayed without bond. (210 C.A.3d 474.) (See *Nielsen v. Stumbos* (1990) 226 C.A.3d 301, 304, 276 C.R. 272, *infra*, §236.)

The situation was clarified by a 1993 amendment. Despite the necessity of including costs for the purpose of determining the amount of the undertaking, "no undertaking shall be required ... solely for costs awarded" under C.C.P. 1021 et seq. (C.C.P. 917.1(d).)

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9 *Witkin Cal. Proc. Appeal* § 236

[§ 236] Attorneys' Fees as Costs.

In *Nielsen v. Stumbos* (1990) 226 C.A.3d 301, 276 C.R. 272, involving an award of attorneys' fees to the prevailing party under C.C. 1717 (see 7 *Cal. Proc.* (5th), *Judgment*, §170), the court said: "We are called upon to determine whether enforcement of the award of attorney fees, together with other costs, is automatically stayed by the taking of an appeal. Resolution of that question hinges on whether attorney fees recovered pursuant to a contractual provision are an element of costs when, as here, respondent has not recovered money damages." (226 C.A.3d 303.) *Held*, enforcement was stayed without an undertaking.

(a) A judgment for costs only is not a money judgment within the meaning of *C.C.P.* 917.1. Hence, enforcement of the judgment is automatically stayed pending appeal. (226 C.A.3d 304, citing *Imperial Beverage Co. v. Superior Court* (1944) 24 C.2d 627, 629, 150 P.2d 881, and *Vadas v. Sosnowski* (1989) 210 C.A.3d 471, 472, 258 C.R. 374, *supra*, §235.)

(b) Whether attorneys' fees should be treated as costs is answered by the language of C.C. 1717 itself. The statute specifically provides that the award of attorneys' fees "shall be ... in addition to other costs," thereby implying that fees are merely one among several types of costs. In addition, the statute also provides that attorneys' fees "shall be an element of the costs of suit." (226 C.A.3d 302.)

(c) *C.C.P.* 1033.5, the statute listing the items recoverable as costs, was amended in 1990 to include attorneys' fees authorized by contract (*C.C.P.* 1033.5(a)(10)(A)). And the enacting legislation (Stats. 1990, chap. 804, §1) states that the legislative intent was to confirm that attorneys' fees are costs. (226 C.A.3d 305.)

(d) "[C]ontractual attorney fees awarded a party who recovers no money damages are to be treated as any other incidental cost of litigation for purposes of the automatic stay provisions. ... Accordingly, no undertaking need be posted by the plaintiff." (226 C.A.3d 305.) (See *Pecsok v. Black* (1992) 7 C.A.4th 456, 462, 9 C.R.2d 12; on contrary holding where attorneys' fees are awarded as sanctions, see *supra*, §233.)

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3. Condition of Undertaking.

9 Witkin Cal. Proc. Appeal § 237

[§ 237] Condition of Undertaking.

The undertaking is on the condition that "if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal." (*C.C.P. 917.1(b)*; see 4 *Pacific L. J.* 311.)

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4. Amount of Undertaking.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 238

[§ 238] In General.

(1) *Relation to Judgment.* The undertaking must be for "double the amount of the judgment or order" unless given by an admitted surety; in that event, it must be for "one and one-half times the amount of the judgment or order." (*C.C.P.* 917.1(b); on deposit in lieu of undertaking, see *infra*, §250.)

(2) *Installment Judgment for Alimony.* Because the amount of the undertaking is based on the amount of the judgment or order, the latter amount must be computed. The usual money judgment presents no difficulty in computation. But an installment judgment for alimony does not fit into the conventional pattern, and the courts have developed a makeshift rule: The amount that will become due during the estimated period of the appeal is taken as the amount of the judgment for the purpose of the undertaking. (See *Smith v. Smith* (1927) 201 C. 217, 219, 256 P. 419; *Smith v. Smith* (1928) 91 C.A. 743, 744, 267 P. 709 [3 years]; 40 *Cal. L. Rev.* 256 [criticizing this method].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Relation to Judgment.* See *Leung v. Verdugo Hills Hosp.* (2008) 168 C.A.4th 205, 212, 85 C.R.3d 203 [proper amount of undertaking pending hospital's appeal of medical negligence judgment was 11/2 times present value of entire judgment, even though it was to be paid in monthly installments; proper undertaking must reflect entire judgment, not just payments that will come due during appeal].



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4. Amount of Undertaking.

bb. Costs.

9 *Witkin Cal. Proc. Appeal* § 239

[§ 239] Costs.

Earlier cases held that costs, being merely incidental to the judgment, are not included in the amount of the judgment for purposes of determining the amount of the undertaking. (See *Whitaker v. Title Ins. & Trust Co.* (1918) 179 C. 111, 115, 175 P. 460.) A distinction was made for attorneys' fees awarded under C.C. 1717, which were held not to be incidental to the judgment and therefore included in computing the amount of the undertaking. (See *Chamberlin v. Dale's R.V. Rentals* (1986) 188 C.A.3d 356, 360, 232 C.R. 785.) However, the importance of this distinction was eradicated in 1986 when C.C.P. 917.1 was amended to provide that for purposes of calculating the amount of the undertaking, costs awarded by the trial court under C.C.P. 1021 et seq. are included in the amount of the judgment or order on which the undertaking is based. (C.C.P. 917.1(d).) And among the costs allowable under these statutes are attorneys' fees authorized by contract, statute, or law. (See C.C.P. 1033.5(a)(10).)

In *Gallardo v. Specialty Restaurants Corp.* (2000) 84 C.A.4th 463, 100 C.R.2d 884, the trial judge entered judgment for defendant, including expert witness costs under C.C.P. 998(c) (7 Cal. Proc. (5th), *Judgment*, §112) and routine costs under C.C.P. 1032 (7 Cal. Proc. (5th), *Judgment*, §§89, 90). Plaintiff appealed, and defendant obtained a writ of execution, reflecting both the routine costs and the expert witness costs. After a withholding order was issued to garnish plaintiff's wages, the trial court issued an order setting the amount of the undertaking based on the total amount of costs, including routine costs. Contending that the portion of the judgment for routine costs was subject to an automatic stay even though the portion of the judgment for expert witness costs required an undertaking, plaintiff petitioned for a writ of supersedeas to stay the writ of execution. *Held*, writ issued staying that portion of the judgment consisting of routine costs.

(a) C.C.P. 917.1(a)(2) requires an undertaking for the portion of the judgment consisting of C.C.P. 998 expert witness costs, but not for C.C.P. 1032 routine costs. C.C.P. 917.1(d) specifies that costs awarded under C.C.P. 1021 et seq. are included in the amount of the judgment or order. The Legislature's inclusion of money judgments and exclusion of costs under C.C.P. 998 and 1141.21 (see C.C.P. 917.1(a)(3)) indicates "an explicit policy choice to differentiate between routine costs awarded along with money judgments" and routine costs awarded along with C.C.P. 998 and

1141.21 costs. "Had the Legislature intended that routine costs be included in the amount of the judgment for purposes of securing an undertaking where the only additional award was for section 998 costs, it would have referred in subdivision (d) simply to subdivision (a) as a whole, or to paragraphs (1) and (2) of subdivision (a)" of *C.C.P. 917.1*. (84 C.A.4th 468, citing *Banks v. Manos* (1991) 232 C.A.3d 123, 283 C.R. 318, supra, §233.)

(b) Dicta in *Bank of San Pedro v. Superior Court* (1992) 3 C.4th 797, 12 C.R.2d 696, 838 P.2d 218, supra, §231, states that the amount of routine costs awarded must be included along with the amount of a damages judgment for the purpose of computing the amount of the required undertaking. However, contrary to this dicta, the 1993 amendment to *C.C.P. 917.1(d)* made it clear that routine costs are not to be included along with *C.C.P. 998* costs in determining the amount of the undertaking. (84 C.A.4th 470.)

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b. Judgment Directing Sale or Delivery of Documents or Personal Property.

1. Application of Statute.

9 Witkin Cal. Proc. Appeal § 240

[§ 240] Application of Statute.

(1) *In General.* An undertaking is required where the judgment or order "directs the assignment or delivery of personal property, including documents, whether by the appellant or another party to the action." (*C.C.P.* 917.2.) (See *United States Fidelity & Guaranty Co. v. More* (1909) 155 C. 415, 416, 101 P. 302 [alternative judgment for recovery of personal property or its value]; *Wilson v. Johnson* (1934) 1 C.2d 288, 289, 34 P.2d 487 [judgment directing assignment and delivery of shares of stock]; *In re Ringgold* (2006) 142 C.A.4th 1001, 1009, 48 C.R.3d 507 [order to turn over documents that would allow trust property to be distributed to beneficiaries was not stayed by appeal in absence of undertaking].)

The appellant may cause the property to be placed in the custody of an officer designated by the court to abide the order of the reviewing court, and this fact "shall be considered ... in fixing the amount of the undertaking." (*C.C.P.* 917.2; see *infra*, §254.)

(2) *Condition of Undertaking.* The condition of the undertaking is that (a) "the appellant or party ordered to assign or deliver the property will obey and satisfy the order of the reviewing court, and will not commit or suffer to be committed any damage to the property"; and (b) "if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered to such property and the value of the use of such property for the period of the delay caused by the appeal." (*C.C.P.* 917.2; see *Hein v. Highlands Ins. Co.* (1976) 64 C.A.3d 627, 630, 134 C.R. 592, *infra*, §241, citing the text; 4 *Pacific L. J.* 312.)

(3) *Foreclosure of Chattel Mortgage.* A judgment or order directing "the sale of personal property upon the foreclosure of a mortgage, or other lien thereon" is not stayed unless "an undertaking in a sum and upon conditions fixed by the trial court" is given. (*C.C.P.* 917.2.)

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2. Recovery for Decline in Value.

9 Witkin Cal. Proc. Appeal § 241

[§ 241] Recovery for Decline in Value.

The statutory language requiring the appellant to pay the damage suffered to the property (see *supra*, §240) was construed in *Hein v. Highlands Ins. Co.* (1976) 64 C.A.3d 627, 134 C.R. 592. In a marriage dissolution proceeding, the judgment entered in February 1973 directed the wife to transfer to the husband shares of stock with a market value of \$ 14,561. The wife appealed and gave an undertaking under C.C.P. 917.2. The judgment was affirmed in July 1974, and the wife delivered the stock to plaintiff, the husband's assignee, in September 1974. At that time, the stock had declined in value to \$ 7,803, and plaintiff brought this action on the undertaking to recover the difference as damages. Defendant took the position that the stock would have declined in value even if it had been delivered at the time of the judgment, and whether the husband would have avoided this result by a timely sale was a matter of pure speculation. *Held*, plaintiff was entitled to recover. The court briefly referred to conflicting authority in other states, and rejected the argument that plaintiff could recover only on proof that the husband would have avoided the decline by a sale if the stock had been delivered to him. "Granting that plaintiff might not have disposed of the property in time to avoid the loss, the fact remains that solely because of the appeal and the stay of enforcement pending the appeal, plaintiff was deprived of any power to attempt to protect his economic interests in that manner. The affirmance of the interlocutory judgment on appeal shows that plaintiff was entitled to delivery of the property at the time of the interlocutory judgment. The stay of enforcement inherently involved a risk of the decline in value of the property pending appeal. That risk should be borne by the party who appealed and her sureties, not by plaintiff, who was wronged by the stay." (64 C.A.3d 633.)

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3. Exception: Where Appellant Is Not in Possession.

9 Witkin Cal. Proc. Appeal § 242

[§ 242] Exception: Where Appellant Is Not in Possession.

An appellant not in possession of the property cannot comply with the judgment by delivering it. Thus, *C.C.P.* 917.2 does not apply, and the appellant need not give a bond to stay execution. (*McCallion v. Hibernia Savings & Loan Soc.* (1893) 98 C. 442, 445, 33 P. 329 [special fund in custody of court officer]; *Baar v. Smith* (1927) 201 C. 87, 103, 255 P. 827; *Boldemann Chocolate Co. v. Price* (1935) 3 C.2d 257, 43 P.2d 810 [document in custody of clerk of court]; *Cunningham v. Reynolds* (1933) 133 C.A. 148, 149, 23 P.2d 837 [property in possession of respondent]; *In re Ringgold* (2006) 142 C.A.4th 1001, 1010, 48 C.R.3d 507 [former statute provided for stay on appeal if things required to be delivered were placed in custody of officer appointed by court]; see 40 Cal. L. Rev. 259; cf. *Bailey v. Superior Court* (1916) 31 C.A. 78, 159 P. 990 [judgment directed sheriff to take possession of personal property and documents; held, it was his duty to obtain and deliver them].)

In the case of a pledge, e.g., where the judgment debtor (pledgor) has previously transferred possession, a judgment foreclosing the pledge is stayed by appeal without bond. (*Rohrbacher v. Superior Court* (1904) 144 C. 631, 632, 78 P. 22; see *Cunningham v. Reynolds*, *supra*, 133 C.A. 150.) The opposite rule applies, of course, to a chattel mortgage, where the debtor (mortgagor) retains possession. (*C.C.P.* 917.2; see *supra*, §240.)

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c. Judgment Directing Sale or Delivery of Real Property.

1. Application of Statute.

9 Witkin Cal. Proc. Appeal § 243

[§ 243] Application of Statute.

(1) *Judgments Covered.* *C.C.P. 917.4* requires an undertaking to stay enforcement of a judgment or order that "directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property." (See *Boob v. Hall* (1895) 105 C. 413, 415, 38 P. 977; *Freeman v. Donohoe* (1922) 188 C. 170, 172, 204 P. 593 [decree ordering sale of partnership property and application of proceeds to plaintiff's claim]; *Archer v. Miller* (1923) 192 C. 67, 70, 218 P. 410 [judgment ordering execution of deed and delivery of possession by vendor on payment of price]; *Vangel v. Vangel* (1953) 116 C.A.2d 615, 632, 254 P.2d 919; *Barnes v. Chamberlain* (1983) 147 C.A.3d 762, 766, 195 C.R. 417, 7 Cal. Proc. (5th), *Judgment*, §81; cf. *First Fed. Bank of Calif. v. Fegen* (2005) 131 C.A.4th 798, 800, 31 C.R.3d 853, 8 Cal. Proc. (5th), *Enforcement of Judgment*, §164 [where judgment debtor's failure to post undertaking permitted sheriff's sale of his property, appeal of order of sale was rendered moot].)

(2) *Undertaking and Condition.* The undertaking is "in a sum fixed by the trial court." The condition is that the appellant or party ordered to sell, etc., "will not commit or suffer to be committed any waste thereon and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered by the waste and the value of the use and occupancy of the property, or the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property." (*C.C.P. 917.4.*)

If the judgment or order is for sale of mortgaged premises and a deficiency, the undertaking must also provide for payment of the deficiency. (*C.C.P. 917.4.*)

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c. Judgment Directing Sale or Delivery of Real Property.

2. Exception: Where Appellant Is Not in Possession.

9 Witkin Cal. Proc. Appeal § 244

[§ 244] Exception: Where Appellant Is Not in Possession.

Just as in the case of judgments for delivery of personal property (*supra*, §242), *C.C.P.* 917.4 does not apply to an appellant who is not in possession or control of the property.

Thus, the bond covers value of occupation and waste, but a person not in possession does not occupy or commit waste. It also covers the "suffering" of waste to be committed, so that one with the right to possession, who permits another to possess the property in subordination to his or her right, comes within its terms; but one with neither possession nor the right to possession is not required to give bond. (*Owen v. Pomona Land & Water Co.* (1899) 124 C. 331, 334, 57 P. 71; *Keeling Collection Agency v. McKeever* (1930) 209 C. 625, 627, 289 P. 617; see *Zappettini v. Buckles* (1914) 167 C. 27, 30, 138 P. 696 [property in possession of court receiver]; 40 *Cal. L. Rev.* 261.)

A mortgagor, however, is ordinarily in possession, either by actual possession or through a tenant who holds in subordination to him or her. The fact that a purchaser at a foreclosure sale receives rent from the tenant does not change the situation, and the appealing mortgagor cannot avoid the necessity of a bond by disclaiming possession. (*McClintock v. Powley* (1930) 210 C. 333, 337, 291 P. 833.)

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c. Judgment Directing Sale or Delivery of Real Property.

3. Forcible Entry or Unlawful Detainer.

aa. In General.

9 Witkin Cal. Proc. Appeal § 245

[§ 245] In General.

(1) *Nature of Requirement.* Judicial action is required to stay enforcement of a judgment rendered in a forcible entry or unlawful detainer action. "An appeal taken by the defendant shall not automatically stay proceedings upon the judgment." (*C.C.P. 1176(a)*.)

(2) *Petition and Grounds for Stay.* A petition for stay must first be directed to the trial judge before whom the judgment was rendered. A stay "shall be granted when the court finds that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance." (*C.C.P. 1176(a)*.)

(3) *Review of Denial of Stay.* If the trial court denies the stay, "the defendant may forthwith file a petition for an extraordinary writ with the appropriate appeals court." (*C.C.P. 1176(a)*.)

(4) *Granting and Conditions.* If the trial or appellate court grants a stay, the court "may condition the stay on whatever conditions the court deems just." But "in any case it shall order the payment of the reasonable monthly rental value to the court monthly in advance as rent would otherwise become due as a condition of issuing the stay." "Reasonable rental value" means "the contract rent unless the rental value has been modified by the trial court in which case that modified rental value shall be used." (*C.C.P. 1176(a)*.)

Decisions rendered under an earlier version of the statute held that this requirement was in addition to the requirement of an undertaking under *C.C.P. 917.4* (supra, §243). (See *Cluness v. Bowen* (1902) 135 C. 660, 661, 67 P. 1048; *Sarthou v. Reese* (1907) 151 C. 96, 97, 90 P. 187; *Mendoza v. Small Claims Court* (1958) 49 C.2d 668, 671, 321 P.2d 9, citing the text; *Plummer v. Agoure* (1912) 20 C.A. 319, 322, 128 P. 1014; *Magnaud v. Traeger* (1924) 66 C.A. 526, 528, 226 P. 990; *Mehr v. Superior Court* (1983) 139 C.A.3d 1044, 1050, 189 C.R. 138, 4 Summary (10th), *Security Transactions in Real Property*, §173.)

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bb. Attorneys' Fees.

9 Witkin Cal. Proc. Appeal § 246

[§ 246] Attorneys' Fees.

In *Selma Auto Mall II v. Appellate Dept.* (1996) 44 C.A.4th 1672, 52 C.R.2d 599, plaintiff landlords filed an unlawful detainer action (see supra, §245) against defendants, the commercial tenants and a sublessee. Finding that defendant tenants had breached the lease, the court awarded possession of the premises to plaintiffs. The judgment also included an award of attorneys' fees against defendant tenants only. Defendant sublessee then appealed that portion of the judgment granting possession to plaintiffs and requested a stay of execution. The court granted the request on several conditions, including one that defendant sublessee post a bond to secure payment of the attorneys' fees awarded to plaintiffs. *Held*, this condition was improper.

(a) *C.C.P. 1176(a)* authorizes a stay of appeal in an unlawful detainer action, and allows the court to impose such conditions as it deems "just." Plaintiffs' contention that the condition was "just," because defendant tenants were insolvent, is without merit. To be "just," a condition (1) must be authorized by law, and (2) must bear some reasonable relationship to the injury that the nonmoving party (plaintiffs) might otherwise suffer from an unconditional stay. (44 C.A.4th 1680.)

(b) Here, the condition failed to meet either element. Under the American rule, each party is responsible for his or her own attorneys' fees, unless provided otherwise by statute. And, under C.C. 1717 (see 7 Cal. Proc. (5th), *Judgment*, §170 et seq.), a contract or lease may include a provision awarding attorneys' fees to the prevailing party. Thus, defendant tenants, as the losing parties to the lease, could be made to pay the fees. However, defendant sublessee was not a party to the lease and could not be required by C.C. 1717 to pay the fees. Also, no other statute authorizes an award of attorneys' fees in unlawful detainer actions. Nevertheless, the court, in effect, improperly made the defendant sublessee liable for fees by imposing the condition. (44 C.A.4th 1682.)

(c) The reasonable relationship between the condition and the alleged harm is also missing. An unconditional stay on appeal would not affect plaintiffs' right to collect attorneys' fees. Whether defendant sublessee appealed from the judgment, whether the writ of possession was stayed on appeal, and whether defendant sublessee won or lost on appeal,

plaintiffs' attorneys' fee award remained enforceable against defendant tenants. If, on the other hand, the judgment for fees, although enforceable, was uncollectible, this was due to defendant tenants' insolvency, not because of defendant sublessee's appeal or because of the stay of that appeal. Thus, the condition was not related to a harm that plaintiffs would suffer from an unconditional stay, and was an abuse of discretion. (*44 C.A.4th 1684.*)

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d. Appointment of Receiver.

9 *Witkin Cal. Proc. Appeal* § 247

[§ 247] Appointment of Receiver.

An order appointing a receiver is not stayed unless an undertaking is given, in an amount fixed by the judge, conditioned on the appellant paying all damages that the respondent may sustain by reason of the stay in the enforcement of the judgment, if the judgment or order is affirmed or the appeal is withdrawn or dismissed. (*C.C.P.* 917.5; see *Sunset Farms v. Superior Court* (1935) 9 *C.A.2d* 389, 393, 50 *P.2d* 106; 4 *Pacific L. J.* 313.)

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e. Right To Attach Order.

9 *Witkin Cal. Proc. Appeal* § 248

[§ 248] Right To Attach Order.

A right to attach order (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §111) is not stayed unless an undertaking is given in the amount specified in the order as the amount to be secured by the attachment. The undertaking is on the condition that if the right to attach order is not reversed and the plaintiff recovers judgment in the action, the appellant will pay the amount of the judgment, together with any interest that may have accrued. (*C.C.P.* 917.65.)

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1. When Undertaking Is Required.

f. Order for Family Allowance in Probate.

9 Witkin Cal. Proc. Appeal § 249

[§ 249] Order for Family Allowance in Probate.

The perfecting of an appeal from an order for the payment of a family allowance during administration of an estate does not stay enforcement unless the person in whose favor the order is made gives an undertaking in double the amount of the payment. The undertaking is conditioned that if the order is modified or reversed so that the payment or any part of it proves to have been unwarranted, the payment will, unless deducted from any preliminary or final distribution ordered in favor of the person, be repaid and refunded into the estate within 30 days after modification or reversal, together with interest and costs. (*Prob.C. 6545.*)

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2. Procedure on Undertaking.

a. In General.

1. Deposit in Lieu of Bond.

9 Witkin Cal. Proc. Appeal § 250

[§ 250] Deposit in Lieu of Bond.

The statutes generally provide that, where an undertaking is required for any procedural purpose, a cash or other acceptable deposit in lieu of an undertaking is permissible. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §44; 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error*, §339 et seq.)

C.C.P. 995.710, applicable to all courts, allows a deposit to be made except to the extent that the statute providing for the bond precludes a deposit or limits its form. Acceptable deposits under *C.C.P. 995.710(a)* include cash, U.S. or California bearer bonds or notes, certificates of deposit, assigned savings accounts, and investment certificates or share accounts. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §44.)

The deposit must be in an amount or have a face or market value "equal to or in excess of the amount that would be required to be secured by the bond if the bond were given by an admitted surety insurer." (*C.C.P. 995.710(b)*.) (On undertaking in statutory amount (money judgment) see *supra*, §230; on undertaking in amount fixed by the court, see *supra*, §§240, 243.)

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a. In General.

2. Form and Filing.

9 *Witkin Cal. Proc. Appeal* § 251

[§ 251] Form and Filing.

(1) *Filing.* The statutes do not fix a time within which the undertaking must be given. It follows, therefore, that it may be filed at any time before execution. (*Bradley Co. v. Mulcrevy* (1913) 166 C. 325, 328, 136 P. 60.)

(2) *Requisites of Undertaking.* Except where execution by an admitted surety insurer is required by statute, an undertaking must be executed by two or more sufficient personal sureties or one sufficient admitted surety insurer, or a combination. (*C.C.P.* 995.310.) An affidavit of the qualifications of each surety must accompany a bond executed by personal sureties. (*C.C.P.* 995.520.) (On sureties and their qualifications, see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §20 et seq.; on undertakings on appeal, see C.E.B., 1 Civil Appellate Practice 3d, §6.21 et seq.; Rutter Group, 1 Civil Appeals and Writs §7:95 et seq.)

(3) *Form.* *C.C.P.* 995.330 sets forth a simplified statutory form of undertaking that is satisfactory for use on appeal. (See 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§207, 208 [undertakings]; §233 [judgment directing delivery of documents]; §234 [judgment directing delivery of personal property]; §219 et seq. [judgments directing sale or delivery of real property]; §§236, 237 [judgments foreclosing chattel mortgage]; §243 [judgment or order appointing receiver].)

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a. In General.

3. Provisional Stay.

9 *Witkin Cal. Proc. Appeal* § 252

[§ 252] Provisional Stay.

No prior court approval of the bond is required. If it is in good form, a provisional stay is immediately effected, despite objection to the bond. This lasts until the proceedings on the objection. (See *infra*, §257; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§27, 28.)

If the bond is sufficient, the temporary stay becomes permanent. If a sufficient bond is not given, the provisional stay expires, and enforcement of the judgment "is no longer stayed." (*C.C.P.* 922, 995.960(b)(1); see *Wheeler v. Karnes* (1900) 130 C. 618, 619, 63 P. 62; *Howland v. Scott* (1932) 215 C. 301, 304, 9 P.2d 824.) If execution has already been levied, property will not be released from levy unless a sufficient bond is given. (*C.C.P.* 922; see *First Nat. Bank of Marysville v. McCoy* (1931) 112 C.A. 665, 669, 297 P. 571.)

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a. In General.

4. Waiver or Reduction of Undertaking.

9 *Witkin Cal. Proc. Appeal* § 253

[§ 253] Waiver or Reduction of Undertaking.

"The beneficiary of a bond given in an action or proceeding may in writing consent to the bond in an amount less than the amount required by statute or may waive the bond." (*C.C.P.* 995.230.) (On predecessor statute, see *Armstrong v. Brown* (1936) 12 *C.A.2d* 22, 54 *P.2d* 1118; for form of waiver, see *C.E.B.*, 1 Civil Appellate Practice 3d, §6.42; Rutter Group, 1 Civil Appeals and Writs §§7:187, 7:187.1.)

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b. Fixing Amount.

1. In General.

9 Witkin Cal. Proc. Appeal § 254

[§ 254] In General.

(1) *By Court.* Except where the statute specifies the amount of the bond, it is fixed by the trial court. (*C.C.P.* 917.2, 917.4, 917.5; see *supra*, §§240, 243; *C.E.B.*, 2 Civil Appellate Practice 3d, §6.39 et seq.; Rutter Group, 1 Civil Appeals and Writs §7:174 et seq.; *Cal. Civil Practice*, 5 Procedure, §36:27.) In fixing the amount, the court must consider the fact that a custodial officer has been appointed or that perishable property has been sold and the proceeds deposited with the clerk. (*C.C.P.* 917.2; see 4 *Pacific L. J.* 312.) (For amount specified by statute, see *C.C.P.* 917.1 [money judgment], *supra*, §§238, 239; *C.C.P.* 917.65 [right to attach order], *supra*, §248.)

The order may be made ex parte. (*Hubbard v. University Bank of Los Angeles* (1898) 120 C. 632, 633, 52 P. 1070; *McClintock v. Powley* (1930) 210 C. 333, 337, 291 P. 833.) But an appeal has been allowed from an order fixing the bond at a sum deemed excessive. (*Vangel v. Vangel* (1953) 116 C.A.2d 615, 632, 254 P.2d 919 [\$ 100,000 bond reduced to \$ 20,000].)

(2) *By Stipulation.* Instead of determining the sum himself or herself, the judge may follow a stipulation by the parties. (*Hammond v. United States Fidelity & Guaranty Co.* (1916) 29 C.A. 464, 468, 155 P. 1023; *Hogan v. Locke Paddon* (1928) 91 C.A. 606, 611, 267 P. 392 [stipulation followed in alimony case, where amount of judgment cannot really be determined].)

(3) *Compelling Judge To Act.* If the judge refuses to fix the amount, the proper remedy is mandamus to compel the judge to act; the appellate court cannot determine the amount of the bond. (*Doudell v. Shoo* (1910) 158 C. 50, 52, 109 P. 615; *Hinkel v. Crowson* (1920) 182 C. 68, 69, 186 P. 1042 [writ of supersedeas denied].) And if the judge refuses to approve a sufficient bond, mandamus is again the proper remedy. (*Lyders v. Superior Court* (1933) 129 C.A. 635, 638, 19 P.2d 300.)

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b. Fixing Amount.

2. Additional Security Is Not Allowable.

9 Witkin Cal. Proc. Appeal § 255

[§ 255] Additional Security Is Not Allowable.

Once the amount is fixed by a proper bond, the trial judge cannot modify it or require additional security. (See *Hubbard v. University Bank of Los Angeles* (1898) 120 C. 632, 634, 52 P. 1070; *McClintock v. Powley* (1930) 210 C. 333, 337, 291 P. 833 [stating that ex parte order fixing bond could be set aside for fraud or mistake under former C.C.P. 937]; on court's power to order new undertaking where sureties or bond become insufficient, see *infra*, §256.)

Nor can the appellate court require additional security. In *Jameson v. Chanslor-Canfield Midway Oil Co.* (1916) 173 C. 612, 613, 160 P. 1066, a bond given under C.C.P. 917.4 had been approved, but on appeal, respondents applied to the appellate court for an order requiring further security, contending that appellants were taking oil from the lands and that the amount of the bond was insufficient. *Held*, the statutory provisions give exclusive and final power in this regard to the trial judge. (173 C. 616.)

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3. Distinction: Changed Circumstances.

9 Witkin Cal. Proc. Appeal § 256

[§ 256] Distinction: Changed Circumstances.

In *Grant v. Superior Court* (1990) 225 C.A.3d 929, 275 C.R. 564, defendants, to stay enforcement of the judgment, posted bonds pursuant to *C.C.P. 917.1* for 11/2 times the amount of the judgment (see *supra*, §§238, 239). Nearly 2 years later, plaintiffs filed a motion to increase the amount of the bonds, claiming that, because of the passage of time and postjudgment interest, costs on appeal and attorneys' fees, the amount could be inadequate to cover all the money that would be due them if they succeeded on appeal. The trial judge ordered the increase. *Held*, the order was proper.

(a) *C.C.P. 917.1(b)* clearly states that the undertaking may be used to satisfy not only the amount of the judgment and costs accrued below, but also postjudgment interest and costs awarded on appeal. (225 C.A.3d 935.)

(b) Setting the amount of the bond in money judgment cases under *C.C.P. 917.1* must be distinguished from a review of the sufficiency of the bond under *C.C.P. 996.010* (6 *Cal. Proc.* (5th), *Provisional Remedies*, §29). "Because money judgments present no problems in computation, it is clear the Legislature felt secure in setting the ratio of the undertaking to the judgment in section 917.1. Logically, this ratio should protect litigants in the typical case. So saying does not, however, preclude the court from determining some time later under section 996.010 that the undertaking--which by the statute may be used to satisfy the judgment, postjudgment interest and appellate costs--has become insufficient. Realistically, section 996.010 reflects a commonsense view that the sufficiency of the undertaking should be assessed in light of those sums which it may be required to satisfy, not in light of the formula for initially setting the amount of the undertaking. To do otherwise ultimately would impair the ability of a successful respondent from recovering the full amount of the judgment to which it is entitled simply by virtue of the passage of time until remittitur issues." (225 C.A.3d 938.)

(c) "The purpose behind section 996.010 is to guard against a bond or undertaking failing to serve its original purpose. At least in the context here, challenging an undertaking given under section 917.1, a movant must demonstrate a real, substantial possibility, not just speculation, that the current bond 'is or has from any cause become insufficient because the sureties were insufficient or because the amount of the bond is insufficient.' " (225 C.A.3d 938.)

(d) "The statute provides the limits of the court's assessment. The trial court determines whether a new bond is necessary and what constitutes a 'sufficient' bond. Because the liabilities of the appellant are not certain until the end of the appeal, the court necessarily must have reasonable latitude in making its assessment." (225 C.A.3d 939.)

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c. Defective or Insufficient Undertaking.

1. Objections.

9 *Witkin Cal. Proc. Appeal* § 257

[§ 257] Objections.

(1) *In General.* Statutes requiring undertakings formerly provided for excepting to the sufficiency of sureties and for justification of the sureties. The procedure is now called objecting to the bond. (See *C.C.P.* 995.910 et seq., 6 *Cal. Proc.* (5th), *Provisional Remedies*, §27; *Cal. Civil Practice*, 5 Procedure, §§36:64, 36:75.) An objection may be based on an insufficiency of the sureties, an insufficiency in the amount of the bond, or an insufficiency of the bond from any other cause. (*C.C.P.* 995.920; see *infra*, §260.)

(2) *Objection to Admitted Surety Insurers.* If an objection is made to the sufficiency of an admitted surety insurer, the person making the objection must attach and incorporate into the objection one or both of the following: (a) The county clerk's certificate that the insurer has not been certified as an admitted surety insurer, or that the insurer's certificate of authority "has been surrendered, revoked, canceled, annulled, or suspended and has not been renewed." (b) An affidavit stating facts that establish the insurer's insufficiency. The insurer must then submit proof of its authority and financial position. (*C.C.P.* 995.650.)

(3) *Formal Requirements.* The objection must (a) be in writing, (b) on noticed motion specifying the precise grounds for the objection, and (c) made within 10 days after service of a copy of the bond on the beneficiary. (*C.C.P.* 995.930(a), (b).)

(4) *Waiver.* "If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances." (*C.C.P.* 995.930(c).)

(5) *Hearing.* Except as otherwise agreed, a hearing on the objection must be held not less than 2 nor more than 5 days after service of the notice of motion. (*C.C.P.* 995.950(a).)

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(2) *Objection to Admitted Surety Insurers.* *C.C.P. 995.650* was amended in 2008 to replace the clerk's statement that the insurer has not been certified as an admitted surety insurer with the clerk's statement that the insurer "is not listed as an admitted surety insurer on the department's Internet Web site."



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2. Execution Is Not Stayed.

9 Witkin Cal. Proc. Appeal § 258

[§ 258] Execution Is Not Stayed.

If the undertaking proves insufficient, there is no stay, and the judgment creditor can execute. (*C.C.P.* 922, *supra*, §252.) *Mohn v. Superior Court* (1921) 53 C.A. 425, 200 P. 360, explained the rationale as follows: "A stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation and can only be had upon a substantial compliance with the provisions of the code. While, in our opinion, the undertaking in question was given in good faith and is ample to secure the payment of the judgment, nevertheless, in the absence of such compliance, courts have no discretion in the exercise of which they can stay the issuance of the execution." (53 C.A. 428.) (See *De Garmo v. Superior Court* (1934) 1 C.2d 83, 85, 33 P.2d 411; *Fidelity & Cas. Co. of New York v. Superior Court* (1934) 139 C.A. 615, 618, 34 P.2d 736.)

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3. Appeal Is Not Affected.

9 *Witkin Cal. Proc. Appeal* § 259

[§ 259] Appeal Is Not Affected.

Although there is no stay where the undertaking is insufficient (*supra*, §258), the appeal itself is unaffected, and cannot be dismissed. The only right obtained by the appellant who files a bond is to have enforcement stayed, and that is the only right he or she can lose by failure to file a sufficient bond. (*Hasnedahl v. J.D. Halstead Lumber Co. (1933) 131 C.A. 224, 225, 21 P.2d 120.*)

In *Buchwald v. Katz (1972) 8 C.3d 493, 105 C.R. 368, 503 P.2d 1376*, plaintiffs, performing artists, contracted with defendant for management services. A dispute arose, and in a previous action, it was held that the Labor Commissioner had exclusive jurisdiction under *Lab.C. 1700.4 et seq.*, the Artists' Managers Act. The Labor Commissioner held that the contracts were void because defendant had failed to obtain the statutory license, and ordered that defendant repay plaintiffs \$ 49,004.88 in commissions previously received. Defendant appealed to the superior court pursuant to *Lab.C. 1700.44*. On motion of plaintiffs, the court fixed the bond at \$ 49,004.88. Defendant failed to file a bond, and the court dismissed his appeal. *Held*, order reversed. The general rule is that if an undertaking is insufficient, there is no stay, but the appeal itself is unaffected. (*8 C.3d 498*, quoting the text.) There is no language in *Lab.C. 1700.44* calling for a different rule. Hence, plaintiffs are free to enforce the money award in the same manner as any other judgment, but the appeal remains. (*8 C.3d 499.*)

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4. Insufficient Bond or Sureties.

9 *Witkin Cal. Proc. Appeal* § 260

[§ 260] Insufficient Bond or Sureties.

(1) *Insufficient Bond*. The insufficiency may be in the bond itself. (*C.C.P.* 995.920(b), (c); see *United States Fidelity & Guaranty Co. v. More* (1909) 155 C. 415, 417, 101 P. 302 [bond under former C.C.P. 943, amount not fixed by judge]; *De Garmo v. Superior Court* (1934) 1 C.2d 83, 84, 33 P.2d 411 [security (part surety and part cash deposit) was unauthorized]; *Fidelity & Cas. Co. of New York v. Superior Court* (1934) 139 C.A. 615, 618, 34 P.2d 736 [bond under former C.C.P. 942 for payment of "damages and costs" failed to provide for payment of "judgment"; sureties were not liable]; cf. *Bradley Co. v. Mulcrevy* (1913) 166 C. 325, 327, 136 P. 60 [inconsistency in statement of amount of bond and judgment, obvious clerical error, question of validity left open].)

(2) *Insufficient Sureties*. Alternatively, the bond may be good, but the sureties may be insufficient. (*C.C.P.* 995.920(a); see *Mohn v. Superior Court* (1921) 53 C.A. 425, 428, 200 P. 360 [construing requirement of former C.C.P. 1057, that if amount is over \$ 3,000 and several sureties each are worth less than amount, their total worth must be equivalent to that of two sufficient sureties]; *Lyders v. Superior Court* (1933) 129 C.A. 635, 636, 19 P.2d 300 [insolvent]; *Lane Mortg. Co. v. Superior Court* (1936) 18 C.A.2d 57, 58, 62 P.2d 1057 [discretion to refuse acceptance of surety whose assets were all held in joint tenancy with wife]; cf. *Bolles v. Hilton & Paley* (1929) 101 C.A. 92, 94, 281 P. 73 [dictum that nonappealing party may be surety on bond of appealing party].)

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5. Substitution of Sufficient Undertaking.

9 *Witkin Cal. Proc. Appeal* § 261

[§ 261] Substitution of Sufficient Undertaking.

Formerly, where the original bond was wholly insufficient, the appellant could substitute a new sufficient bond before execution took place. The reasoning was that the bond, being wholly insufficient at the outset and thus void, could be treated as if it had never been offered. (See *Bradley Co. v. Mulcrevy* (1913) 166 C. 325, 329, 136 P. 60.)

C.C.P. 995.960(b) now provides as follows if the court determines that the bond is insufficient at the hearing on an objection:

(1) The court must specify the insufficiency and must order that a new bond with sufficient sureties and in a sufficient amount be given within 5 days. "If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the bond immediately cease and the court shall upon ex parte motion so order." (*C.C.P.* 995.960(b)(1).)

(2) "If a bond is in effect, the bond remains in effect until a bond with sufficient sureties and in a sufficient amount is given in its place, or the time in which to give the bond has expired, whichever first occurs." (*C.C.P.* 995.960(b)(2).)

In *W. Jay Saylor, Ltd. v. Superior Court* (1933) 131 C.A. 185, 20 P.2d 989, the trial judge, on justification proceedings, held the corporate surety insufficient and ordered a new undertaking. Appellant appealed from this order, and contended that execution must be stayed because otherwise there would be an enforcement of the order appealed from. *Held*, execution should issue, for, under appellant's interpretation, "he could obtain the benefits of a stay by means of a worthless bond, simply by giving a notice of appeal from the order requiring him to give a better one." (131 C.A. 187.)

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6. Distinction: Valid Partial Undertaking.

9 *Witkin Cal. Proc. Appeal* § 262

[§ 262] Distinction: Valid Partial Undertaking.

In *Merritt v. J.A. Stafford Co.* (1968) 68 C.2d 619, 68 C.R. 447, 440 P.2d 927, plaintiff sued defendant Stafford and its employee for personal injuries received in an automobile accident, and recovered judgment for \$ 434,441.68. Defendants appealed. Stafford's insurance policy had a \$ 100,000 limit, and the insurer tendered that sum (plus costs and interest) to plaintiff, who refused it. Stuyvesant, on behalf of the insurer, filed an undertaking in the sum of \$ 181,883.90 (instead of in the sum of 11/2 times the amount of the judgment, as required by *C.C.P.* 917.1). On affirmance of the judgment, plaintiff made an agreement with defendant Stafford under which the latter paid \$ 20,000 as a separate consideration (not credited on the judgment); plaintiff took an assignment of any cause of action Stafford had against its insurer; and plaintiff agreed not to execute until final termination of the action on the assigned cause. Then plaintiff moved for judgment on the bond under *C.C.P.* 917.1 (*infra*, §265). *Held*, order denying motion reversed.

(a) Stuyvesant's principal defense was that the bond was not in conformity with *C.C.P.* 917.1 because the statute only contemplates a bond in the prescribed amount, and that a bond not in conformity with the statute is void and imposes no liability on the surety. (See *supra*, §260.) However, a surety may be liable on a bond not in conformity with the statute where there was a stay, i.e., where the benefit was received. (68 C.2d 624.) And there is no reason why the appellant and judgment creditor cannot stipulate to stay execution on a bond in less than the amount required. (68 C.2d 625.)

(b) Moreover, from a practical standpoint, an insurer should not be faced with the alternative of either furnishing a bond for the entire judgment or not giving any bond. Failure to give a bond would result in a large loss to the insured, but the insurer should not be required to give a bond far in excess of its liability. "Fairness to the insurer and the insured requires that the insurer be permitted to fulfill its covenant of good faith and fair dealing by filing an appeal bond in an amount sufficient to cover the part of the judgment for which it is liable and that the respondent be denied his right to seek execution with regard to such part of the judgment." (68 C.2d 626.)

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1. Construction of Bond.

9 *Witkin Cal. Proc. Appeal* § 263

[§ 263] Construction of Bond.

A few cases state the older doctrine of strict construction, namely, that sureties may stand upon the terms of their contract and are never bound beyond its express language. (See, e.g., *Ogden v. Davis* (1897) 116 C. 32, 36, 47 P. 772 [bond against waste, void for misdescription of property].)

The correct view, however, is that the language of a bond, like that of other contracts, should receive a fair and reasonable interpretation to effect its objects. (*Bradley Co. v. Mulcrevy* (1913) 166 C. 325, 327, 136 P. 60; *Austin v. Union Paving & Contracting Co.* (1906) 4 C.A. 610, 614, 88 P. 731 [erroneous statement of amount of bond was obvious clerical error]; *Gerrior v. Superior Court* (1924) 69 C.A. 186, 192, 230 P. 967; *Hogan v. Locke Paddon* (1928) 91 C.A. 606, 613, 267 P. 392 [sureties cannot question truth of recitals as to nature of judgment]; see 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §421 et seq.)

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2. Failure To Give Sufficient Undertaking.

9 Witkin Cal. Proc. Appeal § 264

[§ 264] Failure To Give Sufficient Undertaking.

If the appellant furnishes an insufficient bond and a sufficient bond is not given within the time prescribed, enforcement is no longer stayed. (*C.C.P.* 922; see *supra*, §252.) Nevertheless, the bond "remains in full force and effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before, expiration." (*C.C.P.* 995.960(b)(2); see *McColgan v. Scoble* (1935) 2 *C.2d* 285, 286, 40 *P.2d* 483; 8 *So. Cal. L. Rev.* 356.)

A different result follows, however, where, after failure of the original sureties to justify, others are substituted and accepted by the respondent. The new bond supersedes the other, and the original sureties are not liable in the event of insolvency of the new sureties. (*Associated Constructors v. Paonessa* (1939) 13 *C.2d* 241, 246, 88 *P.2d* 924; on substitution and release of surety, see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §33.)

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3. Enforcement of Liability.

9 *Witkin Cal. Proc. Appeal* § 265

[§ 265] Enforcement of Liability.

Under former law, liability was ordinarily enforced by an action against the sureties. (See *Churchill v. More* (1908) 7 C.A. 767, 770, 96 P. 108; 9 A.L.R.3d 330 [measure and amount of damages where recovery or possession of real estate is involved].) But for an undertaking to stay a money judgment, C.C.P. 917.1 provided a more expeditious remedy. If the obligation was not paid within 30 days after filing of the remittitur, judgment could be summarily entered against the sureties, on motion of respondent, without notice to the sureties. This judgment, being based on the prior agreement of the sureties, was considered a consent judgment and was nonappealable. (See *Hood v. Verdugo Lumber Co.* (1933) 219 C. 558, 560, 27 P.2d 897; *Roberts v. Fitzgerald* (1928) 94 C.A. 747, 748, 271 P. 1110; *supra*, §43.)

Now, liability may be enforced either by an action against both the principal and the sureties (C.C.P. 996.410(a)), or on a motion made in the court after judgment without the necessity of an independent action (C.C.P. 996.440(a)). (See 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§367 et seq., 380 et seq.; 6 Cal. Proc. (5th), *Provisional Remedies*, §37 et seq.)

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e. Surety's Right of Subrogation.

1. In General.

9 Witkin Cal. Proc. Appeal § 266

[§ 266] In General.

"If a surety on the undertaking pays the judgment, either with or without action, after the judgment is affirmed, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment." (*C.C.P. 917.1(c)*; see *Smith v. Fall River Joint Union High School Dist.* (1934) 1 C.2d 331, 332, 34 P.2d 994, *infra*, §267; *Holmes v. Hughes* (1932) 125 C.A. 290, 291, 14 P.2d 149, *infra*, §267); *King v. Hartford Acc. & Indem. Co.* (1933) 133 C.A. 711, 717, 24 P.2d 906, *infra*, §268; on identical provision regarding undertaking for enforcement of right to attach order, see *C.C.P. 917.65*, *supra*, §248.)

C.C.P. 882(b) provides for the right of any surety who has paid the obligation of another to compel repayment from the principal. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §509.) The surety's application for repayment must be made "at any time before the judgment is satisfied in full or within 30 days thereafter." (*C.C.P. 883(a)*.) The order determining liability for repayment entitles the surety "to the benefit of the judgment to enforce liability, including every remedy that the judgment creditor has against the persons liable, to the extent of the liability." (*C.C.P. 883(b)*.) (See *Cozad v. Raisch Imp. Co.* (1934) 220 C. 657, 659, 32 P.2d 133 [decided under former C.C.P. 709]; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §510.)

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2. Where Surety Is Liable on Judgment Itself.

9 Witkin Cal. Proc. Appeal § 267

[§ 267] Where Surety Is Liable on Judgment Itself.

The right of the surety to subrogation or reimbursement exists where the sole obligation of the surety is on the appeal bond. If the surety is also liable on the judgment, it cannot, through the exercise of its right of subrogation arising from the appeal bond, escape its liability on the primary obligation. In *Smith v. Fall River Joint Union High School Dist.* (1934) 1 C.2d 331, 34 P.2d 994, plaintiff recovered judgment for personal injuries against three defendants. They appealed, and two gave appeal bonds. A surety company had previously given indemnity insurance to these two defendants covering the tort liability. On affirmance, the surety paid the judgment, took an assignment, and sought to enforce it against the other defendants. *Held*, this could not be done. The insurance policy made the surety liable on the judgment as a joint tortfeasor, and its payment operated as a complete satisfaction of the judgment. To assert the right of subrogation in its capacity as surety on the appeal bond, ignoring its capacity as insurer of the primary liability, would be to defeat its insurer's liability by indirection. (1 C.2d 339.)

It has been further held that an insurer in such a situation cannot shift its liability to the insured by bringing in some other company as surety on the appeal bond. In *Holmes v. Hughes* (1932) 125 C.A. 290, 14 P.2d 149, the insurance company was liable on a judgment for personal injuries against its insured. Without his knowledge, it took an appeal and procured an appeal bond from a surety company, agreeing to hold it harmless against liability thereunder. After affirmance, the insurance company became insolvent. The surety company paid the judgment and sought to enforce it against the insured. *Held*, though the insured was the nominal appellant and principal named in the appeal bond, the real principal and party liable was the insurance company that instituted the appeal and procured the bond. Under these facts, the surety company was not a surety for the insured and was not entitled to subrogation against him. (125 C.A. 295.)

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3. Rights as Between Successive Sureties.

9 Witkin Cal. Proc. Appeal § 268

[§ 268] Rights as Between Successive Sureties.

If more than one bond is given in an action on a debt, e.g., a defendant's bond to release attachment and a defendant's bond to stay execution on appeal, the successive sureties are liable in the inverse order in which they became sureties. Hence, the surety on the appeal bond--the last one--is ultimately liable and is not subrogated to the judgment creditor's remedies against the prior surety unless his or her equities are superior. The reason generally given is that the later surety helps prolong the litigation, thereby preventing the prior surety from exercising the right of subrogation against the debtor. (See *King v. Hartford Acc. & Indem. Co. (1933) 133 C.A. 711, 717, 24 P.2d 906.*)

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1. Automatic Stay.

a. Theory.

9 *Witkin Cal. Proc. Appeal* § 269

[§ 269] Theory.

Except as provided in *C.C.P. 917.1* et seq. and in *C.C.P. 116.810*, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." (*C.C.P. 916(a)*; see *Reed v. Superior Court* (2001) 92 *C.A.4th* 448, 452, 111 *C.R.2d* 842 [under *C.C.P. 916(a)*, appeal from denial of motion to disqualify opposing counsel did not automatically stay discovery proceedings].)

This does not mean, however, that automatic stay by appeal without undertaking is the general rule:

(1) The judgments most commonly rendered come within the statutes requiring an undertaking. (See *supra*, §230 et seq.)

(2) Some of those that do not are not stayed at all. (See *infra*, §276 et seq.)

(3) Judgments in the residual group falling within *C.C.P. 916(a)* are nevertheless subject to the discretionary power of the trial judge to require a bond. (See *infra*, §273.)

The automatic stay under *C.C.P. 916(a)* has been explained as follows: In situations covered by the bond statutes, the appellant is required to do something by the judgment. And, without the security of a bond, the successful respondent might lose the fruits of his or her judgment if the appellant disposed of the money or property, or put it out of his or her power to do the act directed. But where no such performance is called for, no bond is necessary to protect the respondent. Hence, the statutes requiring undertakings (*C.C.P. 917.1* et seq.) apply "only where the appellant has money or other property in his possession or under his control which has been adjudged by the lower court to belong to the respondent, or where the appellant has been directed to do some act for the benefit of the respondent." (*Halsted v. First Savings Bank* (1916) 173 *C.* 605, 608, 160 *P.* 1075; see *Pennie v. Superior Court* (1891) 89 *C.* 31, 33, 26 *P.* 617; *McCallion v. Hibernia Savings & Loan Soc.* (1893) 98 *C.* 442, 444, 33 *P.* 329; *Keeling Collection Agency v. McKeever* (1930) 209 *C.* 625, 628, 289 *P.* 617; *Jensen v. Hugh Evans & Co.* (1939) 13 *C.2d* 401, 406, 90 *P.2d* 72; 23 *Cal. L. Rev.* 602; 40 *Cal. L. Rev.* 255, 273.)

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1. Automatic Stay.

b. Illustrations.

9 Witkin Cal. Proc. Appeal § 270

[§ 270] Illustrations.

It is, of course, impossible to list all the types of judgments that fall within the residual class covered by *C.C.P. 916(a)* (supra, §269), but the following illustrations disclose their exceptional and specialized character:

(1) *Mandatory injunction*. The test is not its label, but its effect, and the difficult distinction between a prohibitory and a mandatory injunction must be applied in order to determine whether it is stayed by appeal alone or not stayed at all (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §278 et seq.). (See *Byington v. Superior Court* (1939) 14 C.2d 68, 69, 92 P.2d 896; *Smith v. Smith* (1941) 18 C.2d 462, 465, 116 P.2d 3 [order in divorce action that defendant move from home forthwith]; *Kettenhofen v. Superior Court* (1961) 55 C.2d 189, 190, 10 C.R. 356, 358 P.2d 684; *Ambrose v. Alioto* (1944) 62 C.A.2d 680, 685, 145 P.2d 32; *People v. Stutz* (1944) 66 C.A.2d 791, 794, 153 P.2d 182; *Pasadena v. Alhambra* (1946) 75 C.A.2d 91, 95, 170 P.2d 499; *In re Donovan* (1949) 94 C.A.2d 399, 401, 210 P.2d 860; *Podesta v. Linden Irr. Dist.* (1955) 132 C.A.2d 250, 260, 281 P.2d 905; *Palmco Corp. v. Superior Court* (1993) 16 C.A.4th 221, 224, 19 C.R.2d 682.)

(2) *Order granting writ of mandamus*. (See *Johnston v. Jones* (1925) 74 C.A. 272, 273, 239 P. 862.)

(3) *Decree of distribution*. (See *Estate of Dabney* (1951) 37 C.2d 402, 407, 232 P.2d 481.)

(4) *Orders appointing executor, administrator, or guardian*. (See *Estate of Lee* (1945) 26 C.2d 295, 297, 158 P.2d 193 [public administrator]; *Estate of Hultin* (1947) 29 C.2d 825, 833, 178 P.2d 756 [executor]; *In re Stratton* (1933) 133 C.A. 738, 739, 24 P.2d 832 [guardian of minor]; cf. *Rungie v. Superior Court* (1942) 55 C.A.2d 115, 130 P.2d 140 [order removing guardian of minor was stayed]; *Estate of Gibson* (1965) 233 C.A.2d 125, 128, 43 C.R. 302 [where administrator, despite appeal, proceeded to probate estate, after reversal, he was properly denied fees].)

(5) *Decree determining heirship*. (See *Estate of Neilson* (1960) 181 C.A.2d 769, 772, 5 C.R. 542.)

(6) *Interlocutory decree in partition action*. (See *Williams v. Wells Fargo Bank* (1941) 17 C.2d 104, 107, 109 P.2d 649.)

(7) *Judgment for costs alone.* The judgment is not considered a judgment directing payment of money. (See *supra*, §235.)

(8) *Order denying motion to strike complaint as SLAPP suit.* (See *Mattel v. Luce, Forward, Hamilton & Scripps* (2002) 99 C.A.4th 1179, 1189, 121 C.R.2d 794 [because appeal challenged legal viability of only cause of action asserted, it embraced the entirety of the action, and automatic stay was triggered]; *Santa Monica v. Stewart* (2005) 126 C.A.4th 43, 80, 24 C.R.3d 72.)

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1. Automatic Stay.

c. Order or Judgment Under Probate Code.

9 Witkin Cal. Proc. Appeal § 271

[§ 271] Order or Judgment Under Probate Code.

Prob.C. 1300 et seq. enumerate the orders and judgments that are appealable in all Probate Code proceedings, as well as those that are appealable only in specified Probate Code proceedings, such as those involving guardianship, conservatorship, and other protective proceedings. (See *supra*, §203 et seq.) Under *Prob.C. 1310*, an appeal from the grant or denial of a judgment or order listed in *Prob.C. 1300* et seq. stays the operation of the judgment or order (*Prob.C. 1310(a)*), with the following exceptions:

(1) *Directions to Fiduciary*. "[F]or the purpose of preventing injury or loss to person or property," the trial judge may give directions to the fiduciary as though no appeal were pending. An appeal of directions made by the court under this provision does not stay these directions. (*Prob.C. 1310(b)*; see *Conservatorship of McElroy* (2002) 104 C.A.4th 536, 555, 128 C.R.2d 485 [under *Prob.C. 1310(b)*, while appeal was pending, trial judge could approve order for substituted judgment, where purpose of judgment was to protect estate from large tax liability and to allow trusts to be properly funded].)

(2) *Guardianship of the Person*. In proceedings for guardianship of the person, *Prob.C. 917.7* (no stay in child custody and dwelling exclusion cases; *supra*, §225) applies. (*Prob.C. 1310(c)*.)

(3) *Undertaking in Court's Discretion*. An appeal does not stay the judgment or order if the court requires an undertaking pursuant to *Prob.C. 917.9* (undertaking in court's discretion; *infra*, §§272, 273) and the undertaking is not given. (*Prob.C. 1310(d)*.)

(4) *Order or Judgment for Payment of Money*. An appeal does not stay the operation and effect of a judgment for money or an order directing payment of money unless one of the following applies:

(a) A bond is posted as provided in *C.C.P. 917.1* (bond on appeal of judgment directing payment of money; *supra*, §230 et seq.). (*Prob.C. 1310(e)(1)*.)

(b) The payment is to be made from a decedent's estate being administered under *Prob.C. 7000* et seq. (14

Summary (10th), *Wills and Probate*, §404 et seq.) or from the estate of a person who is subject to a guardianship or conservatorship of the estate under *Prob.C. 1400* et seq. (14 *Summary* (10th), *Wills and Probate*, §903 et seq.). However, the court may require a bond in its discretion. (*Prob.C. 1310(e)(2)*.)

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2. Exception: Undertaking in Court's Discretion.

a. Background and Former Law.

9 *Witkin Cal. Proc. Appeal* § 272

[§ 272] Background and Former Law.

Former C.C.P. 949 was amended in 1927 to add the provision that "the court in its discretion may require an undertaking in an amount to be fixed by it conditioned for the performance of the judgment or order appealed from if the same is affirmed or the appeal is dismissed." (See *Los Angeles Local Joint Executive Bd. of Culinary Workers & Bartenders, A.F. of L. v. Stan's Drive-Ins* (1955) 136 C.A.2d 95, 96, 288 P.2d 291 [arbitration award, confirmed, directing appellant employer to pay various unnamed persons certain sums and other sums into health and welfare fund; \$ 25,000 bond]; *Balestrieri v. Sullivan* (1956) 138 C.A.2d 559, 560, 292 P.2d 310 [mandatory injunction directing appellant to remove fence].)

A narrow interpretation of this statute robbed it of much of its usefulness. The court in *Jensen v. Hugh Evans & Co.* (1939) 13 C.2d 401, 90 P.2d 72, held that the statutory language, "conditioned for the performance of the judgment," indicated an intent that a bond could be ordered only in "cases where the appellant was adjudged to have money or other property in his possession belonging to the respondent, or was required to perform some act for the benefit of the respondent or in pursuance of the directions of the judgment or order appealed from, and that in all other cases the provisions of the section should operate as a stay of proceedings without bond." (13 C.2d 406.) In other words, the trial judge could not require a bond in every case merely on the respondents' application. (13 C.2d 406.) (See *Estate of Dabney* (1951) 37 C.2d 402, 407, 232 P.2d 481; 23 Cal. L. Rev. 602; 40 Cal. L. Rev. 274.)

C.C.P. 917.9, replacing the earlier statute in 1968, did not contain the restrictive language relied on in *Jensen*. The court in *Estate of Murphy* (1971) 16 C.A.3d 564, 568, 94 C.R. 141, held that C.C.P. 917.9 wiped out the *Jensen* limitation. C.C.P. 917.9 was amended in 1972, mainly to nullify the broad construction given it in *Estate of Murphy*, and to reenact the substance of former C.C.P. 949. (See 4 *Pacific L. J.* 314.)

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2. Exception: Undertaking in Court's Discretion.

b. Current Statute.

9 Witkin Cal. Proc. Appeal § 273

[§ 273] Current Statute.

Perfecting an appeal does not stay enforcement of the judgment or order in cases not provided for in *C.C.P. 917.1* to *917.8*, inclusive, if the trial court, in its discretion, requires an undertaking and the undertaking is not given, in any of the following cases:

(1) The appellant was found to possess money or other property belonging to respondent. (*C.C.P. 917.9(a)(1).*)

(2) The appellant is required to perform an act for respondent's benefit pursuant to the judgment or order appealed from. (*C.C.P. 917.9(a)(2).*)

(3) The judgment against the appellant is solely for costs awarded to the respondent by the trial court under *C.C.P. 1021* et seq. (*C.C.P. 917.9(a)(3).*)

The undertaking must:

(a) Be in the sum fixed by the court and be in an amount sufficient to cover all damages that the respondent may sustain by reason of the stay in enforcement. (*C.C.P. 917.9(b).*)

(b) Be conditioned on the performance of the judgment or order appealed from or payment of the sums required thereby, if the judgment or order is affirmed or the appeal is withdrawn or dismissed. (*C.C.P. 917.9(c).*)

(c) Provide that if the judgment or order appealed from or any part of it is affirmed, or the appeal is withdrawn or dismissed, the appellant will pay all damages that the respondent may sustain by reason of the stay in the enforcement of the judgment. (*C.C.P. 917.9(c).*)

"Damages" are defined as either the reasonable compensation for the loss of use of the money or property, or payment of the amounts specified in *C.C.P. 917.9(a)(3)* (judgment solely for costs). (*C.C.P. 917.9(d).*)

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D. Stay by Appeal Without Undertaking.

3. Exemption From Undertaking Requirement.

a. Representatives.

9 Witkin Cal. Proc. Appeal § 274

[§ 274] Representatives.

"The trial court may, in its discretion, dispense with or limit the security required by any section in this chapter, when the appellant is an executor, administrator, trustee, guardian, conservator or other person acting in another's right." (C.C.P. 919.)

The theory is that where, e.g., conflicting claimants demand a trust fund, the trustee should not immediately pay to the one who gets judgment, but should await the outcome of the appeal in order to pay the party rightfully entitled. If he or she did pay, and judgment were later reversed, there would be great practical difficulty in getting the money back for redistribution pursuant to the final determination of the controversy. And ordinarily, the trustee should not be compelled to furnish bond for this justifiable noncompliance with the judgment. (*Kirsch v. Derby* (1892) 93 C. 573, 574, 29 P. 218 [executor]; *Mercantile Trust Co. of San Francisco v. Miller* (1913) 166 C. 563, 567, 137 P. 913 [statutory trustee: superintendent of banks, in liquidation proceeding]; *Feldmeier v. Superior Court* (1938) 12 C.2d 302, 306, 83 P.2d 929 ["It is the duty of a court to preserve the *status quo*, and in the absence of any showing that a trustee is financially unsound or that trust assets may be dissipated before the final judgment, the trial court may well exercise the discretion given it by section 946"]; Cal. Civil Practice, 5 Procedure, §36:37 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §350 et seq.)

Mercantile Trust Co. v. Miller, supra, 166 C. 568, questioned whether the section covered private trustees as well as those appointed by the court or acting by virtue of some official authority. It is now settled by the decision in *Feldmeier v. Superior Court*, supra, dealing with a trustee-depositary under a mortgage indenture, that the statute does cover these trustees. Where, however, the representative is not in fact acting in another's right, but for himself or herself, the statute is inapplicable and a bond is required. (*Estate of Danielson* (1891) 88 C. 480, 482, 26 P. 505 [administrator's appeal from order revoking his appointment]; *Feldmeier v. Superior Court*, supra, 12 C.2d 306.)

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3. Exemption From Undertaking Requirement.

b. Governmental Officers.

9 *Witkin Cal. Proc. Appeal* § 275

[§ 275] Governmental Officers.

C.C.P. 995.220 contains a general exemption from any statutory bond requirements for (1) the state or the people, subdivisions, agencies, and officers of the state; and (2) the United States, its agencies and officers. (See *Meyer v. State Land Settlement Bd.* (1930) 104 C.A. 577, 583, 286 P. 743; *Maurice L. Bein v. Housing Authority* (1958) 157 C.A.2d 670, 689, 321 P.2d 753 [Housing Authority is state agency within meaning of former statute]; cf. *F.R. Civ. P.*, Rule 62(e); 11 Federal Practice & Procedure (Wright & Miller) §2906.)

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E. Judgments Not Stayed by Appeal or Undertaking.

1. Self-Executing Judgments.

9 *Witkin Cal. Proc. Appeal* § 276

[§ 276] Self-Executing Judgments.

(1) *Rule and Theory.* It is a fundamental principle that a stay of enforcement can only operate on a judgment commanding or permitting some act to be done. Where the judgment is effective by itself, without any additional act, it is said to be "self-executing," and there is nothing to restrain. Hence, no stay can be obtained except in rare cases when a writ of supersedeas will issue. (See *Boggs v. North Amer. Bond & Mortg. Co.* (1936) 6 C.2d 523, 525, 58 P.2d 918; 40 Cal. L. Rev. 265; on writ of supersedeas, see *infra*, §279 et seq.)

(2) *Prohibitory Injunction.* The chief example of a self-executing judgment not stayed is a prohibitory injunction. It requires no process for its enforcement, but acts directly on the defendant. Accordingly, it remains in effect despite the taking of an appeal, and the appellant may be held in contempt for disobeying it. (See *Wolf v. Gall* (1916) 174 C. 140, 141, 162 P. 115; *Ohaver v. Fenech* (1928) 206 C. 118, 122, 273 P. 555; *Joerger v. Mt. Shasta Power Corp.* (1932) 214 C. 630, 637, 7 P.2d 706; *Dry Cleaners & Dyers Institute of San Francisco & Bay Counties v. Reiss* (1936) 5 C.2d 306, 308, 54 P.2d 470; *Agricultural Lab. Rel. Bd. v. Tex-Cal Land Management* (1987) 43 C.3d 696, 709, 238 C.R. 780, 739 P.2d 140; 40 Cal. L. Rev. 267; for distinction between prohibitory and mandatory injunctions, see 6 Cal. Proc. (5th), *Provisional Remedies*, §278 et seq.; 28 Cal. L. Rev. 599.)

The theory is thus set forth in *Wolf v. Gall*, *supra*: "By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitive injunction, and that the lower court has full power to punish a violation of such injunction pending the appeal. ... It is otherwise where the injunction is mandatory. The reason for this distinction is found in the inherent nature of an order which merely restrains or prohibits affirmative action. An appeal can operate as a *supersedeas* or stay only by arresting the enforcement by the court below of the judgment appealed from. ... A prohibitive injunction requires no execution for its enforcement. It acts 'directly without process upon the defendant.' In the case of a mandatory injunction, on the other hand, the contempt proceeding is a kind of process to carry into execution the affirmative command embodied in the judgment." (174 C. 142.)

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2. Other Types Not Stayed.

9 *Witkin Cal. Proc. Appeal* § 277

[§ 277] Other Types Not Stayed.

The other judgments that cannot be stayed, except by writ of supersedeas (§279 et seq.), are chiefly, though not exclusively, those described in *C.C.P. 917.8*. (See *40 Cal. L. Rev.* 264.)

(1) Decree in a *quo warranto* proceeding adjudging the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within the state. (*C.C.P. 917.8(a)*.)

(2) Judgment ordering a corporation officer or agent to permit a director, stockholder, or member to inspect or make copies of books or documents. (*C.C.P. 917.8(b)*); see *Becker v. Hendricks* (1930) 109 C.A. 166, 167, 292 P. 546 [supersedeas granted]; *Private Investors v. Homestake Mining Co.* (1936) 11 C.A.2d 488, 491, 54 P.2d 535 [supersedeas denied].)

(3) Decree adjudging a building or place to be a nuisance and ordering it closed. This is in part a mandatory injunction that would be stayed except for the express statutory provision. (*C.C.P. 917.8(c)*); see *People v. Jackson* (1923) 190 C. 257, 258, 212 P. 4; *People v. Piazza* (1922) 59 C.A. 43, 44, 209 P. 1017.)

(4) Judgment or order, including a temporary restraining order or preliminary injunction, granting relief in an action brought by a governmental agency under P.C. 11225 et seq. (Red Light Abatement Law) or *Health & Saf.C. 11570* et seq. (abatement of narcotics use). (*C.C.P. 917.8(d)*.)

(5) Order directing the sale of perishable property. The lower court may order it sold and the proceeds deposited with the clerk. (*C.C.P. 917.2*.)

(6) Order directing the execution of an instrument. Enforcement of a judgment or order directing execution of "one or more instruments" is not stayed on appeal unless "the instrument or instruments are executed and deposited" with the clerk "to abide the order of the reviewing court." (*C.C.P. 917.3*; see *Ballinger v. Ballinger* (1936) 7 C.2d 307, 308, 60 P.2d 279, 61 P.2d 45; *Guardianship of Morro* (1939) 14 C.2d 134, 135, 92 P.2d 1012.)

(7) Order in a special proceeding where the Legislature has expressly restricted the right to stay. (*Trede v. Superior Court* (1943) 21 C.2d 630, 634, 134 P.2d 745.)

(8) Order in a special proceeding under a statute not containing the catch-all incorporation by reference of the provisions of Part II of the Code of Civil Procedure governing actions (see 3 *Cal. Proc.* (5th), *Actions*, §66). (*Carpenter v. Pacific Mut. Life Ins. Co. of Calif.* (1939) 13 C.2d 306, 311, 89 P.2d 637 [liquidation proceeding under Insurance Code].)

(9) Judgment or order under *Health & Saf.C. 25181* (compliance with hazardous waste control statutes, rules, or regulations) or *Health & Saf.C. 25358.3(a)* (remedial action in response to release of a hazardous substance involving imminent or substantial danger to the public health or welfare or the environment). (*C.C.P. 917.15*; see 17 *Pacific L. J.* 717.)

(10) Order dismissing an action by a bankrupt plaintiff. (*Shah v. Glendale Fed. Bank* (1996) 44 C.A.4th 1371, 1373, 52 C.R.2d 417 [where breach of contract and tort action was initiated by, instead of against, plaintiffs, who then filed for bankruptcy, automatic stay of appeal granted by bankruptcy statute (11 U.S.C., §362(a)(1)) did not serve to stay order of dismissal when plaintiffs appealed from that order].)

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(8) *Order in special proceeding under statute not containing catch-all incorporation:* See *Veyna v. Orange County Nursery* (2009) 170 C.A.4th 146, 154, 87 C.R.3d 658 [buy-out procedure under *Corp.C. 2000* to prevent dissolution].



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3. Appeal From Order After Judgment.

9 Witkin Cal. Proc. Appeal § 278

[§ 278] Appeal From Order After Judgment.

A distinguishable but related situation arises where a judgment is rendered and no appeal is taken nor stay sought, and later, a special order after final judgment is made and an appeal is taken from that order. A stay bond given at this time can only affect the order; it cannot stay enforcement of the original judgment. (*Weldon v. Rogers* (1908) 154 C. 632, 635, 98 P. 1070 [order directing execution after 5 years]; *Macario v. Macario* (1929) 208 C. 601, 603, 283 P. 291 [order after judgment, denying motion to quash execution]; *Crowley v. Superior Court* (1936) 17 C.A.2d 52, 53, 61 P.2d 372 [original judgment against husband for support, imposing lien on property; later order fixing amount of delinquency and directing execution to issue]; *Peterson v. Lampton* (1941) 46 C.A.2d 751, 753, 116 P.2d 952 [following *Weldon*]; *Miller v. Gross* (1975) 48 C.A.3d 608, 612, 121 C.R. 875 [same]; see 40 Cal. L. Rev. 257.)

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F. Stay by Writ of Supersedeas.

1. In General.

a. Nature and Purpose of Writ.

9 *Witkin Cal. Proc. Appeal* § 279

[§ 279] Nature and Purpose of Writ.

Supersedeas is an extraordinary writ issued by an appellate court to a lower court or officer, directing that enforcement of a judgment be stayed pending an appeal in the court issuing the writ, where the relief is necessary to protect the appellant from serious injury in case of reversal, and will not cause the respondent disproportionate injury in case of affirmance. It has been said that the sole purpose of the writ is to preserve appellate jurisdiction pending review of the appeal and a ruling on the merits. (See *People v. Emeryville* (1968) 69 C.2d 533, 538, 72 C.R. 790, 446 P.2d 790, *infra*, §280; *Mills v. Trinity* (1979) 98 C.A.3d 859, 861, 159 C.R. 679; *In re Christy L.* (1986) 187 C.A.3d 753, 758, 232 C.R. 184.)

The writ is grounded on the inherent power of the Supreme Court or Court of Appeal, formerly recognized in the constitutional reference (former Cal. Const., Art. VI, §§4, 4b) to "writs necessary or proper to the complete exercise of its appellate jurisdiction." (See *Dulin v. Pacific Wood & Coal Co.* (1893) 98 C. 304, 306, 33 P. 123; *Southern Pac. Co. v. Superior Court* (1914) 167 C. 250, 252, 139 P. 69; *Halsted v. First Savings Bank* (1916) 173 C. 605, 609, 160 P. 1075; *Luckenbach v. Krempel* (1922) 188 C. 175, 177, 204 P. 591; *In re Imperial Water Co. No. 3* (1926) 199 C. 556, 558, 250 P. 394; *Rosenfeld v. Miller* (1932) 216 C. 560, 562, 15 P.2d 161; *Craig v. Stansbury* (1918) 37 C.A. 668, 670, 174 P. 404; *Sanchez v. Sanchez* (1960) 178 C.A.2d 810, 813, 818, 3 C.R. 501, citing the text; *Sun-Maid Raisin Growers of Calif. v. Paul* (1964) 229 C.A.2d 368, 374, 40 C.R. 352, *infra*, §296, citing the text; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1967) 255 C.A.2d 51, 53, 62 C.R. 819; *Davis v. Custom Component Switches* (1970) 13 C.A.3d 21, 28, 91 C.R. 181, *infra*, §289; *California Table Grape Com. v. Dispoto* (1971) 14 C.A.3d 314, 316, 92 C.R. 268, *infra*, §297, quoting the text; *In re Marriage of Dover* (1971) 15 C.A.3d 675, 680, 93 C.R. 384, *supra*, §228; *Estate of Murphy* (1971) 16 C.A.3d 564, 569, 94 C.R. 141, *infra*, §289; C.E.B., 1 Civil Appellate Practice 3d, §6.68 *et seq.*; Rutter Group, 1 Civil Appeals and Writs §7:260 *et seq.*; 40 *Cal. L. Rev.* 251; 17 *So. Cal. L. Rev.* 297; *cf.* *F.R. App. P.*, Rule 8; on procedure, see *infra*, §300 *et seq.*; on issuance of the writ in noncapital criminal appeals, see *People v. Burnette* (1939) 34 C.A.2d 663, 664, 94 P.2d 399; C.R.C., Rule 8.312; 17 *So. Cal. L. Rev.* 274.)

The power to issue the writ is now expressly confirmed by C.C.P. 923: "The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order

appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction."

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F. Stay by Writ of Supersedeas.

1. In General.

b. Effect of Constitutional Revision.

9 Witkin Cal. Proc. Appeal § 280

[§ 280] Effect of Constitutional Revision.

Former Cal. Const., Art. VI, §§4, 4b, seemingly authorized the Supreme Court and Court of Appeal to issue writs of supersedeas by providing that each of these courts should have power to issue the usual extraordinary writs "and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." This language was, however, construed not as a grant of power but as a recognition of an inherent power. (See *supra*, §279.) Accordingly, the Constitution Revision Commission, in revising Article VI, deleted the quoted language as unnecessary. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §3.)

In *People v. Emeryville* (1968) 69 *C.2d* 533, 537, 72 *C.R.* 790, 446 *P.2d* 790, defendant contended that the deletion had a restrictive effect on the power. The court, quoting the Judicial Council Report, rejected the contention. "A distinction must be drawn, however, between writs 'on the merits,' such as mandamus, certiorari, and prohibition, which themselves grant the substantive or procedural relief sought by the petitioner; and purely auxiliary writs such as supersedeas, which have the sole function of preserving the court's jurisdiction while it prepares, usually in the context of an appeal, to rule on those merits. The quoted language of the Constitution Revision Commission relates to the former only; indeed, in that regard the 1966 amendments give the courts more power than less. ... By contrast, no explicit constitutional grant is necessary to authorize issuance of such auxiliary writs as supersedeas, long recognized to be an attribute of the inherent power of the courts to preserve their own jurisdiction. ... The elimination of such surplusage, which was one of the primary tasks of the commission, thus has no substantive significance." (69 *C.2d* 538.)

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1. In General.

c. Discretion of Reviewing Court.

9 Witkin Cal. Proc. Appeal § 281

[§ 281] Discretion of Reviewing Court.

It is said that issuance of the writ of supersedeas is entirely discretionary with the reviewing court. This means that, where the Legislature has not provided for a stay by undertaking or by appeal (*supra*, §§230 et seq., 269 et seq.), a strong showing must be made by the appellant to obtain this extraordinary relief. "This court must consider the rights of respondents as well as those of appellants. Affirmances must be contemplated as well as reversals; in fact, until the contrary is shown, the presumption is in favor of the lower court's decision. A *supersedeas* is issued usually to protect the appellate court's jurisdiction. If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction." (*Nuckolls v. Bank of California* (1936) 7 C.2d 574, 578, 61 P.2d 927; see *McKenzie v. Los Angeles Life Ins. Co.* (1928) 88 C.A. 259, 260, 263 P. 338; *Willis v. Paul* (1931) 116 C.A. 733, 735, 3 P.2d 339; *Kerr v. Kerr* (1932) 126 C.A. 160, 162, 14 P.2d 316; *Private Investors v. Homestake Mining Co.* (1936) 11 C.A.2d 488, 492, 54 P.2d 535 ["it is incumbent upon him who seeks it to carry the burden of showing that necessity" and "to show that substantial questions will be presented upon the appeal"]; *Sandell v. Bailey* (1961) 193 C.A.2d 518, 520, 14 C.R. 347 [bond required by statute was unreasonably high; writ ordered on condition that bond in specified amount be furnished]; *Sun-Maid Raisin Growers of Calif. v. Paul* (1964) 229 C.A.2d 368, 375, 40 C.R. 352, *infra*, §296 [rights of respondents must also be considered].)

The situation is different, however, where the case is one in which the statute does provide a stay and the appellant is being unjustly deprived of it. In that case, supersedeas issues practically as a matter of right. (See *Estate of Dabney* (1951) 37 C.2d 402, 408, 232 P.2d 481; *Beshara v. Goldberg* (1963) 214 C.A.2d 767, 771, 29 C.R. 739, citing the text; *infra*, §284 et seq.)

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F. Stay by Writ of Supersedeas.

1. In General.

d. Retroactive and Corrective Effect.

1. Stay in Effect.

9 Witkin Cal. Proc. Appeal § 282

[§ 282] Stay in Effect.

If, in defiance of a statutory stay by appeal or undertaking, the respondent takes steps to enforce the judgment, the writ may have the corrective effect of annulling these invalid proceedings. (See *Smith v. Smith* (1941) 18 C.2d 462, 466, 116 P.2d 3 [contempt]; *Estate of Dabney* (1951) 37 C.2d 402, 408, 232 P.2d 481; *Holcomb v. Juster* (1919) 39 C.A. 462, 463, 179 P. 445 [money collected under execution was ordered returned]; *California Standard Finance Corp. v. Cornelius Cole, Ltd.* (1933) 132 C.A. 105, 107, 22 P.2d 520 [writ of execution was recalled and execution was quashed].)

In *Estate of Neilson* (1960) 181 C.A.2d 769, 5 C.R. 542, a widow received judgment in an heirship proceeding, determining her claim to community property and also a cost award against the estate. Both judgments were automatically stayed (see supra, §§270, 271), but nevertheless, she levied execution on funds in possession of the executor to satisfy the cost judgment, and the trial judge refused to recall the execution. *Held*, writ of supersedeas issued. Even though the sheriff had already collected the money, the writ, in its corrective capacity, was available so long as the funds had not yet been paid over to the widow. (181 C.A.2d 774.) (See 90 A.L.R.2d 483 [effect of supersedeas or stay on antecedent levy].)

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F. Stay by Writ of Supersedeas.

1. In General.

d. Retroactive and Corrective Effect.

2. Stay Not in Effect.

9 *Witkin Cal. Proc. Appeal* § 283

[§ 283] Stay Not in Effect.

If, at the time enforcement steps are taken, no stay is in effect, the writ will not issue to annul these valid steps. In *Messenkop v. Duffield* (1930) 211 C. 222, 294 P. 715, a stay bond failed for insufficiency of sureties. Application was made for supersedeas, but, before issuance of either the writ or a temporary stay order, execution was completed. *Held*, the writ should be denied because at the time of execution, there was no effective stay. "The effect of a *supersedeas* is not to undo what already has been done, but to hold matters in the same condition as they existed at the time the stay became effective." (211 C. 225.) (See *Craig v. Stansbury* (1918) 37 C.A. 668, 670, 174 P. 404 [writ was not available to set aside execution sale completed before notice of appeal].)

The writ may nevertheless issue where enforcement proceedings have begun but are not completed. In *Williams v. Spence* (1956) 141 C.A.2d 213, 296 P.2d 577, execution was levied on a fund prior to issuance of a stay order. But before the money was paid to the sheriff, supersedeas was granted to prevent him from collecting the money and turning it over to plaintiff, and to stay any proceedings supplemental to execution. (141 C.A.2d 218.)

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F. Stay by Writ of Supersedeas.

2. Reasons for Granting Writ.

a. Statutory Stay Is Violated.

1. Appeal Stayed by Undertaking.

9 Witkin Cal. Proc. Appeal § 284

[§ 284] Appeal Stayed by Undertaking.

Where a statutory stay may be had by undertaking, and a sufficient bond is given, but the lower court or officer nevertheless proceeds to enforce the judgment, supersedeas will issue as a matter of course unless some special affirmative reason for denying it appears. (See *McAneny v. Superior Court* (1906) 150 C. 6, 9, 87 P. 1020; *Jameson v. Chanslor-Canfield Midway Oil Co.* (1916) 173 C. 612, 616, 160 P. 1066; *Murphy v. Koford* (1922) 189 C. 489, 490, 209 P. 360; *Smith v. Smith* (1927) 201 C. 217, 218, 256 P. 419; *Bolles v. Hilton & Paley* (1929) 101 C.A. 92, 94, 281 P. 73.)

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2. Reasons for Granting Writ.

a. Statutory Stay Is Violated.

2. Automatic Stay.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 285

[§ 285] In General.

Supersedeas should also issue where the trial court attempts to enforce a judgment that is automatically stayed by an appeal. "[T]he case before us is one, then, where the appeal being regularly taken, the statute in terms stays execution of the judgment, and this court is without any discretionary power in the matter. It can only enforce the law, regardless of the possible loss or hardship to the respondent." (*Zappettini v. Buckles* (1914) 167 C. 27, 31, 138 P. 696.) "[I]t is unnecessary for us to balance or weigh the arguments with reference to the possible irreparable injury to appellants or respondents as would be necessary if the question of the issuance of the writ was solely a matter of our discretion." (*Feinberg v. One Doe Co.* (1939) 14 C.2d 24, 29, 92 P.2d 640.)

A number of decisions support this rule. (See *Archer v. Miller* (1923) 192 C. 67, 68, 218 P. 410; *Smith v. Smith* (1941) 18 C.2d 462, 466, 116 P.2d 3; *California Standard Finance Corp. v. Cornelius Cole, Ltd.* (1933) 132 C.A. 105, 108, 22 P.2d 520; *Mathewson v. Naylor* (1936) 17 C.A.2d 420, 421, 62 P.2d 154; *Guardianship of Walters* (1949) 93 C.A.2d 208, 211, 208 P.2d 713; *Podesta v. Linden Irr. Dist.* (1955) 132 C.A.2d 250, 261, 281 P.2d 905 [writ issued "to set the matter at rest"]; *Estate of Neilson* (1960) 181 C.A.2d 769, 772, 5 C.R. 542, *supra*, §282; *Beshara v. Goldberg* (1963) 214 C.A.2d 767, 771, 29 C.R. 739; *Donen v. Donen* (1964) 228 C.A.2d 441, 450, 39 C.R. 547, quoting the text [order in nature of mandatory injunction]; *Paramount Pictures Corp. v. Davis* (1964) 228 C.A.2d 827, 839, 39 C.R. 791, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §282 [mandatory parts of injunction]; *Nielsen v. Stumbos* (1990) 226 C.A.3d 301, 303, 276 C.R. 272, citing the text; 12 *U.C.L.A. L. Rev.* 1227.)

The writ issues even though the judgment is self-executing. In *Estate of Dabney* (1951) 37 C.2d 402, 232 P.2d 481, petitioners, claiming adversely to an estate and seeking in their separate actions to establish a constructive trust, filed objections to petitions for ratable distribution. Their appeal from orders of denial resulted in an automatic stay under C.C.P. 916(a) (*supra*, §269), but notwithstanding this, the executor declared his intention to distribute. Supersedeas was asked on a showing that the amounts involved in ratable distribution orders were large, and the executor's bond was small, so that even if successful on their appeal, they would be forced to take prohibitively expensive steps to recover from the individual distributees. The court, reviewing the authorities discussed above, observed that "in none of those

cases does it appear that the appeal effected an automatic stay of proceedings in the lower court." (37 C.2d 408.) Pointing to other decisions in which the writ was issued to stay acts of executors or guardians, the court concluded that the application should be granted. Thus, the objection of self-executing judgment now seems to apply only in the situations in which supersedeas is wholly discretionary (see *infra*, §294); it has no force where a statutory stay is violated and supersedeas is practically a matter of right.

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a. Statutory Stay Is Violated.

2. Automatic Stay.

bb. Necessity of Writ.

9 *Witkin Cal. Proc. Appeal* § 286

[§ 286] Necessity of Writ.

A spurious problem has arisen in connection with the effect of an automatic stay on the need for a writ of supersedeas, as is indicated in the following statement in *Williams v. Wells Fargo Bank* (1941) 17 C.2d 104, 109 P.2d 649: "For these reasons the appeal has stayed all proceedings upon the interlocutory decree and the petitioner does not require the writ of this court to that effect. The petition is therefore denied." (17 C.2d 107.) Taken literally, this would mean that the writ of supersedeas does not issue in cases of automatic statutory stay, but in view of the many cases in which the writ has been issued, this is clearly untrue. The correct analysis appears to be as follows:

(1) If the respondent takes no steps to enforce the judgment, a writ of supersedeas is superfluous; it would merely duplicate the existing statutory stay, and cannot be said to be an exercise of inherent power of the appellate court. Why does the appellant ask for it? Because, being in doubt whether the judgment is one that is automatically stayed, he or she applies for the writ as a precautionary measure. But once this point is resolved by the appellate court, its denial of the writ on the ground that a statutory stay already exists is a conclusive legal determination, just as effective in its warning to the respondent as the issuance of a writ. (See *Williams v. Wells Fargo Bank*, *supra*; cf. *People v. Stutz* (1944) 66 C.A.2d 791, 795, 153 P.2d 182 [writ was denied without prejudice where no enforcement proceedings were pending; "If any such proceedings are started the need and right to apply for the writ may arise"]; *Estate of Lee* (1945) 26 C.2d 295, 296, 158 P.2d 193 [same].)

(2) If the respondent or trial court, mistakenly believing that the judgment is not automatically stayed, takes steps to enforce it, the writ may be used in its "corrective capacity," to prevent these unauthorized steps or to annul action already taken. (See *Smith v. Smith* (1941) 18 C.2d 462, 466, 116 P.2d 3; *supra*, §282.)

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b. Bond Is Valid but Sureties Are Insufficient.

9 *Witkin Cal. Proc. Appeal* § 287

[§ 287] Bond Is Valid but Sureties Are Insufficient.

(1) *Good Faith and Diligence*. A frequent reason for applying for supersedeas is the excusable failure to obtain a stay after filing a bond in good form. The failure of the sureties to justify may be a surprise to the appellant. If a showing of good faith and proper diligence is made, a writ of supersedeas may be issued on condition of furnishing a proper bond. (See *Nonpareil Mfg. Co. v. McCartney* (1904) 143 C. 1, 3, 76 P. 653 [appellant mistakenly followed wrong procedure]; *Segarini v. Bargagliotti* (1924) 193 C. 538, 539, 226 P. 2 [sureties failed to appear because of illness in family]; *Foster v. Fernandes* (1927) 200 C. 274, 275, 252 P. 726 [sureties were 1 day late through mistake as to date]; *Rosenfeld v. Miller* (1932) 216 C. 560, 562, 15 P.2d 161 [appellant reasonably believed surety was sufficient, discovered facts at hearing, too late to procure another]; *Ellinwood v. McCoy* (1933) 133 C.A. 597, 598, 24 P.2d 549 [appellant's neglect was excusable; respondent recovered large judgment, was financially irresponsible, so that if judgment were reversed appellant could not reimburse himself]; *Parrett v. Carothers* (1935) 4 C.A.2d 724, 726, 41 P.2d 595 [competency of surety questioned]; *Dairy Holding Co. v. Pacific Coast Dairy Co.* (1937) 19 C.A.2d 252, 253, 64 P.2d 1111 [sureties inadvertently failed to appear]; *Dowling v. Fedele* (1953) 116 C.A.2d 849, 851, 254 P.2d 605; *Sloan v. Stearns* (1954) 128 C.A.2d 717, 719, 275 P.2d 913.)

In *Kim v. Chinn* (1942) 20 C.2d 12, 123 P.2d 438, the court declared that "where it appears that petitioner has in good faith attempted to comply with the law and the respondent will not suffer injury, liberality should characterize the exercise of that discretion to the end that the *status quo* may be maintained and the fruits of the appeal preserved." (20 C.2d 15.)

(2) *Lack of Good Faith and Diligence*. Where the appellant fails to show good faith and diligence, the writ will be denied. *Williams v. Borgwardt* (1897) 115 C. 617, 47 P. 594, makes this clear: "In short, there is nothing to show either accident, surprise, inadvertence, or excusable neglect, and for this court to extend the relief asked would be equivalent to making a rule that the appellant may always neglect to follow the procedure prescribed by the statute, secure that upon his mere request this court will issue its *supersedeas* upon the filing of a bond to be approved by us. We do not think such practice should be sanctioned or encouraged. It would necessarily involve greater expense and inconvenience to respondents, and would seriously encroach upon the time of this court." (115 C. 618.) (See *Reliance Acceptance Corp. v. Lundblade* (1929) 96 C.A. 371, 372, 274 P. 360; *Willis v. Paul* (1931) 116 C.A. 733, 735, 3 P.2d 339.)

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c. Where Judgment Is Not Stayed by Appeal or Undertaking.

9 *Witkin Cal. Proc. Appeal* § 288

[§ 288] Where Judgment Is Not Stayed by Appeal or Undertaking.

The preceding sections illustrate the routine use of supersedeas as a means of protecting the normal right to a stay of execution already given by statute. The important purpose of the writ, however, is to go beyond the scope of a statutory stay of execution, and to give a stay where the judgment is not stayed by appeal or undertaking. (See *C.C.P.* 923, *supra*, §279.)

Thus, where the judgment falls entirely outside the scope of a statutory stay, it may nevertheless be stayed by writ of supersedeas if no legislative purpose would be violated (*infra*, §292). An example is a judgment, followed by execution, motion to recall execution, denial of the motion, and appeal from the latter order. This appeal, even with bond, does not stay execution on the *judgment itself* (see *supra*, §278); hence, a writ of supersedeas may be necessary. (*Macario v. Macario* (1929) 208 C. 601, 602, 283 P. 291.) (See *Kent v. County Fire Ins. Co. of Philadelphia* (1938) 25 C.A.2d 676, 677, 78 P.2d 436 [order denying relief under *C.C.P.* 473]; *Mills v. Trinity* (1979) 98 C.A.3d 859, 861, 159 C.R. 679 [to stay enforcement of mandamus issued by trial court ordering county to refrain from enforcing resolution for increased fees for planning department].) (On supersedeas in child custody cases, see *supra*, §§226, 227.)

In *Rogers v. Superior Court* (1910) 158 C. 467, 111 P. 357, the lower court ordered a sale of property as perishable (see *C.C.P.* 917.2). It consisted of land, railroad machinery and rolling stock, and franchises, in no danger of immediate destruction or deterioration. The writ was issued. "[I]f it appears that the court below has ordered a sale of property as perishable which clearly, and as a matter of law, is not of that nature, or if, as a matter of fact, it is extremely doubtful if it is perishable ... , we have no doubt this court, by virtue of its inherent powers as a court of appeal, has power to order a stay of proceedings pending such appeal, upon such terms and such security as, in its discretion, it may deem proper." (158 C. 468.)

Supersedeas was formerly granted to stay the trial on appeal from an order of the superior court granting or denying a motion for change of venue. (See *Bardwell v. Turner* (1933) 219 C. 228, 230, 25 P.2d 978; *Walker v. Wells Fargo Bank* (1937) 8 C.2d 447, 448, 65 P.2d 1299; *Alhambra Shumway Mines v. Alhambra Gold Mine Corp.* (1952) 109 C.A.2d 119, 120, 240 P.2d 340; *Erickson v. Bohne* (1953) 120 C.A.2d 606, 607, 261 P.2d 782; cf. *Kane v. Universal Film Exchanges* (1939) 32 C.A.2d 365, 366, 89 P.2d 693, 91 P.2d 577 [writ denied]; *Friedman Bag Co. v. Shrier* (1961)

194 C.A.2d 561, 563, 15 C.R. 38 [no substantial question on appeal, writ denied].) Unlimited civil case venue orders are now reviewable by mandamus with a statutory stay. (*C.C.P. 400*; see *supra*, §170.) Limited civil case venue orders are appealable. (See *supra*, §170.)

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d. Cost of Bond Is Prohibitive.

9 *Witkin Cal. Proc. Appeal* § 289

[§ 289] Cost of Bond Is Prohibitive.

In two cases, the court, exercising its broad discretion to preserve the status quo pending an appeal (see *C.C.P.* 923, *supra*, §279), issued supersedeas to stay a judgment that could have been stayed by an undertaking, where the cost of the undertaking was, under the circumstances, prohibitive.

(1) *Undertaking Required by Statute.* In *Davis v. Custom Component Switches* (1970) 13 C.A.3d 21, 91 C.R. 181, plaintiff received a \$ 3.5 million judgment against a corporation for money due from royalties. He collected \$ 1.8 million, leaving a balance of \$ 1.7 million. The corporation appealed, raising substantial issues. An undertaking in double the amount due (or 1 1/2 times the amount if a corporate surety could be found) was beyond the capacity of the corporation, and execution on the judgment would wipe out minority shareholders. A stay of execution would cause no prejudice to plaintiff, for the corporation was operating at a profit that would enable it to satisfy the judgment if it were affirmed. *Held*, supersedeas should issue, but on condition that the appeal be prosecuted within the minimum periods of time specified by the rules. (13 C.A.3d 26.) (See *infra*, §307.)

(2) *Undertaking Required by Trial Judge.* In *Estate of Murphy* (1971) 16 C.A.3d 564, 94 C.R. 141, on an appeal from an order terminating and distributing the corpus of a \$ 2 million testamentary trust, the order was one that would ordinarily be stayed on appeal without bond, but the probate judge, acting within the discretion conferred by *C.C.P.* 917.9, required a \$ 175,000 bond as a condition to the stay. (See *supra*, §272.) Appellants, financially unable to comply, sought supersedeas. *Held*, writ granted.

(a) The bond was too large for many of the appellants, and, without a stay, the property would be distributed to many parties including some nonresidents, and its recovery would be extremely difficult. (16 C.A.3d 569.)

(b) The respondent would not be prejudiced by delay in distribution, for the trustee was a reputable financial institution. "[T]he potential damage which may result to appellants in allowing the estate to be distributed at this time outweighs the hardship to respondent in postponing distribution." (16 C.A.3d 569.)

The same condition of prompt prosecution of the appeal as in *Davis* was imposed. (See *infra*, §307.)

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3. Reasons for Refusing Writ.

a. In General.

1. No Valid Appeal.

9 Witkin Cal. Proc. Appeal § 290

[§ 290] No Valid Appeal.

Supersedeas, which is issued in aid of jurisdiction over a particular appeal, will not be granted where the appeal from the judgment or order is void because of nonappealability, late filing, or other cause. (See *Whittell v. Renz* (1939) 32 C.A.2d 282, 283, 89 P.2d 668 [appeal from orders, not from judgment; no supersedeas as to judgment]; *Brown v. Trophy-Craft Co.* (1948) 85 C.A.2d 246, 248, 192 P.2d 779 [nonappealable interlocutory order]; *Peninsula Properties Co. v. Santa Cruz* (1951) 106 C.A.2d 669, 671, 235 P.2d 635 [same]; *Solomon v. Solomon* (1952) 110 C.A.2d 660, 661, 243 P.2d 556 [no appeal taken from order in question]; *In re Christy L.* (1986) 187 C.A.3d 753, 759, 232 C.R. 184, citing the text [writ will not be granted where underlying judgment is final and appeal is no longer pending]; cf. *Hale & Norcross Silver Mining Co. v. Fox* (1898) 122 C. 56, 57, 54 P. 270 [supersedeas was granted pending determination of question of appealability of order on motion to dismiss]; *Guardianship of Davis* (1966) 246 C.A.2d 290, 294, 295, 54 C.R. 621, citing the text [same].)

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a. In General.

2. Appeal Is Without Merit.

9 Witkin Cal. Proc. Appeal § 291

[§ 291] Appeal Is Without Merit.

If the appeal is obviously taken for delay, is plainly without merit, or presents no substantial questions, the writ may properly be denied. (*People v. Jackson* (1923) 190 C. 257, 263, 212 P. 4; *O'Brien v. Municipal Court* (1934) 140 C.A. 362, 364, 35 P.2d 395 ["Where it is not probable that the appellant is entitled to the relief denied by the judgment from which an appeal has been taken, *supersedeas* will not issue"]; *Private Investors v. Homestake Mining Co.* (1936) 11 C.A.2d 488, 492, 497, 54 P.2d 535; *Olsen v. Board of Supervisors of San Luis Obispo* (1939) 30 C.A.2d 635, 637, 87 P.2d 36; on sanctions for frivolous application for the writ, see *Coast Savings & Loan Assn. v. Black* (1986) 187 C.A.3d 1494, 1495, 232 C.R. 483, 8 Cal. Proc. (5th), *Extraordinary Writs*, §215.)

There are two qualifications to this proposition:

(1) The frivolous character of the appeal must clearly appear on the showing made in response to the petition for the writ; the court will not go into the record or attempt to resolve substantial questions relating to the merits. (*Estate of Dabney* (1951) 37 C.2d 402, 406, 232 P.2d 481.)

(2) Where the writ is sought because of refusal to recognize a statutory stay as a matter of right, there is no real discretion, and therefore, little reason for inquiring into the merits. (See *supra*, §284 et seq.; cf. *Murphy v. Koford* (1922) 189 C. 489, 491, 209 P. 360 [mandamus to compel trial court to fix a stay bond; "A stay may be had as well on a frivolous appeal as on any other".])

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a. In General.

3. Writ Would Defeat Statutory Purpose.

9 Witkin Cal. Proc. Appeal § 292

[§ 292] Writ Would Defeat Statutory Purpose.

The court should not exercise its discretion in favor of issuance where a reasonable statutory object would be defeated. In *United States v. Berg* (1927) 202 C. 10, 258 P. 942, the judgment declared a building to be a nuisance, and former C.C.P. 949 (now C.C.P. 917.8) denies a stay in such a case. The opinion observes that "the legislature, by amending the section, has indicated as its opinion that there should be no stay of an action to abate a nuisance where the judgment orders the closing of the building for any period of time, and the court having jurisdiction of the appeal ought to be careful not to nullify the statute." (202 C. 15.) (See *Private Investors v. Homestake Mining Co.* (1936) 11 C.A.2d 488, 491, 54 P.2d 535.)

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a. In General.

4. Failure To Exhaust Other Remedies.

9 *Witkin Cal. Proc. Appeal* § 293

[§ 293] Failure To Exhaust Other Remedies.

The appellant should diligently attempt to obtain a statutory stay in a proper case, and is not entitled to supersedeas if he or she refuses to act or loses the right by inexcusable neglect. (*Davis v. Davis* (1930) 208 C. 676, 678, 284 P. 442; *Wilson v. Johnson* (1934) 1 C.2d 288, 289, 34 P.2d 487; *Guardianship of Morro* (1939) 14 C.2d 134, 135, 92 P.2d 1012 [failure to obtain stay by deposit of instrument under C.C.P. 917.3]; on lack of diligence to obtain justification of sureties, see *supra*, §287; on mandamus to compel trial judge to fix amount of bond, see *supra*, §254.)

Where giving a stay is committed to the trial court's discretion (see *supra*, §225), this should be invoked before seeking supersedeas. As the court observed in *Nuckolls v. Bank of California* (1936) 7 C.2d 574, 61 P.2d 927: "Inasmuch as the legislature has provided a method by which the trial court, in a proper case, may grant the stay, the appellate courts, assuming that they have the power, should not, except in some unusual emergency, exercise their power until the petitioner has first presented the matter to the trial court." (7 C.2d 577.)

If the appellant does invoke the trial court's discretion and is denied relief, supersedeas will ordinarily be refused, despite the exhaustion of this remedy, because the discretion of the trial court will be upheld in the absence of a clear showing of abuse. (See *Plummer v. Agoure* (1912) 20 C.A. 319, 322, 128 P. 1014 [unlawful detainer]; *Ott v. Gotfried* (1940) 39 C.A.2d 397, 398, 103 P.2d 207 [appeal under former law from denial of motion for change of venue for convenience of witnesses, and refusal to grant continuance pending appeal].)

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3. Reasons for Refusing Writ.

b. Self-Executing Judgment: In General.

1. Theory of Refusal.

9 *Witkin Cal. Proc. Appeal* § 294

[§ 294] Theory of Refusal.

The traditional view is that there must be something for the writ to restrain, i.e., some process of the court (not the mere act of a party) directed toward the enforcement of the judgment or order. If the judgment is self-executing and requires no process for enforcement, there is no statutory stay (see *supra*, §276), and, as a general rule, supersedeas is equally inappropriate. (*Madera v. Raymond Granite Co.* (1902) 138 C. 244, 246, 71 P. 112; *Hulse v. Davis* (1927) 200 C. 316, 317, 253 P. 136; *Stewart v. Hurt* (1937) 9 C.2d 39, 41, 68 P.2d 726; *Caminetti v. Guaranty Union Life Ins. Co.* (1943) 22 C.2d 759, 763, 141 P.2d 423; *Wood v. Board of Fire Commrs.* (1920) 50 C.A. 594, 595, 195 P. 739; *In re Graves* (1923) 62 C.A. 168, 169, 216 P. 386; *Lickley v. County Bd. of Education* (1923) 62 C.A. 527, 529, 217 P. 133; *Parker v. Board of Dental Examiners of Calif.* (1930) 108 C.A. 156, 157, 291 P. 421; *Deepwell Homeowners' Protective Assn. v. City Council of Palm Springs* (1965) 239 C.A.2d 63, 65, 48 C.R. 321, citing the text; see 40 *Cal. L. Rev.* 265; *infra*, §295.)

This view is explained in two leading cases:

(1) "It has been repeatedly held by this court that a *supersedeas* will issue only to restrain the court below or its officers from proceeding to enforce a judgment pending appeal and that such writ is limited to restraining any action under the authority of the court upon the judgment appealed from. In other words, a writ of *supersedeas* will not issue to restrain or prevent a party from acting or proceeding under a judgment from which an appeal has been duly taken where no process of or action by the court below is involved." (*In re Imperial Water Co. No. 3* (1926) 199 C. 556, 557, 250 P. 394.)

(2) "The writ itself is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining any action upon the judgment appealed from. It cannot be used to perform the functions of an injunction against the parties to the action, restraining them from any act in the assertion of their rights, other than to prevent them from using the process of the court below to enforce the judgment, nor can the writ be employed for any purpose upon persons not parties to the judgment. Its effect is merely to leave the parties to the judgment in the same position as they were prior to its entry, and to prevent the appellant from being prejudiced by its enforcement." (*Dulin v.*

Pacific Wood & Coal Co. (1893) 98 C. 304, 306, 33 P. 123.)

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b. Self-Executing Judgment: In General.

2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 295

[§ 295] Illustrations.

Although the most common type of self-executing judgment is the prohibitory injunction (*infra*, §296 et seq.), this reason for denying supersedeas is invoked in connection with various other types.

In *Dulin v. Pacific Wood & Coal Co.* (1893) 98 C. 304, 33 P. 123, D sued in the superior court to set aside the election of C as a corporate director, and to confirm his own election. He received judgment. Defendants appealed, and sought supersedeas to restrain D from acting or interfering with C's activities. *Held*, writ denied; D's assuming to act as director was not a proceeding upon the judgment under court process, but independent; and appellants did not seek to stay the court's attempted enforcement, but to prevent D, an individual, from acting. (98 C. 308.)

In *re Imperial Water Co. No. 3* (1926) 199 C. 556, 250 P.2d 394, involved a superior court order dissolving respondent corporation and directing distribution of its property through the directors as trustees. Petitioner appealed and asked for supersedeas, contending that she had a damage action against the corporation then pending on appeal, and that distribution of the assets would deprive her of any opportunity of enforcing her claim if successful. *Held*, writ denied; its issuance would simply enjoin the respondent trustees from acting, and would not restrain the lower court, for no court process or enforcement was involved. Petitioner's contention that the directors, while acting as trustees, were court officers, was rejected; they were mere statutory liquidators and not subject to control by writ of supersedeas. (199 C. 557.)

In *Hulse v. Davis* (1927) 200 C. 316, 253 P. 136, petitioner recovered judgment and levied execution on respondent's property. The lower court later recalled and quashed the writ, ordering the sheriff to release the property. Petitioner appealed from this order, and sought supersedeas to require the sheriff to keep the property pending appeal. *Held*, writ denied; the order quashing execution was self-executing, terminating the effect of the levy without any further process. (200 C. 317.)

In *Stewart v. Hurt* (1937) 9 C.2d 39, 68 P.2d 726, petitioner trustee was sued, and judgment was rendered (a) removing him, (b) setting aside an order allowing his first account, and (c) ordering him to account de novo. He

appealed, turned over all trust personalty to his successor (allegedly to avoid contempt proceedings), and then sought supersedeas. His contention was that he had an equitable lien against the trust estate for money advanced, which might be lost by sale of the trust property to a bona fide purchaser. *Held*, the removal of petitioner was a self-executing provision; the order to account de novo was not an attempted enforcement of the judgment, but a part of it, contemplating a further proceeding with a full hearing; and supersedeas was inappropriate. (9 C.2d 42.)

In *Solorza v. Park Water Co.* (1947) 80 C.A.2d 809, 183 P.2d 275, M Water Co. sold its assets to defendant P Water Co. Petitioner, on behalf of himself and other dissident shareholders of M Co., sued to rescind. The trial judge ordered rescission conditioned on restoration of consideration, but, on M Co.'s failure to restore, entered final judgment denying rescission. Petitioner appealed and sought supersedeas, alleging that he and other water users had paid their charges into a trust fund to protect them in the event that they were successful on appeal, and that defendant P Co. had refused to furnish water to them on that basis. *Held*, supersedeas would not issue. Before the action was commenced, defendant P Co. was in possession of the water system, furnishing water at a specified rate, and the trial judge's denial of rescission maintained the status quo, with no process required to carry the judgment into effect. To issue the writ would not be to "stay" enforcement of a judgment, but rather to issue a new judgment--an appellate injunction. (80 C.A.2d 814.) (But see *infra*, §299.)

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c. Self-Executing Judgment: Prohibitory Injunction.

1. Prohibitory Injunction Granted.

aa. Former Law: Writ Refused.

9 *Witkin Cal. Proc. Appeal* § 296

[§ 296] Former Law: Writ Refused.

Where a prohibitory injunction is granted by the trial court, the inherent power of the reviewing court to issue supersedeas is recognized (see *infra*, §297), but there is still the objection that the decree is self-executing, and in the earlier cases this was generally deemed to be a sufficient reason for denying the writ. (See *Clayton v. Schultz* (1939) 12 C.2d 703, 708, 87 P.2d 355; *Crown Body Corp. v. Los Angeles* (1942) 50 C.A.2d 499, 503, 123 P.2d 566; *Rubin v. American Sportsmen Television Equity Soc.* (1951) 102 C.A.2d 288, 289, 227 P.2d 303; 25 So. Cal. L. Rev. 121.)

The courts in these earlier cases were unmoved by the fact of disruption of a large business organization, or the huge expense or loss entailed by cessation of operations of a private concern. Thus, in *Ohaver v. Fenech* (1928) 206 C. 118, 273 P. 555, appellants maintained a hog ranch under contracts with the city of Sacramento and others whereby they collected garbage from Sacramento hotels and other places for food. A temporary injunction on the ground of nuisance was ordered on plaintiff's motion. Upon appeal, supersedeas was requested, appellants asserting that it was practically impossible before trial to find another place to maintain the hogs or use the garbage. *Held*, writ denied; the hardship and loss could not be considered where the relief would deprive plaintiffs of the free use and enjoyment of their property. (206 C. 124.)

In *French Art Cleaners v. State Bd. of Dry Cleaners* (1948) 88 C.A.2d 45, 198 P.2d 91, plaintiff cleaner obtained a temporary prohibitory injunction against enforcement of a minimum price schedule by defendant state board. Defendant's application for supersedeas was denied on the basis of the following analysis: (a) In *Food & Grocery Bureau of Southern Calif. v. Garfield* (1941) 18 C.2d 174, 114 P.2d 579, *infra*, §297, the prohibitory injunction stopped the merchant's current practice of a long-established character, and it was held that the merchant met the burden of showing his right to continue pending appeal. (b) In this, the converse of the *Garfield* case, the injunction permitted continuance of a long-established practice. The heavier burden on defendant board, to show why the merchant should discontinue this practice pending appeal, was not met. (88 C.A.2d 46.)

In *Sun-Maid Raisin Growers of Calif. v. Paul* (1964) 229 C.A.2d 368, 40 C.R. 352, defendant State Director of

Agriculture made a 1-year marketing order affecting use of raisins in distillation of liquor. On the day it was to go into effect, plaintiff packers sued to enjoin its enforcement on the ground that federal regulations had preempted the field. The lower court granted a preliminary prohibitory injunction. Defendant appealed and sought supersedeas. *Held*, denied, because (a) there was no showing of irreparable injury, and (b) the order would expire during the period of determination of the appeal on the merits; hence, issuance of the writ "would in practical effect be a decision contrary to the injunction and in favor of the appellants for most of the period involved." (229 C.A.2d 377.)

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1. Prohibitory Injunction Granted.

bb. Current Law: Writ Authorized.

9 *Witkin Cal. Proc. Appeal* § 297

[§ 297] Current Law: Writ Authorized.

During the period of uniform denial of supersedeas to stay the operation of a prohibitory injunction (*supra*, §296), the courts were uttering strong dicta to the effect that the power exists, and that it may be exercised in an exceptional situation. *Goodall v. Brite* (1934) 1 C.2d 583, 36 P.2d 190, seems to be the first important case to give meaning to these dicta. Defendant supervisors conducted a county hospital under a policy admitting all persons, whether indigent or not, and charging those capable of paying. Plaintiff taxpayers sued to enjoin, asserting that the law prohibited defendants from admitting any but needy persons. An injunction was granted. Defendants appealed and asked for supersedeas on the ground that to comply with the injunction would lead to disruption of the organization, reduction of its staff, and disuse of expensive appliances. *Held*, writ granted. "The policy controlling the conduct of the institution appears to be one of long standing. No doubt, to literally obey the mandate of the injunction would cause interruption and perhaps confusion in the organization and conduct of the hospital." (1 C.2d 586.)

The *Goodall* case could have been explained in terms of an exception based solely on the public interest. But later, in *Food & Grocery Bureau of Southern Calif. v. Garfield* (1941) 18 C.2d 174, 114 P.2d 579, the entire theory of no supersedeas in prohibitory injunction cases was for all practical purposes abandoned. The dictum became the rule, and the usual test of discretion the only limitation. In the *Garfield* case, appellant, the operator of 10 retail drug stores in Los Angeles, gave trading stamps to buyers. Respondent trade association sued to enjoin this activity as a violation of the Unfair Practices Act, and the trial judge granted a preliminary injunction. *Held*, appellant was entitled to the writ. The test, said the court, is not a balancing of conveniences or hardships, but a consideration of the respective rights of the litigants. (a) As to appellant, his merchandising practice was of long standing; "its abrupt abolishment would cause disruption in the orderly conduct of his business and a loss of patronage and customer good will, possibly so irreparable as to deprive him of the fruits of a meritorious appeal." (18 C.2d 178.) (b) As to respondent, it was not directly injured by the activity, it had delayed for many years the bringing of this proceeding, and it was alleged (and not denied) that some of its members were engaging in the same practice. (18 C.2d 178; see 30 Cal. L. Rev. 209; 40 Cal. L. Rev. 269.)

Subsequent decisions show that the rule is now firmly established. In *John Paul Lumber Co. v. Agnew* (1953) 116

C.A.2d 638, 254 P.2d 131, plaintiff lumber company received both a judgment quieting title to timber land and an injunction restraining defendant from asserting any interest in the property. Defendant's appeal stayed the quiet title judgment, but plaintiff's cutting of lumber on the land continued. If defendant won his appeal, he would only have an action for damages; the property itself was meanwhile unprotected. Supersedeas was therefore granted. (*116 C.A.2d 640.*)

In *California Table Grape Com. v. Dispoto* (1971) *14 C.A.3d 314, 92 C.R. 268*, plaintiff Commission sued defendant grape shipper for money due under an assessment order. The lower court gave plaintiff a judgment for \$ 11,256.17, together with an injunction against shipping grapes until the sum was paid in full. Defendant appealed, and filed a sufficient bond to stay execution on the judgment (see *supra*, §230), but the prohibitory injunction was not stayed (see *supra*, §276). Defendant accordingly sought supersedeas. *Held*, quoting the text, the writ should issue. (a) The injunction deprived the appellant of the benefits of his appeal bond, and threatened irreparable damage to his trade outlets. (b) Supersedeas would cause no prejudice to the respondent, for the only object of the injunction--to secure payment--was already achieved by the bond. (*14 C.A.3d 316.*) (See *Wind v. Hite* (1962) *58 C.2d 415, 417, 24 C.R. 683, 374 P.2d 643* [injunction restraining county registrar of voters from submitting proposed ordinance to voters on judge's determination of unconstitutionality]; *Suburban Gas Service v. Higgins* (1950) *98 C.A.2d 767, 770, 220 P.2d 798* [injunction would have largely prevented conduct of business in certain area after 23 years of operation]; *Wilkman v. Banks* (1953) *120 C.A.2d 521, 522, 261 P.2d 299* [injunction against maintaining hospital or sanitarium in alleged violation of building restrictions].)

Adoption of Pierce (1970) *5 C.A.3d 316, 85 C.R. 104*, though difficult to classify, probably illustrates use of the writ to stay operation of a lower court with prohibitory effect. P filed an "inverse paternity action" against S, alleging that he was the father of her child and requesting visitation rights. S answered, admitting the allegation, and cross-complained for a declaration of paternity and support. The trial judge made the declaration, ordered support, and granted visitation rights. Then S married K, who filed a stepparent adoption proceeding. In the adoption proceeding, the judge concluded that P had not legitimated the child, hence, the mother's consent alone was sufficient, and ordered the adoption, suspending P's visitation rights. P appealed from the adoption order, and asked for supersedeas to stay enforcement of that part that canceled his visitation rights. The appellate court thought that the decree of adoption, not yet final "and of questionable validity," should not terminate the existing visitation rights, but that the interests of the child should be considered. Hence, the trial judge was ordered to hold an evidentiary hearing on whether visitation would be for the child's best interests, and "[t]he petition for a writ of supersedeas is granted subject to the conditions set forth in this opinion." (*5 C.A.3d 321.*) The opinion emphasizes the broad power to issue any process necessary to protect appellate jurisdiction and the rights of the appellant. (*5 C.A.3d 320*, citing the text.)

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2. Prohibitory Injunction Denied.

aa. Former Law: Writ Refused.

9 *Witkin Cal. Proc. Appeal* § 298

[§ 298] Former Law: Writ Refused.

Suppose the petitioner, in an action in the lower court, seeks an injunction, and the court either denies it or, after granting a temporary injunction, dissolves it. May the petitioner stay the operation of the last order? Not only is the order self-executing, but the effect of supersedeas in that situation would be to grant or continue in force an injunction that the lower court refused to give or maintain.

The former law was clear. The appellate court has no original jurisdiction to grant an injunction, and it cannot do so in the guise of issuing a writ of supersedeas. (See *Wollenshlager v. Riegel* (1921) 186 C. 622, 623, 200 P. 726; *McCann v. Union Bank & Trust Co.* (1935) 4 C.2d 24, 27, 47 P.2d 283; *Seltzer v. Musicians' Union* (1939) 12 C.2d 718, 720, 87 P.2d 699; *Canavarró v. Theatre & Amusement Janitors Union* (1940) 15 C.2d 495, 500, 101 P.2d 1081; *Dysart v. Clark* (1936) 17 C.A.2d 637, 638, 62 P.2d 757; 40 Cal. L. Rev. 275.)

Estate of Colyear (1964) 230 C.A.2d 558, 41 C.R. 88, reached a result in conflict with these decisions, although neither the facts nor the opinion dealt squarely with the issue. A trust was created with a corporation as its principal corpus. Voting rights in the corporation were vested exclusively in a cotrustee who was not a beneficiary. The voting cotrustee voted with the majority of the corporation's directors to sell all of its assets to a competitor. Petitioner beneficiary, who was also a cotrustee without voting rights, sought instructions from the probate court. The court, treating the question as one of law, denied the petition, and its order declared that the voting cotrustee had power to vote on the sale. Petitioner appealed and sought supersedeas, showing that the directors intended to proceed with the sale on the theory that the exclusive voting right was established by final order and that the probate court had no jurisdiction to supervise its exercise. *Held*, supersedeas issued. The probate court had continuing jurisdiction under former Prob.C. 1120 (now Prob.C. 17300; see 13 *Summary* (10th), *Trusts*, §235), and the issue on appeal--whether petitioner beneficiary could challenge the sale as unfair to the trust--was substantial. (230 C.A.2d 566.)

Admitting the justice of the result, the facts can be restated in a manner that casts doubt on the principle that supersedeas cannot be used as a substitute for an injunction: Petitioner sought to stop (enjoin) the cotrustee from voting

for the sale, the lower court denied the relief, and by writ of supersedeas the appellate court granted it. The court's cryptic answer is that "the power of respondents to act in the fashion proposed was authorized with clarity only by the challenged order." (230 C.A.2d 567.) In other words, the writ issued on the theory that the lower court initially granted the power and the grant was stayed because its correctness was in doubt. But this statement scarcely meets the issue. The judge did not grant the power; he construed the instrument that dealt with it. And the order of the appellate court was that supersedeas should issue, "staying any further exercise of the voting power ... for the purpose of effecting a sale of the assets ... pending outcome of the pending appeal." (230 C.A.2d 567.) Is this not the issuance, by the appellate court, of the injunction denied by the probate court?

The question, however, is academic, for the reviewing court now has power to grant injunctive relief. (See *infra*, §299.)

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2. Prohibitory Injunction Denied.

bb. Current Law: Writ Authorized.

9 *Witkin Cal. Proc. Appeal* § 299

[§ 299] Current Law: Writ Authorized.

The constitutional revision of 1966 eliminated any reference to supersedeas (see *supra*, §280), and *C.C.P.* 923 confirmed the inherent power in the broadest terms: "to make any order appropriate to preserve the status quo." (*C.C.P.* 923, *supra*, §279.) These changes were mentioned in support of a radical departure from the established rule in *People v. Emeryville* (1968) 69 *C.2d* 533, 72 *C.R.* 790, 446 *P.2d* 790, *supra*, §280.

California's Attorney General brought an action on behalf of the San Francisco Bay Conservation and Development Commission (BCDC) against defendant town to enjoin its fill operations for failure to obtain a BCDC permit pursuant to *Govt.C.* 66604. The trial judge first granted an injunction, then dissolved it on the ground that defendant was exempted by the grandfather clause of *Govt.C.* 66632.1 (project already started under local governmental and Army Engineers permission). Plaintiff appealed, and, because of the urgency of the litigation, the Supreme Court ordered the cause transferred to it, and issued an order enjoining all fill operations by defendant pending final determination of the appeal. *Held*, this injunctive order was valid.

(a) Defendant's contention, that the reviewing court had no injunctive power, was in accord with "older cases," but "the preferable rule, which we henceforth follow" (69 *C.2d* 536), is that reviewing courts can grant that relief. "We are not unmindful that the stay order in this case is injunctive in nature, since it operates directly to restrain the fill activities of the town; but its office remains similar to that of a writ of supersedeas--to preserve the status quo pending determination of the appeal--and its issuance is therefore controlled by the same principles." (69 *C.2d* 538.)

(b) The trial court's familiarity with the circumstances makes it the normal forum to weigh the relative hardships. "But where, as here, difficult questions of law are involved and the fruits of a reversal would be irrevocably lost unless the status quo is maintained, justice requires that an appellate court issue a stay order to preserve its own jurisdiction. While this power should be sparingly employed and reserved for the exceptional situation, the propriety of its exercise in this case cannot be seriously disputed: had Emeryville been permitted to resume its fill activities, it would have been able, as a practical matter, to render this appeal moot." (69 *C.2d* 537.)

It is worthy of note that the court did not issue a writ of supersedeas, but a "stay order" similar to the writ in purpose and effect.

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4. Procedure.

a. Petition.

9 *Witkin Cal. Proc. Appeal* § 300

[§ 300] Petition.

(1) *Service and Filing of Verified Petition.* A party seeking a stay of the enforcement of a judgment or order pending appeal "may serve and file a petition for writ of supersedeas in the reviewing court." (C.R.C., Rule 8.112(a)(1).) The petition must be verified. (C.R.C., Rule 8.112(a)(5).) It must also bear the same title as the appeal and, if known, the appeal's docket number. (C.R.C., Rule 8.112(a)(2).) (See *Southern Pac. Co. v. Superior Court* (1914) 167 C. 250, 252, 139 P. 69; *Estate of Dabney* (1951) 37 C.2d 402, 404, 232 P.2d 481; C.E.B., 1 Civil Appellate Practice 3d, §6.75 et seq.; Rutter Group, 1 Civil Appeals and Writs §7:288 et seq.; Cal. Civil Practice, 5 Procedure, §§36:82, 36:83.)

(2) *Content.* The petition "must explain the necessity for the writ and include a memorandum." (C.R.C., Rule 8.112(a)(3).) If the record has not been filed in the reviewing court, the petition must include a statement of the case sufficient to show that the petitioner will raise substantial issues on appeal, including a fair summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its rulings related to these issues. (C.R.C., Rule 8.112(a)(4)(A).)

(3) *Documents Filed With Petition.* The petitioner must file (a) the judgment or order (showing its date of entry); (b) the notice of appeal (showing its date of filing); (c) any application, and opposition thereto, for a stay filed in the trial court; and (d) any other document from the trial court proceeding that is necessary for proper consideration of the petition. (C.R.C., Rule 8.112(a)(4)(B); on requirements of these documents, see C.R.C., Rule 8.112(a)(4)(C).)

(4) *Other Information.* When a petition for original writ, petition for review, or any other document requests a writ of supersedeas or temporary stay from a reviewing court, the cover of the document must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed. (C.R.C., Rule 8.116(a).) In addition, the trial court and department involved, and the name and telephone number of the trial judge whose order the request seeks to stay must be stated on the cover or at the beginning of the text. (C.R.C., Rule 8.116(b).) If the document does not comply with these requirements, the reviewing court may decline to consider the request. (C.R.C., Rule 8.116(c).)

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(2) *Content.* The petition need no longer include any oral statement by the court. (C.R.C., Rule 8.112(a)(4)(A), as amended in 2009.)

(3) *Documents Filed With Petition.* The documents filed by the petitioner must now include a reporter's transcript of any oral statement by the court supporting its rulings related to the issues likely to be raised on appeal, or, if a transcript is unavailable, a declaration fairly summarizing the statements. (C.R.C., Rule 8.112(a)(4)(B)(iii), added in 2009.) A reporter's transcript, or a summarizing statement must also accompany an application for a stay and any opposition to it. (C.R.C., Rule 8.112(a)(4)(B)(iv), added in 2009.)



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4. Procedure.

b. Temporary Stay.

9 *Witkin Cal. Proc. Appeal* § 301

[§ 301] Temporary Stay.

Supersedeas is usually needed in haste. The former practice was to issue an order to show cause or "alternative" or "temporary" writ on an ex parte application, pending a hearing on the petition. (See *Collins v. Bridge Inv. Co.* (1939) 14 C.2d 41, 42, 92 P.2d 801; *California Standard Finance Corp. v. Cornelius Cole, Ltd.* (1933) 132 C.A. 105, 106, 22 P.2d 520; *Parrett v. Carothers* (1935) 4 C.A.2d 724, 725, 41 P.2d 595.) C.R.C., Rule 8.112 now provides that the petition may include a request for a temporary stay under C.R.C., Rule 8.116 (supra, §300) pending the ruling on the petition. (C.R.C., Rule 8.112(c)(1).) Except when the custody of a minor is involved, a separately filed request for a temporary stay need not be served on the respondent. (C.R.C., Rule 8.112(c)(2).) (See *Peninsula Properties Co. v. Santa Cruz* (1951) 106 C.A.2d 669, 673, 235 P.2d 635 [stay pending determination of petition for writ and motion to dismiss appeal].)

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c. Opposition.

9 Witkin Cal. Proc. Appeal § 302

[§ 302] Opposition.

"The court may not issue a writ of supersedeas until the respondent has had the opportunity to file an opposition." (C.R.C., Rule 8.112(b)(3).) Unless otherwise ordered, the opposition must be served and filed within 15 days after the petition is filed. (C.R.C., Rule 8.112(b)(1).) In addition, it "must state any material facts not included in the petition and include a memorandum." (C.R.C., Rule 8.112(b)(2).)

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4. Procedure.

d. Determination.

9 *Witkin Cal. Proc. Appeal* § 303

[§ 303] Determination.

(1) *No Hearing in Ordinary Case.* Original proceedings for extraordinary writs of mandamus or prohibition call for a hearing and determination on the merits, and the writs grant the substantive or procedural relief sought. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §201.) In contrast, supersedeas is purely auxiliary to the appeal, and the writ may issue on a consideration of the verified pleadings, without oral argument. (*Mills v. Trinity* (1979) 98 C.A.3d 859, 861, 159 C.R. 679.)

(2) *Hearing in Child Custody Case.* A hearing is required where the writ is requested to stay a child custody order. (C.R.C., Rule 8.112(d)(2); see *supra*, §226.)

(3) *Immediate Petition for Review After Denial by Court of Appeal.* The summary denial by the Court of Appeal of a petition for a writ of supersedeas is final immediately after filing of the order, and thus an immediate petition for review may be filed in the Supreme Court. (C.R.C., Rule 8.264(b)(2)(B); see *infra*, §835.)

(4) *Notification of Trial Court.* Upon issuance of a writ or stay, the reviewing court must notify the trial court pursuant to C.R.C., Rule 8.490(k). (C.R.C., Rule 8.112(d)(3).)

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(3) *Immediate Petition for Review After Denial by Court of Appeal.* C.R.C., Rule 8.264(b)(2)(B) was renumbered C.R.C., Rule 8.264(b)(2)(A) in 2008.

(4) *Notification of Trial Court.* C.R.C., Rule 8.112(d)(3) was amended in 2008 to require notification pursuant to C.R.C., Rule 8.489.



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e. Form and Content of Writ.

9 Witkin Cal. Proc. Appeal § 304

[§ 304] Form and Content of Writ.

The writ may take various forms, depending on the nature of the judgment to be stayed and the conditions imposed. (See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1967) 255 C.A.2d 51, 56, 62 C.R. 819 [limited writ]; *In re Marriage of Dover* (1971) 15 C.A.3d 675, 681, 93 C.R. 384, supra, §228 [coupled with prohibition, and adding mandatory directions to trial judge]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §379; for conditions, see *infra*, §305 et seq.; for reservation of jurisdiction to modify, see *infra*, §308.)

The writ may be made retroactive in terms, to annul unauthorized acts of enforcement (supra, §§282, 283), but usually it is prospective in form. (See *Estate of Dabney* (1951) 37 C.2d 402, 411, 232 P.2d 481.)

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4. Procedure.

f. Conditions.

1. Bond.

9 Witkin Cal. Proc. Appeal § 305

[§ 305] Bond.

The court may issue the writ "on any conditions it deems just." (C.R.C., Rule 8.112(d)(1).)

The most common condition is a bond; e.g., where an undertaking or deposit would be necessary to stay execution in the lower court, the reviewing court will impose the requirement as a condition to issuance of supersedeas. (See *Dowling v. Fedele* (1953) 116 C.A.2d 849, 852, 254 P.2d 605.) The practice is to have the sufficiency of the bond referred to the Presiding Judge of the lower court for approval; but he or she acts as an officer of the appellate court, and the bond is filed with the clerk of the appellate court. (*Nonpareil Mfg. Co. v. McCartney* (1904) 143 C. 1, 3, 76 P. 653; *Petersen v. Lyders* (1933) 134 C.A. 552, 553, 25 P.2d 993; *Parrett v. Carothers* (1935) 4 C.A.2d 724, 726, 41 P.2d 595.)

Where the appellate court grants the writ on condition that bond be furnished within a specified period, such as 10 days, and the appellant fails to do so, the temporary stay expires at the end of the period. (*Collins v. Bridge Inv. Co.* (1939) 14 C.2d 41, 43, 92 P.2d 801.)

It has been said that the appellate court will not impose conditions beyond the requirements of the statute. Thus, where the governing code section specifies the amount of bond, the appellate court cannot, as a condition to issuance of the writ, demand an additional amount; and where the statute gives a stay without bond, supersedeas is granted without requiring it. (See *Jameson v. Chanslor-Canfield Midway Oil Co.* (1916) 173 C. 612, 616, 160 P. 1066.)

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f. Conditions.

2. Other Protective Conditions.

9 Witkin Cal. Proc. Appeal § 306

[§ 306] Other Protective Conditions.

In *Ballinger v. Ballinger* (1936) 7 C.2d 307, 60 P.2d 279, 61 P.2d 45, plaintiff widow sued defendant to recover a community interest in shares of stock given away by her husband. The court rendered judgment for her, ordering defendant to have the transfer made on the corporation books and to have new shares issued in plaintiff's name. Defendant appealed without bond, but deposited the old certificates, duly assigned to plaintiff, with the court clerk. He then applied for supersedeas, and the Supreme Court imposed the condition of compliance with former C.C.P. 943 and 944 (now C.C.P. 917.2 and 917.3, supra, §§240, 277)--deposit of new certificates in plaintiff's name as required by the judgment. On his failure to so deposit the certificates, the writ was denied. He petitioned for rehearing, and the court, denying the petition, said: "Assuming, for the purpose of argument only, that the court was in error in requiring the appellant to comply with the provisions of sections 943 and 944 of the Code of Civil Procedure as a prerequisite to the granting of an application for *supersedeas*, *supersedeas* is a discretionary writ, and it was within the province of the court to prescribe that a certain thing be done as a prerequisite to the granting of such writ. The appellant not having complied with the conditions prescribed by the court, by the doing of such thing, the court was within its province in denying the petition." (7 C.2d 309.)

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3. Prompt Prosecution of Appeal.

9 Witkin Cal. Proc. Appeal § 307

[§ 307] Prompt Prosecution of Appeal.

In *Davis v. Custom Component Switches* (1970) 13 C.A.3d 21, 91 C.R. 181, appeal from a money judgment required a bond that would have been prohibitive, and supersedeas was issued without it. (See supra, §289.) But the court declared that, as a condition of the stay, "we require timely prosecution of the appeal, and we will view with disfavor any application by any party to the appeal to delay the preparation of the record, the briefing of the appeal, or the argument of the appeal, or to depart in any manner from the time schedule for the conduct of appeals set out in California Rules of Court." (13 C.A.3d 31.)

Accordingly, the order was made as follows: "The appeal shall be prosecuted, the record filed, the briefs filed, and the appeal argued within the minimum periods of time specified in California Rules of Court. Should the appealing parties become delinquent in performing any of the steps associated with the appeal, the real party in interest ... may apply to this court for vacation of the stay of execution." (13 C.A.3d 33.)

A similar order was made in *Estate of Murphy* (1971) 16 C.A.3d 564, 94 C.R. 141, supra, §289. The court, after observing that delay would cause no prejudice to respondent, added: "Moreover any hardship which may be occasioned by delay can be mitigated by expeditious prosecution and determination of the appeal. The record on appeal has already been filed. No extensions of time will be granted for preparation of briefs and argument. The case has been briefed thoroughly in the superior court and it would seem that the parties may adopt their former briefs or enlarge or revise them readily. It should be satisfying to all parties to have an early decision on the merits of the appeal. Accordingly, we deem it appropriate to grant the supersedeas without bond, but with conditions to insure diligent prosecution of the appeal." (16 C.A.3d 569.)

The order read: "The petition for a writ of supersedeas is granted and the enforcement of the order of distribution is stayed pending the outcome of the appeal. The appellants' briefs will be filed within the minimum periods of time specified by the California Rules of Court. Should appellants fail to comply with this requirement, an application to terminate this stay will be entertained." (16 C.A.3d 570.)

The court was concerned, however, with the possible implication that trial judges should normally not exercise their discretion under *C.C.P.* 917.9 to require a bond, but should rely on the reviewing court to require timely prosecution of the appeal as a condition of a stay without bond. The opinion makes it clear that this is no reason for refusal to exercise such discretion: "A word of caution is in order at this point for the benefit of judges of the superior court. Since we have held that an undertaking may be required as a condition of stay of distribution, the questions whether such undertaking should be exacted and, if so, in what amount, should be decided without considering the possibility of extraordinary advancing of the appeal. This should be left to the Court of Appeal. It happens that in this particular case, because of the completion of the record, the nature of the briefing already done, and the condition of the court's calendar, the appeal can be disposed of within a fairly short time. But because these matters can only be determined by the appellate court as each case arises, the decision of the superior court should not be made upon these considerations." (16 *C.A.3d* 569.)

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g. Modification and Recall.

9 *Witkin Cal. Proc. Appeal* § 308

[§ 308] Modification and Recall.

The reviewing court may, in its order granting the writ, reserve jurisdiction to modify it on a subsequent application. (*Orange County Water Dist. v. Riverside* (1959) 171 C.A.2d 518, 519, 340 P.2d 1036.)

In *Braun v. Brown* (1939) 13 C.2d 130, 87 P.2d 1009, petitioner appealed from an order denying intervention on a motion for new trial, and obtained a writ of supersedeas staying execution of the judgment. On affirmance of the order denying intervention, and dismissal of petitioner's appeal from the judgment, it was ordered that the writ be recalled. (13 C.2d 134.)

Where the condition of a writ is timely prosecution of the appeal, the order may provide that, on failure of the appellants to comply, the respondent may apply to the court to vacate or terminate the stay. (See *Davis v. Custom Component Switches* (1970) 13 C.A.3d 21, 33, 91 C.R. 181; *Estate of Murphy* (1971) 16 C.A.3d 564, 570, 94 C.R. 141; *supra*, §289.)

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A. Nature and Scope of Power.

1. Constitutional and Legislative Development.

9 Witkin Cal. Proc. Appeal § 309

[§ 309] Constitutional and Legislative Development.

(1) *In General.* Formerly, California's reviewing courts had no power to make findings or take evidence in a case pending on appeal. So, if the findings did not support the judgment, the case had to be retried even though evidence in the record would have justified findings in its support. (See *Wallace Ranch Water Co. v. Foothill Ditch Co.* (1935) 5 C.2d 103, 118, 53 P.2d 929.) And if the trial court failed to find on a material issue, the decision was against law, and reversal was necessary, even though the evidence would only have warranted a finding in favor of the prevailing party. (See *Tupman v. Haberkern* (1929) 208 C. 256, 266, 280 P. 970, *infra*, §312; *Sessions v. Trott* (1934) 220 C. 714, 717, 32 P.2d 374.) Likewise, if the prevailing party neglected to offer evidence on an essential point, reversal was the only possible result, even though he or she was obviously able to prove it. (See *Tupman v. Haberkern*, *supra*, 208 C. 267.)

In 1926, former Cal. Const., Art. VI, §43/4, was adopted, authorizing the Legislature to grant fact-finding power to any court of appellate jurisdiction. In 1927, the detailed provision was repeated with slight differences of language in former C.C.P. 956a, in which the Legislature exercised the power. In the constitutional revision of 1966, the enabling provision was moved to Cal. Const., Art. VI, §11, and reduced to a bare grant of authority, with the details left to the statute. In 1968, former C.C.P. 956a was replaced by C.C.P. 909. (See *infra*, §310.)

The single sentence on this subject in Cal. Const., Art. VI, §11(c), reads as follows: "The Legislature may permit courts exercising appellate jurisdiction to take evidence and make findings of fact when jury trial is waived or not a matter of right." (See Rutter Group, 1 Civil Appeals and Writs §5:168 et seq.)

(2) *Judicial Notice.* To obtain judicial notice by a reviewing court (see 1 Cal. Evidence (4th), *Judicial Notice*, §45 et seq.), a party must serve and file a separate motion with a proposed order. If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so. (C.R.C., Rules 8.252(a), 8.520(g).) (See *Canal Ins. Co. v. Tackett* (2004) 117 C.A.4th 239, 242, 11 C.R.3d 626 [Court of Appeal would not consider plaintiff's request that it take judicial notice of certain items included in respondent's appendix, where, instead of filing separate motion, plaintiff's motion was filed as part of its respondent's brief].) Although appellate courts are authorized to take evidence and make findings of fact on appeal by C.C.P. 909 and C.R.C., Rule 8.252, this authority should be exercised sparingly. (Advisory Committee Comment to C.R.C., Rule 8.252.)

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(2) *Judicial Notice*. The motion must state (a) why the matter to be noticed is relevant to the appeal; (b) whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and (c) whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal. (C.R.C., Rule 8.252(a)(2), added in 2008.)



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A. Nature and Scope of Power.

2. Implementing Statute.

9 *Witkin Cal. Proc. Appeal* § 310

[§ 310] Implementing Statute.

(1) *In General*. "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues." (*C.C.P.* 909.)

(2) *Civil Cases Only*. The statute covers civil cases only. (See *People v. Cowan* (1940) 38 C.A.2d 144, 153, 100 P.2d 1079; cf. *People v. Benford* (1959) 53 C.2d 1, 7, 345 P.2d 928 [question left open].)

(3) *Power Is Discretionary*. Exercise of the power, either to make factual determinations or take evidence, is discretionary. (See *Tupman v. Haberkern* (1929) 208 C. 256, 257, 280 P. 970, *infra*, §312; *In re Zeth S.* (2003) 31 C.4th 396, 405, 2 C.R.3d 683, 73 P.3d 541 [power should be exercised sparingly]; *People v. Peevy* (1998) 17 C.4th 1184, 1205, 73 C.R.2d 865, 953 P.2d 1212 [California Supreme Court's policy is not to review issues dependent on factual record that has not been made]; *Berkeley Federation of Teachers v. Berkeley Unified School Dist.* (1986) 178 C.A.3d 775, 777, 224 C.R. 44, citing the text; 1 Cal. L. Rev. 500; 18 Cal. L. Rev. 84; 20 Cal. L. Rev. 171; 1 So. Cal. L. Rev. 386; 3 So. Cal. L. Rev. 351; 17 So. Cal. L. Rev. 246.)

(4) *Distinction: Motion for New Trial*. The procedure cannot be used as a substitute for a motion for new trial on the basis of newly discovered evidence. (*Rollins v. San Francisco* (1974) 37 C.A.3d 145, 148, 112 C.R. 168, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §4; *Monsan Homes v. Pogrebneak* (1989) 210 C.A.3d 826, 830, 258 C.R. 676.)

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A. Nature and Scope of Power.

3. Where Power Will Not Be Exercised.

a. Judgment Roll Appeal.

9 *Witkin Cal. Proc. Appeal* § 311

[§ 311] Judgment Roll Appeal.

An appeal on the judgment roll alone does not bring up any of the evidence (see *infra*, §667). Hence, it is not possible in that case to make factual determinations unless evidence is taken on appeal, and the reviewing court will not do so. (See *Geneusz v. Harrington* (1933) 218 C. 760, 762, 25 P.2d 4; *Cummings v. Columbia Pictures Corp. of Calif.* (1935) 8 C.A.2d 244, 247, 47 P.2d 504 ["additional testimony can only be taken and considered in connection with the testimony taken before the trial court"]; *Estate of Dreer* (1932) 122 C.A. 763, 767, 10 P.2d 803 [improper to make findings in appeal on judgment roll alone].)

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3. Where Power Will Not Be Exercised.

b. General Reversal.

1. No Fact-Finding.

9 Witkin Cal. Proc. Appeal § 312

[§ 312] No Fact-Finding.

The scope and limitations of the fact-finding power were authoritatively declared in the leading case of *Tupman v. Haberkern* (1929) 208 C. 256, 280 P. 970. Plaintiffs sued for an accounting, and, after trial but before decision, the trial judge resigned. By stipulation the exhibits and transcript of proceedings were submitted to another judge for decision, and he found for defendants. Plaintiffs appealed on the ground that the evidence was insufficient to support the findings, and contended that the appellate court had the same power to review the evidence as the lower court, because neither had actually heard the witnesses at the trial. *Held*, the constitutional amendment and the statute neither affect "[t]he respective provinces of the trial and reviewing courts," nor change the established rule against appellate weighing of evidence.

(a) Where an appellant asks for findings contrary to those of the trial judge, and a reversal on those findings with direction for judgment in his or her favor, the language of the statute cannot be taken too literally. On a general reversal, the cause must ordinarily be remanded for further proceedings in the trial court. If there is a reversal with directions to enter judgment for the appellant, it is permissible to make new findings as a basis. (208 C. 269.)

(b) "[T]he effect of the new law is to create and establish an exception to the general rule; that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated; that when the judgment appealed from must be reversed and a new trial is ordered, either pursuant to a general order of reversal or a specific remanding of the cause for a new trial, findings of fact by the reviewing court become inappropriate and unauthorized; and that when the judgment appealed from is to be reversed and the trial court is to be directed to enter a judgment for the appellant the reviewing court may make findings in support of the judgment so to be entered, but this power should be exercised with caution, and only when it may be declared, as matter of law, that the respondent could not make a substantial showing in support of his cause if a new trial were had, or that the respondent could not, or should not in the interests of justice, make or be permitted to make a further showing upon a retrial if one should be had. This construction of the new law not only preserves generally the fundamental distinction between the functions of the trial courts and the appellate tribunals, but also affords to litigants

and the cause of justice the relief which the recent law intended to afford." (208 C. 270.)

The *Tupman* case has been continuously cited with approval, and its theories must be regarded as settled. (See *Davis v. Chipman* (1930) 210 C. 609, 623, 293 P. 40; *Isenberg v. Sherman* (1931) 212 C. 454, 461, 298 P. 1004, 299 P. 528; *Sminia v. Department of Water & Power of Los Angeles* (1931) 119 C.A. 428, 431, 6 P.2d 561; *Barrow v. Simon* (1934) 2 C.A.2d 500, 505, 38 P.2d 197; *Burton v. Los Angeles Ry. Corp.* (1947) 79 C.A.2d 605, 611, 180 P.2d 367; *Golden West Baseball Co. v. Anaheim* (1994) 25 C.A.4th 11, 42, 31 C.R.2d 378; *Long Beach v. Wright* (1933) 134 C.A. 366, 371, 25 P.2d 541 [comparing power of trial court under C.C.P. 662]; *Monsan Homes v. Pogrebneak* (1989) 210 C.A.3d 826, 830, 258 C.R. 676; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 C.A.3d 1058, 1090, 267 C.R. 457, citing the text.)

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b. General Reversal.

2. No Evidence Taken.

9 *Witkin Cal. Proc. Appeal* § 313

[§ 313] No Evidence Taken.

The same limitations apply to the incidental power to take additional evidence; i.e., that it should not be exercised except to affirm the judgment or, in rare cases, to reverse with directions. (See *Kabisius v. Board of Playground & Recreation of Los Angeles* (1935) 4 C.2d 488, 494, 50 P.2d 1040; *In re Zeth S.* (2003) 31 C.4th 396, 405, 2 C.R.3d 683, 73 P.3d 541, 10 Summary (10th), Parent and Child, §693; *First Nat. Bank of Findlay v. Terry* (1930) 103 C.A. 501, 509, 285 P. 336; *Murphy v. Sheftel* (1931) 119 C.A. 467, 468, 6 P.2d 549; *Grove v. Lewis* (1932) 125 C.A. 357, 362, 13 P.2d 847; *Kleinsasser v. McNamara* (1932) 127 C.A. 258, 261, 15 P.2d 788; *Ford v. Pacific Gas & Elec. Co.* (1997) 60 C.A.4th 696, 706, 70 C.R.2d 359; *Wachovia Bank v. Lifetime Industries* (2006) 145 C.A.4th 1039, 1053, 52 C.R.3d 168.)

This restriction was ignored in *Bassett v. Johnson* (1949) 94 C.A.2d 807, 211 P.2d 939, on unusual facts. The court declared that where "the additional evidence is of such a nature that its effect on the appeal is decisive, such additional evidence, in the discretion of the court, can be and should be taken even though a judgment in favor of appellant is not directed." (94 C.A.2d 812.)

In *Estate of Culver* (1947) 81 C.A.2d 640, 184 P.2d 738, an appeal from an order settling a guardian's final account, the same view was taken under equally peculiar circumstances. Vital documentary evidence in the possession of respondent was not discovered by appellant until 5 months after the appeal was taken. It would have been sufficient to justify the granting of a new trial for newly discovered evidence, except that the motion did not lie in the particular probate proceeding and the time had elapsed. "If, then, new evidence of this character would call for a new trial, it should persuade an appellate court to receive and consider it as an amplification of the settled record on appeal." (81 C.A.2d 645.) Accordingly, the documents were admitted in evidence, added to the record, and the order appealed from was reversed.

Both of these cases have been disapproved. (See *Estate of Schluttig* (1950) 36 C.2d 416, 422, 224 P.2d 695 [disapproving *Culver*]; *People v. Benford* (1959) 53 C.2d 1, 6, 345 P.2d 928 [disapproving *Bassett*].)

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B. Factual Determinations on Appeal.

1. Where Factual Determinations May Be Made.

a. To Affirm or Modify.

9 Witkin Cal. Proc. Appeal § 314

[§ 314] To Affirm or Modify.

The typical situation in which factual determinations may be made is where the result would be to affirm or modify the judgment. In *Sessions v. Trott* (1934) 220 C. 714, 32 P.2d 374, the trial judge found that defendants had made fraudulent representations, relied on by plaintiffs, and stated the conclusion of law that plaintiffs were entitled to recover \$ 3,500. But he failed to find that plaintiffs suffered injury from the misrepresentations. *Held*, the finding should be made, on appeal, that plaintiffs were damaged in that sum. (220 C. 717.)

Many other cases of this type may be found in the reports. (See *Kirk v. Culley* (1927) 202 C. 501, 508, 261 P. 994 [reasonable value of legal services]; *Linberg v. Stanto* (1931) 211 C. 771, 776, 297 P. 9 [trial court found that plaintiffs were injured through defendants' negligence, but did not find exact amount of damage, although it made conclusion of law in amount]; *Proctor v. Smith* (1931) 214 C. 227, 231, 4 P.2d 773 [judgment included improper items, and making correct findings was "a simple matter of computation"]; *Kastel v. Stieber* (1932) 215 C. 37, 44, 8 P.2d 474 [trial court's finding that defendants were not guilty of gross negligence was amended to read that there was gross negligence]; *Wallace Ranch Water Co. v. Foothill Ditch Co.* (1935) 5 C.2d 103, 122, 53 P.2d 929 [water rights]; *Johndrow v. Thomas* (1947) 31 C.2d 202, 207, 187 P.2d 681 [findings to correct formal conflict due to inadvertence]; *Allee v. Shay* (1928) 92 C.A. 749, 765, 268 P. 962 [fraudulent conveyance]; *Bacon v. Bacon* (1937) 21 C.A.2d 540, 548, 69 P.2d 884 [contract to purchase real property]; *Capital Nat. Bank of Sacramento v. Smith* (1944) 62 C.A.2d 328, 345, 144 P.2d 665 [findings made in conformity with stipulation]; *Mirich v. Underwriters at Lloyd's London* (1944) 64 C.A.2d 522, 528, 149 P.2d 19 [fraud; knowledge of falsity]; *Turknette v. Turknette* (1950) 100 C.A.2d 271, 277, 223 P.2d 495 [finding of cruelty by one party to putative marriage]; *Luce v. Sutton* (1953) 115 C.A.2d 428, 434, 252 P.2d 352 [agency: "We are merely making specific findings after the trial court has definitely indicated its determination of the credibility of the witnesses"]; *Cirimele v. Shinazy* (1955) 134 C.A.2d 50, 52, 285 P.2d 311 [reasonable value of legal services]; *Beyl v. Yasukochi* (1955) 135 C.A.2d 638, 639, 287 P.2d 863 [correct description of property to limit scope of easement]; *Guerin v. Guerin* (1957) 152 C.A.2d 696, 712, 313 P.2d 902; *Boller v. Signal Oil & Gas Co.* (1964) 230 C.A.2d 648, 656, 41 C.R. 206, 1 Cal. Proc. (5th), Attorneys, §207 [increase of amount awarded as attorneys' fees in tax litigation]; *Guardianship of Marino* (1973) 30 C.A.3d 952, 960, 106 C.R. 655 [probate judge properly appointed guardian of child, but failed to make finding in accordance with statute; necessary additional finding was added]; *Golden West Baseball*

Co. v. Anaheim (1994) 25 C.A.4th 11, 42, 31 C.R.2d 378 [finding that plan to construct office complex on part of baseball stadium parking lot would not reduce available parking spaces below 12,000 or interfere with ingress or egress].)

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B. Factual Determinations on Appeal.

1. Where Factual Determinations May Be Made.

b. To Reverse With Directions.

9 *Witkin Cal. Proc. Appeal* § 315

[§ 315] To Reverse With Directions.

As might be expected from the declarations in *Tupman v. Haberkern* (1929) 208 C. 256, 280 P. 970, *supra*, §312, the cases in which the power to make factual determinations has been exercised to reverse are very few. (See *Donahue v. Conley* (1927) 85 C.A. 15, 17, 258 P. 985; *Sturdevant v. Sturdevant* (1934) 3 C.A.2d 443, 448, 39 P.2d 433; *McCulloch v. Liguori* (1948) 88 C.A.2d 366, 375, 199 P.2d 25; cf. *Cunningham v. Reynolds* (1933) 135 C.A. 91, 92, 26 P.2d 869, *infra*, §862; *Duncan v. Peterson* (1970) 3 C.A.3d 607, 612, 83 C.R. 744.)

Stellman v. Stellman (1953) 119 C.A.2d 805, 260 P.2d 209, is a good illustration of the proper exercise of the power. Plaintiff sued for an annulment, offering strong evidence that defendant was still married to another woman, but the trial court found her allegations untrue. While the appeal was pending, defendant obtained an Illinois divorce from the other woman. Plaintiff obtained leave to take additional evidence on appeal, consisting of the Illinois decree, and this conclusively established her right to an annulment. Accordingly, the finding was made that her allegations were true, and the cause was remanded with directions to enter judgment in her favor. (119 C.A.2d 808.)

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B. Factual Determinations on Appeal.

2. Where Factual Determinations Are Improper.

9 *Witkin Cal. Proc. Appeal* § 316

[§ 316] Where Factual Determinations Are Improper.

The cases disclose the following situations in which the courts deem it improper to exercise the fact-finding power:

(1) *Case Tried by Jury*. The Constitution and the Code limit the power, for obvious reasons, to cases where no jury is required or a jury was waived. (See *Robinson v. Wada* (1935) 10 C.A.2d 5, 7, 51 P.2d 171.)

(2) *No Findings Made Below*. "We are not now inclined to extend the scope of the quoted code section to include a case in which the trial court erroneously fails to make *any* findings. The express language of the section tends to negative such inclusion." (*Estate of Pendell* (1932) 216 C. 384, 387, 14 P.2d 506 [petition for removal of executors; findings were required by statute but none were made]; see *Larson v. Thoresen* (1951) 36 C.2d 666, 670, 226 P.2d 571; *Gonzalez v. Los Angeles* (2004) 122 C.A.4th 1124, 1131, 19 C.R.3d 381 [whether 3-year dismissal statute applied required exercise of discretion, and thus was not pure matter of law that could be raised for first time on appeal]; cf. *Kramer v. Sanguinetti* (1939) 33 C.A.2d 303, 312, 91 P.2d 604 [appellate court properly supplied all findings on issues tendered by cross-complaint, but issues had already been covered by findings on complaint and answer].) (On abolition of findings of fact and current procedure of statement of decision, see 7 *Cal. Proc.* (5th), *Trial*, §390.)

(3) *Evidence in Substantial Conflict*. The rule of conflicting evidence (*infra*, §366) limits the fact-finding power. No modification of or addition to findings will be attempted where the trial judge's findings are based on substantial evidence. (*Spaulding v. Cameron* (1952) 38 C.2d 265, 270, 239 P.2d 625; *Hicks v. Barnes* (1952) 109 C.A.2d 859, 863, 241 P.2d 648; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 C.A.3d 1058, 1090, 267 C.R. 457, citing the text.)

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B. Factual Determinations on Appeal.

3. Procedure.

9 Witkin Cal. Proc. Appeal § 317

[§ 317] Procedure.

Formerly, no procedure was specified for invoking the power to make factual determinations, and the suggestion was usually made in a brief. In *Replogle v. Ray* (1941) 48 C.A.2d 291, 119 P.2d 980, the court noted the "belated" request made in appellant's reply brief, and denied it on the theory that a party should make it at the earliest opportunity, in order to give the adverse party a chance to oppose it. (48 C.A.2d 311.)

The rules allow a party to move the reviewing court to make findings under C.C.P. 909 (supra, §310), and require that the motion include the proposed findings. (C.R.C., Rule 8.252(b).) (See Cal. Civil Practice, 5 Procedure §§41:31, 41:32; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §830; 17 So. Cal. L. Rev. 247.) The request will be denied where there is no attempt to comply with this procedure. (See *Pomatto v. Sarten* (1963) 214 C.A.2d 747, 751, 29 C.R. 721 [involving former rule].)

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Witkin Summary of California Law

IX. FACT-FINDING POWER OF REVIEWING COURT

C. New Evidence on Appeal.

1. In General.

9 Witkin Cal. Proc. Appeal § 318

[§ 318] In General.

The reviewing courts are not equipped to undertake any appreciable amount of evidence-taking on appeal, and, in consequence, the power has been sparingly invoked. (See *Crofoot Lumber v. Lewis* (1962) 210 C.A.2d 678, 681, 27 C.R. 443, citing the text.) Most of the cases deal with reasons for denying the application (infra, §§320, 321), but in a few situations the power has been exercised. (See *Ward Redwood Co. v. Fortain* (1940) 16 C.2d 34, 35, 104 P.2d 813 [parties stipulated to matters involved]; *Stellman v. Stellman* (1953) 119 C.A.2d 805, 260 P.2d 209, supra, §315; *Long v. Hultberg* (1972) 27 C.A.3d 606, 608, 103 C.R. 19 [to show events occurring after judgment rendering appeal moot]; *Berkeley Federation of Teachers v. Berkeley Unified School Dist.* (1986) 178 C.A.3d 775, 777, 778, 224 C.R. 44 [additional evidence submitted to show length of employment contract].)

In *Conservatorship of Hart* (1991) 228 C.A.3d 1244, 279 C.R. 249, new evidence was admitted even though it did not lead to the termination of the litigation. "We can readily rationalize *Tupman's* relatively inflexible rule that an appellate court should undertake to resolve factual disputes only if by doing so it can terminate litigation. But we perceive a significant distinction, under *Code of Civil Procedure section 909*, between our authority to redetermine disputed facts with or without new evidence and our authority to take new evidence 'for any other purpose in the interests of justice.' We conclude that the special circumstances of record in this case authorize us to take further evidence in the interests of justice." The most significant special circumstance noted by the court was that the conservatee, from whose estate substantial gifts had been made, was neither represented nor capable of representing herself before the trial court. (228 C.A.3d 1259.)

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C. New Evidence on Appeal.

2. Procedure.

9 *Witkin Cal. Proc. Appeal* § 319

[§ 319] Procedure.

(1) *In General.* Although the court may act on its own motion, it will rarely do so. C.R.C., Rule 8.252(c) incorporates the procedural provisions of C.R.C., Rule 8.54 on noticed motions in the reviewing court for this purpose. (See Cal. Civil Practice, 5 Procedure §41:31; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §812 et seq.; *infra*, §727 et seq.)

(2) *Motion.* A party "may move that the reviewing court take evidence." (C.R.C., Rule 8.252(c)(1).)

(3) *Order.* An order granting the motion must: (a) state the issues on which evidence will be taken; (b) specify whether the court, a justice, or a special master or referee will take the evidence; and (c) give notice of the time and place for taking the evidence. (C.R.C., Rule 8.252(c)(2).) (On referee, see *People v. Associated Oil Co.* (1931) 211 C. 348, 350, 296 P. 273; *infra*, §767.)

(4) *Documentary Evidence.* For documentary evidence, a party may offer the original, a certified copy, or a photocopy. The court may admit the document in evidence without a hearing. (C.R.C., Rule 8.252(c)(3).) (See *Crofoot Lumber v. Lewis* (1962) 210 C.A.2d 678, 681, 27 C.R. 443 [court accepted offered agreement and, pursuant to its evidentiary effect, modified judgment]; 17 So. Cal. L. Rev. 248.)

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C. New Evidence on Appeal.

3. Reasons for Denial of Motion.

a. Evidence Is Inadmissible or Cumulative.

9 *Witkin Cal. Proc. Appeal* § 320

[§ 320] Evidence Is Inadmissible or Cumulative.

(1) *Inadmissible*. If the proposed evidence is inadmissible, no purpose would be served by taking it. (See *Wolf v. Drew* (1928) 94 C.A. 449, 450, 271 P. 346 [hearsay]; *Schelling v. Thomas* (1929) 96 C.A. 682, 686, 274 P. 755 [immaterial and outside issues]; *In re Glorianna K.* (2005) 125 C.A.4th 1443, 1448, 24 C.R.3d 582 [evidence was not authenticated]; cf. *In re Marriage of Folb* (1975) 53 C.A.3d 862, 877, 126 C.R. 306 [matters occurring after judgment and therefore not reviewable on appeal; see *infra*, §337].)

(2) *Cumulative*. If evidence is merely cumulative or corroborative and would not affect the result, the application should be denied. (*Grove v. Lewis* (1932) 125 C.A. 357, 362, 13 P.2d 847 ["on the issues presented by the pleadings it would still be within the power, authority and discretion of the court to make findings identical with those already made. In other words, the 'newly-discovered evidence' is not, nor would it be, determinative of the issues presented"]; *Bauer v. Bauer* (1940) 38 C.A.2d 309, 317, 100 P.2d 1070 [corroborative].) The same is true where the new evidence would merely add to the existing conflict. (*Estate of Schluttig* (1950) 36 C.2d 416, 420, 423, 224 P.2d 695; *Helmer v. Helmer* (1948) 87 C.A.2d 682, 688, 197 P.2d 558; *Beaudreau v. Allen* (1951) 102 C.A.2d 552, 556, 227 P.2d 896; *Estate of Marshall* (1953) 120 C.A.2d 747, 755, 262 P.2d 42.)

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C. New Evidence on Appeal.

3. Reasons for Denial of Motion.

b. Lack of Diligence.

9 *Witkin Cal. Proc. Appeal* § 321

[§ 321] Lack of Diligence.

C.C.P. 909 (*supra*, §310), by stating that the additional evidence may be of facts occurring "at any time prior to the decision of the appeal," recognizes the possibility of taking evidence on a point that could have been presented to the trial court but was overlooked. This is, indeed, one of the purposes of the remedial legislation.

Nevertheless, the court may deny an application inexcusably delayed. (See *Bauer v. Bauer* (1940) 38 C.A.2d 309, 317, 100 P.2d 1070 [application made on petition for rehearing, evidence available 21/2 years before]; *Estate of Marshall* (1953) 120 C.A.2d 747, 755, 262 P.2d 42 [appellant made no request for continuance in trial court to obtain testimony]; *Rebmann v. Major* (1970) 5 C.A.3d 684, 689, 85 C.R. 399, citing the text; *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 C.A.4th 74, 87, 15 C.R.2d 585 [leave to produce additional evidence from court file of out-of-state action was denied due to lack of diligence in obtaining file for presentation in trial court].)

In *Halvorsen v. Halvorsen* (1941) 44 C.A.2d 211, 112 P.2d 28, the trial judge, without evidence or findings on Mexican law, denied annulment of a Mexican marriage. On appeal, it was suggested that the court take evidence on Mexican law and affirm the judgment. Rejecting the proposal, the court said: "To grant the request that evidence as to the laws of Mexico be taken in this court would naturally lead to and require also the taking of testimony as to the general facts involved. This would result in a complete trial on all of the issues in this court when, as a practical matter, no trial has been had in the trial court. No good reason appears for such a radical departure from the usual and orderly procedure." (44 C.A.2d 214.)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

a. Review of Question of Law.

1. General Principle.

9 Witkin Cal. Proc. Appeal § 322

[§ 322] General Principle.

(1) *Statement of Rule.* The function of an appellate court is to review errors of law and not to pass on questions of fact. Neither the constitutional provision on reversible error (*infra*, §416) nor that which establishes the fact-finding power of appellate courts (*supra*, §309) has changed this basic principle. (See *Tupman v. Haberkern* (1929) 208 C. 256, 257, 280 P. 970; *Sminia v. Department of Water & Power of Los Angeles* (1931) 119 C.A. 428, 431, 6 P.2d 561; *Menning v. Sourisseau* (1933) 128 C.A. 635, 638, 18 P.2d 77; *Dawson v. East Side Union High School Dist.* (1994) 28 C.A.4th 998, 1041, 34 C.R.2d 108 [appellate court independently reviews questions of law and is not bound by trial court's determinations in that regard]; *Hill v. Long Beach* (1995) 33 C.A.4th 1684, 1687, 40 C.R.2d 125, *supra*, §127 [same]; *Rutter Group*, 1 Civil Appeals and Writs §8:106 et seq.; 74 *Harv. L. Rev.* 86 [discussing problem in federal courts]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §646 et seq.; *infra*, §§366, 369.)

(2) *Qualifications.* Two qualifications should be noted:

(a) If there is no substantial evidence to support the judgment, it is erroneous as a matter of law. To this extent (determination of substantiality of the respondent's evidence), the appellate court properly reviews the facts. (See *infra*, §373.)

(b) Error of law is not reversible unless, on an examination of the record, it appears to have resulted in a miscarriage of justice. This often means that the appellate court, without power to reverse on the weight of the evidence alone, may nevertheless find an error of law to have been prejudicial when considered in light of the weight of the evidence. And the process is, in a sense, a review of facts. (See *infra*, §449.)

(3) *Distinguishing Questions of Law and Questions of Fact.* The line between fact and law was stated in *Board of Education v. Jack M.* (1977) 19 C.3d 691, 139 C.R. 700, 566 P.2d 602, as follows: "In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." (19 C.3d 698, footnote 3; see *infra*, §323.) (See *Crocker Nat. Bank v. San Francisco* (1989) 49 C.3d 881, 888, 264 C.R. 139, 782 P.2d 278, *infra*, §325 [questions of fact, which are reviewable under

substantial evidence test, concern establishment of historical or physical facts; questions of law, which are reviewable independently, relate to selection of a rule].) However, in practice the line between fact and law is impossible to draw with precision. The result is that a court may, in the guise of examining questions of law, interfere with the fact-finding power of the trial judge or jury, or may refuse to review questions of law by treating them as issues of fact.

(4) *Independent Review of Record in Civil Cases.* Under *People v. Wende* (1979) 25 C.3d 436, 158 C.R. 839, 600 P.2d 1071, 6 Cal. Crim. Law (3d), *Criminal Appeal*, §39, when appointed counsel for an indigent criminal defendant submits an opening brief certifying that counsel is unable to find any arguable issues on which a meritorious appeal can be made, the appellate court is required to independently review the entire record for error. However, this special "Wende review" is not required in civil appeals (including indigent parent appeals). (*In re Sade C.* (1996) 13 C.4th 952, 984, 55 C.R.2d 771, 920 P.2d 716 [resolving former conflict of authority]; *Kern v. Dillier* (1999) 69 C.A.4th 1412, 1421, 82 C.R.2d 318 [reasoning of *In re Sade C.*, which involved termination of parental status, also applies when creation of parental status is at stake, and thus *Wende* review is not required].)

West's Key Number Digest, Appeal and Error 836, 842, 1008 et seq.

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A. In General.

1. Function of Appellate Court.

a. Review of Question of Law.

2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 323

[§ 323] Illustrations.

Despite the uncertainties involved in the distinction between law and fact (see *supra*, §322), the following are illustrative of issues that, in the main, present questions of law for the reviewing court:

(1) *Interpretation and Application of Statute.* The interpretation and applicability of a statute or ordinance is clearly a question of law. (See *Bodinson Mfg. Co. v. California Emp. Com.* (1941) 17 C.2d 321, 325, 109 P.2d 935; *Estate of Madison* (1945) 26 C.2d 453, 456, 159 P.2d 630; *Killian v. San Francisco* (1978) 77 C.A.3d 1, 7, 143 C.R. 430, citing the text; *Dean W. Knight & Sons v. California* (1984) 155 C.A.3d 300, 305, 202 C.R. 44, citing the text; *Sutco Const. Co. v. Modesto High School Dist.* (1989) 208 C.A.3d 1220, 1228, 256 C.R. 671, quoting the text; *People v. Taylor* (1992) 6 C.A.4th 1084, 1091, 8 C.R.2d 439, citing the text; *Mansell v. Board of Administration* (1994) 30 C.A.4th 539, 544, 35 C.R.2d 574 [applicability of statutory exception]; *Harustak v. Wilkins* (2000) 84 C.A.4th 208, 212, 100 C.R.2d 718; *Upland Police Officers Assn. v. Upland* (2003) 111 C.A.4th 1294, 1300, 4 C.R.3d 629; 46 Harv. L. Rev. 1086; on aids to construction, see 7 *Summary* (10th), *Constitutional Law*, §123 et seq.)

(2) *Interpretation of Writing.* The interpretation of an instrument or writing may be either a question of law or a mixed question of law and fact. (See *Clark v. Leshner* (1956) 46 C.2d 874, 883, 299 P.2d 865 [whether agreement of assignment covered cause of action for fraud was question of law, erroneously left to jury]; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 C.A.4th 1538, 1559, 6 C.R.2d 698 [question of law where extrinsic evidence is unnecessary; question of fact where parol evidence is necessary]; *Western Mut. Ins. Co. v. Yamamoto* (1994) 29 C.A.4th 1474, 1481, 35 C.R.2d 698 [interpretation of insurance policy is question of law]; on review of mixed questions of law and fact, see *infra*, §325.)

(3) *Agency and Scope of Employment.* The existence of the legal relationship of agency or independent contract, and the scope of employment, are questions of law. (See *Baugh v. Rogers* (1944) 24 C.2d 200, 205, 148 P.2d 633; *Fields v. Sanders* (1947) 29 C.2d 834, 843, 180 P.2d 684; *Mantonya v. Bratlie* (1948) 33 C.2d 120, 128, 199 P.2d 677; *Hinman v. Westinghouse Elec. Co.* (1970) 2 C.3d 956, 963, 88 C.R. 188, 471 P.2d 988; cf. *Loper v. Morrison* (1944) 23 C.2d 600, 605, 145 P.2d 1; *Washko v. Stewart* (1937) 20 C.A.2d 347, 348, 67 P.2d 144, *infra*, §378; see 33 *Cal. L. Rev.*

646.)

(4) *Legal Basis of Tort Liability.* The legal bases of tort liability, i.e., negligence and proximate cause, ought likewise to be questions of law when the issue is the general or special standard of care, the effect of intervening cause, etc. However, the fact situations are so varied that no clear pattern emerges, and the cases can only be classified by their holdings:

(a) *Question of law.* (See *Fennessey v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 141, 145, 124 P.2d 51 [dissenting opinion]; *Mosley v. Arden Farms Co.* (1945) 26 C.2d 213, 220, 222, 157 P.2d 372 [concurring opinion]; *Gray v. Brinkerhoff* (1953) 41 C.2d 180, 183, 258 P.2d 834 [negligence was established as matter of law; see dissent]; *Callahan v. Gray* (1955) 44 C.2d 107, 111, 279 P.2d 963 [when contributory negligence is question of law]; *Huetter v. Andrews* (1949) 91 C.A.2d 142, 145, 204 P.2d 655; *Tate v. Canonica* (1960) 180 C.A.2d 898, 901, 5 C.R. 28 [when proximate cause is question of law]; *Whinery v. Southern Pac. Co.* (1970) 6 C.A.3d 126, 132, 85 C.R. 649 [same]; *Sanders v. Atchison, Topeka & Santa Fe Ry. Co.* (1977) 65 C.A.3d 630, 649, 135 C.R. 555; *infra*, §§374, 378.)

(b) *Question of fact.* (See *Fennessey v. Pacific Gas & Elec. Co.*, *supra*, 20 C.2d 145; *Mosley v. Arden Farms Co.*, *supra*, 26 C.2d 219; *Hoyem v. Manhattan Beach City School Dist.* (1978) 22 C.3d 508, 520, 150 C.R. 1, 585 P.2d 851, 5 *Summary* (10th), *Torts*, §327; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 56, 192 C.R. 857, 665 P.2d 947, 6 *Summary* (10th), *Torts*, §1206; *Biondini v. Amship Corp.* (1947) 81 C.A.2d 751, 760, 185 P.2d 94 [invitee or licensee]; *Laymon v. Simpson* (1964) 225 C.A.2d 50, 52, 36 C.R. 859 [contributory negligence was question of fact].)

(5) *Plagiarism of Literary Work.* The issue of similarity of literary works in plagiarism cases has been the subject of much dispute. (See *Stanley v. Columbia Broadcasting System* (1950) 35 C.2d 653, 660, 663, 672, 221 P.2d 73 [question of fact]; *Golding v. R.K.O. Pictures* (1950) 35 C.2d 690, 698, 221 P.2d 95 [same, but recognizing review of substantiality of evidence]; *Burtis v. Universal Pictures Co.* (1953) 40 C.2d 823, 831, 256 P.2d 933 [sufficiency of evidence is question of law, and judgment for plaintiff was reversed for lack of evidence of substantial similarity; see dissent, 40 C.2d 840]; 5 *Cal. Proc.* (5th), *Pleading*, §708 [determination on demurrer]; 42 *Cal. L. Rev.* 52 [exhaustive discussion].)

(6) *Foreign Law.* A question of foreign law, e.g., the existence and effect of a foreign statute, has been considered one of fact. (See *Estate of Schluttig* (1950) 36 C.2d 416, 424, 224 P.2d 695 [whether German statutes gave reciprocal rights of inheritance so as to permit succession by nonresident alien]; *Estate of Arbulich* (1953) 41 C.2d 86, 89, 257 P.2d 433 ["Where treaties or statute law alone are before the court the construction thereof is a matter of law, but the question of how the foreign country has construed and applied such treaties or statutes is a question of fact"]; *Estate of Johnson* (1950) 100 C.A.2d 73, 79, 223 P.2d 105; *Estate of Leefers* (1954) 127 C.A.2d 550, 559, 274 P.2d 239.) This rule was changed in 1957 by a statute providing for judicial notice of "[t]he law and statutes of foreign countries and of political subdivisions of foreign countries." (See 1 *Cal. Evidence* (4th), *Judicial Notice*, §27.) The Evidence Code broadened the rule to include "[t]he law of an organization of nations and of foreign nations and public entities in foreign nations." (*Ev.C.* 452(f).) (See 1 *Cal. Evidence* (4th), *Judicial Notice*, §28.)

(7) *Usurious Transaction.* Whether a particular transaction is usurious is generally a mixed question of fact and law. (See *Ghirardo v. Antonioli* (1994) 8 C.4th 791, 800, 35 C.R.2d 418, 883 P.2d 960.)

(8) *Abuse of Discretion.* Where the underlying facts are not in dispute, whether the trial court abused its discretion is a question of law. (See *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 C.A.4th 965, 974, 97 C.R.2d 280 [discretion in holding that homeowners association properly interpreted restrictive covenant].)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

a. Review of Question of Law.

3. Distinction: Independent Review of "Constitutional Fact."

9 Witkin Cal. Proc. Appeal § 324

[§ 324] Distinction: Independent Review of "Constitutional Fact."

Under the rule of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, a public official may not recover damages for a defamatory falsehood in the absence of actual malice. (See 5 *Summary* (10th), *Torts*, §§602, 603.) In such a case, the reviewing court reviews a finding of actual malice de novo, independent of any previous determination by the trier of fact. "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' " In other words, "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." (*McCoy v. Hearst Corp.* (1986) 42 C.3d 835, 842, 231 C.R. 518, 727 P.2d 711, 5 *Summary* (10th), *Torts*, §612, quoting *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502.)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

b. Review of Mixed Question of Fact and Law.

9 *Witkin Cal. Proc. Appeal* § 325

[§ 325] Review of Mixed Question of Fact and Law.

The Supreme Court examined the scope of review of mixed questions of fact and law in *Crocker Nat. Bank v. San Francisco* (1989) 49 C.3d 881, 264 C.R. 139, 782 P.2d 278, 13 Summary (10th), *Personal Property*, §106. In *Crocker*, a bank sought refunds for real property taxes paid on electronic data processing equipment classified as a fixture by defendant city, and the trial judge agreed with defendant's classification. The Court of Appeal affirmed, reviewing the trial judge's classification as the resolution of a question of fact under the substantial evidence test (*infra*, §365). *Held*, reversed; the trial court's classification of a particular item as a fixture must be reviewed independently on appeal.

(a) Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. "If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently." (49 C.3d 888.)

(b) Thus, it is plain that, on appeal, a trial court's classification of a particular item as a fixture must be reviewed independently. The question of classification is mixed: it involves the application of the rule to the facts and the consequent determination whether the rule is satisfied. The "pertinent inquiry" is predominantly legal: it involves the various policy considerations implicated in the solution of the problem of taxability, and therefore requires a critical consideration, in a factual context, of legal principles and their underlying values. (49 C.3d 888.)

In *McGhan Med. Corp. v. Superior Court* (1992) 11 C.A.4th 804, 14 C.R. 264, 4 Cal. Proc. (5th), *Pleading*, §353, plaintiffs petitioned for coordination of 300 to 600 breast implant cases pending in 20 different counties. The coordination motion judge denied coordination on the ground that common questions did not predominate. *Held*, reversed.

(a) The trial judge's ruling was a mixed question of fact and law, and the proper method of review is as follows: "If

the concerns of judicial administration--efficiency, accuracy, and precedential weight--make it more appropriate for a [trial] judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the [trial] judge's finding to de novo review." (11 C.A.4th 809, quoting from *People v. Louis* (1986) 42 C.3d 969, 232 C.R. 110, 728 P.2d 180.)

(b) Here, the specific discretionary call was the ultimate conclusion that the benefit to be derived by coordination was outweighed by complications and problems that the trial judge anticipated would result. This decision "is one not necessarily made better by a trial court judge than by an appellate tribunal." This decision requires the "exercise [of] judgment about the values that animate legal principles." Hence, "the concerns of judicial administration ... favor the appellate court, and the question should be classified as one of law and reviewed de novo." (11 C.A.4th 811.) (See 20th Century Ins. Co. v. Garamendi (1994) 8 C.4th 216, 271, 32 C.R.2d 807, 878 P.2d 566, 8 Summary (10th), Constitutional Law, §1083 [reiterating Crocker test]; Ghirardo v. Antonioli (1994) 8 C.4th 791, 801, 35 C.R.2d 418, 883 P.2d 960 [applying McGhan analysis, and concluding that question whether debt restructuring was loan subject to usury law was question of law]; 64 So. Cal. L. Rev. 235 [treatment of mixed questions of law and fact in federal court].)

West's Key Number Digest, Appeal and Error 842(9)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

c. Moot or Abstract Question.

9 *Witkin Cal. Proc. Appeal* § 326

[§ 326] Moot or Abstract Question.

If the entire case is moot, the appeal may be dismissed. (See *infra*, §749 et seq.) If only some of the issues or points are moot, or academic as a result of the circumstances, these are simply not subject to review and will not be considered by the court. (See *Streator v. Linscott* (1908) 153 C. 285, 288, 95 P. 42; *Russell v. Ross* (1910) 157 C. 174, 180, 106 P. 583 [moot because of theory on which case was tried]; *Mailhes v. Investors Syndicate* (1934) 220 C. 735, 737, 32 P.2d 610; *Stack v. Welder* (1934) 137 C.A. 647, 654, 31 P.2d 426 [question whether plaintiff was entitled to surplus on foreclosure sale became moot when sale occurred and no surplus resulted]; *Security-First Nat. Bank v. O'Connor* (1937) 18 C.A.2d 592, 595, 64 P.2d 487 [property was sold under foreclosure for amount sufficient to cover mortgage debt; question whether judgment properly provided for deficiency was moot]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §596 et seq.)

In *Keefer v. Keefer* (1939) 31 C.A.2d 335, 87 P.2d 856, error in denial of a motion for change of venue in a divorce action was rendered moot when an annulment proceeding was consolidated with it for trial, without opposition by appellant, and an annulment decree was rendered. "An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial rights can be affected by the decision either way." (31 C.A.2d 337.)

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1. Function of Appellate Court.
- d. Error That Appellant Cannot Assert.
 1. Error Favorable to Appellant.

9 Witkin Cal. Proc. Appeal § 327

[§ 327] Error Favorable to Appellant.

There is a generally accepted principle that the appellant must show prejudicial error affecting his or her interests in order to prevail on appeal (*infra*, §417), and it follows that the appellate court need not and will not review errors that could not have been prejudicial to the appellant.

The clearest examples of nonreviewable errors are those that are in favor of the appellant or against the respondent. In *Walker v. Etcheverry* (1941) 42 C.A.2d 472, 109 P.2d 385, a wrongful death action, plaintiff failed to join a widow, one of the heirs. After trial, she was joined by amendment, and an additional finding was made that she was not a dependent. *Held*, any error in allowing the amendment or in making the finding was favorable to the appealing defendants, for the widow was thereby precluded from obtaining any recovery against them. (42 C.A.2d 476.) (See *Rauer v. Fernando Nelson & Sons* (1921) 53 C.A. 695, 700, 200 P. 809 [trial judge erroneously reduced plaintiff's recovery below amount to which he was entitled; appealing defendant had no ground for complaint]; *De Arman v. Connelly* (1933) 134 C.A. 173, 181, 25 P.2d 24 [court gave lump sum judgment for several plaintiffs; defendant-appellants objected that separate judgment in favor of each plaintiff should have been given]; *Morgan v. Veach* (1943) 59 C.A.2d 682, 694, 139 P.2d 976 [defendants, properly subject to mandatory injunction, were not entitled to object to provision allowing them alternative of paying damages]; *Driskill v. Thompson* (1956) 141 C.A.2d 479, 483, 296 P.2d 834; *Summers v. Burdick* (1961) 191 C.A.2d 464, 472, 13 C.R. 68; *Johnson v. A. Schilling & Co.* (1961) 194 C.A.2d 123, 134, 14 C.R. 684, quoting the text; *In re Christian J.* (1984) 155 C.A.3d 276, 281, 202 C.R. 54, citing the text; *People v. Webb* (1986) 186 C.A.3d 401, 411, 230 C.R. 755.)

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 2. Error Favorable to Coparty.

9 *Witkin Cal. Proc. Appeal* § 328

[§ 328] Error Favorable to Coparty.

The same general principle (see *supra*, §327) applies where the error is favorable to a coparty and not injurious to the appellant; the appellant cannot assert it on appeal. (See *Dobbs v. Purington* (1902) 136 C. 70, 71, 68 P. 323; *Frazzini v. Cable* (1931) 114 C.A. 444, 454, 300 P. 121; *Laubscher v. Blake* (1935) 7 C.A.2d 376, 381, 46 P.2d 836 [in action against several defendants, instruction unduly favorable to nonappealing codefendant was immaterial]; cf. *Sullivan v. San Francisco* (1950) 95 C.A.2d 745, 755, 214 P.2d 82 [nonsuit granted to codefendant who was joint tortfeasor; defendant could not complain under law prior to enactment of contribution statute].)

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d. Error That Appellant Cannot Assert.

3. Error Against Nonappealing Party.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 329

[§ 329] In General.

In *Nichols v. Nichols* (1933) 135 C.A. 488, 491, 27 P.2d 414, the court said: "It is elementary that an appellant is entitled to assign for error only such proceedings in the trial court as injuriously affect him, without regard to the errors of which others might complain. He cannot, on his appeal, urge errors which affect only his coparties who do not appeal, and such errors can be reviewed only at the instance of the parties affected thereby." The action was brought by a wife for divorce. On an order to show cause, at which defendant bank appeared, the court restrained defendant from conveying community property to the husband and appointed a receiver to take charge of the property. Defendant bank alone appealed, contending that the court had no authority to make the order because no notice of the proceeding had been given to the husband. *Held*, it could not complain of an error affecting a nonappealing coparty. (135 C.A. 491.) (See *Ginsberg v. Faraone* (1932) 126 C.A. 337, 342, 14 P.2d 777 [appellants were not entitled to complain of joinder of codefendants, where the latter, after unsuccessfully attempting to have action dismissed, defaulted]; *Broadway Fed. Savings & Loan Assn. of Los Angeles v. Howard* (1955) 133 C.A.2d 382, 400, 285 P.2d 61 [error against nonappealing codefendant]; *Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 C.A.4th 1746, 1750, footnote 1, 37 C.R.2d 612, *infra*, §392 [respondent who failed to file cross-appeal could not urge erroneous admission of evidence on appeal]; *In re Joshua M.* (1997) 56 C.A.4th 801, 807, 65 C.R.2d 748 [where only mother appealed order terminating both parents' parental rights, she could not raise issue that she was prejudiced by ineffective assistance of father's counsel].)

If the appellant, ignoring the rule that the appellant can only urge error injuriously affecting himself or herself, takes an appeal, may the respondent have it summarily dismissed and thereby save the delay and cost of proceedings to prepare the record and briefs? One opinion by dictum recognized the propriety of such a motion in a clear and compelling case; but the court, denying the motion, commented on the dangers of the practice: "If the counterclaimants, in their brief, should raise issues in which they have no interest, respondent can make his present point in his brief. We do not believe, however, that it would be in the interest of the administration of appellate justice in California to inaugurate a kind of appellate pretrial in which the scope of review is determined before the record is even filed or the contentions on appeal are limited before they have been voiced." (*Kristovich v. Crail* (1971) 18 C.A.3d 589, 591, 96

C.R. 207.)

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 - bb. Nonappealing Class Member.

9 Witkin Cal. Proc. Appeal § 330

[§ 330] Nonappealing Class Member.

Rebney v. Wells Fargo Bank (1990) 220 C.A.3d 1117, 269 C.R. 844, involved two class actions challenging the practice of defendant banks, Wells Fargo and Bank of America, of assessing fees against customers who wrote "not sufficient funds" (NSF) checks. In each action, court-approved settlement agreements expanded the class to include various non-NSF fees. The Wells Fargo settlement agreement also called for monetary and injunctive relief, while the Bank of America agreement provided credit coupons for former customers and monetary credits and injunctive relief for present customers. Appeals were filed in each action by various class members who had objected to the settlements at the fairness hearings. *Held*, judgments approving the settlements affirmed; lack of standing precluded nearly all of the claims raised by appellants.

(a) *Wells Fargo action.*

(1) *Expansion and unfairness errors.* Appellants raised various errors with regard to the expansion of the class and the fairness of the settlement, all of which affected only those class members who (a) paid non-NSF fees, (b) qualified for automatic NSF-fee waivers (which were eliminated by the settlement), or (c) had market rate accounts (which were included by the expansion). However, appellants neither qualified for automatic NSF-fee waivers nor had market rate accounts, and the only fees demonstrated with certainty to have been paid by them were *NSF fees*. (220 C.A.3d 1130.) If, as asserted by appellants, improper representation caused the settlement to have an overwhelming "NSF subclass tilt," appellants were beneficiaries of that unfairness and hence lacked standing to assert it as a basis for reversal. (220 C.A.3d 1131.)

(2) *Party must be aggrieved.* Class actions are subject to the requirement of being aggrieved.

(a) Application of the requirement will not preclude review of the effect of a settlement on aggrieved parties. There will be review if any of the aggrieved parties desire it; they need only appear as objectors at the fairness hearing and then take an appeal. (220 C.A.3d 1131.)

(b) The appellate court need not play a "guardian role," similar to that played by trial judges to protect the rights of absentees in class litigation. The scope of appellate review is never defined by the parameters of trial court jurisdiction, but rather is limited by specialized jurisdictional principles. Because the requirement of standing is jurisdictional, it imposes absolute limitations on the appellate court's guardian role. (220 C.A.3d 1132.)

(c) A federal decision cited by appellants does not support the proposition that class members with any measure of appellate standing may assert errors that aggrieve a nonappealing class member, regardless of whether they were themselves aggrieved by those errors. That decision simply permitted class members to raise errors by which they were themselves aggrieved on behalf of the entire class, without regard to whether nonappealing parties were members of a different subclass. It did not involve the assertion of errors by appellants who were not aggrieved. (220 C.A.3d 1132.)

(b) *Bank of America action.*

(1) *Expansion and unfairness errors: individual standing.* The errors asserted by appellants in their individual capacity with regard to these matters injured only those class members who (a) had high volume business accounts for which maintenance fees were assessed on analysis, (b) had a high volume of deposited items returned (DIR) accounts, or (c) paid savings account overdraft protection transfer fees. However, appellants conceded that they had neither on-analysis accounts nor a high volume of DIRs, and they did not claim any payment of savings account overdraft protection transfer fees. Hence, they were not aggrieved by the purported expansion and fairness errors of which they complain. (220 C.A.3d 1133.)

(2) *Expansion and unfairness errors: organizational standing.*

(a) Appellants contended that one of them, the California Grocers Association (CGA), had organizational standing to proceed on behalf of its members, some of whom apparently had on-analysis accounts and a high volume of DIRs, and therefore were aggrieved. However, CGA had "opted out" of the settlement as to claims for monetary relief and was suing defendant separately in Alameda County. Hence, the issue is whether CGA should be permitted the alternative of opting out and bringing a separate action for damages and simultaneously taking a partial appeal as to the injunctive portions of the settlement. (220 C.A.3d 1135.)

(b) The problem with allowing CGA to proceed in this manner is that the settlement is nonseverable; hence, a successful challenge by CGA to the injunctive portions would undermine the entire settlement, including the monetary portions. To review the entire judgment at CGA's request, while also allowing it to seek damages separately in its new action against defendant, would be unjust for several reasons: "First, such an approach would permit CGA to simultaneously litigate the same damage claims in two separate lawsuits--the present appeal and the Alameda County action. Second, it would permit CGA to litigate indirectly, in this appeal, that which, as a nonaggrieved stranger to the monetary portions of the settlement, it may not litigate directly. Third, it would permit CGA, as a nonaggrieved stranger, to challenge the monetary portions of the settlement when the only parties with appellate standing to do so on the grounds asserted here have uniformly chosen not to, but have elected instead to accept the monetary benefits of the settlement. And finally, it would permit all of this in spite of the fact that there was an alternative procedure available to CGA for directly litigating both the monetary and injunctive elements--appeal without opting out." (220 C.A.3d 1136.)

(c) There is no support for appellants' contention that CGA opted out only in its individual capacity and remained in the action on behalf of its members; but even had the opt-out been only individual, it would nevertheless have extinguished CGA's organizational standing to assert its members' monetary claims, because of the resulting absence of injury to CGA itself from the monetary portions of the settlement. (220 C.A.3d 1137.)

(3) *Other errors.*

(a) Appellants argued that the manner of proposed settlement notice to class members with high-volume business accounts, i.e., newspaper publication for former customers and individual notice accompanying the current customers' periodic statements, violated due process. However, because appellants, including CGA in its individual capacity, did

not have these accounts and hence were not aggrieved, and because of the aforementioned problems with CGA's organizational standing, this claim is not cognizable. (*220 C.A.3d 1137.*)

(b) Appellants contended that the trial judge abused his discretion in denying a motion to take the depositions of class counsel. However, two of the appellants had not joined in the motion and hence were not aggrieved. And, once again, appellate standing should not be extended to CGA, because reversal on this basis would have to be total and would be unfair in view of CGA's partial opt-out and pursuit of relief in another action. (*220 C.A.3d 1138.*)

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1. Point Raised by Appellate Court.

9 Witkin Cal. Proc. Appeal § 331

[§ 331] Point Raised by Appellate Court.

The rule that error against a nonappealing party cannot be reviewed (*supra*, §329) is not inflexible. Where portions of a judgment adverse to a nonappealing party are inextricably interwoven with the whole judgment, a general reversal may be ordered to do complete justice. (See *Estate of McDill* (1975) 14 C.3d 831, 840, 122 C.R. 754, 537 P.2d 874; *Estate of Stauffer* (1956) 142 C.A.2d 35, 43, 297 P.2d 1029 [construction of residuary clause of will benefited two residuary legatees, only one of whom appealed]; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 C.A.3d 1071, 1092, 258 C.R. 721, quoting the text [summary judgment against nonappealing insured and secondary insurer was reversed as to both parties because judgment against insured was "inextricably interwoven" with outcome of secondary insurer's appeal].) And other circumstances may induce the reviewing court to raise and deal with the error.

Thus, in *Estate of Haines* (1946) 76 C.A.2d 673, 173 P.2d 693, the probate judge held void a charitable gift in a will made within 30 days of death, but ordered distribution to M, under a clause providing for a substitutional gift to her in the event of invalidity. The heirs alone appealed, and the court held that the substitutional provision left them without an interest or a right to attack; hence, the charitable gift was valid. The court then observed that, although appellant heirs could not prevail, it would be wrong to affirm the decree in favor of respondent M when the party entitled was the respondent charity. "Therefore the judgment is reversed with directions that a decree be entered in accordance with the opinion herein." (76 C.A.2d 679.) In other words, error against a nonappealing party was reviewed and a judgment directed in favor of that party. (76 C.A.2d 679.)

The power and discretion of the court to give relief in these situations was stated in an extremely candid manner in *Osborn v. Osborn* (1954) 42 C.2d 358, 267 P.2d 333. Decedent wife died intestate. T, her husband, and M, her son, settled claims to her estate in an agreement approved by the court, under which T made a deed to M, subject to a reserved life estate, and M agreed not to record until after T's death, when trustees would turn the deed over to him. A creditor of M levied execution on the property, bought it at the sale, and then, at T's request, transferred the certificate of sale to defendant L, T's second wife. M sued L to quiet title. The trial judge held that the deed was not legally delivered by T and therefore refused to quiet title in either M or L. M alone appealed. *Held*, judgment reversed; there was a binding contract between T and M and title to his remainder passed as under an escrow. But the court rejected M's

contention that the reversal should merely direct that title be quieted in him and should affirm that part of the judgment that refused to quiet title in L who did not appeal.

The court's decision to reverse generally was based on a realistic consideration of the circumstances confronting the nonappealing party at the time of the judgment. L had two choices: (1) First, appeal, and argue that M did get a remainder and that the execution sale gave L the whole of that remainder; but this meant conceding M's remainder, so that if L failed to prove her rights under the execution sale, she would get nothing. (2) Second, let the judgment (that T's deed was void) stand, give up her claim under the execution sale, and take half the property as one of T's two heirs. L chose the second course: "She was apparently willing to let the judgment stand and take half an interest as heir rather than risk an adverse ruling with respect to the execution sale, which would leave her with nothing." (42 C.2d 366.) Because both parts of the judgment turned on the trial court's construction of the agreement and deed, and embraced the identical issue (whether M acquired a remainder), the reviewing court had jurisdiction to review the entire judgment; and, unless the entire judgment was reversed, L would be denied an opportunity to establish her claim that the execution sale was valid.

In re Marriage of Lackey (1983) 143 C.A.3d 698, 191 C.R. 309, involved a decree of dissolution ordering the father to pay child support. The mother filed an action against him in the small claims court to collect \$ 485 in arrearages, and received judgment for \$ 390 plus costs. Thereafter, the district attorney filed another action on behalf of the mother in the superior court to recover \$ 4,680, including \$ 1,560 that had accrued prior to the small claims court action. The superior court decided that the small claims judgment was res judicata only as to arrearages for the months specified in the small claims action, and gave judgment for \$ 4,225, the balance due. On the father's appeal, the appellate court held that the small claims court judgment was void for lack of subject matter jurisdiction, and remanded the matter for a determination of arrearages with no deduction for the amount of that judgment. The court recognized that its reversal was actually in favor of the mother who did not appeal, but declared that this was one of the situations in which a departure from the general rule was proper; i.e., it would be unreasonable to require the mother to appeal from the superior court's determination that the father was already obligated to pay her arrearages under the small claims court order. (143 C.A.3d 708, citing the text.)

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 - aa. Nature of Problem and Former Law.

9 Witkin Cal. Proc. Appeal § 332

[§ 332] Nature of Problem and Former Law.

(1) *Original Rule Precluding Review.* If both parties are dissatisfied with the judgment, both may appeal. If one is satisfied with it, the satisfied party may decide not to appeal, even though the record would show substantial error committed against him or her, such as improper exclusion of evidence and overruling of a good demurrer. It had been generally assumed that, because the satisfied party decides not to attack the judgment, review of these errors would serve no purpose. (See *Bates v. Babcock* (1892) 95 C. 479, 482, 30 P. 605 [demurrer overruled]; *Salter v. Ulrich* (1943) 22 C.2d 263, 268, 138 P.2d 7; *Henigson v. Bank of America* (1948) 32 C.2d 240, 244, 195 P.2d 777 [error in findings]; *American Enterprise v. Van Winkle* (1952) 39 C.2d 210, 221, 246 P.2d 935; *Rapp v. Southern Service Co.* (1931) 116 C.A. 699, 708, 4 P.2d 195 [evidence admitted over objection]; *Griffin v. Los Angeles* (1933) 134 C.A. 763, 765, 26 P.2d 655; *Bank of America v. Fidelity & Deposit Co. of Maryland* (1935) 9 C.A.2d 687, 691, 51 P.2d 472; *Lady v. Palen* (1936) 12 C.A.2d 1, 3, 54 P.2d 1133; *Sassano v. Roullard* (1938) 27 C.A.2d 372, 373, 81 P.2d 213; *Hager v. Hager* (1959) 174 C.A.2d 546, 550, 345 P.2d 68; *Blum v. San Francisco* (1962) 200 C.A.2d 639, 648, 19 C.R. 574, quoting the text.)

This view was criticized. (See 20 Cal. L. Rev. 70; 51 Harv. L. Rev. 1058.) And it is fundamentally unsound. A respondent should be permitted to show that error committed against him or her counteracts the prejudicial effect of error committed against the appellant and thereby negates the appellant's assertion of reversible error. (See *infra*, §333.)

(2) *Judicial Departures.* There were occasions on which errors urged by the respondent were considered. In *Mott v. Horstmann* (1950) 36 C.2d 388, 224 P.2d 11, petitioner brought a mandamus proceeding to compel recognition of his appointment to a city office. The lower court denied the writ, and petitioner alone appealed. Respondent auditor, in support of the judgment of denial, contended that the charter had been violated because petitioner was already under contract with another city. The trial court had expressly found against respondent on this point. *Held*, nevertheless, the nonappealing respondent could raise it, because in this mandamus proceeding, the judgment was merely that the peremptory writ be denied and there was nothing from which the respondent could appeal. "He therefore invokes the doctrine that the judgment denying the writ should stand if upon any tenable legal theory it may be sustained by the

record. In other words, he insists that an erroneous reason should be disregarded if the decision is correct. ... Under these circumstances the merits of the respondent's position will be examined." (36 C.2d 393; see infra, §346.) (See *Meyer v. State Bd. of Equalization* (1954) 42 C.2d 376, 386, 267 P.2d 257 [rule against review was stated, but respondent's attack was nevertheless examined and decided on the merits]; *La France Enterprises v. Van Der Linden* (1977) 70 C.A.3d 375, 380, 138 C.R. 690, citing *Mott* and the text.)

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bb. To Negate Prejudice From Error Against Appellant.

9 *Witkin Cal. Proc. Appeal* § 333

[§ 333] To Negate Prejudice From Error Against Appellant.

In 1957, the old rule (*supra*, §332) was abrogated. *C.C.P.* 906 now reads in part as follows: "The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters [e.g., verdict, decision, intermediate ruling, etc.] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken." (See *Central Mfg. Dist. v. Board of Supervisors of Los Angeles County* (1960) 176 C.A.2d 850, 857, 1 C.R. 733 [respondent may assert a legal theory which, if found to be sound, should result in affirmance notwithstanding appellant's contentions].)

In *Kasel v. Remington Arms Co.* (1972) 24 C.A.3d 711, 101 C.R. 314, plaintiff sued defendant franchisor for injuries received from the explosion of a shotgun shell manufactured by defendant's Mexican franchisee. The injury occurred in Mexico, which does not recognize strict products liability. The trial judge ruled that California law applied, hence, recovery could be had on the theory of strict liability; but his instructions to the jury precluded franchisor liability and the verdict was for defendant. Plaintiff alone appealed. The appellate court first held that strict liability could be imposed on R as franchisor if California law applied, and then took up the issue whether it did apply. Plaintiff objected that defendant was bound by the trial judge's ruling on this point because it failed to appeal. *Held*, the issue was subject to review on appeal, because its determination was involved in the basic issue of prejudice to plaintiff in the instruction excluding franchisor liability. In other words, if Mexican law applied, the erroneous instruction would not be prejudicial because there could be no recovery from anyone on strict products liability. (24 C.A.3d 728.) (See *Ratkovich v. San Bruno* (1966) 245 C.A.2d 870, 887, 54 C.R. 333, citing the text; *Lucas v. Monterey* (1977) 65 C.A.3d 947, 951, 135 C.R. 707, citing the text; *Adoption of Lenn E.* (1986) 182 C.A.3d 210, 218, 227 C.R. 63 [respondent could raise issue of appellant's standing to intervene in adoption proceeding]; *Erikson v. Weiner* (1996) 48 C.A.4th 1663, 1671, 56 C.R.2d 362; cf. *Estate of Powell* (2000) 83 C.A.4th 1434, 1439, 100 C.R.2d 501 [in probate proceeding where decedent's husband appealed, but respondent executor did not, exception in *C.C.P.* 906 to rule that nonappealing respondent may not urge error on appeal did not apply, because respondent sought reversal of judgment].)

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f. Matters Outside Record.

1. General Rule: Nonreviewable.

9 Witkin Cal. Proc. Appeal § 334

[§ 334] General Rule: Nonreviewable.

The appellate court is ordinarily confined in its review to the proceedings that took place in the court below and are brought up for review in a properly prepared record on appeal. (See *5 Am.Jur.2d* (2007 ed.), *Appellate Review* §§442, 443; *infra*, §626 et seq.) There are two aspects of this limiting rule:

(1) *Defective Record*. The matter may be one that would have been reviewable if a proper record had been brought up, but was omitted from the record. Prior to the Appellate Rules, the technicalities of the judgment roll and the requirement of authentication of the record made this a serious problem. Under the present practice, there are no technical problems in preparing the clerk's or reporter's transcript, certification by the judge is not required, and augmentation of a record lacking in some part of the proceedings is freely allowed. (See *infra*, §§667, 683 et seq.) Accordingly, this cause of limited review ought to become progressively obsolete.

(2) *Matter Not Presented in Lower Court*. A more fundamental objection is that the matter referred to on appeal was not before the lower court at all. This is different from the failure to raise an issue or point in the trial court. (See *infra*, §400 et seq.) Here, the point was raised below and may be raised on appeal, but the facts, events, documents, or other matters urged by the appellant were not offered in evidence and cannot be included in the record on appeal. It is improper to set them forth in briefs or oral argument, and they are outside the scope of review. (*Loving & Evans v. Blick* (1949) 33 C.2d 603, 613, 204 P.2d 23; *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 184, footnote 1, 151 C.R. 837, 588 P.2d 1261, citing the text; *Shoemaker v. Goldman* (1934) 2 C.A.2d 229, 230, 37 P.2d 724 [miscellaneous accusations of fraud in brief]; *Lady v. Barrett* (1941) 43 C.A.2d 685, 687, 111 P.2d 702; *Danziger v. Peebler* (1948) 88 C.A.2d 307, 310, 198 P.2d 719; *Estate of Walters* (1950) 99 C.A.2d 552, 557, 222 P.2d 100 [letter from counsel with affidavit to show that litigation had not delayed probate]; *Knapp v. Newport Beach* (1960) 186 C.A.2d 669, 679, 9 C.R. 90, citing the text ["Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal"]; *Green v. Green* (1963) 215 C.A.2d 31, 33, 30 C.R. 30; *Weller v. Chavarria* (1965) 233 C.A.2d 234, 246, 43 C.R. 364, citing the text; *Sequoia Pine Mills v. Superior Court* (1968) 258 C.A.2d 65, 69, 65 C.R. 353, 3 Cal. Proc. (5th), *Actions*, §927; *Oldenkott v. American Elec.* (1971) 14 C.A.3d 198, 207, 92 C.R. 127 [point brought up in "Additional Brief," though

not in record and not passed on by trial court]; *Pulver v. Avco Financial Services* (1986) 182 C.A.3d 622, 632, 227 C.R. 491, citing the text [appellant's brief relied on material that was not before trial court but was improperly included in record on appeal; appropriate remedy is to ignore defects, not dismiss appeal]; *Bach v. Butte* (1989) 215 C.A.3d 294, 306, 263 C.R. 565, quoting the text; *Frank v. Los Angeles* (2007) 149 C.A.4th 805, 815, 57 C.R.3d 430 [in reviewing liability aspect of judgment based on jury verdict, appellate court may not review exhibits identified, but not admitted at trial]; see C.R.C., Rule 8.204(a)(2)(C) [appellant's opening brief must provide summary of significant facts limited to matters in the record]; 56 *Harv. L. Rev.* 1313; 39 *San Diego L. Rev.* 1253 [sua sponte appellate rulings: determination of issues not presented and argued].)

West's Key Number Digest, Appeal and Error 671 et seq., 906

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

f. Matters Outside Record.

2. Exceptions.

9 *Witkin Cal. Proc. Appeal* § 335

[§ 335] Exceptions.

The rule just stated (*supra*, §334) should be read in the light of several not too clearly defined exceptions:

(1) *Judicial Notice*. The reviewing court has the same power to take judicial notice as the trial court, and a liberal use of this power may sometimes salvage an appellant's case. (See *Sewell v. Johnson* (1913) 165 C. 762, 771, 134 P. 704 [judicial notice of reversal of prior judgment that was foundation of judgment appealed from]; *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423, 126 P.2d 609 [judicial notice of repeal of statute authorizing action]; *Reserve Ins. Co. v. Pisciotto* (1982) 30 C.3d 800, 813, 180 C.R. 628, 640 P.2d 764, *infra*, §340; *Pennix v. Winton* (1943) 61 C.A.2d 761, 777, 143 P.2d 940 [Supreme Court, in denying hearing, took judicial notice of minutes of Court of Appeal]; 56 *Harv. L. Rev.* 1324; 61 *Harv. L. Rev.* 696; 4 *Stanf. L. Rev.* 378 [suggesting that judicial notice may be taken of legislative materials of statutory interpretation]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §443; 1 *Cal. Evidence* (4th), *Judicial Notice*, §45 et seq.)

(2) *Admissions of Party*. While briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may use statements in them as admissions against the party. (See, e.g., *Browne v. Superior Court* (1940) 16 C.2d 593, 599, 107 P.2d 1; *Kashow v. Plant* (1929) 97 C.A. 696, 697, 276 P. 117; *Alkus v. Johnson-Pac. Co.* (1947) 80 C.A.2d 1, 16, 181 P.2d 72; *DeRose v. Carswell* (1987) 196 C.A.3d 1011, 1019, footnote 3, 242 C.R. 368, quoting the text; *infra*, §704.)

(3) *Use on Retrial*. Matters outside the record may, in rare cases, have significance in the event of a retrial after reversal. In *Taylor v. S & M Lamp Co.* (1961) 190 C.A.2d 700, 12 C.R. 323, an action was brought by plaintiff in pro. per., charging conversion and fraud. The trial judge improperly granted a motion to exclude all evidence. The appellate court held that the complaint stated two good causes of action, and to guide the trial court on reversal the court considered alleged facts asserted but excluded from evidence, derived in part from discussions of court and counsel below, and set forth in the briefs. (190 C.A.2d 709.)

(4) *Reconciliation of Conflicting Decisions*. It may happen that cases arising out of the same background of events,

and involving the same issues of fact and law, are separately tried in different courts with diametrically opposed results. In rare instances, the reviewing court has thought it desirable to go outside the record of the case before it in order to reconcile these conflicting decisions. (See *infra*, §388.)

(5) *Matters Occuring After Judgment*. Matters occurring after the entry of judgment, and therefore not properly included as part of the actual record, may in unusual circumstances be shown by affidavit or other means, and be given consideration. (See *infra*, §338 et seq.)

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1. Function of Appellate Court.

g. Matters Occurring After Trial but Before Judgment.

9 Witkin Cal. Proc. Appeal § 336

[§ 336] Matters Occurring After Trial but Before Judgment.

Changes in the law occurring after commencement of the trial but before rendition of judgment are not within the rule allowing for consideration of postjudgment matters (see *infra*, §§339, 340). In this situation, a party claiming the benefit of the new law has the opportunity to raise the point in the trial court and cannot do so for the first time on appeal. (See *Oldenkott v. American Elec. (1971) 14 C.A.3d 198, 206, 207, 92 C.R. 127.*)

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A. In General.

1. Function of Appellate Court.

h. Matters Occurring After Entry of Judgment.

1. General Rule: Nonreviewable.

9 Witkin Cal. Proc. Appeal § 337

[§ 337] General Rule: Nonreviewable.

Matters occurring after entry of judgment are ordinarily not reviewable. The appeal reviews the correctness of the judgment or order as of the time of its rendition, leaving later developments to be handled in subsequent litigation. (See *Bradley v. Bradley* (1919) 40 C.A. 638, 640, 181 P. 237; *Solomon v. Solomon* (1953) 118 C.A.2d 149, 155, 257 P.2d 760; *In re Marriage of Folb* (1975) 53 C.A.3d 862, 877, 126 C.R. 306, citing the text; *In re Francisco W.* (2006) 139 C.A.4th 695, 706, 43 C.R.3d 171 [rule of nonreviewability applies in dependency cases]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §618.)

The rule is set forth in *People's Home Savings Bank v. Sadler* (1905) 1 C.A. 189, 81 P. 1029, as follows: "The function of an appellate court is to review the action of the inferior court in rendering the judgment or making the order from which the appeal is taken. For this purpose a record of the proceedings before the inferior court and of the matters presented for its action is brought to the appellate court, and in determining the correctness of the judgment or order appealed from it is limited to a consideration of that record. If the judgment is affirmed such affirmance is as of the date at which it was rendered. If it is reversed the case stands as if no judgment had been rendered by the inferior court. It is therefore manifest that error on the part of the inferior court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrelevant for the appellate court to entertain any evidence of such subsequent matters." (1 C.A. 193.)

West's Key Number Digest, Appeal and Error 873

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.
- h. Matters Occurring After Entry of Judgment.
2. Exception: Judgment Inoperative.

9 Witkin Cal. Proc. Appeal § 338

[§ 338] Exception: Judgment Inoperative.

If the judgment appealed from has become inoperative or unenforceable, it would be useless to affirm it. Accordingly, it is proper to show these matters occurring after entry:

(1) Judgment has been satisfied by the appellant. (See *supra*, §64; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §507.)

(2) Judgment has become moot by subsequent acts or circumstances. (See *Illinois Trust & Savings Bank v. Pacific Ry. Co.* (1896) 115 C. 285, 299, 47 P. 60 [stipulation filed at submission of cause]; *Old Nat. Financial Services v. Seibert* (1987) 194 C.A.3d 460, 467, 239 C.R. 728; *infra*, §749.)

(3) Nonsurvivable right has been abated by death. (See *Estate of Henry* (1960) 181 C.A.2d 173, 177, 5 C.R. 582, citing the text [nomination of administrator by surviving spouse; power granted by widow died with her].)

(4) Statutory cause of action has been repealed without a saving clause. (See *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423, 126 P.2d 609; 3 *Cal. Proc.* (5th), *Actions*, §20.)

(5) Intervening decision of highest court in similar case has held that enforcement of asserted right would be unconstitutional. (See *Claremont Imp. Club v. Buckingham* (1948) 89 C.A.2d 32, 33, 200 P.2d 47 [unconstitutionality of racial restrictive covenants was determined while appeal was pending]; see *infra*, §§339, 340.)

(6) Prior judgment upon which present judgment rests was reversed. (See *Sewell v. Johnson* (1913) 165 C. 762, 763, 134 P. 704.)

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- h. Matters Occurring After Entry of Judgment.
3. Exception: Change in Circumstances or Law.
- aa. Change Following Entry of Equitable Decree.

9 *Witkin Cal. Proc. Appeal* § 339

[§ 339] Change Following Entry of Equitable Decree.

Where there has been a change in the circumstances or the law following the entry of an equitable decree, such as a prohibitory injunction, this may be shown on appeal as the basis for reversal or modification. (See *Dr. Miles Calif. Co. v. Sontag Chain Stores Co.* (1937) 8 C.2d 178, 180, 64 P.2d 726 [change in state law]; *Cal-Dak Co. v. Sav-On Drugs* (1953) 40 C.2d 492, 496, 254 P.2d 497 [change in federal statute]; *White v. Davis* (1975) 13 C.3d 757, 773, footnote 8, 120 C.R. 94, 533 P.2d 222, citing the text [constitutional amendment, adopted after demurrer was sustained, was controlling because complaint sought injunctive relief as to future]; *Building Industry Assn. v. Oxnard* (1985) 40 C.3d 1, 2, 218 C.R. 672, 706 P.2d 285 [appeal from injunction prohibiting enforcement of ordinance that was amended while appeal was pending; reviewing court was properly concerned only with validity of amended ordinance]; *Thompson v. Los Angeles* (1947) 82 C.A.2d 45, 47, 185 P.2d 393 [change in zoning law]; *Callie v. Board of Supervisors* (1969) 1 C.A.3d 13, 18, 81 C.R. 440 [injunction and mandamus; current law applied]; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 66, 216 C.R. 180, citing the text [change in federal statute]; *Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 C.A.4th 1, 4, 30 C.R.2d 316, citing the text [change in California Fair Employment and Housing Act]; *Aktar v. Anderson* (1997) 58 C.A.4th 1166, 1179, 68 C.R.2d 595 [decree prohibiting involuntary collection of food stamp overissuances was modified to allow involuntary collection where overissuance occurred after date of federal law authorizing collection]; 59 *Harv. L. Rev.* 957; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §619; 7 *Cal. Proc.* (5th), *Judgment*, §§81, 82.)

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- h. Matters Occurring After Entry of Judgment.
3. Exception: Change in Circumstances or Law.
 - bb. Change in Other Types of Cases.

9 Witkin Cal. Proc. Appeal § 340

[§ 340] Change in Other Types of Cases.

Changes in the circumstances or law occurring after the entry of judgment may be considered in various types of cases other than those involving an equitable degree. (See *United States v. Alabama* (1960) 362 U.S. 602, 80 S.Ct. 924, 926, 4 L.Ed.2d 982, 986 [amendment to Civil Rights Act authorizing particular kind of action against state]; *Cort v. Ash* (1975) 422 U.S. 66, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26, 34 [amendments creating Federal Election Commission and administrative procedure for processing complaints was applicable to bar private action filed prior to amendments]; *Complete Service Bureau v. San Diego County Med. Soc.* (1954) 43 C.2d 201, 207, 272 P.2d 497 [standing of physicians to sue as cross-complainants, not legally clear at time of suit in 1951, was established by 1953 amendment to former B. & P.C. 2436 (now B. & P.C. 2311) while appeal was pending]; *Manquero v. Turlock Joint Union High School Dist.* (1964) 227 C.A.2d 131, 135, 38 C.R. 470 [remedial legislation permitting relief from delay in filing claim against public entity]; *Bank of Idaho v. Pine Avenue Associates* (1982) 137 C.A.3d 5, 11, 186 C.R. 695 [commenting on conflicting expressions in opinions]; *In re Karen G.* (2004) 121 C.A.4th 1384, 1389, 18 C.R.3d 301 [appeal from jurisdictional and dispositional order adjudicating minor dependent and returning her to mother's custody was dismissed, where basis for requested dismissal was evidence of which court could take judicial notice and subsequent events had rendered appeal moot].) (On retroactive effect of overruling of decision, see *infra*, §542.)

In *Reserve Ins. Co. v. Pisciotto* (1982) 30 C.3d 800, 180 C.R. 628, 640 P.2d 764, the court considered the postjudgment insolvency of a primary insurer in determining whether an excess insurer was liable for coverage that the primary insurer would otherwise have assumed. To avoid repetitive litigation, "we deem it appropriate to consider Reserve's insolvency; because the fact is not in dispute, we do not usurp the fact-finding function of the trial court. ... Furthermore, the court records regarding Reserve's insolvency would properly be the subject of judicial notice." (30 C.3d 813.)

In *Waller v. Truck Ins. Exchange* (1995) 11 C.4th 1, 44 C.R.2d 370, 900 P.2d 619, defendant, a commercial general liability insurer, contended on appeal that it had no duty to defend a third-party action seeking damages based on economic loss. *Held*, defendant was properly allowed to rely on two appellate cases to support its position,

notwithstanding that the two cases were not decided until after the trial and that the defense was not raised in the trial court or in the regular briefing in the Court of Appeal.

(a) Courts of Appeal routinely consider newly published case law that was unavailable until after judgment in the trial court. Moreover, after the two cases were decided, defendant got permission to file supplemental briefs. Supplemental briefing is proper when a court wishes to consider a point of law following the regular briefing of a case on appeal. (11 C.4th 24.)

(b) Further, the duty to defend issue involved a question of law based on undisputed facts. Under settled law, the Court of Appeal had discretion to address the issue even though it had not been raised at trial. (11 C.4th 24.)

(c) Plaintiffs assert that the Court of Appeal should not have applied the two appellate decisions retroactively. This claim ignores the general rule that judicial decisions are to be applied retroactively. (11 C.4th 24.) Although plaintiffs assert that they relied on law prior to one of the appellate decisions in deciding what facts needed to be explored, that the decision was unforeseeable, and that retroactive application of its holding was contrary to public policy, similar arguments have been rejected by the *United States Supreme Court*. (11 C.4th 25, citing *Harper v. Virginia Dept. of Taxation* (1993) 509 U.S. 86, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74, 86.) Also, one of the appellate decisions was not new law; it was a clarification of existing law. (11 C.4th 25.)

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1. Function of Appellate Court.

h. Matters Occurring After Entry of Judgment.

4. Postjudgment Order Fixing Costs and Fees.

9 Witkin Cal. Proc. Appeal § 341

[§ 341] Postjudgment Order Fixing Costs and Fees.

In *Grant v. List & Lathrop* (1992) 2 C.A.4th 993, 3 C.R.2d 654, supra, §188, plaintiffs filed a notice of appeal from a judgment entered for defendants in an action involving the sale of an automobile dealership. The amounts of the costs and fees awarded to defendants, which were initially left blank by the trial judge, were fixed by a postjudgment order. Although they could have done so, plaintiffs did not file a separate appeal from this order, and defendants argued that plaintiffs had thereby lost their right of review on the issues of costs and fees. *Held*, the right of review was not lost; when a judgment awards costs and fees and provides for the later determination of the amounts, the notice of appeal from the judgment subsumes any later order setting the amounts of the award.

(a) The order fixing costs and fees was an appealable order. (2 C.A.4th 996.) And allowing a separate appeal from the order provides litigants with the opportunity of seeking review of costs and fees when there is no desire to challenge the original judgment. However, requiring a separate appeal when the judgment expressly makes an award of costs and fees serves no apparent purpose. "The notice of appeal itself challenges the appropriateness of awarding fees and costs to respondents. Thus, appellate jurisdiction exists and respondents are on notice that appellants are seeking review of the award. Respondents have not been misled." (2 C.A.4th 997.)

(b) "Furthermore, because the judgment expressly provides for an award of fees and costs, the issue is not a collateral matter unrelated to the judgment's validity and finality. Determination of the amount in essence defines the scope of the judgment itself. Long before we were called upon to consider any issues raised on appeal, the award amounts became a part of the judgment. If we were to follow respondents' restrictive approach, we could review only part of the judgment from which the appeal was taken and in essence rule upon a judgment containing *blanks*. We see no policy reason favoring that approach and respondents have not cited any authority requiring us to follow it." (2 C.A.4th 997.)

(c) Addressing challenges to the amounts awarded necessarily involves consideration of events occurring after judgment, thereby violating the rule that postjudgment matters are irrelevant. (2 C.A.4th 998, citing the text.) However, this rule is not inflexible. "The fact that the court determined the amount of fees and costs awarded is not in dispute. By

considering the postjudgment matters, we are not usurping the trial court's fact-finding function. ... We are satisfied that this is a proper case for our reviewing the postjudgment proceedings determining the amounts of fees and costs." (2 C.A.4th 998, citing *Reserve Ins. Co. v. Pisciotto* (1982) 30 C.3d 800, 180 C.R. 628, 640 P.2d 764, supra, §340.)

Grant held only that, when a judgment awards costs and fees and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amount of the award. *Grant*, however, did not hold that an appellate court could review a determination of the entitlement to fees in a case where there was no postjudgment order fixing the amount. (*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 C.A.4th 1047, 1054, 120 C.R.2d 98, supra, §187.)

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1. Function of Appellate Court.

i. Matters Unnecessary to Decision.

1. General Rule: Nonreviewable.

9 Witkin Cal. Proc. Appeal § 342

[§ 342] General Rule: Nonreviewable.

If the court finds that certain errors require reversal (or, on the other hand, that affirmance is proper on certain grounds), and these are the major issues on appeal, it will ordinarily rest its decision upon them and will not consider other points made. This practice has been justified on the theory that discussion of unnecessary matters would be neither law of the case nor a precedent, and that unnecessary discussion might be prejudicial to the interests of litigants in other actions.

In *Young v. Three For One Oil Royalties* (1934) 1 C.2d 639, 36 P.2d 1065, the court said: "[W]e are urged by the respondents and a number of *amici curiae* appearing herein to decide this question as a large number of cases involving state trust companies are now pending in the courts awaiting a decision of this question. Notwithstanding this request we have decided to leave this question for future action. We have reached this conclusion for the reason that any decision that we might render herein, if adverse to the respondents, would be *dictum* pure and simple. It hardly seems fair that we should pass upon this important question and possibly prejudice the rights of litigants in other pending actions except when the conditions are equal and the decision binding upon all parties to the litigation." (1 C.2d 647.)

In *Eggert v. Pacific States Savings & Loan Co.* (1943) 57 C.A.2d 239, 136 P.2d 822, intervener building and loan commissioner did not appeal, but by stipulation, was permitted to file a brief as *amicus curiae*. He urged several points for modification not presented by either appellant or respondents. The court declared that "[t]hese questions will not be considered by us for the reason that the rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. *Amicus curiae* must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an *amicus curiae* will not be considered." (57 C.A.2d 251.)

A number of decisions state or apply the rule. (See *Cohen v. Alameda* (1914) 168 C. 265, 269, 142 P. 885; *McKannay v. McKannay* (1925) 195 C. 262, 263, 232 P. 464 [judgment was summarily reversed on respondent's confession of error, despite appellant's request to retain it to determine other issues]; *Rozewski v. Simpson* (1937) 9 C.2d 515, 520, 71 P.2d 72; *Palermo v. Stockton Theatres* (1948) 32 C.2d 53, 65, 195 P.2d 1 [court will not "reach out and

unnecessarily pronounce upon the constitutionality of any duly enacted statute"]; *Ferguson v. Keays* (1971) 4 C.3d 649, 656, footnote 6, 94 C.R. 398, 484 P.2d 70, *infra*, §558 [having determined that appellate courts have inherent power to waive fees and costs for indigent litigants, "we need not reach the question whether constitutional principles of due process or equal protection of the law would invalidate general fee legislation which has the effect of depriving indigents in ordinary civil cases from access to the courts"]; *New York Life Ins. Co. v. Bank of Italy* (1923) 60 C.A. 602, 608, 214 P. 61; *Formosa Corp. v. Rogers* (1951) 108 C.A.2d 397, 412, 239 P.2d 88; *Agricultural Lab. Rel. Bd. v. Laflin & Laflin* (1979) 89 C.A.3d 651, 662, footnote 11, 152 C.R. 800, citing the text.)

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i. Matters Unnecessary to Decision.

2. Exception: Guidance of Trial Court or Administrative Body.

9 *Witkin Cal. Proc. Appeal* § 343

[§ 343] Exception: Guidance of Trial Court or Administrative Body.

(1) *Trial Court*. There is a statutory exception to the general rule stated in the preceding section: "[I]f a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." (*C.C.P.* 43.)

Thus, the appellate court is not restricted to a review of just those matters necessary to support a reversal, but may (and should) consider matters that may arise on a retrial, for the guidance of the trial court. (See *Short v. Frink* (1907) 151 C. 83, 88, 90 P. 200; *Estate of Stevens* (1945) 27 C.2d 108, 118, 162 P.2d 918 [suggestions to probate court on law applicable to future proceeding on final distribution]; *Rader v. Thrasher* (1962) 57 C.2d 244, 252, 18 C.R. 736, 368 P.2d 360 [reversal for failure to find on material issue; court advised trial judge of pertinent rules of law governing determination of issue]; *Vasquez v. Superior Court* (1971) 4 C.3d 800, 821, footnote 18, 94 C.R. 796, 484 P.2d 964; *Hale v. Morgan* (1978) 22 C.3d 388, 405, 149 C.R. 375, 584 P.2d 512 [interpretation of statute after constitutional challenge was resolved]; *A. Hamburger & Sons v. Lemboeck* (1937) 20 C.A.2d 565, 572, 67 P.2d 380 [suggestions to trial judge on solution of anticipated problem]; *Wells v. Lloyd* (1939) 35 C.A.2d 6, 11, 94 P.2d 373; *Department of Social Welfare v. Wingo* (1946) 77 C.A.2d 316, 319, 175 P.2d 262; *King v. Kaplan* (1949) 94 C.A.2d 697, 700, 211 P.2d 578; *Kass v. Young* (1977) 67 C.A.3d 100, 109, 136 C.R. 469, 4 Cal. Proc. (5th), *Pleading*, §326.)

(2) *Administrative Body*. In an appeal from a judgment of the superior court denying an application for mandamus to review an administrative decision, the court may consider matters for the guidance of the administrative body. (*Sanchez v. Unemp. Ins. App. Bd.* (1977) 20 C.3d 55, 69, 141 C.R. 146, 569 P.2d 740.)

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i. Matters Unnecessary to Decision.

3. Other Departures From Rule.

aa. In General.

9 Witkin Cal. Proc. Appeal § 344

[§ 344] In General.

The courts depart from the general practice of not reviewing unnecessary matters on occasions when they deem it desirable to do so, deciding cases on several alternative grounds, or anticipating future controversies. The following cases are illustrative:

Cheff v. Schnackenberg (1966) 384 U.S. 373, 86 S.Ct. 1523, 1526, 16 L.Ed.2d 629, 634 ["Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver"].

San Francisco v. San Mateo (1950) 36 C.2d 196, 198, 222 P.2d 860 [judgment on demurrer affirmed for failure to exhaust administrative remedy; but question of public importance nevertheless was decided "as a guide generally to the taxing authorities of the state"].

Marin v. Superior Court (1960) 53 C.2d 633, 640, 2 C.R. 758, 349 P.2d 526 [discussion of alternate contentions was "unnecessary," but "due to the importance of, and the emphasis placed upon one of these questions, especially by amicus curiae, we are disposed to give it consideration"].

Sokol v. Public Util. Com. (1966) 65 C.2d 247, 257, 53 C.R. 673, 418 P.2d 265 ["the parties have invited us to decide the issue. ... The question is one of law, and the failure to consider it now would serve no purpose other than to exacerbate the burdens of the litigation"].

Mann v. Superior Court (1942) 53 C.A.2d 272, 279, 127 P.2d 970 ["Such a complete misconception of the supposed rights of interveners and their counsel with respect to attorneys' fees--seemingly too generally held--deserves discussion here, even though it is not an issue before us for determination"].

Gould v. People (1976) 56 C.A.3d 909, 921, 128 C.R. 743 [obscenity statute was held constitutional, thereby disposing of appeal; but court nevertheless proceeded to hold this taxpayer's action against judicial officer improper for reasons set forth].

Diaz v. Oakland Tribune (1983) 139 C.A.3d 118, 131, 188 C.R. 762 ["Although the judgment is reversed, it is in the interests of judicial administration to address the merits of defendants' remaining contentions"].

Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 C.A.3d 1023, 1030, 204 C.R. 913, citing the text ["appellate courts depart from this general rule in cases where the determination is of great importance to the parties and may serve to avoid future litigation ... or where the issue presented is of continuing public interest and is likely to recur"].

Fagerquist v. Western Sun Aviation (1987) 191 C.A.3d 709, 715, 236 C.R. 633 [court chose to review finding of negligence in wrongful death action, even though judgment could have been affirmed solely on strict liability theory, because of impact of finding of negligence on related federal indemnity claim].

In *Gawzner Corp. v. Minier* (1975) 46 C.A.3d 777, 120 C.R. 344, the trial judge granted a permanent injunction preventing the district attorney from enforcing a statute that regulated outside rate advertising of motels but not that of hotels. Thereafter, the Attorney General rendered an opinion that the statute was constitutional, and the district attorney moved to dissolve the injunction. The judge denied the motion and the district attorney appealed. The appellate court pointed out that the Attorney General's opinion was not a change in the law and that the order of denial was therefore not an abuse of discretion. But the court also took note of the district attorney's dilemma: Prevented by the injunction from enforcing the statute against plaintiff motel owners, he would be accused of discriminatory action when he attempted to enforce it against other motel owners. Thus, if the order were summarily affirmed and the constitutional challenge were not reviewed on this appeal, the district attorney would have to attempt such discriminatory enforcement and await the result of trial and appellate proceedings before obtaining a decision on constitutionality. Accordingly: "To avoid uncertainty with respect to the propriety of enforcement of the questioned legislation and to avoid doubt with respect to its proper interpretation, we review herein the questions raised on this appeal." (46 C.A.3d 782.)

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i. Matters Unnecessary to Decision.

3. Other Departures From Rule.

bb. Decision on Merits in Dismissed Appeal.

9 Witkin Cal. Proc. Appeal § 345

[§ 345] Decision on Merits in Dismissed Appeal.

The most extreme illustration of this practice (*supra*, §344) occurs where the appeal itself was improperly taken and is dismissed, but the reviewing court, lacking appellate jurisdiction to decide the merits of the particular proceeding, nevertheless renders what is in effect an advisory opinion to serve as a precedent. The following are illustrative:

People v. Riley (1951) 37 C.2d 510, 516, 235 P.2d 381 [appeal from nonappealable order in proceeding to determine sanity of defendant under death sentence; appeal was dismissed, but legal issues were discussed "in the interest of furnishing guidance to the trial courts in the conduct of such sanity proceeding"].

People v. Valenti (1957) 49 C.2d 199, 203, 316 P.2d 633 [determining important issues on effect of illegal search and seizure, then dismissing appeal].

Griffin v. Lima (1954) 124 C.A.2d 697, 699, 269 P.2d 191 [appeal from temporary injunction; court held injunction void for lack of bond and uncertainty in terms, then dismissed appeal for lack of sufficient appealable order].

Shearer v. United Calif. Theatres (1955) 133 C.A.2d 720, 724, 284 P.2d 934 [because plaintiff was not aggrieved by summary judgment in favor of one defendant cross-complaining against new party, plaintiff's appeal therefrom was dismissed; but court also held that summary judgment was properly granted].

Rios v. Torvald Klaveness (1969) 2 C.A.3d 1077, 1079, 83 C.R. 150 [appeal from nonappealable unsigned minute order: "We, therefore, dismiss the appeal but only after first having satisfied ourselves that the appellant would not have prevailed on the merits"; full opinion written on governing law].

People v. West Coast Shows (1970) 10 C.A.3d 462, 467, 89 C.R. 290, supra, §23 and infra, §760 [although appeals from orders to produce records in connection with investigation of carnival industry by Attorney General had to be dismissed as moot, Court of Appeal could pass on issues raised by appeals, where decision would be in public interest

and where nonconsideration of issues raised would result in similar proceedings and similar appeals with consequent additional delays].

Heimberger v. Fairfield (1975) 44 C.A.3d 711, 713, 117 C.R. 482, citing the text [appeal from nonappealable order sustaining demurrer; "where the questions are of law and the parties have invited the appellate court to decide the issues, the court may dismiss the appeal after rendering an opinion dealing with the merits"].

Acme Fill Corp. v. San Francisco Bay Conservation & Dev. Com. (1986) 187 C.A.3d 1056, 1065, 232 C.R. 348, citing the text ["Since the failure to exhaust administrative remedies is a basic defect, the matter is now subject to dismissal"; but court, citing cases on moot appeals (infra, §§759, 760), decided issues of broad public interest].

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j. Reasons for Trial Court's Decision.

1. General Rule: Nonreviewable.

9 *Witkin Cal. Proc. Appeal* § 346

[§ 346] General Rule: Nonreviewable.

If the decision of the lower court is right, the judgment or order will be affirmed regardless of the correctness of the grounds on which the court reached its conclusion. Two theories seem to be involved here: *first*, that the appellate court reviews the action of the lower court and not the reasons for its action; *second*, that there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct.

The rule is thus stated in *Davey v. Southern Pac. Co.* (1897) 116 C. 325, 48 P. 117: "The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (116 C. 329.)

The rule has been followed frequently. (See *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423, 126 P.2d 609; *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 C.3d 773, 779, footnote 6, 108 C.R. 828, 511 P.2d 1180, citing the text; *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 19, 112 C.R. 786, 520 P.2d 10; *El Centro Grain Co. v. Bank of Italy* (1932) 123 C.A. 564, 567, 11 P.2d 650 ["It is judicial action and not judicial reasoning which is the subject of review"]; *Hunter v. Sparling* (1948) 87 C.A.2d 711, 721, 727, 197 P.2d 807; *Snider v. Snider* (1962) 200 C.A.2d 741, 756, 19 C.R. 709, quoting the text; *Maxon v. Security Ins. Co. of New Haven, Connecticut* (1963) 214 C.A.2d 603, 610, footnote 6, 29 C.R. 586, citing the text; *Harley v. Superior Court* (1964) 226 C.A.2d 432, 435, 38 C.R. 72, citing the text; *People v. Evans* (1967) 249 C.A.2d 254, 257, 57 C.R. 276; *Sequoia Pine Mills v. Superior Court* (1968) 258 C.A.2d 65, 68, 65 C.R. 353, 3 Cal. Proc. (5th), Actions, §927, citing the text; *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 C.A.3d 924, 936, footnote 12, 112 C.R. 846, citing the text; *Chilton v. Contra Costa Community College Dist.* (1976) 55 C.A.3d 544, 548, 127 C.R. 659, quoting the text; *Smith v. Walter E. Heller & Co.* (1978) 82 C.A.3d 259, 267, 147 C.R. 1, quoting the text; *Schultz v. Contra Costa* (1984) 157 C.A.3d 242, 248, 203 C.R. 760; *Westbrook v. Superior Court* (1986) 176 C.A.3d 703, 710, 222

C.R. 317; Constance B. v. California (1986) 178 C.A.3d 200, 211, 223 C.R. 645, quoting the text; People v. Gibson (1987) 195 C.A.3d 841, 853, 241 C.R. 126, quoting the text; United Pac. Ins. Co. v. Hanover Ins. Co. (1990) 217 C.A.3d 925, 933, 266 C.R. 231, quoting the text; Ladas v. California State Auto. Assn. (1993) 19 C.A.4th 761, 769, 23 C.R.2d 810; Western Mut. Ins. Co. v. Yamamoto (1994) 29 C.A.4th 1474, 1481, 35 C.R.2d 698 [judgment should be affirmed if correct on any theory of law applicable to case]; Tippet v. Terich (1995) 37 C.A.4th 1517, 1539, 44 C.R.2d 862; Schabarum v. California Legislature (1998) 60 C.A.4th 1205, 1217, 70 C.R.2d 745; and see also 51 Harv. L. Rev. 1059.)

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aa. Exclusion of Evidence.

9 *Witkin Cal. Proc. Appeal* § 347

[§ 347] Exclusion of Evidence.

If evidence is excluded on an objection that is itself not sound, but the excluded evidence is objectionable on a different ground, it is immaterial that the reason advanced by counsel or relied on by the court was wrong. (*Davey v. Southern Pac. Co.* (1897) 116 C. 325, 330, 48 P. 117 ["even where no objection is made, but the court excludes evidence of its own motion, the ruling will be sustained, if the evidence was for any reason inadmissible"]; *Careaga v. Moore* (1925) 70 C.A. 614, 623, 234 P. 121; *Bohn v. Gruver* (1931) 111 C.A. 386, 396, 295 P. 891; *Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 C.A.3d 159, 173, 222 C.R. 800, citing the text ["If the exclusion is proper upon any theory of law applicable to the instant case, the exclusion must be sustained regardless of the particular considerations which may have motivated the trial court in its decision"].)

The distinction between the effect of improper admission and exclusion should be noted here. The requirement of a proper objection is fundamental, and, if improper evidence is admitted, the party who gave the wrong reason for objecting can make no claim of reversible error. But if the evidence is excluded, the only question on appeal is whether the ruling is right. As the court said in *Clarke v. Huber* (1864) 25 C. 593, 598: "The respondent is at liberty to suggest any ground that he may choose, to show that the ruling was right, whether advanced in the discussions below or not. If the testimony had been admitted, and Clarke had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt." (25 C. 598.)

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9 *Witkin Cal. Proc. Appeal* § 348

[§ 348] Other Situations.

Other situations in which the trial court's judgment or order has been upheld despite an erroneous reason given include the following:

(1) *Correct Legal Basis Exists*. Where the decision was based on the wrong rule of law, but a sound legal basis exists, it will be upheld. (See *International Assn. of Cleaning & Dye House Workers v. Landowitz* (1942) 20 C.2d 418, 423, 126 P.2d 609 [judgment entered on ground that ordinance in question was unconstitutional was upheld on other grounds without considering issue of constitutionality]; *El Centro Grain Co. v. Bank of Italy* (1932) 123 C.A. 564, 565, 11 P.2d 650 [judgment otherwise proper was sustained even though trial court might have been in error as to construction of law on which judgment was based]; *People v. Evans* (1967) 249 C.A.2d 254, 257, 57 C.R. 276 [defendant refused to pay over money collected under local city tax; misdemeanor complaint dismissed on erroneous theory that mens rea was required, but order was upheld because state statute had preempted field and nullified misdemeanor provision of ordinance]; *Sequoia Pine Mills v. Superior Court* (1968) 258 C.A.2d 65, 67, 65 C.R. 353, 3 Cal. Proc. (5th), Actions, §927 [denial of motion for change of venue, mistakenly applying local action rule to transitory action, was affirmed on ground that defendant had failed to file affidavit of residence outside county].)

(2) *Evidence Supports Alternative Count*. Where inconsistent counts are pleaded, and an appeal is taken from the judgment, the reviewing court may disregard particular theories and findings and affirm the judgment on a theory supported by findings and evidence. (*Croghan v. Metz* (1956) 47 C.2d 398, 403, 303 P.2d 1029.)

(3) *Sufficient Ground for Demurrer*. Where the respondent set up both good and bad grounds in a demurrer, it is immaterial that the trial judge sustained it on an untenable ground. (*Burke v. Maguire* (1908) 154 C. 456, 461, 98 P. 21; *Koch v. Speedwell Motor Car Co.* (1914) 24 C.A. 123, 126, 140 P. 598 ["The defendant cannot be deprived of the right to be heard here upon any or all of the grounds of his demurrer merely because the court below designated a single ground as the reason for its order sustaining the demurrer"]; *Davie v. Regents of Univ. of Calif.* (1924) 66 C.A. 693, 702, 227 P. 243 ["If the complaint is insufficient upon any ground properly specified in the demurrer the order must be

sustained though the lower court may have deemed it sufficient in that respect and may in its order have declared it defective only in some particular in which we hold it to be good"].)

(4) *Sufficient Ground for Summary Judgment.* Where a motion for summary judgment has been granted and there is a sufficient ground to support the judgment, it will be upheld regardless of the grounds on which the trial court based its decision. (See *Snider v. Snider* (1962) 200 C.A.2d 741, 756, 19 C.R. 709 [summary judgment for defendant, granted in contract action on ground that affidavits showed rescission, was upheld on ground that defendant's affidavit denied execution of contract and plaintiff's affidavit failed to present any triable issue of fact in opposition]; *Troche v. Daley* (1990) 217 C.A.3d 403, 407, 266 C.R. 34, quoting the text.)

(5) *Sufficient Ground for New Trial Order.* Where an order grants a new trial on a ground other than insufficiency of the evidence or excessive or inadequate damages, it will be affirmed on any good ground set forth in the motion and supported by the record, even though the judge relied on and specified a different ground. (C.C.P. 657; see *Treber v. Superior Court* (1968) 68 C.2d 128, 133, 136, 65 C.R. 330, 436 P.2d 330, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §89.)

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9 *Witkin Cal. Proc. Appeal* § 349

[§ 349] Exceptions.

There are several situations in which the reasons for the trial court's decision are either required by statute or, though not required, may have a significant effect on the determination of the appeal.

(1) *Order Granting New Trial*. An order granting a new trial must state the grounds and reasons. If the ground is insufficiency of evidence or excessive or inadequate damages, it is "conclusively presumed" on appeal that the order was made only for the reasons specified, and the scope of review is limited to those reasons. (*C.C.P.* 657; see *Mercer v. Perez* (1968) 68 C.2d 104, 119, 65 C.R. 315, 436 P.2d 315, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §79.)

(2) *Order Granting Nonsuit*. A motion for a nonsuit must specify the grounds in order that the opposing party may remedy the defect in his or her proof; hence, an order made on the wrong ground will not be sustained. (*Lawless v. Calaway* (1944) 24 C.2d 81, 92, 147 P.2d 604; *Markwell v. Sykes* (1959) 173 C.A.2d 642, 651, 343 P.2d 769, citing the text; see 7 Cal. Proc. (5th), *Trial*, §416.)

(3) *Decision Not on Merits*. Where the trial judge fails to pass on the merits in reaching a decision, grounds that might have been sufficient to sustain it on the merits will not be considered. (*Gosnell v. Webb* (1943) 60 C.A.2d 1, 5, 139 P.2d 985 [denial of motion to reduce alimony on erroneous ground that decree merely approved property settlement and was not subject to modification].)

(4) *Point Expressly Undecided*. Where a point is expressly left undecided, the effect on that point is a failure to pass on the merits. (See *Kyne v. Kyne* (1943) 60 C.A.2d 326, 332, 140 P.2d 886 ["where, as here, the trial court specifically stated that it was not determining, but refused to pass on all other issues except the existence of the contingent fee agreement, an appellate court is not justified in holding that the order may be supported on any of the other issues involved where the determination of those issues depends upon conflicting evidence"]; *Zak v. State Farm Mut. Liab. Ins. Co.* (1965) 232 C.A.2d 500, 506, 42 C.R. 908 ["Where the record reflects that the trier of fact has not considered a theory under which the evidence is conflicting, the reviewing court cannot rely on that theory to sustain the action of the lower court"]; *Cramer v. Morrison* (1979) 88 C.A.3d 873, 887, 153 C.R. 865.)

(5) *Statement of Decision*. After a court trial, the court, on request, must issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (C.C.P. 632.) Accordingly, a trial judge's opinion and ruling that are merely tentative are not a "statement of decision" that can be used to impeach the judgment. (*Tyler v. Children's Home Soc. of Calif.* (1994) 29 C.A.4th 511, 551, 35 C.R.2d 291, *infra*, §350; 7 Cal. Proc. (5th), Trial, §389 et seq.)

(6) *Judge Misconceived Duty*. Where the judge's comments indicate that he or she misconceived the duty in ruling on a motion for new trial. (See *Lippold v. Hart* (1969) 274 C.A.2d 24, 26, 78 C.R. 833, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §38.)

(7) *Judge's Bias*. Where the judge's comments show a personal bias or arbitrary point of view. In *Wirz v. Wirz* (1950) 96 C.A.2d 171, 176, 214 P.2d 839, plaintiff husband sued for divorce on the ground of incurable insanity, offering adequate proof by unimpeached and uncontradicted medical testimony. The trial judge, denouncing the law as unjust, denied the divorce. Although the judgment was affirmed on a distinct ground (no sufficient showing of ability to support), the appellate court strongly criticized the statements of the trial judge on the law. (See *In re Marriage of Iverson* (1992) 11 C.A.4th 1495, 1499, 15 C.R.2d 70 [judgment of dissolution was reversed where judge's statements revealed gender bias that made it impossible for wife to receive fair trial].)

(8) *Means Used To Arrive at Decision*. Where the focus is primarily on the means used by the trial judge in arriving at a decision. In *Clothesrigger v. GTE Corp.* (1987) 191 C.A.3d 605, 236 C.R. 605, 4 Cal. Proc. (5th), *Pleading*, §293, a class action involving all state long-distance telephone subscribers, the trial judge denied plaintiff's motion to modify the definition of the class to include all such subscribers nationwide. *Held*, reversed. Where the appellate focus is on the means used by the trial judge, the right result is an inadequate substitute for an incorrect process. In such cases, the appellate scrutiny should be on the reasons expressed by the trial judge in the context of counsel's arguments. (191 C.A.3d 611.) Here, in denying plaintiff's motion to modify the certified class definition, the trial judge did not engage in the analysis required by California law regarding class actions (7 *Summary* (10th), *Constitutional Law*, §32) and by California choice of law rules. Hence, "[o]ur focus on correct process requires us to reverse even though there may be substantial evidence to support the court's order." (191 C.A.3d 612.)

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aa. In General.

9 *Witkin Cal. Proc. Appeal* § 350

[§ 350] In General.

Sometimes the trial court's expression of its reasons for a ruling or decision goes beyond a simple statement of grounds or legal conclusions, and is embodied in an opinion, discussing the facts and law in the manner of an appellate court opinion. It has already been pointed out that such an opinion is not the decision (see 7 *Cal. Proc.* (5th), *Judgment*, §10), and neither its conclusions nor its reasoning furnishes any basis for attack on an otherwise correct statement of decision, judgment, or order. (See *Scholle v. Finnell* (1916) 173 C. 372, 376, 159 P. 1179; *De Cou v. Howell* (1923) 190 C. 741, 751, 214 P. 444; *Taormino v. Denny* (1970) 1 C.3d 679, 684, 83 C.R. 359, 360, 463 P.2d 711, citing the text; *Buckhantz v. R.G. Hamilton & Co.* (1945) 71 C.A.2d 777, 781, 163 P.2d 756; *Marosi v. J.W. Robinson Co.* (1951) 107 C.A.2d 811, 815, 238 P.2d 78; *Daly City v. Smith* (1952) 110 C.A.2d 524, 528, 243 P.2d 46; *Oldis v. La Societe Francaise de Bienfaisance Mutuelle* (1955) 130 C.A.2d 461, 471, 279 P.2d 184 [full review of cases is on proper and improper use of opinion]; *Western Mut. Ins. Co. v. Yamamoto* (1994) 29 C.A.4th 1474, 1481, 35 C.R.2d 698 [reviewing court is not limited to theory adopted by trial court]; *Patarak v. Williams* (2001) 91 C.A.4th 826, 830, 111 C.R.2d 381, citing the text [trial judge's contemporaneous remarks, whether written or oral, may not be used to impeach final judgment]; 17 *So. Cal. L. Rev.* 107.) Nor can it serve as a substitute for the record on matters of evidence. (See *Estate of Bernard* (1962) 206 C.A.2d 375, 380, 23 C.R. 828.)

In *Tyler v. Children's Home Soc. of Calif.* (1994) 29 C.A.4th 511, 35 C.R.2d 291, plaintiff parents sought to rescind agreements relinquishing their child for adoption, based on defendant adoption agency's noncompliance with certain state regulations. The trial court entered judgment for defendants. Plaintiffs contended on appeal that the trial judge prejudicially erred in failing to consider constructive fraud as a ground for rescission, based on the trial judge's remark in his tentative decision ("Opinion and Ruling") that violation of the regulations was of "limited relevance." *Held*, judgment for defendants affirmed. Plaintiffs waived their contention that the trial judge erred in failing to consider constructive fraud, because they did not request a statement of decision.

(a) Although the trial judge, in his tentative decision, stated that defendants' noncompliance was of "limited relevance," a lower court judgment or order is presumed correct on appeal. Parties wishing to avoid inferences in favor

of the judgment must obtain a statement of decision under *C.C.P.* 632, 634. (29 *C.A.4th* 551.)

(b) Here, however, no party requested a statement of decision. The trial judge's written opinion and ruling was not a statement of decision, but merely a tentative decision, which cannot be used to impeach the judgment. (29 *C.A.4th* 551.)

Some of the earlier cases went so far as to declare that the appellate court is "not interested" in the reasons of the trial judge, and that an opinion might be stricken from the record. (See 17 *So. Cal. L. Rev.* 107, 108.) But, even during this period of disparagement, opinions were being written by trial judges, consulted by reviewing courts, and occasionally adopted in whole or in part, with due acknowledgment, as appellate court opinions. (See *infra*, §785.) And, well-considered cases make it clear that the opinion has several legitimate uses. (See *infra*, §§351, 352.)

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bb. Aid to Interpretation or Discovery of Grounds.

9 *Witkin Cal. Proc. Appeal* § 351

[§ 351] Aid to Interpretation or Discovery of Grounds.

(1) *Opinion in Present Case.* Although it cannot be invoked to contradict the statement of decision or judgment, a judge's opinion may be used as an aid in the interpretation of an uncertain decision or the discovery of the grounds of it, for the purpose of affirming, modifying, or reversing it. (See 17 *So. Cal. L. Rev.* 108.) The following cases are illustrative:

(a) *For purpose of affirming.* (See *Birkenfeld v. Berkeley* (1976) 17 C.3d 129, 161, 130 C.R. 465, 550 P.2d 1001, citing the text; *Macmillan Petroleum Corp. v. Griffin* (1953) 116 C.A.2d 425, 427, 255 P.2d 75; *Silvers v. Wesson* (1954) 122 C.A.2d 902, 906, 266 P.2d 169 [order granting new trial; opinion quoted to show that judge properly performed his function--weighed evidence and found it speculative]; *Williams v. Puccinelli* (1965) 236 C.A.2d 512, 516, 46 C.R. 285, citing the text; *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 C.A.3d 924, 933, footnote 10, 112 C.R. 846, citing the text; *South Bay Irr. Dist. v. California-Amer. Water Co.* (1976) 61 C.A.3d 944, 960, 964, 995, 133 C.R. 166; *Carroll v. Puritan Leasing Co.* (1978) 77 C.A.3d 481, 491, 492, 143 C.R. 772; *Estes v. Grover City* (1978) 82 C.A.3d 509, 512, 147 C.R. 131 ["scholarly opinion" aided court in conclusion that judge used proper standard for administrative review]; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1312, 64 C.R.2d 705, 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §74, citing the text; cf. *Martin v. Ray* (1946) 74 C.A.2d 922, 927, 170 P.2d 75 [opinion showed that modification of former judgment was proper correction of clerical error].)

In *Kuffel v. Seaside Oil Co.* (1977) 69 C.A.3d 555, 138 C.R. 575, the trial judge had failed to make requested findings on two material issues relating to the calculation of damages, but he did file a memorandum opinion setting forth the method used and advising appellants of the actual findings on those issues. *Held*, judgment affirmed. A memorandum opinion cannot be used to fill interstices in findings; hence, the failure to find was error. But an opinion can be used to ascertain whether the appellant is prejudiced by the error; and here it clearly showed that there was no prejudice and consequently no reversible error. (69 C.A.3d 568.)

(b) *For purpose of modifying.* (See *Union Sugar Co. v. Hollister Estate Co.* (1935) 3 C.2d 740, 749, 47 P.2d 273.)

(c) *For purpose of reversing.* (See *Estate of Tarrant* (1951) 38 C.2d 42, 46, 48, 237 P.2d 505; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 C.A.2d 776, 790, 194 P.2d 148; *Finley v. Winkler* (1950) 99 C.A.2d Supp. 887, 889, 222 P.2d 345; *Mathes v. Long Beach* (1953) 121 C.A.2d 473, 475, 263 P.2d 472 [observing that judge's opinion, with its research, "has been of great help to this court"]; *Canepa v. Sun Pac.* (1954) 126 C.A.2d 706, 710, 714, 272 P.2d 860 [opinion showed that tort measure of damages had been applied, whereas plaintiff had elected quasi-contract recovery; opinion therefore showed error in measure of damages]; *Bailey v. Fosca Oil Co.* (1960) 180 C.A.2d 289, 294, 4 C.R. 474 [opinion was integral part of order, stating erroneous theory on which judge proceeded]; *Wechsler v. Capitol Trailer Sales* (1963) 220 C.A.2d 252, 263, 33 C.R. 680 [opinion showed that judge erroneously found contract free from ambiguity and therefore failed to consider relevant extrinsic evidence]; *People v. Van Gorden* (1964) 226 C.A.2d 634, 640, 38 C.R. 265 [opinion showed misconception of law regarding burden of proof]; *Distribu-Dor v. Karadanis* (1970) 11 C.A.3d 463, 468, 90 C.R. 231; *People v. Butcher* (1986) 185 C.A.3d 929, 936, 937, 229 C.R. 910 [oral opinion showed that judge erroneously interpreted statute]; cf. *Steele v. Superior Court* (1961) 56 C.2d 402, 405, footnote 1, 15 C.R. 116, 364 P.2d 292 [review of discovery order on mandamus; "The filing of such opinions is of great benefit to appellate courts"].)

(2) *Opinion in Prior Case.* It has also been held that the opinion in a prior case arising out of the same controversy may be examined to determine the scope of collateral estoppel in a subsequent case: "[E]vidence other than the record itself may be considered in order to determine what questions were actually decided by the court. It appears to us that there is no better extrinsic evidence on this issue than the oral opinion of the judge who has himself decided the case. Therefore, the trial court in the instant case erred when he refused to admit in evidence the certified copy of the oral opinion." (*Tevis v. Beigel* (1957) 156 C.A.2d 8, 14, 319 P.2d 98, 7 Cal. Proc. (5th), *Judgment*, §418.)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

j. Reasons for Trial Court's Decision.

4. Trial Judge's Opinion.

cc. Other Uses.

9 *Witkin Cal. Proc. Appeal* § 352

[§ 352] Other Uses.

An opinion of a trial judge may be of great value to the respondent as an additional brief, and to the reviewing court as a draft of its own opinion. The reports contain a number of illustrations of adoption of a trial court's opinion as the opinion, in whole or in part, of the appellate court. (See, e.g., *Estate of Fulton* (1936) 15 C.A.2d 202, 203, 59 P.2d 508; *Phelps v. Prussia* (1943) 60 C.A.2d 732, 733, 141 P.2d 440; *Los Angeles v. Continental Corp.* (1952) 113 C.A.2d 207, 208, 248 P.2d 157; *Stockton Theatres v. Palermo* (1954) 124 C.A.2d 353, 358, 268 P.2d 799 [opinion quoted at length on essential issues of case, with observation that "such opinions are always helpful to an appellate court"]; *Hart v. Gudger* (1957) 153 C.A.2d 217, 218, 314 P.2d 549; *Pacific Tel. & Tel. Co. v. Granite Const. Co.* (1964) 225 C.A.2d 765, 767, 37 C.R. 727 ["because such opinions are always helpful to an appellate court we adopt said opinion as part of the opinion of this court"]; *Harry H. White Lumber Co. v. Crocker-Citizens Nat. Bank* (1967) 253 C.A.2d 368, 370, 61 C.R. 381; *Union Cen. Life Ins. Co. v. Pepe* (1970) 8 C.A.3d 502, 504, 87 C.R. 610; *Fox v. Federated Dept. Stores* (1979) 94 C.A.3d 867, 874, 156 C.R. 893; *Davis v. Sacramento* (1982) 138 C.A.3d 356, 359, 188 C.R. 607; and see 17 *So. Cal. L. Rev.* 108.)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

k. Policy of Legislation.

1. Improper Consideration.

9 *Witkin Cal. Proc. Appeal* § 353

[§ 353] Improper Consideration.

Judicial opinions abound in declarations to the effect that a reviewing court must follow the law, and that the policy, wisdom, or justice of the law is for the Legislature and not the courts to determine. (See, e.g., *Watson v. Division of Motor Vehicles of Calif.* (1931) 212 C. 279, 285, 298 P. 481 ["The courts have nothing to do with the wisdom, policy, or expediency of the law, for the power to make the law carries with it the power to judge of its necessity, expediency, and justice"]; *Lucas v. Los Angeles* (1938) 10 C.2d 476, 485, 75 P.2d 599 ["when a subject-matter is purely legislative, the courts will not decry the wisdom or policy of the enactment because they are not in accord with the views of the law-making body"]; *Wholesale Tobacco Dealers Bureau of Southern Calif. v. National Candy & Tobacco Co.* (1938) 11 C.2d 634, 646, 82 P.2d 3; *Sullivan v. Union Oil Co. of Calif.* (1940) 16 C.2d 229, 236, 105 P.2d 922; *Bodinson Mfg. Co. v. California Emp. Com.* (1941) 17 C.2d 321, 325, 109 P.2d 935 ["It is not the province of this court to consider the arguments of social policy which have been urged upon it by each side; these are matters which must be, and no doubt were, addressed to the legislature"]; *Werner v. Southern Calif. Associated Newspapers* (1950) 35 C.2d 121, 129, 216 P.2d 825; *Estate of Calhoun* (1955) 44 C.2d 378, 387, 282 P.2d 880 ["This court may not usurp the legislative function to change the statutory law which has been uniformly construed by a long line of judicial decisions"]; *Di Genova v. State Bd. of Education* (1962) 57 C.2d 167, 177, 18 C.R. 369, 367 P.2d 865; *Cullinan v. McColgan* (1947) 80 C.A.2d 976, 981, 183 P.2d 115; *Adams v. Wolff* (1948) 84 C.A.2d 435, 444, 190 P.2d 665; *Rudley v. Tobias* (1948) 84 C.A.2d 454, 458, 190 P.2d 984; and see 64 *Harv. L. Rev.* 1188; 8 *Stanf. L. Rev.* 293; for the opposite approach, see *infra*, §354.)

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X. SCOPE OF REVIEW

A. In General.

1. Function of Appellate Court.

k. Policy of Legislation.

2. Proper Consideration.

9 Witkin Cal. Proc. Appeal § 354

[§ 354] Proper Consideration.

The proposition stated in the preceding section, like some other sweeping generalizations, is not a wholly accurate description of the process of judicial decision. It is doubtless true that a court should not allow its views of economic or social policy to frustrate the clear legislative intent of a statute, and it seems equally improper for individual courts to reject common law doctrines or well established precedents because of personal disagreement with the policy of the rules. (See cases *supra*, §353.)

But the law is founded on justice and policy, and it is neither possible nor desirable to eradicate their influence from the judicial mind. And the opinions disclose various situations in which the courts have frankly relied on considerations of policy in reaching decisions, and thus have made clear the propriety of urging these considerations in appellate briefs and argument. (See, e.g., *Silva v. Providence Hosp. of Oakland* (1939) 14 C.2d 762, 775, 97 P.2d 798 [abolition of immunity of charitable hospital from tort liability]; *Shafer v. Registered Pharmacists Union Local 1172* (1940) 16 C.2d 379, 383, 106 P.2d 403 [statute regulating labor relations]; *Roehm v. Orange* (1948) 32 C.2d 280, 287, 196 P.2d 550 [policies underlying taxation of intangible property; economic writings cited]; *Perez v. Sharp* (1948) 32 C.2d 711, 725, 198 P.2d 17 [holding antimiscegenation statute unconstitutional]; *Rediker v. Rediker* (1950) 35 C.2d 796, 808, 221 P.2d 1 ["We conclude that the public policy of this state requires the preservation of the second marriage and the protection of the rights of the second spouse 'rather than a dubious attempt to resurrect the original' marriage"]; *Thorsby v. Babcock* (1950) 36 C.2d 202, 204, 206, 222 P.2d 863 [liberal construction of homestead exemption]; *Stewart v. McCollister* (1951) 37 C.2d 203, 207, 231 P.2d 48 [statute requiring filing of claim for negligence of public officer]; *Estate of Torregano* (1960) 54 C.2d 234, 248, 5 C.R. 137, 352 P.2d 505 [legislative policy protecting pretermitted heirs stressed in holding general disinheritance clause ineffective]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 394, 115 C.R. 765, 525 P.2d 669, *infra*, §531 [spouse's right to recover for loss of consortium; judiciary has responsibility for growth of law and constant reexamination of rules in light of current conditions]; *Sindell v. Abbott Laboratories* (1980) 26 C.3d 588, 610, 163 C.R. 132, 607 P.2d 924 [recovery allowed for DES cancer victims; courts must fashion remedies to meet changing needs brought about by advances in science and technology]; *Brubaker v. Beneficial Standard Life Ins. Co.* (1955) 130 C.A.2d 340, 278 P.2d 966 [question of first impression on rights under life

insurance policy; decision follows "enlightened view," rejects contrary rule as unfair to beneficiaries of such policies]; *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 303, 5 C.R. 263 ["We take notice of hostility toward penalties as a settled principle of our statutory and case law ... and conclude" that case decided in 1924 "does not correctly reflect the modern trend of judicial thought in this area"]; *Minor v. Minor* (1960) 184 C.A.2d 118, 126, 7 C.R. 455 [attack on rule against recovery for anticipatory breach on unilateral installment contract, answered by noting social consequences that might result from change in rule]; and see generally 49 Cal. L. Rev. 615, 778; 61 Harv. L. Rev. 692; 5 Hastings L. J. 133; 4 Stanf. L. Rev. 370; 6 Stanf. L. Rev. 623; 9 Stanf. L. Rev. 455; 11 Southwestern L. Rev. 1237; Witkin, Manual on Appellate Court Opinions, §93 et seq.; infra, §521 et seq.)

Bacich v. Board of Control of Calif. (1943) 23 C.2d 343, 144 P.2d 818, dealing with a property owner's right to compensation for impairment of the easement of access by highway construction, is an excellent example. Both the majority and dissenting opinions argue the practical effects of the rule to be announced, and the majority opinion states: "If the question is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed." (23 C.2d 350.)

In *Freedland v. Greco* (1955) 45 C.2d 462, 289 P.2d 463, C.C.P. 580d, prohibiting a deficiency judgment after a sale under a deed of trust, was construed to preclude its evasion by the device of two separate notes, only one secured by trust deed, for the same debt. The court referred to "strong reasons of policy" and considered "the policies and purposes of the act" in arriving at a statutory construction "to promote rather than defeat the legislative purpose and policy." (45 C.2d 467.)

A quite sophisticated statement appears in *National City Bank of New York v. Republic of China* (1955) 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389, 4 Cal. Proc. (5th), Pleading, §110, where the court limited the sovereign immunity of a foreign state. Reviewing the declarations showing a "steady shift in attitude" and "chilly feeling" toward the immunity doctrine, the court said: "The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process." (75 S.Ct. 426, 99 L.Ed. 469.)

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CHAPTER XIII - Appeal

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X. SCOPE OF REVIEW

A. In General.

2. Presumptions in Favor of Judgment.

a. In General.

9 Witkin Cal. Proc. Appeal § 355

[§ 355] In General.

(1) *Presumption of Correctness*. A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error. (See *Coleman v. Farwell* (1929) 206 C. 740, 741, 276 P. 335; *Denham v. Superior Court* (1970) 2 C.3d 557, 564, 86 C.R. 65, 468 P.2d 193, quoting the text; *In re Marriage of Arceneaux* (1990) 51 C.3d 1130, 1133, 275 C.R. 797, 800 P.2d 1227; *Estate of Goulet* (1995) 10 C.4th 1074, 1077, footnote 1, 43 C.R.2d 111, 898 P.2d 425, supra, §51, citing the text; *Laymon v. Simpson* (1964) 225 C.A.2d 50, 52, 36 C.R. 859, citing the text; *Waller v. Brooks* (1968) 267 C.A.2d 389, 394, 72 C.R. 228, citing the text; *Harris v. Compton* (1985) 172 C.A.3d 1, 9, 217 C.R. 884, citing the text; *Jacques Interiors v. Petrak* (1987) 188 C.A.3d 1363, 1369, 234 C.R. 44, quoting the text; *Atlantic Richfield Co. v. California* (1989) 214 C.A.3d 533, 538, 262 C.R. 683, quoting the text; *Tyler v. Children's Home Soc. of Calif.* (1994) 29 C.A.4th 511, 551, 35 C.R.2d 291, supra, §350 [parties to action tried by court "wishing to avoid inferences in favor of the judgment must obtain a statement of decision"]; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1313, 64 C.R.2d 705, 9 Cal. Proc. (5th), *Administrative Proceedings*, §74, citing the text; *Estate of Fain* (1999) 75 C.A.4th 973, 991, 89 C.R.2d 618; on presumptions in favor of general verdict, see *Snodgrass v. Hand* (1934) 220 C. 446, 448, 31 P.2d 198; 7 Cal. Proc. (5th), *Trial*, §§341, 366 et seq.; *Walling v. Kimball* (1941) 17 C.2d 364, 373, 110 P.2d 58; *Rutter Group*, 1 Civil Appeals and Writs §8:15 et seq.)

(2) *Application of Presumption to Findings*. The presumption in favor of correctness had a number of applications under the former requirement of findings (now statement of decision):

(a) Where findings were waived, it was implied in favor of the judgment that the court found all the facts necessary to support it. (*Stewart v. Langer* (1935) 9 C.A.2d 60, 61, 48 P.2d 758; *Mastrofini v. Swanson* (1952) 114 C.A.2d Supp. 848, 850, 250 P.2d 764.)

(b) Where findings were not brought up, it was presumed that they supported the judgment. (*Minton v. Cavaney* (1961) 56 C.2d 576, 579, footnote 1, 15 C.R. 641, 364 P.2d 473, citing the text.)

(c) If there was any clear and sufficient finding on which a judgment could rest, it would be presumed in favor of the judgment that the court did rely on it, and inconsistencies or insufficiency of other findings would be disregarded. (*Brewer v. Simpson* (1960) 53 C.2d 567, 583, 584, 2 C.R. 609, 349 P.2d 289; *Carlton v. Castranova* (1961) 189 C.A.2d 409, 412, 11 C.R. 258; *Mayes v. Sturdy Northern Sales* (1979) 91 C.A.3d 69, 81, 154 C.R. 43, citing the text.)

(3) *Record Must Be Silent*. A qualification, inherent in the rule, is that the presumption applies only where the record is silent. No presumption can be indulged that contradicts an express recital in the record; and where the record purports to state everything that was actually done (and this is insufficient to support the judgment), no presumption will be indulged as to other matters. (See *Johnston v. Southern Pac. Co.* (1907) 150 C. 535, 537, 89 P. 348; *Prescott v. O'Connell* (1938) 27 C.A.2d 220, 222, 80 P.2d 749; *Steuri v. Junkin* (1938) 27 C.A.2d 758, 760, 82 P.2d 34 ["legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. When the record states what was done, it will not be presumed that something different was done"]; *Gee v. American Realty & Const.* (2002) 99 C.A.4th 1412, 1413, 122 C.R.2d 167, citing the text.)

West's Key Number Digest, Appeal and Error 900 et seq.

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2. Presumptions in Favor of Judgment.

b. Appeal on Judgment Roll.

1. Former Law.

9 Witkin Cal. Proc. Appeal § 356

[§ 356] Former Law.

In an appeal on the judgment roll alone, where only the pleadings, statement of decision, or verdict and other formal papers are brought up (see *infra*, §667), the presumptions in favor of the judgment are particularly important.

It was formerly settled that anything consistent with the face of the judgment roll could be presumed in support of the decision. "Upon an appeal from a judgment, upon the judgment-roll alone, all intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary." (*Sagerstrom v. Scott* (1911) 16 C.A. 256, 261, 116 P. 690.) "This appeal being on the judgment-roll alone we are limited in our review to a determination of the question, do the findings support the judgment? 1. That is to say, does the complaint state a cause of action? 2. Are the findings within the issues? 3. Is the judgment supported by the findings? 4. Does reversible error concerning a matter of law appear on the face of the record?" (*Hammond Lumber Co. v. Timourian* (1932) 122 C.A. 448, 450, 10 P.2d 181.) (See *Snodgrass v. Hand* (1934) 220 C. 446, 448, 31 P.2d 198; *Crowther v. Metalite Mfg. Co.* (1933) 133 C.A. 452, 455, 24 P.2d 551; *Middleton v. Parsons* (1937) 22 C.A.2d 250, 251, 70 P.2d 515; *Lohn v. Fletcher Oil Co.* (1940) 38 C.A.2d 26, 30, 100 P.2d 505; *Walker v. Etcheverry* (1941) 42 C.A.2d 472, 475, 109 P.2d 385; *Lincoln v. Averill* (1941) 47 C.A.2d 335, 337, 117 P.2d 913; *Ferl v. Ferl* (1955) 135 C.A.2d 458, 462, 287 P.2d 514.)

This doctrine meant much more than resolving uncertainties in favor of the judgment and presuming that matters omitted from the record were adverse to the appellant. If the introduction of certain evidence, the waiver of pleading objections, or any other act in the trial court would have overcome an apparent defect on the face of the judgment roll, it was presumed that this affirmative act did take place. This conjuring up of imaginary happenings largely destroyed the usefulness of the judgment roll appeal.

Thus, in *Myers v. Canepa* (1918) 37 C.A. 556, 174 P. 903, plaintiff sued for the value of services and materials. A demurrer was overruled and, after trial, verdict and judgment went for plaintiff for a sum less than he had demanded. Defendant appealed on the judgment roll, and the court agreed with his contention that the special demurrer for

misjoinder of causes and uncertainty was good. *Held*, nevertheless, the judgment should be affirmed. In the absence of a record of the trial, it was impossible to determine upon what theory the case was tried, what evidence was introduced, or on what claims the jury based its verdict. "It was entirely proper for the parties to try the case on its merits, if they chose to do so, even though the complaint was ambiguous and uncertain, and there were several causes of action improperly united. In support of the judgment we must presume that the case was tried on its merits regardless of the imperfection of the complaint, which must be deemed to have been waived." (37 C.A. 561.) (See *Sledge v. Stolz* (1919) 41 C.A. 209, 217, 182 P. 340 [same holding where it was contended that general demurrer was improperly overruled].)

The judgment roll appeal was particularly ineffective where the error raised was a violation of the former mandatory requirement of findings. Thus, the contention that the court failed to make required findings could be answered by the presumption that they were waived; without a complete record showing the absence of a waiver, the error could not be established. (*Hutton v. Newhouse* (1919) 41 C.A. 689, 691, 183 P. 276.) If the contention was that the court had failed to find on a material issue raised by the pleadings, the judgment roll, containing the pleadings and findings, would show the error, but not the prejudice; it would be presumed, in the absence of the evidence, that if the necessary finding had been made it would have been adverse to the appellant. (*Streicher v. Battles* (1938) 29 C.A.2d 526, 527, 84 P.2d 1049; *Oppenheimer v. Union Pac. R. Co.* (1956) 142 C.A.2d 8, 9, 297 P.2d 700.) And if it was contended that findings were outside the issues, the court could assume that evidence was introduced to support the challenged findings, and that the pleadings were treated as sufficient to raise the issues or that no objection was made to the evidence on that ground. (*Freeman v. Gray-Cowan* (1933) 219 C. 85, 86, 25 P.2d 415.)

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2. Presumptions in Favor of Judgment.

b. Appeal on Judgment Roll.

2. Nature of Rule and Limitation.

9 *Witkin Cal. Proc. Appeal* § 357

[§ 357] Nature of Rule and Limitation.

(1) *In General.* The Appellate Rules authorize several types of short records, including the judgment roll, a partial transcript, and agreed or settled statement. (See *infra*, §§635, 657, 664, 667.) These records, however, are dangerous to the appellant if the court may presume the happening of significant affirmative acts that do not appear in the record (*supra*, §356). (See *Alkus v. Johnson-Pac. Co.* (1947) 80 C.A.2d 1, 9, 181 P.2d 72, *infra*, §358; *Skoglie v. Crumley* (1972) 26 C.A.3d 294, 297, 103 C.R. 205; 17 So. Cal. L. Rev. 124.)

(2) *Prescription.* "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised." (C.R.C., Rule 8.163, based on former C.R.C., Rule 52.)

(3) *Limitation.* "If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record." (C.R.C., Rule 8.163.) This limitation applies to any short record. (On former C.R.C., Rule 52, see *Estate of Pierce* (1948) 32 C.2d 265, 274, 196 P.2d 1 [agreed statement]; *Kovacik v. Reed* (1957) 49 C.2d 166, 170, 315 P.2d 314 [settled statement]; *Sloan v. Stearns* (1955) 137 C.A.2d 289, 293, 290 P.2d 382 [same].)

(4) *Intent.* The intent is explained in the case law. *Dumas v. Stark* (1961) 56 C.2d 673, 16 C.R. 368, 365 P.2d 424, points out that the rule, by providing that the presumption arises, with respect to an error in an appeal lacking a reporter's transcript, only if the error appears on the face of the record, makes it clear that there was no intent to allow unwarranted presumptions against the judgment. In other words, if, on appeal on a short record, the error urged by the appellant does not appear on the face of the record, all intendments will be made in support of the judgment, as was the case under the former law (see *supra*, §356). On the other hand, if the error claimed by appellant does appear on the face of the record, the presumption is applicable. (56 C.2d 674.)

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2. Presumptions in Favor of Judgment.

b. Appeal on Judgment Roll.

3. No Requirement That Short Record Bring Up Some Evidence.

9 Witkin Cal. Proc. Appeal § 358

[§ 358] No Requirement That Short Record Bring Up Some Evidence.

The danger that former C.R.C., Rule 52 (now C.R.C., Rule 8.163) might have been applied only to short records that brought up some of the evidence, e.g., partial transcript or settled statement, was quickly dispelled by the important case of *Alkus v. Johnson-Pac. Co.* (1947) 80 C.A.2d 1, 181 P.2d 72. Plaintiff lessors sued for declaratory relief on a claim for reimbursement from defendant lessees. Judgment was given for defendants, but the trial judge's finding of nonliability was an erroneous interpretation of the language of the leases incorporated in the findings. In plaintiffs' appeal on the judgment roll, defendants relied on the old presumption that evidence that could have been introduced to establish a different intended meaning of the terms of the lease was introduced. Reminding them of the new presumption, the appellate court proposed that counsel for defendants bring up any such evidence at plaintiffs' expense, as allowed by the Rules of Court, but counsel declined the offer. *Held*, in the absence of augmentation, the presumption applied, and the judgment was unsupported by the findings.

Alkus contains a comprehensive analysis of the background and objectives of the rule revision, and concludes that the new rule was clearly intended to apply to judgment roll appeals, and that, properly applied, it is reasonable and fair to both parties. The application of the rule "in judgment roll appeals is a necessary concomitant of the modernizing and streamlining of short record appeals, including those on the judgment roll. This rule fully protects a respondent in that, if it is necessary to justify a finding that evidence be brought up, and there is such evidence, respondent can do so. On the other hand, appellant in making a short record appeal, cannot justly be penalized by a presumption which may actually be contrary to the true situation." (80 C.A.2d 15.) (See 35 Cal. L. Rev. 493; 21 So. Cal. L. Rev. 270.)

In *Palpar v. Thayer* (1947) 82 C.A.2d 578, 186 P.2d 748, it was held that the findings, which contradicted admissions in the pleadings and were outside the issues, could not support the judgment. Rejecting the contention that in a judgment roll appeal it should be presumed that the case was tried on the theory that these matters were in issue, the court said: "[We] can no longer indulge such presumption. ... If in fact the issues were enlarged on the trial respondents may make that showing by asking for an augmentation of the record." (82 C.A.2d 583.) (See *West Covina Enterprises v. Chalmers* (1958) 49 C.2d 754, 758, 322 P.2d 13, citing the text [appeal on clerk's transcript and exhibits]; *Grote v. American Surety Co. of New York* (1961) 195 C.A.2d 383, 384, 15 C.R. 691, citing the text; *Estate of Bernard* (1962)

206 C.A.2d 375, 385, 23 C.R. 828, citing the text; *Ferelli v. Weaver* (1962) 210 C.A.2d 108, 110, 26 C.R. 439, citing the text; *Harvey v. White* (1963) 213 C.A.2d 275, 279, 28 C.R. 601, citing the text; *National Secretarial Service v. Froehlich* (1989) 210 C.A.3d 510, 521, 258 C.R. 506 [appeal on clerk's transcript].)

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4. Error on Face of Record.

9 Witkin Cal. Proc. Appeal § 359

[§ 359] Error on Face of Record.

(1) *Affirmance Where No Error Appears on Face of Judgment Roll.* If no error appears on the face of the judgment roll, the presumption of C.R.C., Rule 8.163, i.e., that the record includes all material matters, does not apply, and instead the general presumption of the correctness of the judgment (see *supra*, §355) is applicable. In *Utz v. Aureguy* (1952) 109 C.A.2d 803, 241 P.2d 639, the judgment dismissed an action after a demurrer was sustained to the third amended complaint on the theory of sham. Plaintiff appealed on the judgment roll, without bringing up defendants' affidavits, the prior pleadings, or plaintiff's deposition. *Held*, judgment affirmed; without the earlier complaints there was no way to ascertain the departures, variances, inconsistencies, or shifting of theories, all of which would bear on the propriety of dismissal for sham. "Since the adoption of rule 52

[now C.R.C., Rule 8.163], if an error appears on the face of a judgment roll or other partial transcript it is not to be presumed on appeal that the error was cured by some proceeding not appearing in the transcript ... but it is still incumbent on an appellant to present a transcript which affirmatively shows on its face that an error occurred." (109 C.A.2d 806.) (See *Dumas v. Stark* (1961) 56 C.2d 673, 674, 16 C.R. 368, 365 P.2d 424, citing the text; *Hearst Publishing Co. v. Abounader* (1961) 196 C.A.2d 49, 55, 16 C.R. 244; *Williams v. Inglewood Bd. of Realtors* (1963) 219 C.A.2d 479, 481, 33 C.R. 289, *infra*, §668; *Duff v. Engelberg* (1965) 237 C.A.2d 505, 509, 47 C.R. 114, 5 Summary (10th), *Torts*, §740, citing the text; *Crummer v. Zalk* (1967) 248 C.A.2d 794, 796, 57 C.R. 185; *Thorson v. Western Dev. Corp.* (1967) 251 C.A.2d 206, 214, 59 C.R. 299; *Krueger v. Bank of America* (1983) 145 C.A.3d 204, 207, 193 C.R. 322; *Kennedy v. Taylor* (1984) 155 C.A.3d 126, 128, 201 C.R. 779, citing the text; *Waller v. TJD* (1993) 12 C.A.4th 830, 832, 16 C.R.2d 38.)

(2) *Reversal Where Error Appears on Face of Judgment Roll.* In *Stauffacher v. Stauffacher* (1964) 227 C.A.2d 735, 39 C.R. 31, the trial judge gave plaintiff wife a divorce, but awarded custody of the child to defendant husband under supervision of the probation officer for placement in a foster home, without any finding of unfitness of either parent. Under the law, that finding is essential to an award of custody to strangers, hence, this was reversible error, if affirmatively shown by the record. Under the former law, it would have been presumed that the omitted finding had been waived in the trial court. But under former C.R.C., Rule 52 (now C.R.C., Rule 8.163), the record is presumed, in

the absence of augmentation, to include all matters material to the determination of the points on appeal, where the error appears on the face of the record; and, because the judgment roll, containing the findings, did not include that necessary finding, the error so appeared. (227 C.A.2d 736, 737.) (See *Clyne v. Clyne* (1964) 228 C.A.2d 597, 598, 39 C.R. 677 [record of husband's ex parte divorce with nothing to show personal jurisdiction of wife, trial judge's dismissal of wife's complaint for property division, support, and custody].)

Ordinarily, a claim of inadequate damages in a personal injury case requires a transcript of the evidence for effective review. But in *Haskins v. Holmes* (1967) 252 C.A.2d 580, 60 C.R. 659, an assault and battery case, trial was by the court and judgment was entered in plaintiff's favor for \$ 1,000. He appealed on the clerk's transcript and exhibits. The findings were all in his favor on liability and severe injuries requiring hospitalization and surgery; these findings and the exhibits demonstrated that the injuries were accompanied by substantial pain, shock, and inconvenience; and the undisputed medical expenses were \$ 911.37. Thus the award gave virtually nothing for pain and suffering. *Held*, reversed for retrial on issue of damages. The judgment roll (findings of fact) and exhibits established an abuse of discretion in refusing to make a substantial award for demonstrated general damages. (252 C.A.2d 587.)

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(1) *Affirmance Where No Error Appears on Face of Judgment Roll*. See *Nielsen v. Gibson* (2009) 178 C.A.4th 318, 324, 100 C.R.3d 335 [where appellant submitted only original trial court file, and failed to provide any reporter's transcript, Court of Appeal was required to treat appeal as appeal "on the judgment roll," and thus conclusively presumed that evidence was ample to sustain trial court's findings, and limited its review to determining whether any error appeared on face of record].



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5. No Review of Sufficiency of Evidence.

9 *Witkin Cal. Proc. Appeal* § 360

[§ 360] No Review of Sufficiency of Evidence.

The rule of conflicting evidence necessarily precludes any successful appeal on insufficiency of the evidence unless an adequate record is brought up. If the appeal is on the judgment roll alone (see *infra*, §667), the evidence is conclusively presumed to support the judgment. (*Sacre v. Imperial Water Co. Number Three* (1928) 206 C. 13, 14, 272 P. 1044; *Gin S. Chow v. Santa Barbara* (1933) 217 C. 673, 680, 22 P.2d 5; *Wheelright v. Marin* (1970) 2 C.3d 448, 454, 85 C.R. 809, 467 P.2d 537; *Semple v. Andrews* (1938) 27 C.A.2d 228, 231, 235, 81 P.2d 203; *Kompf v. Morrison* (1946) 73 C.A.2d 284, 286, 166 P.2d 350 ["on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment"]; *Hunt v. Plavsa* (1951) 103 C.A.2d 222, 224, 229 P.2d 482; *White v. Jones* (1955) 136 C.A.2d 567, 571, 288 P.2d 913; *Millbrae Assn. for Residential Survival v. Millbrae* (1968) 262 C.A.2d 222, 226, 69 C.R. 251; *Ford v. California* (1981) 116 C.A.3d 507, 515, 172 C.R. 162, quoting the text; *Cosenza v. Kramer* (1984) 152 C.A.3d 1100, 1102, 200 C.R. 18, citing the text; *Hillman v. Leland E. Burns* (1989) 209 C.A.3d 860, 864, 257 C.R. 535, citing the text.)

In *Finney v. Lockhart* (1950) 35 C.2d 161, 164, 217 P.2d 19, an action for defamation, the verdict was for \$ 1 general and \$ 2,000 exemplary damages. Defendant contended that on its face the judgment showed a plain disregard of the rule that exemplary damages must bear some reasonable proportion to the compensatory damages. *Held*, however, the fact that the jury awarded only nominal compensatory damages "does not necessarily imply a finding that no more actual damage was sustained." And the rule governing review of an ordinary actual damage award claimed excessive applies equally to review of an exemplary damage award; i.e., the evidence must be examined. "The presence of the influential factors on the amount of the damages cannot be disclosed except by the record of the trial proceedings including the evidence. The problem cannot be resolved by an inspection of the judgment roll alone. Therefore the basis for the determination of the question is not in the record. On the present appeal it must be assumed that the evidence was substantial in support of the amount of the verdict." (35 C.2d 164.)

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2. Presumptions in Favor of Judgment.

c. Appeal From Default Judgment.

9 Witkin Cal. Proc. Appeal § 361

[§ 361] Appeal From Default Judgment.

(1) *General Rule: No Review of Sufficiency of Evidence.* Where the defaulting party takes no steps in the trial court to set aside the default, his or her appeal from the default judgment brings up for review only such questions as jurisdiction and sufficiency of the pleadings. (*Mackie v. Mackie* (1960) 186 C.A.2d 825, 830, 9 C.R. 173; *Lee v. Ski Run Apartments Associates* (1967) 249 C.A.2d 293, 294, 57 C.R. 496 [judgment beyond prayer].) Because no issue of fact is raised, there can be no review of the sufficiency of the evidence. (*Heathman v. Vant* (1959) 172 C.A.2d 639, 644, 343 P.2d 104; *J.M. Wildman v. Stults* (1959) 176 C.A.2d 670, 673, 1 C.R. 651 [default by defendant wife was binding on her, not on defendant husband who did not default]; *Corona v. Lundigan* (1984) 158 C.A.3d 764, 767, 204 C.R. 846, citing the text.)

(2) *Distinction: Excessive Damages.* An exception to this rule has been recognized where a default judgment awards excessive damages. In *Uva v. Evans* (1978) 83 C.A.3d 356, 147 C.R. 795, plaintiffs, a minor child and her father, sued for damages suffered when the child was bitten by defendant's dog. Her medical expenses were \$ 182, and an estimated \$ 2,100 would have covered brief hospitalization and plastic surgery to remove a scar. There was no evidence that the incident was particularly unsettling or that the medical procedures had been or would be painful; the evidence showed that she suffered "a couple of average dog bites." (83 C.A.3d 365.) The complaint prayed for damages of \$ 30,000 (contrary to C.C.P. 425.10, prohibiting a specific statement; see 4 Cal. Proc. (5th), *Pleading*, §511), but defendant failed to move to strike the improper prayer and defaulted. The trial judge, after a default hearing, awarded \$ 30,000 general damages. *Held*, reversed for retrial on issue of damages.

(a) "We have been unable to find any case explicitly holding that, where proof of damages is required in the trial court prior to a default judgment being entered ... the appellate court is precluded from reviewing the question of whether the damages awarded were excessive. On the other hand, the few appellate courts which have been faced with the problem have in fact conducted such a review." (83 C.A.3d 363.)

(b) The power of an appellate court to review the determination of damages by the trier of fact is "severely circumscribed." The court may interfere with the determination "only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption ... or where the award is so

out of proportion to the evidence that it shocks the conscience of the appellate court." (83 C.A.3d 363.) "A rule precluding review of damages on appeal from a default judgment would consequently protect the award precisely in those cases in which review is most necessary--that is, where the damages awarded are totally unconscionable and without evidentiary justification." (83 C.A.3d 364.)

(c) "[T]he right to appellate review also flows logically from the fact that damages must be proved in the trial court before the default judgment may be entered. ... The requirement of proof of damages is meaningless if it can be fulfilled by *any* evidence, even evidence which results in a judgment prompted by 'passion, prejudice or corruption.' ... While the role of the appellate court in reviewing damages is much more limited than that of the trial court reviewing a jury verdict, the policies which sanction such review are not dissimilar; just as the trial court need not sit idly by and watch injustice be done through an improper award by the jury, we know of no statutory or constitutional barrier which requires an appellate court to ignore gross injustice in the award of damages simply because the judgment was procured by way of default." (83 C.A.3d 364.) (See *Scognamillo v. Herrick* (2003) 106 C.A.4th 1139, 1150, 131 C.R.2d 393 [default judgment improperly awarded damages for second surgery where evidence indicated that need for this surgery was speculative].)

West's Key Number Digest, Appeal and Error 927, 934(3)

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3. Review of Lower Court's Discretion.

a. Rule and Theory.

9 *Witkin Cal. Proc. Appeal* § 362

[§ 362] Rule and Theory.

In many situations throughout the entire field of procedural and substantive law, the trial judge has, either by express statute or by rule of policy, a discretionary power to decide the issue. In those situations the exercise of discretion will not be disturbed unless it is abused, i.e., the appellate court will not substitute its own view as to the proper decision. "[T]he showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice." (*Brown v. Newby* (1940) 39 C.A.2d 615, 618, 103 P.2d 1018; see *Barajas v. USA Petroleum Corp.* (1986) 184 C.A.3d 974, 989, 229 C.R. 513, citing the text; *San Bernardino City Unified School Dist. v. Superior Court* (1987) 190 C.A.3d 233, 241, 235 C.R. 356, citing the text; *In re Executive Life Ins. Co.* (1995) 32 C.A.4th 344, 358, 38 C.R.2d 453 [appellate court, under abuse of discretion standard, must "employ the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences"]; *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (2000) 78 C.A.4th 355, 358, 92 C.R.2d 709; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §623; *infra*, §§363, 364; for discussion of limited deference to trial judge's discretion to award attorneys' fees under C.C.P. 1021.5, where legal action resulted in appellate decision, see *Los Angeles Police Protective League v. Los Angeles* (1986) 188 C.A.3d 1, 7, 232 C.R. 697, 7 *Cal. Proc.* (5th), *Judgment*, §263; *Rutter Group*, 1 *Civil Appeals and Writs* §8:85 et seq.)

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b. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 363

[§ 363] Illustrations.

The principal situations in which the trial judge exercises discretion are in the field of procedure, and these have been covered in particular topics of this work and in *California Evidence* (4th) and *California Criminal Law* (3d). The following may be consulted:

- (1) Change of venue for convenience of witnesses or impartial trial. (See 4 *Cal. Crim. Law* (3d), *Jurisdiction and Venue*, §70 et seq.)
- (2) Stay or dismissal of action on ground of inconvenient forum. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §374.)
- (3) Provisional remedies: injunction, receiver. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §§274 et seq., 419 et seq.)
- (4) Pleading: bringing in new parties, leave to amend, intervention. (See 4 *Cal. Proc.* (5th), *Pleading*, §§177, 219; 5 *Cal. Proc.* (5th), *Pleading*, §§994 et seq., 1194 et seq.)
- (5) Dismissal for lack of prosecution. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §438 et seq.)
- (6) Continuance. (See 7 *Cal. Proc.* (5th), *Trial*, §10 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §331 et seq.)
- (7) Trial: order of proceedings and proof, reopening case, jury trial after waiver or in equity case, argument. (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§514 et seq., 542 et seq., 554, 566 et seq.)
- (8) Evidence: discovery and production of evidence, exclusion of cumulative evidence, restriction of rebuttal evidence, scope of cross-examination, reexamination or recall of witness, exclusion of witness while other witness testifies. (See 2 *Cal. Evidence* (4th), *Discovery*, §25; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §§67, 70, 73, 75, 78, 230, 231; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§27 et seq., 530 et seq.)
- (9) Costs other than as matter of right. (See 7 *Cal. Proc.* (5th), *Judgment*, §97 et seq.)

(10) Stay of execution by trial judge. (See *supra*, §§223, 225; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §162; 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §§93, 94.)

(11) Execution or other enforcement of judgment after 10 years. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §34 et seq.)

(12) Order granting or denying new trial. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §127 et seq.; *infra*, §§420, 421; 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §§123, 124.)

(13) Order granting or denying relief from default under *C.C.P.* 473. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§144, 188 et seq.)

(14) Order granting relief from late filing of claim against public entity on ground of mistake or excusable neglect. (See 3 *Cal. Proc.* (5th), *Actions*, §290.)

(15) Issuance or denial of extraordinary writ. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§31, 157 et seq.)

(16) Award of attorneys' fees. (See 7 *Cal. Proc.* (5th), *Judgment*, §304.)

(17) Order sealing or unsealing records. (See 2 *Cal. Proc.* (5th), *Courts*, §41 et seq.)

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c. Limits of Legal Discretion.

9 *Witkin Cal. Proc. Appeal* § 364

[§ 364] Limits of Legal Discretion.

The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. (See 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §623.) The classic statement is in *Bailey v. Taaffe* (1866) 29 C. 422: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates." (29 C. 424.)

In *Gossman v. Gossman* (1942) 52 C.A.2d 184, 126 P.2d 178, the court quoted the following from a Massachusetts case: "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just." (52 C.A.2d 195.)

A number of decisions are in accord. (See *Waite v. Southern Pac. Co.* (1923) 192 C. 467, 470, 221 P. 204; *Brill v. Fox* (1931) 211 C. 739, 743, 297 P. 25; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 C.2d 523, 525, 190 P.2d 593; *People v. Russel* (1968) 69 C.2d 187, 195, 70 C.R. 210, 443 P.2d 794; *Baggett v. Gates* (1982) 32 C.3d 128, 143, 185 C.R. 232, 649 P.2d 874, citing the text [no reasonable basis for denial of attorneys' fees]; *Westside Community for Independent Living v. Obledo* (1983) 33 C.3d 348, 355, 188 C.R. 873, 657 P.2d 365, quoting the text [same]; *Toon v. Pickwick Stages, Northern Div.* (1924) 66 C.A. 450, 454, 226 P. 628; *Essig v. Seaman* (1928) 89 C.A. 295, 298, 264 P. 552; *Dunn v. Standard Acc. Ins. Co.* (1931) 114 C.A. 208, 209, 299 P. 575; *Berry v. Chaplin* (1946) 74 C.A.2d 669, 672, 169 P.2d 453; *Guardianship of Kiles* (1947) 80 C.A.2d 751, 755, 182 P.2d 639; *Estate of Selb* (1949) 93 C.A.2d 788, 792, 210 P.2d 45; *Estate of Lundell* (1949) 95 C.A.2d 352, 354, 212 P.2d 914, 214 P.2d 23; *Estate of Buchman* (1954) 123 C.A.2d 546, 559, 267 P.2d 73, 2 *Cal. Proc.* (5th), *Jurisdiction*, §308; *Frank E. Beckett Co. v. Bobbitt* (1960) 180 C.A.2d

Supp. 921, 927, 4 *C.R.* 833 [reversing order denying motion under *C.C.P.* 473; where facts are not disputed, issue is one of law]; *Cohen v. Herbert* (1960) 186 *C.A.2d* 488, 493, 8 *C.R.* 922 [receiver appointed without granting reasonable request for 1-week continuance]; *Martin v. Cook* (1977) 68 *C.A.3d* 799, 807, 137 *C.R.* 434, quoting *Bailey* and citing the text.)

Despite the numerous references in the cases to completely arbitrary action, it has been noted that the judge's conduct need not be totally irrational to constitute an abuse of discretion: "The City advances as the sole test of such an abuse whether the trial court's action was whimsical, arbitrary, or capricious. ... This pejorative boilerplate is misleading since it implies that in every case in which a trial court is reversed for an abuse of discretion its action was utterly irrational. Although irrationality is beyond the legal pale it does not mark the legal boundaries which fence in discretion." (*Sacramento v. Drew* (1989) 207 *C.A.3d* 1287, 1297, 255 *C.R.* 704, citing the text.)

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B. Sufficiency of Evidence.

1. Rule of Conflicting Evidence.

a. In General.

1. Nature of Rule.

9 *Witkin Cal. Proc. Appeal* § 365

[§ 365] Nature of Rule.

Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. The presumption being in favor of the judgment (see *supra*, §355), the court must consider the evidence in the light most favorable to the prevailing party, giving him or her the benefit of every reasonable inference, and resolving conflicts in support of the judgment.

The exposition in *Crawford v. Southern Pac. Co.* (1935) 3 C.2d 427, 45 P.2d 183, is typical: "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (3 C.2d 429.)

The rule is identical where the trial is by the court: "[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." (*Bancroft-Whitney Co. v. McHugh* (1913) 166 C. 140, 142, 134 P. 1157.)

This fundamental doctrine is stated and applied in hundreds of cases, of which the following are examples: *Estate of Bristol* (1943) 23 C.2d 221, 223, 143 P.2d 689; *Estate of Teel* (1944) 25 C.2d 520, 527, 154 P.2d 384; *Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 881, 92 C.R. 162, 479 P.2d 362; *Nestle v. Santa Monica* (1972) 6 C.3d 920, 925, 101 C.R. 568, 496 P.2d 480, citing the text; *Stevens v. Parke, Davis & Co.* (1973) 9 C.3d 51, 64, 107 C.R. 45, 507 P.2d 653; *In re Marriage of Mix* (1975) 14 C.3d 604, 614, 122 C.R. 79, 536 P.2d 479, citing the text; *Board of Education v. Jack M.* (1977) 19 C.3d 691, 697, 139 C.R. 700, 566 P.2d 602, citing the text; *Crocker Nat. Bank v. San Francisco* (1989) 49 C.3d 881, 888, 264 C.R. 139, 782 P.2d 278, *supra*, §325 [mixed question of fact and law is factual

question, reviewed under substantial evidence test, where pertinent inquiry requires application of experience with human affairs]; *Hodges v. Porikos* (1948) 88 C.A.2d 238, 239, 198 P.2d 577; *Kruckow v. Lesser* (1952) 111 C.A.2d 198, 199, 244 P.2d 19; *Ventimiglia v. Hodgen* (1952) 112 C.A.2d 658, 659, 247 P.2d 123; *Mastrofini v. Swanson* (1952) 114 C.A.2d Supp. 848, 850, 250 P.2d 764; *Maslow v. Maslow* (1953) 117 C.A.2d 237, 243, 255 P.2d 65; *Burnett v. Reyes* (1953) 118 C.A.2d Supp. 878, 879, 256 P.2d 91; *Evje v. City Title Ins. Co.* (1953) 120 C.A.2d 488, 490, 261 P.2d 279, *infra*, §372; *Standard Realty & Dev. Co. v. Ferrera* (1957) 151 C.A.2d 514, 516, 311 P.2d 855, citing the text; *Lake v. Jackson* (1961) 191 C.A.2d 372, 374, 12 C.R. 652; *T.V. Wire Products v. Osipow Elec. Supply Co.* (1962) 204 C.A.2d 522, 525, 22 C.R. 384, citing the text; *Huber Tool Works v. Marchant Calculators* (1962) 204 C.A.2d 822, 827, 23 C.R. 10, citing the text; *Curtis v. Mendenhall* (1962) 208 C.A.2d 834, 838, 25 C.R. 627; *Walton v. Bank of California* (1963) 218 C.A.2d 527, 539, 32 C.R. 856; *Laymon v. Simpson* (1964) 225 C.A.2d 50, 51, 36 C.R. 859, quoting the text; *Waller v. Brooks* (1968) 267 C.A.2d 389, 394, 72 C.R. 228, citing the text; *Estate of D'India* (1976) 63 C.A.3d 942, 950, 134 C.R. 165, citing the text; *Guardianship of Phillip B.* (1983) 139 C.A.3d 407, 414, 188 C.R. 781; *Skyway Aviation v. Troyer* (1983) 147 C.A.3d 604, 609, 195 C.R. 281, citing the text; *Long Beach Police Officers Assn. v. Long Beach* (1984) 156 C.A.3d 996, 1001, 203 C.R. 494, citing the text; *Estate of Silverstein* (1984) 159 C.A.3d 221, 226, 205 C.R. 294, quoting the text; *Alderson v. Alderson* (1986) 180 C.A.3d 450, 465, 225 C.R. 610, quoting the text; *Kroopf v. Guffey* (1986) 183 C.A.3d 1351, 1356, 228 C.R. 807 [same standard for review of conflict in declarations on motion]; *Orange County Employees Assn. v. Orange* (1988) 205 C.A.3d 1289, 1293, 253 C.R. 584, quoting the text; *Minelian v. Manzella* (1989) 215 C.A.3d 457, 463, 263 C.R. 597, citing the text; *Grappo v. Coventry Financial Corp.* (1991) 235 C.A.3d 496, 507, 286 C.R. 714, citing the text; *Oldham v. Kizer* (1991) 235 C.A.3d 1046, 1057, 1065, 1 C.R.2d 195; *Tyler v. Children's Home Soc. of Calif.* (1994) 29 C.A.4th 511, 529, 35 C.R.2d 291, *supra*, §350 [trial court findings are inferred to be in favor of judgment where no statement of decision is requested]; *Hill v. Long Beach* (1995) 33 C.A.4th 1684, 1687, 40 C.R.2d 125, *supra*, §127; *Cochran v. Rubens* (1996) 42 C.A.4th 481, 486, 49 C.R.2d 672, 6 Summary (10th), Torts, §947; *Reichardt v. Hoffman* (1997) 52 C.A.4th 754, 766, 60 C.R.2d 770, *infra*, §723; *Obregon v. Superior Court* (1998) 67 C.A.4th 424, 430, 79 C.R.2d 62. (See Rutter Group, 1 Civil Appeals and Writs §8:38 et seq.; *F.R. Civ. P.*, Rule 52(a)(6) [findings by court not to be set aside "unless clearly erroneous"]; 9A Federal Practice & Procedure (Wright & Miller) §2583 et seq.; 2A Federal Procedure, L.Ed., §§3:800, 3:844 et seq.; 36 Cal. L. Rev. 116; 2 Stanf. L. Rev. 784; 5 Am.Jur.2d (2007 ed.), Appellate Review §625 et seq.)

That this virtual abandonment of appellate review of facts does not wholly satisfy the members of the Bar appears from occasional irritated reminders in opinions: "With rhythmic regularity it is necessary for us to say that where the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; that we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. No one seems to listen." (*Overton v. Vita-Food Corp.* (1949) 94 C.A.2d 367, 370, 210 P.2d 757.)

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a. In General.

2. Policy Limitations on Power.

9 *Witkin Cal. Proc. Appeal* § 366

[§ 366] Policy Limitations on Power.

(1) *Power of Appellate Court.* Although it is sometimes said that the reviewing court has no "power" to disturb the judgment in cases where the evidence is in conflict, the rule is simply one of policy and appellate practice. The appellate court can interfere, but will not do so because of self-imposed limitations on the scope of its reviewing power. In *Dunaway v. Anderson* (1913) 22 C.A. 691, 136 P. 309, the court, after quoting a number of expressions in prior cases implying lack of authority to review, said: "Technically considered, no doubt the supreme court has the power to interfere with a finding that is supported by substantial evidence or to set it aside when it appears 'reasonably certain' that said finding or verdict is wrong, but, of course, it is in no position to exercise the power justly or to be assured that the finding or verdict is wrong where it is supported by substantial testimony that is not inherently improbable." (22 C.A. 694.)

(2) *Justification for Conflicting Evidence Rule.* The justification commonly advanced for the rule is that the appellate court has no opportunity to observe the appearance and general bearing of the witnesses, and is thus deprived of an important aid in the determination of the value and weight to be given the testimony. "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Maslow v. Maslow* (1953) 117 C.A.2d 237, 243, 255 P.2d 65.) "There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the 'feel' of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the court room." (*Cummings v. Kendall* (1940) 41 C.A.2d 549, 555, 107 P.2d 282.) (See *Estate of Bristol* (1943) 23 C.2d 221, 223, 143 P.2d 689; *Buckhantz v. R.G. Hamilton & Co.* (1945) 71 C.A.2d 777, 780, 163 P.2d 756.)

This rationale applies even when the trial is videotaped, i.e., the appellate court will not base its decision on the "sights and sounds" of the courtroom as reflected in the videotape. (See *Moustakas v. Dashevsky* (1994) 25 C.A.4th 752, 754, 30 C.R.2d 753, *infra*, §645; *Conservatorship of McElroy* (2002) 104 C.A.4th 536, 546, 128 C.R.2d 485.)

(3) *Criticism of Rule.* It would seem that these psychological factors have been overemphasized, and that the "cold record," analyzed by counsel and studied with deliberation, may present as accurate a picture of the facts as the fleeting recollection by the jury or trial judge of testimony of successive witnesses. As the dissenting justices observed in *Estate of Bristol*: "The suggestion in the majority opinion that evidence may be overwhelming in its persuasiveness even though it 'may appear relatively unsubstantial--if it can be reflected at all--in a phonographic record' is in effect a suggestion that an appellate court may disregard the manifest unpersuasiveness of the evidence it is charged to review. If the appellate court could attribute reality to the phantom of a persuasiveness that does not survive in the record, it would no longer be bound by the record itself and could even affirm a judgment that was not sustained by any proof." (23 C.2d 233.)

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3. Function of Appellate Court.

9 Witkin Cal. Proc. Appeal § 367

[§ 367] Function of Appellate Court.

The remaining argument for the conflicting evidence rule is based upon the essential difference between trial and appellate courts under California law. The trial courts, by their organization, procedure, and numbers, are fitted to determine the facts. The appellate courts have the primary function of reviewing errors of law, and lack the time and resources to assume the added burden of studying records for the purpose of redetermining the facts. (See *Tupman v. Haberkern* (1929) 208 C. 256, 257, 280 P. 970.) This is the practical reason for this limitation on the undoubted power of an appellate court to reverse a judgment contrary to the great weight of the evidence. And the evils of the limitation are not as serious as may appear at first glance; a judgment wrong on the facts can be easily overturned, without departing from the conflicting evidence rule, by ferreting out reversible error. (See *infra*, §449.)

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4. Examination of Entire Record.

9 Witkin Cal. Proc. Appeal § 368

[§ 368] Examination of Entire Record.

Some courts, instead of asking whether there is any substantial evidence to support the trial court's factual determinations, have looked to the entire record to make that determination. As the court said in *Bowers v. Bernards* (1984) 150 C.A.3d 870, 197 C.R. 925: "Unlike the former practice, reviewing courts will now, in determining the existence of substantial evidence, *look to the entire record of the appeal*, and *will not* limit their appraisal 'to isolated bits of evidence selected by the respondent.' ... When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence ... If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, ... *or drawing other reasonable inferences, might have reached a contrary conclusion.*" (150 C.A.3d 873.)

This "entire record" test has been adopted by the California Supreme Court in criminal cases. (See *People v. Johnson* (1980) 26 C.3d 557, 576, 162 C.R. 431, 606 P.2d 738.) However, recent decisions of that court have continued to apply the "any substantial evidence" test in civil cases. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 C.4th 559, 571, 38 C.R. 139, 888 P.2d 1268; *Scott v. Pacific Gas & Elec. Co.* (1995) 11 C.4th 454, 455, 46 C.R.2d 427, 904 P.2d 834.) This any substantial evidence test has not been used by the United States Supreme Court. (See *Concrete Pipe & Prod. of Calif. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 124 L. Ed. 2d 539, 558, 113 S.Ct. 2264, 2279.) The use of the test in California civil cases has been criticized. (See 10 Cal. L. Rev. 73 [New Bite for an Old Maxim: Appellate Courts Put Some Teeth Into the Substantial Evidence Rule].)

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1. Slight Evidence of Respondent.

9 *Witkin Cal. Proc. Appeal* § 369

[§ 369] Slight Evidence of Respondent.

(1) *In General.* The conflicting evidence rule does not permit weighing of the evidence or reversal of a judgment in accordance with the preponderance of the evidence. A judgment against the weight of the evidence will be affirmed, provided the record is free from prejudicial error, if there is substantial evidence to support it. (See *supra*, §366.)

Although "substantial" evidence is not synonymous with "any" evidence (see *infra*, §373), the standard is easily satisfied.

(2) *Testimony of Single Witness.* The testimony of a single witness, even the party himself or herself, may be sufficient. (See *Kircher v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 32 C.2d 176, 183, 195 P.2d 427; *In re Marriage of Mix* (1975) 14 C.3d 604, 614, 122 C.R. 79, 536 P.2d 479, quoting the text; *Menning v. Sourisseau* (1933) 128 C.A. 635, 639, 18 P.2d 77 ["Defendant's demeanor on the stand, his appearance and his manner of giving testimony may have been sufficient to convince the trial judge of the defendant's honesty, integrity and the truthfulness of his testimony"]; *Estate of Filippi* (1935) 9 C.A.2d 407, 408, 49 P.2d 892; *Chodos v. Insurance Co. of North America* (1981) 126 C.A.3d 86, 97, 178 C.R. 831, citing the text; *In re Marriage of Slivka* (1986) 183 C.A.3d 159, 162, 228 C.R. 76; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §89.)

(3) *Lay Versus Expert Testimony.* The testimony of one or more lay witnesses will ordinarily be sufficient against that of experts. (See *Ortzman v. Van Der Waal* (1952) 114 C.A.2d 167, 170, 249 P.2d 846; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §85.)

(4) *Inadmissible Evidence.* Incompetent or otherwise inadmissible evidence admitted without objection will sustain the judgment. (See *Holzer v. Read* (1932) 216 C. 119, 122, 13 P.2d 697 [nonresponsive answer]; *Powers v. Board of Public Works* (1932) 216 C. 546, 552, 15 P.2d 156 [hearsay]; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §393.) And the same is true of admissible evidence erroneously stricken out. (See *Gray v. Southern Pac. Co.* (1944) 23 C.2d 632, 644, 145 P.2d 561.)

(5) *Inferences*. Inferences from circumstantial evidence may be sufficient against direct evidence. (See *Spolter v. Four-Wheel Brake Service Co.* (1950) 99 C.A.2d 690, 696, 222 P.2d 307; *Halstead v. Paul* (1954) 129 C.A.2d 339, 341, 277 P.2d 43; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 697, 39 C.R. 64; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §138.)

(6) *Presumptions*. It was formerly held that a presumption was evidence and could be sufficient against other evidence, but this rule was abrogated by the Evidence Code. (See 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §52.)

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9 Witkin Cal. Proc. Appeal § 370

[§ 370] Overwhelming Evidence of Appellant Is Disregarded.

Appellants often mistakenly assume that, if the evidence against the judgment greatly preponderates, a reversal is proper because of the absence of a *substantial conflict*. The test, however, is not whether there is substantial conflict, but rather whether there is *substantial evidence in favor of the respondent*. If this "substantial" evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. In brief, the appellate court ordinarily looks only at the evidence supporting the successful party, and disregards the contrary showing. "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*Estate of Teel* (1944) 25 C.2d 520, 527, 154 P.2d 384.)

A number of decisions are in accord. (See *Croghan v. Metz* (1956) 47 C.2d 398, 404, 303 P.2d 1029 [citing *Estate of Teel* and quoting the text]; *Nestle v. Santa Monica* (1972) 6 C.3d 920, 925, 101 C.R. 568, 496 P.2d 480, quoting the text; *Campbell v. Southern Pac. Co.* (1978) 22 C.3d 51, 60, 148 C.R. 596, 583 P.2d 121, quoting the text; *Buckhantz v. R.G. Hamilton & Co.* (1945) 71 C.A.2d 777, 780, 163 P.2d 756 ["this court will not extend its inquiry for the purpose of determining whether appellant's evidence was as 'overwhelming' as he claims in his brief"]; *Walton v. Bank of California* (1963) 218 C.A.2d 527, 540, 32 C.R. 856, quoting the text; *Tangora v. Matanky* (1964) 231 C.A.2d 468, 471, 42 C.R. 348, quoting the text; *Dunlap v. Marine* (1966) 242 C.A.2d 162, 165, 51 C.R. 158; *Estate of Nigro* (1966) 243 C.A.2d 152, 160, 52 C.R. 128; *Guardianship of Mosier* (1966) 246 C.A.2d 164, 169, 54 C.R. 447, quoting the text; *Chodos v. Insurance Co. of North America* (1981) 126 C.A.3d 86, 97, 178 C.R. 831, citing the text; *Skyway Aviation v. Troyer* (1983) 147 C.A.3d 604, 609, 195 C.R. 281, citing the text; *Horn v. Oh* (1983) 147 C.A.3d 1094, 1099, 195 C.R. 720; *Long Beach Police Officers Assn. v. Long Beach* (1984) 156 C.A.3d 996, 1001, 203 C.R. 494, citing the text; *Tillery v. Richland* (1984) 158 C.A.3d 957, 963, 205 C.R. 191; *Mariposa v. Yosemite West Associates* (1988) 202 C.A.3d 791, 807, 248 C.R. 778, citing the text.)

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9 Witkin Cal. Proc. Appeal § 371

[§ 371] Where Clear and Convincing Evidence Is Required.

In a few situations, the law requires that a party produce more than an ordinary preponderance; he or she must establish a fact by "clear and convincing evidence." (See 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §§38, 39.) But the requirement applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, the clear and convincing test disappears. On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong. (*Stromerson v. Averill* (1943) 22 C.2d 808, 815, 141 P.2d 732; *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; *Viner v. Utrecht* (1945) 26 C.2d 261, 267, 158 P.2d 3; *Crail v. Blakely* (1973) 8 C.3d 744, 750, 106 C.R. 187, 505 P.2d 1027; *Baines v. Zuieback* (1948) 84 C.A.2d 483, 488, 191 P.2d 67; *Estate of Moramarco* (1948) 86 C.A.2d 326, 333, 194 P.2d 740; *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 697, 4 C.R. 670, citing the text; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 246, 42 C.R. 686, citing the text; *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 387, 88 C.R. 551, citing the text; *Rubin v. Los Angeles Fed. Savings & Loan Assn.* (1984) 159 C.A.3d 292, 298, 205 C.R. 455; *In re Marriage of Murray* (2002) 101 C.A.4th 581, 601, 124 C.R.2d 342; see 32 Cal. L. Rev. 74; 60 Harv. L. Rev. 111; 17 So. Cal. L. Rev. 333.)

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9 Witkin Cal. Proc. Appeal § 372

[§ 372] Evidence Attacked as Inherently Improbable.

The rule that a court may reject uncontradicted testimony as "inherently improbable" is, like the clear and convincing evidence rule (*supra*, §371), one for the trial judge. If he or she believes and decides in accordance with the testimony, an appellate court will not make its own evaluation of that testimony as a basis for reversal. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §91.) Many cases have stated that, in theory, the appellate court, in deciding whether there is any substantial evidence to support the judgment, may reject evidence that is inherently improbable (see *infra*, §373.) However, few decisions have actually reversed judgments on this ground.

In *Evje v. City Title Ins. Co.* (1953) 120 C.A.2d 488, 261 P.2d 279, appellant argued that the testimony of respondent's witness was shown to be false by circumstances, his admissions, and documentary evidence. The respondent did not try to explain any of these peculiar circumstances, but instead argued that the conflict was resolved by the trial judge in its favor. In affirming the judgment, the appellate court recognized its power to refuse to uphold a judgment based on evidence inherently improbable, but then added: "There are expressions--nearly all dicta--in one form or another to the effect that an appellate court will reject testimony inherently improbable or impossible of belief in some 40 civil cases collected in 2 McKinney's Digest. ... However, only in one of these cases did the appellate court actually reject as unbelievable testimony believed by the trier of facts." This is because testimony can be rejected only when "wholly unacceptable to reasonable minds" or "unbelievable *per se*," and the appellate court will not substitute its own evaluation of credibility of the witnesses even though to some triers of fact the evidence "would have seemed so improbable, impossible and unbelievable" as to compel a contrary judgment. (120 C.A.2d 492.)

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c. What Does Not Constitute Substantial Evidence.

1. No Clear Test.

9 *Witkin Cal. Proc. Appeal* § 373

[§ 373] No Clear Test.

A small selection of the hundreds of cases that uphold trial court judgments has been cited in the preceding sections (*supra*, §369 et seq.). A selection from the much smaller group of cases in which trial judges were reversed is presented in this and the next section, as a source of suggestions for hopeful appellants. (See *Fewel & Dawes v. Pratt* (1941) 17 C.2d 85, 89, 109 P.2d 650; *Dierman v. Providence Hosp.* (1947) 31 C.2d 290, 295, 188 P.2d 12; *Mantonya v. Bratlie* (1948) 33 C.2d 120, 127, 199 P.2d 677; *Estate of Lingenfelter* (1952) 38 C.2d 571, 573, 241 P.2d 990; *Burtis v. Universal Pictures Co.* (1953) 40 C.2d 823, 831, 256 P.2d 933; *Guardianship of Sturges* (1939) 30 C.A.2d 477, 497, 86 P.2d 905; *Estate of Llewellyn* (1948) 83 C.A.2d 534, 535, 189 P.2d 822, 191 P.2d 419; *Dobson v. Dobson* (1948) 86 C.A.2d 13, 14, 193 P.2d 794; *Hall v. Osell* (1951) 102 C.A.2d 849, 853, 228 P.2d 293; *Toyota Motor Sales U.S.A. v. Superior Court* (1990) 220 C.A.3d 864, 871, 269 C.R. 647; *Roddenberry v. Roddenberry* (1996) 44 C.A.4th 634, 552, 51 C.R.2d 907; *infra*, §374.)

An examination of these opinions discloses no practical test. It does make clear, however, that the reversals are based not on the strength of the appellant's evidence but on the weakness of the respondent's evidence. Within the limits of the rule of *Estate of Bristol* (1943) 23 C.2d 221, 143 P.2d 689, *Estate of Teel* (1944) 25 C.2d 520, 154 P.2d 384, and similar cases (*supra*, §§366, 370), an appellate court may hold that the respondent's evidence was demonstrably false, inherently improbable, or for some other reason of insufficient substantiality to support the judgment.

In *Estate of Teed* (1952) 112 C.A.2d 638, 247 P.2d 54, the court attempted to explain the concept of "substantial evidence" as follows: "The sum total of the above definitions is that, if the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (112 C.A.2d 644.)

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9 Witkin Cal. Proc. Appeal § 374

[§ 374] Illustrations.

In *Estate of Lingenfelter* (1952) 38 C.2d 571, 241 P.2d 990, a will was denied probate after a jury verdict for the contestant on grounds of incompetency and undue influence. In an elaborate review of the record, the Supreme Court found the evidence insufficient and reversed the judgment. A vigorous dissent highlights the difficulties of appellate review in such cases. "It should be remembered that in this case we have not only the verdict of the jury holding the will invalid on both the above mentioned grounds but we have the rulings of the trial judge denying, first, a motion for a nonsuit; second, a motion for a directed verdict; third, a motion for judgment notwithstanding the verdict; and fourth, a motion for a new trial. We also have the unanimous opinion of the District Court of Appeal holding that the evidence is sufficient to support the finding of unsoundness of mind but that the evidence is insufficient as a matter of law to support the finding of undue influence. ... Now a majority of this court holds that the evidence is insufficient as a matter of law to sustain the finding of either unsoundness of mind or of undue influence. In so holding the majority of this court has, in my opinion, gone farther in this case than in any other reported decision in usurping the function of the triers of fact, and has in effect placed itself in the position of the trier of fact in weighing the evidence and passing upon the credibility of the witnesses." (38 C.2d 588.)

In *Estate of Welch* (1954) 43 C.2d 173, 272 P.2d 512, a judgment denying probate of a will on the ground of undue influence was reversed for insufficiency of the evidence to justify the jury's verdict, following *Estate of Lingenfelter*, and distinguishing *Estate of Teel* (1944) 25 C.2d 520, 154 P.2d 384, *supra*, §370.

In *Krause v. Apodaca* (1960) 186 C.A.2d 413, 9 C.R. 10, defendant, who was blind, leased a paint store from plaintiff, and operated it through his sense of touch. A fire, which experts testified started from a can of varnish left on a hot plate at closing time, caused damage. In plaintiff lessor's action for damages for negligence, verdict and judgment were for defendant. *Held*, reversed: "We have concluded that the evidence is insufficient to support the verdict. There is no testimony as to the cause of the conflagration except that of the two experts, and no circumstantial proof except that which corroborates their opinions. The record suggests no reasonable explanation of the fire except that expressed by these experts. No question is raised as to their qualifications or their probity. Respondent merely argues that the trial judge was free to reject their testimony. Not so." (186 C.A.2d 417.)

For other illustrative cases, see the following:

Gray v. Brinkerhoff (1953) 41 C.2d 180, 183, 258 P.2d 834 [defendant truck driver's testimony was insufficient to overcome evidence of his negligence].

Setzer v. Robinson (1962) 57 C.2d 213, 216, 18 C.R. 524, 368 P.2d 124 [action by attorney to recover contingent fees; judgment holding that defendant client was incompetent, and that plaintiff attorney did not rebut presumption of undue influence, was without support by any substantial evidence].

Oldenburg v. Sears, Roebuck & Co. (1957) 152 C.A.2d 733, 734, 314 P.2d 33 [fall on chalk in front of store; no substantial evidence of defendant's negligence].

Carroll v. Dungey (1963) 223 C.A.2d 247, 248, 35 C.R. 681 [judge's findings of no misrepresentation and lack of reliance was without support in the evidence].

Andreotti v. Andreotti (1964) 224 C.A.2d 533, 534, 36 C.R. 709 [plaintiff heir was found by trial judge to be entitled to decedent's property as against other heirs; evidence was insufficient to support recovery either on theory of adverse possession or estoppel (parol gift)].

Crawford v. Continental Cas. Co. (1968) 261 C.A.2d 98, 102, 67 C.R. 641 [testimony of plaintiff insured was contradicted by subsequent acts and other evidence].

Lane & Pyron v. Gibbs (1968) 266 C.A.2d 61, 66, 71 C.R. 817 [only support for finding was abolished presumption of legality].

White v. California (1971) 21 C.A.3d 738, 759, 99 C.R. 58 [no substantial evidence to support trial judge's finding as to county surveyor's intent].

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d. Review of Punitive Damages Award.

9 *Witkin Cal. Proc. Appeal* § 375

[§ 375] Review of Punitive Damages Award.

In *Devlin v. Kearny Mesa AMC/Jeep/Renault* (1984) 155 C.A.3d 381, 202 C.R. 204, plaintiffs visited defendant car dealer's store to look at cars. Plaintiff husband was 84 years old and unable to drive, and plaintiff wife was 66 and suffering from cancer. Defendant's sales manager showed them a used 1980 automobile with a mileage reading of 8,462, representing that it was only a demonstrator that had never been owned. Plaintiffs bought the car, and shortly afterwards discovered that the vehicle had been owned and repossessed, had been driven 20,687 miles, and needed substantial repairs. They brought an action for damages, defendant defaulted, and a default judgment was rendered for \$ 3,425.69 compensatory and \$ 80,000 punitive damages. *Held*, judgment affirmed.

(a) *Appellate process in determining whether punitive damages are excessive.*

(1) *Nature of process.* "The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct that one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter." (155 C.A.3d 388.)

(2) *Factors considered.* An analysis of a representative sampling of cases (see *Appendix*, 155 C.A.3d 393 et seq.) discloses that no formula exists; hence, the appellate court must examine the three factors recited in the opinions: (a) the nature of the defendant's acts, (b) the amount of compensatory damages awarded, and (c) the wealth of the defendant. (155 C.A.3d 388, 389.)

(b) *Award was not excessive as matter of law.*

(1) *First factor.* The fraudulent statements of defendant's sales manager were "reprehensible in the extreme," and

the pressures applied to defraud the elderly plaintiffs were "unconscionable." Defendant's "blatant violation of law and public policy" in turning back the odometer was further evidence of reprehensible conduct. Thus, the case was one that could support a relatively large punitive damages award. (155 C.A.3d 389, 390.)

(2) *Second factor.* There is no fixed ratio, and, in light of the circumstances, "we could not say as a matter of law that punitive damages equal to almost 27 times the award of compensatory damages were unreasonable." Courts have affirmed awards with higher ratios (see Appendix). (155 C.A.3d 390.)

(3) *Third factor.* At the judgment hearing on remand, plaintiffs offered evidence on wealth, showing defendant's projected year-end net worth as \$ 457,000. On the basis of this and other figures (gross sales and net profits), the amount awarded was not excessive as a matter of law. "Although the award, representing 17.5 percent of [defendant's] annualized net worth or almost 4 months net profit, is somewhat greater than comparable ratios contained in the reported cases ... we cannot say these numerical differences mandate a finding of excessiveness. ... The lesson we learned from parsing the cases is that the reason why there is no simple formula for calculating punitive damages is that there is no particular sum which represents the *only* correct amount for such damages in any given case. Instead, there is a range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented." (155 C.A.3d 391.) "This is not a case where an unreasonable award was rendered by a runaway jury. Rather, the award was the result of measured deliberation by a conscientious judge. Deference to the trial court function requires appellate restraint." (155 C.A.3d 392.)

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a. Nature of Rule.

9 *Witkin Cal. Proc. Appeal* § 376

[§ 376] Nature of Rule.

The rule of conflicting evidence (*supra*, §365 et seq.) is usually invoked where evidence on one side is contradicted by evidence on the other. If the evidence is without conflict, and the decision depends on inferences, is the appellate court at liberty to draw its own legitimate inferences and decide the case accordingly? Under that part of the conflicting evidence rule that may be termed the rule of conflicting inferences, the answer is no. Where different inferences may reasonably be drawn from undisputed evidence, the conclusion of the jury or trial judge must be accepted by the appellate court. The following are typical statements of the rule:

(1) "[E]ven though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury). ... In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment." (*Mah See v. North Amer. Acc. Ins. Co. of Chicago, Illinois* (1923) 190 C. 421, 426, 213 P. 42.)

(2) "The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question." (*Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 C.2d 598, 602, 604, 86 P.2d 829.)

(3) "Even if this court were of the opinion that that determination was wrong, it would not have the power to substitute its deductions for those of the trial court. For, as has so often been said, when opposing inferences may reasonably be drawn from the facts in a case, the findings of the trial court will not be set aside." (*McIntyre v. Doe & Roe* (1954) 125 C.A.2d 285, 287, 270 P.2d 21, *infra*, §378.)

A number of decisions are to similar effect. (See *Juchert v. California Water Service Co.* (1940) 16 C.2d 500, 501, 106 P.2d 886; *Estate of Bristol* (1943) 23 C.2d 221, 223, 143 P.2d 689; *Callahan v. Gray* (1955) 44 C.2d 107, 111, 279 P.2d 963; *Hughes v. Quackenbush* (1934) 1 C.A.2d 349, 354, 37 P.2d 99; *Hales v. Snowden* (1937) 19 C.A.2d 366, 372, 65 P.2d 847 [case is "in substance the same as where the court decides upon the weight of contradictory evidence"]; *Cummings v. Kendall* (1940) 41 C.A.2d 549, 554, 107 P.2d 282; *Export Leaf Tobacco Co. v. Los Angeles* (1949) 89

C.A.2d 909, 916, 202 P.2d 622; *Spolter v. Four-Wheel Brake Service Co.* (1950) 99 C.A.2d 690, 693, 222 P.2d 307; *Industrial Indem. Co. v. Golden State Co.* (1953) 117 C.A.2d 519, 538, 256 P.2d 677; *Benam v. Benam* (1960) 178 C.A.2d 837, 841, 3 C.R. 410, citing the text; *Curtis v. Mendenhall* (1962) 208 C.A.2d 834, 839, 25 C.R. 627; *McKinney v. Kull* (1981) 118 C.A.3d 951, 955, 173 C.R. 696, *infra*, §379, quoting the text; *Rubin v. Los Angeles Fed. Savings & Loan Assn.* (1984) 159 C.A.3d 292, 298, 205 C.R. 455, citing the text; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1312, 64 C.R.2d 705, 9 Cal. Proc. (5th), *Administrative Proceedings*, §74, citing the text; *Davis v. Continental Airlines* (1997) 59 C.A.4th 205, 211, 69 C.R.2d 79, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §549, citing the text; *Rodney F. v. Karen M.* (1998) 61 C.A.4th 233, 241, 71 C.R.2d 399 [jury could reasonably infer that man having affair with married woman who resided with her husband would not have reasonably relied on her statement that they had exclusive sexual relationship]; *Winograd v. American Broadcasting Co.* (1998) 68 C.A.4th 624, 633, 80 C.R.2d 378, quoting the text; *Federal Home Loan Mortg. Corp. v. La Conchita Ranch Co.* (1998) 68 C.A.4th 856, 860, 80 C.R.2d 634.)

If photographs are introduced as independent evidence, they are also subject to the conflicting inference rule; and the same is true of the judge's view of the scene. (*South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 398, 400, 41 C.R. 846 [photographs did not support judgment, but view of the scene did].) (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §§17, 29 et seq.)

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b. Exception: Only One Reasonable Inference.

9 Witkin Cal. Proc. Appeal § 377

[§ 377] Exception: Only One Reasonable Inference.

The rule stated in the preceding section is obviously subject to the exception that the conclusion of the jury or trial court is not binding on the reviewing court if the inference was wholly improper. Thus, the evidence may be such that only one inference could be drawn by a reasonable person; or, though the inference could properly be drawn from certain evidence, it is conclusively rebutted by other evidence. In this situation, the question is one of law and the unwarranted inference will not support the judgment.

In *Hicks v. Reis* (1943) 21 C.2d 654, 134 P.2d 788, the court upheld the judgment but nevertheless said: "To these well settled rules there is a common sense limited exception which is aimed to preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities." (21 C.2d 660.) (See *Isenberg v. California Emp. Stabilization Com.* (1947) 30 C.2d 34, 40, 180 P.2d 11; *Estate of Holmes* (1948) 88 C.A.2d 360, 364, 198 P.2d 708; *California v. Superior Court (Natomas Co.)* (1962) 208 C.A.2d 659, 665, 25 C.R. 363, citing the text; *South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 398, 41 C.R. 846 [issue whether water constituted "watercourse"--with definite bed, banks, and channel; airplane photographs taken from such height as to make determination impossible]; *Fullerton Union High School Dist. v. Riles* (1983) 139 C.A.3d 369, 383, 188 C.R. 897, citing the text; 36 Cal L. Rev. 116.)

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c. Distinction: Questions of Law.

9 Witkin Cal. Proc. Appeal § 378

[§ 378] Distinction: Questions of Law.

The rule of conflicting inferences is sometimes stretched beyond reasonable limits by mistaking questions of law for questions of fact.

In *Washko v. Stewart* (1937) 20 C.A.2d 347, 67 P.2d 144, the issue was whether a tortfeasor was an employee or independent contractor. On undisputed facts, the trial judge, holding him to be an independent contractor, denied recovery for wrongful death against defendant employer. This was affirmed on appeal. "[T]he real question before us for decision is not, Did the relation of employer and employee exist between the driver and the Howard Company at the time of the accident? but, Was there any substantial evidence before the trial court to sustain the finding that such relationship did not exist?" (20 C.A.2d 349.) This seems entirely erroneous. Because there was no conflict in the evidence as to what the driver was engaged to do and what he did, the effect of that undisputed evidence in establishing the legal relationship was purely a question of law. (See *Baugh v. Rogers* (1944) 24 C.2d 200, 206, 148 P.2d 633; *Mantonya v. Bratlie* (1948) 33 C.2d 120, 128, 199 P.2d 677; *Saathoff v. San Diego* (1995) 35 C.A.4th 697, 700, 41 C.R.2d 352 [appellate court reviewing ruling on writ of mandamus, while ordinarily confined to substantial evidence rule, may make its own determination when case involves questions of law, and facts are undisputed].)

In *McIntyre v. Doe & Roe* (1954) 125 C.A.2d 285, 270 P.2d 21, plaintiff, an 82-year-old woman, was standing in the lobby of a theater waiting for the doors to open. Children, playing tag after being warned not to do so by the manager, bumped plaintiff and she fell. In a trial without a jury, the judge found defendant theater not negligent. The theory of the opinion affirming the judgment (see quotation, supra, §376) seems unsound: The facts were undisputed, and the "opposing inferences" were not factual but legal; i.e., whether reasonable care had been taken to protect invitees from dangerous activity on the premises.

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d. Stipulation of Facts.

9 *Witkin Cal. Proc. Appeal* § 379

[§ 379] Stipulation of Facts.

In *Oliver & Williams Elevator Corp. v. State Bd. of Equalization* (1975) 48 C.A.3d 890, 122 C.R. 249, the court declared that, where the case was submitted on a stipulation of facts with documents, and no oral evidence was introduced, "the issue becomes a question of law which can be resolved by an appellate court as well as a trial court." (48 C.A.3d 894.)

The court in *McKinney v. Kull* (1981) 118 C.A.3d 951, 173 C.R. 696, emphatically disagreed: "It is readily apparent that unless the parties stipulate to an ultimate fact, which is tantamount to the elimination of an issue from the case, agreed facts or events provide only the basis for an inference of other facts which transform the events into matters of direct legal significance. Where the parties stipulate to facts which form the basis for a further inference of fact, the factual inference to be drawn is not per se a question of law and the law controls only the reasonableness of the inference. ... Where the inferences are conflicting, it is for the trier of fact to resolve the conflict in the absence of a rule of law specifying the inference to be drawn." (118 C.A.3d 956, citing the text.) (See *Winograd v. American Broadcasting Co.* (1998) 68 C.A.4th 624, 633, 80 C.R.2d 378, quoting the text and following *McKinney*.)

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3. Review of Interpretation of Writings.

a. Nature of Problem.

9 Witkin Cal. Proc. Appeal § 380

[§ 380] Nature of Problem.

The issue in a case may be the proper construction of an instrument or other writing that can be interpreted in more than one way. Is the reviewing court bound to accept the construction given by the trial judge, or may it reverse the judgment by substituting its own construction, which it deems more reasonable? The cases fall into three classes:

(1) Where extrinsic evidence has been properly admitted as an aid to interpretation, and the evidence is in conflict. (See *infra*, §381.)

(2) Where no competent extrinsic evidence has been introduced, and the interpretation is derived solely from the terms of the instrument. (See *infra*, §382.)

(3) Where competent extrinsic evidence has been introduced, but it is not in conflict. (See *infra*, §383.)

The California decisions in the second and third classes were difficult to reconcile, but the uncertainty was resolved in the landmark case of *Parsons v. Bristol Dev. Co.* (1965) 62 C.2d 861, 44 C.R. 767, 402 P.2d 839, *infra*, §§382, 383. (See *Los Banos Gravel Co. v. Freeman* (1976) 58 C.A.3d 785, 791, 130 C.R. 180, quoting the text; *People v. Taylor* (1992) 6 C.A.4th 1084, 1091, 8 C.R.2d 439, citing the text.)

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b. Extrinsic Evidence Conflicting.

9 *Witkin Cal. Proc. Appeal* § 381

[§ 381] Extrinsic Evidence Conflicting.

The long-established rule, still followed, is that where the extrinsic evidence has been properly admitted and the evidence is in conflict, any reasonable construction by the lower court will be upheld under the general rule of conflicting evidence. (See *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 C.2d 751, 772, 128 P.2d 665; *Quader-Kino A.G. v. Nebenzal* (1950) 35 C.2d 287, 294, 217 P.2d 650; *In re Marriage of Fonstein* (1976) 17 C.3d 738, 747, 131 C.R. 873, 552 P.2d 1169, citing the text; *Enos v. Armstrong* (1946) 75 C.A.2d 663, 668, 171 P.2d 137; *Estate of Sullivan* (1948) 86 C.A.2d 890, 895, 195 P.2d 894; *Crillo v. Curtola* (1949) 91 C.A.2d 263, 272, 204 P.2d 941; *Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 C.A.2d 113, 114, 233 P.2d 74; *Schmidt v. Macco Const. Co.* (1953) 119 C.A.2d 717, 734, 260 P.2d 230; *Neider v. Dardi* (1957) 152 C.A.2d 156, 163, 313 P.2d 72, citing the text; *Brookes v. Adolph's, Ltd.* (1959) 170 C.A.2d 740, 746, 339 P.2d 879, citing the text; *Collins v. Home Savings & Loan Assn.* (1962) 205 C.A.2d 86, 101, 22 C.R. 817, citing the text; *Haidinger-Hayes v. Marvin Hime & Co.* (1962) 206 C.A.2d 46, 52, 23 C.R. 455, citing the text; *Peskin v. Herron* (1962) 210 C.A.2d 482, 486, 26 C.R. 821; *Kreipl v. Philosophical Research Soc.* (1963) 212 C.A.2d 588, 596, 28 C.R. 323, citing the text; *Coronet Credit Corp. v. West Thrift Co.* (1966) 244 C.A.2d 631, 641, 53 C.R. 433; *Rabinowitch v. California Western Gas Co.* (1967) 257 C.A.2d 150, 157, 65 C.R. 1; *Paramount Television Productions v. Bill Derman Productions* (1968) 258 C.A.2d 1, 12, 65 C.R. 473; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 C.A.3d 1071, 1084, 258 C.R. 721, quoting the text; *Atlantic Richfield Co. v. California* (1989) 214 C.A.3d 533, 538, 262 C.R. 683, citing the text.)

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c. No Extrinsic Evidence Introduced.

9 *Witkin Cal. Proc. Appeal* § 382

[§ 382] No Extrinsic Evidence Introduced.

Prior to the definitive holding in *Parsons v. Bristol Dev. Co.* (1965) 62 C.2d 861, 44 C.R. 767, 402 P.2d 839, *infra*, §383, a number of opinions gave exceptional weight to the trial judge's interpretation, even though there was no conflict in the evidence and consequently no problem of credibility. (See *Prickett v. Royal Ins. Co.* (1961) 56 C.2d 234, 237, 14 C.R. 675, 363 P.2d 907 [dictum]; *Estate of Cuneo* (1963) 60 C.2d 196, 201, 32 C.R. 409, 384 P.2d 1; *Lundin v. Hallmark Productions* (1958) 161 C.A.2d 698, 701, 327 P.2d 166; *Estate of Starr* (1961) 197 C.A.2d 582, 585, footnote 1, 17 C.R. 240, citing the text; *Steiner Lumber Co. v. Sapp* (1963) 216 C.A.2d 800, 805, 31 C.R. 276, 32 C.R. 395.)

The contrary view that, in the absence of conflicting evidence, the question is one of law, and that the reviewing court will give the writing its own independent interpretation, was declared in *Estate of Platt* (1942) 21 C.2d 343, 352, 131 P.2d 825.

In *Estate of Shannon* (1965) 231 C.A.2d 886, 42 C.R. 278, the court took note of the two lines of authority and followed *Platt*. "[W]here only the interpretation of written instruments is concerned, unaffected by extrinsic evidence, is not an appellate court, after studying the briefs on appeal, listening to the arguments of counsel, and thereafter engaging in a full discussion of the problem among the justices, in a more adequately informed position than is the trial judge and therefore better able to interpret the intent of the parties? ... We conclude that in any case where extrinsic evidence is completely lacking or the quantum or quality thereof does not in reason place the trial judge in a better position to form an accurate interpretation of writings, or in other words, where interpretation is essentially a question of law rather than of fact, an appellate court is not bound by the determination of the trial court." (231 C.A.2d 890.)

In *Parsons*, the court approved the approach of *Platt* and *Shannon*. The extreme cases suggesting that the trial judge's interpretation must be accepted if it is reasonable were explained as holding only that the reviewing court must find the interpretation erroneous in order to reverse; they do not mean that the reviewing court is absolved of its duty to interpret. (62 C.2d 866.) (For cases following *Parsons*, see *Keane v. Smith* (1971) 4 C.3d 932, 939, 95 C.R. 197, 485 P.2d 261; *Integrated v. Alec Fergusson Electrical Contractor* (1967) 250 C.A.2d 287, 294, 58 C.R. 503; *Davies Machinery Co. v. Pine Mountain Club* (1974) 39 C.A.3d 18, 23, 113 C.R. 784, citing the text; *Wu v. Interstate Consol. Industries* (1991) 226 C.A.3d 1511, 1515, 277 C.R. 546; *Upland Police Officers Assn. v. Upland* (2003) 111 C.A.4th

1294, 1301, 4 C.R.3d 629.) (On *Parsons* rule where extrinsic evidence is introduced, but is without conflict, see *infra*, §383.)

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d. Extrinsic Evidence Not Conflicting.

9 *Witkin Cal. Proc. Appeal* § 383

[§ 383] Extrinsic Evidence Not Conflicting.

In *Parsons v. Bristol Dev. Co.* (1965) 62 C.2d 861, 44 C.R. 767, 402 P.2d 839, the issue was whether defendant's liability for payments under a contract was subject to a condition precedent--an event that had not yet occurred. Extrinsic evidence was admitted, and the trial judge denied recovery. The Supreme Court affirmed, and, because it reached the same conclusion as the trial judge, there was no need to consider the differing views. But the court felt that it was time to resolve the conflict in prior decisions.

(a) In a clarifying dictum, the opinion rejected the view that the trial judge's interpretation may be controlling even where there is no extrinsic evidence. (See *supra*, §382.)

(b) It applied the same reasoning to the situation in which, although extrinsic evidence is admitted, it is not conflicting. The former view that the trial judge's interpretation must be accepted because he or she may draw different inferences from the uncontradicted evidence was rejected, and cases supporting it (e.g., *Estate of Rule* (1944) 25 C.2d 1, 152 P.2d 1003, and *Overton v. Vita-Food Corp.* (1949) 94 C.A.2d 367, 210 P.2d 757) were disapproved. The correct view, the court declared, was that of *Estate of Platt* (1942) 21 C.2d 343, 131 P.2d 825, and *Estate of Shannon* (1965) 231 C.A.2d 886, 42 C.R. 278, *supra*, §382: "Since there is no conflict in the extrinsic evidence" (and therefore no problem of its credibility, but only of inferences to be drawn from it), the reviewing court "must make an independent determination of the meaning." (62 C.2d 866.)

Later cases are in accord. (See *United States Leasing Corp. v. Du Pont* (1968) 69 C.2d 275, 284, 290, 70 C.R. 393, 444 P.2d 65; *Estate of Dodge* (1971) 6 C.3d 311, 318, 320, 98 C.R. 801, 491 P.2d 385 [interpretation of will]; *Miller v. Citizens Savings & Loan Assn.* (1967) 248 C.A.2d 655, 660, 56 C.R. 844; *Kusmark v. Montgomery Ward & Co.* (1967) 249 C.A.2d 585, 587, 57 C.R. 678; *Kurland v. United Pac. Ins. Co.* (1967) 251 C.A.2d 112, 115, 59 C.R. 258; *Los Banos Gravel Co. v. Freeman* (1976) 58 C.A.3d 785, 791, 130 C.R. 180, quoting the text; *Western Camps v. Riverway Ranch Enterprises* (1977) 70 C.A.3d 714, 723, 138 C.R. 918, citing the text; *Blumenfeld v. R.H. Macy & Co.* (1979) 92 C.A.3d 38, 44, 154 C.R. 652, citing the text; *Medical Operations Management v. National Health Laboratories* (1986) 176 C.A.3d 886, 891, 222 C.R. 455; *Delucchi v. Santa Cruz* (1986) 179 C.A.3d 814, 821, 225 C.R. 43.)

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a. Nature of Problem.

9 Witkin Cal. Proc. Appeal § 384

[§ 384] Nature of Problem.

The review in the superior court of the determinations of an administrative agency, by mandamus or certiorari, is discussed in a previous chapter. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §277.) The decision of the superior court granting or denying relief is a final judgment, and appealable. (See *supra*, §95.) What is the scope of review of the evidence on that appeal?

Two situations must be distinguished:

(1) The administrative agency has made a determination on the evidence before it in the administrative hearing, and the superior court, considering the record of that evidence together with new evidence introduced in the writ proceeding, reaches a different conclusion. On appeal, the usual presumptions in favor of the judgment apply to this resolution of conflicting evidence by the trial judge, and it will be reversed only if there is no substantial evidence in the two records (administrative and trial court) to support it. (See *supra*, §§355, 366.)

(2) The administrative agency has made its determination on evidence produced in the administrative hearing, and the record of that hearing is the only evidence in the writ proceeding; i.e., no new evidence is presented in the superior court. On appeal, it would seem that the issue is whether the administrative determination was correct. In other words, the superior court was acting, in effect, as a reviewing court, not as a trial court; should not the appeal be treated as another review of the administrative determination, rather than as a review of an ordinary superior court decision on conflicting evidence?

This simple question has been hotly debated in California, and the conclusion reached, contrary to the view stated above, is that the appeal in the second situation is treated in the same manner as the first; i.e., the appellate court reviews the superior court judgment in accordance with the conflicting evidence rule. (See *infra*, §§385, 386.)

West's Key Number Digest, Administrative Law and Procedure 651 et seq.

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b. Findings of Trial Court Upheld.

1. Conflicting Evidence Rule.

9 Witkin Cal. Proc. Appeal § 385

[§ 385] Conflicting Evidence Rule.

In *Moran v. Board of Med. Examiners of Calif.* (1948) 32 C.2d 301, 196 P.2d 20, defendant medical board, after a hearing, found petitioner physician guilty of unprofessional conduct, and ordered suspension of his license. In this mandamus proceeding, the superior court merely examined the transcript of the evidence before the board, and did not take any new evidence. Findings were made that the board's decision was against the weight of the evidence, and the order of suspension was annulled. This judgment was affirmed. The Supreme Court declared that "the question before us is whether the evidence, viewed in the light most favorable to petitioner, sustains the findings of the trial court to the effect that the charges against petitioner were not supported by the weight of the evidence." (32 C.2d 309.)

Three dissenting justices in *Moran* vigorously criticized the logic and practicality of this position. "The majority opinion, however, is based on the assumption that the superior court is not acting as a reviewing court but as a trial court deciding issues of fact in the first instance as if there had never been an administrative hearing and as if the record made before the agency had been made before the court. Even though an appellate court reviewing the identical record of the administrative hearing that was before the superior court for review, concludes that the weight of the evidence clearly supports or does not support the agency's findings, as the case may be, it is bound by the superior court's decision as if the case were originally tried there, if there is conflicting evidence in the record. What special insight or qualifications does that court have to make its review of the identical record binding on the appellate court? ... The basic issue in the case, whether the agency's findings are supported by the weight of the evidence, is transformed into a new issue essentially analogous to the issue in the case of a nonsuit or directed verdict. The appellate court must consider only the evidence in favor of the agency's findings, when the superior court finds that they are supported by the weight of the evidence, or only the evidence against such findings, when the superior court finds that they are not supported by the weight of the evidence." (32 C.2d 317.)

Continuing, the dissenters painted a gloomy picture of the condition of judicial review in this field: "Appellate courts disclaim virtually all responsibility when it is claimed that the agency's findings are not supported by the evidence. The superior court determines whether or not the writ shall issue, whether or not additional evidence shall be taken or a complete trial de novo given, and whether or not the agency decision shall be upheld or set aside. ... Thus, on

the one hand the superior court by refusing to issue the writ or by upholding the agency's findings, even though they are not supported by the weight of the evidence, may refuse to exercise the check on administrative agencies that the statute contemplates they should exercise. On the other hand, it has virtually unlimited freedom to destroy the effectiveness of such an agency. When it erroneously finds that the weight of the evidence does not support the agency's findings it substitutes its judgment for that of the agency and controls the discretion vested by the Legislature in the agency. ... Judicial review becomes more than a check on administrative action, it completely supplants that action and destroys 'the values--expertness, specialization and the like--which, as we have seen, were sought in the establishment of administrative agencies.' " (32 C.2d 319.) (See 44 Cal. L. Rev. 278, 290; 22 So. Cal. L. Rev. 49; 1 Stanf. L. Rev. 326; 2 Stanf. L. Rev. 300.)

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b. Findings of Trial Court Upheld.

2. Decisions Following Rule.

9 *Witkin Cal. Proc. Appeal* § 386

[§ 386] Decisions Following Rule.

The rule in *Moran v. Board of Med. Examiners of Calif.* (1948) 32 C.2d 301, 196 P.2d 20, supra, §385, was followed, often without extended discussion, in a number of subsequent cases. (See *Tringham v. State Bd. of Education* (1958) 50 C.2d 507, 508, 326 P.2d 850; *Merrill v. Department of Motor Vehicles* (1969) 71 C.2d 907, 916, 80 C.R. 89, 458 P.2d 33, citing the text; *Bixby v. Pierno* (1971) 4 C.3d 130, 149, 93 C.R. 234, 481 P.2d 242, 8 Cal. Proc. (5th), *Extraordinary Writs*, §§282, 299; *Jones v. Maloney* (1951) 106 C.A.2d 80, 84, 234 P.2d 666; *Manning v. Watson* (1952) 108 C.A.2d 705, 712, 239 P.2d 688; *Almaden-Santa Clara Vineyards v. Paul* (1966) 239 C.A.2d 860, 866, 49 C.R. 256; *Arenstein v. California State Bd. of Pharmacy* (1968) 265 C.A.2d 179, 186, 71 C.R. 357; cf. *Magit v. Board of Med. Examiners* (1961) 57 C.2d 74, 80, 17 C.R. 488, 366 P.2d 816 [trial judge's finding that petitioner did not violate law was erroneous, and judgment was reversed]; *David Kikkert & Associates v. Shine* (1970) 6 C.A.3d 112, 116, 86 C.R. 161, 8 Cal. Proc. (5th), *Extraordinary Writs*, §279 [where controlling facts are undisputed, determination of their effect is question of law, and *Moran* rule does not apply].)

Twenty years after *Moran*, the rule was reexamined and reaffirmed in *Yakov v. Board of Med. Examiners* (1968) 68 C.2d 67, 64 C.R. 785, 435 P.2d 553. Doctor Y was convicted of nine counts of furnishing dangerous drugs without a prescription. The evidence consisted of sales of large supplies of amphetamines to three state agents. The Board of Medical Examiners then filed charges and, after a hearing, revoked his medical certificate. In the mandamus proceeding, the trial judge concluded that the finding of moral turpitude was not sustained by the weight of the evidence, and annulled the order. *Held*, affirmed.

(a) "Since its inception in 1948, the *Moran* rule has been consistently applied to describe the scope of review of decisions not only by the Board of Medical Examiners but also by other statewide administrative agencies that are without constitutional authority to exercise judicial powers." (68 C.2d 72.) And, under the rule, "the question before this court turns upon whether the evidence reveals substantial support, contradicted or uncontradicted, for the trial court's conclusion that the weight of the evidence does not show Dr. [Y] to be guilty of conduct involving moral turpitude." (68 C.2d 72.)

(b) The record supported the trial judge's conclusion that the doctor's objective was not personal profit, but a desire to assist poor persons by selling them pills below drugstore prices. And, because he thought the pills were not dangerous, his motive was not evil but "benign." "[A]lthough he recognized potential danger from any drug used incorrectly, he considered amphetamine no more dangerous or habit-forming than coffee or Coca Cola. Even assuming a lack of sound medical judgment in Dr. [Y]'s appraisal of the physical consequences of the pills, we find no evidence of subjective intent other than to serve the best interests of his patients." (68 C.2d 74.)

(c) Policy also justifies the rule. "The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection. Perhaps one rationalization for *Moran* lies in its prophylactic requirement that in the instant situation the appellate court must accept the facts as found by the trial court, a judicial tribunal, rather than by the disciplinary board, an administrative agency." (68 C.2d 75.)

In *Lacy v. California Unemp. Ins. App. Bd.* (1971) 17 C.A.3d 1128, 95 C.R. 566, the court, after stating that it was bound by the *Moran* rule (17 C.A.3d 1132), joined the critics. The real question is whether the agency's decision harmonizes with the statutory purpose. "In California the quest for statutory purpose in administrative mandamus is successfully blunted by the *Moran* doctrine, which enthrones each superior court judge as the practical arbiter of the facts and restricts appellate courts to a role more appropriate to the review of jury verdicts in automobile collision cases. The inflation of the one-judge superior court's role correspondingly deflates that of the administrative agency at one end of the scale and that of the three-judge and seven-judge appellate courts at the other. The present *denouement* was predicted in Justice Traynor's dissent in *Moran v. Board of Medical Examiners*." (17 C.A.3d 1135, footnote 2.)

Despite this criticism, the *Moran* rule still governs. (See *Holmes v. Kizer* (1992) 11 C.A.4th 395, 400, 13 C.R.2d 746 [following *Lacy*]; *Amvest Mortg. Corp. v. Antt* (1997) 58 C.A.4th 1239, 1242, 68 C.R.2d 457, citing the text.) In *Yordamlis v. Zolin* (1992) 11 C.A.4th 655, 14 C.R.2d 225, a dissenting justice pointed out that the trial judge ruled the evidence insufficient as a matter of law, and contended that the Court of Appeal was not limited to substantial evidence review but could reach its independent determination based on the undisputed facts. (11 C.A.4th 664.) The majority strongly disagreed, pointing out that the independent judgment test would apply only where the evidence is both undisputed and not subject to conflicting inferences and the issues only involve proper application of a statute or regulation. (11 C.A.4th 660, footnote 3, 663, footnote 9.)

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9 *Witkin Cal. Proc. Appeal* § 387

[§ 387] Distinction: Legislative Determination.

If the determination of an administrative agency is not quasi-judicial but legislative, it is not "reviewed" in the same sense or in the same manner. (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §270.)

Thus, in an attack on the validity of a municipal zoning ordinance, the trial court's decision has none of the usual conclusiveness of a determination of fact. "The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers, neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations. As applied to the case at hand, the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." (*Lockard v. Los Angeles* (1949) 33 *C.2d* 453, 461, 202 *P.2d* 38.)

The same approach is taken in review of other administrative regulations promulgated under a legislative grant of power. (See *Ralphs Grocery Co. v. Reimel* (1968) 69 *C.2d* 172, 175, 70 *C.R.* 407, 444 *P.2d* 79 [rule of Alcoholic Beverage Control Board prohibiting quantity discount in sale of beer; superior court judge's order annulling rule was reversed]; *Credit Ins. General Agents Assn. v. Payne* (1976) 16 *C.3d* 651, 657, 128 *C.R.* 881, 547 *P.2d* 993 [following *Ralphs Grocery Co.*].)

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5. Reconciliation of Conflicting Decisions.

9 Witkin Cal. Proc. Appeal § 388

[§ 388] Reconciliation of Conflicting Decisions.

In *Robinson v. El Centro Grain Co.* (1933) 133 C.A. 567, 24 P.2d 554, the court remarked that "[t]he Supreme Court was once placed in the unfortunate position of having to affirm two judgments, reaching opposite conclusions on the same state of facts, because no request for a continuance of the second case had been made in the trial court." (133 C.A. 573.) If a continuance is impracticable or is not obtained, and two California lower courts render contradictory judgments in litigation arising out of the same occurrences and based on substantially the same conflicting evidence, is an appellate court bound to affirm each decision?

In *Southern Pac. Co. v. Los Angeles* (1936) 5 C.2d 545, 55 P.2d 847, the court refused to be so bound, and carved out an extraordinary exception to the rule of conflicting evidence. An aqueduct of defendant city broke during a rainstorm, flooded and destroyed valuable chemical deposits of Inyo Co., and damaged plaintiff's railroad tracks. Separate actions were brought in separate courts. (a) In the first action by Inyo Co., one lower court found that the city was negligent in the construction and maintenance of the aqueduct and that its negligence proximately caused the injury. The Court of Appeal of the Fourth District upheld this conclusion. (b) In the second action, another superior court judge found that there was no negligence and that the rainstorm was a superseding cause. The judgment against plaintiff was affirmed by the Court of Appeal of the Second District. The Supreme Court granted hearings and, after an examination of the briefs and the records, concluded that the cases were practically identical in the evidence offered, issues involved, and legal theories urged.

"It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases." (5 C.2d 548.) Accordingly, the court adopted the conclusion reached in the first case, holding the city liable, and reversed the judgment in the second case.

Situations within the pattern of the *Southern Pac.* case are most unlikely. (See, however, *South v. French* (1919) 40

C.A. 28, 180 P. 357.) Consequently, though the theory of the case has been approved by dicta in a number of decisions, it is usually held inapplicable because the two conflicting judgments are not before the reviewing court at the same time. In other words, where one judgment is already final, the appellate court in reviewing a second judgment based on substantially similar evidence will not depart from the conflicting evidence rule merely to make it conform. (*Dillard v. McKnight* (1949) 34 C.2d 209, 224, 209 P.2d 387; *Bell-Brook Dairies v. Bryant* (1950) 35 C.2d 404, 407, 218 P.2d 1; *Morris v. Fortier* (1943) 59 C.A.2d 132, 136, 138 P.2d 368; cf. *Seney v. Pickwick Stages, Northern Div.* (1929) 206 C. 389, 390, 274 P. 536 [earlier decision was followed though recognized as not controlling]; *Berryman v. Quinlan* (1938) 29 C.A.2d 608, 609; 85 P.2d 202 [same].)

West's Key Number Digest, Appeal and Error 1002, 1011

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C. Estoppel and Waiver.

1. Error Invited: Estoppel.

a. Theory of Invited Error.

9 *Witkin Cal. Proc. Appeal* § 389

[§ 389] Theory of Invited Error.

(1) *In General.* Where a party by his or her conduct induces the commission of error, the party is estopped from asserting it as a ground for reversal. This application of the estoppel principle is generally known as the doctrine of invited error. (See *Mary M. v. Los Angeles* (1991) 54 C.3d 202, 213, 285 C.R. 99, 814 P.2d 1341, *infra*, §393, citing the text; *Merrill v. Kohlberg* (1916) 29 C.A. 382, 386, 155 P. 824; *Cummings v. Cummings* (1929) 97 C.A. 144, 149, 275 P. 245; *Abbott v. Cavalli* (1931) 114 C.A. 379, 383, 300 P. 67; *Mathieson v. Wallace* (1932) 124 C.A. 25, 28, 12 P.2d 99; *Noble v. Miles* (1933) 129 C.A. 724, 727, 19 P.2d 265; *Collins v. Graves* (1936) 17 C.A.2d 288, 297, 61 P.2d 1198; *Nels E. Nelson v. Tarman* (1958) 163 C.A.2d 714, 730, 329 P.2d 953, citing the text; *Bondulich v. O.E. Anderson Co.* (1962) 210 C.A.2d 12, 17, 26 C.R. 147, quoting the text; *California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 C.A.2d 715, 729, 37 C.R. 1, citing the text; *Morris v. Frudenberg* (1982) 135 C.A.3d 23, 32, 185 C.R. 76, footnote 3, citing the text; *Hensley v. Hensley* (1987) 190 C.A.3d 895, 899, 235 C.R. 684, citing the text; *In re Marriage of Broderick* (1989) 209 C.A.3d 489, 501, 257 C.R. 397, citing the text; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 C.A.4th 1538, 1555, 6 C.R.2d 698, citing the text; *Mesecher v. San Diego* (1992) 9 C.A.4th 1677, 1685, 12 C.R.2d 279; *Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 C.A.4th 1746, 1750, 37 C.R.2d 612, *infra*, §392, citing the text; *Weber, Lipshie & Co. v. Christian* (1997) 52 C.A.4th 645, 658, 60 C.R.2d 677; 23 *Cal. L. Rev.* 206; cf. *Munoz v. Union City* (2007) 148 C.A.4th 173, 179, 55 C.R.3d 393 [invited error doctrine was not applicable where trial court's error in rejecting plaintiffs' requested reallocation of damages was result of its misapplication of not of any misleading conduct by plaintiffs].)

The estoppel usually arises in one of two ways: (a) from the appellant's own affirmative act (see *infra*, §390), or (b) from the appellant's objection (see *infra*, §391). However, defensive acts do not give rise to an estoppel. (See *infra*, §393.)

(2) *Distinction: Opposition Induced To Make Error.* In *Burckhard v. Del Monte Corp.* (1996) 48 C.A.4th 1912, 56 C.R.2d 569, *infra*, §549, plaintiffs argued that defendant invited error by sending them settlements without explicit instructions that they were to be signed by the parties only, and not by counsel. *Held*, the theory was inapplicable. It refers only to affirmative acts that lead the *court* into error. Here, the alleged error caused the opposition to commit error, but defendant had no responsibility to ensure that plaintiffs complied with the statutory requirements. (48 C.A.4th

1918.)

West's Key Number Digest, Appeal and Error 882

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Distinction: New Trial.* The theory of invited error applies on an appeal from a judgment, but not on an appeal from an order granting a new trial. Thus, where the jury has been erroneously instructed and the trial court has determined that the error was prejudicial, the trial court is not precluded from granting a new trial merely because there was a waiver or an estoppel by one of the parties. (*McCarty v. Department of Trans.* (2008) 164 C.A.4th 955, 984, 79 C.R.3d 777.)



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b. Appellant's Act Inducing Error.

9 Witkin Cal. Proc. Appeal § 390

[§ 390] Appellant's Act Inducing Error.

(1) *Acts Inviting Error*. The appellant may originally do something affirmatively that leads the court into error. The following are illustrative:

(a) *Improper evidence*. If the appellant offers inadmissible matter in evidence, he or she cannot complain of its admission. (*Gjurich v. Fieg* (1913) 164 C. 429, 433, 129 P. 464.) The same is true where, on cross-examination, the appellant asks questions with presumed knowledge that the answers will be improper. (*Zarafonitis v. Yellow Cab Co. of Alameda County* (1932) 127 C.A. 607, 609, 16 P.2d 141 [counsel for insurance company asked witness question knowing that answer would disclose insurance coverage].)

(b) *Erroneous instruction*. The appellant cannot complain that an instruction was erroneous where he or she requested the instruction or one substantially similar to it. (*Yolo Water & Power Co. v. Hudson* (1920) 182 C. 48, 51, 186 P. 772; *Collins v. Graves* (1936) 17 C.A.2d 288, 297, 61 P.2d 1198; *Miller v. Dollar Steamship Lines* (1937) 19 C.A.2d 206, 211, 64 P.2d 1163; *Bender v. Perry* (1940) 37 C.A.2d 206, 212, 99 P.2d 319; *Greenleaf v. Briggs* (1947) 78 C.A.2d 720, 725, 178 P.2d 459; *Barlin v. Barlin* (1957) 156 C.A.2d 143, 149, 319 P.2d 87; *Carlson v. Glanville* (1959) 170 C.A.2d 246, 247, 338 P.2d 580; *Devincenzi v. Faulkner* (1959) 174 C.A.2d 250, 253, 344 P.2d 322; *Smith v. Americania Motor Lodge* (1974) 39 C.A.3d 1, 7, 113 C.R. 771, quoting the text; *Mozzetti v. Brisbane* (1977) 67 C.A.3d 565, 573, 136 C.R. 751, citing the text; *Correll v. Clark Equipment Co.* (1978) 76 C.A.3d 548, 553, 143 C.R. 269, citing the text; *Morris v. Frudenberg* (1982) 135 C.A.3d 23, 34, 185 C.R. 76, citing the text; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1653, 57 C.R.2d 525; *Weber, Lipshie & Co. v. Christian* (1997) 52 C.A.4th 645, 657, 60 C.R.2d 677; *Mayes v. Bryan* (2006) 139 C.A.4th 1075, 1098, 44 C.R.3d 14; 23 Cal. L. Rev. 206; cf. *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 C.2d 117, 120, 114 P.2d 343 [appellant cannot attack improper verdict resulting from erroneous instruction requested by appellant].)

(c) *Propriety of instruction*. The appellant cannot object to the propriety of instructing on a particular issue as to which he or she proposed an instruction. (*Charves v. San Francisco-Oakland Terminal Ry.* (1919) 44 C.A. 221, 225, 186 P. 154; *Hughes v. Pacific Elec. Ry. Co.* (1922) 58 C.A. 375, 380, 208 P. 335; cf. *Pobor v. Western Pac. R. Co.* (1961) 55 C.2d 314, 320, 11 C.R. 106, 359 P.2d 474 [party cannot complain of instruction on statute where his own

counsel read same statute to jury in argument].)

(d) *Matter beyond scope of issues.* The appellant cannot submit a matter for determination by the lower court and contend on appeal that the matter was beyond the scope of the issues. (*Estate of Armstrong* (1966) 241 C.A.2d 1, 7, 50 C.R. 339 [heirship proceeding; issue whether property was community or separate].)

(e) *Defective findings.* The appellant cannot challenge defective findings (now statement of decision) that he or she proposed. (*Tucker v. Cave Springs Mining Corp.* (1934) 139 C.A. 213, 218, 33 P.2d 871; *Johnson v. Rich* (1957) 150 C.A.2d 740, 747, 310 P.2d 980; *Smith v. Royal Mfg. Co.* (1960) 185 C.A.2d 315, 320, 8 C.R. 417; *Kraus v. Willow Park Public Golf Course* (1977) 73 C.A.3d 354, 374, 140 C.R. 744, citing the text.)

(f) *Submitted issues.* The appellant cannot submit all issues for determination and then claim that the trial court erred in deciding certain issues. Thus, where appellants submit the "entirety of all the issues" for the trial court to determine, they are precluded from claiming that the court erred in awarding judgment for respondents on one of the causes of action. (*Geffcken v D'Andrea* (2006) 137 C.A.4th 1298, 1312, 41 C.R.3d 80 [appellants were precluded from claiming that trial court erroneously ordered judgment to be entered in respondents' favor on nuisance and constructive eviction causes of action].)

(2) *Distinction: Stipulation Not Inviting Error.* A stipulation does not invite error and thereby preclude an appeal involving the stipulated fact where, despite erroneous language, the stipulation manages to present the issue appealed and does not mislead the trial judge. (*In re Marriage of Koester* (1999) 73 C.A.4th 1032, 1038, 87 C.R.2d 76 [stipulation in dissolution proceeding incorrectly described certain property as "community," but nevertheless presented to trial judge the issue raised on appeal, i.e., whether husband was entitled to return on his separate business or merely to reimbursement].)

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c. Appellant's Objection Inducing Error.

9 *Witkin Cal. Proc. Appeal* § 391

[§ 391] Appellant's Objection Inducing Error.

If the error consists of the respondent's failure to prove an essential fact, and that failure resulted from an erroneous ruling sustaining the appellant's objection or motion to strike the evidence offered, the appellant is estopped to claim error on appeal. (*Watenpaugh v. State Teachers' Retirement System* (1959) 51 C.2d 675, 680, 336 P.2d 165; *Merrill v. Kohlberg* (1916) 29 C.A. 382, 386, 155 P. 824 [objection to evidence on certain theory of damages, leading to ruling establishing wrong theory of damages on which case was tried]; *Credit Clearance Bureau v. Guaranty Loan Co.* (1923) 61 C.A. 528, 215 P. 104; *Kessler v. Gray* (1978) 77 C.A.3d 284, 290, 143 C.R. 496.)

The principle is also involved where improper matters are introduced by the respondent over objection by the appellant, and the respondent thereafter attempts to withdraw them by having them stricken out. If the appellant objects and prevents their withdrawal (in order to establish a ground for appeal), he or she loses the right to take advantage of the error. (*Kahn v. Triest-Rosenberg Cap Co.* (1903) 139 C. 340, 346, 73 P. 164; *Sellers v. Wood Hydraulic Hoist & Body Co.* (1928) 205 C. 519, 523, 271 P. 1055.)

Another example is error in failing to submit an issue to the jury, brought about by the appellant's objection to submission. (*Estate of Novotny* (1928) 94 C.A. 782, 790, 271 P. 923, 273 P. 58.)

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d. Respondent's Objection Inducing Error.

9 Witkin Cal. Proc. Appeal § 392

[§ 392] Respondent's Objection Inducing Error.

In *Kardly v. State Farm Mut. Auto. Ins. Co.* (1995) 31 C.A.4th 1746, 37 C.R.2d 612, the respondent's objection induced the error. Plaintiffs (respondents) sued their liability insurer for bad faith refusal to settle a claim, and the trial judge granted their motion to exclude, during opening argument, evidence of their involvement with another insurer concerning the subject of the claim. Following the liability phase of the trial, the jury awarded plaintiffs contract and compensatory damages. However, during the punitive damages phase, the judge granted defendant's motion to admit the evidence, stating that he may have prejudicially erred in excluding it from the liability phase. *Held*, judgment for plaintiffs reversed; exclusion of the evidence during the liability proceedings was reversible error. Plaintiffs cannot contend on appeal that, because their motion to exclude the evidence was only granted for the purpose of opening argument, defendant was free at any time during trial to make an offer of proof for admission of the evidence. Plaintiffs conceded that the liability proceedings were conducted as if the court's ruling excluded the evidence from the entire trial and not just the opening statements, and they took tactical advantage of the exclusion throughout the trial. It is plain that everyone, including the court and plaintiffs' counsel, presumed that exclusion of the evidence applied to the entire proceedings. Thus, any error by defendant in failing to make an offer of proof cannot form a basis for affirming the judgment. "When a party by his conduct induces the commission of an error, he is estopped from asserting it as a ground for reversal." (31 C.A.4th 1750, citing the text.)

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e. Exception: Defensive Acts.

9 *Witkin Cal. Proc. Appeal* § 393

[§ 393] Exception: Defensive Acts.

No estoppel results from acts of the appellant that are defensive or precautionary. Thus, where the appellant offers instructions on an irrelevant matter only after an unsuccessful attempt to remove it from the case, he or she may attack its relevancy on appeal. (*Williamson v. Pacific Greyhound Lines* (1949) 93 C.A.2d 484, 487, 209 P.2d 146; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 C.A.4th 1538, 1555, 6 C.R.2d 698, citing the text.)

In *Mary M. v. Los Angeles* (1991) 54 C.3d 202, 285 C.R. 99, 814 P.2d 1341, the issue was whether defendant city could be held liable to plaintiff victim for the misconduct of a police officer under the doctrine of respondeat superior. Plaintiff relied on *White v. Orange* (1985) 166 C.A.3d 566, 212 C.R. 493, a case in point; defendant city contended that *White* was wrongly decided. The trial judge, bound by *White*, told the parties that he would instruct the jury in accordance with that decision, and that unless defendant city proffered an alternative instruction it would give plaintiff's proposed instruction. Defendant city then submitted a *White* instruction. *Held*, the doctrine of invited error did not apply and defendant city could challenge the authority of *White* on appeal.

(a) "Here, the City did not invite the trial court to instruct the jury that liability for a sexual assault can arise from a police officer's exercise of official authority. To the contrary, it took the opposite position throughout the case, including the instruction conference. The City never *induced* the trial court to follow *White* ... ; it merely acquiesced--after objecting--to the court's decision to instruct in accordance with *White*, and submitted an instruction in accordance with that decision. Although the City would be barred from attacking the specific language of the jury instruction it submitted, it is, under the circumstances of this case, not precluded from asserting that *White* ... was erroneously decided." (54 C.3d 213.)

(b) Two justices, although disagreeing with the holding in favor of plaintiff on substantive liability, nevertheless concurred in the judgment on the ground that defendant city had invited the error. They took the position that the objection to the instruction submitted by defendant city should have been made a matter of record at the time it was proposed, instead of after the jury had been instructed. (54 C.3d 226, 227.) The majority disagreed: "This contention ignores the realities of trial practice. Experienced litigators know that many trial courts conduct unreported instruction conferences and permit counsel to 'make their record' by recording their objections after the jury has retired to

deliberate. This practice promotes judicial efficiency, because it allows matters to be placed on the record at a time when the jury will not be kept waiting. We see no reason to condemn the procedure used by the trial court in this case." (54 C.3d 213, footnote 4.) (See *Norgart v. Upjohn Co.* (1999) 21 C.4th 383, 402, 87 C.R.2d 453, 981 P.2d 79 [doctrine of invited error did not apply to consent judgment, where plaintiffs entered stipulation to hasten review and make best of bad situation for which they were not responsible--namely, unfavorable result at trial that would have been compelled by Court of Appeal decision in another case; following *Mary M.*].)

In *Hughes v. Pacific Elec. Ry. Co.* (1922) 58 C.A. 375, 208 P. 335, a collision caused injuries to a child and death to an adult. Two actions were tried together by stipulation, and one attorney represented both plaintiffs. A directed verdict for defendant was granted in the wrongful death case, and a verdict was rendered against the child. In an appeal by the child alone, certain instructions were attacked. *Held*, counsel had invited the error by requesting instructions on the same issues, and by consolidating the cases for trial, counsel had subjected the case of the child appellant to any vicissitudes that might attend the consideration by the jury of the other case. However, counsel might in such a situation save the appellant's right to show error in the instructions by one of three courses: (a) specify that the requested instructions relate to one case; (b) in requesting the instructions, state that, in the event of a directed verdict for one defendant, these instructions should not be given; (c) after the directed verdict in the first case, withdraw the instructions. (58 C.A. 381.)

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a. Theory of Error Waived.

9 *Witkin Cal. Proc. Appeal* § 394

[§ 394] Theory of Error Waived.

Even though the appellant is not guilty of any prior conduct inviting an erroneous ruling or other step (*supra*, §389), the appellant may, by express agreement, or by some contemporaneous or subsequent conduct or inaction, acquiesce in the error and thereby lose the right to attack it. (See *In re Marriage of Broderick* (1989) 209 C.A.3d 489, 501, 257 C.R. 397, citing the text.) The waiver may be express (see *infra*, §395) or implied (see *infra*, §396 et seq.). But necessary defensive acts do not constitute a waiver. (See *infra*, §399.)

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b. Express Waiver.

9 *Witkin Cal. Proc. Appeal* § 395

[§ 395] Express Waiver.

The waiver may be express, i.e., by stipulation of counsel that no objection will be made to the ruling or procedure. (See *Turpen v. Turlock Irr. Dist.* (1903) 141 C. 1, 2, 74 P. 295 [stipulation that if plaintiff recovers, there should be joint judgment against both defendants]; *Seale v. Carr* (1909) 155 C. 577, 579, 102 P. 262; *Grunsky v. Field* (1905) 1 C.A. 623, 625, 82 P. 979 [unconditional stipulation that, in retrial after jury disagreement, cause would be submitted on transcript of former trial was waiver of objections to evidence made at that trial]; *Berkeley Bank of Savings & Trust Co. v. Miller* (1913) 23 C.A. 315, 317, 137 P. 1101 [stipulation as to what claims should be disposed of in action and what left for another action]; *Southern Pac. Co. v. Santa Cruz* (1914) 26 C.A. 26, 28, 145 P. 736 [stipulation that motion for nonsuit would be determined on issue of statute of limitations was waiver of defective pleading of statute]; *Guitron v. Rodriguez* (1930) 105 C.A. 513, 515, 288 P. 134 [agreement that certain matter was not for jury to determine]; *Gordon v. Kifer* (1938) 26 C.A.2d 252, 254, 79 P.2d 164 [defendant's stipulation that, if court would instruct jury that no insurance company was involved, he would not raise misconduct point on appeal]; *Japan Food Corp. v. Sacramento* (1976) 58 C.A.3d 891, 893, 130 C.R. 392, citing the text; *Nevada County Office of Education v. Riles* (1983) 149 C.A.3d 767, 779, 197 C.R. 152, citing the text.)

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2. Error Consented to: Waiver.

c. Implied Waiver.

1. Failure To Object.

9 *Witkin Cal. Proc. Appeal* § 396

[§ 396] Failure To Object.

The most obvious types of implied waiver arise from failure to object to the ruling or proceeding. (See *Shain v. Peterson* (1893) 99 C. 486, 487, 33 P. 1085 [unauthorized order of reference; appellant voluntarily appeared before referee and submitted testimony]; *Kauffman v. De Mutis* (1948) 31 C.2d 429, 432, 189 P.2d 271 [surprise at trial (missing witness); no request for continuance]; *Sabella v. Southern Pac. Co.* (1969) 70 C.2d 311, 319, 74 C.R. 534, 449 P.2d 750, 7 Cal. Proc. (5th), Trial, §211 [misconduct of counsel; no objection or request for admonition]; *Exposita v. United R. of San Francisco* (1919) 42 C.A. 320, 322, 183 P. 576 [withdrawal of child witness at court's suggestion, without protest]; *Cummings v. Cummings* (1929) 97 C.A. 144, 149, 275 P. 245 [motion by respondent to exclude evidence on erroneous grounds; appellant failed to oppose it]; *Trigueiro v. Skow* (1937) 24 C.A.2d 253, 256, 74 P.2d 836 [failure to swear child witness]; *Rosenthal v. Harris Motor Co.* (1953) 118 C.A.2d 403, 408, 257 P.2d 1034 [failure to make order for amendment to conform to proof; defendants remained silent with knowledge of technical defect]; *In re Marriage of Hinman* (1997) 55 C.A.4th 988, 1002, 64 C.R.2d 383, citing the text; *Ferris v. Gatke Corp.* (2003) 107 C.A.4th 1211, 1225, footnote 7, 132 C.R.2d 819, citing the text [even assuming that it was error to rule on motion for nonsuit following offer of proof rather than after opening statement, error was invited by counsel's failure to timely object before trial court ruled]; *Cushman v. Cushman* (1960) 178 C.A.2d 492, 498, 3 C.R. 24; C.E.B., 2 Civil Proc. During Trial 3d, §15.25; Rutter Group, 1 Civil Appeals and Writs §8:268 et seq.)

In *Gimbel v. Laramie* (1960) 181 C.A.2d 77, 5 C.R. 88, the trial judge improperly received evidence out of court, for which a mistrial could have been successfully demanded (see 7 Cal. Proc. (5th), Trial, §250). But plaintiff's attorney instead requested permission to reopen his case and offer contradictory evidence. *Held*, he waived his right to urge the error as a ground for a new trial or reversal on appeal. "Counsel may not elect to introduce additional evidence to counteract evidence wrongfully received by the court, speculating upon a favorable judgment, and at the same time reserve his objection in the event the judgment should be adverse to him." (181 C.A.2d 86.)

In *Wiley v. Southern Pac. Trans. Co.* (1990) 220 C.A.3d 177, 269 C.R. 240, defendant appealed from an order granting plaintiff's motion for a new trial on the ground of juror misconduct. Defendant contended that plaintiff's motion should have been denied because of plaintiff's failure to file a "no-knowledge" affidavit (see 7 Cal. Proc. (5th), Trial,

§386). *Held*, defendant waived the error by failing to object in the trial court. The failure to file a no-knowledge affidavit is a procedural defect and not a noncurable defect of substance (see *infra*, §406). At the time the new trial motion was heard, plaintiff still had 2 more days to file additional affidavits (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §65). Hence, by failing to raise the defect, defendant deprived the trial court and plaintiff of the opportunity to cure it. (220 *C.A.3d* 188.)

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c. Implied Waiver.

2. Acts Indicating Acquiescence.

9 *Witkin Cal. Proc. Appeal* § 397

[§ 397] Acts Indicating Acquiescence.

Affirmative acts that indicate an acquiescence in the ruling may also constitute an implied waiver. The following are illustrative:

(1) *Using evidence after objection is sustained.* If the respondent's evidence is admitted over the appellant's objection, and the appellant then offers and makes use of the same evidence, he or she waives the prior objection. (*Heiman v. Market Street Ry. Co. (1937) 21 C.A.2d 311, 315, 69 P.2d 178.*)

(2) *Withdrawing objection.* If the appellant objects and then withdraws his or her objection the objection is waived. (See *Hill v. Estate of Westbrook (1952) 39 C.2d 458, 461, 247 P.2d 19* [objection to certain evidence sustained and appellant's counsel agreed, "We can't get it in"]; *Buchanan v. Nye (1954) 128 C.A.2d 582, 587, 275 P.2d 767* [respondent offered inadmissible hearsay over objection; other hearsay was then offered after appellant's counsel stated, "I have decided to withdraw my objection"]; *Electronic Equipment Express v. Donald H. Seiler & Co. (1981) 122 C.A.3d 834, 856, 176 C.R. 239*, citing the text.)

(3) *Failing to offer evidence after objection is withdrawn.* If, after the erroneous exclusion of the appellant's evidence, the respondent withdraws his or her objection, the appellant should offer it again. An appellant who declines, for the purpose of building up a record for an appeal, he or she waives the error. (*Estate of Ross (1915) 171 C. 64, 68, 151 P. 1138*; *Coos Bay Mfg. Co. v. California Selling Co. (1916) 29 C.A. 407, 413, 155 P. 817* [respondent's withdrawal after submission of case, appellant was notified and given opportunity to reopen case and offer proof].)

In *Rinehart v. First Cupertino Co. (1957) 154 C.A.2d 842, 317 P.2d 30*, plaintiff sued partners who were husband and wife, and defendants sought affirmative relief by answer, hence waiving their marital privilege against testimony. But the husband's counsel objected to the wife's testimony, and the court erroneously sustained the objection. *Held*, the error was waived when, shortly after the ruling, and at the close of defendants' case, counsel for defendants offered to put the wife on the stand and plaintiff refused the offered opportunity. (*154 C.A.2d 844.*)

(4) *Amending complaint after demurrer is erroneously sustained.* A waiver may also occur where, after a demurrer is erroneously sustained, the plaintiff voluntarily amends the complaint to remedy the supposed defect. (*Brittan v. Oakland Bank of Savings* (1896) 112 C. 1, 2, 44 P. 339; *Alhambra Transfer & Storage Co. v. Muse* (1940) 41 C.A.2d 92, 93, 106 P.2d 63; see 5 *Cal. Proc.* (5th), *Pleading*, §989.)

(5) *Failing to answer after demurrer is properly sustained.* Where, although a demurrer to the complaint is properly sustained, the defendant files an answer, he or she waives defects in the complaint except the fundamental one of failure to state a cause of action. (*Lynch v. Gagnon* (1929) 96 C.A. 512, 516, 274 P. 584.)

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3. Concession of Liability.

9 Witkin Cal. Proc. Appeal § 398

[§ 398] Concession of Liability.

Horn v. Atchison, Topeka & Santa Fe Ry. Co. (1964) 61 C.2d 602, 39 C.R. 721, 394 P.2d 561, involves what might be described as an implied waiver of error by conceding the point to which it relates. The action was brought under the Federal Employers' Liability Act and Safety Appliance Act, for injury to a brakeman's foot. The answer denied liability. But in defense counsel's opening statement, he told the jury that in spite of his good defense, he was not asking for a defendant's verdict: "[L]egally we don't owe the plaintiff a dime. Nevertheless, we want you to give him some money." Later, he specified the amount: \$ 26,500; and in closing argument he was more specific and even more generous: "I said I was asking for a plaintiff's verdict ... which would naturally carry court costs. ... I have sought and received authority to tell you to give the plaintiff \$ 3,360.00 [for prosthetic equipment and supplies for the remainder of plaintiff's expected life] ... and ... \$ 23,290.00 [to compensate for the injury]." The jury gave plaintiff \$ 149,000. On appeal, defendant set up errors in admitting testimony of custom and practice and as to the meaning of defendant's safety rules. *Held*, judgment affirmed. This evidence went to the issue of liability, and there was no longer any such issue. "Defense counsel's unequivocal invitations to a plaintiff's verdict can only be construed, in legal significance, as a concession of liability under the Federal Employers' Liability Act or the Safety Appliance Act or both of them, in spite of earlier formal denials of such liability. Counsel, by his own statement, was authorized to make such concessions and his client is bound thereby in the absence of fraud." (61 C.2d 605.)

Horn was distinguished in *Irwin v. Pacific Southwest Airlines* (1982) 133 C.A.3d 709, 714, 184 C.R. 228, where the court found that the statement was not an unequivocal admission.

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d. Exception: Defensive Acts.

9 *Witkin Cal. Proc. Appeal* § 399

[§ 399] Exception: Defensive Acts.

If the appellant makes an objection based on defective pleading, inadmissible evidence, erroneous instructions, etc., and is unsuccessful, it is hardly safe for him or her to stand firm, risking everything on the objection. Usually, the appellant will proceed, despite the error, to meet the opposing case on the merits. This necessary precaution on the appellant's part does not indicate acquiescence in the ruling and does not result in a waiver of the error. The following are examples:

(1) *Offering contradictory evidence after objection is overruled.* If inadmissible evidence is offered, the appellant, after his or her objection is overruled, may offer contradictory evidence in rebuttal without waiving the objection. (*Fernandez v. Western Fuse & Explosives Co.* (1917) 34 C.A. 420, 423, 167 P. 900; *De Roulet v. Mitchel* (1945) 70 C.A.2d 120, 125, 160 P.2d 574; *Hoel v. Los Angeles* (1955) 136 C.A.2d 295, 310, 288 P.2d 989, quoting the text.)

(2) *Cross-examining witness after objection to testimony is overruled.* If an objection to inadmissible testimony has been overruled, the appellant may then cross-examine the witness without losing the right to complain on appeal. "Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party, after rightfully objecting to the admission of evidence, may by his cross-examination lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action." (*Jameson v. Tully* (1918) 178 C. 380, 384, 173 P. 577; see *People v. Sam* (1969) 71 C.2d 194, 207, 77 C.R. 804, 454 P.2d 700, citing the text; *Moore v. Norwood* (1940) 41 C.A.2d 359, 368, 106 P.2d 939.)

(3) *Exercising peremptory challenge after challenge for cause is denied.* No waiver results from exercising a peremptory challenge to a juror and going to trial after erroneous denial of a challenge for cause. "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible. There is no element of waiver or of estoppel in such conduct of counsel." (*Leibman v. Curtis* (1955) 138 C.A.2d 222, 225, 291 P.2d 542, 292 P.2d 270, *infra*, §403, citing the text.)

(4) *Coerced amendment to pleading.* The defensive action may consist of coerced amendment of a pleading. In *People v. Lagiss* (1958) 160 C.A.2d 28, 324 P.2d 926, a condemnation action, defendant pleaded fraud and abuse of discretion in three successive answers. Each was erroneously stricken and his offers of proof were rejected, whereupon he filed an answer without the allegations. *Held*, reviewing cases and citing the text, his conduct in giving up the unsuccessful attempt to plead this defense, and going to trial on the other issues, did not constitute a waiver. (160 C.A.2d 37.)

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3. Point Not Properly Raised Below.

a. Nature and Scope of Rule.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 400

[§ 400] In General.

An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method. (See generally *Abner Doble Co. v. Keystone Consol. Mining Co.* (1904) 145 C. 490, 495, 78 P. 1050; *Wood v. Moulton* (1905) 146 C. 317, 322, 80 P. 92; *Everly Enterprises v. Altman* (1960) 54 C.2d 761, 765, 8 C.R. 455, 356 P.2d 199; *Harriman v. Tetik* (1961) 56 C.2d 805, 810, 17 C.R. 134, 366 P.2d 486; *Bardessono v. Michels* (1970) 3 C.3d 780, 794, 91 C.R. 760, 478 P.2d 480; *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 184, footnote 1, 151 C.R. 837, 588 P.2d 1261, quoting the text; *Burmester v. McNear* (1919) 42 C.A. 527, 529, 183 P. 832; *Nanny v. Ruby Lighting Corp.* (1952) 108 C.A.2d 856, 859, 239 P.2d 885; *Estate of Raphael* (1953) 115 C.A.2d 525, 529, 252 P.2d 979; *Dunn v. Dunn* (1960) 180 C.A.2d 839, 840, 4 C.R. 748; *Gimbel v. Laramie* (1960) 181 C.A.2d 77, 78, 5 C.R. 88, *supra*, §396; *Estate of Cooper* (1970) 11 C.A.3d 1114, 1122, 90 C.R. 283; *Chamberlain v. Ventura County Civil Service Com.* (1977) 69 C.A.3d 362, 372, 138 C.R. 155; *Royster v. Montanez* (1982) 134 C.A.3d 362, 367, 184 C.R. 560, quoting the text; *Menefee v. Fresno* (1985) 163 C.A.3d 1175, 1182, 210 C.R. 99, citing the text; *CNA Cas. of Calif. v. Seaboard Surety Co.* (1986) 176 C.A.3d 598, 618, 222 C.R. 276, citing the text; *Steele v. Totah* (1986) 180 C.A.3d 545, 551, 552, 225 C.R. 635, quoting the text; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 505, 227 C.R. 318, citing the text; *In re Andre P.* (1991) 226 C.A.3d 1164, 1169, 277 C.R. 363, citing the text; *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 998, 16 C.R.2d 787; *In re Aaron B.* (1996) 46 C.A.4th 843, 846, 54 C.R.2d 27; *In re Marriage of Hinman* (1997) 55 C.A.4th 988, 1002, 64 C.R.2d 383, quoting the text; *Vikco Ins. Services v. Ohio Indem. Co.* (1999) 70 C.A.4th 55, 66, 82 C.R.2d 442, citing the text; *Monarch Healthcare v. Superior Court* (2000) 78 C.A.4th 1282, 1287, 93 C.R.2d 619; *Jones v. Wagner* (2001) 90 C.A.4th 466, 480, 108 C.R.2d 669; *Gonzalez v. Los Angeles* (2004) 122 C.A.4th 1124, 1131, 19 C.R.3d 381; C.E.B., 2 Civil Proc. During Trial 3d, §15.24 et seq.; Rutter Group, 1 Civil Appeals and Writs §8:249 et seq.; 15 California Lawyer 59 (December 1995); 20 California Lawyer 67 (June 2000); 64 *Harv. L. Rev.* 652; 157 *A.L.R. Fed* 581 [sufficiency, in federal court, of raising issue below to preserve matter for appeal]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §575.)

The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the

headings of estoppel or waiver. (See *supra*, §§389, 394.) Often, however, the explanation is simply that it is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.

In *Sommer v. Martin* (1921) 55 C.A. 603, 204 P. 33, the court said: "Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (55 C.A. 610.)

In *Simmons v. Southern Pac. Trans. Co.* (1976) 62 C.A.3d 341, 133 C.R. 42, a personal injury and wrongful death action against defendant railroad company, expert witness D testified for plaintiff. On appeal, long after the expiration of time to move for a new trial, defendant requested that the appellate court take judicial notice of proceedings in a superior court action between different parties in which charges were made that D was an impostor without expert qualifications. In refusing to do so, the court reasoned as follows: (a) Judicial notice may be taken of proceedings by an appellate court, but the effect of the matters noticed is determined by principles of appellate review. (62 C.A.3d 366.) (b) While newly discovered evidence to impeach a witness may, in rare situations, justify granting a new trial (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §33), it is not a basis for reversing a judgment on appeal. Unless one of the exceptions applies (see *infra*, §406), the objection to a witness' credibility must be raised below. Here, defendant's counsel made no *voir dire* of the witness at the trial, and no showing was made of any reason why the information concerning the witness could not have been discovered in time to move for new trial. (62 C.A.3d 367.)

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See *Keener v. Jeld-Wen* (2009) 46 C.4th 247, 262, 92 C.R.3d 862, 206 P.3d 403 [by not objecting to incomplete polling of juror on special verdict question, defendants forfeited right to assert that failure to complete polling rendered that part of verdict invalid, because incomplete polling was apparent and could have been corrected when court completed polling, or soon thereafter].



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3. Point Not Properly Raised Below.

a. Nature and Scope of Rule.

2. No Requirement That Objection Be Supported by Extensive Evidence.

9 Witkin Cal. Proc. Appeal § 401

[§ 401] No Requirement That Objection Be Supported by Extensive Evidence.

In *Boyle v. CertainTeed Corp.* (2006) 137 C.A.4th 645, 40 C.R.3d 501, a wrongful death action alleging that defendant corporation manufactured or distributed asbestos, defendant moved for expedited summary judgment pursuant to a local court rule. Although the motion was initially granted, the Court of Appeal reversed, holding that the local rule impermissibly conflicted with C.C.P. 437c, the summary judgment statute (6 Cal. Proc. (5th), *Proceedings Without Trial*, §201 et seq.). Defendant did not contest this point, but instead unsuccessfully argued that it had been waived, because, although plaintiffs had raised the point in their summary judgment opposition brief, they had not supported their claim with reasoned argument and citations to authority. *Held*, "The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court. ... There is no requirement that a trial court objection be supported by extensive argumentation to avoid forfeiture. If an appeal is pursued, the party asserting trial court error may not then rest on the bare assertion of error but must present argument and legal authority on each point raised." (137 C.A.4th 649.)

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a. Nature and Scope of Rule.

3. Distinction: Recently Announced Rule of Law.

9 Witkin Cal. Proc. Appeal § 402

[§ 402] Distinction: Recently Announced Rule of Law.

In *Guardianship of Stephen G.* (1995) 40 C.A.4th 1418, 47 C.R.2d 409, the clear and convincing evidence standard of proof was utilized in a guardianship proceeding. On appeal, plaintiff, for the first time, claimed that the correct standard was preponderance of the evidence. This claim was based on a Court of Appeal case (*Guardianship of Diana B.* (1994) 30 C.A.4th 1766, 36 C.R.2d 447, 14 Summary (10th), *Wills and Probate*, §925) decided after the guardianship proceeding had ended, which held that preponderance of the evidence was the correct standard of proof. *Held*, plaintiff could raise the point for the first time on appeal. (40 C.A.4th 1423.)

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3. Point Not Properly Raised Below.

b. Methods of Raising Point.

1. Formal Exceptions Abolished.

9 *Witkin Cal. Proc. Appeal* § 403

[§ 403] Formal Exceptions Abolished.

(1) *General Requirement.* "An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a Court, tribunal, Judge, or other judicial officer, in an action or proceeding." (*C.C.P.* 646.) The exception "must be taken at the time the decision is made," except as provided in *C.C.P.* 647. (*C.C.P.* 646.) This outmoded requirement of some unspecified formality in the way of an objection has been much criticized, and in some jurisdictions (and in the federal practice) has been abolished. (See *Horstman v. Krumgold* (1942) 55 *C.A.2d* 296, 299, 130 *P.2d* 721; *Grossblatt v. Wright* (1951) 108 *C.A.2d* 475, 479, 239 *P.2d* 19; *F.R. Civ. P.*, Rule 46; 9A Federal Practice & Procedure (Wright & Miller) §2471 et seq.; 2A Federal Procedure, L.Ed., §3:856 et seq.; 13 *So. Cal. L. Rev.* 20.)

(2) *Deemed Exceptions.* Nearly all important rulings as to which counsel might forget to take formal exception were covered by the "deemed exception" language of *C.C.P.* 647: "All of the following are deemed excepted to: the verdict of the jury; the final decision in an action or proceeding; an interlocutory order or decision, finally determining the rights of the parties, or some of them; an order or decision from which an appeal may be taken; an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out or refusing to strike out a pleading or a portion thereof, or refusing a continuance; an order made upon ex parte application, giving an instruction, refusing to give an instruction, or modifying an instruction requested; an order or decision made in the absence of the party or an order granting or denying a nonsuit or a motion to strike out evidence or testimony; a ruling sustaining or overruling an objection to evidence; and any statement or other action of the court in commenting upon or in summarizing the evidence."

There remained, however, a few situations outside the scope of *C.C.P.* 647, in which the nature of the action taken or the circumstances did not allow for an ordinary objection. As to these, an unwary party might be precluded from seeking relief on appeal where no formal exception was taken at the trial. (See *Allin v. International Alliance of Theatrical etc. Employees* (1952) 113 *C.A.2d* 135, 137, 247 *P.2d* 857.)

(3) *Amendment Abolishing Formal Exceptions.* In 1953, *C.C.P.* 647 was amended to add the following provision:

"If the party, at the time when the order, ruling, action or decision is sought or made, or within a reasonable time thereafter, makes known his position thereon, by objection or otherwise, all other orders, rulings, actions or decisions are deemed to have been excepted to." The effect of the amendment seems clear: By making any method of raising a point below the equivalent of a formal exception, it has abolished the requirement of exceptions. The party is protected if he or she objects at the time of the ruling, etc., or makes a timely attack thereafter by motion.

In *Leibman v. Curtis* (1955) 138 C.A.2d 222, 291 P.2d 542, 292 P.2d 270, counsel for plaintiff challenged a juror for prejudice; all attorneys and the judge conferred at the bench; plaintiff's counsel asked whether his challenge was denied and the court said that it was. *Held*, this was sufficient for a review of the error. "Counsel having made his position clear, and having had an automatic exception reserved to him, was not required thereafter to repeat his objection to the court's ruling or to seek to have it reversed." (138 C.A.2d 225, quoting the text on the effect of the amendment.) (See *Medeiros v. Medeiros* (1960) 177 C.A.2d 69, 74, 1 C.R. 696, quoting the text; *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 C.A.4th 10, 15, 1 C.R.2d 805, quoting the text.)

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b. Methods of Raising Point.

2. Steps Before and During Trial.

9 Witkin Cal. Proc. Appeal § 404

[§ 404] Steps Before and During Trial.

The methods of raising a point in the lower court, in order to save it for appeal, depend somewhat on the nature of the error and the circumstances under which it was made. The following outline will be helpful in locating the detailed discussion elsewhere of the principal situations:

(1) *Defective pleading*: Demurrer, motion to strike, motion for judgment on the pleadings, and, sometimes, motion to dismiss or objection to evidence. (See 5 *Cal. Proc.* (5th), *Pleading*, §§946, 1002, 1008, 1009; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §185 et seq.)

(2) *Inadmissible evidence*: Objection or motion to strike. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §§367 et seq., 383 et seq.) Evidence admissible for one purpose but not admissible for another should be met by a request for a limiting instruction. (See 7 *Cal. Proc.* (5th), *Trial*, §296; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §382.)

(3) *Exclusion of admissible evidence*: Offer of proof. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §401.)

(4) *Variance between pleading and proof*: Objection to admission of evidence, motion for nonsuit. (See *Abner Doble Co. v. Keystone Consol. Mining Co.* (1904) 145 C. 490, 491, 78 P. 1050; *Martin v. Della* (1931) 211 C. 74, 76, 293 P. 25; *Cousin v. Mason* (1926) 78 C.A. 111, 113, 248 P. 299; 7 *Cal. Proc.* (5th), *Trial*, §§406, 407.)

(5) *Surprise at trial*: Application for continuance. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §21.)

(6) *Misconduct of court, counsel, or jury*: Assignment of misconduct, request for instruction to jury to disregard improper matter, motion for mistrial. (See 7 *Cal. Proc.* (5th), *Trial*, §§210, 242, 376.)

(7) *Erroneous instruction or failure to instruct*: Request for, and submission of, proper instruction. (See *Valentine v. Kaiser Foundation Hosp.* (1961) 194 C.A.2d 282, 291, 15 C.R. 26; 7 *Cal. Proc.* (5th), *Trial*, §260.)

(8) *Verdict defective in form*: Request for correction. (See 7 *Cal. Proc.* (5th), *Trial*, §376.)

(9) *Scope of pretrial order*: Motion to correct, modify, or amend order. (See 7 *Cal. Proc.* (5th), *Trial*, §49.) Where an issue is not included in the pretrial order, it cannot be raised on appeal even though it was framed by the pleadings. (*Baird v. Hodson* (1958) 161 C.A.2d 687, 691, 327 P.2d 215.) Where the pretrial order does include an issue, the objection that it goes beyond the pleadings is likewise waived unless a correction or modification of the order is sought. (*Bilardi Const. v. Spencer* (1970) 6 C.A.3d 771, 784, 86 C.R. 406.)

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b. Methods of Raising Point.

3. Motion for New Trial.

9 *Witkin Cal. Proc. Appeal* § 405

[§ 405] Motion for New Trial.

The most formal method of raising an objection in the lower court is a motion for a new trial. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §18 et seq.) Generally speaking, this is an alternative method of review, and an error may be raised on appeal although it could have been made the basis of a motion for a new trial. (See *Mattox v. Isley* (1952) 111 C.A.2d 774, 780, 245 P.2d 664.) This is also true of the motion to vacate and enter a different judgment. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §139.)

But a motion for a new trial has been held a prerequisite where the error claimed is excessive or inadequate damages. (*Alexander v. McDonald* (1948) 86 C.A.2d 670, 671, 195 P.2d 24 [inadequate damages]; *Schmidt v. Macco Const. Co.* (1953) 119 C.A.2d 717, 721, 260 P.2d 230 [same]; *Sholar v. Barker* (1962) 211 C.A.2d 31, 32, 27 C.R. 451 [excessive damages]; *Los Angeles v. Southern Calif. Edison Co.* (2003) 112 C.A.4th 1108, 1121, 5 C.R.3d 575 [inadequate damages].)

However, *Schmidt* makes this distinction: An appellant may, without a motion, urge specific errors in admission of evidence or instructions even though they resulted in an improper reduction of damages. (See *Mendoyoma v. Mendocino* (1970) 8 C.A.3d 873, 877, 87 C.R. 740 [following *Schmidt*].) The court in *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 135 C.R. 802, explains the distinction as follows: The failure to move for a new trial does not preclude an attack on legal errors in the trial of the damage issue, such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure. But where ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on credibility of witnesses, the award cannot be challenged for the first time on appeal. (66 C.A.3d 126.)

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See *Jamison v. Jamison* (2008) 164 C.A.4th 714, 719, 79 C.R.3d 561 [on appeal, landowners were precluded from challenging amount of owelty award after partition of parcels held as tenants in common by their failure to timely move

for new trial; whether award is termed owelty or damages, it still requires evaluation of amount awarded in light of evidence presented at trial, "an issue that can and should be resolved at trial court level"].



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3. Point Not Properly Raised Below.

c. Exceptions to Requirement.

9 *Witkin Cal. Proc. Appeal* § 406

[§ 406] Exceptions to Requirement.

The rule that the appellate court will not consider points not raised below (*supra*, §400 et seq.) is limited to matters involving only the rights and interests of the litigant that could have been cured in the trial court.

(1) *Question of Law*. The rule does not apply to noncurable defects of substance where the question is one of law, such as lack of jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §13) or complete failure to state a cause of action (see 5 *Cal. Proc.* (5th), *Pleading*, §958). (See *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 405, 6 C.R. 13, 353 P.2d 725 [where facts are not disputed and issue merely raises new question of law]; *Redevelopment Agency of Berkeley v. Berkeley* (1978) 80 C.A.3d 158, 167, 143 C.R. 633 [in discretion of appellate court, where point involves only legal question determinable from uncontroverted facts]; *Wilson v. Lewis* (1980) 106 C.A.3d 802, 805, 165 C.R. 396 [pure question of law]; *Muffett v. Royster* (1983) 147 C.A.3d 289, 300, 195 C.R. 73 [same]; *Flores v. Natividad Med. Center* (1987) 192 C.A.3d 1106, 1117, 238 C.R. 24, quoting the text; *Conservatorship of Delay* (1988) 199 C.A.3d 1031, 1039, 245 C.R. 216, citing the text [excess of jurisdiction]; *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 C.A.3d 1327, 1338, 267 C.R. 787, quoting the text; *Resolution Trust Corp. v. Winslow* (1992) 9 C.A.4th 1799, 1809, 12 C.R.2d 510, 7 *Summary* (10th), *Constitutional Law*, §12 [whether federal statutory and common law barred recovery from conservator of savings and loan association for misrepresentations made by association and its subsidiary]; *Bonner v. Santa Ana* (1996) 45 C.A.4th 1465, 1476, 53 C.R.2d 671, 7 *Summary* (10th), *Constitutional Law*, §617; *Fox v. State Personnel Bd.* (1996) 49 C.A.4th 1034, 1040, 57 C.R.2d 279 [whether correctional officer must tender witness fees when subpoenaing peace officer]; *Burckhard v. Del Monte Corp.* (1996) 48 C.A.4th 1912, 1918, 56 C.R.2d 569, *infra*, §549; *Dudley v. Department of Trans.* (2001) 90 C.A.4th 255, 259, 108 C.R.2d 739 [when demurrer is sustained without leave to amend, petitioner may advance new legal theory on appeal]; *Inland Empire Health Plan v. Superior Court* (2003) 108 C.A.4th 588, 592, 133 C.R.2d 735 [governmental immunity is jurisdictional matter that can be raised for first time on appellate review]; *In re P.C.* (2006) 137 C.A.4th 279, 287, 40 C.R.3d 17 [appellants could challenge constitutionality of statute setting forth exception to termination of parental rights even though they failed to raise issue below]; *Woodward Park Homeowners Assn. v. Fresno* (2007) 150 C.A.4th 683, 712, 58 C.R.3d 102 [whether environmental impact report for commercial development on vacant land erroneously used hypothetical office park, instead of actual vacant land, as environmental baseline]; cf. *Westcon Const. Corp. v. Sacramento* (2007) 152 C.A.4th 183, 194, 61 C.R.3d 89

[contractor could not argue for first time on appeal that Public Contract Code claim was submitted in letters to county, rather than in subsequent, untimely packets of documentation, because change in theory raised factual question whether letters amounted to sufficient claim].)

(2) *Public Interest*. The rule does not apply to matters involving the public interest or the due administration of justice, e.g., illegality or unclean hands. (See *Wong v. Di Grazia* (1963) 60 C.2d 525, 532, footnote 9, 35 C.R. 241, 386 P.2d 817 [issue of rule against perpetuities ignored by litigants, raised by court of Appeal at oral argument; "the issue ... is of considerable public interest; it has been fully argued before this court; we, accordingly, dispose of the issue on its merits"]; *Hale v. Morgan* (1978) 22 C.3d 388, 394, 149 C.R. 375, 584 P.2d 512 [constitutional issue of great public interest]; *In re S.B.* (2004) 32 C.4th 1287, 1292, 13 C.R.3d 786, 90 P.3d 746 [order that visitation rights be determined by guardians; because order involved well-being of children, allowing it to be challenged for first time on appeal was not abuse of discretion]; *Vikco Ins. Services v. Ohio Indem. Co.* (1999) 70 C.A.4th 55, 66, 82 C.R.2d 442, citing the text [jurisdictional question of first impression]; *Woodward Park Homeowners Assn. v. Fresno*, *supra*, 150 C.A.4th 712, [whether city agency complied with California Environmental Quality Act]; 5 Cal. Proc. (5th), *Pleading*, §§1097, 1126; cf. *Hager v. Hager* (1959) 174 C.A.2d 546, 549, 345 P.2d 68 [defense of unreasonable delay in bringing divorce action, although "declared policy of the law," was waived by failure to assert it at trial]; *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 C.A.4th 1645, 1654, 57 C.R.2d 525 [whether C.C.P. 377.34 (limiting damages recoverable by personal representative) prohibits damages for lost pension rights is not question of public interest].)

(3) *Illustrations*. Both exceptions--question of law and public interest--were applied in *Bayside Timber Co. v. Board of Supervisors of San Mateo* (1971) 20 C.A.3d 1, 97 C.R. 431. The trial court rendered judgment granting permits to plaintiff timber company to log, under the regulations of the State Board of Forestry. Defendant county appealed and, for the first time, raised the issue of unconstitutionality of the Forest Practice Act. The appellate court, treating this as the main issue on appeal, held the statute invalid. (20 C.A.3d 4, 5.)

In re Marriage of Weaver (1990) 224 C.A.3d 478, 273 C.R. 696, applied the public interest exception in holding that the clear and convincing standard of *Ev.C.* 662 applies to a claim of transmutation of property from separate to community (see 11 *Summary* (10th), *Community Property*, §152 et seq.). Although the issue had not been raised at trial, the rule had not previously received appellate attention in family law litigation and involved an important issue of public policy. (224 C.A.3d 488.)

In *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 5, 74 C.R.2d 248, 954 P.2d 511, 3 Cal. Evidence (4th), *Presentation at Trial*, §117, the court listed the following reasons for determining the issue whether a separate tort of spoliation of evidence exists, even though that issue was not raised in either the trial court or the Court of Appeal:

(a) The petition for review specifically raised the issue, and the issue was extensively briefed not only by the parties but by numerous amici curiae.

(b) It is an issue of law that does not turn on the facts of the case.

(c) It is a significant issue of public interest.

(d) Given the widespread recognition of the tort by the lower courts, delaying an announcement that no such tort existed would be extremely wasteful of the resources of both courts and parties.

(e) The trial court was bound by the prior appellate courts' recognition of the tort, and it would have been pointless to raise the issue there.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Question of Law*. See *Preserve Shorecliff Homeowners v. San Clemente* (2008) 158 C.A.4th 1427, 1433, 71 C.R.3d 332 [no material issue of disputed fact was raised by challenge to constitutionality of statute imposing residency requirement for circulators of municipal referendum petitions; issue involved pure question of law, which Court of

Appeal could review for first time on appeal]; *Sheller v. Superior Court* (2008) 158 C.A.4th 1697, 1709, 71 C.R.3d 207 [scope of trial court's authority to sanction foreign attorney appearing pro hac vice was question of law that could be raised for first time on appeal]; *In re A.C.* (2008) 166 C.A.4th 146, 156, 82 C.R.3d 542 [in dependency proceeding, father for whom Lanterman-Petris-Short Act conservator had been appointed was not precluded by his failure to raise issue in trial court from asserting on appeal that court erred in failing to appoint guardian ad litem for him; due to his mental illness, father was hardly in position to recognize error or to protest court's failure to make appointment].



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4. Theory of Trial.

a. Nature of Doctrine.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 407

[§ 407] In General.

Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal.

This doctrine of "theory on which the case was tried," referred to more briefly as "theory of trial," is a well-established rule of appellate practice. (See *Gray v. Janss Inv. Co.* (1921) 186 C. 634, 641, 200 P. 401; *Estate of Westerman* (1968) 68 C.2d 267, 279, 66 C.R. 29, 437 P.2d 517; *Agmar v. Solomon* (1927) 87 C.A. 127, 130, 261 P. 1029; *Asnon v. Foley* (1930) 105 C.A. 624, 629, 288 P. 792; *Viglione v. San Francisco* (1952) 109 C.A.2d 158, 159, 240 P.2d 68; *Townsend v. Wingler* (1952) 114 C.A.2d 64, 68, 249 P.2d 613; *Redfoot v. J.T. Jenkins Co.* (1955) 138 C.A.2d 108, 112, 291 P.2d 134, citing the text; *People v. Richmond* (1956) 141 C.A.2d 107, 118, 296 P.2d 351; *Nelson v. Department of Alcoholic Beverage Control* (1959) 166 C.A.2d 783, 788, 333 P.2d 771, quoting the text; *Central Mfg. Dist. v. Board of Supervisors of Los Angeles County* (1960) 176 C.A.2d 850, 861, 1 C.R. 733; *Moore Equipment Co. v. American River Sand & Gravel Co.* (1962) 205 C.A.2d 48, 51, 22 C.R. 774; *Thomson v. Casaudoumecq* (1962) 205 C.A.2d 549, 553, 23 C.R. 189; *Travis v. Southern Pac. Co.* (1962) 210 C.A.2d 410, 427, 26 C.R. 700; *Nelson v. American Airlines* (1968) 263 C.A.2d 742, 748, 70 C.R. 33, citing the text; *In re Marriage of Karlin* (1972) 24 C.A.3d 25, 33, 101 C.R. 240, citing the text; *Clark Equipment Co. v. Mastelotto* (1978) 87 C.A.3d 88, 95, 150 C.R. 797, quoting the text; *Signal Hill Aviation Co. v. Stroppe* (1979) 96 C.A.3d 627, 638, 158 C.R. 178, quoting the text; *Rickel v. Schwinn Bicycle Co.* (1983) 144 C.A.3d 648, 655, 656, 192 C.R. 732, citing the text; *Hilliard v. A.H. Robins Co.* (1983) 148 C.A.3d 374, 392, 196 C.R. 117, quoting the text [insufficient pleading of basis for punitive damages, but parties and trial judge considered punitive damages in issue]; *Curcio v. Svanevik* (1984) 155 C.A.3d 955, 960, 202 C.R. 499; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 503, 227 C.R. 318; *Richmond v. Dart Industries* (1987) 196 C.A.3d 869, 874, 242 C.R. 184, quoting the text; *Planned Protective Services v. Gorton* (1988) 200 C.A.3d 1, 12, 245 C.R. 790, quoting the text [doctrine applied to motion to tax costs]; *In re Marriage of Broderick* (1989) 209 C.A.3d 489, 501, 257 C.R. 397; *Estate of Stevenson* (1992) 11 C.A.4th 852, 864, 14 C.R.2d 250, quoting the text; *Sanchez v. Truck Ins. Exchange* (1994) 21 C.A.4th 1778, 1787, 26 C.R.2d 812; *Strasberg v. Odyssey Group* (1996) 51 C.A.4th 906, 919, 59

C.R.2d 474; Jones v. Dutra Const. Co. (1997) 57 C.A.4th 871, 876, 67 C.R.2d 411, quoting the text; Telles Transport v. Work. Comp. App. Bd. (2001) 92 C.A.4th 1159, 1167, 112 C.R.2d 540; Los Angeles v. Southern Calif. Edison Co. (2003) 112 C.A.4th 1108, 1118, 5 C.R.3d 575; on exceptions to theory of trial doctrine, see, infra §§414, 415.)

A number of decisions explain the reason for the rule. The following are illustrative:

Ernst v. Searle (1933) 218 C. 233, 240, 22 P.2d 715 ["A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant"].

Slaughter v. Goldberg, Bowen & Co. (1915) 26 C.A. 318, 325, 147 P. 90 ["It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue"].

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4. Theory of Trial.

a. Nature of Doctrine.

2. Justification.

9 *Witkin Cal. Proc. Appeal* § 408

[§ 408] Justification.

Application of the doctrine of theory of trial (supra, §407) may often be justified on principles of estoppel or waiver.

(1) The assumption may result from the appellant's insistence on a certain theory (invited error). (See *Merrill v. Kohlberg* (1916) 29 C.A. 382, 386, 155 P. 824; *Miller v. Dollar Steamship Lines* (1937) 19 C.A.2d 206, 211, 64 P.2d 1163; *Viglione v. San Francisco* (1952) 109 C.A.2d 158, 159, 240 P.2d 68.)

(2) The parties may adopt the theory by stipulation (express waiver of objection). (See *Webster v. Webster* (1932) 216 C. 485, 489, 14 P.2d 522 [stipulation that allegations of supplemental complaint be deemed denied]; *Vitale v. Los Angeles* (1936) 13 C.A.2d 704, 705, 57 P.2d 993 [stipulation limiting scope of hearing and agreeing on sole issue to be determined].)

(3) The assumption may be made by the respondent or the trial court with the acquiescence of the appellant (implied waiver). (See *Durkee v. Chino Land & Water Co.* (1907) 151 C. 561, 569, 91 P. 389; *Agmar v. Solomon* (1927) 87 C.A. 127, 130, 261 P. 1029; *In re Marriage of Freeman* (1996) 45 C.A.4th 1437, 1450, 53 C.R.2d 439, 10 Summary (10th), *Parent and Child*, §29.)

In *People v. Nahabedian* (1959) 171 C.A.2d 302, 306, 307, 340 P.2d 1053, the court stated: "It is a time honored rule that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, the doctrine of estoppel precludes either party from thereafter asserting that no such issue was in controversy, even though it was not actually raised by the pleadings." (171 C.A.2d 306.)

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1. Sufficiency of Pleadings.

9 *Witkin Cal. Proc. Appeal* § 409

[§ 409] Sufficiency of Pleadings.

The most common application of the theory of trial doctrine is to curable defects of pleadings that were ignored at the trial. Thus, the case may be tried on the theory that a complaint states a cause of action or an answer states a good defense. (See *Carroll v. Briggs* (1903) 138 C. 452, 454, 71 P. 501; *McClure v. Donovan* (1949) 33 C.2d 717, 731, 205 P.2d 17; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 C.2d 284, 288, 267 P.2d 16; *Slaughter v. Goldberg, Bowen & Co.* (1915) 26 C.A. 318, 325, 147 P. 90 [action for wrongful death, failure to allege existence of heirs, an essential element of cause of action]; *Boyle v. Coast Imp. Co.* (1915) 27 C.A. 714, 720, 151 P. 25; *Asnon v. Foley* (1930) 105 C.A. 624, 629, 288 P. 792; *O'Dea v. Leland* (1935) 10 C.A.2d 551, 554, 52 P.2d 510 [imperfect pleading of contributory negligence in answer]; *Coffman v. Singh* (1920) 49 C.A. 342, 344, 193 P. 259 [same]; *Kemp v. Campbell* (1935) 9 C.A.2d 298, 299, 49 P.2d 872 [action on bonds by assignee, failure to allege assignment]; *Employees' Participating Assn. v. Pine* (1949) 91 C.A.2d 299, 300, 204 P.2d 965; *Viglione v. San Francisco* (1952) 109 C.A.2d 158, 159, 240 P.2d 68 [mandamus to compel city to pay compromised claim, failure to allege that funds were available]; *Nelson v. Department of Alcoholic Beverage Control* (1959) 166 C.A.2d 783, 788, 333 P.2d 771, quoting the text; *Jones v. Dutra Const. Co.* (1997) 57 C.A.4th 871, 876, 67 C.R.2d 411.)

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2. Matters in Issue.

9 *Witkin Cal. Proc. Appeal* § 410

[§ 410] Matters in Issue.

The case may be tried on the theory that a particular issue is raised by the pleadings, in which case there can be no objection on appeal that evidence was admitted on that issue (variance), or that instructions were given on it. (See *Milwaukee Mechanics' Ins. Co. v. Warren* (1907) 150 C. 346, 353, 89 P. 93; *Gervaise v. Brookins* (1909) 156 C. 110, 112, 103 P. 332; *Gray v. Janss Inv. Co.* (1921) 186 C. 634, 641, 200 P. 401; *McClure v. Donovan* (1949) 33 C.2d 717, 730, 205 P.2d 17; *Agmar v. Solomon* (1927) 87 C.A. 127, 130, 261 P. 1029; *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.* (1947) 81 C.A.2d 437, 440, 184 P.2d 183 [complaint against warehouseman for conversion, trial on theory of negligent storage]; *Lande v. Southern Calif. Freight Lines* (1948) 85 C.A.2d 416, 419, 193 P.2d 144 [complaint seeking equitable remedy, trial on theory of damage award]; *Priebe v. Sinclair* (1949) 90 C.A.2d 79, 86, 202 P.2d 577; *Granberg v. Turnham* (1958) 166 C.A.2d 390, 397, 333 P.2d 423, citing the text; *People v. Nahabedian* (1959) 171 C.A.2d 302, 306, 340 P.2d 1053, supra, §408; *Auer v. Frank* (1964) 227 C.A.2d 396, 405, 38 C.R. 684; *Professional Hockey Corp. v. World Hockey Assn.* (1983) 143 C.A.3d 410, 417, 191 C.R. 773; *Curcio v. Svanevik* (1984) 155 C.A.3d 955, 960, 961, 202 C.R. 499 [stipulation taking issue out of case].) (For distinction where evidence is introduced on different issue, see *infra*, §414.)

The same rule applies to a pretrial order; i.e., the case may be tried on the theory that the issue was raised by the order, even though the issue may not have been within the scope of the order. (See *Collison v. Thomas* (1961) 55 C.2d 490, 491, 11 C.R. 555, 360 P.2d 51.)

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3. Measure of Damages.

9 *Witkin Cal. Proc. Appeal* § 411

[§ 411] Measure of Damages.

A typical situation calling for application of the theory of trial doctrine is where the parties try the case on the theory that a particular measure of damages governs. As the court said in *Durkee v. Chino Land & Water Co.* (1907) 151 C. 561, 91 P. 389: "[W]hether the rule adopted for the ascertainment of damages was the correct one or not, we are not called upon to consider. It was the one adopted and acquiesced in by both parties and followed by the court, and neither of the litigants can be heard after judgment to question its correctness or the competency of the evidence introduced under it." (151 C. 571.) (See *Gibson Properties Co. v. Oakland* (1938) 12 C.2d 291, 299, 83 P.2d 942; *Kincaid v. Dunn* (1915) 26 C.A. 686, 687, 148 P. 235; *Merrill v. Kohlberg* (1916) 29 C.A. 382, 385, 155 P. 824; *W.C. Cook & Co. v. White Truck & Transfer Co.* (1932) 124 C.A. 721, 726, 13 P.2d 549; *Kantlehner v. Bisceglia* (1951) 102 C.A.2d 1, 6, 226 P.2d 636 ["This rule has frequently been applied where one theory of damages was acquiesced in at the trial and appellants sought to shift to another theory of damages on appeal"]; *Evans v. Faught* (1965) 231 C.A.2d 698, 713, 42 C.R. 133.)

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4. Controlling Statute or Ordinance.

9 *Witkin Cal. Proc. Appeal* § 412

[§ 412] Controlling Statute or Ordinance.

The theory of trial doctrine has also been followed where the parties assumed the applicability of a particular statute or ordinance. (See *Sommer v. Martin* (1921) 55 C.A. 603, 609, 204 P. 33 [theory that local traffic ordinance, instead of state law, was controlling]; cf. *Smeland v. Renwick* (1920) 50 C.A. 565, 568, 196 P. 283 [election of statutory cause of action against corporate directors for fraud, by absence of allegations on elements of common law action for deceit]; *Abbott v. Cavalli* (1931) 114 C.A. 379, 382, 300 P. 67 [theory that certain statute applied retroactively].)

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5. Legal Relationship or Ground of Liability.

9 *Witkin Cal. Proc. Appeal* § 413

[§ 413] Legal Relationship or Ground of Liability.

Frequently, the evidence offered and authorities submitted in a trial are directed solely to establishment of a particular legal relationship or legal doctrine of liability or defense. To permit a change in either of these on appeal would, in most cases, be highly prejudicial and accordingly is not permitted. Many cases illustrate this application of the doctrine of theory of trial, including the following:

Ernst v. Searle (1933) 218 C. 233, 240, 22 P.2d 715 [attempted change of theory that appellant dealt with another as agent with ostensible authority to theory that appellant was principal].

Anderson v. Derrick (1934) 220 C. 770, 776, 32 P.2d 1078 [case tried on theory that plaintiff shareholders sued in individual capacities, attempted change to representative suit].

Oakland v. Wheeler (1917) 34 C.A. 442, 457, 168 P. 23 [case tried on theory that all issues were for jury; contention on appeal that some should have been decided by court].

United States Farm Land Co. v. Darter (1919) 42 C.A. 292, 303, 183 P. 696 [attempted change from theory of principal and agent to theory of vendor and purchaser].

Coy v. E.F. Hutton & Co. (1941) 44 C.A.2d 386, 391, 112 P.2d 639 [attempted change from theory of conversion to theory of breach of contract].

Baskett v. Crook (1948) 86 C.A.2d 355, 362, 195 P.2d 39 [attempted change from theory of property jointly acquired as husband and wife to resulting trust].

Phalanx Air Freight v. National Skyway Freight Corp. (1951) 104 C.A.2d 771, 774, 232 P.2d 510 [theory of only one contract rather than a series of newly negotiated monthly agreements].

Rench v. Watsonville Meat Co. (1956) 138 C.A.2d 482, 485, 292 P.2d 85 [theory that employee was discharged for

fraudulent concealment of conviction; change to theory of misconduct not known at time of employment].

Algeri v. Tonini (1958) 159 C.A.2d 828, 832, 324 P.2d 724, citing the text [foreclosure of deed of trust; defense of no loan because joint venture changed to purchase money deed of trust to avoid deficiency judgment].

Rickel v. Schwinn Bicycle Co. (1983) 144 C.A.3d 648, 655, 656, 192 C.R. 732, citing the text [complaint based on breach of fiduciary duty; attempted change of theory to breach of implied covenant of good faith and fair dealing was improper, for defendant never had opportunity to make factual challenge of alleged breach].

North Coast Business Park v. Nielsen Const. Co. (1993) 17 C.A.4th 22, 29, 21 C.R.2d 104 [trial based on date plaintiff discovered drainage defect; on appeal from summary judgment for defendant, plaintiff attempted to rely on different defect to show that statute of limitations had not run].

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4. Theory of Trial.

c. Exceptions to Doctrine.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 414

[§ 414] In General.

The doctrine of theory of trial has received some criticism as an unwise restriction of the right to appellate review. (See 64 *Harv. L. Rev.* 654.) In any event, its application is discretionary with the reviewing court, and several loose exceptions have been recognized:

(1) *Fundamental Error*. A court may refuse to follow the doctrine where the error is too fundamental to be ignored, e.g., in cases of illegality, unclean hands, complete failure to state a cause of action, or variance so fundamental as to constitute "departure" or failure of proof. (See *Schirmer v. Drexler* (1901) 134 C. 134, 138, 66 P. 180; *Watson v. Department of Trans.* (1998) 68 C.A.4th 885, 890, 80 C.R.2d 594 [where recovery of attorneys' fees could be had only on cause of action for "implied" indemnity, and cross-complaint's attempted recovery of fees was based on "equitable" indemnity, "fundamental error" occurred, and thus theory of case did not preclude attorneys' fees issue from being reviewed]; 64 *Harv. L. Rev.* 652; 5 *Cal. Proc.* (5th), *Pleading*, §§958, 1097, 1126, 1215.)

(2) *Issue Solely Legal*. A change in theory may be permitted where the issue is one of law alone. (See *infra*, §415.)

(3) *Theory Disregarded To Affirm*. The rule that the appellate court is interested in the decision instead of in the reasons of the lower court necessarily means that the doctrine of theory of trial will often be disregarded in order to affirm, not reverse, the judgment. (See *Superior Motels v. Rinn Motor Hotels* (1987) 195 C.A.3d 1032, 1055, footnote 13, 241 C.R. 487, quoting the text.)

(4) *Purpose for Which Evidence Was Offered*. In applying the doctrine to matters in issue (*supra*, §410), the court must not overlook the purpose for which evidence was offered. The respondent, invoking the doctrine, may point to evidence that is pertinent to an issue outside the pleadings, and argue that the case was tried on the theory that this issue was involved. It may be shown, however, that the evidence was actually introduced in support of a different issue. (*Riverside Water Co. v. Gage* (1895) 108 C. 240, 245, 41 P. 299; *Miller v. Peters* (1951) 37 C.2d 89, 93, 230 P.2d 803; *Boomer v. Southern Calif. Edison Co.* (1928) 91 C.A. 382, 386, 267 P. 181.)

In the *Lein v. Parkin* (1957) 49 C.2d 397, 318 P.2d 1, defendant failed to plead assumption of risk, but contended that, because plaintiff had introduced evidence supporting the defense, the trial judge's finding on it was proper. *Held*, the particular evidence was all relevant to the issue of defendant's negligence, and its introduction was therefore not an acquiescence in the theory that assumption of risk was an issue. (49 C.2d 401.)

(5) *Guidance on Remand*. The doctrine will not preclude the reviewing court from considering an issue for the guidance of the trial judge on reversal. In *General Motors Acceptance Corp. v. Kyle* (1960) 54 C.2d 101, 4 C.R. 496, 351 P.2d 768, the case was tried on the theory that plaintiff was merely the financing assignee of a seller. On appeal, it asserted that its rights were those of a bona fide purchaser. "[S]ince the case must be remanded for a new trial on the issue of the amount of recovery, it is appropriate that we forestall any thought of GMAC that on such trial it might be able to show a right to enforce the contract of conditional sale as a bona fide purchaser." (54 C.2d 107.)

(6) *Change in Case Law*. A court may refuse to follow the doctrine where, after trial, there is a change in judicially declared law that validates a theory that would have been rejected if presented under the case law as it existed at the time of trial. (*Marsango v. Automobile Club of Southern Calif.* (1969) 1 C.A.3d 688, 694, 82 C.R. 92; *In re Marriage of Moschetta* (1994) 25 C.A.4th 1218, 1227, footnote 12, 30 C.R.2d 893, quoting the text [enforceability of surrogacy contract was reviewable on appeal even though plaintiff had expressly waived the issue at trial].)

(7) *Appeal at Pleading Stage*. The rule against raising a new theory for the first time on appeal applies to an appeal after a trial. The rule is grounded on principles of waiver and estoppel, and is a matter of judicial economy and fairness to opposing parties. At the pleading stage, these considerations are not applicable. Thus, on an appeal from a judgment on demurrer, the court will examine the pleaded facts to see if they make out a claim for relief under any theory. (*Barquis v. Merchants Collection Assn.* (1972) 7 C.3d 94, 103, 101 C.R. 745, 496 P.2d 817; *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 C.A.3d 625, 629, 223 C.R. 339, citing the text.)

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c. Exceptions to Doctrine.

2. Issue of Law Alone.

9 *Witkin Cal. Proc. Appeal* § 415

[§ 415] Issue of Law Alone.

An appellant may be permitted to change his or her theory when a question of law alone is presented on the facts appearing in the record. In that case, the opposing party is not required to defend for the first time on appeal against a new theory that contemplates a controverted factual situation. (*Ward v. Taggart* (1959) 51 C.2d 736, 742, 336 P.2d 534 [change from tort theory of damages for fraud to quasi-contract recovery for unjust enrichment, on same facts]; see *American Auto. Ins. Co. v. Seaboard Surety Co.* (1957) 155 C.A.2d 192, 200, 318 P.2d 84; *Folden v. Lobrovich* (1959) 171 C.A.2d 627, 628, 341 P.2d 368; *Bernson v. Bowman* (1960) 182 C.A.2d 697, 698, 6 C.R. 455; *Roberts v. Roberts* (1966) 241 C.A.2d 93, 98, 50 C.R. 408; *Marsango v. Automobile Club of Southern Calif.* (1969) 1 C.A.3d 688, 694, 82 C.R. 92; *Bayside Timber Co. v. Board of Supervisors of San Mateo* (1971) 20 C.A.3d 1, 5, 97 C.R. 431 [appellate courts are more inclined to consider untimely legal issues where public interest or public policy is involved]; *Barton v. Owen* (1977) 71 C.A.3d 484, 491, 139 C.R. 494; *Merced v. California* (1984) 153 C.A.3d 777, 781, 200 C.R. 642; *Fenton v. Board of Directors* (1984) 156 C.A.3d 1107, 1113, 203 C.R. 388; *Seeley v. Seymour* (1987) 190 C.A.3d 844, 856, 237 C.R. 282 [application of interpretation of document to undisputed facts]; *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 C.A.4th 10, 15, 1 C.R.2d 805, citing the text; *Resolution Trust Corp. v. Winslow* (1992) 9 C.A.4th 1799, 1810, 12 C.R.2d 510 [quoting *Bayside Timber Co.*]; *American Western Banker v. Price Waterhouse* (1993) 12 C.A.4th 39, 52, 14 C.R.2d 916; *Sanchez v. Truck Ins. Exchange* (1994) 21 C.A.4th 1778, 1787, 26 C.R.2d 812; *Xiloj-Itzep v. Agoura Hills* (1994) 24 C.A.4th 620, 633, 29 C.R.2d 879 [citing *Ward*]; *In re Marriage of Moschetta* (1994) 25 C.A.4th 1218, 1227, 30 C.R.2d 893; *Renee J. v. Superior Court* (2002) 96 C.A.4th 1450, 1459, 118 C.R.2d 118 [whether clarifying statutory amendment, which was unknown to parties at trial, was retroactive was pure question of law on undisputed evidence and could be raised for first time on appeal].)

The exception does not apply, of course, where the facts are not uncontroverted. (See *Strasberg v. Odyssey Group* (1996) 51 C.A.4th 906, 920, 59 C.R.2d 474 [exception is not applicable where new theory contemplates controverted factual situation not put in issue at trial]; *McDonald's Corp. v. Board of Supervisors of Mendocino* (1998) 63 C.A.4th 612, 617, 74 C.R.2d 101 [exception was not applicable where new theory (tax was escape assessment) depended on factual question of when particular lease could have been discovered through exercise of reasonable diligence]; *Brown*

v. Boren (1999) 74 C.A.4th 1303, 1316, 88 C.R.2d 758 [contract theory could not be raised for first time on appeal, where absence of reporter's transcript prevented court from determining whether facts underlying contract theory were uncontroverted].)

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XI. REVERSIBLE ERROR

A. In General.

1. Development of California Doctrine.

9 Witkin Cal. Proc. Appeal § 416

[§ 416] Development of California Doctrine.

Reversible error is error committed in an action or proceeding in a lower court that will compel a reversal of the judgment or order on appeal. It is almost universally agreed that error is not reversible unless it is prejudicial. This view was declared in 1872 when the codes were adopted.

"The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (*C.C.P.* 475.)

The code statement itself is adequate to establish the principle. But a reluctance to apply the section fully, or a belief that the courts lacked power to weigh the evidence, led to many a reversal in both civil and criminal cases where the judgment was clearly right and the error was not prejudicial. (See *San Jose Ranch Co. v. San Jose Land & Water Co.* (1899) 126 C. 322, 325, 58 P. 824; *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 554, 147 P. 238; *Rutter Group*, 1 Civil Appeals and Writs §8:285 et seq.; 25 *So. Cal. L. Rev.* 348.)

Criticism of this attitude led to the adoption of former Cal. Const., Art. VI, §4, designed to remove all doubt as to the power and duty of the court to disregard nonprejudicial error. The current constitutional provision reads as follows:

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., Art. VI, §13.)

This provision revolutionized the theory of reversible error in California. (On its history, scope, and effect, see *Vallejo & Northern R. Co. v. Reed Orchard Co.*, supra; *Tupman v. Haberkern* (1929) 208 C. 256, 263, 280 P. 970;

Soule v. General Motors Corp. (1994) 8 C.4th 548, 576, 34 C.R.2d 607, 882 P.2d 298, *infra*, §455 [applying analysis developed in criminal cases to civil appeal]; *De Leon v. Jenkins* (2006) 143 C.A.4th 118, 129, 49 C.R.3d 145; *infra*, §417 et seq.) (On test of reversible error, see *infra*, §445; on reversible error in criminal cases, see 6 *Cal. Crim. Law* (3d), *Reversible Error*, §1 et seq.)

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A. In General.

2. Theory of Constitutional Provision.

a. No Presumption of Injury From Error.

9 Witkin Cal. Proc. Appeal § 417

[§ 417] No Presumption of Injury From Error.

The burden is on the appellant, not alone to show error, but to show injury from the error. "[T]he effect of the section was to release the reviewing court from the rigid rule that prejudice was presumed from error and to enjoin upon the reviewing court the duty to declare ... whether the error found to exist has resulted in a miscarriage of justice, and not to reverse the judgment unless such error be prejudicial." (*Tupman v. Haberkern* (1929) 208 C. 256, 263, 280 P. 970.) (See *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 554, 147 P. 238 ["the injury must appear affirmatively to the mind of the court after the examination required, or from the nature of the error itself"]; *Coleman v. Farwell* (1929) 206 C. 740, 741, 276 P. 335; *Buckley v. Chadwick* (1955) 45 C.2d 183, 203, 288 P.2d 12, *infra*, §454; *Arnett v. Nall* (1921) 51 C.A. 194, 195, 196 P. 291; *Private Investors v. Homestake Mining Co.* (1936) 16 C.A.2d 1, 5, 60 P.2d 146; *Semple v. Andrews* (1938) 27 C.A.2d 228, 235, 81 P.2d 203; *Moise v. Fairfax Markets* (1951) 106 C.A.2d 798, 802, 236 P.2d 216; *Rosenthal v. Harris Motor Co.* (1953) 118 C.A.2d 403, 408, 257 P.2d 1034; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 C.A.4th 313, 318, 4 C.R.2d 649, quoting the text; 32 *Hastings L. J.* 687 [California Supreme Court and Constitution in conflict over harmless error rule]; on test of reversible error, see *infra*, §445.)

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2. Theory of Constitutional Provision.

b. Review of Entire Record.

9 Witkin Cal. Proc. Appeal § 418

[§ 418] Review of Entire Record.

The court must be convinced of the injurious nature of the error after an examination of the entire record. In other words, it must, to some extent, weigh the evidence, for the probability of injury from the error may be dependent on the state of the evidence. This is the change that the courts thought was made when the constitutional provision (now Cal. Const., Art. VI, §13) was brought to the aid of *C.C.P.* 475 (supra, §416).

"It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence. ... An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular. Prior to its adoption, if the evidence was in substantial conflict as to a fact in issue we were concluded by the decision of the trial court thereon for all purposes of the case, unless the error entered into and affected the consideration of that evidence. Under the above section, we have the power to review conflicting evidence for the purpose of ascertaining whether or not an error 'has resulted in a miscarriage of justice.' It is indeed made our duty to do so, and the further duty is imposed to disregard a manifest error when, upon such examination, we shall not 'be of the opinion that the error complained of has resulted in a miscarriage of justice.' " (*Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 554, 147 P. 238.) (See *Etienne v. Kendall* (1927) 202 C. 251, 257, 259 P. 752.)

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XI. REVERSIBLE ERROR

A. In General.

2. Theory of Constitutional Provision.

c. Reversible Error Is Relative Term.

9 Witkin Cal. Proc. Appeal § 419

[§ 419] Reversible Error Is Relative Term.

With a few exceptions (see *infra*, §453 et seq.), the classification of types of errors, e.g., incorrect rulings on evidence or pleadings, or incorrect instructions or findings, is quite misleading. Errors of varying degrees of seriousness may or may not be reversible under particular circumstances, depending on the state of the record. Cases "in point" are only relatively in point; they may be cited as to the seriousness or substantial nature of the error, but they must be supplemented by an argument of probable prejudice based on the state of the evidence in the case under review.

The impreciseness of "miscarriage of justice" is shown by statements in the following cases:

Alarid v. Vanier (1958) 50 C.2d 617, 625, 327 P.2d 897 ["No precise formula can be drawn for deciding whether there has been a miscarriage of justice. In each instance the determination whether the probable effect of an instruction has been to mislead the jury and whether the error has been prejudicial so as to require a reversal depends upon all the circumstances, including the evidence and the other instructions given"].

Soule v. General Motors Corp. (1994) 8 C.4th 548, 577, 34 C.R.2d 607, 882 P.2d 298, *infra*, §455 [distinguishing between "structural defects in the constitution of the trial mechanism," reversible per se, and "mere trial error," subject to harmless-error analysis].

Gee v. Poy (1928) 88 C.A. 627, 646, 264 P. 564 ["Notwithstanding an abundance of authority going to an explanation and construction of this constitutional provision, from necessity its application depends upon each particular case as it arises"].

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3. Review of Order on New Trial Motion.

a. Appeal From Order Granting.

9 *Witkin Cal. Proc. Appeal* § 420

[§ 420] Appeal From Order Granting.

The constitutional provision also governs the trial judge in ruling on a motion for a new trial. This changes the approach to error on appeal, after it has been successfully urged in the trial court on a motion for a new trial. If the trial judge deems the error prejudicial and grants a new trial, the reviewing court will normally uphold the order, on the theory that the judge is better able to determine the prejudicial effect of error committed during the trial. In other words, on an appeal from an order granting a new trial the burden of showing prejudice is no longer on the party against whom the error was committed. (*Brown v. George Pepperdine Foundation* (1943) 23 C.2d 256, 260, 262, 143 P.2d 929; *Tunmore v. McLeish* (1919) 45 C.A. 266, 269, 187 P. 443; *Pozzobon v. O'Donnell* (1934) 1 C.A.2d 151, 156, 36 P.2d 236; *Olinger v. Pacific Greyhound Lines* (1935) 7 C.A.2d 484, 488, 46 P.2d 774; *Sandco Amer. v. Notrica* (1990) 216 C.A.3d 1495, 1506, 265 C.R. 587, quoting the text; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §133.)

This difference is sharply emphasized by cases upholding orders granting new trials for minor errors in instructions that the trial judge concluded were "confusing" to the jury. In *Brown*, two erroneous instructions were given to the effect that the negligence of an independent contractor servicing an elevator could not be imputed to an apartment house owner. The jury brought in a verdict in favor of the independent contractor, thus impliedly finding that there was no negligence to impute, and curing the error (*infra*, §441). The Supreme Court nevertheless affirmed the order granting a new trial, commenting on "the cumulative effect of all errors, conflicts and confusion that appear in the charge as a whole." (23 C.2d 260.) "If it is clear that the error could not have affected the result of the trial, the court is bound to deny the motion. But if the error can possibly have been prejudicial, the trial court must consider its probable effect and decide the motion accordingly. The trial court here has determined that the errors in the instructions prejudiced respondents' cause, and we cannot say in the light of the record that the trial court was in error in so holding." (23 C.2d 262.) (See *Brignoli v. Seaboard Trans. Co.* (1947) 29 C.2d 782, 789, 792, 178 P.2d 445; *Brandelius v. San Francisco* (1957) 47 C.2d 729, 745, 306 P.2d 432; *Malkasian v. Irwin* (1964) 61 C.2d 738, 747, 40 C.R. 78, 394 P.2d 822 [order was affirmed on ground of misconduct of counsel, based on single comment in argument, which was not serious error, and not objected to]; *People v. Ault* (2004) 33 C.4th 1250, 1256, 17 C.R.3d 302, 95 P.3d 523, quoting the text [rejecting rule of independent appellate review applicable when trial court denies new trial motion (see *infra*, §421)]; *Granius v. Pacific Gas & Elec. Co.* (1962) 201 C.A.2d 126, 129, 130, 20 C.R. 18, 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial*

Court, §136 [order upheld although error was invited]; *Romo v. Ford Motor Co. (2002) 99 C.A.4th 1115, 1125, 122 C.R.2d 139* [reversing order and distinguishing *Malkasian*, which involved misconduct of counsel committed in judge's presence; present case involved juror misconduct committed outside judge's presence].)

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3. Review of Order on New Trial Motion.

b. Review of Order Denying.

9 Witkin Cal. Proc. Appeal § 421

[§ 421] Review of Order Denying.

The extraordinary deference to the trial judge's determination is usually shown in appeals from orders granting a new trial. (See *supra*, §420.) Where the trial judge denies the motion, the situation is different, and calls for a different approach. The order of denial is not appealable (see *supra*, §164); it is reviewed on an appeal from the judgment. In this appeal, the court has the duty to review the record and make an independent determination whether the error was prejudicial; hence, the typical statements about the judge's discretion in appeals from orders granting have no application to review of orders denying on appeals from judgments: "[W]e respectfully dissent from such pronouncements when made in the context of an appeal from the judgment after denial of a motion for new trial. Such pronouncements insert the trial court's discretion as a barrier between the appellate court and the latter's duty under article VI, section 412 [now Cal. Const., Art. VI, §13]. They result from a mechanical transposition of a rule from one kind of an appeal to another where it has no pertinence." (*Wilkinson v. Southern Pac. Co.* (1964) 224 C.A.2d 478, 484, 36 C.R. 689, citing the text; see *Los Angeles v. Decker* (1977) 18 C.3d 860, 872, 135 C.R. 647, 558 P.2d 545, 7 Cal. Proc. (5th), Trial, §224 [misconduct in argument on crucial issue of valuation in condemnation action was held prejudicial and judgment was reversed].)

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A. In General.

4. Improper Evidence in Trial by Court.

9 *Witkin Cal. Proc. Appeal* § 422

[§ 422] Improper Evidence in Trial by Court.

Many of the rules of evidence were designed to guard against placing improper matters before a jury. When the trial is before a judge sitting without a jury, the judge is presumably capable of rejecting improper evidence and remaining uninfluenced by unduly prejudicial matter. Some opinions, therefore, suggest that a claim of prejudice from error will be tested more strictly in such a case, and that the error will not be considered reversible unless a strong showing is made that it did influence the result. (See *Estate of Boole* (1929) 98 C.A. 714, 721, 277 P. 759 [same theory where advisory jury is used in equity action]; *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.* (1933) 128 C.A. 743, 765, 18 P.2d 413; *Keating v. Basich Bros. Const. Co.* (1944) 66 C.A.2d 258, 263, 151 P.2d 892; *Nason v. Leth-Nissen* (1947) 82 C.A.2d 70, 74, 185 P.2d 880; *Estate of Clark* (1949) 93 C.A.2d 110, 116, 208 P.2d 737; *Bixby v. Bixby* (1953) 120 C.A.2d 495, 499, 261 P.2d 286.)

The contrary view has been taken in other cases. (See *C.O. Bashaw Co. v. Wood & Stevens* (1925) 72 C.A. 94, 101, 236 P. 346 [Supreme Court disapproval of statement that, as trial was by court, "it is patent that immaterial testimony could do no harm"]; *Wilson v. Manduca* (1965) 233 C.A.2d 184, 189, 43 C.R. 435, *infra*, §449.)

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5. Appeal on Short Record.

9 Witkin Cal. Proc. Appeal § 423

[§ 423] Appeal on Short Record.

If an appeal is taken on the judgment roll (with no evidence), or on a partial transcript or settled or agreed statement (without all the evidence), is there any difference in the test of reversible error? Formerly, (1) almost any presumption would be indulged to support the judgment (see *supra*, §356); and (2) reversible error could rarely be established, because the reviewing court did not have all the evidence to examine in order to determine the effect of the error. (See *Coleman v. Farwell* (1929) 206 C. 740, 741, 276 P. 335 [partial bill of exceptions]; *Semple v. Andrews* (1938) 27 C.A.2d 228, 236, 81 P.2d 203 [appeal on judgment roll]; *Walker v. Etcheverry* (1941) 42 C.A.2d 472, 475, 109 P.2d 385 [same].) It has been pointed out that the arbitrary presumptions against the appellant that made a fair appellate review almost impossible were abrogated by the Rules of Court (see C.R.C., Rule 8.163; *supra*, §357). It seems clear, also, that C.R.C., Rule 8.163 changes the other practice and allows reversible error to be shown in an appeal on a short record.

Discussing an earlier version of C.R.C., Rule 8.163, the draftsman stated: "[T]he phrase 'entire cause including the evidence,' ... need not be given the arbitrary meaning of everything that took place in the lower court. The reviewing court never can know what happened below except through the record, which consists of what is brought up by the parties in accordance with the procedure prescribed by statute or rule. Even under our former statutes and rules some matters were frequently omitted, so that the record did not include all the proceedings. It would seem, then, that the Constitution can be interpreted in accordance with its admitted objective, namely, to prohibit reversals for error where the record shows no miscarriage of justice; but the function of the reviewing court is performed when it examines the entire record before the court, to determine whether the error, in the light of the evidence brought up, is prejudicial. The court may and should rely on the parties to prepare a record which contains all that is relevant and material to the issue as to which error is urged." (17 So. Cal. L. Rev. 124; see *Kovacik v. Reed* (1957) 49 C.2d 166, 170, 315 P.2d 314 [rule applies to appeal on settled statement]; *Alkus v. Johnson-Pac. Co.* (1947) 80 C.A.2d 1, 19, 181 P.2d 72 [quoting draftsman's statement]; *Sloan v. Stearns* (1955) 137 C.A.2d 289, 293, 290 P.2d 382 [rule applies to appeal on settled statement]; *Thorson v. Western Dev. Corp.* (1967) 251 C.A.2d 206, 214, 59 C.R. 299 [rule applies to judgment roll appeal]; *Anderson v. El Dorado* (1967) 253 C.A.2d 611, 613, 61 C.R. 502 [same]; *Skoglie v. Crumley* (1972) 26 C.A.3d 294, 297, 103 C.R. 205, quoting the text.)

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6. Analysis of Reversible Error Problem.

9 Witkin Cal. Proc. Appeal § 424

[§ 424] Analysis of Reversible Error Problem.

In approaching a reversible error problem, the following steps in analysis may be employed:

(1) Is the ruling or conduct error?

(2) Is it unsubstantial error that is not reversible under any circumstances? Some errors are so inconsequential that on no theory or state of the record could they be deemed prejudicial. (See *infra*, §425 et seq.) Other kinds of minor errors are likely to occur in any trial, in connection with pleadings, evidence, and other procedural matters. In unusual circumstances, they might be deemed prejudicial; but it is seldom possible to show any serious effects resulting from them, and, as a practical matter, they may normally be regarded as unsubstantial and nonprejudicial.

(3) If it is substantial error, is it reversible error under the probability test (*infra*, §445) because the case is close (*infra*, §443), sometimes taking into account the deliberate character of a serious error (*infra*, §451) or the cumulative effect of numerous less serious errors (*infra*, §450)?

(4) Even if it is substantial error, is it nonreversible because invited (*supra*, §389 et seq.) or waived (*supra*, §394 et seq.), or because it was cured by the party (*infra*, §436 et seq.) or by subsequent corrective action of the judge or jury (*infra*, §439 et seq.)?

(5) Even if the constitutional doctrine would normally call for affirmance because the judgment was clearly right (*infra*, §442) or the probability test of prejudice was not met (*infra*, §445), is the error within the judicially created class of those reversible per se, without regard to the state of the record (*infra*, §453 et seq.)?

(6) Is the error of constitutional dimension, calling for harmlessness beyond a reasonable doubt? (See *infra*, §452.)

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1. Trivial Error or Irregularity.

a. Clerical or Grammatical Error.

9 *Witkin Cal. Proc. Appeal* § 425

[§ 425] Clerical or Grammatical Error.

Clerical or typographical mistakes and grammatical errors are properly disregarded. (See *Squier v. Davis Standard Bread Co.* (1919) 181 C. 533, 537, 185 P. 391 [misuse of article "the" instead of "a" in instruction]; *Stone v. San Francisco Brick Co.* (1910) 13 C.A. 203, 205, 109 P. 103 [clerical error in findings]; *Wilson v. Mattei* (1927) 84 C.A. 567, 574, 258 P. 453 ["A mere inaccurate conclusion or erroneous computation of figures, as to the aggregate amount of a judgment, which satisfactorily appears from the face of the findings, is not reversible error, and should be reconciled, giving way to the true sum secured by a correct computation of the value of the items specifically enumerated in the findings"]; *Vinole v. Caso* (1931) 119 C.A. 226, 229, 6 P.2d 586 [use of plural ("plaintiffs") instead of singular in instruction]; *Collins v. Welsh* (1934) 2 C.A.2d 103, 108, 37 P.2d 505 [typographical error in complaint, incorporating by reference "Counts I and II" instead of "I and III"]; *Cummings v. Columbia Pictures Corp. of Calif.* (1935) 8 C.A.2d 244, 250, 47 P.2d 504 [clerical error or oversight in preparing findings, referring to wrong one of two options]; *Mayfield v. Fidelity & Cas. Co. of New York* (1936) 16 C.A.2d 611, 629, 61 P.2d 83 [use of disjunctive "or" instead of conjunctive "and" in instruction].)

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1. Trivial Error or Irregularity.
- b. Inadvertent Misuse of Terms.

9 *Witkin Cal. Proc. Appeal* § 426

[§ 426] Inadvertent Misuse of Terms.

In *Taylor v. Ballard* (1919) 41 C.A. 232, 182 P. 464, the court gave judgment for a "right of way of necessity." It was objected on appeal that no such claim was pleaded and that the right-of-way was created by agreement. *Held*, the decree properly established an easement, and the phrase "of necessity" was superfluous. "It was descriptive merely, and the only possible result of a reversal of the judgment on this ground would be to permit a pen to be drawn through the superfluous words. A judgment will not be reversed for a matter of form nor upon a rigid interpretation of an immaterial statement of fact, even though technical error appears." (41 C.A. 235.) (See *Baillargeon v. Myers* (1919) 180 C. 504, 510, 182 P. 37 [use of term "testimony" instead of "evidence" in instruction]; *State Comp. Ins. Fund v. Jorn* (1921) 186 C. 782, 785, 200 P. 624 [instruction on negligence, using word "approximately" for "proximately"]; *Hanselman v. Meadville* (1938) 12 C.2d 259, 260, 83 P.2d 295 [findings inadvertently used word "cross-complaint" instead of "answer"]; *Rottman v. Rottman* (1921) 55 C.A. 624, 636, 204 P. 46 [finding of "no consideration" where actually a slight consideration passed; error was immaterial where question was fairness of contract]; *Kraus v. Willow Park Public Golf Course* (1977) 73 C.A.3d 354, 374, 140 C.R. 744, citing the text [judgment affirmed on evidence establishing constructive trust, despite judge's mistaken use of counsel's proposed findings of resulting trust].)

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1. Trivial Error or Irregularity.
- c. Slight Irregularity in Procedure.

9 *Witkin Cal. Proc. Appeal* § 427

[§ 427] Slight Irregularity in Procedure.

The failure to follow some statutory rule or form may be a mere technical error that could not have any substantial effect on the merits of an ordinary case. (See *American Nat. Bank of San Francisco v. Donnellan* (1915) 170 C. 9, 14, 148 P. 188 [submission of whole case to jury before disposing of equitable issues of cross-complaint held "a technical objection to the order of proof"]; *Baker v. Eilers Music Co.* (1917) 175 C. 652, 656, 166 P. 1006 [judge signed findings prior to expiration of 5-day period for service on parties]; *Nicholas v. Chloupek* (1937) 23 C.A.2d 184, 186, 72 P.2d 561 [temporary absence of judge from courtroom during reading of deposition]; *Davenport v. Waite* (1959) 175 C.A.2d 623, 627, 346 P.2d 501 [jurors inadvertently took W's unadmitted deposition into jury room; no prejudice where W's testimony on stand was same as on deposition]; *Estate of Cooper* (1970) 11 C.A.3d 1114, 1121, 90 C.R. 283, citing the text [failure to circulate proposed judgment within 10 days after oral announcement or mailing, as required by rule].)

In *Peak v. Key System Transit Co.* (1928) 88 C.A. 354, 263 P. 578, a statute authorized intervention of a party "before trial"; the court allowed it after trial had begun. *Held*, the objection that this was too late was "perfunctory," and the lower court's action was "a mere irregularity of procedure without substantial injury to the rights of the defendant." (88 C.A. 360.)

In *Fransen v. Washington* (1964) 229 C.A.2d 570, 40 C.R. 458, an action against a car owner and driver with permission, the trial judge erred in refusing to submit a verdict form finding in favor of the owner alone and against plaintiffs. *Held*, not prejudicial; the jury were instructed that they could find for the owner on the permission issue, and the verdicts were clearly in favor of plaintiffs against both defendants. (229 C.A.2d 574.)

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B. Unsubstantial Error.

2. Minor Error Usually Harmless.

a. Defect of Parties or Pleadings.

9 *Witkin Cal. Proc. Appeal* § 428

[§ 428] Defect of Parties or Pleadings.

The failure to appoint a guardian ad litem for a minor plaintiff is a serious error. But where a minor was represented by counsel, and his or her rights were protected during trial and on appeal as fully as if a guardian had been appointed, the error could not have prejudiced the minor's substantial rights. (*King v. Wilson* (1931) 116 C.A. 191, 194, 2 P.2d 833; see *Pacific Coast Joint Stock Land Bank of San Francisco v. Clausen* (1937) 8 C.2d 364, 366, 65 P.2d 352; 4 Cal. Proc. (5th), *Pleading*, §85.)

Where a demurrer sets up defects in a pleading not going to the basic sufficiency of the statement of a cause of action, and the appellant is not misled by the pleading, error in overruling the demurrer is harmless. This is so, e.g., where some of the allegations are uncertain or ambiguous, but these are immaterial allegations not essential to recovery. (See *Green v. Hanson* (1930) 103 C.A. 430, 432, 284 P. 1082.)

Similar decisions have been made with respect to overruling a special demurrer for misjoinder of parties, which did not prevent a trial on the merits or deprive the appellant of any substantial right. As the court said in *Trask v. Garza* (1921) 51 C.A. 739, 197 P. 807: "If a liability for the amount recovered existed against the defendant, the fact that he may have been improperly joined with other parties in an action wherein the recovery was secured must be deemed to be without prejudice to any substantial right. This court has had occasion heretofore to suggest that under the section of the constitution referred to, it would be a rare case indeed which would call for a reversal of a judgment for the sole reason that the trial judge had overruled a demurrer interposed upon some special ground not going to the sufficiency of the cause of action stated." (51 C.A. 743.) (See *Joerger v. Pacific Gas & Elec. Co.* (1929) 207 C. 8, 20, 276 P. 1017; *Fuentes v. Tucker* (1947) 31 C.2d 1, 10, 187 P.2d 752; *Meier v. Wagner* (1915) 27 C.A. 579, 585, 150 P. 797; *Webb v. Tischauser* (1928) 89 C.A. 267, 272, 264 P. 526; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §683.)

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2. Minor Error Usually Harmless.

b. Immaterial Variance.

9 *Witkin Cal. Proc. Appeal* § 429

[§ 429] Immaterial Variance.

The proof must conform to the allegations of the pleading, and a material variance, not corrected by an amendment to conform to proof, may be serious error. But where the nonconforming proof does not, in fact, surprise the appellant, and the variance does not actually mislead, there is no prejudice to the appellant's substantial rights. (*Murnane v. Le Mesnager* (1929) 207 C. 485, 486, 279 P. 800; *Young v. Lo Presti* (1928) 95 C.A. 79, 84, 272 P. 310 [slight variance between pleading and proof as to date of transaction, date not being material element]; *Rosenthal v. Harris Motor Co.* (1953) 118 C.A.2d 403, 408, 257 P.2d 1034 [award exceeding prayer]; see 5 *Cal. Proc.* (5th), *Pleading*, §1210.)

Thus, where there has already been one trial, and the facts disclosed at the second trial are the same, the defect in the complaint (failure to apprise the defendant of the particular facts to be proved) is cured by the proof of them at the first trial. The defendant cannot claim surprise or other prejudice under these circumstances. (*Bridge v. New Amsterdam Cas. Co.* (1933) 129 C.A. 355, 360, 19 P.2d 76; *Beck v. Sirota* (1941) 42 C.A.2d 551, 558, 109 P.2d 419.)

Variance is also deemed harmless where it is clear that, if a reversal were ordered, the complaint could be amended and the objectionable evidence would be perfectly proper on the retrial, with the result that the same judgment would be rendered. (*Moore v. McDonald* (1932) 122 C.A. 61, 72, 9 P.2d 556; *Karle v. Reed* (1934) 1 C.A.2d 144, 148, 36 P.2d 150 ["It would seem an idle act to reverse a judgment because of the admission of evidence which would be admissible at the second trial"]; *Appel v. Burman* (1984) 159 C.A.3d 1209, 1214, 206 C.R. 259, quoting the text.)

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2. Minor Error Usually Harmless.
- c. Evidence Erroneously Admitted.

9 *Witkin Cal. Proc. Appeal* § 430

[§ 430] Evidence Erroneously Admitted.

Though evidence is erroneously admitted over proper objection, the error will be harmless in the following circumstances: (1) where the evidence was immaterial or of so little materiality or value that it could not have had any substantial influence on the result; (2) where, though material, it was merely cumulative or corroborative of other evidence properly in the record; (3) where, though material, and not merely cumulative, it was not necessary, the judgment being supported by other evidence. (See 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §703 et seq.)

Illustrations, which include the following, are numerous:

Fuentes v. Tucker (1947) 31 *C.2d* 1, 9, 187 *P.2d* 752 [evidence on issue was eliminated by admission, but jury's verdict was reasonable].

Continental Baking Co. v. Katz (1968) 68 *C.2d* 512, 527, 67 *C.R.* 761, 439 *P.2d* 889, 6 *Cal. Proc.* (5th), *Provisional Remedies*, §381 [cumulative evidence].

Yates v. Morotti (1932) 120 *C.A.* 710, 720, 8 *P.2d* 519 [erroneous evidence on point already admitted by pleadings].

Erickson v. Geranson (1932) 123 *C.A.* 575, 584, 11 *P.2d* 907 [self-serving declarations; "the presence or absence of these declarations makes little difference"].

De Tray v. Higgins (1939) 31 *C.A.2d* 482, 487, 88 *P.2d* 241 [judge reserved rulings on objections, then failed to rule; but evidence thus erroneously admitted was not element in decision of case].

Inouye v. McCall (1939) 35 *C.A.2d* 634, 636, 96 *P.2d* 386 ["The entire testimony ... could have been stricken out and it is quite evident that it would have made no difference in the result of the trial. Every material point brought out ... had been covered by some other witness"].

Hernandez v. Hernandez (1952) 109 *C.A.2d* 903, 910, 242 *P.2d* 59 [brief discussion of inadmissible offer to

compromise without objection].

Kalfus v. Frazee (1955) 136 C.A.2d 415, 423, 427, 288 P.2d 967 [erroneous admission of cumulative evidence].

Frampton v. Hartzell (1960) 179 C.A.2d 771, 775, 4 C.R. 427 [inadmissible hearsay was not prejudicial where same evidence came in later in business records without proper objection].

Kelley v. Bailey (1961) 189 C.A.2d 728, 737, 11 C.R. 448 [improper impeachment of plaintiff's medical expert was not prejudicial, because testimony related only to damages and verdict impliedly found no liability].

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- 2. Minor Error Usually Harmless.
- d. Evidence Erroneously Excluded.

9 Witkin Cal. Proc. Appeal § 431

[§ 431] Evidence Erroneously Excluded.

The erroneous exclusion of evidence will be harmless under circumstances similar to those in which admission is harmless (*supra*, §430): (1) where the evidence was immaterial or of so little materiality or value that its admission would not have had any substantial influence on the result; (2) where, though material, it would have been merely cumulative or corroborative of evidence properly in the record; (3) where, though material and not merely cumulative, it would for some other reason have been of no value.

The following cases are illustrative:

Estate of Fisher (1927) 202 C. 205, 213, 259 P. 755 [opinions on sanity were improperly excluded, but facts on which opinions were based were before the court, and expressions of opinion would not have added much weight or have changed decision].

Warfield v. Krueger (1929) 96 C.A. 671, 673, 274 P. 764 [evidence was excluded only on claim of exemplary damages, and jury, by verdict for defendant, found in effect that no actual damages were suffered].

Silvey v. Harm (1932) 120 C.A. 561, 573, 8 P.2d 570 [excluding cross-examination regarding sobriety at time of accident, while error, was not prejudicial, because material portion of witness' testimony was corroborated by witnesses whose sobriety was unquestioned].

Larimer v. Smith (1933) 130 C.A. 98, 104, 19 P.2d 825 [cumulative evidence].

Cooper v. McDonald (1939) 32 C.A.2d 114, 122, 89 P.2d 412 ["In each instance a practically identical question was answered by the witness about the same time"].

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e. Misconduct of Counsel, Court, or Jury.

9 *Witkin Cal. Proc. Appeal* § 432

[§ 432] Misconduct of Counsel, Court, or Jury.

Misconduct, consisting of improper remarks or actions by the court, counsel, or jury, may be so slight or so ephemeral in character as to be harmless under the circumstances. (See *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 C. 379, 399, 104 P. 986; *Walling v. Kimball* (1941) 17 C.2d 364, 370, 110 P.2d 58; *Perez v. Crocker* (1927) 86 C.A. 288, 292, 294, 260 P. 838; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1315, 64 C.R.2d 705, 9 Cal. Proc. (5th), *Administrative Proceedings*, §74, citing the text; 35 A.L.R.5th 1 [prejudicial effect of trial judge's remarks disparaging litigants, witnesses, or subject matter of litigation]; 7 Cal. Proc. (5th), *Trial*, §§220, 327, 337.)

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f. Erroneous Instruction or Failure To Instruct.

9 *Witkin Cal. Proc. Appeal* § 433

[§ 433] Erroneous Instruction or Failure To Instruct.

Minor errors in connection with instructions (see 5 *Am. Jur.2d* (2007 ed.), *Appellate Review* §692 et seq.) are probably more frequent than any other kind, and the following types are usually considered harmless:

(1) Incorrect terminology in instruction on burden of proof. (See *Valentine v. Provident Mut. Life Ins. Co. of Philadelphia* (1936) 12 C.A.2d 616, 619, 55 P.2d 1243; 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §6 et seq.; 7 *Cal. Proc.* (5th), *Trial*, §§294, 295.)

(2) Instruction erroneous, but not relating to any issue or evidence in the case and not calculated to mislead the jury. (See *Estate of Budan* (1909) 156 C. 230, 235, 104 P. 442 ["It must appear ... that there was some testimony in the case to which the jury might have applied the erroneous instruction"]; *Mehollin v. Ysuchiyama* (1938) 11 C.2d 53, 57, 77 P.2d 855; 7 *Cal. Proc.* (5th), *Trial*, §315.)

(3) Correct instruction on an abstract question, i.e., a correct statement of law but not relating to any issue in the case; the error is harmless if it does not mislead the jury as to the issues to be decided. (See *Hardy v. Schirmer* (1912) 163 C. 272, 276, 124 P. 993; *Estate of Clark* (1919) 180 C. 395, 398, 181 P. 639; *Marston v. Pickwick Stages* (1926) 78 C.A. 526, 532, 248 P. 930; *Trelut v. Kazarian* (1952) 110 C.A.2d 506, 512, 243 P.2d 104; *Wilkinson v. Southern Pac. Co.* (1964) 224 C.A.2d 478, 482, 36 C.R. 689.)

(4) Formula instruction, omitting a condition necessary to a verdict, where no substantial evidence was introduced relating to the omitted condition. (See *Jordan v. Great Western Motorways* (1931) 213 C. 606, 609, 2 P.2d 786.)

(5) An instruction erroneous on a particular issue, or in connection with one cause of action, where on another controlling issue or cause of action the verdict or judgment is sustained by the evidence. (See *Brandes v. Rucker Fuller Desk Co.* (1929) 102 C.A. 221, 228, 282 P. 1009; *Martin v. Vierra* (1939) 34 C.A.2d 86, 94, 93 P.2d 261.)

West's Key Number Digest, Appeal and Error 1064.4

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g. Erroneous Statement of Decision or Failure To Resolve Issue.

9 *Witkin Cal. Proc. Appeal* § 434

[§ 434] Erroneous Statement of Decision or Failure To Resolve Issue.

The accumulation of case law deals with the former requirement of findings (now statement of decision; see 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.).

Where a finding (now a factual determination and a part of the statement of decision) is lacking in evidentiary support, but it is on a matter that is immaterial, or of so little materiality that a finding either way on the matter would not influence the judgment, or for some other reason the finding was unnecessary, other findings being sufficient to support the judgment, the error is harmless. (See *American Nat. Bank of San Francisco v. Donnellan* (1915) 170 C. 9, 15, 148 P. 188; *Schurman v. Look* (1923) 63 C.A. 347, 361, 218 P. 624; *Shelley v. Board of Trade of San Francisco* (1927) 87 C.A. 344, 358, 262 P. 403; *Nathan v. American Photoplayer Co.* (1928) 95 C.A. 320, 321, 272 P. 775.)

If the error is failure to find on a material issue (now failure of the statement of decision to resolve a material issue), it is harmless where (1) other findings are sufficient to support the judgment, or (2) the evidence is such that the finding would necessarily have been adverse. (See *Arnaz v. Forbes* (1921) 51 C.A. 665, 666, 197 P. 364; *Imperial Water Co. No. 1 v. Imperial Irr. Dist.* (1923) 62 C.A. 286, 290, 217 P. 88 [court found against appellant on controlling issue]; *Brown v. Schroeder* (1927) 88 C.A. 192, 201, 263 P. 325; *Wood v. Girot* (1929) 102 C.A. 160, 165, 282 P. 981; *Miller v. Ambassador Park Syndicate* (1932) 121 C.A. 92, 97, 9 P.2d 267 [finding would have been adverse]; *Astor v. Safeway Stores* (1938) 26 C.A.2d 163, 166, 79 P.2d 146; *Bergman v. Bierman* (1956) 138 C.A.2d 692, 697, 292 P.2d 623, citing the text; *Haley v. Los Angeles County Flood Control Dist.* (1959) 172 C.A.2d 285, 293, 342 P.2d 476, 5 *Cal. Proc.* (5th), *Pleading*, §878 [declaratory relief; failure to declare rights where declaration necessarily would have been unfavorable to appellant]; *Young v. Sausalito* (1961) 189 C.A.2d 768, 773, 11 C.R. 429, quoting the text; *Space Properties v. Tool Research Co.* (1962) 203 C.A.2d 819, 829, 22 C.R. 166, citing the text; *Agair v. Shaeffer* (1965) 232 C.A.2d 513, 520, 42 C.R. 883, citing the text; *Kuffel v. Seaside Oil Co.* (1977) 69 C.A.3d 555, 567, 138 C.R. 575, *supra*, §351 [trial judge's memorandum opinion fully covered omitted matters, and failure to make formal findings was not prejudicial].)

West's Key Number Digest, Appeal and Error 1071.4

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3. Failure To Award Nominal Damages.

9 *Witkin Cal. Proc. Appeal* § 435

[§ 435] Failure To Award Nominal Damages.

(1) *General Rule.* The general rule in contract and tort actions is that, where a plaintiff is entitled at most to nominal damages, a judgment, nonsuit, or directed verdict against the plaintiff is not reversible error. (*McAllister v. Clement* (1888) 75 C. 182, 184, 16 P. 775 ["we think it is a case where in this court the maxim, *De minimis non curat lex*, should be applied"]; *Holmes v. Snow Mountain Water & Power Co.* (1918) 36 C.A. 394, 397, 172 P. 178; *Martin v. Pritchard* (1921) 52 C.A. 720, 727, 199 P. 846 ["And a judgment for a defendant in an action *ex contractu* for damages where it is established that a plaintiff is entitled to nothing more than nominal damages will not be reversed on appeal"]; *Gray v. Southern Pac. Co.* (1937) 21 C.A.2d 240, 247, 68 P.2d 1011.)

(2) *Exceptions.* In a few situations, error in failing to award nominal damages may be a ground for reversal:

(a) Where the record might sustain an award of a substantial amount. (*Arkley v. Union Sugar Co.* (1905) 147 C. 195, 199, 81 P. 509; *Standard Livestock Co. v. Pentz* (1928) 204 C. 618, 631, 269 P. 645.)

(b) Where the action seeks to establish a permanent property right, the nominal damages being merely incidental. (*Arkley v. Union Sugar Co.*, supra; *O'Dea v. San Mateo* (1956) 139 C.A.2d 659, 662, 294 P.2d 171.)

(c) Where the action is for libel; the theory is that the court cannot say as a matter of law that the plaintiff is only entitled to nominal damages. (*Taylor v. Hearst* (1895) 107 C. 262, 272, 40 P. 392; *Von Schroeder v. Spreckels* (1905) 147 C. 186, 187, 81 P. 515.)

(d) Where the award carries costs as a matter of right. In *Sweet v. Johnson* (1959) 169 C.A.2d 630, 337 P.2d 499, defendant was guilty of a deliberate breach of contract, but plaintiff was unable to establish any actual damages. The trial judge therefore gave judgment for defendant with costs of \$ 307.04. *Held*, conditionally reversed. Plaintiff was entitled to nominal damages; and, if such an award would carry costs, the judgment would clearly be reversible error. But, because the action was brought in the superior court and a judgment for nominal damages would be one that an inferior court could give (under the procedure then in effect), costs were discretionary. Hence, the only relief to which plaintiff was entitled on appeal was a remission of the award of costs to defendant. (169 C.A.2d 633.)

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1. Error Cured by Party.

a. Rulings on Pleadings.

9 *Witkin Cal. Proc. Appeal* § 436

[§ 436] Rulings on Pleadings.

(1) *Cure by Defendant's Pleading.* Error in overruling a defendant-appellant's good demurrer for failure of the complaint to include an essential allegation (or failure to plead it properly) may be cured by his or her own (defendant-appellant's) express denial of the omitted or defective allegation or by express negative averment in the answer. Thus, the error is cured by the appellant's own act. (*Baker v. Miller* (1923) 190 C. 263, 267, 212 P. 11 [essential allegation was stated as conclusion of law, general demurrer was improperly overruled, but defendant answered, denying defective averment]; *Bledsoe v. Stuckey* (1920) 47 C.A. 95, 101, 102, 190 P. 217 ["This rule that omitted allegations of a complaint may be aided by averments in the answer applies even though a demurrer to the sufficiency of the complaint has been erroneously overruled"]; *Ades v. Brush* (1944) 66 C.A.2d 436, 444, 152 P.2d 519; *Mann v. Mueller* (1956) 140 C.A.2d 481, 484, 295 P.2d 421 [complaint failed to allege facts of full performance; defendants, by denials and affirmative allegations in answer, put in issue all facts omitted]; see 5 *Cal. Proc.* (5th), *Pleading*, §1056.)

(2) *Cure by Trial.* Any error in overruling a defendant-appellant's demurrer or denying his or her motion to strike based on technical defects in the pleadings or parties, such as misjoinder, uncertainty, allegations in the form of conclusions of law or evidentiary matters, etc., is cured by going to trial on the merits. After trial and judgment, these matters are not grounds for reversal. (*Baker v. Miller*, *supra*, 190 C. 267; *Joerger v. Pacific Gas & Elec. Co.* (1929) 207 C. 8, 20, 276 P. 1017; *Miller v. Lantz* (1937) 9 C.2d 544, 547, 71 P.2d 585; *Nittler v. Continental Cas. Co.* (1928) 94 C.A. 498, 506, 271 P. 555, 272 P. 309; *Ades v. Brush*, *supra*, 66 C.A.2d 444.)

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1. Error Cured by Party.

b. Denial of Nonsuit.

9 *Witkin Cal. Proc. Appeal* § 437

[§ 437] Denial of Nonsuit.

Where the judge should have granted a motion for nonsuit because of a defect in the plaintiff's proof, the error in denying it is cured when either party subsequently overcomes the defect in proof by introduction of evidence. If, at the conclusion of the entire case it warrants submission to the jury, the prior error becomes immaterial. (*Lowe v. San Francisco & Northwestern Ry. Co.* (1908) 154 C. 573, 575, 98 P. 678; *Peters v. Southern Pac. Co.* (1911) 160 C. 48, 52, 116 P. 400; *Western Calif. Land Co. v. Welch* (1919) 41 C.A. 435, 438, 183 P. 169; see 7 *Cal. Proc.* (5th), *Trial*, §411.)

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1. Error Cured by Party.

c. Denial of Summary Judgment.

9 Witkin Cal. Proc. Appeal § 438

[§ 438] Denial of Summary Judgment.

In *Waller v. TJD* (1993) 12 C.A.4th 830, 16 C.R.2d 38, the question was "whether a presumptively valid judgment rendered after full trial on the merits can be set aside on the ground of error in denying a motion for summary judgment." (12 C.A.4th 833.) In holding that the error is not reversible unless it results in prejudice to the appellant, the court extensively reviewed the principles and authorities that govern appeals asserting error in ruling on pleadings, procedures, or other preliminary matters. (12 C.A.4th 833.)

(a) Under Cal. Const., Art. VI, §13 (supra, §416), the reviewing court must examine the entire cause, not the particular ruling in isolation. "Since we are enjoined to presume that the trial itself was fair and that the verdict in plaintiffs' favor was supported by the evidence, we cannot find that an erroneous pretrial ruling based on declarations and exhibits renders the ultimate result unjust." (12 C.A.4th 833, citing the text, *Lowe v. San Francisco & Northwestern R. Co.* (1908) 154 C. 573, 98 P. 678, and *Peters v. Southern Pac. Co.* (1911) 160 C. 48, 116 P. 400.)

(b) A number of courts in other states have reached the same conclusion (12 C.A.4th 835), and an Illinois Court of Appeals opinion gives a convincing explanation: "An incorrect ruling deprived the moving party of a judgment it should have had. It could not immediately appeal from the orders denying its motions because the orders were not final and appealable. ... To deny a review seems to be unjust. But to grant it would necessarily result, under our first assumption, in the finding that the judgment entered upon the verdict should be set aside and the judgment should be awarded upon one of the motions. This would be unjust to the party that was victorious at the trial, which won the judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised. The greater injustice would be to the party which would be deprived of the jury verdict." (12 C.A.4th 835.)

(c) "[W]e are cognizant of the fact that California cases have frequently indicated, as a general proposition, that an order denying a motion for summary judgment, while not directly appealable, may be reviewed on appeal from the final judgment. ... However, no case that we have discovered has actually engaged in such review for the purpose urged upon us in this appeal, i.e., to consider the merits of the order denying summary judgment as a basis to reverse a judgment entered after trial on the merits." (12 C.A.4th 836.)

(d) In some circumstances, review may be proper; e.g., where there have been "cross-motions" for summary judgment, and one is granted while the other is denied, or where a judgment adverse to the moving party is reversed for independent reasons. "Our opinion is limited to situations in which a party moves for summary judgment on the ground that there is no triable issue of fact, the motion is denied, and the same questions raised by the motion are then decided adversely to the unsuccessful moving party after a trial on the merits which is itself free from prejudicial error." (12 C.A.4th 836.) (See *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 C.A.4th 861, 908, 85 C.R.2d 301 [where plaintiff failed to identify any prejudice at trial allegedly resulting from denial of its summary judgment motion, denial, even if erroneous, did not render unjust judgment for defendant entered after full trial on merits; following *Waller*]; *California Housing Finance Agency v. Hanover/Calif. Management & Accounting Center* (2007) 148 C.A.4th 682, 688, 56 C.R.3d 92 [denial of defendants' summary judgment motion because triable issues of fact remained did not result in miscarriage of justice, where factual issues, i.e., whether defendants fraudulently concealed relevant facts and time of plaintiff's knowledge of alleged wrongdoing, were fully litigated at trial and determined adversely to defendants].)

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2. Error Cured by Judge or Jury.

a. Evidence.

9 *Witkin Cal. Proc. Appeal* § 439

[§ 439] Evidence.

The erroneous admission of incompetent, irrelevant, or unduly prejudicial evidence may be cured by the judge's order striking it out and instructing the jury to disregard it. (*Gorman v. Sacramento* (1928) 92 C.A. 656, 666, 268 P. 1083; *Elliott v. Federated Fruit & Vegetable Growers* (1930) 108 C.A. 412, 418, 291 P. 681; cf. *Caminetti v. Prudence Mut. Life Ins. Assn.* (1944) 62 C.A.2d 945, 948, 146 P.2d 15 [court's erroneous ruling on burden of proof was cured by later order reopening case and vacating ruling]; see 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §§702, 703; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §386.) Even if the objectionable matter is not stricken out, it will be deemed harmless if, on an examination of the verdict, it appears that the jury was not influenced by it. (See *McKay v. Hedger* (1934) 139 C.A. 266, 278, 34 P.2d 221; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §670.)

The erroneous exclusion of a defendant's evidence may sometimes be cured by the judge, on motion for a new trial, ordering a reduction of the verdict as a condition of denying a new trial. (See *Sabella v. Southern Pac. Co.* (1969) 70 C.2d 311, 317, 74 C.R. 534, 449 P.2d 750.)

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2. Error Cured by Judge or Jury.

b. Misconduct.

9 *Witkin Cal. Proc. Appeal* § 440

[§ 440] Misconduct.

The theory of error cured is invoked with great frequency in the field of misconduct of counsel, e.g., in making improper reference to insurance or offers to compromise. The prejudicial effect is usually deemed overcome by the action of the court in striking out the objectionable statement and instructing the jury to disregard it. Sometimes, for good measure, the court reprimands counsel. (See *Thompson v. Hickman* (1948) 89 C.A.2d 356, 362, 200 P.2d 893; *Jonte v. Key System* (1949) 89 C.A.2d 654, 659, 201 P.2d 562; *Shaff v. Baldwin* (1951) 107 C.A.2d 81, 86, 236 P.2d 634; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1315, 64 C.R.2d 705, 9 Cal. Proc. (5th), *Administrative Proceedings*, §74, citing the text; 21 So. Cal. L. Rev. 229, 232; 7 Cal. Proc. (5th), *Trial*, §212; cf. *Cassim v. Allstate Ins. Co.* (2004) 33 C.4th 780, 788, 16 C.R.3d 374, 94 P.3d 513 [absence of request for curative admonition does not forfeit issue of misconduct of counsel if trial court immediately overrules objection to alleged misconduct, so that objecting litigant has no opportunity to make request].)

Misconduct of the judge may be similarly cured by his or her admonition to disregard the improper remarks or conduct, together with an instruction that the jury is the sole judge of the facts. (See 7 Cal. Proc. (5th), *Trial*, §243.)

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2. Error Cured by Judge or Jury.

c. Instructions.

9 *Witkin Cal. Proc. Appeal* § 441

[§ 441] Instructions.

(1) *Cure by Judge*. An erroneous instruction or the refusal to give a proposed instruction may be cured by giving other correct instructions that sufficiently cover the case. (*Saltzen v. Associated Oil Co. of Calif.* (1926) 198 C. 157, 160, 244 P. 338; *Miner v. Dabney-Johnson Oil Corp.* (1933) 219 C. 580, 583, 28 P.2d 23; *Tuttle v. Crawford* (1936) 8 C.2d 126, 133, 63 P.2d 1128; *Valentine v. Provident Mut. Life Ins. Co. of Philadelphia* (1936) 12 C.A.2d 616, 620, 55 P.2d 1243; see 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §692; 7 *Cal. Proc.* (5th), *Trial*, §317.)

(2) *Cure by Jury's Verdict*. Refusal to give a proper instruction, or giving erroneous instructions, may also be cured by the jury where, despite the improper charge, it brings in a correct verdict. (See *Pool v. Oakland* (1986) 42 C.3d 1051, 1069, 1072, 232 C.R. 528, 728 P.2d 1163; *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 570, 34 C.R.2d 607, 882 P.2d 298, *infra*, §455; 7 *Cal. Proc.* (5th), *Trial*, §357.)

In *Kramer v. Ferguson* (1964) 230 C.A.2d 237, 41 C.R. 61, defendants published statements urging recall of plaintiff city councilmen. The judge gave no clear instructions on the statutory qualified privilege of a person interested, a matter of law, thus erroneously leaving it to the jury to determine whether the occasion was privileged. But as to certain defendants against whom the jury awarded punitive damages, the verdict by necessary implication carried a finding of malice, overcoming the privilege. Hence, the failure to instruct was harmless error. (230 C.A.2d 246.)

In *Wanland v. Los Gatos Lodge* (1991) 230 C.A.3d 1507, 281 C.R. 890, the jury was given an instruction on punitive damages in a wrongful termination case in which punitive damages are unavailable. However, the jury did not award punitive damages, and therefore under the established rule the error was not prejudicial. (230 C.A.3d 1520.) Defendant nevertheless contended that the fact that the jury heard the punitive damage instruction must have tainted their deliberations on the compensatory damage claim. However, the compensatory damage instructions set forth an exclusively contractual measure on damages; the jury was directed not to consider whether defendant's conduct was malicious or oppressive until it had determined whether defendant had breached the covenant of good faith and fair dealing; and the jury found that punitive damages were unwarranted by the evidence. "Logically, therefore, we must conclude that the mere presence of the punitive damage instructions did not taint the verdict." (230 C.A.3d 1521.)

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3. Judgment Clearly Right.

9 *Witkin Cal. Proc. Appeal* § 442

[§ 442] Judgment Clearly Right.

Cal. Const., Art. VI, §13, has its most striking effect on substantial error that was calculated to influence the court or jury. If, nevertheless, the judgment is the only proper one in the state of the record, i.e., under the pleadings and evidence the same result would have been reached even if the error had not been committed, there is no miscarriage of justice. Many cases, including the following, apply this rule:

Tanforan v. Tanforan (1916) 173 C. 270, 274, 159 P. 709 [court, after plaintiff's case was in, erroneously compelled her to elect between inconsistent counts, but no evidence supported discarded count].

Estate of Keith (1917) 175 C. 26, 30, 165 P. 10 ["The appellant's case is so obviously without merit that a decision against her was inevitable. ... Under these circumstances, it would be idle to discuss, or even to enumerate, the assignments of error which are presented"].

Taboada v. Sociedad Espanola de Beneficencia Mutua (1923) 191 C. 187, 192, 215 P. 673 [error in overruling demurrer to complaint, but defendants were neither deceived nor placed at disadvantage in preparing and presenting their defense, and "right result" was clearly reached].

Paulsen v. McDuffie (1935) 4 C.2d 111, 119, 47 P.2d 709 [erroneous instruction on presumption, but evidence clearly showed plaintiff's right to recover].

Hillman v. Garcia-Ruby (1955) 44 C.2d 625, 627, 283 P.2d 1033 [erroneous failure to instruct on absolute liability of keeper of animal; error was not prejudicial where there was no evidence of dangerous propensity].

Vasquez v. Alameda (1958) 49 C.2d 674, 676, 321 P.2d 1 [despite erroneous instructions, evidence overwhelmingly established plaintiff's contributory negligence].

Alarid v. Vanier (1958) 50 C.2d 617, 625, 327 P.2d 897 [despite error in instructions, ample uncontradicted evidence negated defendant's negligence].

Imperial Water Co. No. 1 v. Imperial Irr. Dist. (1923) 62 C.A. 286, 290, 217 P. 88 [failure to find on material issue,

but other issue was controlling and no different judgment was possible].

Wiseman v. Sklar (1930) 104 C.A. 369, 378, 285 P. 1081 [unnecessary to determine whether bringing in contractor as party plaintiff was error, where defendants were in no manner prejudiced].

Jacobs v. Bozzani Motors, Ltd. (1952) 109 C.A.2d 681, 685, 241 P.2d 642 [erroneous instructions, but it did not appear from record "that a different result would have been probable had the questioned instructions not been given"].

Bixby v. Bixby (1953) 120 C.A.2d 495, 499, 261 P.2d 286 [evidence was erroneously admitted, but other competent evidence supported judgment; presumed that judge relied on competent evidence].

Murphy v. Atchison, Topeka & Santa Fe Ry. (1958) 162 C.A.2d 818, 823, 329 P.2d 75 [erroneous failure to instruct on presumption, but not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"].

Mason v. Case (1963) 220 C.A.2d 170, 183, 33 C.R. 710 [despite erroneous instructions, evidence of contributory negligence was too strong for recovery].

Johnson Rancho County Water Dist. v. Yuba (1963) 223 C.A.2d 681, 684, 35 C.R. 828 [error in sustaining demurrer where admittedly no cause of action existed].

Coronet Credit Corp. v. West Thrift Co. (1966) 244 C.A.2d 631, 647, 53 C.R. 433 [failure to comply with request for specific findings under former law, where finding would necessarily have been adverse].

Conservatorship of Fadley (1984) 159 C.A.3d 440, 442, 447, 205 C.R. 572 [proceeding to determine if patient lacked capacity to give informed consent to electroconvulsive therapy; findings that this therapy was required and was least drastic available treatment were improper, but harmless, where evidence suggested that patient could not knowingly act on information given regarding therapy, and where result more favorable--finding that patient was able to give informed consent--would not have been reached absent trial court's misapprehension of nature of hearing].

Paterno v. California (1999) 74 C.A.4th 68, 108, 87 C.R.2d 754 [error in eliminating nuisance theory was harmless, where negligence theory was heard and plaintiff failed to show that anything would have been added by consideration of nuisance theory].

This theory has been invoked to sustain a judgment rendered by an entirely unauthorized procedure. In *Stafford v. People* (1956) 144 C.A.2d 79, 300 P.2d 231, defendants moved to quash summons and dismiss for lack of jurisdiction, but then attacked the complaint, thereby making a general appearance. *Held*, however, the complaint was fatally defective and could not be amended to state a cause of action; hence, the erroneous procedure was not prejudicial and reversal would be useless. Accordingly, the judgment of dismissal without prejudice was affirmed. (144 C.A.2d 81.) (See 5 Cal. Proc. (5th), Pleading, §§1004, 1006.)

Another illustration appears in *Estate of Lagersen* (1959) 169 C.A.2d 359, 337 P.2d 102. Although serious error (improper restriction of cross-examination) had been committed, the only issue was the right to appointment of an administrator of an estate, the probate of which had been practically completed, and reversal would probably not have changed the appointee. (169 C.A.2d 368.)

In *Zeppi v. Beach* (1964) 229 C.A.2d 152, 40 C.R. 183, collateral estoppel was the basis for application of the theory. K drove his car on a highway, killing himself and injuring plaintiffs. The action was against K's estate and the public officers charged with negligent maintenance of the highway. The officers relied on a statute barring recovery if the public property was not being properly used. The judge granted a nonsuit as to the public officers, and this, at the time it was granted, was wholly improper because it had not yet been determined that K was negligent (i.e., was improperly using the highway). But the jury then brought in a verdict against K's estate; judgment for plaintiffs was

entered on the verdict, and K's estate did not appeal. Thus, at the time of plaintiffs' appeal from the judgment of nonsuit in favor of the officers, the judgment on the verdict against K's estate had conclusively established the fact that the public property was not being carefully used, and that no liability existed under the statute. In other words, the error in granting the nonsuit was rendered harmless by the res judicata effect of the judgment on the verdict, and reversal for a retrial of the cause of action against the officers would be futile. Hence, the judgment of nonsuit was affirmed. (229 C.A.2d 160.)

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1. Close Case.

a. Nature of Problem.

9 Witkin Cal. Proc. Appeal § 443

[§ 443] Nature of Problem.

It has been seen that error is not reversible if the judgment is clearly right. (See *supra*, §442.) But is error only reversible when the judgment is clearly wrong?

In *Rodetsky v. Nerney* (1925) 72 C.A. 545, 237 P. 791, the court said: "Before an appellate court may reverse the judgment of a trial court it must be of the opinion that the error complained of has resulted in a miscarriage of justice. Such may not be presumed but the result must fairly and reasonably appear from the whole record. For us to say that we cannot determine therefrom that the error complained of did not have that result is not sufficient. Our conclusion in the premises must be an affirmative one." (72 C.A. 548.)

Haney v. Takakura (1934) 2 C.A.2d 1, 37 P.2d 170, 38 P.2d 160 is similar: "It is not sufficient that the court is able to say that it cannot be determined whether there has or has not been a miscarriage of justice." (2 C.A.2d 9.)

The foregoing statements mean only that prejudice from error must be clearly and "affirmatively" shown. It would be difficult indeed for the appellant to demonstrate that the judgment is clearly wrong; it should be enough for the appellant to show that the pleadings and evidence were in such a state (i.e., the case was "close") that a verdict or decision in his or her favor would probably have been rendered if the error had not been committed. And this is the present view. (See *infra*, §445.)

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1. Close Case.

b. Test of Reversible Error.

1. Repudiated Test of Possible Prejudice.

9 Witkin Cal. Proc. Appeal § 444

[§ 444] Repudiated Test of Possible Prejudice.

After early cases had correctly stated the constitutional requirement of an affirmative showing of prejudice (see *supra*, §417), a number of decisions were rendered that diluted the requirement and purportedly established the "double negative" or possible prejudice test. The typical language was, "we cannot say that the error was not prejudicial," or "we cannot say that the jury would not have reached a different verdict."

This approach was used in both civil and criminal appeals. (See *Citti v. Bava* (1928) 204 C. 136, 139, 266 P. 954 ["From an examination of the record in this case it is impossible for us to state that the jury would not have found a different verdict"]; *Arnold v. California Portland Cement Co.* (1919) 41 C.A. 420, 427, 183 P. 171 ["in view of the slight margin of evidence in favor of the proposition that respondent himself was not guilty of contributory negligence, we cannot say that the error was not without prejudice to appellant"]; *Carroll v. Central Counties Gas Co.* (1929) 96 C.A. 161, 168, 273 P. 875 ["There is a sharp conflict in the evidence upon material matters, and this court cannot say that the jury was not influenced in rendering its verdict for respondent by reason of said errors"]; *Mashbir v. Mashbir* (1938) 29 C.A.2d 733, 737, 85 P.2d 482 ["we cannot say that, had the trial court received the excluded evidence and given it due consideration, a different result would not have ensued"]; *Boyd v. Theetgee* (1947) 78 C.A.2d 346, 352, 177 P.2d 637 ["This was a close case in which the evidence, while sufficient to support the verdict, was far from satisfactory"]; *Rasich v. Gladding McBean & Co.* (1949) 90 C.A. 2d 241, 243, 202 P.2d 576 [refusal to give proper instruction on damages, evidence conflicting, second trial after new trial on insufficiency of evidence, jury evenly divided for a long time; "we cannot say that had the requested instruction been given the jury might not have reached a different result"]; 25 So. Cal. L. Rev. 350; for decisions in criminal appeals, see 6 Cal. Crim. Law (3d), *Reversible Error*, §6.)

This test has been repudiated for civil appeals (*infra*, §445) and ordinary criminal appeals (see 6 Cal. Crim. Law (3d), *Reversible Error*, §7), and remains only as a test for federal constitutional error (see *infra*, §452).

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1. Close Case.

b. Test of Reversible Error.

2. Current Test of Probable Prejudice.

9 Witkin Cal. Proc. Appeal § 445

[§ 445] Current Test of Probable Prejudice.

Although the constitutional doctrine applies equally to both civil and criminal cases, it was principally directed at criminal appeals, and the major battles in defining and establishing tests for reversible error were waged in criminal cases. (See 6 *Cal. Crim. Law* (3d), *Reversible Error*, §7.) It was expectable, therefore, that the reexamination of the possibility test (*supra*, §444) would be made in a criminal case.

In *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, the court revived the earlier rule requiring an affirmative showing of error, but stated the requirement in the less rigid form of "reasonable probability":

"[I]t appears that the test generally applicable may be stated as follows: That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. Phrasing the test in this language avoids any complexity which may be said to result from the language employed in the double negative approach, and such phrasing seems to coincide with the affirmative language used in the constitutional provision. We are of the view, however, that the test as above stated does not constitute a departure from the tests heretofore applied, but is merely a crystallization in affirmative form of the guiding principle which the courts have sought to enunciate in phrasing the test in other language. For example, the application of the double negative approach, as stated in some of the recent decisions, presupposes that a reversal will result only when there exists, in the opinion of the court, at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result. But the fact that there exists at least such an equal balance of reasonable probabilities necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' Thus, it appears that the tests, as variously stated, are not fundamentally different but, on the contrary, are essentially the same. Nevertheless, the test, as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." (46 C.2d 836.)

The *Watson* approach has been used in a number of subsequent civil cases. (See *Daly v. General Motors Corp.*

(1978) 20 C.3d 725, 746, 144 C.R. 380, 575 P.2d 1162; *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 574, 34 C.R.2d 607, 882 P.2d 298, *infra*, §455; *Murphy v. Atchison, Topeka & Santa Fe Ry.* (1958) 162 C.A.2d 818, 823, 329 P.2d 75; *Wiley v. Easter* (1962) 203 C.A.2d 845, 858, 21 C.R. 905; *Aldabe v. Aldabe* (1962) 209 C.A.2d 453, 457, 26 C.R. 208, citing the text; *Downing v. Barrett Mobile Home Transport* (1974) 38 C.A.3d 519, 525, 113 C.R. 277, citing the text; *Estate of Kime* (1983) 144 C.A.3d 246, 360, 193 C.R. 718, citing the text; *Wanland v. Los Gatos Lodge* (1991) 230 C.A.3d 1507, 1520, 281 C.R. 890, *supra*, §441; *Beasley v. Wells Fargo Bank* (1991) 235 C.A.3d 1383, 1397, 1 C.R.2d 446; *Daum v. SpineCare Med. Group* (1997) 52 C.A.4th 1285, 1313, 61 C.R.2d 260; 32 *Hastings L. J.* 687, 692.)

In *People v. Graziadio* (1964) 231 C.A. 2d 525, 42 C.R. 29, an action to condemn land for highway purposes, the exclusion of admissible evidence was held nonprejudicial because other evidence permitted defendant's counsel to argue the point involved to the jury (231 C.A.2d 531, 532); and the adverse effect of misconduct of plaintiff's counsel in a remark to the jury was overcome by proper instructions to the jury (231 C.A.2d 534). "Viewing the case in its entirety, we believe there is no reasonable probability that absent the two errors discussed above, the jury would have arrived at a different verdict." (231 C.A.2d 534.)

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c. Illustrations.

1. Rulings on Evidence.

9 Witkin Cal. Proc. Appeal § 446

[§ 446] Rulings on Evidence.

The following selection of cases may be consulted as illustrations of reversible error in a close case:

(1) *Admission of Inadmissible Evidence*. (See *Webster v. Orr* (1917) 174 C. 426, 428, 163 P. 361; *Arnold v. California Portland Cement Co.* (1919) 41 C.A. 420, 424, 183 P. 171 [evidence of insurance]; *Moore v. Norwood* (1940) 41 C.A.2d 359, 368, 106 P.2d 939 [expert witness invading province of jury on main issues of case]; *Buchanan v. Nye* (1954) 128 C.A.2d 582, 587, 275 P.2d 767 [hearsay statement where there was no other eyewitness to accident]; *Wiley v. Easter* (1962) 203 C.A.2d 845, 856, 858, 21 C.R. 905 [hearsay declaration admitted as spontaneous utterance without sufficient foundation]; *Downing v. Barrett Mobile Home Transport* (1974) 38 C.A.3d 519, 525, 113 C.R. 277 [automobile collision; defense counsel's cross-examination of plaintiff to bring out inadmissible prior accident to show accident proneness]; *Loth v. Truck-A-Way Corp.* (1998) 60 C.A.4th 757, 769, 70 C.R.2d 571 [evidence of "hedonic damages" for loss of enjoyment of life created risk of double recovery, because loss of enjoyment of life is but one element of pain and suffering]; *O'Hearn v. Hillcrest Gym & Fitness Center* (2004) 115 C.A.4th 491, 501, 9 C.R.3d 342 [evidence of settlement agreements in unrelated cases].)

(2) *Exclusion of Admissible Evidence on Material Issue*. (See *California Home Extension Assn. v. Hilborn* (1951) 37 C.2d 459, 465, 235 P.2d 369; *Clifton v. Ullis* (1976) 17 C.3d 99, 105, 130 C.R. 155, 549 P.2d 1251; *Longuy v. La Societe Francaise de Bienfaisance Mutuelle* (1921) 52 C.A. 370, 376, 198 P. 1011 [wrongful death case, exclusion of expert opinion on whether victim would have died from disease, regardless of accident]; *Redemeyer v. Cunningham* (1923) 61 C.A. 423, 433, 437, 215 P. 83 [evidence erroneously excluded was proof of one element of appellant's claim of title by adverse possession]; *Gleeson v. Dunn* (1931) 113 C.A. 347, 351, 298 P. 119 [erroneously excluded parol evidence that went to show that contract should take effect only on certain condition]; *Mashbir v. Mashbir* (1938) 29 C.A.2d 733, 734, 85 P.2d 482 [evidence in support of affirmative defense of release stricken out]; *Schubkegel v. Gordino* (1943) 56 C.A.2d 667, 673, 133 P.2d 475 [malicious prosecution action, exclusion of evidence on issue of malice]; *Bole v. Bole* (1946) 76 C.A.2d 344, 346, 172 P.2d 936 [divorce, refusal of trial judge to require 9-year-old child of parties to testify]; *Aldabe v. Aldabe* (1962) 209 C.A.2d 453, 457, 477, 26 C.R. 208; *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 491, 200 C.R. 387 [expert testimony improperly excluded]; *Loftheidir Icelandic Airlines v.*

McDonnell Douglas Corp. (1984) 158 C.A.3d 83, 96, 204 C.R. 358 [same]; *Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 C.A.4th 424, 439, 88 C.R.2d 118 [exclusion of defense evidence of its method of determining cost in bidding below cost case].)

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(1) *Admission of Inadmissible Evidence.* See *Winfred D. v. Michelin North America* (2008) 165 C.A.4th 1011, 1038, 81 C.R.3d 756 [motorist's personal injury action against designer and manufacturer of tire; evidence of motorist's extramarital affairs].



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2. Instructions and Failure To Instruct.

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[§ 447] Instructions and Failure To Instruct.

There may be reversible error in instructions or in refusal or failure to instruct. The factors to be considered in determining whether the error is prejudicial have been stated as follows: Whether instructional error is prejudicial depends heavily on the nature of the error, including its natural and probable effect on a party's ability to place his or her full case before the jury. The court must evaluate (a) the state of the evidence, (b) the effect of other instructions, (c) the effect of counsel's arguments, and (d) any indications by the jury itself that it was misled. (*Soule v. General Motors Corp.* (1994) 8 C.4th 548, 580, 34 C.R.2d 607, 882 P.2d 298, *infra*, §455; see *Rutherford v. Owens-Illinois* (1997) 16 C.4th 953, 954, 67 C.R.2d 16, 941 P.2d 1203 [erroneous instruction on burden of proof in asbestos products liability case was not prejudicial; applying *Soule* analysis]; 24 *Pepperdine L. Rev.* 343 [*Soule*].)

The following are examples in which the error was deemed to be prejudicial:

(1) *Refusal To Give Proper Instruction.* (See *Miller v. Peters* (1951) 37 C.2d 89, 95, 230 P.2d 803 [refusal to give instruction correctly defining issues, and instructing on matter outside issues]; *Williams v. E.W. Robinson Van Lines* (1955) 46 C.2d 14, 15, 291 P.2d 453 [evidence of indemnity agreement, not binding on plaintiff, was admitted without limiting instruction]; *Dawkins v. Los Angeles* (1978) 22 C.3d 126, 135, 148 C.R. 857, 583 P.2d 711; *Rasich v. Gladding McBean & Co.* (1949) 90 C.A.2d 241, 243, 202 P.2d 576; *Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 524, 196 C.R. 82, citing the text; *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 491, 494, 200 C.R. 387; *Barouh v. Haberman* (1994) 26 C.A.4th 40, 44, 31 C.R.2d 259 [refusal to instruct as to meaning of word "unlawful" in instruction defining battery as any intentional, unlawful, and harmful conduct]; *Kaljian v. Menezes* (1995) 36 C.A.4th 573, 583, 42 C.R.2d 510 [refusal to instruct on statute of frauds was prejudicial under test of *Soule*]; *Daum v. SpineCare Med. Group* (1997) 52 C.A.4th 1285, 1313, 61 C.R.2d 260 [refusing request to instruct on negligence per se, where all elements of that doctrine had been established; citing *Soule*]; *Norman v. Life Care Centers of America* (2003) 107 C.A.4th 1233, 1251, 132 C.R.2d 765 [refusal to instruct on negligence per se; based on evidence in record]; 7 *Cal. Proc.* (5th), *Trial*, §258; *infra*, §455.)

(2) *Failure of Court To Give Proper Instruction on Its Own Motion.* (See *Thomas v. Buttress & McClellan* (1956)

141 C.A.2d 812, 819, 297 P.2d 768 [trial judge should have instructed jury on correct measure of damages]; *Lysick v. Walcom* (1968) 258 C.A.2d 136, 157, 65 C.R. 406 [trial judge should have instructed jury that negligence was established as matter of law]; *Williams v. Carl Karcher Enterprises* (1986) 182 C.A.3d 479, 489, 490, 227 C.R. 465; 7 Cal. Proc. (5th), Trial, §261; on greater duty in criminal cases, see 5 Cal. Crim. Law (3d), Criminal Trial, §609 et seq.)

(3) *Erroneous Instructions*. (See *Clement v. State Reclamation Bd., Sacramento San Joaquin Drainage Dist.* (1950) 35 C.2d 628, 644, 220 P.2d 897 [making question one of law instead of fact, and precluding jury from considering theory on which different result might have been reached]; *Rivera v. Parma* (1960) 54 C.2d 313, 317, 5 C.R. 665, 353 P.2d 273; *Robinson v. Cable* (1961) 55 C.2d 425, 428, 11 C.R. 377, 359 P.2d 929 ["The fact that only the bare number of jurors required to reach a verdict agreed upon the verdict for defendants lends further support to the probability that the erroneous instruction was the factor which tipped the scales in defendants' favor"]; *Cervantez v. J.C. Penney Co.* (1979) 24 C.3d 579, 591, 156 C.R. 198, 595 P.2d 975; *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 770, 771, 774, 206 C.R. 354, 686 P.2d 1158, 7 Cal. Proc. (5th), Trial, §305; *Rutherford v. Standard Engineering Corp.* (1948) 88 C.A.2d 554, 562, 199 P.2d 354; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 C.A.4th 1735, 1747, 52 C.R.2d 620; *Daum v. SpineCare Med. Group, supra*, 52 C.A.4th 1313 [instructing jury in medical malpractice action involving informed consent to consider only expert testimony on duty of disclosure, where statute and regulation also affected that duty]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 C.A.4th 374, 393, 70 C.R.2d 427 [instruction, in close case, erroneously placing burden of proof on defendant, instead of plaintiff]; 90 A.L.R.2d 1040 [informing jury of effect special verdict may have on ultimate liability or judgment]; 7 Cal. Proc. (5th), Trial, §305.)

(4) *Contradictory Instructions*. Where the jury is both correctly and incorrectly instructed, and it cannot be determined from the record which of the conflicting instructions were followed in reaching the verdict, a reversal may be ordered. (See *Hobart v. Hobart Estate Co.* (1945) 26 C.2d 412, 447, 449, 159 P.2d 958; *Lane v. Pacific Greyhound Lines* (1945) 26 C.2d 575, 586, 160 P.2d 21; *Cobbs v. Grant* (1972) 8 C.3d 229, 238, 104 C.R. 505, 502 P.2d 1; *LeMons v. Regents of Univ. of Calif.* (1978) 21 C.3d 869, 876, 148 C.R. 355, 582 P.2d 946; *Soda v. Marriott* (1931) 118 C.A. 635, 643, 5 P.2d 675; *Bellows v. San Francisco* (1951) 106 C.A.2d 57, 60, 234 P.2d 729; *Finley v. San Francisco* (1952) 115 C.A.2d 116, 122, 251 P.2d 687; 7 Cal. Proc. (5th), Trial, §308.)

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3. Defective Verdict or Statement of Decision.

9 Witkin Cal. Proc. Appeal § 448

[§ 448] Defective Verdict or Statement of Decision.

Defects in the verdict of the jury are frequent bases of reversal. (See *Koebig v. Southern Pac. Co.* (1895) 108 C. 235, 239, 41 P. 469 [verdict contrary to instructions]; *Haydel v. Morton* (1935) 8 C.A.2d 730, 736, 48 P.2d 709, 7 Cal. Proc. (5th), Trial, §363 [verdict inconsistent as to damages]; *Davison v. Diamond Match Co.* (1935) 10 C.A.2d 218, 220, 51 P.2d 452 [verdict against employer, exonerating employee]; *Mish v. Brockus* (1950) 97 C.A.2d 770, 776, 218 P.2d 849 [uncertainty of verdict]; *Bond v. De Witt* (1954) 126 C.A.2d 540, 544, 272 P.2d 561 [special finding inconsistent with general verdict]; *Mixon v. Riverview Hosp.* (1967) 254 C.A.2d 364, 380, 62 C.R. 379, 7 Cal. Proc. (5th), Trial, §356 [improper apportionment of recovery]; *Byrum v. Brand* (1990) 219 C.A.3d 926, 939, 268 C.R. 609, citing the text [special verdict form in conflict with instructions]; 7 Cal. Proc. (5th), Trial, §§354 et seq., 375.)

Defective findings (now statement of decision) also provide common grounds for reversal:

(1) Failure to find on a material issue. (See *Arnold v. Arnold* (1946) 76 C.A.2d 877, 881, 174 P.2d 674; *San Jose Abstract & Title Ins. Co. v. Elliott* (1952) 108 C.A.2d 793, 801, 240 P.2d 41.)

(2) Contradictory, inconsistent, or uncertain findings. (See *Andrews v. Cunningham* (1951) 105 C.A.2d 525, 528, 233 P.2d 563; *Chase v. Shasta Lake Union School Dist.* (1968) 259 C.A.2d 612, 616, 66 C.R. 517.)

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1. Close Case.

d. Review of Conflicting Evidence.

9 Witkin Cal. Proc. Appeal § 449

[§ 449] Review of Conflicting Evidence.

Because reviewing courts refuse to consider the weight of evidence, they occasionally affirm judgments despite an overwhelming preponderance of evidence in favor of the appellant. (See *supra*, §§366, 370.) But this severe self-imposed limitation on the appellate power to review the facts alone is balanced by an unrestricted power and duty to review them when error is shown. An unjust judgment against the weight of the evidence, safe from attack on that ground, may be overturned on a showing of errors of a type that are not unusual in trials. It should make little difference to the appellant which door is opened to him or her, and the appellant should be careful to frame his or her argument in the proper form, using the weight of evidence not as a ground for reversal but as a basis for showing prejudice from the error.

This approach is expounded in the famous case of *Herbert v. Lankershim* (1937) 9 C.2d 409, 71 P.2d 220: "In the state of the evidence in this case it is a very serious question whether, as a matter of law, the evidence adduced by the plaintiff is sufficiently substantial to support the judgment. In cases in which a serious doubt is created in the mind of the reviewing court as to the sufficiency of the evidence to support the judgment, it becomes the duty of the court to consider carefully the errors complained of, and if it should appear upon such consideration that the errors committed probably prejudiced the case of the party against whom they were committed, it is the duty of the court to order a retrial of the cause. In such cases the provisions of article VI, section 412 [now Cal. Const., Art. VI, §13] of the Constitution cannot be invoked in aid of the affirmance of the judgment, unless it can be said that the justice of the cause preponderated so heavily on the side of the prevailing party that none of such errors did or could have contributed to or resulted in a miscarriage of justice." (9 C.2d 476.)

The *Lankershim* theory may be the underlying basis for many of the "close case" reversals for particular errors (see *supra*, §443 et seq.). But opinions expressly relying on *Lankershim* are extremely rare. (See, e.g., *Belletich v. Pollock* (1946) 75 C.A.2d 142, 149, 171 P.2d 57; *Wilson v. Manduca* (1965) 233 C.A.2d 184, 187, 43 C.R. 435.)

In *Wilson*, plaintiff sued her ex-husband to quiet title to land, and he defended by introducing a deed from her to him. She claimed that it was a forgery, offering a strong showing: a qualified handwriting expert, and two witnesses who testified that she was out of the state at the time of the alleged signing. He called a bank officer and a notary who

testified that plaintiff signed and acknowledged the deed. The trial judge, observing that the case was close, thought that plaintiff had not sustained her burden of proof, and decided for defendant. The appellate court declared that it could not reverse on the facts, which were sufficient to sustain the judgment, but found an error: Defendant, over objection, offered a witness who testified to plaintiff's drinking habits when she came to his bank. There was no foundation by a showing of drinking at the time of alleged execution of the deed, and the handwriting expert testified that drinking would not alter the fundamental characteristics of the handwriting. Hence, the evidence was irrelevant and improperly admitted.

This was not a true *Lankershim* case, for it was tried without a jury. But the court cited two cases for the view that admission of improper evidence may be as prejudicial in a court trial as in a jury trial (see *supra*, §422). "It seems probable, in view of the striking conflict of the evidence, and the trial court's statement of its consideration of the proofs on each side, that the improperly admitted evidence received marked consideration by the court and that its weight tilted the scales in favor of the defendants." (233 C.A.2d 190.)

This may well be questioned. The test of probable prejudice should not be the same for jurors and judges (see *supra*, §422), and it is difficult to believe that any judge would have been seriously influenced by this minor item of irrelevant matter.

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2. Numerous Errors Having Cumulative Effect.

9 *Witkin Cal. Proc. Appeal* § 450

[§ 450] Numerous Errors Having Cumulative Effect.

Sometimes the record discloses a number of errors that individually might be relatively unimportant and unsubstantial. However, where the errors take place continuously, their cumulative effect may be highly prejudicial and ground for a reversal. This is particularly true of misconduct of counsel, court, or jury. (See *Delzell v. Day* (1950) 36 C.2d 349, 351, 223 P.2d 625; *Gackstetter v. Market Street Ry. Co.* (1933) 130 C.A. 316, 326, 20 P.2d 93; *Carlston v. Shenson* (1941) 47 C.A.2d 52, 61, 117 P.2d 408; *Andrews v. Orange* (1982) 130 C.A.3d 944, 955, 957, 959, 960, 182 C.R. 176 [many acts of misconduct by juror indicating prejudgment of case and possible concealment of bias on voir dire]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §668; 7 *Cal. Proc.* (5th), *Trial*, §213.)

But a word of caution was expressed in *Dam v. Lake Aliso Riding School* (1936) 6 C.2d 395, 57 P.2d 1315. Appellant set forth "more than fifty acts, statements, rulings or decisions" as misconduct or other error. The court said: "Counsel ... proceeds upon the assumption that a multitude of minor errors acquires the cumulative force of grave and prejudicial error. This might be possible when they establish a course of conduct from which the court can infer that the appellant was deprived of a fair trial. But the intelligence and spirit of fairness usually manifested by trial courts makes very exceptional the unfair conduct of a trial. We are unable to say that there was any such unfair trial in this case." (6 C.2d 399.)

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3. Error Intentional or in Bad Faith.

9 *Witkin Cal. Proc. Appeal* § 451

[§ 451] Error Intentional or in Bad Faith.

The element of bad faith or deliberate intention may be a factor in making error reversible. The cases are nearly all concerned with misconduct of counsel or the attempted introduction of unduly prejudicial matter in evidence, under circumstances that the effect cannot be eradicated or "cured" by an instruction or admonition. Sometimes, in stressing the bad conduct of respondents, the courts seem to give only cursory attention to the state of the evidence; and these opinions constitute a warning to attorneys and trial judges not to rely on the constitutional provision as a cure-all or cloak for intentional error.

In *Keena v. United R. of San Francisco* (1925) 197 C. 148, 239 P. 1061, counsel charged his opponent with wilful suppression of evidence where the latter had merely failed to call a particular witness. The charge was made repeatedly, deliberately, and included hints and insinuations. "It is altogether too evident that the purpose of the accusation ... was none other than to bolster up a weak case by creating a prejudice against the defendant in the minds of the members of the jury. Such means of winning a lawsuit cannot be commended or receive recognition and indorsement by this court." (197 C. 159.)

In *Gee v. Poy* (1928) 88 C.A. 627, 264 P. 564, irrelevant evidence tending to degrade appellant was offered. The opinion quotes a prior criminal case as follows: "There are bounds beyond which the saving grace of this provision may not pass, and the appellate courts should not be called upon to spread it, like 'a mantle of sweet charity,' over intentional acts of misconduct. Frequent warnings in relation to the practice governing proving ineffectual, reversals on appeal must be anticipated if the right of defendants to a fair trial is to prevail." (88 C.A. 647.)

Other cases with similar language are numerous. (See *Citti v. Bava* (1928) 204 C. 136, 138, 266 P. 954 [court refers to "avowed purpose and successful attempt of plaintiff's counsel" to bring improper matter before the jury]; *Sanguinetti v. Moore Dry Dock Co.* (1951) 36 C.2d 812, 819, 228 P.2d 557, 7 Cal. Proc. (5th), Trial, §223 [motion to increase damage prayer, made in presence of jury]; *Arnold v. California Portland Cement Co.* (1919) 41 C.A. 420, 427, 183 P. 171; *Peacock v. Levy* (1931) 114 C.A. 246, 252, 299 P. 790 [flagrant misconduct of such prejudicial nature that Constitution could not be relied upon to save judgment]; *Davis v. Pezel* (1933) 131 C.A. 46, 50, 20 P.2d 982 [gross misconduct of judge]; *Pennix v. Winton* (1943) 61 C.A.2d 761, 774, 143 P.2d 940; *Podlasky v. Price* (1948) 87 C.A.2d 151, 164, 196 P.2d 608 [gross misconduct of judge]; *Dastagir v. Dastagir* (1952) 109 C.A.2d 809, 810, 816, 241 P.2d

656 [reversal for serious misconduct despite failure of appellant's trial counsel to object]; *Stevenson v. Link* (1954) 128 C.A.2d 564, 565, 275 P.2d 782, 7 Cal. Proc. (5th), Trial, §218 [deliberate and successful attempt to get before jury fact of insurance and inadmissible prior acquittal in criminal case; not cured by court's admonitions where evidence in sharp conflict]; *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 C.A.4th 1305, 1315, 64 C.R.2d 705, 9 Cal. Proc. (5th), Administrative Proceedings, §74, citing the text; 7 Cal. Proc. (5th), Trial, §244 et seq.; cf. *Sabella v. Southern Pac. Co.* (1969) 70 C.2d 311, 317, 74 C.R. 534, 449 P.2d 750 [waiver of misconduct].)

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4. Federal Constitutional Error.

9 *Witkin Cal. Proc. Appeal* § 452

[§ 452] Federal Constitutional Error.

In criminal cases, where the error is of constitutional dimension, reversal is required unless the reviewing court can declare that it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 705, 6 Cal. Crim. Law (3d), *Reversible Error*, §10.) In a civil case in which a deprivation of individual liberty is involved, should the test of probable prejudice (see supra, §445) or the stricter *Chapman* rule apply? In *Conservatorship of Buchanan* (1978) 78 C.A.3d 281, 144 C.R. 241, the appeal was from an order entered on a jury verdict finding appellant "gravely disabled" and appointing the public guardian his conservator (Welf.C. 5350; see 14 *Summary* (10th), *Wills and Probate*, §945). The court held that the *Chapman* standard applied, but found the error harmless beyond a reasonable doubt. (78 C.A.3d 288, 289.)

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E. Reversible Error Per Se.

1. Theory of Error Necessarily Reversible.

9 *Witkin Cal. Proc. Appeal* § 453

[§ 453] Theory of Error Necessarily Reversible.

If the constitutional provision (supra, §416) were applied literally, no error could be held reversible by itself and without regard to the circumstances and the evidence. But this has not been the practice of the reviewing courts. Some errors are regarded as so serious that, under any circumstances, they must be deemed prejudicial. And, although it may be inconsistent with the constitutional theory, there is an undeniable practice of placing certain fundamental rights beyond the reach of the "protective mantle" of Cal. Const., Art. VI, §13.

This theory of reversible error per se has been given an enormous scope in criminal cases. (See 6 *Cal. Crim. Law* (3d), *Reversible Error*, §20 et seq.) In civil cases, however, it is infrequently applied and to a less extensive list of errors. (See *infra*, §454 et seq.)

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2. Denial or Impairment of Jury Trial.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 454

[§ 454] In General.

Where the case is triable by jury, and a jury is not waived, denial or substantial impairment of the right has been held to constitute an act in excess of jurisdiction. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §306.) Necessarily, therefore, if raised on appeal, it is reversible error per se. (See *People v. One 1941 Chevrolet Coupe* (1951) 37 C.2d 283, 300, 231 P.2d 832; *Cowlin v. Pringle* (1941) 46 C.A.2d 472, 476, 116 P.2d 109; *Leibman v. Curtis* (1955) 138 C.A.2d 222, 226, 291 P.2d 542, 292 P.2d 270, 7 *Cal. Proc.* (5th), *Trial*, §§132, 134 [erroneous denial of good challenge for cause, resulting in exhaustion of peremptories while still dissatisfied with jury]; *Redondo Beach v. Kumnick* (1963) 216 C.A.2d 830, 839, 31 C.R. 367, 7 *Cal. Proc.* (5th), *Trial*, §102 [erroneous determination that jury in condemnation action was waived by failure to deposit fees]; *Selby Constructors v. McCarthy* (1979) 91 C.A.3d 517, 527, 154 C.R. 164 [deprivation of right to jury trial in action basically involving legal issues]; *Holley v. J & S Sweeping Co.* (1983) 143 C.A.3d 588, 594, 192 C.R. 74, 7 *Cal. Proc.* (5th), *Trial*, §128 [use of peremptory challenge based solely on ground of group bias]; *Old Republic Ins. Co. v. FSR Brokerage* (2000) 80 C.A.4th 666, 681, 95 C.R.2d 583, citing the text.)

Buckley v. Chadwick (1955) 45 C.2d 183, 288 P.2d 12, 289 P.2d 242, is in theory distinguishable from the *Leibman* case (and is distinguished therein). Plaintiff's statutory right to a peremptory challenge of a juror, after having passed it, was erroneously denied. (See 7 *Cal. Proc.* (5th), *Trial*, §135.) It was held, nevertheless, that no miscarriage of justice had resulted, because plaintiff had made no affirmative showing that the jurors selected were biased or otherwise unfit, or that he did not have an impartial trial. (45 C.2d 201.) The decision was strongly attacked in dissenting opinions and criticized in the law reviews on two chief grounds: (a) No practical means of showing prejudice exists; and (b) the rule in criminal cases, treating the right of challenge as part of the constitutional guarantee of jury trial, and its denial as not a mere error in procedure, should be followed in civil cases. (See 7 *Hastings L. J.* 320; 8 *Stanf. L. Rev.* 699; 3 *U.C.L.A. L. Rev.* 384.)

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2. Denial or Impairment of Jury Trial.

b. Distinction: Refusal To Give Instruction.

9 *Witkin Cal. Proc. Appeal* § 455

[§ 455] Distinction: Refusal To Give Instruction.

Contrary to the general rule that the refusal to give a proper instruction is a substantial error that, depending on the state of the record, may or may not be deemed prejudicial (see *supra*, §447), *Phillips v. G.L. Truman Excavation Co.* (1961) 55 C.2d 801, 13 C.R. 401, 362 P.2d 33, held that the error was "obviously and necessarily" prejudicial because of its effect on the right to a jury trial. (55 C.2d 808.)

However, in *Soule v. General Motors Corp.* (1994) 8 C.4th 548, 34 C.R.2d 607, 882 P.2d 298, the court reviewed the standard of reversibility applicable to the erroneous omission of instructions, and concluded that, contrary to the *Phillips* holding, no category of civil instructional error is so inherently prejudicial as to escape the requirement of Cal. Const., Art. VI, §13, that actual prejudice must be shown. Plaintiff successfully sued the manufacturer of her car for injuries sustained in a collision. On appeal, defendant raised two instances of error in the instructions: (1) The jury should not have been instructed on the "ordinary consumer expectations" standard for establishing a design defect; and (2) the trial judge should not have refused a special instruction requested by defendant, to the effect that any design defect was not a legal cause of plaintiff's injuries if the injuries would have occurred with a nondefective design. *Held*, affirmed. Neither error caused actual prejudice. Although substantial authority supported defendant's argument that refusal of the causation instruction was reversible error per se, this argument overlooks California's constitutional requirement that a judgment not be reversed unless error caused actual prejudice in light of the whole record.

(a) Cal. Const., Art. VI, §13, states that a judgment may not be reversed, even for "misdirection of the jury," unless "after an examination of the entire cause, including the evidence," it appears that the error caused a "miscarriage of justice." An error of state law generally does not warrant reversal unless there is a reasonable probability that without the error, the result would have been more favorable to the appealing party. (8 C.4th 574, citing *People v. Watson* (1956) 46 C.2d 818, 836, 299 P.2d 243, *supra*, §445.) Nevertheless, a substantial body of California decisions recites that the erroneous denial of correct specific instructions on a civil litigant's "theory of the case" is "inherently" prejudicial, under the rationale that the error prevents jury consideration of the omitted theory and to that extent denies the right to a jury trial. (8 C.4th 574, 575, citing *Phillips*, among other cases.)

(b) *People v. Cahill* (1993) 5 C.4th 478, 20 C.R.2d 582, 853 P.2d 1037, 6 Cal. Crim. Law (3d), *Reversible Error*,

§12, draws a distinction between (1) "structural defects in the constitution of the trial mechanism," like those that are automatically reversible in criminal cases under federal constitutional law, and (2) mere "trial error" occurring during presentation of the case to the jury, which may be quantitatively assessed in the context of the other evidence in order to determine whether its admission was prejudicial or harmless. (8 C.4th 577, quoting *People v. Cahill*, 5 C.4th 502, and *Arizona v. Fulminante* (1991) 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, 6 Cal. Crim. Law (3d), *Reversible Error*, §11.) Earlier California authorities justified an exception for involuntary confessions based on the extraordinary evidentiary impact of confessions, but *Cahill* rejected this rationale as inconsistent with Cal. Const., Art. VI, §13, which specifies "the admission or rejection of evidence" as an issue subject to harmless error analysis. *Cahill* also declined to retain a rule of per se reversibility for its deterrent effect or as a matter of stare decisis. (8 C.4th 578.)

(c) The principles developed in *Cahill*, "properly adapted," apply with equal or even greater force here. "[T]he constitutional requirement of actual prejudice cannot apply any less stringently to a civil judgment than to a criminal conviction." (8 C.4th 578.) Cal. Const., Art. VI, §13, explicitly mentions "misdirection of the jury" as error warranting reversal only if a miscarriage of justice results. The word "misdirection" logically includes every kind of instructional error. And the erroneous refusal of a proffered civil instruction is not a structural defect in the trial mechanism that defies evaluation for harmlessness. Instead, like the improper admission of evidence in *Cahill*, it is a trial error that may be assessed in context to determine whether it was prejudicial or harmless. If a civil litigant was permitted to introduce evidence, cross-examine witnesses, and present argument before a fairly selected jury that rendered its honest verdict on the trial record, there is no structural defect calling for automatic reversal without consideration of actual prejudice. Obviously, any substantial error during the presentation of the case to the jury impairs the jury function to some degree, but that does not make every such error a fundamental denial of the right to a jury. (8 C.4th 579.)

(d) "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' " Contrary implications in prior decisions are disapproved and overruled. (8 C.4th 580.)

(e) Instructional error in a civil case is prejudicial " 'where it seems probable' that the error 'prejudicially affected the verdict.' " (8 C.4th 580, citing *LeMons v. Regents of Univ. of Calif.* (1978) 21 C.3d 869, 148 C.R. 355, 582 P.2d 946, 7 Cal. Proc. (5th), Trial, §305; *Pool v. Oakland* (1986) 42 C.3d 1051, 232 C.R. 528, 728 P.2d 1163, and *People v. Watson*.) "Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury. ... [W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (8 C.4th 580, 581.) (See 24 *Pepperdine L. Rev.* 343 [Soule].)

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3. Denial of Fair Hearing.

9 *Witkin Cal. Proc. Appeal* § 456

[§ 456] Denial of Fair Hearing.

A fair hearing is a requisite of due process in both civil and criminal cases; hence, its denial is an act in excess of jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §302 et seq.) and reversible error per se.

A purported entry of judgment without findings, in a case requiring findings, has been held reversible error per se. (See *Engleman v. Green* (1954) 125 C.A.2d Supp. 882, 886, 270 P.2d 127; *Mellinger v. Municipal Court* (1968) 265 C.A.2d 843, 847, 71 C.R. 535; 7 *Cal. Proc.* (5th), *Judgment*, §47.) (On abolition of findings and substitution of statement of decision, see 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.)

The following are examples of other acts resulting in the denial of a fair hearing:

(1) *Striking Out Proper Pleading.* (See *People v. Lagiss* (1958) 160 C.A.2d 28, 32, 324 P.2d 926; *Deeter v. Angus* (1986) 179 C.A.3d 241, 251, 224 C.R. 801, citing the text; 2 *Cal. Proc.* (5th), *Jurisdiction*, §307; 5 *Cal. Proc.* (5th), *Pleading*, §§1008, 1009.)

(2) *Denial of Party's Right To Testify or To Offer Evidence.* (See *Guardianship of Waite* (1939) 14 C.2d 727, 729, 97 P.2d 238; *Fewel v. Fewel* (1943) 23 C.2d 431, 433, 144 P.2d 592; *National Auto. Ins. Co. v. Fraties* (1941) 46 C.A.2d 431, 434, 115 P.2d 997; *Shippey v. Shippey* (1943) 58 C.A.2d 174, 175, 136 P.2d 86; *Estate of Buchman* (1954) 123 C.A.2d 546, 559, 267 P.2d 73, 2 *Cal. Proc.* (5th), *Jurisdiction*, §308; *Caldwell v. Caldwell* (1962) 204 C.A.2d 819, 821, 22 C.R. 854, citing the text; *Adoption of Baby Girl B.* (1999) 74 C.A.4th 43, 52, 87 C.R.2d 569.)

(3) *Denial of Right of Cross-Examination.* (See *McCarthy v. Mobile Cranes* (1962) 199 C.A.2d 500, 509, 18 C.R. 750, citing the text.)

(4) *Evidence Taken Outside of Court.* (See *Fewel v. Fewel*, *supra* [judge's reliance on confidential report of domestic relations investigator]; *Noble v. Kertz & Sons Feed & Fuel Co.* (1945) 72 C.A.2d 153, 158, 164 P.2d 257 [judge's view of scene without presence of parties or counsel]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §309.)

(5) *Refusal To Hear Case on Merits After General Reversal.* (See *Erlin v. National Union Fire Ins. Co.* (1936) 7 C.2d 547, 549, 61 P.2d 756, *infra*, §870.)

(6) *Representation by Counsel With Adverse Interest*. (See *Hammett v. McIntyre* (1952) 114 C.A.2d 148, 158, 249 P.2d 885, 1 Cal. Proc. (5th), Attorneys, §119 ["Without deciding whether a correct decision has been rendered in this particular case, to us it seems imperative that the fairness and purity of trial procedure is of paramount importance"]; *In re Marriage of Jackson* (2006) 136 C.A.4th 980, 997, 39 C.R.3d 365 [terminating parental rights without appointing counsel for children was jurisdictional error and was reversible per se].)

(7) *Judgment Entered After Erroneous Granting of Motion for Summary Judgment*. A judgment entered on the erroneous granting of a motion for summary judgment is clearly reversible error per se. Because no trial was held, the error constitutes a denial of a fair hearing (supra, §456). (See *Dvorin v. Appellate Dept.* (1975) 15 C.3d 648, 651, 125 C.R. 771, 542 P.2d 1363 [summary judgment granted to plaintiff though defendant was sole moving party]; *Callahan v. Chatsworth Park* (1962) 204 C.A.2d 597, 610, 22 C.R. 606; 6 Cal. Proc. (5th), *Proceedings Without Trial*, §265.)

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(8) *(New) Ending Trial While Party Is Still Presenting Evidence*. (See *In re Marriage of Carlsson* (2008) 163 C.A.4th 281, 290, 77 C.R.3d 305.)



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4. Failure To Issue Sufficient Statement of Decision.

9 *Witkin Cal. Proc. Appeal* § 457

[§ 457] Failure To Issue Sufficient Statement of Decision.

When requested under *C.C.P.* 632, the trial court must issue a statement of decision that meets the statutory requirements; and issuance of an insufficient statement has been held to constitute reversible error per se. (*Miramar Hotel Corp. v. Frank B. Hall & Co. of Calif.* (1985) 163 C.A.3d 1126, 1129, 1130, 210 C.R. 114, 7 Cal. Proc. (5th), Trial, §§402, 405.)

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F. Confession of Error.

9 *Witkin Cal. Proc. Appeal* § 458

[§ 458] Confession of Error.

(1) *Respondent's Right To Authorize Reversal.* The adversary theory of litigation leaves it to the losing party and his or her counsel to determine whether to take or pursue an appeal; hence, the losing party may waive the right to appeal, or dismiss an appeal already taken. (See *supra*, §63 et seq., and *infra*, §731 et seq.) If an appeal is taken, the successful respondent has an equivalent right to admit that the appeal is meritorious and to consent to reversal of the judgment. This consent, usually termed a "confession of error," may be made in open court, or by written stipulation filed, or even in a brief. (See 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §802; 2 *Am.Jur.* P.P. Forms (2000 ed.), *Appeal and Error*, §705.) A mere admission that error occurred is consistent with the contention that it was not prejudicial; but a confession of error is an admission that reversible error occurred and a consent to reversal.

In most cases, the court will accept the offer and reverse summarily by a memorandum opinion without discussion of the issues. (See, e.g., *Morales v. Ingels* (1937) 23 C.A.2d 53, 54, 72 P.2d 172 [reversal with directions to sustain demurrer with permission to amend]; *Pacific Gas & Elec. Co. v. Davis* (1949) 93 C.A.2d 869, 870, 209 P.2d 12 [stipulation to reverse where companion case was controlling]; *Love v. Wolf* (1967) 249 C.A.2d 822, 840, 58 C.R. 42 [consent to reversal of order granting new trial for inadequacy of damages, where applicable statute would preclude greater award].)

In re Thiesen (1956) 141 C.A.2d 274, 277, 296 P.2d 566, involved an appeal from an order denying a petition for naturalization of a conscientious objector. The Department of Justice conceded in its brief that the decision was inconsistent with that of the United States Supreme Court in two controlling cases, confessed error, and suggested that, if the court agreed, the order should be reversed and the cause remanded with directions to admit the appellant to citizenship. It was so ordered. (141 C.A.2d 277.)

(2) *Reviewing Court's Power To Examine Record.* In some opinions, the courts have cast doubt on the absolute power of the respondent, by adding a recital to the effect that the record has been examined and that the point appears to be well taken. (See *Waite v. Waite* (1919) 180 C. 238, 239, 180 P. 941; *Security-First Nat. Bank of Los Angeles v. Denton* (1936) 11 C.A.2d 707, 54 P.2d 504 ["The errors pointed out appear to be material, prejudicial and sufficient to justify a reversal"]; *Courts v. Thomson* (1939) 33 C.A.2d 89, 90, 91 P.2d 135 ["it appears from an examination of the record ... that legal grounds exist for the granting of such request"]; *Love v. Wolf, supra*, 249 C.A.2d 840.)

In *Thaler v. Thaler* (1932) 127 C.A. 28, 15 P.2d 192, this doubt became an explicit denial: "The mere fact that respondent is now willing to have the order reversed would not justify this court in rendering a judgment of reversal. A judgment or order will not be reversed unless the record shows some legal ground for reversal." (127 C.A. 29.) (On federal practice in criminal appeals and other public matters, see *Sibron v. New York* (1968) 392 U.S. 40, 88 S.Ct. 1889, 1912, 20 L.Ed.2d 917, 932, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §249 [confession of error does not relieve appellate court of duty to examine record on merits]; cf. *Casey v. United States* (1952) 343 U.S. 808, 72 S.Ct. 999, 96 L.Ed. 1317, 1318 [dissenting opinion]; 66 Harv. L. Rev. 182.)

In *Sun Ins. Co. v. White* (1897) 118 C. 468, 50 P. 546, respondent filed a confession of error as to certain rulings of the trial judge and moved that the case be reversed for a new trial. Appellant resisted the motion on the ground that not all the errors committed were confessed, and that on the record a reversal with directions to enter judgment for appellant should be given. *Held*, the motion should not be granted; the respondent cannot foreclose examination of the record by a confession of certain errors that may or may not be determinative of the rights of the parties. (118 C. 469.)

In *Clay v. Clay* (1937) 19 C.A.2d 589, 65 P.2d 1363, the appellate court summarily reversed on the sole authority of a stipulation. But, because it was a divorce case, the court refused to follow the agreement for direction of judgment for defendant, and ordered a general reversal in order to allow the trial judge to exercise further jurisdiction. (19 C.A.2d 590.)

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XII. LAW OF THE CASE

A. Nature of Doctrine.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 459

[§ 459] In General.

If a case is first tried, and the judgment rendered is reversed on appeal, it will ordinarily be tried again (except where the reversal is with directions to enter judgment). (See *infra*, §870.) And after retrial (and in some situations after a judgment is entered pursuant to directions), another appeal may be taken. The doctrine of "law of the case" deals with the effect of the first appellate decision on the subsequent retrial or appeal. The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.

A typical statement of the doctrine appears in *Tally v. Ganahl* (1907) 151 C. 418, 90 P. 1049: "[W]here, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal ... and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular. ... Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." (151 C. 421.)

Applications of the doctrine are exceedingly numerous. (See *Klauber v. San Diego Street Car Co.* (1893) 98 C. 105, 107, 32 P. 876; *Wallace v. Sisson* (1896) 114 C. 42, 43, 45 P. 1000, *infra*, §471; *Estate of Baird* (1924) 193 C. 225, 234, 223 P. 974; *United Dredging Co. v. Industrial Acc. Com.* (1930) 208 C. 705, 712, 284 P. 922; *Deacon v. Bryans* (1931) 212 C. 87, 89, 298 P. 30; *Hoffman v. Southern Pac. Co.* (1932) 215 C. 454, 457, 11 P.2d 387; *Penziner v. West Amer. Finance Co.* (1937) 10 C.2d 160, 169, 74 P.2d 252; *Gore v. Bingaman* (1942) 20 C.2d 118, 121, 124 P.2d 17; *Wells v. Lloyd* (1942) 21 C.2d 452, 454, 132 P.2d 471; *Allen v. California Mut. Bldg. & Loan Assn.* (1943) 22 C.2d 474, 481, 139 P.2d 321; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 642, 160 P.2d 804; *Pigeon Point Ranch v. Perot* (1963) 59 C.2d 227, 232, 28 C.R. 865, 379 P.2d 321, *infra*, §469; *People v. Durbin* (1966) 64 C.2d 474, 477, 50 C.R. 657, 413 P.2d 433; *Clemente v. California* (1985) 40 C.3d 202, 210, 219 C.R. 445, 707 P.2d 818; *Nally v. Grace Community Church* (1988) 47 C.3d 278, 301, 253 C.R. 97, 763 P.2d 948, quoting the text; *George Arakelian Farms v. Agricultural Lab. Rel. Bd.* (1989) 49 C.3d 1279, 1291, 265 C.R. 162, 783 P.2d 749 ["once a court has passed on a question of law in its review of agency action, the agency cannot act inconsistently with the court's orders"]; *People's Lumber Co. v. Gillard* (1907) 5 C.A. 435, 438, 90 P. 556; *Elliott v. Bunce* (1909) 10 C.A. 741, 742, 103 P. 897; *Merchants' Nat. Bank of San Francisco v. Carmichael* (1920) 50 C.A. 749, 755, 196 P. 76; *Snoffer v. Los Angeles*

(1936) 14 C.A.2d 650, 653, 58 P.2d 961; *Swarzwald v. Cooley* (1940) 39 C.A.2d 306, 319, 103 P.2d 580; *Blatz Brewing Co. v. Collins* (1948) 88 C.A.2d 438, 441, 199 P.2d 34; *Benson v. Andrews* (1958) 166 C.A.2d 44, 51, 332 P.2d 698, quoting the text; *People v. Rath Packing Co.* (1974) 44 C.A.3d 56, 57, 118 C.R. 438; *Meyer v. Byron Jackson* (1984) 161 C.A.3d 402, 409, 207 C.R. 663; *Wilder v. Whittaker Corp.* (1985) 169 C.A.3d 969, 972, 215 C.R. 536, quoting the text; *Fogerty v. California* (1986) 187 C.A.3d 224, 234, 231 C.R. 810; *Hanna v. Los Angeles* (1989) 212 C.A.3d 363, 376, 260 C.R. 782, quoting the text; *Yu v. Signet Bank/Virginia* (2002) 103 C.A.4th 298, 312, 126 C.R.2d 516 [by raising new arguments, "[l]itigants are not free to continually reinvent their position on legal issues that have been resolved against them by an appellate court"]; *In re Marriage of Balcof* (2006) 141 C.A.4th 1509, 1518, 47 C.R.3d 183 [in second appeal in marital dissolution proceeding, law of case doctrine prevented wife from claiming that, after first appeal had ruled that writing transmuting community property to wife's separate property was effective, case had been improperly remanded to decide whether transmutation was enforceable]; *Rutter Group*, 2 Civil Appeals and Writs §14:172 et seq.; 42 *Harv. L. Rev.* 938; 62 *Harv. L. Rev.* 286; 5 *Stanf. L. Rev.* 751; 87 *A.L.R.2d* 271 [erroneous decision as law of case on subsequent appellate review]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §566 et seq.)

The doctrine applies to criminal as well as civil cases. (*People v. Shuey* (1975) 13 C.3d 835, 841, 845, 120 C.R. 83, 533 P.2d 211 [doctrine applies to both prosecution and defendant]; *People v. Harvey* (1958) 156 C.A.2d 516, 518, 319 P.2d 689; *Castiel v. Superior Court* (1958) 162 C.A.2d 710, 711, 328 P.2d 476 [decision on prior appeal established right of defendant to disclosure of name of prosecution's informer; mandamus issued to compel trial judge to order disclosure]; *People v. Getty* (1975) 50 C.A.3d 101, 106, footnote 3, 123 C.R. 704 [stating rule but applying exceptions]; *People v. Sequeira* (1982) 137 C.A.3d 898, 901, 188 C.R. 470, quoting the text [applying exception for intervening change in law]; *People v. Sandoval* (1987) 194 C.A.3d 481, 487, 239 C.R. 544 [decision on prior appeal that prison sentence was not cruel or unusual punishment]; *In re Saldana* (1997) 57 C.A.4th 620, 624, 625, 67 C.R.2d 183, quoting the text [stating rule but applying exception for intervening change in law].)

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XII. LAW OF THE CASE

A. Nature of Doctrine.

2. Appellate Court Decisions.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 460

[§ 460] In General.

(1) *Doctrine Is Not Applicable to Trial Court Decisions.* The doctrine applies only to a decision of an appellate court in the same case. Final decisions or rulings of a trial court in a separate case, or in various independent stages of a proceeding, are governed by the distinct principle of res judicata. (*Lawrence v. Ballou* (1869) 37 C. 518; *Los Angeles v. Oliver* (1929) 102 C.A. 299, 326, 283 P. 298; *Provience v. Valley Clerks Trust Fund* (1984) 163 C.A.3d 249, 256, 209 C.R. 276, quoting the text [doctrine was not applicable to ruling of federal district court to which case was removed and which later remanded case to state court]; *Tippett v. Terich* (1995) 37 C.A.4th 1517, 1523, footnote 2, 44 C.R.2d 862, citing the text [doctrine was not applicable to ruling granting motion for judgment on pleadings directed to original complaint in action]; see 42 *Harv. L. Rev.* 938; 5 *Stanf. L. Rev.* 754; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §567; 7 *Cal. Proc.* (5th), *Judgment*, §334.)

(2) *Doctrine Is Applicable to Court of Appeal Decisions.* It is sometimes said that the doctrine only applies to a "court of last resort" or the "highest court." However, the Court of Appeal in California is a court of last resort within the meaning of the rule, because there is no further appeal, but only a discretionary review in the Supreme Court. Accordingly, a prior decision of a Court of Appeal may be law of the case in a subsequent appeal either in that court or the Supreme Court. "Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to this court directly or intermediately, for reasons of policy and convenience, this court generally will not inquire into the merits of said first decision, but will regard it as the law of the case. If the appellant was dissatisfied with the first decision of the District Court of Appeal he should have applied to this court for a hearing." (*United Dredging Co. v. Industrial Acc. Com.* (1930) 208 C. 705, 712, 284 P. 922; see *Otten v. Spreckels* (1920) 183 C. 252, 254, 191 P. 11; *Gore v. Bingaman* (1942) 20 C.2d 118, 121, 124 P.2d 17; *Pigeon Point Ranch v. Perot* (1963) 59 C.2d 227, 232, 28 C.R. 865, 379 P.2d 321, *infra*, §469; *Davies v. Krasna* (1975) 14 C.3d 502, 507, and footnotes 4 and 5, 121 C.R. 705, 535 P.2d 1161, citing the text [prior appeal before Court of Appeal, subsequent appeal before Supreme Court]; *People v. Stanley* (1995) 10 C.4th 764, 786, 42 C.R.2d 543, 897 P.2d 481 [Court of Appeal decision on previous appeal was law of case in Supreme Court]; *Hill v. Maryland Cas. Co.* (1915) 28 C.A. 422, 426, 152 P. 953; *Hanley v. Lund* (1963) 218 C.A.2d 633, 639, 32 C.R. 733.)

(3) *Where Federal Question Is Involved.* A special qualification has been declared where a question arises under the

United States Constitution or statutes. As to such a question, no state court, not even California's Supreme Court, can speak finally, and consequently none is a court of last resort. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Com. of Calif.* (1930) 209 C. 460, 472, 288 P. 775 [United States Supreme Court ruled on point contrary to California's former appellate determination and subsequent to it; following view of United States Supreme Court].)

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A. Nature of Doctrine.

2. Appellate Court Decisions.

b. Writ Proceedings.

9 Witkin Cal. Proc. Appeal § 461

[§ 461] Writ Proceedings.

(1) *General Rule: Doctrine Is Applicable.* The doctrine has been extended beyond appeals to decisions of an appellate court in original proceedings. Thus, in *Guardianship of Walters* (1947) 81 C.A.2d 684, 184 P.2d 684, a writ of prohibition was issued against further proceedings in guardianship of an incompetent, on the ground of invalidity of the order of appointment. *Held*, this was law of the case in an appeal from the order, and compelled a reversal. (81 C.A.2d 685.) (See *Price v. Civil Service Com.* (1980) 26 C.3d 257, 267, footnote 5, 161 C.R. 475, 604 P.2d 1365; *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 57, footnote 11, 192 C.R. 857, 665 P.2d 947; *People v. Stanley* (1995) 10 C.4th 764, 786, 42 C.R.2d 543, 897 P.2d 481 [Court of Appeal decision on search and seizure issue in mandamus proceeding was law of case in Supreme Court on subsequent appeal].)

(2) *Distinction: Summary Denial of Prerogative Writ.* In *Richer v. Superior Court* (1976) 63 C.A.3d 748, 134 C.R. 52, petitioner moved to abate a probate proceeding because of the pendency of a civil action. The probate judge denied the motion on a showing of dilatory tactics, and petitioner sought prohibition. The writ was denied by an order stating that "the record supports the implied finding of the trial court that the superior court action was filed for the purpose of delay." *Held*, this order, containing a statement of the reasons for the decision, was a determination on the merits and was thus law of the case. (63 C.A.3d 755, 756.)

However, in *Kowis v. Howard* (1992) 3 C.4th 888, 12 C.R.2d 728, 838 P.2d 250, 8 Cal. Proc. (5th), *Extraordinary Writs*, §210, the court disapproved *Richer*, and held that summary "denial" of a writ petition does not establish law of the case unless the denial is accompanied by a written opinion following the issuance of an alternative writ." (3 C.4th 891.) And a short statement or citation explaining the reason for the denial is not the "opinion" required to transform the denial into a decision of a cause entitled to law of the case effect. (3 C.4th 895.) With respect to whether the doctrine applies if the summary denial is on the merits, the court answered in the negative, rejecting the argument that a summary denial is the law of the case when the "sole possible" ground of decision is on the merits. "When the court denies a writ petition without issuing an alternative writ, it does not take jurisdiction over the case; it does not give the legal issue full plenary review. A summary denial does not decide a 'cause' ... , and should therefore not be given law of the case effect." The court relied on the lack of opportunity of the losing party to present an oral argument when the petition is summarily denied, and on the uncertainty that would result if a court had to determine if the denial was, or

was not, on the merits. (3 C.4th 897, 898.)

(3) *Distinction: Summary Denial of Habeas Corpus.* In *People v. Pacini* (1981) 120 C.A.3d 877, 174 C.R. 820, defendant was committed by the trial judge to a state mental hospital for an extended term, and challenged the extension as violative of the governing statute. He appealed to the Third District Court of Appeal from the order of commitment, and then petitioned for habeas corpus in the Fifth District Court of Appeal. The prosecution opposed the petition, and the Court of Appeal denied it by a one-sentence order reciting that the denial was "upon the merits." In the hearing on appeal, the prosecution argued that the denial of the petition was law of the case on the issue. *Held*, it was not; the court emphasized the same lack of an opinion as exists in cases where a writ is summarily denied.

(a) Habeas corpus proceedings differ procedurally from prerogative writ proceedings. The function of the petition is to obtain the writ and to establish the grounds of illegality; the return to the writ (or order to show cause) is analogous to the complaint in a civil proceeding, in asserting grounds of legality. Thus, the petition is preliminary in nature; only on its issuance is a return filed, which gives the prosecution an opportunity to be heard. Hence, neither its grant or denial establishes law of the case. (120 C.A.3d 883, 884, 885.)

(b) Without an opinion, it is not possible to determine what merits were resolved by the Fifth District decision--essential to application of the law of the case doctrine. (120 C.A.3d 886.) It would be unjust to deprive defendant of an opinion on the merits of his contentions by "the summary and cryptic denial" of his petition. "On another occasion it would work an equally harsh result in precluding the right of the People to respond to a petition." (120 C.A.3d 887.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule: Doctrine Is Applicable.*

(*New*) *Necessity of written opinion:* Absent a written opinion following issuance of the alternative writ, the court's reasoning in issuing the alternative writ is not the law of the case. (*Cerna v. Oakland* (2008) 161 C.A.4th 1340, 1354, 75 C.R.3d 168.)



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XII. LAW OF THE CASE

A. Nature of Doctrine.

3. Earlier Inflexible Rule.

9 *Witkin Cal. Proc. Appeal* § 462

[§ 462] Earlier Inflexible Rule.

The courts have not been consistent in their explanations of the doctrine. Some treat it as a form of estoppel, analogous to *res judicata*. (See *People's Lumber Co. v. Gillard* (1907) 5 C.A. 435, 438, 90 P. 556; *Brown v. Brown* (1938) 26 C.A.2d 637, 638, 79 P.2d 1112; cf. *Pillsbury v. Superior Court* (1937) 8 C.2d 469, 472, 66 P.2d 149 [distinguishing the doctrines].) Others take the view that an appellate court has no power on a second appeal to review its own (or another appellate court's) prior final decision. (See *Leese v. Clark* (1862) 20 C. 387, 417; *Sharon v. Sharon* (1889) 79 C. 633, 687, 22 P. 26, 131 [concurring opinion]; *Hoffman v. Southern Pac. Co.* (1932) 215 C. 454, 457, 11 P.2d 387.) One decision suggests that "the sole reason" for the doctrine is that both parties on the retrial are assumed to have offered evidence in conformity with the rule, and that it would be manifestly unfair to either party to change the rule on the second appeal. (*Allen v. Bryant* (1909) 155 C. 256, 258, 100 P. 704; cf. *Estate of Baird* (1924) 193 C. 225, 234, 223 P. 974 [disapproving this view].) And other justifications have been offered. (See 42 *Harv. L. Rev.* 938; 62 *Harv. L. Rev.* 289; 5 *Stanf. L. Rev.* 754.)

This conflict in theory has led to different conclusions as to the effect of a prior determination. Many of the earlier cases, stressing the estoppel and lack of power theories, describe the doctrine in terms of a binding and inflexible rule. (See, e.g., *Klauber v. San Diego Street Car Co.* (1893) 98 C. 105, 107, 32 P. 876 ["Hence, it has been invariably held that ... this court must accept its former determination as conclusive, and is precluded from any re-examination of the matters therein determined"]; *Deacon v. Bryans* (1931) 212 C. 87, 90, 298 P. 30 ["We know of no instance where this court has failed to adhere to the doctrine of the law of the case"]; *Elliott v. Bunce* (1909) 10 C.A. 741, 742, 103 P. 897 [ruling "becomes the law of the case and is conclusive between the same parties upon a subsequent appeal, from which the court cannot depart"]; cf. *Hubbard v. Jurian* (1920) 47 C.A. 543, 545, 190 P. 1052 [decision held conclusive, even though in the meantime, Supreme Court had laid down different rule on same question in another case]; *Union Oil Co. of Calif. v. Reconstruction Oil Co.* (1943) 58 C.A.2d 30, 35, 135 P.2d 621 [same].) This view is no longer followed. (See *infra*, §463.)

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A. Nature of Doctrine.

4. Modern Rule of Policy.

a. Departure by Appellate Court.

9 *Witkin Cal. Proc. Appeal* § 463

[§ 463] Departure by Appellate Court.

The later decisions not only recognize several kinds of exceptions to the application of the doctrine (see *infra*, §478 et seq.), but also reject the notion of limited power (*supra*, §462) and treat the doctrine as merely one of policy and normal practice. (See 62 *Harv. L. Rev.* 294 [suggesting that doctrine might be abandoned in favor of rule of court analogous to rule against advancing new points on petition for rehearing]; 65 *Harv. L. Rev.* 822; 5 *Stanf. L. Rev.* 764; 87 *A.L.R.2d* 271, 325 [when law of case doctrine is not applicable].)

The leading case stating this approach is *England v. Hospital of the Good Samaritan* (1939) 14 *C.2d* 791, 97 *P.2d* 813, *infra*, §480, where the court said: "The doctrine of the law of the case is recognized as a harsh one ... and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision. ... However, it is generally followed in this state. But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former appeal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before." (14 *C.2d* 795.) (See *Gore v. Bingaman* (1942) 20 *C.2d* 118, 122, 124 *P.2d* 17 [dictum]; *Vangel v. Vangel* (1955) 45 *C.2d* 804, 810, 291 *P.2d* 25 ["Even if the decision upon the former appeal be construed as limiting the apportionment of profits in the manner suggested, it would be unjust to do so, and the decision should not be followed to that extent"]; *Standard Oil Co. of Calif. v. Johnson* (1942) 56 *C.A.2d* 411, 415, 132 *P.2d* 910; *Judson v. Herrington* (1945) 71 *C.A.2d* 565, 566, 162 *P.2d* 931 ["the application of the rule ... seems now to be somewhat a matter of discretion"]; *Wicktor v. Los Angeles* (1960) 177 *C.A.2d* 390, 2 *C.R.* 352, *infra*, §480; *Ryan v. Mike-Ron Corp.* (1968) 259 *C.A.2d* 91, 96, 66 *C.R.* 224, *infra*, §464, quoting the text; *In re Saldana* (1997) 57 *C.A.4th* 620, 625, 67 *C.R.2d* 183; 62 *Harv. L. Rev.* 290 [observing that doctrine should be applied less rigidly than *res judicata*, but somewhat more compellingly than *stare decisis*].)

Indirect evidence of this approach is furnished by cases that use the doctrine only as a make-weight or alternative ground of decision. By also examining the point on the merits and arriving at the conclusion that the former appeal correctly determined the law, they impliedly reject the rigid doctrine with its "right or wrong" effect. In *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 *C.2d* 1, 87 *P.2d* 830, the court first held that the point previously determined was binding, but added that, "independently of the doctrine" and on further deliberation and full

consideration of the arguments advanced, "the prior opinion constitutes a sound precedent and should be followed." (13 C.2d 17.) (See 62 Harv. L. Rev. 291.)

However, to invoke the "unjust decision" exception, there must be more than a disagreement with a prior appellate determination; "judicial order demands there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior appellate proceeding." (*People v. Shuey* (1975) 13 C.3d 835, 846, 120 C.R. 83, 533 P.2d 211.)

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A. Nature of Doctrine.

4. Modern Rule of Policy.

b. Departure by Trial Court.

9 *Witkin Cal. Proc. Appeal* § 464

[§ 464] Departure by Trial Court.

The second appellate court, as we have seen, may depart from the doctrine for good reason. (See *supra*, §463.) It has sometimes been asserted that a trial court on retrial after a reversal has no discretion to depart from the law declared in the first appellate opinion. (See *Estate of Baird* (1924) 193 C. 225, 258, 223 P. 974 [strong statement denying discretion].)

This narrow view can lead to absurd results in a situation where the law has changed (see *infra*, §479); the trial court would have to follow the law of the case, but the losing party would be entitled to a reversal on appeal. Thus, a trial court has been held to have authority to disregard the law of the case where a controlling appellate decision has intervened as a precedent. (See *In re Saldana* (1997) 57 C.A.4th 620, 625, 67 C.R.2d 183 [trial judge was not bound at resentencing hearing by prior appellate decision holding that he lacked discretion under three strikes law to strike prior conviction, where there was intervening change in applicable law]; 62 *Harv. L. Rev.* 287; 5 *Stanf. L. Rev.* 766.)

In *Ryan v. Mike-Ron Corp.* (1968) 259 C.A.2d 91, 66 C.R. 224, the issue was the right of a buyer to set up a seller's violation of statutory conditional sale regulations as a defense to the whole contract. In the first appeal, the Court of Appeal held the contract entire and sustained the buyer's position. By the time the case came back to the trial court, the Supreme Court, in another case, held this type of contract severable, disapproving the first *Ryan* decision. Thus, the law of the case was clearly erroneous, but the trial judge, deeming himself bound by the wrong rule, followed it. *Held*, reversed.

(a) "We conceive the law now to be that when, between two intermediate appeals, the California Supreme Court announces a rule contrary to the first opinion of appellate court, that court should subsequently follow the Supreme Court rather than its own former decision, the law of the Supreme Court being *per se* justice." (259 C.A.2d 98.)

(b) As to the trial judge's position, a trial judge may likewise disregard the law of the case where a controlling decision has intervened. (259 C.A.2d 99, quoting the text.)

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XII. LAW OF THE CASE

B. Requisites for Invoking Doctrine.

1. Points of Law.

a. In General.

9 Witkin Cal. Proc. Appeal § 465

[§ 465] In General.

Except where the sufficiency of the evidence as a matter of law is involved (*infra*, §470), the doctrine does not give any conclusive effect to determinations of questions of fact. "So well settled is the proposition that the doctrine of the law of the case, generally speaking, is applied only to the principles of law laid down by the court as applicable to a retrial of fact, that it does not embrace the facts themselves ... that no quotation from the authorities is necessary." (*Moore v. Trott* (1912) 162 C. 268, 273, 122 P. 462; see *Wallace v. Sisson* (1896) 114 C. 42, 43, 45 P. 1000, *infra*, §471; *Robinson v. Thornton* (1896) 114 C. 275, 276, 46 P. 79; *Allen v. Bryant* (1909) 155 C. 256, 258, 100 P. 704; *McNeely v. Connell* (1927) 87 C.A. 87, 88, 261 P. 754; *Daly v. Smith* (1963) 220 C.A.2d 592, 602, 33 C.R. 920, citing the text; *Muktarian v. Barmby* (1968) 264 C.A.2d 966, 968, 70 C.R. 903, citing the text; 5 *Stanf. L. Rev.* 757, 759; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §570.)

Typical illustrations of such points of law are the validity or construction of a document or judgment (*infra*, §466); the nature and sufficiency of pleadings (*infra*, §467); and the admissibility of evidence (*infra*, §468). Other unusual cases applying the doctrine include the following:

Union Oil Co. of Calif. v. Reconstruction Oil Co. (1943) 58 C.A.2d 30, 35, 135 P.2d 621 [form of action (equity) as basis for denying jury trial].

Ybarra v. Spangard (1949) 93 C.A.2d 43, 45, 208 P.2d 445 [what circumstances when proved give rise to inference of *res ipsa loquitur*].

Los Angeles v. Los Angeles Bldg. & Const. Trades Council (1952) 109 C.A.2d 81, 82, 240 P.2d 16 [unlawfulness of picketing against agency of city in violation of charter].

Adams v. Pacific Bell Directory (2003) 111 C.A.4th 93, 97, 3 C.R.3d 365, citing the text [federal preemption].

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B. Requisites for Invoking Doctrine.

1. Points of Law.

b. Validity or Construction of Document or Judgment.

9 *Witkin Cal. Proc. Appeal* § 466

[§ 466] Validity or Construction of Document or Judgment.

The validity or invalidity of a document, judgment, or order, and the proper construction of it, are obviously questions of law to which the doctrine of law of the case applies. (See *James v. E.G. Lyons Co.* (1905) 147 C. 69, 75, 81 P. 275 [legal effect of document]; *Newport v. Hatton* (1929) 207 C. 515, 519, 279 P. 134 [same]; *Security-First Nat. Bank of Los Angeles v. Marxen* (1941) 19 C.2d 100, 103, 119 P.2d 131 [determination that agreement subordinated leasehold rights to plaintiff's title]; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 642, 160 P.2d 804 [whether contract lacked mutuality of obligation]; *People's Lumber Co. v. Gillard* (1907) 5 C.A. 435, 436, 90 P. 556 [character and validity of bond]; *Franklin v. Churchill Co.* (1925) 73 C.A. 304, 309, 238 P. 822 [legal effect of judgment]; *Beam v. Dugan* (1940) 37 C.A.2d 491, 496, 99 P.2d 694 [interpretation of instrument]; *Blatz Brewing Co. v. Collins* (1948) 88 C.A.2d 438, 441, 199 P.2d 34 [validity of liquor control order by state board]; *Clark v. Deschamps* (1952) 109 C.A.2d 765, 766, 241 P.2d 681 [validity of trial judge's orders]; *Kerr Land & Timber Co. v. Emmerson* (1965) 233 C.A.2d 200, 214, 43 C.R. 333 [construction of writing granting easement].)

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c. Sufficiency or Nature of Pleadings.

9 *Witkin Cal. Proc. Appeal* § 467

[§ 467] Sufficiency or Nature of Pleadings.

The determination that a pleading is sufficient or insufficient is clearly one of law, and is governing in the retrial or appeal where the pleading is *substantially the same*. "While it is true that the precise special reason urged in support of the general objection to the cross-complaint at the hearing of that appeal in this case was different from the precise special reason urged in support of the general objection to the pleading here, it is the statement only of an obvious proposition to say that the ultimate question submitted for decision by the court on the former appeal is precisely the same as the ultimate question submitted for determination here, viz.: Does the cross-complaint state facts sufficient to constitute a cause of action? Therefore, we affirm that the supreme court, having sent the cause back for retrial after a decision against the objection that the cross-complaint here was bad for want of facts, has impliedly, if not expressly, held that the specific objection here urged against said pleading is groundless." (*McCowen v. Pew* (1912) 18 C.A. 302, 313, 123 P. 191.) (See *Eversdon v. Mayhew* (1890) 85 C. 1, 7, 21 P. 431, 24 P. 382; *Merrill v. Merrill* (1894) 102 C. 317, 319, 36 P. 675; *Baker v. Brickell* (1894) 102 C. 620, 621, 36 P. 950; *Westerfeld v. New York Life Ins. Co.* (1910) 157 C. 339, 342, 107 P. 699; *Brett v. S.H. Frank & Co.* (1912) 162 C. 735, 736, 124 P. 437; *Lubarsky v. Richardson* (1933) 218 C. 27, 30, 21 P.2d 557; *Elliott v. Bunce* (1909) 10 C.A. 741, 744, 103 P. 897; *Franklin v. Churchill Co.* (1925) 73 C.A. 304, 310, 238 P. 822.)

But if in the second trial the pleading is amended in a material manner, the determination as to sufficiency of the former pleading is no longer significant. (*Flood v. Templeton* (1907) 152 C. 148, 158, 92 P. 78; *Bayer v. Barrett* (1932) 127 C.A. 305, 309, 15 P.2d 801.)

The nature of the pleading may also become law of the case. In *Davies v. Krasna* (1970) 12 C.A.3d 1049, 91 C.R. 250, plaintiff sued for literary plagiarism, in two causes of action: (a) implied in fact contract, and (b) implied in law obligation. In the first trial, a judgment of nonsuit was granted on (b), after the trial court had sustained defendant's motion for judgment on the pleadings, and the jury gave defendant a verdict on (a). The appellate court affirmed the judgment on (a), but reversed it on (b). In the trial court, defendant had received its nonsuit on (b) on the theory that there was only one cause of action in separate counts. *Held*, theory rejected. The appellate court in the first appeal said that there was an issue of fact whether defendant improperly made use of plaintiff's idea, and decided that plaintiff was entitled to a trial on the merits of the second cause of action. And this holding was the law of the case on the second

appeal. "The identity or nonidentity of the two causes of action must have been examined by the appellate court in the first appeal, and by reversing the nonsuit on the second cause of action, the appellate court has determined that the two causes of action could not be identical nor is plaintiff's second cause of action barred by res judicata or collateral estoppel." (12 C.A.3d 1053.)

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1. Points of Law.

d. Admissibility of Evidence.

9 *Witkin Cal. Proc. Appeal* § 468

[§ 468] Admissibility of Evidence.

A determination of the admissibility of a particular kind of evidence is binding on a retrial. (*Davis v. Edmonds* (1933) 218 C. 355, 359, 23 P.2d 289 [character and competency of evidence of book account]; see *Deacon v. Bryans* (1931) 212 C. 87, 88, 298 P. 30 [competency of executor to testify after waiver of former "dead man statute"]; cf. *Wallace v. Sisson* (1896) 114 C. 42, 46, 45 P. 1000, *infra*, §471 [law of case doctrine does not apply to determinations of fact on conflicting competent evidence, especially where there is additional, though cumulative evidence].)

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1. Points of Law.

e. Appellate Jurisdiction.

9 Witkin Cal. Proc. Appeal § 469

[§ 469] Appellate Jurisdiction.

Appellate jurisdiction can become the law of the case, if the decision is on the merits. (See *Gore v. Bingaman* (1942) 20 C.2d 118, 121, 124 P.2d 17 [form of action under former law making this determinative].) However, only the older cases hold that the dismissal is on the merits.

For example, in *Pigeon Point Ranch v. Perot* (1963) 59 C.2d 227, 28 C.R. 865, 379 P.2d 321, plaintiff corporation sued its officers, P and D, to recover money misused. The complaint contained three counts against P and one against P and D. General demurrers were sustained to the P counts, judgment of dismissal as to those was entered, and plaintiff appealed. This premature judgment, which did not dispose of all counts, was not appealable and should have been dismissed (see *supra*, §118). Nevertheless, defendants' motion to dismiss the judgment was denied on appeal by the Court of Appeal. *Held*, this determination was law of the case.

(a) This denial of the motion to dismiss was a conclusive determination of the issue of appealability, and it was therefore the law of the case that the judgment was appealable. (59 C.2d 231, 232, following *Gore*, *supra*, and overruling, to the extent that it is inconsistent, *Bettencourt v. Bank of Italy Nat. Trust & Savings Assn.* (1932) 216 C. 174, 180, 13 P.2d 659.)

(b) There was no reason to invoke the unfairness or injustice exception (*infra*, §478), for here, application of the doctrine enabled the court to promptly dispose of the case on the merits. (59 C.2d 232.)

However, *In re Christopher A.* (1991) 226 C.A.3d 1154, 277 C.R. 302, criticized the reasoning of *Pigeon Point*, and held that denial of a motion to dismiss by the Presiding Justice acting alone was not law of the case.

(a) In the related context of denial of a writ petition (see *supra*, §461), "an appellate court's denial *without opinion* ... *normally* is not conclusive, and does not constitute law of the case, unless the only possible basis for the denial was on the merits." (226 C.A.3d 1159.) Applying this reasoning in the similar area of an appeal of a motion to dismiss, followed by a second appeal, the court in *Pigeon Point* held that the doctrine applied on the second appeal, where the sole question allegedly presented by the motion to dismiss was the appealability of the judgment, i.e., where the only

possible basis of the decision was on the merits. (226 C.A.3d 1160.)

(b) This conclusion was criticized in *Chernett v. Jacques* (1988) 202 C.A.3d 69, 248 C.R. 63, where the court, in stating the normal meaning implicit in such an order, reasoned that the initial denial of a motion to dismiss did not evidence that the court was able to consider and decide the merits of the dismissability issue in the context of an adequate record. The court only determined at that point and on the basis of the record and supporting arguments it was not yet in a position to grant the motion to dismiss. This is the "clearly correct rule": "[T]he facts of appellate life are that motions made before the record is available will often be denied as an interlocutory matter, with no necessary implication as to the court's view on the merits." (226 C.A.3d 1160.) The denial of the motion in *Pigeon Point* was made before the record was transmitted, and the Supreme Court's later interpretation of that denial as having only one possible basis "may not have been factually accurate." (226 C.A.3d 1160.) "Thus the *Pigeon Point* rule impedes the orderly administration of justice, is incompatible with interpretation of court action in related proceedings, was deemed 'meritless' in *Chernett*, and possibly was not even based on the facts of that very case." However, this court, as an appellate tribunal, is bound by the holdings of the Supreme Court. Thus, the denial of the motion to dismiss, if made on the merits, is the law of the case, even though this court believes that the Supreme Court, in *Pigeon Point*, was wrong when it decided that the dismissal therein was on the merits. (226 C.A.3d 1160.)

(c) But *Pigeon Point* is distinguishable: In that case the order denying the motion to dismiss was signed by three judges; in the present case the order was signed by the presiding justice acting alone. And it is fundamental that a binding determination of the merits of a cause must have the agreement of two justices (Cal. Const., Art. VI, §3; see *infra*, §775). "For this reason, if for no other, the rule of *Pigeon Point* is not applicable." (226 C.A.3d 1161.)

In *Kowis v. Howard* (1992) 3 C.4th 888, 12 C.R.2d 728, 838 P.2d 250, 8 Cal. Proc. (5th), *Extraordinary Writs*, §210, the Supreme Court adopted the reasoning of *In re Christopher A.*, and expressly overruled *Pigeon Point Ranch*. (3 C.4th 901.) (See *Tippett v. Terich* (1995) 37 C.A.4th 1517, 1523, footnote 2, 44 C.R.2d 862 [order granting motion for judgment on pleadings did not establish law of case; citing *Kowis*].)

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2. Sufficiency of Evidence.

a. Where Evidence Is Substantially the Same.

1. General Rule.

9 Witkin Cal. Proc. Appeal § 470

[§ 470] General Rule.

Where the sufficiency of the evidence to sustain the judgment depends on the probative value or effect of the evidence itself (as distinguished from the credibility of witnesses), and there is no substantial difference in the evidence in the retrial, the former decision is law of the case. (*Snyder v. Jack* (1903) 140 C. 584, 585, 74 P. 139, 74 P. 355; *Raymond v. Glover* (1904) 144 C. 548, 552, 78 P. 3; *Hoffman v. Southern Pac. Co.* (1932) 215 C. 454, 457, 11 P.2d 387; *Wells v. Lloyd* (1942) 21 C.2d 452, 455, 132 P.2d 471; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 643, 160 P.2d 804; *Arnold v. San Francisco-Oakland Terminal Rys.* (1919) 41 C.A. 483, 484, 182 P. 805; *Merchants' Nat. Bank of San Francisco v. Carmichael* (1920) 50 C.A. 749, 755, 196 P. 76; *Gordon v. Green* (1924) 66 C.A. 303, 304, 225 P. 872; *First English Evangelical Lutheran Church of Los Angeles v. Dysinger* (1934) 137 C.A. 228, 229, 30 P.2d 545; *Sischo v. Los Banos* (1940) 37 C.A.2d 717, 718, 100 P.2d 305; *Nelson v. Robinson* (1946) 73 C.A.2d 263, 269, 166 P.2d 76; *Stroman v. Atchison, Topeka & Santa Fe Ry. Co.* (1962) 200 C.A.2d 418, 420, 19 C.R. 438; *Stromer v. Browning* (1968) 268 C.A.2d 513, 521, 74 C.R. 155, citing the text; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 C.A.3d 274, 288, 93 C.R. 907, citing the text; *Wetherbee v. United Ins. Co. of America* (1971) 18 C.A.3d 266, 269, 95 C.R. 678; see 62 *Harv. L. Rev.* 291; 5 *Stanf. L. Rev.* 760.)

The evidence produced on a retrial is seldom identical to that in the first trial, and the doctrine will be applied notwithstanding insubstantial changes, e.g., where the new evidence is merely cumulative or of such slight probative value as to have no effect on an already existing conflict. In *Estate of Baird* (1924) 193 C. 225, 223 P. 974, the court said: "The authorities use such expressions as that the new evidence must be 'materially,' 'essentially,' or 'substantially' different before it can be held the doctrine does not apply. ... Additional evidence merely cumulative to evidence of the same class given on the first appeal will not carry a question outside the operation of the rule as to the law of the case, but to successfully escape the rule a new and substantial fact must be brought into the case on the subsequent appeal." (193 C. 244.) (See *Coats v. General Motors Corp.* (1938) 11 C.2d 601, 606, 81 P.2d 906 ["Such evidence, and additional evidence on other disputed facts, merely served to continue the conflict in the evidence"]; *Wagner v. Meinzer* (1921) 53 C.A. 783, 784, 200 P. 838; *Swarzwald v. Cooley* (1940) 39 C.A.2d 306, 320, 103 P.2d 580; *Joyce v. Simi Valley Unified School Dist.* (2003) 110 C.A.4th 292, 303, 1 C.R.3d 712 [no material change in evidence requiring

different instruction on dangerous condition of school property].)

In reaching its conclusion that the evidence is the same, the reviewing court may examine the opinion on the previous appeal, and, if necessary, compare the records of the two trials. (See *Estate of Baird*, supra, 193 C. 235; *Coulter v. Howard* (1931) 113 C.A. 208, 214, 298 P. 140.)

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a. Where Evidence Is Substantially the Same.

2. Distinction: Where Credibility Is Involved.

9 *Witkin Cal. Proc. Appeal* § 471

[§ 471] Distinction: Where Credibility Is Involved.

Where the sufficiency depends on the credibility of witnesses, and perhaps in some other situations, the former decision may not be law of the case, though the evidence is substantially the same. This distinction was made and applied in *Wallace v. Sisson* (1896) 114 C. 42, 45 P. 1000.

(a) "It frequently happens that the sufficiency of the evidence to justify the decision depends upon the competency of the evidence, or the effect of an act or admission, or the construction to be given to a written instrument. If in such a case the appellate court holds that the evidence was incompetent, or received an erroneous construction by the trial court, and that for this reason the evidence was insufficient to justify the decision, such ruling of the appellate court becomes the law of the case, since the sufficiency of the evidence depends upon the question of law which is thus decided. ... But, when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision." (114 C. 45.)

(b) This results from the relative functions of the trial and appellate courts in the determination of facts. "If the evidence had been identical with that given at the former trial, and the trial court had still been of the opinion that it justified the former findings, it would not be precluded from so finding merely because this court had reversed its former decision. This court might again reverse the decision, but before doing so would consider whether it might not be that that portion of the evidence which could not be reproduced in printed form--the demeanor of the witnesses, as well as their credibility, the weight to be given to contradictory testimony, the inferences to be drawn from different portions of the evidence--was such as to support the conclusion of the trial court." (114 C. 48.) (See *Kramm v. Stockton Elec. R. Co.* (1909) 10 C.A. 271, 280, 101 P. 914; *Madsen v. Le Clair* (1932) 125 C.A. 393, 398, 13 P.2d 939; *Kalfus v. Frazee* (1955) 136 C.A.2d 415, 429, 288 P.2d 967; *Phillips v. Phillips* (1957) 152 C.A.2d 582, 585, 313 P.2d 630, quoting the text; *American Oil Service v. Hope Oil Co.* (1965) 233 C.A.2d 822, 823, 44 C.R. 60, citing the text.)

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b. Where Evidence Is Substantially Different.

9 *Witkin Cal. Proc. Appeal* § 472

[§ 472] Where Evidence Is Substantially Different.

Where the evidence in the new trial is materially changed, the former determination on sufficiency is, of course, inapplicable, and the doctrine cannot be invoked. This proposition is sometimes expressed in the statement that the doctrine will not apply where there is no substantial identity of facts. (See *Allen v. Bryant* (1909) 155 C. 256, 259, 100 P. 704; *Foley v. Northern Calif. Power Co.* (1913) 165 C. 103, 106, 130 P. 1183 [additional witness with new material testimony]; *Otten v. Spreckels* (1920) 183 C. 252, 253, 191 P. 11; *Sichterman v. R.M. Hollingshead Co.* (1931) 117 C.A. 504, 506, 4 P.2d 181; *Bowman v. Bowman* (1932) 125 C.A. 602, 609, 13 P.2d 1049; *A. Paladini v. Durchman* (1938) 24 C.A.2d 440, 446, 75 P.2d 553; *Weaver v. Shell Co. of Calif.* (1939) 34 C.A.2d 713, 718, 94 P.2d 364 [six additional witnesses and some different evidence tending to supply deficiency in former proof]; *Rutledge v. Rutledge* (1955) 134 C.A.2d 689, 694, 286 P.2d 429; *Wicktor v. Los Angeles* (1960) 177 C.A.2d 390, 391, 2 C.R. 352, *infra*, §480; *In re Saldana* (1997) 57 C.A.4th 620, 627, footnote 2, 67 C.R.2d 183 [doctrine was not applicable on appeal from resentencing hearing; trial judge considered facts at hearing that were not part of record of first appeal and did not form basis for appellate court's first ruling]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §572.)

In *Haase v. Central Union High School Dist.* (1938) 27 C.A.2d 319, 80 P.2d 1044, an action for damages for negligence, in the first appeal, the cause of the accident was held a mystery, and judgment for plaintiffs was reversed. On the second trial, the evidence was without material difference except that plaintiffs' counsel used a blackboard diagram on which the driver of the machine traced his tracks. Judgment was given for plaintiffs. Defendants, appealing, failed to include the diagram or photograph of it in the record. *Held*, the diagram, used to illustrate the testimony, might have offered a credible explanation of the accident; and, because appellants failed to bring up a complete record, it was presumed that the missing evidence supported the verdict. (27 C.A.2d 322.)

In *Curran v. Mount Diablo Council of the Boy Scouts of America* (1998) 17 C.4th 670, 72 C.R.2d 410, 952 P.2d 218, a prior appeal concluded that the complaint was sufficient to state a cause of action under the Unruh Civil Rights Act. However, a number of allegations in that complaint concerning defendant's attributes and activities were not borne out by evidence introduced at the subsequent trial, and substantial additional evidence relating to defendant's activities, not referred to in the complaint, was brought forth at trial. *Held*, under these circumstances, the law of the case doctrine did not apply to foreclose consideration whether defendant was a business establishment subject to the Act. (17 C.A.4th

685.)

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3. What Constitutes Decision on Point.

a. Nature of First Appellate Decision.

9 *Witkin Cal. Proc. Appeal* § 473

[§ 473] Nature of First Appellate Decision.

Although there is a tendency to think of the law of the case as governing in a "retrial" after a first "trial," the doctrine is not so limited. It may be applied wherever there was a prior appeal in the same case, although that appeal was from a judgment on demurrer, order of nonsuit, or order on an application for a provisional remedy. (See *Pellett v. Sonotone Corp.* (1945) 26 C.2d 705, 708, 160 P.2d 783 [nonsuit]; *Aurenz v. Los Angeles Ry. Corp.* (1939) 35 C.A.2d 615, 617, 96 P.2d 397 [nonsuit]; *Blatz Brewing Co. v. Collins* (1948) 88 C.A.2d 438, 441, 199 P.2d 34 [judgment on demurrer]; *Los Angeles v. Los Angeles Bldg. & Const. Trades Council* (1952) 109 C.A.2d 81, 84, 240 P.2d 16 [order granting preliminary injunction]; *Bergman v. Drum* (2005) 129 C.A.4th 11, 18, 28 C.R.3d 112 [summary judgment]; cf. *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 C.3d 49, 56, 192 C.R. 857, 665 P.2d 947 [implied determination of issue on demurrer in prior Court of Appeal opinion]; *Reiman v. Moore* (1940) 42 C.A.2d 130, 137, 108 P.2d 452 [directed verdict for defendants on plaintiffs' opening statement].)

However, *Daar & Newman v. VRL Int.* (2005) 129 C.A.4th 482, 28 C.R.3d 566, held that the law of the case did not apply to an action by a law firm against a client to recover fees for legal services rendered to the client in the underlying personal injury action. Although the client successfully moved to quash the underlying action based on insufficient contacts with California, the fee action was entirely separate from the personal injury action. (129 C.A.4th 487.)

Also, because the concurrence of the requisite number of judges is essential to the binding force of an appellate judgment (*infra*, §775), statements in any opinion by one or more judges, not concurred in by the requisite number, cannot constitute the law of the case. (See *In re Coburn* (1913) 165 C. 202, 206, 131 P. 352; *Turner v. Fidelity Loan Concern* (1905) 2 C.A. 122, 141, 83 P. 62, 70; cf. *Oakland v. Oakland Water Front Co.* (1912) 162 C. 675, 676, 124 P. 251 [some points concurred in by enough judges, others not].)

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b. Matter Necessarily Involved.

1. Dictum Is Not Binding.

9 *Witkin Cal. Proc. Appeal* § 474

[§ 474] Dictum Is Not Binding.

It is fundamental that the point relied on as law of the case must have been necessarily involved in the case. Accordingly, a dictum is not binding. "But this was a statement upon a point not presented in the record, and although it was upon a fact asserted and a point argued by counsel, it was not a decision having binding force as an adjudication of the law of the case. That doctrine does not extend to *obiter dicta*." (*Millsap v. Balfour* (1910) 158 C. 711, 714, 112 P. 450; see *Wixson v. Devine* (1889) 80 C. 385, 388, 22 P. 224; *Mattingly v. Pennie* (1895) 105 C. 514, 518, 525, 39 P. 200; *Tally v. Ganahl* (1907) 151 C. 418, 422, 90 P. 1049; *Taylor v. Bunnell* (1931) 211 C. 601, 606, 296 P. 288; *Tomaier v. Tomaier* (1944) 23 C.2d 754, 757, 146 P.2d 905; *Stockton Theatres v. Palermo* (1956) 47 C.2d 469, 474, 304 P.2d 7; *Gyerman v. United States Lines Co.* (1972) 7 C.3d 488, 498, 102 C.R. 795, 498 P.2d 1043, quoting the text; *White v. Rosenstein* (1935) 8 C.A.2d 217, 222, 47 P.2d 358 ["we have come to the conclusion that our intimation--as dictum so often is--was wrong"]; *DeMirjian v. Ideal Heating Corp.* (1954) 129 C.A.2d 758, 764, 278 P.2d 114; *Salaman v. Bolt* (1977) 74 C.A.3d 907, 917, 141 C.R. 841; *Quackenbush v. Superior Court* (2000) 79 C.A.4th 867, 874, 94 C.R.2d 282.)

In *Estate of Roulac* (1977) 68 C.A.3d 1026, 136 C.R. 492, the issue was whether, in the event of intestacy because of the order in which trust income beneficiaries die, the heirs of the testator should be determined as of the date of the testator's death or as of the date of termination of the trust. On a previous appeal, the appellate court rendered a 37-page unpublished opinion reversing the judgment in part with directions to the trial judge to enter a decree that any undistributed income and any share of the corpus should, on termination of the trust, pass to the then living heirs of the testator. This issue had not been decided by the trial judge and had not been argued by the parties; the opinion dealt with wholly different issues, and the statement, appearing only in the direction to the trial court on remand, was not essential to the decision. Moreover, the distribution was an event to take place in the future, and the statement had no practical impact on the parties. Concluding that intestacy must be determined at the time of the testator's death, the court said: "Fully understanding that our previous opinion undoubtedly misled the trial court, we nevertheless come to a different conclusion. ... Because our comment in the earlier decision, relied on here to invoke the doctrine of the law of the case, was not essential to the decision, it does not preclude us from considering the issue which is raised and argued for the

first time on this appeal." (68 C.A.3d 1030.)

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b. Matter Necessarily Involved.

2. Where Decision Is on Additional Grounds.

9 Witkin Cal. Proc. Appeal § 475

[§ 475] Where Decision Is on Additional Grounds.

There is a thin but vital distinction between matters essential to a decision and additional grounds for the decision. Certainly the doctrine of law of the case applies to every point essential to the decision, both express and implied, but it is not restricted to those. Sometimes, in a case that might have been decided on one essential, controlling ground, the appellate court actually rests its decision on additional grounds. The points thus actually decided are not dicta, and are law of the case though not essential to the decision. As the court observed in *Westerfeld v. New York Life Ins. Co.* (1910) 157 C. 339, 107 P. 699: "It was a matter properly presented to the court for decision and one whose decision was proper as a guide to the court below on a new trial. Under these circumstances the decision of the point is to be deemed to be the law of the case on this appeal, even though it may not have been absolutely necessary to the determination of the question whether or not the judgment and order appealed from should be reversed." (157 C. 345.) (See *Gwinn v. Hamilton* (1888) 75 C. 265, 266, 17 P. 212; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 643, 160 P.2d 804; *People's Lumber Co. v. Gillard* (1907) 5 C.A. 435, 438, 90 P. 556; cf. *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 C.A.4th 204, 211, 23 C.R.3d 803 [dismissal of substantive appeal of order sustaining defendant's demurrer without leave to amend, which was not appealable, was not based on substantive principle necessary to resolution of case, and thus was not law of case on issue of appealability of trial court's order denying defendant's motion for contractual attorneys' fees].) (For similar problem in determining effect of decision as precedent, see *infra*, §§509, 512.)

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c. Matter Expressly Decided.

1. Point Not Raised Is Not Binding.

9 *Witkin Cal. Proc. Appeal* § 476

[§ 476] Point Not Raised Is Not Binding.

A most perplexing problem arises where the point could have been determined in the first appeal, but counsel did not raise it and the appellate court's opinion does not expressly mention it. May a point be deemed impliedly decided for the purpose of the doctrine of the law of the case?

The general rule holds that the doctrine is applicable only to points raised below. In other words, stated negatively: "The doctrine of the law of the case (in this state) does not extend to the facts or the points of law which might have been but were not presented *and determined* on a prior appeal." (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 644, 160 P.2d 804 [issue whether contract was abandoned; no indication in prior opinion that this defense was urged]; see *Trower v. San Francisco* (1910) 157 C. 762, 765, 109 P. 617; *Moore v. Trott* (1912) 162 C. 268, 273, 122 P. 462; *Cowell v. Snyder* (1915) 171 C. 291, 298, 152 P. 920; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 366, 273 P.2d 897, *infra*, §477; *Di Genova v. State Bd. of Education* (1962) 57 C.2d 167, 179, 18 C.R. 369, 367 P.2d 865 [doctrine does not extend to "points of law which might have been, but were not presented and determined on a prior appeal"]; *Estate of Horman* (1971) 5 C.3d 62, 73, 95 C.R. 433, 485 P.2d 785, citing the text; *Wood v. Elling Corp.* (1977) 20 C.3d 353, 360, 142 C.R. 696, 572 P.2d 755; *Knight v. Hall* (1915) 28 C.A. 435, 438, 152 P. 952; *Central Nat. Bank of Oakland v. Peck* (1936) 15 C.A.2d 512, 514, 59 P.2d 599; *Weck v. Los Angeles County Flood Control Dist.* (1951) 104 C.A.2d 599, 607, 232 P.2d 293 [prior opinion determined that railroads had diverted water, but not whether this created continuing legal liability under circumstances]; *In re Alexandria Y.* (1996) 45 C.A.4th 1483, 1486, footnote 4, 53 C.R.2d 679; *Shelton v. Rancho Mortg. & Inv. Corp.* (2002) 94 C.A.4th 1337, 1346, 115 C.R.2d 82 [where prior appellate decision imposed sanctions for frivolous appeal, law of case doctrine was not applicable to question whether sanctions should be imposed by trial court]; *Roden v. AmerisourceBergen Corp.* (2007) 155 C.A.4th 1548, 1576, 67 C.R.3d 26 [award of costs in first two of three appeals in action to determine former CEO's entitlement to costs and fees did not address entitlement issue]; 5 *Stanf. L. Rev.* 758.)

For example, in *Searle v. Allstate Life Ins. Co.* (1985) 38 C.3d 425, 212 C.R. 466, 696 P.2d 1308, decedent obtained a life insurance policy from defendant insurer, with a clause excluding coverage for "suicide, whether sane or insane," within 2 years of issuance. Ten months later, decedent shot and killed himself, and defendant denied coverage.

In the action by plaintiff beneficiary (*Searle I*), a summary judgment was ordered for defendant; and on appeal, the Court of Appeal reversed, holding that the clause was ambiguous because a person who is insane cannot form the intent to commit suicide, and, therefore, cannot commit suicide within the meaning of the exclusion. In the second trial, the judge instructed that plaintiff had the burden of proving that decedent did not intend to take his own life, i.e., that he could not have committed "suicide," within the meaning of the exclusion. However, the jury found that he had the mental capacity to intend to take his life, and judgment was entered for the insurer. *Held*, reversed.

(a) The law of the case doctrine will not be adhered to when to do so would cause an injustice. There is an additional reason for departing from the doctrine: "The primary purpose served by the law-of-the-case rule is one of judicial economy. Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding. ... That reason for the rule is inoperative when the court hearing the subsequent appeal determines that there should be a reversal on a ground that was not considered on the prior appeal. The fact that reversal is necessary in any event frees us from the compulsion that the rule of law of the case might otherwise impose on us to follow a ruling in the prior appeal that we now perceive to be manifestly erroneous." (38 C.3d 435.)

(b) Because *Searle I* was an appeal from a summary judgment, the Court of Appeal did not rule on the burden of proof. "Because we must reverse on that ground, this litigation will not be prolonged or complicated by our providing guidance on the meaning of 'suicide, whether sane or insane' even though the guidance diverges from some of the conclusions drawn in *Searle I*." (38 C.3d 435.) (See *Nally v. Grace Community Church* (1988) 47 C.3d 278, 301, 253 C.R. 97, 763 P.2d 948, citing the text and quoting *Searle*.)

The nonapplicability of law of the case is particularly true where the court in its opinion expressly declines to pass on the point. (See *Estate of Hall* (1908) 154 C. 527, 531, 98 P. 269; *Estate of Baird* (1924) 193 C. 225, 239, 223 P. 974.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Santa Clarita Organization for Planning the Environment v. Los Angeles* (2007) 157 C.A.4th 149, 156, 68 C.R.3d 449 [Court of Appeal's finding that water service portion of environmental impact report did not comply with California Environmental Quality Act did not bar, under doctrine of law of case, subsequent challenge to specific water transfer in revised report].



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2. Exception: Point Essential to Decision Is Binding.

9 *Witkin Cal. Proc. Appeal* § 477

[§ 477] Exception: Point Essential to Decision Is Binding.

The general rule, i.e., that the law of the case doctrine is not applicable to points not decided (*supra*, §476), is subject to an important exception: Where the particular point was essential to the decision, and the appellate judgment could not have been rendered without its determination, a necessary conclusion in support of the judgment is that it was determined. With respect to such a point, the appellate decision is law of the case even though the point was not raised by counsel or expressly mentioned.

Davis v. Edmonds (1933) 218 C. 355, 23 P.2d 289, provides a statement of this principle: "Obviously, the objections either not having been made on the former trial or not having been urged as a ground or grounds for upholding the judgment, the merits thereof were not expressly decided by the decision on the former appeal. Nevertheless that decision necessarily is, just as effectually as though expressly so stated, that inasmuch as the objections were waived by not having been made or not having been urged, the items constitute the proper subject of a book account. ... It was a necessary element in the final determination. The evidence involved is the same on this as on the former appeal." (218 C. 358.) (See *Coats v. General Motors Corp.* (1938) 11 C.2d 601, 607, 81 P.2d 908; *Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 C.2d 634, 642, 160 P.2d 804; *Olson v. Cory* (1983) 35 C.3d 390, 399, 197 C.R. 843, 673 P.2d 720 [although issue was not raised in prior case, it was "implicitly decided" because it was essential to decision]; *McCowen v. Pew* (1912) 18 C.A. 302, 314, 123 P. 191; *White v. Rosenstein* (1935) 8 C.A.2d 217, 225, 47 P.2d 358; *Lindsey v. Meyer* (1981) 125 C.A.3d 536, 541, 178 C.R. 1, citing the text; *Eldridge v. Burns* (1982) 136 C.A.3d 907, 921, 186 C.R. 784; *Hanna v. Los Angeles* (1989) 212 C.A.3d 363, 376, 260 C.R. 782, quoting the text.)

A striking illustration of the exception is the implied determination of subject matter jurisdiction. In *Gore v. Bingaman* (1942) 20 C.2d 118, 124 P.2d 17, defendants received judgment in an action mainly for declaratory relief, and plaintiffs appealed to the Court of Appeal. The judgment was reversed with directions, the Supreme Court denied a hearing, and judgment was entered for plaintiffs in conformity with the decision. Then defendants appealed, contending that the judgment was void because the action was equitable and the Court of Appeal then lacked appellate jurisdiction. *Held*, the question whether the action was legal or equitable, insofar as it fixed appellate jurisdiction, was necessarily involved in the first appeal and impliedly decided (rightly or wrongly) in favor of jurisdiction. Thus, the theory of

"jurisdiction to determine jurisdiction," which may make an erroneous determination of subject matter jurisdiction res judicata (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §346), may also make it the law of the case. (20 *C.2d* 122.) And the lack of an express determination, far from being an objection, was an added reason for applying the doctrine. Defendants had abundant opportunity to raise the point during the appeal, at which time the cause could have been promptly transferred to the Supreme Court. (See *infra*, §766.) The belated attack on the judgment on this technical ground, in an attempt to nullify the entire course of proceedings, could not be countenanced. (20 *C.2d* 122, 123.)

Schlyen v. Schlyen (1954) 43 *C.2d* 361, 273 *P.2d* 897, reached a conclusion different from that in the *Gore* case on distinguishable facts. The superior court consolidated an equity suit to cancel a deed with a contest of a will, and rendered an interlocutory judgment. Defendants appealed to the Court of Appeal, and that court, on plaintiff's motion, dismissed the appeal (nonappealable interlocutory judgment). Then, in the trial court, defendants moved to dismiss the *action* on the ground that the probate court had exclusive jurisdiction. Plaintiffs contended that the issue of jurisdiction was necessarily involved when the Court of Appeal entertained the motion to dismiss the appeal. *Held*, the question of jurisdiction of the subject matter was not decided in the prior appeal and was not law of the case, because (a) nonappealability of the interlocutory judgment appeared on its face, hence, there was no need for the appellate court to inquire into the jurisdictional question; and (b) the parties in briefs and argument mentioned the jurisdictional point, but agreed that it was not before the court. (43 *C.2d* 368.)

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C. Circumstances Justifying Departure From Doctrine.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 478

[§ 478] In General.

It has been seen that the later California decisions view the doctrine as one of policy only, to be disregarded when compelling circumstances call for a redetermination of the point of law determined on a prior appeal. (See *supra*, §463.) As yet, there is nothing approaching a test for such circumstances, other than the loose notion that the doctrine will not be invoked to accomplish injustice. (See *England v. Hospital of the Good Samaritan* (1939) 14 C.2d 791, 795, 97 P.2d 813, *infra*, §480; *People v. Medina* (1972) 6 C.3d 484, 492, 99 C.R. 630, 492 P.2d 686 [contrary to policy and purpose of statute]; *Searle v. Allstate Life Ins. Co.* (1985) 38 C.3d 425, 435, 212 C.R. 466, 696 P.2d 1308; *Salazar v. Eastin* (1995) 9 C.4th 836, 859, 39 C.R.2d 21, 890 P.2d 43, *infra*, §480 [doctrine not followed "where its application will result in an unjust decision"]; *Ryan v. Mike-Ron Corp.* (1968) 259 C.A.2d 91, 96, 66 C.R. 224, *supra*, §464; *Daar & Newman v. VRL Int.* (2005) 129 C.A.4th 482, 487, 28 C.R.3d 566, *supra*, §473; 62 *Harv. L. Rev.* 287; 5 *Stanf. L. Rev.* 764.)

But there is a situation in which it is now clear that the doctrine will be rejected: where there is a change in law, either an intervening change or one that is contemporaneous with the subsequent appeal. In that case, the doctrine will not be applied, even though all requisites for invoking it are present. (See *infra*, §479.)

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2. Recognition of Rule.

9 *Witkin Cal. Proc. Appeal* § 479

[§ 479] Recognition of Rule.

Earlier California decisions refused to recognize an exception where, in the interval between the two appeals, the case law had changed by the overruling of former decisions or the establishment of a new precedent by controlling authority. (See *supra*, §462.) This exception, however, found increasing support in other jurisdictions and was applied in *Standard Oil Co. of Calif. v. Johnson* (1942) 56 C.A.2d 411, 132 P.2d 910. In plaintiff's action to recover sales taxes paid under protest, the issues were whether transactions were interstate and whether the tax was an invalid burden on interstate commerce. A judgment for defendant on demurrer was reversed on the authority of a United States Supreme Court decision. On the retrial, plaintiff received judgment on the merits. On appeal, this was reversed, because intervening decisions of the United States Supreme Court indicated that such transactions were intrastate and that the tax did not unreasonably burden commerce. (56 C.A.2d 424.)

Later cases recognize the rule. (See *Subsequent Injuries Fund of Calif. v. Industrial Acc. Com.* (1960) 53 C.2d 392, 395, 1 C.R. 833, 348 P.2d 193; *George Arakelian Farms v. Agricultural Lab. Rel. Bd.* (1989) 49 C.3d 1279, 1292, and footnote 9, 265 C.R. 162, 783 P.2d 749; *Hilton v. McNitt* (1962) 200 C.A.2d 879, 884, 19 C.R. 688; *Ryan v. Mike-Ron Corp.* (1968) 259 C.A.2d 91, 96, 66 C.R. 224, *supra*, §464, quoting the text; *Riemer v. Hart* (1977) 73 C.A.3d 293, 296, 142 C.R. 174 [intervening decision of Supreme Court, controlling authority]; *Anton v. San Antonio Community Hosp.* (1982) 132 C.A.3d 638, 649, 183 C.R. 423, citing the text; *People v. Sequeira* (1982) 137 C.A.3d 898, 901, 188 C.R. 470, quoting the text; *Provience v. Valley Clerks Trust Fund* (1984) 163 C.A.3d 249, 256, 209 C.R. 276 [citing *Di Genova v. State Bd. of Education* (1962) 57 C.2d 167, 18 C.R. 369, 367 P.2d 85]; *Davidson v. Superior Court* (1999) 70 C.A.4th 514, 530, 82 C.R.2d 739 [where California Supreme Court held that settlement was invalid, law of case doctrine did not prevent annulment of judgment of contempt based on that judgment, even though, at time that judgment was issued, earlier decision had held that settlement was valid]; *Crespin v. Coye* (1994) 27 C.A.4th 700, 708, 34 C.R.2d 10 [statutory amendment after initial decision]; *Building Industry Assn. v. Oceanside* (1994) 27 C.A.4th 744, 759, 33 C.R.2d 137 [holding that Supreme Court decision undermined prior opinion's statements as to test of when growth control ordinance is inconsistent with general plan or state law]; *In re Saldana* (1997) 57 C.A.4th 620, 625, 67 C.R.2d 183; cf. *People v. Stanley* (1995) 10 C.4th 764, 789, 42 C.R.2d 543, 897 P.2d 481 [unjust decision exception to law of case doctrine does not apply when there is mere disagreement with prior appellate determination]; *Griset v. Fair Political Practices Com.* (2001) 25 C.4th 688, 701, 107 C.R.2d 149, 23 P.3d 43, *infra*, §853 ["intervening change in

controlling law" exception to law of case doctrine has no applicability where litigation is concluded]; *Bell v. Farmers Ins. Exchange* (2004) 115 C.A.4th 715, 727, 9 C.R.3d 544 [recognizing exception, but refusing to apply it on ground that intervening law did not change original determination that claims representatives in question were not exempt for purposes of overtime pay].)

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3. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 480

[§ 480] Illustrations.

England v. Hospital of the Good Samaritan (1939) 14 C.2d 791, 97 P.2d 813, made it clear that the doctrine can be rejected whenever the erroneous rule of law is made clear by controlling authority. Plaintiff sued a charitable hospital for negligence of a nurse. During the first two trials the charitable immunity doctrine was accepted in California, and this was declared in each of the Court of Appeal opinions. On the third appeal, the Supreme Court, in a companion case, abrogated the immunity rule. *Held*, the new rule of liability applied. "In the present appeal, rigid adherence to the law of the case would compel a most unjust decision." (14 C.2d 795.) "To now say that his cause of action may not be determined upon the principles stated in the *Silva* case, notwithstanding the fact that it is decisive of all points raised by the hospital with the exception of those relating to the law of the case, would exalt form far above substance." (14 C.2d 796.) (See 62 *Harv. L. Rev.* 288, 292; 5 *Stanf. L. Rev.* 765.)

In *Wicktor v. Los Angeles* (1960) 177 C.A.2d 390, 2 C.R. 352, plaintiff widow sued to enforce her right to a pension under the county retirement fund. The county contended that decedent husband had originally designated his sister as beneficiary and never had changed it to plaintiff on his marriage to her. In the first trial, judgment for plaintiff was reversed on the ground that, though intent was shown, no record of the change was proved, and the rules governing insurance policies precluded her recovery. At the time of the second trial, a new Supreme Court decision had repudiated this theory and held that principles stated in War Risk policies cases should govern, stressing intention to change the beneficiary and disregard of legal technicalities. *Held*, the law of the first case should not be followed. Not only was the evidence different (see *supra*, §472), but to apply the first decision would be unjust to the widow. "If its application were to result in a reversal that would be a highly inequitable disposition of the matter. The husband wanted plaintiff to have the death benefit, he actively tried to effect that end, the sister avowedly does not want the money and no one but the widow claims it. Appellants do not resist payment of the benefit to a rightful claimant. They have nothing at stake except an apparent desire to establish a precise and convenient administrative procedure for change of beneficiary." (177 C.A.2d 404.)

In *Salazar v. Eastin* (1995) 9 C.4th 836, 39 C.R.2d 21, 890 P.2d 43, a taxpayers' action challenging the constitutionality of *Educ. C.* 39807.5, which permits school districts to charge parents and guardians for the transportation of students to and from school, the Court of Appeal ruled that the statute violated both the free school guaranty (Cal. Const., Art. IX, §5) and the Equal Protection Clause (Cal. Const., Art. I, §7(a)) of the California

Constitution, and issued an injunction and writ of mandamus against state education officials to prevent enforcement of the statute. The trial judge vacated the injunction and writ of mandamus on the basis of a subsequent Supreme Court decision in another case that concluded that the statute did not, on its face, violate either the free school guaranty or the Equal Protection Clause. *Held*, because the intervening Supreme Court decision eliminated the legal basis for the injunction and writ of mandamus, the trial judge did not abuse his discretion by vacating them.

(a) The law of the case doctrine does not bar defendant from challenging the ruling, announced in the earlier case involving these parties, that the statute was unconstitutional. The earlier case never held that the statute was only unconstitutional as applied, and the intervening Supreme Court decision held that it was valid on its face. An intervening change in the controlling rules of law, if that is what occurred, justifies a departure from the law of the case doctrine. (9 C.4th 859.)

(b) It would also be unjust to preclude defendant from relitigating the holding in the earlier case after the same argument concerning constitutionality that prevailed there was rejected by the Supreme Court. The law of the case doctrine will not be adhered to where its application will result in an unjust decision. (9 C.4th 859.)

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XIII. STARE DECISIS

A. Nature of Doctrine.

1. In General.

9 Witkin Cal. Proc. Appeal § 481

[§ 481] In General.

The doctrine of stare decisis expresses a fundamental policy of common law jurisdictions, that a rule once declared in an appellate decision constitutes a precedent that should normally be followed by certain other courts in cases involving the same problem. It is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. Another justification for the doctrine is convenience; lawyers and the courts are relieved of the necessity of continually reexamining matters settled by prior decisions.

The doctrine has been both praised and attacked, and attempts by courts and writers to define its scope have not been wholly successful. (See *Holt v. College of Osteopathic Physicians & Surgeons* (1964) 61 C.2d 750, 764, 40 C.R. 244, 394 P.2d 932 [dissenting opinion]; *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 296, 250 C.R. 116, 758 P.2d 58, *infra*, §552, quoting the text [citing cases on flexibility in applying doctrine and necessity for departure when early decision is unsound]; *People v. Ewoldt* (1994) 7 C.4th 380, 412, 27 C.R.2d 646, 867 P.2d 757 [dissenting opinion]; *Peterson v. Superior Court* (1995) 10 C.4th 1185, 1195, 43 C.R.2d 836, 899 P.2d 905, *infra*, §525, quoting the text.)

Commentary on the doctrine is extensive. (See Llewellyn, *The Common Law Tradition--Deciding Appeals*; Rutter Group, 2 *Civil Appeals and Writs* §14:191 et seq.; 52 *Cal. L. Rev.* 921 [rules of construction in wills and trusts]; 34 *Harv. L. Rev.* 74; 37 *Harv. L. Rev.* 409; 50 *Harv. L. Rev.* 4; 66 *Harv. L. Rev.* 84; 80 *Harv. L. Rev.* 797 [stare decisis in English House of Lords]; 81 *Harv. L. Rev.* 899 [state court decisions in federal courts]; 10 *Hastings L. J.* 283, 394; 17 *Pepperdine L. Rev.* 605 [Precedent, What It Is and What It Isn't]; 1 *So. Cal. L. Rev.* 53; 41 *So. Cal. L. Rev.* 73; 63 *So. Cal. L. Rev.* 3 [Constrained by Precedent; elucidation of three different models of the practice]; 6 *Stanf. L. Rev.* 613; 39 *Stanf. L. Rev.* 571 [scholarly discussion of meaning and effect of the doctrine]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §129 et seq.)

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XIII. STARE DECISIS

A. Nature of Doctrine.

2. Departure From Precedent.

a. Unlimited Power of Highest Court.

9 *Witkin Cal. Proc. Appeal* § 482

[§ 482] Unlimited Power of Highest Court.

The doctrine of stare decisis in America imposes no rigid bonds but declares a flexible rule of policy, and the highest courts of the state and nation are free, under some circumstances, to depart from precedent. (See 103 *Harv. L. Rev.* 1344 [Constitutional Stare Decisis]; 29 *Hastings L. J.* 1 [The Decisions of Justice Tobriner]; 29 *Hastings L. J.* 1025 [The Limits of Judicial Creativity]; 30 *Hastings L. J.* 523 [The Effect of Future Orientation on the American Reformation of English Judicial Method]; 6 *San Fernando Valley L. Rev.* 49 [Result-Oriented Adjudication].)

The following statements are illustrative:

Burnet v. Coronado Oil & Gas Co. (1932) 285 U.S. 393, 52 S.Ct. 443, 446, 76 L.Ed. 815, 823 [dissent: "No interest which could be subserved by so rigid an application of stare decisis is superior to that of a system of justice based on a considered and consistent application of the Constitution of the United States"].

Helvering v. Hallock (1940) 309 U.S. 106, 60 S.Ct. 444, 451, 84 L.Ed. 604, 612 [it "is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience"].

United States v. South-Eastern Underwriters Assn. (1944) 322 U.S. 533, 64 S.Ct. 1162, 1187, 88 L.Ed. 1440, 1472 [dissent: "before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity"].

Los Angeles v. Faus (1957) 48 C.2d 672, 679, 312 P.2d 680 ["The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each instance by the discretion of the court. Previous decisions should not be followed to the extent that error may be perpetuated and that wrong may result"].

Cianci v. Superior Court (1985) 40 C.3d 903, 924, 221 C.R. 575, 710 P.2d 375 [overruling prior decision in *Willis v. Santa Ana Community Hosp. Assn.* (1962) 58 C.2d 806, 26 C.R. 640, 376 P.2d 568, 1 *Summary* (10th), *Contracts*,

§592, and stating: "Stare decisis does not prevent us from reconsidering *Willis*. Although the doctrine does indeed serve important values, it nevertheless should not shield court-created error from correction"].

Childers v. Childers (1946) 74 C.A.2d 56, 61, 168 P.2d 218 ["The rule of *stare decisis* is a rule of public policy. For the preservation of harmony and for the stabilization of the law the courts will ordinarily follow precedents when the same points arise in subsequent litigation, although they will not persist in an absurdity or perpetuate a manifest error"].

The problems of policy involved in reexamining precedents of the highest court were discussed in *Patterson v. McLean Credit Union* (1988) 485 U.S. 617, 108 S.Ct. 1419, 99 L.Ed.2d 879. The lead opinion (Per Curiam) decided, in explaining the decision to restore the case to the calendar for reargument, to consider whether the holding in *Runyon v. McCrary* (1976) 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415, 8 Summary (10th), *Constitutional Law*, §879, should be reconsidered. The opinion pointed out that the order did not imply a decision to overrule *Runyon*, but was simply a request for argument on whether it should be modified or overruled. (108 S.Ct. 1420, 99 L.Ed.2d 880.) The opinion then cited a long list of cases overruling precedents. (108 S.Ct. 1420, 99 L.Ed.2d 880.)

"Both of the dissents intimate that the statutory question involved in *Runyon v. McCrary* should not be subject to the same principles of *stare decisis* as other decisions because it benefited civil rights plaintiffs by expanding liability under the statute. We do not believe that the Court may recognize any such exception to the abiding rule that it treat all litigants equally: that is, that the claim of any litigant for the application of a rule to its case should not be influenced by the Court's view of the worthiness of the litigant in terms of extralegal criteria." (108 S.Ct. 1421, 99 L.Ed.2d 881.)

Four justices dissented, in two opinions; the following excerpts illustrate the view of the dissenters:

(a) "I am at a loss to understand the motivation of five Members of this Court to reconsider an interpretation of a civil rights statute that so clearly reflects our society's earnest commitment to ending racial discrimination, and in which Congress so evidently has acquiesced." (108 S.Ct. 1422, 99 L.Ed.2d 882.)

(b) "As I have said before, the 'adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.' ... If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation--and for the future of this Court as an institution--will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious--and unwise--wound upon itself today." (108 S.Ct. 1423, 99 L.Ed.2d 883, 884.)

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A. Nature of Doctrine.

2. Departure From Precedent.

b. Doctrine Is Jurisdictional in Lower Court.

9 *Witkin Cal. Proc. Appeal* § 483

[§ 483] Doctrine Is Jurisdictional in Lower Court.

In *Auto Equity Sales v. Superior Court* (1962) 57 C.2d 450, 20 C.R. 321, 369 P.2d 937, the court held that a lower court that refuses to follow a binding precedent of a higher court is acting in excess of jurisdiction, and a higher court may issue an extraordinary writ to compel the lower court to rule in accordance with the controlling precedent. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §297.)

Despite this debatable jurisdictional explanation (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §297), the *Auto Equity Sales* doctrine, i.e., that trial courts and lower appellate courts are bound to follow the decisions of higher appellate courts, has been restated and followed in many Court of Appeal decisions. (See *Wall v. Sonora Union High School Dist.* (1966) 240 C.A.2d 870, 872, 50 C.R. 178; *Redevelopment Agency of San Francisco v. Pacific Vegetable Oil Corp.* (1966) 241 C.A.2d 606, 613, 50 C.R. 676; *Orser v. George* (1967) 252 C.A.2d 660, 672, 60 C.R. 708; *O'Connor v. Richmond Savings & Loan Assn.* (1968) 262 C.A.2d 523, 531, 68 C.R. 882; *Ford v. Ford* (1969) 276 C.A.2d 9, 14, 80 C.R. 435; *People v. West Coast Shows* (1970) 10 C.A.3d 462, 471, 89 C.R. 290; *Beckman v. Mayhew* (1975) 49 C.A.3d 529, 535, 122 C.R. 604; *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 40, 123 C.R. 216, *infra*, §496, citing the text; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1018, 140 C.R. 168, citing the text [opinion in case in which extraordinary writ is granted has same value as precedent as one rendered on an appeal]; *Greek Theatre Assn. v. Los Angeles* (1978) 76 C.A.3d 768, 776, 784, 142 C.R. 919, *infra*, §496; *People v. Savala* (1981) 116 C.A.3d 41, 58, 171 C.R. 882, *infra*, §494; *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1211, 58 C.R.2d 205; *Cuccia v. Superior Court* (2007) 153 C.A.4th 347, 353, 62 C.R.3d 796; *cf. People v. Steele* (2000) 83 C.A.4th 212, 220, 99 C.R.2d 458 [California Supreme Court decision was not followed where decision was poorly reasoned, subsequently published Court of Appeal decisions to the contrary had gone unchallenged, and Supreme Court itself had refused to follow its earlier decision].)

A practical exception to the doctrine became necessary when selective publication of Court of Appeal opinions was introduced: An unpublished opinion cannot be cited; hence, though theoretically a precedent, it will not have the effect of a precedent. (See *infra*, §§820, 821.) (On distinctions, when something other than court precedent is followed, see *infra*, §§484, 485.)

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A. Nature of Doctrine.

3. Distinction: Common Law as Rule of Decision.

9 *Witkin Cal. Proc. Appeal* § 484

[§ 484] Distinction: Common Law as Rule of Decision.

(1) *In General.* A related doctrine is declared by statute in many states, including California: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." (C.C. 22.2.) In other words, courts will look to the common law of England, instead of to court precedent. However, in the process of determining what law to adopt, the court will apply court decisions, i.e., those of English courts, as well as those of American courts (such as sister states) that follow the common law. (See *Martin v. Superior Court* (1917) 176 C. 289, 293, 168 P. 135; *Fletcher v. Los Angeles Trust & Savings Bank* (1920) 182 C. 177, 182, 187 P. 425; *Cole v. Rush* (1955) 45 C.2d 345, 355, 289 P.2d 450; *Estate of Sahlender* (1948) 89 C.A.2d 329, 339, 201 P.2d 69; *Victory Oil Co. v. Hancock Oil Co.* (1954) 125 C.A.2d 222, 229, 270 P.2d 604; *Dry Creek Valley Assn. v. Board of Supervisors* (1977) 67 C.A.3d 839, 843, 135 C.R. 726; *Estate of Hering* (1980) 108 C.A.3d 88, 92, 166 C.R. 298; Rutter Group, 2 Civil Appeals and Writs §14:191 et seq.; 50 Harv. L. Rev. 4 [nature and development of American common law]; 2 *Pepperdine L. Rev.* 257; 14 *So. Cal. L. Rev.* 183; 15A *Am.Jur.2d* (2000 ed.), *Common Law* §10.)

(2) *When Common Law Will Be Rejected.* But a common law doctrine will be rejected in the following circumstances:

(a) Where California's statutes preclude its application. (See *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 573, 140 P. 242; *Burlingame v. Traeger* (1929) 101 C.A. 365, 371, 281 P. 1051; *Monterey Club v. Superior Court* (1941) 48 C.A.2d 131, 145, 119 P.2d 349.)

(b) Where the common law rule is completely unacceptable under modern social or economic conditions. The common law rule, unlike the decisions of higher courts, is not binding on a lower court, which may reject it. (See *Self v. Self* (1962) 58 C.2d 683, 684, 26 C.R. 97, 376 P.2d 65; *People v. Statley* (1949) 91 C.A.2d Supp. 943, 946, 206 P.2d 76.)

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4. Distinction: Statute as Precedent.

9 *Witkin Cal. Proc. Appeal* § 485

[§ 485] Distinction: Statute as Precedent.

A statute, although not expressly applicable, and therefore not a binding direction, may nevertheless serve as a precedent or model in the judicial formulation of rules. (See *Estate of Mason* (1965) 62 C.2d 213, 217, 42 C.R. 13, 397 P.2d 1005, 14 Summary (10th), *Wills and Probate*, §259 [abatement statute was model for formulation of judicial rule on ademption]; *In re Waltreus* (1965) 62 C.2d 218, 224, 42 C.R. 9, 397 P.2d 1001, 5 Cal. Crim. Law (3d), *Criminal Trial*, §39 [federal Jencks Act was model for determining right of defendant to compel inspection of statements of prosecuting witnesses]; *Vasquez v. Superior Court* (1971) 4 C.3d 800, 820, 94 C.R. 796, 484 P.2d 964 ["Although we have concluded that the provisions of the Consumers Legal Remedies Act do not apply retroactively to this case, no valid reason exists to prevent the trial court from utilizing many of the procedural provisions of the act in the interests of efficiency"]; *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 812, 119 C.R. 858, 532 P.2d 1226 [listing states that, by legislation, abrogated "all or nothing" defense of contributory negligence, in support of decision establishing doctrine of comparative negligence in California]; *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 741, 144 C.R. 380, 575 P.2d 1162 [Uniform Comparative Fault Act: "While lacking any legislative sanction, the Act, in our view, points in the direction of a responsible national trend"]; 49 Cal. L. Rev. 615.)

In *Green v. Superior Court* (1974) 10 C.3d 616, 636, 111 C.R. 704, 517 P.2d 1168, the issue was whether breach of the newly recognized warranty of habitability could be raised by a tenant as a defense in a landlord's unlawful detainer proceeding contrary to the common law rule of property. (See *infra*, §§529, 1027.) In holding that this could be done, the court relied in part on legislative precedents:

"Finally, an additional legal development casts significant light upon the continued vitality of the traditional common law rule. The past half century has brought the widespread enactment of comprehensive housing codes throughout the nation. ... These comprehensive housing codes affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state. As the Supreme Court of Wisconsin declared with respect to that state's housing code: '[T]he legislature has made a policy judgment--that it is socially (and politically) desirable to impose these duties on a property owner--which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.' " (10 C.3d 627.) (See 10 C.3d 636, citing model landlord-tenant codes of Commissioners on Uniform State Laws, and American Bar Foundation, as

recognizing "salutary trend toward determination of the rights and liabilities of litigants in one, rather than multiple proceedings.")

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1. In General.

a. Trial Courts and Administrative Tribunals.

9 *Witkin Cal. Proc. Appeal* § 486

[§ 486] Trial Courts and Administrative Tribunals.

(1) *In General.* The doctrine applies only to the decisions of appellate courts. Trial courts do not make binding precedents. (See *King v. Order of United Commercial Travelers* (1948) 333 U.S. 153, 68 S.Ct. 488, 492, 92 L.Ed. 608, 612; *Santa Ana Hosp. Med. Center v. Belshe'* (1997) 56 C.A.4th 819, 830, 65 C.R.2d 754; 22 So. Cal. L. Rev. 186.) Nor do administrative tribunals. Though they may exercise reviewing functions, and often determine legal issues by following established case law, their decisions are not within the scope of the doctrine. (*Motor Transit Co. v. Railroad Com. of Calif.* (1922) 189 C. 573, 586, 209 P. 586; *Product Research Associates v. Pacific Tel. & Tel. Co.* (1971) 16 C.A.3d 651, 660, 94 C.R. 216 [decision of Public Utilities Commission on question of general law--validity of provision exculpating utility from liability]; see 62 Harv. L. Rev. 118 [discussing analogous development of "case law" in labor arbitration]; 4 U.C.L.A. L. Rev. 657 [same]; 79 A.L.R.2d 1126 [administrative agencies].)

(2) *Persuasive Authority.* These cases and administrative decisions are by no means ignored; when collected and readily available for study, they may be cited for their persuasive value and are occasionally followed in the absence of controlling higher authority. (See *Santa Ana Hosp. Med. Center v. Belshe'*, *supra*, 56 C.A.4th 830 [but holding that isolated ruling was not part of readily available compilation so as to be citable for its persuasive value].) Examples of works citable for their persuasive value are the following:

(a) *Coffey's Probate Decisions* (superior court decisions written many years ago by a probate judge). (See *Estate of Reinicke* (1941) 44 C.A.2d 271, 273, 112 P.2d 311; *Estate of Clary* (1950) 98 C.A.2d 524, 527, 220 P.2d 754.)

(b) *Workers' Compensation Appeals Board Decisions* (formerly Industrial Accident Commission, then Workmen's Compensation Appeals Board). (See *Coborn v. Industrial Acc. Com.* (1948) 31 C.2d 713, 716, 192 P.2d 959; *Subsequent Injuries Fund of Calif. v. Industrial Acc. Com.* (1955) 44 C.2d 604, 608, 283 P.2d 1039; *Cannon v. Industrial Acc. Com.* (1959) 53 C.2d 17, 22, 346 P.2d 1; *McCoy v. Industrial Acc. Com.* (1966) 64 C.2d 82, 88, 48 C.R. 858, 410 P.2d 362; *Granco Steel v. Work. Comp. App. Bd.* (1968) 68 C.2d 191, 199, 65 C.R. 287, 436 P.2d 287; *Johnson v. Work. Comp. App. Bd.* (1970) 2 C.3d 964, 970, 88 C.R. 202, 471 P.2d 1002; *Laeng v. Work. Comp. App. Bd.* (1972) 6 C.3d 771, 779, 780, 100 C.R. 377, 494 P.2d 1; *Wilkinson v. Work. Comp. App. Bd.* (1977) 19 C.3d 491, 496, 497, 138 C.R. 696, 564 P.2d 848; *Associated Indem. Corp. v. Industrial Acc. Com.* (1941) 43 C.A.2d 292, 294, 110 P.2d

676; *United States Pipe & Foundry Co. v. Industrial Acc. Com.* (1962) 201 C.A.2d 545, 550, 20 C.R. 395; *Transactron v. Work. Comp. App. Bd.* (1977) 68 C.A.3d 233, 238, 239, 137 C.R. 142.)

(c) *Public Utilities Commission Decisions.* (See *Hill v. Progress Co.* (1947) 79 C.A.2d 771, 778, 180 P.2d 956; *Demeter v. Annenson* (1947) 80 C.A.2d 48, 55, 180 P.2d 998.)

(d) *Unemployment Insurance Appeals Board Decisions.* (See *Sanchez v. Unemp. Ins. App. Bd.* (1977) 20 C.3d 55, 65, 141 C.R. 146, 569 P.2d 740; *Lewis v. Unemp. Ins. App. Bd.* (1976) 56 C.A.3d 729, 735, 128 C.R. 795; *International Union of United Auto. Aerospace & Agricultural Implement Workers of America (UAW) v. Department of Human Resources Dev.* (1976) 58 C.A.3d 924, 931, 130 C.R. 368; *Rabago v. Unemp. Ins. App. Bd.* (1978) 84 C.A.3d 200, 210, 148 C.R. 499.)

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1. In General.

b. Superseded Cases: Former Procedure.

9 Witkin Cal. Proc. Appeal § 487

[§ 487] Superseded Cases: Former Procedure.

Where a prior appellate opinion was actually superseded by another, the first has no authoritative, and little persuasive, force. This is true, e.g., of some early opinions of the Supreme Court heard in a department where the final appellate decisions in the cases were rendered by the court in bank. (See *Weyer v. Weyer* (1919) 40 C.A. 765, 769, 182 P. 776; *Federoff v. Birks Bros.* (1925) 75 C.A. 345, 347, 242 P. 885; cf. *Banken v. State Bd. of Equalization* (1947) 79 C.A.2d 572, 575, 180 P.2d 400 [Supreme Court decision in bank, though superseded on rehearing, was nevertheless cited as persuasive].)

A considerable volume of superseded opinions has accumulated in cases in which, under California's former law, a hearing was granted in the Supreme Court after a decision by the Court of Appeal. Though technically unreported, i.e., eliminated from the permanent official California Appellate Reports, they are published, i.e., they remain in the Pacific Reporter and California Reporter. Nevertheless, these opinions are superseded, and it has frequently been emphasized that an opinion in this class is wholly without force as a precedent. (*Knouse v. Nimocks* (1937) 8 C.2d 482, 484, 66 P.2d 438 ["that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written"]; *People v. Woods* (1937) 19 C.A.2d 556, 560, 65 P.2d 940 ["the opinion in that case is resting in a judicial morgue, having succumbed to a painless lethal gas in the form of an inoffensive order by the Supreme Court transferring the case to a higher sphere"]; cf. *Bachis v. State Farm Mut. Auto. Ins. Co.* (1968) 265 C.A.2d 722, 725, footnote 4, 71 C.R. 486, 2 Cal. Proc. (5th), *Jurisdiction*, §52 [rehearing granted in Supreme Court; "since the second opinion repeated the holding of the first, we believe that the first opinion has more vitality than is ordinarily the case"].)

In *Ponce v. Marr* (1956) 47 C.2d 159, 301 P.2d 837, the Supreme Court, having taken over a case on its own motion because the Court of Appeal opinion had relied on a superseded case, said: "It therefore seems necessary to reiterate that the effect of an order of transfer to this court is to remove the cause in its entirety from the District Court of Appeal." And the case so transferred "has been rendered a nullity and of no force and effect," and has "ceased to be authoritative in any sense as a precedent." (47 C.2d 161.) (See 31 So. Cal. L. Rev. 87.)

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1. In General.

c. Nonsuperseded Cases: Present Procedure.

9 Witkin Cal. Proc. Appeal § 488

[§ 488] Nonsuperseded Cases: Present Procedure.

The situation was slightly changed where the Court of Appeal decision was nullified, but not superseded, by a different decision of the Supreme Court. For example, after review has been granted, the case might be settled or the appeal dismissed as moot (see *infra*, §§736, 749). In that situation, the temptation to refer to the Court of Appeal opinion was strong, and the courts sometimes yielded to it. Thus, in *Montaldo v. Hires Bottling Co. (1943) 59 C.A.2d 642, 139 P.2d 666*, the court cited the opinion in a dismissed case for its review of decisions on collective labor agreements, observing that "[w]hile it is true the Supreme Court neither approved nor disapproved the conclusions in that opinion, it is worthy of consideration." (59 C.A.2d 650.) (See *Blatz Brewing Co. v. Collins (1945) 69 C.A.2d 639, 650, 160 P.2d 37* [opinion in dismissed case quoted at length because its analysis and conclusions were "logical, persuasive and correct"]; *Smith v. Great Lakes Airlines (1966) 242 C.A.2d 23, 30, 51 C.R. 1* [case taken over on rehearing by stipulation and appeal dismissed; cited and quoted because "we agree with the views expressed"].) (For the current rule on Supreme Court review, under which the Court of Appeal decision is not superseded but is reviewed, and the Supreme Court may order the opinion published in official reports, see *infra*, §951.)

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2. Unreported or Unpublished Decisions.

a. Early Unreported Cases.

9 *Witkin Cal. Proc. Appeal* § 489

[§ 489] Early Unreported Cases.

There was a period of a few years during which only those Supreme Court decisions that the Supreme Court ordered published appeared in the official reports. Prior to that time and afterwards all opinions were published. The unpublished opinions were later collected in a series of seven volumes entitled "California Unreported Cases" (cited *Cal. Unrep.*).

Although there is some feeling among both courts and lawyers that these decisions are not very strong authority, they have been cited with much the same effect as other Supreme Court decisions. "It is to be noted that this case has never been overruled and is therefore binding upon this court. The fact that this case was not ordered reported in the official report of the Supreme Court does not detract from its binding force." (*Estate of Little* (1937) 23 C.A.2d 40, 43, 72 P.2d 213.) (See *MacDonald v. MacDonald* (1909) 155 C. 665, 672, 102 P. 927 ["The fact that this case was not ordered reported in the official reports cannot be taken to indicate, as claimed by defendant, that this court disapproved the doctrine announced therein"]; *People v. Pantages* (1931) 212 C. 237, 255, 256, 297 P. 890 [referring to "leading case" and following it]; *Overton v. White* (1937) 18 C.A.2d 567, 571, 574, 64 P.2d 758, 65 P.2d 99; *Brazell v. Brazell* (1942) 54 C.A.2d 458, 460, 129 P.2d 117; *Citizens Nat. Trust & Savings Bank of Los Angeles v. Brown* (1942) 54 C.A.2d 688, 692, 129 P.2d 466; *Johnson v. Superior Court* (1989) 208 C.A.3d 1093, 1097, 256 C.R. 651 [relying on early unreported decision].)

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2. Unreported or Unpublished Decisions.

b. Unpublished Appellate Division Decisions.

9 *Witkin Cal. Proc. Appeal* § 490

[§ 490] Unpublished Appellate Division Decisions.

Another type of unreported case comes from the appellate division (formerly appellate department) of the superior court. This court is not required to write opinions (see *infra*, §781), and most of its decisions are rendered in memorandum form without publication. These unpublished decisions can scarcely be regarded as authority.

Nevertheless, they are sometimes cited by counsel and followed by appellate divisions or by Courts of Appeal. (See *In re Mares* (1946) 75 C.A.2d 798, 802, 171 P.2d 762 [opinion quoted at length]; *Los Angeles v. Security-First Nat. Bank of Los Angeles* (1948) 84 C.A.2d 575, 578, 191 P.2d 78; *Gibson v. Corbett* (1948) 87 C.A.2d Supp. 926, 928, 200 P.2d 216; *Saldana v. Los Angeles* (1949) 92 C.A.2d 214, 217, 206 P.2d 866; *Slosberg v. Municipal Court of Los Angeles* (1950) 101 C.A.2d 238, 240, 225 P.2d 312; *Engleman v. Green* (1954) 125 C.A.2d Supp. 882, 886, 270 P.2d 127 [following prior unpublished decisions of same appellate division]; *People v. Stipp* (1961) 190 C.A.2d Supp. 883, 885, 12 C.R. 476 [same]; *In re Martin* (1963) 221 C.A.2d 14, 18, 34 C.R. 299 [unpublished opinion cited by counsel and quoted by court]; *People v. Dudley* (1967) 250 C.A.2d Supp. 955, 957, 58 C.R. 557 [construction of statute; unpublished opinion of other county's appellate division not followed, unpublished opinion of its own followed]; *Buckner v. Azulai* (1967) 251 C.A.2d Supp. 1013, 1014, 1015, 59 C.R. 806 [except for unpublished opinion "there is no case in point in California," and "it is controlling here"]; cf. *Haupt v. La Brea Heating & Air Conditioning Co.* (1954) 125 C.A.2d Supp. 888, 889, 270 P.2d 125 [expressly disapproving prior unpublished opinion]; *People v. Cowles* (1956) 142 C.A.2d Supp. 865, 867, 298 P.2d 732 [refusing to follow unpublished decision of another appellate division]; *Oppenheimer v. Sunkist Growers* (1957) 153 C.A.2d Supp. 897, 899, 315 P.2d 116 [disapproving prior unreported decisions].)

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2. Unreported or Unpublished Decisions.

c. Unpublished Court of Appeal Decisions.

9 Witkin Cal. Proc. Appeal § 491

[§ 491] Unpublished Court of Appeal Decisions.

An opinion of the Court of Appeal that ordinarily would be a precedent binding on trial courts and the appellate division of the superior court (see *supra*, §483), may lose its force as a precedent if not published, because in that event it cannot be cited. (See *infra*, §821.) This can happen in four situations:

(1) The Court of Appeal does not certify it for publication. (See *infra*, §813.)

(2) The Court of Appeal certifies it for publication but the Supreme Court orders it decertified. (See *infra*, §816.)

(3) The Court of Appeal certifies it for publication, but the Supreme Court grants review, and thereafter does not order it published. (See *infra*, §951.)

(4) The Court of Appeal certifies the opinion for publication but supersedes it by subsequently granting rehearing or, less commonly, modifying it to order that it not be officially published. (See *infra*, §§813, 814, 910, 948.)

An exception is specified. An unpublished Court of Appeal opinion may be cited when the opinion is relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel. (C.R.C., Rule 8.1115(b)(1).) (See *Los Angeles Police Protective League v. Los Angeles* (2002) 102 C.A.4th 85, 90, 124 C.R.2d 911 [under collateral estoppel doctrine (see 7 Cal. Proc. (5th), *Judgment*, §413 et seq.), unpublished opinion could be cited to establish that city officers held property interest in pay grades; construing former rule].)

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3. California Supreme Court Decisions.

a. Effect on California Courts.

9 *Witkin Cal. Proc. Appeal* § 492

[§ 492] Effect on California Courts.

(1) *Binding on Lower Courts.* A decision of the highest reviewing court in a state is considered absolutely binding on a trial court or lower appellate court. Hence, a Supreme Court decision must be followed by trial judges, Courts of Appeal, and appellate divisions of the superior court. "It is not for us to inquire what the law ought to be when the Supreme Court has emphatically informed us what the law is. Counsel's suggestion, therefore, cannot be addressed with propriety to any court subordinate to the Supreme Court." (*Orange County Water Dist. v. Riverside* (1959) 173 C.A.2d 137, 165, 343 P.2d 450; see *People v. Triggs* (1973) 8 C.3d 884, 890, 106 C.R. 408, 506 P.2d 232, *infra*, §502; *Akley v. Bassett* (1924) 68 C.A. 270, 296, 228 P. 1057; *Blair v. Williams* (1927) 86 C.A. 676, 682, 261 P. 539; *Capron v. West* (1931) 114 C.A. 633, 634, 300 P. 149; *Estate of Maguire* (1936) 14 C.A.2d 388, 390, 58 P.2d 209; *Birkhofer v. Krumm* (1938) 27 C.A.2d 513, 537, 81 P.2d 609; *Stoneman v. Fritz* (1939) 34 C.A.2d 26, 31, 92 P.2d 1035; *Latham v. Santa Clara County Hosp.* (1951) 104 C.A.2d 336, 340, 231 P.2d 513; *Beckman v. Mayhew* (1975) 49 C.A.3d 529, 535, 122 C.R. 604 ["We are not permitted to violate stare decisis for the sake of straws in the wind. Our duty as an intermediate appellate court is to follow the decisional law laid down by the State Supreme Court"]; *Civil Service Com. v. Superior Court* (1976) 63 C.A.3d 627, 631, 133 C.R. 825; *Greek Theatre Assn. v. Los Angeles* (1978) 76 C.A.3d 768, 776, 784, 142 C.R. 919, *infra*, §496; *People v. Savala* (1981) 116 C.A.3d 41, 58, 171 C.R. 882, *infra*, §494; *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1211, 58 C.R.2d 205; *In re Marriage of Condon* (1998) 62 C.A.4th 533, 549, 73 C.R.2d 33, citing the text [Supreme Court case binds Court of Appeal even though case appealed was decided at trial court level before Supreme Court decision]; for view of dissenting judge that he was not bound by Supreme Court decision, see *Morrow v. Hood Communications* (1997) 59 C.A.4th 924, 926, 69 C.R.2d 489, *infra*, §895.)

(2) *Federal Question.* Although Courts of Appeal are bound by decisions of the United States Supreme Court on federal questions (*infra*, §505), these courts are bound by the California Supreme Court's interpretation of federal questions in the absence of contrary decisions of the United States Supreme Court and despite contrary holdings of other federal courts. (*People v. Greenwood* (1986) 182 C.A.3d 729, 734, 227 C.R. 539 [Fourth Amendment].)

(3) *Dicta.* A dictum is generally regarded as only persuasive (see *infra*, §511). However, a dictum of the Supreme Court has been considered binding on the Court of Appeal in the same manner as an express holding. (See *Hickman v. Mulder* (1976) 58 C.A.3d 900, 902, 130 C.R. 304 ["The case is squarely controlled by a dictum in *Cornelison v.*

Kornbluth ... and in obedience to that dictum we must reverse the judgment of dismissal"].) But there is authority to the contrary. (See *Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16 C.A.4th 1349, 1358, 20 C.R.2d 515 [criticizing *Hickman*, and holding that Supreme Court dicta does not control lower courts].)

(4) *Minute Orders*. Minute orders are not binding precedent. However, this rule does not preclude lower courts from considering these orders. (*Thompson v. Department of Corrections* (2001) 25 C.4th 117, 125, 105 C.R.2d 46, 18 P.3d 1198; *California Assn. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 270 C.R. 796, 793 P.2d 2.)

(5) *Not Binding on Supreme Court Itself*. Where its own prior decisions are invoked, the highest reviewing court, while generally adhering to the policy of stare decisis, is free to depart from a rule formerly announced. (See *supra*, §482 and *infra*, §§513 et seq., 519 et seq.)

(6) *Not Binding as to Propositions Not Considered*. Decisions of Supreme Court are not controlling authority for propositions not considered. (*Ginns v. Savage* (1964) 61 C.2d 520, 521, 39 C.R. 377, 393 P.2d 689; *People v. Harris* (1989) 47 C.3d 1047, 1071, 255 C.R. 352, 767 P.2d 619; *People v. Superior Court (Marks)* (1991) 1 C.4th 56, 65, 2 C.R.2d 389, 820 P.2d 613; *People v. Saunders* (1993) 5 C.4th 580, 592, footnote 8, 20 C.R.2d 638, 853 P.2d 1093; *People v. Banks* (1993) 6 C.4th 926, 945, 25 C.R.2d 524, 863 P.2d 769; *Cobb v. University of Southern Calif.* (1995) 32 C.A.4th 798, 803, 38 C.R.2d 543, *supra*, §192; *Dyer v. Superior Court* (1997) 56 C.A.4th 61, 66, 65 C.R.2d 85.)

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b. Effect on Federal Courts.

9 Witkin Cal. Proc. Appeal § 493

[§ 493] Effect on Federal Courts.

Decisions of the Supreme Court, authoritatively declaring the law of this state, are conclusive in the federal courts. (See *Wortley v. Wood-Callahan Oil Co. (1941) 17 C.2d 762, 766, 112 P.2d 226* [quoting federal case overruling its own prior decisions inconsistent with later California decision]; cf. *Meredith v. Winter Haven (1943) 320 U.S. 228, 64 S.Ct. 7, 11, 88 L.Ed. 9, 13* [latest decision of state Supreme Court, on question of law involved in action in federal court, must be taken as controlling, unless it can be said with some assurance that state Supreme Court will not follow that decision in future].)

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3. California Supreme Court Decisions.

c. Subsequent Declaration of Legislative Intent.

9 Witkin Cal. Proc. Appeal § 494

[§ 494] Subsequent Declaration of Legislative Intent.

A Supreme Court decision interpreting legislative intent is binding on Courts of Appeal despite a subsequent declaration of a different intent in clarifying legislation. This conclusion was reached in *People v. Savala* (1981) 116 C.A.3d 41, 171 C.R. 882, on an examination of precedents and policies. In *People v. Harvey* (1979) 25 C.3d 754, 159 C.R. 696, 602 P.2d 396, the court, resolving an apparent inconsistency in Penal Code sections, had determined that the underlying legislative intent was to preclude enhancement of punishment under the circumstances presented. The Legislature immediately adopted an urgency measure to "clarify and reemphasize" the original legislative intent, contrary to the *Harvey* construction. (116 C.A.3d 55.) Held, the *Harvey* rule was binding.

(a) Prior Court of Appeal decisions on the issue have all held *Harvey* controlling under the doctrine of *Auto Equity Sales v. Superior Court* (1962) 57 C.2d 450, 20 C.R. 321, 369 P.2d 937, supra, §483, despite some disagreement with the holding. (116 C.A.3d 57.)

(b) The Legislature's hint that its intent was judicially misconstrued does not permit a departure from stare decisis. "A subsequent expression of the Legislature as to the intent of a prior statute is not binding on the court, though it may properly be used in determining the effect of a prior act. ... The Supreme Court may now deem it appropriate to reconsider its prior interpretation of legislative intent, but we do not perceive it appropriate for an intermediate court of review to peremptorily assume this function of the Supreme Court." (116 C.A.3d 59.)

(c) "A decision by us to implement the legislative 'clarification' contained in the Act necessarily includes adoption of a broad policy that intermediate appellate courts may depart from an otherwise controlling holding of the California Supreme Court whenever the Legislature declares its intent has been misconstrued. There are two prospective unfortunate results from such a policy. First, the meaning and application of the law would be in a state of confusion, to the disadvantage of other courts and the public in general--the avoidance of which forms the basis of the stare decisis doctrine. Second, there could result an unnecessary obfuscation of the distinction between the judicial and the legislative functions of government. Such a course could well increase the potential for political intrusion into the judicial function." (116 C.A.3d 60.)

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d. Criticisms by Lower Court.

1. General Rule.

9 *Witkin Cal. Proc. Appeal* § 495

[§ 495] General Rule.

The disclaimer by an intermediate appellate court of any interest in what the law ought to be (see *Orange County Water Dist. v. Riverside* (1959) 173 C.A.2d 137, 343 P.2d 450, supra, §492) does not reflect the universal position of reviewing courts that are bound by precedents laid down by a higher court. They are bound, but not gagged. They may, in following a controlling decision, express misgivings or outright condemnation of the rule. And these expressions are frequently helpful to counsel seeking review in the Supreme Court, which can reverse itself, or to interested persons seeking legislative change. Many cases illustrate this procedure:

Tenzer v. Superscope (1985) 39 C.3d 18, 29, 216 C.R. 130, 702 P.2d 212 [observing that Court of Appeal justice pointed to criticism of particular rule and "invited" Supreme Court to disapprove it; "Today we accept his invitation"].

People v. MacMullen (1933) 134 C.A. 81, 85, 24 P.2d 794 ["Nevertheless, it appears to us that the question merits further consideration by that court or by the legislature"].

People v. Sayre (1937) 26 C.A.2d Supp. 757, 767, 70 P.2d 546 [concurring opinion criticizing decision].

Christiana v. Rose (1950) 100 C.A.2d 46, 55, 222 P.2d 891 [criticized rule should not be blindly extended].

Shea v. Shea (1950) 100 C.A.2d 60, 64, 223 P.2d 32 [Supreme Court decision characterized as harsh and contrary to spirit of statute].

People v. Rochin (1950) 101 C.A.2d 140, 143, 225 P.2d 1 [criticized rule should not be blindly extended].

Fuller v. Standard Stations (1967) 250 C.A.2d 687, 691, 58 C.R. 792 ["Such declarations form a back-eddy running counter to the mainstream of modern tort doctrine"]

Rosener v. Sears, Roebuck & Co. (1980) 110 C.A.3d 740, 758, 168 C.R. 237 [lengthy concurring opinion expressing view that "the law of punitive damages as it has developed in this state no longer serves any public policy, or

the legitimate interests of the unentitled recipients of its constantly accelerating largess"].

Kiick v. Levias (1980) 113 C.A.3d 399, 404, 405, 169 C.R. 859 [court followed rule that automobile owner who leaves key in car is not liable for injuries inflicted by thief who takes it and drives it, but suggested that theory and underlying policy of rule should be reexamined].

Nix v. Preformed Line Products Co. (1985) 170 C.A.3d 975, 986, 216 C.R. 581 [suggestion that time is ripe for reexamination of rule that there is no cause of action for loss of parental consortium].

Lyon v. Western Title Ins. Co. (1986) 178 C.A.3d 1191, 1194, 1203, 224 C.R. 385 ["We have certified this opinion for publication for, respectfully, it criticizes with reasons given the rule announced by" Supreme Court in earlier case and "[w]e are not alone in our criticism of" that case].

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2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 496

[§ 496] Illustrations.

Numerous Court of Appeal decisions contain criticisms of Supreme Court holdings.

In *People v. Wilson* (1943) 59 C.A.2d 610, 139 P.2d 673, involving the interpretation of a criminal statute, two of the three justices concurred "only because this court, by tradition and practice, is expected to follow the decisions of the Supreme Court," adding that those decisions "require us, in practice, to affirm a judgment we regard as violative of natural justice and at variance with a legislative intent." (59 C.A.2d 612.)

In *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 123 C.R. 216, the court, bound by a prior Supreme Court decision, decided the case in accordance with it, but only after a careful examination of later Supreme Court decisions leading to the conclusion that the earlier authority had been completely undermined. Principled obedience to the rule enunciated in *Fifield Manor v. Finston* (1960) 54 C.2d 632, 7 C.R. 377, 354 P.2d 1073, 13 *Summary* (10th), *Equity*, §138, "need not prevent awareness that it may be ripe for renunciation or limitation. In following a rule of decisional law, an intermediate court of appeal may appropriately analyze the factors which cast doubt upon its viability." (50 C.A.3d 41, citing the text.)

In *Craig v. Superior Court* (1976) 54 C.A.3d 416, 126 C.R. 565, a concurring justice developed at length his thesis that a binding California Supreme Court decision was contrary to prior United States Supreme Court decisions and its own prior holdings. In justification for his extended discussion, he said, citing and quoting the text: "[I]t seems to be the clear policy of this state that its intermediate reviewing courts record their disagreement with existing law, at least in areas of public importance such as this." Further support for this policy was found in former C.R.C., Rule 976 (now C.R.C., Rule 8.1105; see *infra*, §815), stating as one of the criteria for publication that the opinion "criticizes existing law." (54 C.A.3d 424.)

In *Greek Theatre Assn. v. Los Angeles* (1978) 76 C.A.3d 768, 142 C.R. 919, the court first observed that "for what the comment may be worth to our Supreme Court on a petition for hearing," changed conditions may have rendered the broad rule of *Stockton Civic Theatre v. Board of Supervisors* (1967) 66 C.2d 13, 20, 56 C.R. 658, 423 P.2d 810, 9

Summary (10th), *Taxation*, §197, no longer suitable. (76 C.A.3d 772.) Then, after an extended discussion, the court concluded that the controlling Supreme Court decision was unsound and that, if not precluded by the doctrine of *Auto Equity Sales v. Superior Court* (1962) 57 C.2d 450, 20 C.R. 321, 369 P.2d 937, *supra*, §483, it would have applied a narrower rule. (76 C.A.3d 784.)

In *People v. Von Staich* (1980) 101 C.A.3d 172, 161 C.R. 448, the court urged a reexamination of Supreme Court decisions calling for independent review of the entire appellate record, where appointed appellate counsel could not find an arguable appellate issue. The court described the awkward position of the court and counsel, and observed that "[r]eviewing this record is probably one of the silliest projects ever undertaken by an appellate court." (101 C.A.3d 177.)

In *Allen v. Jones* (1980) 104 C.A.3d 207, 163 C.R. 445, a concurring justice ridiculed the established rule denying recovery for negligent infliction of emotional distress not accompanied by physical injury, but added, "from my place in the judicial pecking order, I can do nothing but grumble about it." (104 C.A.3d 217.) Some months later, the Supreme Court, citing the concurring opinion and out-of-state cases, abrogated the rule. (See *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 927, 167 C.R. 831, 616 P.2d 813.)

In *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 146 C.R. 182, 578 P.2d 899, the court discussed a Court of Appeal opinion (*Poeschl*) at length, observing that the appellate court "revealed its misgivings with the existing equitable indemnity doctrine," and that "[t]he proof of the *Poeschl* court's prescience was not long in coming." (20 C.3d 596, 597.)

In *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 151 C.R. 837, 588 P.2d 1261, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §547, the Court of Appeal, analyzing conflicting appellate and Supreme Court decisions, concluded that the supposed rule on waiver of the right to arbitrate by mere filing of a suit, without a determination of the merits, was incorrect. The Supreme Court, on hearing, adopted the Court of Appeal opinion. (23 C.3d 182.)

An extremely candid recognition of the role of the Courts of Appeal in suggesting reexamination of Supreme Court holdings appears in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669, *infra*, §531: In affirming the judgment, the Court of Appeal likewise indicated its dissatisfaction with the rule of *Deshotel v. Atchison, Topeka & Santa Fe Ry Co.* (1958) 50 C.2d 664, 328 P.2d 449, *infra* §531, "but correctly deferred to this court for any reconsideration of the doctrine: Presiding Justice Kaus, writing for a unanimous court, stated that 'In spite of counsel's eloquent exhortations to the contrary, we must hold that it is up to the Supreme Court to qualify or overrule its decisions. We say this in full recognition of [the] argument that several Supreme Court cases since *Deshotel* and *West* can be read as undermining the rationale of those holdings.' This is a perceptive and accurate reading of our decisions, as we shall explain." (12 C.3d 388, citing *Deshotel* and *West v. San Diego* (1960) 54 C.2d 469, 6 C.R. 289, 353 P.2d 929, *infra*, §531.)

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4. Court of Appeal Decisions.

a. Binding on Lower Courts and Federal Courts.

9 Witkin Cal. Proc. Appeal § 497

[§ 497] Binding on Lower Courts and Federal Courts.

Because there is no further appeal to the Supreme Court but only a discretionary review (see *infra*, §913), a decision of the Court of Appeal is often the only authority on a point. It is binding on the trial courts and the appellate divisions of the superior court. (See *Auto Equity Sales v. Superior Court* (1962) 57 C.2d 450, 455, 20 C.R. 321, 369 P.2d 937, *supra*, §483; *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1211, 58 C.R.2d 205 [trial court in drunk driving prosecution was bound by Court of Appeal decisions holding that driver's license revocation or suspension is not punishment within meaning of Double Jeopardy Clause (U.S. Const., Fifth Amendment)].)

Where Courts of Appeal have rendered conflicting decisions, what is the trial court to do? "As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation." (*McCallum v. McCallum* (1987) 190 C.A.3d 308, 315, footnote 4, 235 C.R. 396.)

On a question of state law, the decision of an intermediate appellate court is binding on the federal courts. (*Six Cos. v. Joint Highway Dist. No. 13 of Calif.* (1940) 311 U.S. 180, 61 S.Ct. 186, 188, 85 L.Ed. 114, 117; *West v. American Tel. & Tel. Co.* (1940) 311 U.S. 223, 61 S.Ct. 179, 183, 85 L.Ed. 139, 144; see 29 Cal. L. Rev. 384; 41 Cal. L. Rev. 638 [state law in federal tax proceedings]; 59 Harv. L. Rev. 1299; 15 So. Cal. L. Rev. 71; 22 So. Cal. L. Rev. 188; 41 So. Cal. L. Rev. 197 [state law in federal tax proceedings].)

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4. Court of Appeal Decisions.

b. Weight in Other Courts of Appeal.

1. Not Binding.

9 *Witkin Cal. Proc. Appeal* § 498

[§ 498] Not Binding.

A decision of a Court of Appeal is not binding in the Courts of Appeal. One district or division may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions. (See *In re Hadley* (1943) 57 C.A.2d 700, 703, 135 P.2d 381; *Freitas v. Peerless Stages* (1952) 108 C.A.2d 749, 754, 239 P.2d 671; *Rubino v. Utah Canning Co.* (1954) 123 C.A.2d 18, 26, 266 P.2d 163; *Christensen v. Slawter* (1959) 173 C.A.2d 325, 337, 343 P.2d 341; *Cho v. Kempler* (1960) 177 C.A.2d 342, 351, 2 C.R. 167; *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 290, 303, 5 C.R. 263; *People v. Muir* (1966) 244 C.A.2d 598, 603, 53 C.R. 398 [prior case was never followed, theory has been recognized as erroneous]; *Swinerton & Walberg Co. v. Inglewood-Los Angeles County Civic Center Authority* (1974) 40 C.A.3d 98, 101, 114 C.R. 834, citing the text; *Beckman v. Mayhew* (1975) 49 C.A.3d 529, 534, 122 C.R. 604 [Court of Appeal decisions in conflict with prior binding authority of Supreme Court]; *Slapin v. Los Angeles Int. Airport* (1976) 65 C.A.3d 484, 489, 135 C.R. 296; *Estate of Toy* (1977) 72 C.A.3d 392, 396, 140 C.R. 183 [Court of Appeal decision incorrectly distinguished binding opinion of Supreme Court]; *Van Gaalen v. Superior Court* (1978) 80 C.A.3d 371, 376, 378, 145 C.R. 509 [Court of Appeal decision irreconcilable with binding Supreme Court decision]; *Theresa Enterprises v. Davis* (1978) 81 C.A.3d 940, 947, 146 C.R. 802 [Court of Appeal division follows its own prior holdings despite contrary decisions by other divisions of district]; *Bridges v. Bridges* (1978) 82 C.A.3d 976, 978, 147 C.R. 471 ["The embarrassing aspect of this case is that ... we part company with our brethren in the First Division of this court, a practice frowned upon in some circles"]; *In re Marriage of Hayden* (1981) 124 C.A.3d 72, 77, footnote 1, 177 C.R. 183 [case illustrates difficulty that trial judge faces in dealing with conflicting decisions, and "also points out the merit in not forcing the various districts within the Court of Appeal to blindly apply stare decisis to the holding first published"]; *Nunez v. Superior Court* (1983) 143 C.A.3d 476, 478, 191 C.R. 893; *Los Angeles Police Protective League v. Los Angeles* (1985) 163 C.A.3d 1141, 1147, 209 C.R. 890, citing the text; *McCallum v. McCallum* (1987) 190 C.A.3d 308, 315, 235 C.R. 396, quoting the text; *Santa Monica Hosp. Med. Center v. Superior Court* (1988) 203 C.A.3d 1026, 1031, 1032, 250 C.R. 384 [conflicting lines of cases examined and one line followed]; *Fenelon v. Superior Court* (1990) 223 C.A.3d 1476, 1483, 273 C.R. 367.)

People v. Yeats (1977) 66 C.A.3d 874, 136 C.R. 243, indicated that a prior opinion of the same Court of Appeal was not binding on it and could be disapproved, just as the Supreme Court is not bound to follow its prior decisions (see *supra*, §492). *Saucedo v. Mercury Savings & Loan Assn.* (1980) 111 C.A.3d 309, 168 C.R. 552, expressed the same view. After noting that its earlier decision had been properly criticized by commentators, the court said: "With due apologies to the trial court and others who relied on our decision of the attorney fee question, ... we overrule that decision insofar as it is inconsistent herewith." (111 C.A.3d 315.) However, there is a tendency for a Court of Appeal to follow decisions from the same or other districts or divisions. (See *infra*, §499.)

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4. Court of Appeal Decisions.

b. Weight in Other Courts of Appeal.

2. Persuasive Effect.

9 *Witkin Cal. Proc. Appeal* § 499

[§ 499] Persuasive Effect.

(1) *In General.* Normally, a Court of Appeal will follow prior decisions of its own or other districts or divisions. The remarks in *La Com v. Pacific Gas & Elec. Co.* (1955) 132 C.A.2d 114, 118, 281 P.2d 894, are typical: "[T]hough we are well aware that there is a difference of opinion as to the binding effect which the opinion and judgment of one District Court of Appeal may have on the court of another district, where, as here, the case is so closely in point, both as to the facts and as to the questions of law involved, we have no hesitancy in resting our judgment on the opinion in the Strother case which we feel is a correct statement of the law." (132 C.A.2d 118.) (See *In re Snell* (1911) 16 C.A. 253, 255, 116 P. 699 [decision of another district]; *Arentz v. Blackshere* (1967) 248 C.A.2d 638, 640, 56 C.R. 809 [rule of prior Court of Appeal decisions "has stood without contradiction for seven years"]; *Swinerton & Walberg Co. v. Inglewood-Los Angeles County Civic Center Authority* (1974) 40 C.A.3d 98, 101, 114 C.R. 834 ["we find its rationale quite persuasive"]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1017, 140 C.R. 168; *Fire Ins. Exchange v. Abbott* (1988) 204 C.A.3d 1012, 1023, 251 C.R. 620; *Cuccia v. Superior Court* (2007) 153 C.A.4th 347, 354, 62 C.R.3d 796 [decision of another district].)

Sometimes it does so with reluctance. (See *In re Ruth H.* (1972) 26 C.A.3d 77, 86, 102 C.R. 534 [describing conclusion of two prior cases as based on artificial distinction; "Nevertheless, we feel obligated to avoid conflict with another division of this district"].)

(2) *Favorable Citation by Supreme Court.* There is some conflict concerning the effect of the Supreme Court's favorable citation of a Court of Appeal decision. In *Adams v. Southern Pac. Trans. Co.* (1975) 50 C.A.3d 37, 123 C.R. 216, the court noted that the Supreme Court had quoted with approval from an Ohio case with facts similar to that of the present case, and observed that "[i]n unmistakable terms, the California Supreme Court announced its adherence to the doctrine of the Ohio decision." (50 C.A.3d 39, 41.)

In *Galloway Crane & Trucking Co. v. Truck Ins. Exchange* (1977) 67 C.A.3d 386, 136 C.R. 645, the majority opinion states that a prior case was cited with approval by the Supreme Court in a later decision. "Unless it can be distinguished on its facts, it is seemingly binding upon us." (67 C.A.3d 388.)

However, a concurring justice in *Galloway Crane* took sharp issue with the suggestion that a Court of Appeal is bound by a decision that is cited favorably by the Supreme Court, observing that no authority was stated for the proposition that a decision of this type "takes on an aura of conclusive effect upon us by virtue of such approval." (67 C.A.3d 392.) (On effect of denial of review in Supreme Court, see *infra*, §§501, 502.)

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4. Court of Appeal Decisions.

c. Weight in Supreme Court.

9 *Witkin Cal. Proc. Appeal* § 500

[§ 500] Weight in Supreme Court.

Obviously, the Supreme Court does not give Court of Appeal decisions the same weight as its own decisions. Thus, in departing from a rule established by the lower appellate courts, it need not expressly distinguish, limit, or overrule the cases, as it does with its own decisions. (See *Burgesser v. Bullock's* (1923) 190 C. 673, 682, 214 P. 649; *Worthley v. Worthley* (1955) 44 C.2d 465, 472, 283 P.2d 19; cf. *Bennett v. Superior Court* (1933) 218 C. 153, 164, 21 P.2d 946 [concurring opinion urging that decision, in effect overruling prior decisions of Court of Appeal, do so expressly by listing the cases]; on theory that Supreme Court can only "disapprove" but not "overrule" Court of Appeal decisions, see *infra*, §540.)

But this does not mean that the Supreme Court regards Court of Appeal decisions as relatively inferior authority. The six districts with many divisions (see 2 *Cal. Proc.* (5th), *Courts*, §§331, 332) produce the bulk of California's current case law. And, because all appellate jurisdiction (except death penalty cases) is in the Court of Appeal (see 2 *Cal. Proc.* (5th), *Courts*, §335), that court, subject to the ultimate supervisory power of the Supreme Court on review granted (see *infra*, §913), is a court of last resort on nearly every type of legal question. It is not surprising, therefore, to find, on examination of the reports, that normally the Supreme Court cites its own decisions and those of the Court of Appeal indiscriminately as authority. And again, to be realistic, it can be said that the Supreme Court is hardly less willing to overrule its own disfavored decisions than to disapprove those of the Court of Appeal. (See *infra*, §540.)

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B. Courts and Decisions to Which Stare Decisis Is, or Is Not, Applicable.

4. Court of Appeal Decisions.

d. Effect of Denial of Review.

1. View That Denial of Review Causes Stronger Precedent.

9 Witkin Cal. Proc. Appeal § 501

[§ 501] View That Denial of Review Causes Stronger Precedent.

Attorneys commonly regard Court of Appeal decisions in which hearings were denied as weightier precedents than those in which no hearing was sought. And many a Court of Appeal justice shares this view, as may be seen from numerous pronouncements to the effect that such decisions come close to Supreme Court decisions as authority in the Courts of Appeal. The following are typical:

Bridges v. Fisk (1921) 53 C.A. 117, 200 P. 71: "The decision, therefore, possesses all the authority of a pronouncement by the supreme court itself." (53 C.A. 122.)

Masonic Mines Assn. v. Superior Court (1934) 136 C.A. 298, 28 P.2d 691: "A transfer was denied by our Supreme Court and we are bound by the decision." (136 C.A. 300.)

Walls v. System Freight Service (1949) 94 C.A.2d 702, 211 P.2d 306: In view of denial of a hearing, "any statements" in a prior *Supreme Court* decision "were overruled by the later decision." (94 C.A.2d 703.)

Allstot v. Long Beach (1951) 104 C.A.2d 441, 231 P.2d 498: "So far as we are concerned, the denial of a hearing in a case which decides questions of such widespread interest and importance means that they were fully considered by the Supreme Court and were not deemed to have been decided incorrectly." (104 C.A.2d 446.)

Housing Authority v. Peters (1953) 120 C.A.2d 615, 261 P.2d 561: "Therefore we are bound by the foregoing decisions, the correct rule being that when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case." (120 C.A.2d 616.)

Victory Oil Co. v. Hancock Oil Co. (1954) 125 C.A.2d 222, 270 P.2d 604: "It must be assumed that the Supreme Court thereby approved the unequivocal decision in *Sahlender*." (125 C.A.2d. 228.)

Barry v. Department of Public Works (1962) 199 C.A.2d 359, 18 C.R. 637: "The Supreme Court having considered

the same arguments which are now made to us, and having, by denial of hearing, apparently found them unconvincing, the appellants here are asking us not only to overrule the District Court of Appeal ... but also effectually to overrule the Supreme Court. This we cannot do." (199 C.A.2d 360.)

People v. Hasson (1968) 265 C.A.2d 865, 71 C.R. 664: "In a case like the *Romo* case where the Court of Appeal was divided, ... the failure of the Supreme Court to grant a hearing upon petition seems to us to be equivalent to a decision by that court in accordance with the majority opinion in the Court of Appeal. ... We are, of course, bound by holdings of the Supreme Court." (265 C.A.2d 866.)

Many other decisions are similar. (See *Zerbe v. United R. of San Francisco* (1922) 56 C.A. 583, 586, 205 P. 887; *People v. Whitaker* (1924) 68 C.A. 7, 11, 228 P. 376; *Clover v. Jackson* (1927) 81 C.A. 55, 59, 253 P. 187; *Bock v. Oakland* (1937) 19 C.A.2d 115, 117, 64 P.2d 1098; *People v. Rowland* (1937) 19 C.A.2d 540, 542, 65 P.2d 1333; *Norwood v. Judd* (1949) 93 C.A.2d 276, 284, 288, 209 P.2d 24 [court declined to follow earlier Court of Appeal decision in which no hearing was sought, on ground that later conflicting decision, in which hearing was denied, had, in legal effect, overruled first one]; *Estate of Brissel* (1963) 218 C.A.2d 841, 844, 32 C.R. 458 [rule of *Housing Authority* "is well settled"]; *Levy v. Bellmar Enterprises* (1966) 241 C.A.2d 686, 692, 50 C.R. 842 [following *Housing Authority*]; *Burns v. State Comp. Ins. Fund* (1968) 265 C.A.2d 98, 102, 71 C.R. 326; *In re Henley* (1970) 9 C.A.3d 924, 931, 88 C.R. 458, citing the text; *Knowles v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 1027, 1032, 89 C.R. 356 [Court of Appeal decisions in which hearing was denied were deemed to distinguish out of existence prior Supreme Court decision]; *People v. Crafts* (1970) 13 C.A.3d 457, 459, 91 C.R. 563; *Maillet v. Work. Comp. App. Bd.* (1972) 23 C.A.3d 107, 110, 99 C.R. 925 [hearing in Supreme Court was denied in prior case raising identical issue; decision stands as one of court of last resort]; *Phillips v. Bartolomie* (1975) 46 C.A.3d 346, 351, 121 C.R. 56, citing the text [denial of hearing is "not without significance"]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1017, 140 C.R. 168, citing the text [same]; *Fire Ins. Exchange v. Abbott* (1988) 204 C.A.3d 1012, 1024, 251 C.R. 620 [denial of review is "not without significance"]; *In re Eli F.* (1989) 212 C.A.3d 228, 235, 260 C.R. 453 [in denying review, "we believe the Supreme Court has made its unspoken views clear"]; *People v. Dee* (1990) 222 C.A.3d 760, 764, 272 C.R. 208, supra, §818.)

The contrary view was expressed in many cases, and that view was restated in the rules on review in the Supreme Court. (See *infra*, §502.)

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4. Court of Appeal Decisions.

d. Effect of Denial of Review.

2. Contrary View.

9 *Witkin Cal. Proc. Appeal* § 502

[§ 502] Contrary View.

(1) *General Rule That Denial Is Not Approval.* During the early period, before the strong declarations discussed in the preceding section, the Supreme Court flatly rejected the notion that its discretionary denial of a hearing, for undisclosed reasons, could be interpreted as a positive approval, and adoption of the point of law decided by the Court of Appeal. Thus, in the leading case of *People v. Davis* (1905) 147 C. 346, 81 P. 718, *infra*, §915, the court said that "the denial in any case ... is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion." (147 C. 350.)

Bohn v. Bohn (1913) 164 C. 532, 129 P. 981, states: "But an order by this court, refusing to transfer a cause after judgment in the district court of appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have." (164 C. 537.) (See *In re Stevens* (1925) 197 C. 408, 423, 241 P. 88; *Western Lithograph Co. v. State Bd. of Equalization* (1938) 11 C.2d 156, 167, 78 P.2d 731; *McMillan v. Greer* (1927) 85 C.A. 558, 563, 259 P. 995; *Prescod v. Unemp. Ins. App. Bd.* (1976) 57 C.A.3d 29, 39, 127 C.R. 540, citing the text; 13 So. Cal. L. Rev. 463.)

Practical evidence of the Supreme Court's view is furnished by examples of disapproval of cases in which a hearing was denied only a few years before the disapproving Supreme Court decision. (See, e.g., *Estate of Rattray* (1939) 13 C.2d 702, 716, 91 P.2d 1042 [repudiating rule of *Estate of Miller* (1937) 23 C.A.2d 16, 71 P.2d 1117]; *Zaragosa v. Craven* (1949) 33 C.2d 315, 320, 202 P.2d 73 [repudiating holding of *Franklin v. Franklin* (1945) 67 C.A.2d 717, 155 P.2d 637]; *Lewis & Queen v. N.M. Ball Sons* (1957) 48 C.2d 141, 154, 308 P.2d 713 [disapproving *Matchett v. Gould* (1955) 131 C.A.2d 821, 281 P.2d 524]; *People v. Butler* (1966) 64 C.2d 842, 845, 52 C.R. 4, 415 P.2d 819 [disapproving *Arata v. Superior Court* (1957) 153 C.A.2d 767, 315 P.2d 473, and its progeny].)

(2) *Effect of Interpretation of Supreme Court Decisions.* A difficult situation arose when Courts of Appeal, interpreting and applying Supreme Court decisions, rendered decisions limiting their effect. If the Supreme Court denied hearings in these cases, did this indicate acquiescence in their results and retreat from the rule announced in its

own decision? In *People v. Triggs* (1973) 8 C.3d 884, 106 C.R. 408, 506 P.2d 232, the court emphatically rejected this notion: "Preliminarily we declare that our refusal to grant a hearing in a particular case is to be given *no* weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court. Our statements of law remain binding on the trial and appellate courts of this state ... and must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which we have declared the applicable principle of law. Our refusal to grant a hearing in any given case must not be deemed a sub silentio overruling of our prior decisions." (8 C.3d 890.)

(3) *Opinion Explaining or Qualifying Denial.* In some instances, to avoid misconceptions where the Supreme Court denied a hearing but did not agree with all that was said in the opinion of the Court of Appeal, the court filed a memorandum opinion on denial of hearing, withholding its approval of certain parts of the challenged opinion. (See, e.g., *California Savings & Commercial Bank v. Canne* (1917) 34 C.A. 768, 770, 169 P. 395; *Bissig v. Johnston Organ & Piano Mfg. Co.* (1918) 36 C.A. 127, 128, 171 P. 816 ["In denying the application ... we deem it proper to say that we do so on the ground last stated in the opinion"]; *Balcom v. Growers Warehouse Co.* (1921) 55 C.A. 474, 482, 204 P. 39; *Wires v. Little* (1938) 27 C.A.2d 240, 244, 80 P.2d 1010, 82 P.2d 388; *Kane v. Universal Film Exchanges* (1939) 32 C.A.2d 365, 370, 89 P.2d 693, 91 P.2d 577 [approval withheld of statements on one point]; *Scott v. McPheeters* (1939) 33 C.A.2d 629, 640, 92 P.2d 678, 93 P.2d 562 ["we expressly withhold our approval" of portion of opinion dealing with legal question not necessary to decision and not affecting soundness of conclusion]; cf. *San Leandro Canning Co. v. Perillo* (1931) 211 C. 482, 488, 489, 295 P. 1026 [on subsequent appeal, Supreme Court criticized Court of Appeal for disregarding "the intimations" in prior opinion on denial of hearing]; and see exhaustive discussion and listing of cases, 28 Cal. L. Rev. 81; 13 So. Cal. L. Rev. 461.) In later years, the court abandoned the practice of issuing an opinion on denial. The current method of eliminating difficulties arising from questioned material in a Court of Appeal opinion is an order of nonpublication (see *infra*, §816).

(4) *Middle Ground.* Nevertheless, the Supreme Court has never undertaken to examine and expressly reject the view espoused by the formidable list of Court of Appeal opinions mentioned in the preceding section (*supra*, §501), and some time ago, took a middle position that perhaps indicates a change of thought: "Although this court's denial of a hearing is not to be regarded as expressing approval of the propositions of law set forth in an opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of this court ... it does not follow that such a denial is without significance as to our views." (*DiGenova v. State Bd. of Education* (1962) 57 C.2d 167, 178, 18 C.R. 369, 367 P.2d 865.)

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5. Appellate Division Decisions.

9 *Witkin Cal. Proc. Appeal* § 503

[§ 503] Appellate Division Decisions.

(1) *Not Binding on Higher Reviewing Courts.* The relatively few opinions ordered published by appellate division judges are of debatable strength as precedents. They are not, of course, binding on either of the higher reviewing courts, and they have not been regarded as controlling in the appellate division. (For cases refusing to follow these decisions, see *C.I.T. Corp. v. Biltmore Garage* (1934) 3 C.A.2d Supp. 757, 762, 36 P.2d 247 [decision of different appellate division rejected]; *People v. Alves* (1957) 154 C.A.2d Supp. 877, 880, 315 P.2d 755 [decision of different appellate division]; *Fentress v. Van Etta Motors* (1958) 157 C.A.2d Supp. 863, 865, 323 P.2d 227 [decision of same appellate division, i.e., in effect overruling its prior decision]; *Patten-Blinn Lumber Co. v. Francis* (1958) 166 C.A.2d 196, 203, 333 P.2d 255 [Court of Appeal rejects appellate division decision]; *Cotton v. Municipal Court* (1976) 59 C.A.3d 601, 604, 130 C.R. 876; *Worthington v. Unemp. Ins. App. Bd.* (1976) 64 C.A.3d 384, 389, 134 C.R. 507, quoting the text ["The department charged with administration of the Unemployment Insurance Code throughout the entire state was not obliged to follow the *Miller* decision of the superior court, even of its appellate department of a single county, but was free to accept the ruling of the Attorney General"]; *Nelson v. Justice Court* (1978) 86 C.A.3d 64, 66, 150 C.R. 39 [unpublished opinion of appellate division was not binding on justice court, by reason of rule against citation of unpublished opinions].) (For effect of unpublished opinions, see *supra*, §502.)

(2) *Persuasive Value.* But the persuasive value of these opinions has been constantly recognized. A double selective process is involved in reporting them: The court first determines that the case is so substantial as to call for a written opinion, and then that the problem is important enough to justify certification for publication. (See *infra*, §815.) Moreover, because of the restricted appellate jurisdiction of the court, its opinions deal with some subjects that seldom reach the higher appellate courts. It is not surprising, therefore, to find these opinions freely cited by the Supreme Court and Courts of Appeal, as well as by appellate divisions in other counties. (See, e.g., *Hammell v. Superior Court* (1932) 217 C. 5, 7, 17 P.2d 101; *Smith v. Hume* (1937) 29 C.A.2d Supp. 747, 750, 74 P.2d 566 [decision of different appellate division followed]; *People v. Superior Court (Schomer)* (1970) 13 C.A.3d 672, 680, 91 C.R. 651; *Cristmat v. Los Angeles* (1971) 15 C.A.3d 590, 597, 599, 93 C.R. 325; and see 6 *Stanf. L. Rev.* 653.)

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6. Decisions of Sister State Courts.

9 *Witkin Cal. Proc. Appeal* § 504

[§ 504] Decisions of Sister State Courts.

Decisions of the courts of other states are regarded as persuasive in varying degrees, depending on the point involved. (See 6 *Stanf. L. Rev.* 653 [statistical study of 1950 California Supreme Court opinions].) They are particularly useful in the following situations:

(1) *Similar Statute*. Where a similar statute or uniform act requires construction. (See *H.J. Heinz Co. v. Superior Court* (1954) 42 C.2d 164, 174, 266 P.2d 5 [cases from Idaho and Montana dealing with procedural provisions taken from California Code]; *Albers v. Los Angeles* (1965) 62 C.2d 250, 269, 42 C.R. 89, 398 P.2d 129 ["In the absence of California authority on a point of eminent domain law this court has often turned to the decisions of our sister states having similar constitutional or statutory provisions"]; *Sanchez v. Unemp. Ins. App. Bd.* (1977) 20 C.3d 55, 64, 141 C.R. 146, 569 P.2d 740; *Fink v. Superior Court* (1930) 105 C.A. 540, 542, 288 P. 124, 289 P. 209; *Frazzini v. Cable* (1931) 114 C.A. 444, 452, 300 P. 121; *Cecil v. Superior Court* (1943) 59 C.A.2d 793, 798, 140 P.2d 125; *Adoption of McDonnell* (1947) 77 C.A.2d 805, 811, 176 P.2d 778; *Myers v. Carter* (1960) 178 C.A.2d 622, 625, 3 C.R. 205 [New York cases on Practice Act provision similar to C.C.P. 1030]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §144.)

Of course, the persuasive force of an apparently similar case disappears when the statute is found to be different. (See *Estate of Ricconi* (1921) 185 C. 458, 463, 197 P. 97; *Grolemund v. Cafferata* (1941) 17 C.2d 679, 688, 111 P.2d 641; *Bachman v. Independence Indem. Co.* (1931) 112 C.A. 465, 482, 297 P. 110, 298 P. 57.) And even where the other state's law was the pattern for the California legislation, that state's decisions may be rejected as bad on principle and policy. (See *Estate of Moore* (1955) 135 C.A.2d 122, 133, 286 P.2d 939 [arbitrary majority rule on ademption rejected and testator's intention emphasized]; *Acco Contractors v. McNamara & Peepe Lumber Co.* (1976) 63 C.A.3d 292, 296, 133 C.R. 717 [reasoning unsound].)

(2) *Law of Other State*. Where the question involves the law of another state. "When a question arises in the courts of this state as to the construction or effect of a statute of another state, our courts will follow the interpretation placed upon such statute by the court of last resort of the enacting state." And, "[w]here there is a conflict between opinions of the same court on a given principle of law the latest thereof should be given preference." (*Jones v. Jones* (1960) 182 C.A.2d 80, 83, 88, 5 C.R. 803; see 20 *Am.Jur.2d* (2005 ed.), *Courts* §145.) (Cf. *Gough v. Gough* (1950) 101 C.A.2d 262, 267, 225 P.2d 668 [New York decisions found contradictory; following view of New York Law Revision Commission

and prior California cases].)

(3) *Policy and Case of First Impression*. Where the question is one involving conflicting policies and the case is one of first impression in California. (See *Bacich v. Board of Control of Calif.* (1943) 23 C.2d 343, 352, 144 P.2d 818; *Demeter v. Annenson* (1947) 80 C.A.2d 48, 50, 180 P.2d 998; *Estate of Steidl* (1948) 89 C.A.2d 488, 494, 201 P.2d 58; *Lebrilla v. Farmers Group* (2004) 119 C.A.4th 1070, 1076, 16 C.R.3d 25, citing the text [whether class can establish that imitation crash parts are uniformly not of like kind and quality as original equipment manufacturer parts; question of first impression in California].)

(4) *Statute Based on Case Law*. Where a California statute is based on another state's decisional law. (See *Baldwin v. California* (1972) 6 C.3d 424, 434, 99 C.R. 145, 491 P.2d 1121 [noting that California Law Revision Commission drafted statute to adopt "similar" rule of New York case].)

On the other hand, if the question does not involve a uniform act or foreign law, and California case law exists, contrary authority from other states is usually regarded as unimportant. (See *Stewart v. Stewart* (1926) 199 C. 318, 341, 249 P. 197; *Coombes v. Getz* (1933) 217 C. 320, 330, 18 P.2d 939; *Ahlborn v. Peters* (1940) 37 C.A.2d 698, 705, 100 P.2d 542; *Schneider v. Schneider* (1947) 82 C.A.2d 860, 862, 187 P.2d 459.) And the majority view in other states will not be followed where it is contrary to good policy. (*People v. Ashley* (1954) 42 C.2d 246, 259, 267 P.2d 271; *Cho v. Kempler* (1960) 177 C.A.2d 342, 349, 2 C.R. 167.) (On weight of authority as factor influencing departure from California precedent, see *Gibson v. Gibson* (1971) 3 C.3d 914, 918, 922, 92 C.R. 288, 479 P.2d 648, *infra*, §531; *Vesely v. Sager* (1971) 5 C.3d 153, 163, 95 C.R. 623, 436 P.2d 151, *infra*, §531.)

In California, an unpublished opinion may not be cited or relied upon (*supra*, §491). However, this rule applies only to opinions originating in California. Opinions from other jurisdictions can be cited without regard to their publication status. (*Lebrilla v. Farmers Group*, *supra*, 119 C.A.4th 1076.)

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See *Guimei v. General Elec. Co.* (2009) 172 C.A.4th 689, 705, 91 C.R.3d 178 [cases from other jurisdictions are not controlling on matters of procedure].



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7. Decisions of Federal Courts.

a. On Federal Questions.

1. Binding Authority of Supreme Court.

9 Witkin Cal. Proc. Appeal § 505

[§ 505] Binding Authority of Supreme Court.

Decisions of the United States Supreme Court are binding not only on all of the lower federal courts, but also on state courts when a federal question is involved, such as constitutionality of a statute or construction of the federal Constitution or statutes. (*Chesapeake & Ohio Ry. Co. v. Martin* (1931) 283 U.S. 209, 51 S.Ct. 453, 458, 75 L.Ed. 983, 990; *Perkins Mfg. Co. v. Jordan* (1927) 200 C. 667, 678, 254 P. 551; *Scott v. Industrial Acc. Com. of Calif.* (1937) 9 C.2d 315, 323, 70 P.2d 940; *In re Harris* (1971) 20 C.A.3d 632, 634, 97 C.R. 844 [decision holding Ohio Criminal Syndicalism Act unconstitutional was conclusive on unconstitutionality of California's similar act]; *Sammons & Sons v. Ladd-Fab* (1982) 138 C.A.3d 306, 310, 187 C.R. 874 [federal patent and copyright laws]; *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 C.A.3d 1023, 1034, 204 C.R. 913, citing the text [federal statute permitting award of attorneys' fees]; *Carpenters Health & Welfare Trust Fund v. Parnas Corp.* (1986) 176 C.A.3d 1196, 1199, 222 C.R. 668; *Elliott v. Albright* (1989) 209 C.A.3d 1028, 1034, 257 C.R. 762, quoting the text; *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1211, 58 C.R.2d 205; *Forsyth v. Jones* (1997) 57 C.A.4th 776, 780, 67 C.R.2d 357, *infra*, §569; see 56 *Harv. L. Rev.* 652; 86 *Harv. L. Rev.* 1307 [criticizing Arizona case refusing to follow 4-3 decision of United States Supreme Court, but suggesting that Supreme Court should seek concurrence of majority of its full membership before declaring statute unconstitutional]; 26 *So. Cal. L. Rev.* 183; 6 *Stanf. L. Rev.* 653.) (On effect of summary affirmance of federal court decision by United States Supreme Court, by per curiam order without opinion, see *Serrano v. Priest* (1971) 5 C.3d 584, 616, 96 C.R. 601, 487 P.2d 1241.)

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7. Decisions of Federal Courts.

a. On Federal Questions.

2. Lower Federal Court Decisions.

9 *Witkin Cal. Proc. Appeal* § 506

[§ 506] Lower Federal Court Decisions.

The rule just stated (*supra*, §505) is sometimes expressed in broader terms to embrace the decisions of other federal courts. In *Keiper v. Northwestern Pac. R. Co.* (1955) 134 C.A.2d 702, 286 P.2d 47, 288 P.2d 262, an action under the Federal Employers' Liability Act, the court said: "All questions of substance presented in actions under this statute are federal questions upon which the decisions of the federal courts are conclusive and binding upon all state courts. ... This being so it is quite obvious that as an intermediate appellate state court our function here is not to attempt any interpretation of the act itself but to ascertain if possible the applicable rule from the existing federal decisions. We cannot resolve conflicts, and we speak with but little authority in attempting to select from among the federal decisions an applicable rule." (134 C.A.2d 706.) (See *Chino v. Superior Court* (1967) 255 C.A.2d 747, 757, 63 C.R. 532; *Conrad v. Bank of America* (1996) 45 C.A.4th 133, 147, 53 C.R.2d 336 [bankruptcy proceeding; California courts "must" defer to well-settled federal rule].)

However, the prevailing view appears to be that the decisions of the lower federal courts, although entitled to great weight, are not binding on state courts. "[T]he decisions of the lower federal courts on federal questions are merely persuasive. ... Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law." (*Rohr Aircraft Corp. v. San Diego* (1959) 51 C.2d 759, 764, 336 P.2d 521.) (See *People v. Estrada* (1965) 234 C.A.2d 136, 145, 44 C.R. 165; *People v. Clark* (1969) 2 C.A.3d 510, 519, 82 C.R. 682; *Central Bank v. Superior Court* (1973) 30 C.A.3d 962, 967, footnote 2, 106 C.R. 912; *Debtor Reorganizers v. State Bd. of Equalization* (1976) 58 C.A.3d 691, 696, 130 C.R. 64; *Elliott v. Albright* (1989) 209 C.A.3d 1028, 1034, 257 C.R. 762, quoting the text; *Yee v. Escondido* (1990) 224 C.A.3d 1349, 1351, 274 C.R. 551, citing the text [Ninth Circuit federal decision found unpersuasive; contrary California Court of Appeal decision followed]; *Smith v. Los Angeles* (1994) 24 C.A.4th 990, 997, 29 C.R.2d 680 [federal district court opinion on constitutionality of zoning ordinance was not binding]; *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1211, 58 C.R.2d 205 [superior court in drunk driving prosecution was not bound by federal district court decisions that driver's license suspensions were considered "punitive" for double jeopardy purposes]; *Flynt v. California Gambling Control Com.* (2002) 104 C.A.4th 1125, 1132, 129 C.R.2d 167; cf. *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 498, 220 C.R. 818, 709 P.2d 837 [Ninth Circuit's

resolution of conflict in California decisions, on lessor's right to refuse to consent to assignment, adopted by Supreme Court]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §148.)

Where there is a conflict in the federal circuits, the view of the Ninth Circuit (which decides appeals from California's federal courts) is not more significant than that of another circuit. (*Debtor Reorganizers v. State Bd. of Equalization*, *supra*, 58 *C.A.3d* 696; *Forsyth v. Jones* (1997) 57 *C.A.4th* 776, 780, 67 *C.R.2d* 357, *infra*, §569.) In other words, where the lower federal courts are split on an issue involving a federal statute, the California reviewing court is free to adopt one of the divergent lines of authority. (*Alicia T. v. Los Angeles* (1990) 222 *C.A.3d* 869, 879, 271 *C.R.* 513, quoting the text.)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Padgett* (2009) 172 *C.A.4th* 830, 839, 91 *C.R.3d* 475 [split of federal authority on effect of Qualified Domestic Relations Order under Employee Retirement Income Security Act required state to make independent evaluation].



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7. Decisions of Federal Courts.

b. On Nonfederal Questions.

9 *Witkin Cal. Proc. Appeal* § 507

[§ 507] On Nonfederal Questions.

(1) *In General.* Federal decisions are, of course, not controlling on matters of state law. (*Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 C. 644, 653, 20 P.2d 940; *Scott v. Austin* (1922) 58 C.A. 643, 646, 209 P. 251; *Ware v. Heller* (1944) 63 C.A.2d 817, 821, 148 P.2d 410; *Estate of D'India* (1976) 63 C.A.3d 942, 948, 134 C.R. 165, citing the text; *Howard Contracting v. G.A. MacDonald Const. Co.* (1998) 71 C.A.4th 38, 52, 83 C.R.2d 590; see 20 *Am.Jur.2d* (2005 ed.), *Courts* §146.) And even where the case deals with liability under a federal statute, it does not necessarily raise a federal question. (See *King v. Schumacher* (1939) 32 C.A.2d 172, 181, 89 P.2d 466 [state precedents govern, in action under Federal Employers' Liability Act on questions of practice and procedure].)

(2) *Tax Law.* Federal decisions are particularly compelling, however, in the interpretation of state income, inheritance, and gift tax laws, which in many respects are identical or closely similar to the federal statutes. (See *Douglas v. California* (1942) 48 C.A.2d 835, 838, 120 P.2d 927; *Gregory v. California* (1946) 77 C.A.2d 26, 29, 174 P.2d 863, 175 P.2d 542; *Estate of Darby* (1949) 93 C.A.2d 96, 100, 208 P.2d 689; 20 *Am.Jur.2d* (2005 ed.), *Courts* §146.)

(3) *California Law Based on Federal Statute or Rule.* The same is true where a California statute is based on a federal statute or the Federal Rules. (See *Crummer v. Beeler* (1960) 185 C.A.2d 851, 858, 8 C.R. 698, 2 *Cal. Evidence* (4th), *Discovery*, §251 [Discovery Act provisions based on federal rules]; *Smith v. Superior Court* (1961) 189 C.A.2d 6, 10, 11 C.R. 165 [same]; *Nishikawa Farms v. Mahony* (1977) 66 C.A.3d 781, 787, 136 C.R. 233 [California Agricultural Labor Relations Act based on National Labor Relations Act]; *Kahn v. Kahn* (1977) 68 C.A.3d 372, 384, 137 C.R. 332 [Discovery Act provisions based on federal rules]; *People v. Soto* (1998) 64 C.A.4th 966, 967, 75 C.R.2d 605.) And federal cases may be helpful in the construction of Rules of Court derived in whole or in part from the Federal Rules. (See *Verdier v. Verdier* (1953) 118 C.A.2d 279, 281, 257 P.2d 723 [Rules on Appeal].)

(4) *Persuasive Authority.* In other situations, federal decisions have about the same value as decisions of sister state courts; i.e., well-considered decisions are persuasive. (See *Farmland Irr. Co. v. Dopplmaier* (1957) 48 C.2d 208, 219, 308 P.2d 732 [assignability of rights under patent license was not federal question, but federal cases were persuasive]; *Posner v. Grunwald-Marx* (1961) 56 C.2d 169, 184, 14 C.R. 297, 363 P.2d 313 [federal rule on arbitration provision in

collective bargaining agreement was followed because of strong policy favoring uniformity in labor relations]; *People v. Herbert's of Los Angeles* (1935) 3 C.A.2d 482, 484, 39 P.2d 829; *Demeter v. Annenson* (1947) 80 C.A.2d 48, 53, 180 P.2d 998; *Sampsell v. Security-First Nat. Bank of Los Angeles* (1949) 92 C.A.2d 648, 651, 207 P.2d 1088; *Banner Metals v. Lockwood* (1960) 178 C.A.2d 643, 659, 3 C.R. 421; *Fletcher v. A.J. Industries* (1968) 266 C.A.2d 313, 323, 72 C.R. 146, 7 Cal. Proc. (5th), *Judgment*, §254 [because California cases have consistently recognized federal case as source of "common-fund" doctrine, federal extension should also be recognized and "substantial benefit" rule applied to permit award of attorneys' fee]; *Holayter v. Smith* (1972) 29 C.A.3d 326, 334, 104 C.R. 745 [following *Posner*]; *Estate of Sloan* (1963) 222 C.A.2d 283, 293, 35 C.R. 167 [federal cases were persuasive on allocation of income and principal of trust of oil royalties]; *Gray Line Tours of Southern Nevada v. Reynolds Electrical & Engineering Co.* (1987) 193 C.A.3d 190, 194, 238 C.R. 419.)

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8. Decisions of Courts of Foreign Countries.

9 *Witkin Cal. Proc. Appeal* § 508

[§ 508] Decisions of Courts of Foreign Countries.

Decisions of foreign courts in jurisdictions that follow the common law, e.g., England, are occasionally cited with much the same effect as decisions of sister state courts. (See *Ocean Acc. & Guarantee Co. v. Industrial Acc. Com. of Calif.* (1916) 173 C. 313, 317, 159 P. 1041 [Workmen's Compensation Act, English decisions on similar statute]; *Tulare Irr. Dist. v. Superior Court* (1925) 197 C. 649, 661, 242 P. 725 [nature of equity jurisdiction]; *People v. Ottey* (1936) 5 C.2d 714, 725, 56 P.2d 193 [source of California constitutional provision allowing trial judge to comment on evidence]; *Guardianship of Hudelson* (1941) 18 C.2d 401, 403, 115 P.2d 805 [discretionary allowance by court from income of incompetent for support of next of kin; American authority lacking]; *Gibson v. Gibson* (1971) 3 C.3d 914, 916, 92 C.R. 288, 479 P.2d 648, *infra*, §531 [Scottish and Canadian cases cited on denial of parental immunity from tort liability]; *Ferguson v. Keays* (1971) 4 C.3d 649, 654, 94 C.R. 398, 484 P.2d 70 [English cases cited for common law on power of courts to permit indigents to appeal in forma pauperis]; *People v. Scott* (1959) 176 C.A.2d 458, 492, 1 C.R. 600 [question of first impression here; English and New Zealand "landmark" cases considered "authoritative"].)

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C. What Constitutes Rule of Decision.

1. Ratio Decidendi and Dicta.

9 *Witkin Cal. Proc. Appeal* § 509

[§ 509] Ratio Decidendi and Dicta.

The *ratio decidendi* is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents. (See generally *Grant v. Murphy* (1897) 116 C. 427, 432, 48 P. 481; *Estate of Torregano* (1960) 54 C.2d 234, 243, 5 C.R. 137, 352 P.2d 505; *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 668, 672, 674, 125 C.R. 757, 542 P.2d 1349, *infra*, §591; *Security Pac. Nat. Bank v. Wozab* (1990) 51 C.3d 991, 1003, 275 C.R. 201, 800 P.2d 557; *Harris v. Capital Growth Investors XIV* (1991) 52 C.3d 1142, 1157, 278 C.R. 614, 805 P.2d 873, citing the text; *Childers v. Childers* (1946) 74 C.A.2d 56, 61, 168 P.2d 218; *Chodos v. Superior Court* (1964) 226 C.A.2d 703, 709, 712, 38 C.R. 301; *Avner v. Longridge Estates* (1969) 272 C.A.2d 607, 613, 77 C.R. 633; *People v. Gregg* (1970) 5 C.A.3d 502, 506, 85 C.R. 273; *People v. Moreno* (1977) 67 C.A.3d 962, 967, 134 C.R. 322; *Simons v. Young* (1979) 93 C.A.3d 170, 188, 155 C.R. 460; *United Steelworkers of America v. Board of Education* (1984) 162 C.A.3d 823, 834, 209 C.R. 16, citing the text; *Bekins Moving & Storage Co. v. Prudential Ins. Co.* (1985) 176 C.A.3d 245, 252, 221 C.R. 738; *Bryant v. Superior Court* (1986) 186 C.A.3d 483, 495, 230 C.R. 777, quoting the text; *Santa Monica Hosp. Med. Center v. Superior Court* (1988) 203 C.A.3d 1026, 1033, 250 C.R. 384, quoting the text; *Johnson v. Superior Court* (1989) 208 C.A.3d 1093, 1097, 256 C.R. 651, quoting the text; *Bunch v. Coachella Valley Water Dist.* (1989) 214 C.A.3d 203, 212, 262 C.R. 513, quoting the text; *People v. Superior Court (Williams)* (1992) 8 C.A.4th 688, 703, 10 C.R.2d 873, citing the text; *J.W. v. Superior Court* (1993) 17 C.A.4th 958, 966, 22 C.R.2d 527, 4 Cal. Proc. (5th), *Pleading*, §79, citing the text; *Krupnick v. Hartford Acc. & Indem. Co.* (1994) 28 C.A.4th 185, 199, 34 C.R.2d 39, *infra*, §510, quoting the text; *Dyer v. Superior Court* (1997) 56 C.A.4th 61, 66, 65 C.R.2d 85; *Western Landscape Const. v. Bank of America* (1997) 58 C.A.4th 57, 61, 67 C.R.2d 868, citing the text; *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1998) 65 C.A.4th 1279, 1300, 77 C.R.2d 296; *Garfield Med. Center v. Belshe* (1998) 68 C.A.4th 798, 806, 80 C.R.2d 527, citing the text; 45 Harv. L. Rev. 1125; 4 Stanf. L. Rev. 509; 20 Am.Jur.2d (2005 ed.), *Courts* §133 et seq.)

A few of the many judicial declarations on this fundamental distinction may be noted:

Hart v. Burnett (1860) 15 C. 530, 598: "A decision is not even authority except upon the point actually passed upon by the Court and directly involved in the case. But even then, the mere reasoning of the Court is not authority. The point

decided by the Court, and which the reasoning illustrates and explains, constitutes a judicial precedent. The books are full of cases in which learned Judges have earnestly deprecated the attempt to urge that the mere *dicta*, or the arguments of Judges, as authoritative expositions of the law." (15 C. 598.)

Ginns v. Savage (1964) 61 C.2d 520, 39 C.R. 377, 393 P.2d 689: "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (61 C.2d 524, footnote 2.)

Southern Calif. Enterprises v. D.N. & E. Walter & Co. (1947) 78 C.A.2d 750, 178 P.2d 785: "A litigant cannot find shelter under a rule announced in a decision that is inapplicable to a different factual situation in his own case, nor may a decision of a court be rested on quotations from previous opinions that are not pertinent by reason of dissimilarity of facts in the cited cases and those in the case under consideration. An extract from an opinion must be read in the light of the subject there under discussion and with reference to the facts in that case, and rules applicable to the decision in which they appear cannot be repeated in exemplification of a theory different from that to which they were applied in the case wherein the opinion was rendered." (78 C.A.2d 757.)

Achen v. Pepsi-Cola Bottling Co. of Los Angeles (1951) 105 C.A.2d 113, 233 P.2d 74: "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." (105 C.A.2d 125.)

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2. Determining Ratio Decidendi.

9 *Witkin Cal. Proc. Appeal* § 510

[§ 510] Determining Ratio Decidendi.

"The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." (*Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 C.A.2d 113, 124, 233 P.2d 74.) In *United Steelworkers of America v. Board of Education* (1984) 162 C.A.3d 823, 209 C.R. 16, the court, citing *Achen*, held that a California Supreme Court opinion interpreting a statute was a holding and was binding on the Court of Appeal, for two reasons: (a) The Supreme Court's analysis of the statute was relevant to material facts before the Court; (b) even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and probably intended for guidance of the court and attorneys at a new hearing, it cannot be treated as mere dictum. (See *People v. Superior Court (Moore)* (1996) 50 C.A.4th 1202, 1212, 58 C.R.2d 205 [language of opinion must be construed with reference to facts presented by case]; *Western Landscape Const. v. Bank of America* (1997) 58 C.A.4th 57, 61, 67 C.R.2d 868 [statement must be compared with facts of case and issues raised; explanatory observations are not binding precedent]; *Garfield Med. Center v. Belshe* (1998) 68 C.A.4th 798, 806, 80 C.R.2d 527 [statement responsive to issues raised on appeal and intended to guide parties and trial court in resolving matter following remand was not dicta; citing *United Steelworkers*]; 57 *Stanf. L. Rev.* 953 [defining dicta].)

The process of confining the ratio decidendi to the facts is illustrated by *Krupnick v. Hartford Acc. & Indem. Co.* (1994) 28 C.A.4th 185, 34 C.R.2d 39, which held that *Rowland v. Christian* (1968) 69 C.2d 108, 70 C.R. 97, 443 P.2d 561, 6 *Summary* (10th), *Torts*, §1086, was not precedent supporting a third-party action against an insurer for negligent infliction of emotional distress. The court said: "[T]he ratio decidendi in *Rowland* was that in cases of personal (physical) injury, the duty of care expressed in section 1714 will be extended to occupiers of real property vis-a-vis their invitees. As a matter of judicial precedent, *Rowland* had absolutely nothing to do with the negligent infliction of emotional distress. In other words, because its holding can only be coextensive with its facts, *Rowland* is inapposite to the issue before us." (28 C.A.4th 199.)

Sometimes the original court will itself unmistakably describe its remarks as unnecessary to the determination of the particular case. Thus, in *Herbert Kraft Co. v. Bryan* (1903) 140 C. 73, 73 P. 745, the court said that a particular issue need not be determined, but added: "We have noticed the subject to this extent because it has been elaborately discussed and because what has been said may possibly be of some aid in examining the question hereafter, if it should ever necessarily arise in some future case." (140 C. 81.) (See *Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933)

217 C. 644, 652, 20 P.2d 940, pointing out that this clearly designated the remarks as dicta.)

Occasionally, the court will examine the record or briefs in the prior case to see what were the facts and issues. (See *Stewart v. Stewart* (1926) 199 C. 318, 327, 249 P. 197 [briefs]; *Harris v. Industrial Acc. Com. of Calif.* (1928) 204 C. 432, 438, 268 P. 902 [record]; *Treff v. Gulko* (1932) 214 C. 591, 595, 7 P.2d 697 [same]; *Estate of Armstrong* (1937) 8 C.2d 204, 207, 64 P.2d 1093 [briefs]; *Palvutjian v. Terkanian* (1920) 47 C.A. 47, 51, 190 P. 503 [same]; *Moore v. Superior Court* (1970) 13 C.A.3d 869, 874, 92 C.R. 23 [same].)

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3. Persuasive Effect of Dicta.

9 *Witkin Cal. Proc. Appeal* § 511

[§ 511] Persuasive Effect of Dicta.

To say that dicta are not controlling (*supra*, §509) does not mean that they are to be ignored; on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate review of the authorities, or when it has been long followed. In short, while a court is free to disregard a dictum that it strongly disapproves, it is quite likely to rely on a dictum where no contrary precedent is controlling and where the view commends itself on principle.

The following decisions are noteworthy:

San Joaquin & Kings River Canal & Irr. Co. v. Stanislaus (1908) 155 C. 21, 28, 99 P. 365 ["[I]t does not follow that the *dictum* of a court is always and at all times to be discarded. A correct principle of law may be announced in a given case, although it may not be necessary to there apply it, because of other principles upon which the case then under consideration may be disposed of"].

Nolan v. Transocean Air Lines (1961) 365 U.S. 293, 81 S.Ct. 555, 557, 5 L.Ed.2d 571, 573, 3 Cal. Proc. (5th), Actions, §707 ["a considered, relevant dictum of general scope by the California Supreme Court"].

Adams v. Seaman (1890) 82 C. 636, 639, 23 P. 53 ["as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in Bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense"].

Granger v. Sherriff (1901) 133 C. 416, 417, 65 P. 873 ["It is objected by the appellant that this is mere *dictum*, and indeed it seems to be, but ... it is the *dictum* of the court in Bank, and is supported by the reasoning of the opinion"].

In re Garner (1918) 179 C. 409, 411, 177 P. 162 [long acquiescence].

Lossman v. Stockton (1935) 6 C.A.2d 324, 330, 44 P.2d 397 ["full consideration there given by court and counsel to the questions"].

Roth v. Marston (1952) 110 C.A.2d 249, 250, 242 P.2d 375 [dicta in line of cases].

Paley v. Superior Court (1955) 137 C.A.2d 450, 460, 290 P.2d 617 ["The quoted language was responsive to an argument presented by counsel and probably intended for guidance of court and attorneys upon a new trial"].

United Steelworkers of America v. Board of Education (1984) 162 C.A.3d 823, 835, 209 C.R. 16 [dictum of Supreme Court should be considered persuasive; citing *Nolan*].

Santa Monica Hosp. Med. Center v. Superior Court (1988) 203 C.A.3d 1026, 1033, 250 C.R. 384 ["We are, of course, mindful that dictum of the Supreme Court commands serious respect"].

Bunch v. Coachella Valley Water Dist. (1989) 214 C.A.3d 203, 212, 262 C.R. 513, quoting the text ["We are persuaded that the far-reaching and elaborate analysis undertaken in *Belair* should be given application beyond the limited facts of that case, and that the principled dicta of that opinion should guide our consideration of the issues presented in the case before us"].

Smith v. Los Angeles (1989) 214 C.A.3d 266, 297, 262 C.R. 754, citing the text ["Such dictum, while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic"].

Dyer v. Superior Court (1997) 56 C.A.4th 61, 66, 65 C.R.2d 85 ["Even when stated in footnotes, our Supreme Court's ... dicta command our serious respect"].

Hubbard v. Superior Court (1997) 66 C.A.4th 1163, 1169, 78 C.R.2d 819 ["Generally speaking, follow dicta from the California Supreme Court. That was good advice then and good advice now"].

A few cases are contrary. (See *Chevron U.S.A. v. Work. Comp. App. Bd.* (1990) 219 C.A.3d 1265, 1272, 268 C.R. 699, citing the text ["We are not bound by Supreme Court dictum that we do not find compelling"]; *Furtado v. Schrieffer* (1991) 228 C.A.3d 1608, 1617, 280 C.R. 16, citing the text; see generally 4 *Stanf. L. Rev.* 512; 20 *Am.Jur.2d* (2005 ed.), *Courts* §134.)

A striking illustration of the importance of dicta is furnished by *Estate of Sahlender* (1948) 89 C.A.2d 329, 201 P.2d 69. A dictum in *Estate of McCray* (1928) 204 C. 399, 268 P. 647, declared that the common law rule against remoteness of vesting was made a part of California law by its constitutional provision against perpetuities. Subsequent Court of Appeal and Supreme Court decisions, almost entirely by dicta, approved this view. (89 C.A.2d 342.) When the question was squarely presented in *Sahlender*, the court was able to say that "the case law in this state" was to this effect, i.e., that the dicta had established the rule. (89 C.A.2d 345.)

For lawyers, this means simply that (a) opposing dicta may not be an insurmountable obstacle if a well-reasoned argument can be made against them, but (b) favorable dicta should never be neglected in the preparation of an argument. (See *infra*, §512.)

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4. Alternative Reasons for Decision.

9 *Witkin Cal. Proc. Appeal* § 512

[§ 512] Alternative Reasons for Decision.

The misty concept of dictum as commonly defined (*supra*, §509) shows tendencies toward complete evaporation when distinguished from "alternative" or "independent" grounds of decision. As the court said in *King v. Pauly* (1911) 159 C. 549, 115 P. 210: "There is no more reason for saying that what was said therein as to the first ground constitutes the real decision and that what was said as to the second was mere *dictum*, than there is for saying that what was said as to the second ground is the vital part, and what was said as to the first *obiter dictum*. While it is not 'necessary' to the decision of a question by an appellate court that there should be more than one good ground or reason, there may be more than one, and where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not '*mere dictum*.'" (159 C. 554.)

This rule is more succinctly stated in *Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 C. 644, 20 P.2d 940: "It is well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, because there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity." (217 C. 650.)

A number of decisions are in accord. (See *Pugh v. Moxley* (1912) 164 C. 374, 377, 128 P. 1037; *Brandt v. Brandt* (1927) 85 C.A. 720, 731, 260 P. 342; *East Bay Mun. Util. Dist. v. Kieffer* (1929) 99 C.A. 240, 261, 278 P. 476, 279 P. 178; *Butler v. Wyman* (1933) 128 C.A. 736, 741, 18 P.2d 354; *Donnell v. Linforth* (1935) 11 C.A.2d 25, 26, 52 P.2d 937; *Gaskill v. Richmaid Ice Cream Co.* (1952) 111 C.A.2d 745, 746, 245 P.2d 53; *People v. One 1950 Cadillac 2-Door Club Coupe Engine No. 506236120* (1955) 133 C.A.2d 311, 313, 284 P.2d 118 [court expressly characterizes one present holding as an alternative ground]; *Los Angeles (County) v. Los Angeles (City)* (1963) 212 C.A.2d 160, 166, 28 C.R. 32, citing the text; *Greyhound Lines v. Santa Clara* (1986) 187 C.A.3d 480, 485, 231 C.R. 702 ["When an appellate court bases its decision on alternative grounds, none is dictum"]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §135.)

The "independent grounds" theory is a flexible and useful tool for courts desirous of developing or supporting a particular rule. Statements in earlier cases may be interpreted as either "dicta" or "alternate grounds," according to their effect on the new doctrine to be pronounced. (See, e.g., *Barkis v. Scott* (1949) 34 C.2d 116, 119, 208 P.2d 367; 4 *Stanf. L. Rev.* 511.) And attorneys should be alert to the possibility of thus improving the quality and strength of favorable

dicta.

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D. Reasons for Following Precedent.

1. Rule of Property.

a. Stare Decisis Is Applicable.

9 *Witkin Cal. Proc. Appeal* § 513

[§ 513] Stare Decisis Is Applicable.

Probably the strongest of the considerations that influence courts to follow precedent is that property rights have been founded and have become vested in accordance with the rule laid down. The statement in *Sacramento Bank v. Alcorn* (1898) 121 C. 379, 53 P. 813, upholding the deed of trust as a security device, is typical: "Their validity has been upheld in numerous cases, beginning very soon after the adoption of the code and continuing until the present time. ... These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless many people have invested their money, relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of *stare decisis* shall prevail be one of policy, there is here no balancing of the evil done against a good attained. The result would be evil only." (121 C. 382.)

Similar revulsion was expressed in *Sorensen v. Hall* (1934) 219 C. 680, 28 P.2d 667, where the rule on the binding effect of recitals in a trustee's deed was challenged: "We hardly think that the appellants are serious in their contention that these decisions of the court should now be overruled and set aside after the many years which they have stood as containing a correct declaration and exposition of the law upon the subject of the regularity and effectiveness of a trustee's deed. The law announced therein has become a rule of property upon which rests the validity of the title to thousands of pieces of real property in this state of incalculable value, and its revocation at this time by this court would render invalid an untold number of contracts and undertakings which have been entered into by the parties thereto in reliance upon the rule of property established by the decisions above cited." (219 C. 683.)

Cases decided in accordance with this theory are numerous. (See *United States v. Maine* (1975) 420 U.S. 515, 95 S.Ct. 1155, 1161, 43 L.Ed.2d 363, 372 [prior decisions establishing paramount rights of federal government in tidelands, relied on by private individuals in business transactions and familiar to states now claiming rights]; *Redmond v. Peterson* (1894) 102 C. 595, 598, 36 P. 923 [appearance of general guardian on behalf of infant or incompetent confers jurisdiction without personal service]; *Schoonover v. Birnbaum* (1906) 148 C. 548, 550, 83 P. 999 [validity of homestead selected by cotenant]; *Estate of Nigro* (1906) 149 C. 702, 703, 87 P. 384 [rule of succession]; *San Diego v.*

Cuyamaca Water Co. (1930) 209 C. 105, 122, 287 P. 475 [water rights of Mexican pueblos and their successors]; *Bank of Italy Nat. Trust & Savings Assn. v. Bentley* (1933) 217 C. 644, 650, 653, 20 P.2d 940 [exhaustion of security before bringing personal action on note secured by deed of trust]; *Scott v. Austin* (1922) 58 C.A. 643, 646, 209 P. 251 [community property rights]; *Barr Lumber Co. v. Shaffer* (1951) 108 C.A.2d 14, 22, 238 P.2d 99 [priority of earlier recorded mortgage or trust deed over mechanic's lien]; 34 *Harv. L. Rev.* 74; 37 *Harv. L. Rev.* 415; 20 *Am.Jur.2d* (2005 ed.), *Courts* §139.)

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D. Reasons for Following Precedent.

1. Rule of Property.

b. What Constitutes Rule of Property.

9 Witkin Cal. Proc. Appeal § 514

[§ 514] What Constitutes Rule of Property.

In refusing to disturb a rule of property (*supra*, §513), the courts often apply the term "property" in its broadest sense. Any doctrine that induces substantial reliance in business transactions, and gives rise to tangible or intangible property interests, including contractual rights, may be regarded as a rule of property. (See *Security Pac. Nat. Bank v. Wozab* (1990) 51 C.3d 991, 1000, 275 C.R. 201, 800 P.2d 557; *Bock v. Oakland* (1937) 19 C.A.2d 115, 117, 64 P.2d 1098 ["where a decision of a court of last resort has been acted on for a long period of time, as here, it ought not, and as a rule will not be disturbed where contractual relations or rights are resting upon the decision"]; 34 *Harv. L. Rev.* 74; 37 *Harv. L. Rev.* 415.)

For example, in *Radovich v. National Football League* (1957) 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456, the Court explained why, though it held the Sherman Antitrust Act applicable to professional football, it nevertheless followed an earlier decision holding it inapplicable to professional baseball: "The Court did this because it was concluded that more harm would be done in overruling Federal Base Ball than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." (77 S.Ct. 393, 1 L.Ed.2d 461.)

There should, however, be some limit to the loose use of the term "property" as a barrier to repudiation of a bad precedent. Such a limit is found in the absence of harm to vested rights that would result if new legal principle were applied. Hence, in *Estate of Maguire* (1936) 14 C.A.2d 388, 58 P.2d 209, a holographic will was entirely in the handwriting of the testator, but the date was incomplete. The court said that if the question were open, this could well be held a sufficient compliance with former Prob.C. 53 (now Prob.C. 6111) but that the matter had already been decided and had become a rule of property. A proper basis for the holding would have been that the Court of Appeal is bound to follow prior decisions of the Supreme Court. But the rule itself was not, in fact, a rule of property in the sense that property rights had been founded on it, except perhaps in the limited period where the validity of some other will was then in question. A decision that holds a type of transfer invalid upsets existing titles; but one that holds that what was

formerly an irregularity does not now invalidate a will can hardly be said to have any serious effect on past property rights. (14 C.A.2d 389.)

In *Abbott v. Los Angeles* (1958) 50 C.2d 438, 326 P.2d 484, for more than 20 years prior to 1925, the statutes, ordinances, and charter of Los Angeles provided a fluctuating retirement pension for police and fire departments of 50% of the salary that might be fixed from time to time for the position. Then, amendments substituted a fixed system. Because salaries meanwhile had been increased, plaintiffs, a large number of retired members, sought the proportionately increased pension payments under the fluctuating plan. The trial judge denied relief on the theory that all parties had accepted the validity of the amendments until 1954 and that the rights involved had become a "rule of property." The court rejected this theory. "In the present case, however, there appear to be neither guiding judicial decisions nor reliance thereon by the city in adopting the amendments here under attack. The fact that the city failed to pay to these plaintiffs a fluctuating rather than a fixed pension obviously does not constitute reliance by it upon anything except its own charter provisions in failing to live up to its obligations to plaintiffs, obligations in return for which, as already mentioned, it has received the full contractual consideration from its employees. It has neither invested money nor acquired any property interests which would be jeopardized by holding it liable for the fluctuating pensions which the employees earned." (50 C.2d 457.) (Cf. *Houghton v. Long Beach* (1958) 164 C.A.2d 298, 311, 330 P.2d 918.)

Also, precedent is less important where the issue relates to state sovereignty instead of to individual rights. (*Oregon v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 97 S.Ct. 582, 592, 50 L.Ed.2d 550, 565 [overruling prior Supreme Court decision on title to accretion in bed of navigable river].)

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D. Reasons for Following Precedent.

2. Rule Long Accepted.

9 *Witkin Cal. Proc. Appeal* § 515

[§ 515] Rule Long Accepted.

The long acceptance of a rule by the courts, as where it is followed in other cases, and by the legal profession and the public generally in governing their conduct and relations is a potent argument in favor of allowing it to stand. Although this factor is particularly significant where the decisions interpret constitutional or statutory provisions, it is also important in cases dealing with other types of questions. The principal reason for following a settled rule is the desirability of certainty in the law, but in some cases, additional considerations are present, e.g., rule of property (*supra*, §513) and failure of Legislature to act (*infra*, §516).

In *Gardiner v. Royer* (1914) 167 C. 238, 139 P. 75, the court refused to abandon a much criticized interpretation of the statute of limitations on stockholders' liability. "We are satisfied that the question should be held to be finally settled by this line of decisions, upon the doctrine of *stare decisis*. For more than twenty years the doctrine of *Hunt v. Ward* ... has stood as the settled law of the state upon a matter vitally affecting all who have acquired stock in corporations. ... It goes without saying that upon such a question as this, it is in the highest degree essential that there should be a well understood and thoroughly established rule, and it seems clear to us that the conclusion deliberately reached by this court on this question more than twenty years ago and uniformly adhered to ever since, should not be disturbed." (167 C. 242.)

Many cases show how influential this consideration can be. (See *In re Dorris* (1892) 93 C. 611, 612, 29 P. 244; *Miller & Lux v. Enterprise Canal & Land Co.* (1904) 142 C. 208, 215, 75 P. 770; *Hollywood Lumber Co. v. Love* (1909) 155 C. 270, 274, 100 P. 698; *Pugh v. Moxley* (1912) 164 C. 374, 376, 128 P. 1037; *Bayley v. Garrison* (1923) 190 C. 690, 694, 214 P. 871; *Knoke v. Swan* (1935) 2 C.2d 630, 631, 42 P.2d 1019; *Burt v. Scarborough* (1961) 56 C.2d 817, 822, 17 C.R. 146, 366 P.2d 498; *People v. Curtis* (1969) 70 C.2d 347, 352, footnote 2, 74 C.R. 713, 450 P.2d 33 ["in view of the decisions which have for so long construed section 834a as prohibiting forceful resistance to all arrests, lawful and unlawful, the statute cannot now be challenged as ambiguous"]; *Weyer v. Weyer* (1919) 40 C.A. 765, 769, 182 P. 776; *Bock v. Oakland* (1937) 19 C.A.2d 115, 117, 64 P.2d 1098; *People v. Sayre* (1937) 26 C.A.2d Supp. 757, 766, 70 P.2d 546; *Sontag v. Springer* (1940) 37 C.A.2d 663, 665, 99 P.2d 1098 ["It has been repeatedly held that where a conclusion reached in a decision has been settled by long acquiescence on the part of the legislature and the courts, it will ordinarily not be disturbed, even if its soundness is doubted"]; *Darsie v. Darsie* (1942) 49 C.A.2d 491, 495, 122 P.2d 64 [rule that court cannot award alimony where complaint fails to request it, accepted as correct by legal

profession for over 21 years]; *Broadway-Locust Co. v. Industrial Acc. Com.* (1949) 92 C.A.2d 287, 293, 206 P.2d 856 [attack by Commission on decision establishing 245-week limit on its jurisdiction; rejected on basis of 30 years of administrative and case law interpretation and adjustment of industry to rule]; *Barr Lumber Co. v. Shaffer* (1951) 108 C.A.2d 14, 22, 238 P.2d 99; *Jaynes v. Stockton* (1961) 193 C.A.2d 47, 56, 14 C.R. 49; 20 Am.Jur.2d (2005 ed.), Courts §137.)

Even where the question merely involves a rule of procedure, and overruling will not affect vested rights or seriously disturb personal or contractual relations, long acceptance tends to create a kind of immunity from judicial tampering. "Courts will not ignore a venerable rule of practice upon a mere implication of a statute. An intention on the part of the lawmakers to deviate from a procedure hoary with age must be unmistakably indicated. The doctrine of stare decisis is too firmly entrenched to be thus eradicated." (*Clary v. Rupert* (1949) 93 C.A.2d 844, 845, 210 P.2d 44 [rule that death of defendant destroys attachment lien, established law for over 80 years].) (See *Sauer v. Superior Court* (1925) 74 C.A. 580, 583, 241 P. 570; *Schneider v. Schneider* (1947) 82 C.A.2d 860, 862, 187 P.2d 459 [suspension of statute of limitations by defendant's absence from state, rule not questioned in over 63 years]; but see *infra*, §§523, 524.)

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3. Failure of Legislature To Act.

a. Theory of Legislative Approval.

9 *Witkin Cal. Proc. Appeal* § 516

[§ 516] Theory of Legislative Approval.

Another justification frequently advanced for following a precedent is that, where the case law has been clearly stated, and the Legislature has not seen fit to change it by statute, the courts should not do so. This argument is usually made where the case was one that construed a statute; it is assumed that the Legislature was aware of the decision and, by its silence, approved it as a statement of legislative intent.

In *Schoonover v. Birnbaum* (1906) 148 C. 548, 83 P. 999, the court said: "Five sessions of the legislature have been held since the last decisions were promulgated. If the legislative department had not been satisfied with the judicial interpretation as to the extent of the right conferred, there has been ample opportunity to amend the statute so as to give in unmistakable language the right withheld by the decisions. In view of these circumstances, and without expressing any opinion concerning the soundness or unsoundness of the decisions in question, we are of the opinion that they should be adhered to." (148 C. 551.)

In *Estate of Fritz* (1951) 102 C.A.2d 385, 227 P.2d 539, a holographic will was held defective because the date was incomplete ("December 1946"). The contention was made that this strict interpretation of former Prob.C. 53 (now Prob.C. 6111) was outmoded and harsh, and that the rule should be brought up to date with modern law elsewhere. The court answered that this interpretation by the Supreme Court had endured 70 years without legislative change, and that "an excess of virtue in the decision of an outside jurisdiction does not cause it to prevail over the settled judicial policy of this state." (102 C.A.2d 394.)

Other cases are to the same effect. (See *Radovich v. National Football League* (1957) 352 U.S. 445, 77 S.Ct. 390, 393, 1 L.Ed.2d 456, 461, supra, §514; *Pioche v. Paul* (1863) 22 C. 105, 110; *Sacramento Bank v. Alcorn* (1898) 121 C. 379, 385, 53 P. 813; *Hollywood Lumber Co. v. Love* (1909) 155 C. 270, 274, 100 P. 698; *Stewart v. Stewart* (1926) 199 C. 318, 341, 249 P. 197; *People v. Hallner* (1954) 43 C.2d 715, 719, 277 P.2d 393; *Estate of Muntz* (1924) 69 C.A. 404, 411, 231 P. 371; *Estate of Maguire* (1936) 14 C.A.2d 388, 390, 58 P.2d 209; *Schumm v. Beery* (1950) 100 C.A.2d 407, 410, 224 P.2d 54; *Latham v. Santa Clara County Hosp.* (1951) 104 C.A.2d 336, 340, 231 P.2d 513; *Anderson Crop Dusters v. Matley* (1958) 159 C.A.2d 811, 813, 324 P.2d 710; 20 *Am.Jur.2d* (2005 ed.), Courts §140.)

Much strength is added to this factor where it further appears that the Legislature modified or reenacted a statute without changing the provision as previously construed. "There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Armstrong v. Armstrong* (1948) 85 C.A.2d 482, 485, 193 P.2d 495.) (See *In re Halcomb* (1942) 21 C.2d 126, 129, 130 P.2d 384; *Bertozzi v. Swisher* (1938) 27 C.A.2d 739, 745, 81 P.2d 1016 ["its omission to make any material alteration therein may safely be taken as a confirmation by the legislature of the judicial construction theretofore placed on said provisions by the early decisions"]; *Childs v. Gross* (1940) 41 C.A.2d 680, 687, 107 P.2d 424; *Hunt v. Superior Court* (1949) 93 C.A.2d 504, 507, 209 P.2d 411.)

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3. Failure of Legislature To Act.

b. Criticism and Departures From Theory.

9 *Witkin Cal. Proc. Appeal* § 517

[§ 517] Criticism and Departures From Theory.

Despite the formidable list of declarations to the effect that legislative inaction equals approval of the existing interpretation (*supra*, §516), the theory that failure of the Legislature to act safeguards an erroneous rule of law seems the least impressive of the reasons for following precedent. The notion of an alert and omnipresent legislative watchdog is pure fantasy. Even in states with law revision commissions or active bar groups, it is seldom possible to undertake a meticulous examination of the mass of reported decisions, to sift out all cases that appear to involve questionable statutory interpretation, and to organize successful programs for legislative action to correct the error.

The sharp dissent in the case of *In re Halcomb* (1942) 21 C.2d 126, 130 P.2d 384, is worthy of thoughtful consideration: "There is no evidence that the Legislature ever had its attention directed to the construction in question. It is unrealistic to suppose that it can take note, much less deliberate the effect, of each judicial construction of statutory provisions, absorbed as it is with forging legislation for an endless number and variety of problems, under the constant pressure of considerations of urgency and expediency. The fiction that the failure of the Legislature to repudiate an erroneous construction amounts to an incorporation of that construction into the statute not only commits the Legislature to embrace something that it may not even be aware of, but bars the court from re-examining its own errors, consequences as unnecessary as they are serious." (21 C.2d 132.)

The majority were equally emphatic in *People v. Pierce* (1964) 61 C.2d 879, 40 C.R. 845, 395 P.2d 893: "In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates." (61 C.2d 882.)

Vesely v. Sager (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, *infra*, §531, illustrates the willingness of the Supreme Court to depart from the theory of legislative approval by inaction of the Legislature (*supra*, §516). In *Cole v. Rush* (1955) 45 C.2d 345, 289 P.2d 450, the court had pointed out that, notwithstanding a number of decisions denying recovery against a dealer who sold liquor to a person who subsequently injured another, the Legislature had passed numerous statutes on liquor and tort law without enacting a Dramshop Act. "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." (45 C.2d 355.)

In *Vesely, Cole* was overruled. "Defendant's arguments that the question of civil liability for tavern keepers should be left to future legislative action is faulty in two respects. First, liability has been denied in cases such as the one before us solely because of the judicially created rule that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication. As demonstrated, *supra*, this rule is patently unsound and totally inconsistent with the principles of proximate cause established in other areas of negligence law. Other common law tort rules which were determined to be lacking in validity have been abrogated by this court ... , and there is no sound reason for retaining the common law rule presented in this case." (5 C.3d 166.) (On legislative reinstatement of common law rule, see 6 *Summary* (10th), *Torts*, §1070.)

A number of decisions follow this view. (See *James v. United States* (1961) 366 U.S. 213, 81 S.Ct. 1052, 1056, 6 L.Ed.2d 246, 254 ["But the fact that Congress has remained silent or has reenacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors"]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 389, 115 C.R. 765, 525 P.2d 669, *infra*, §531; *Central Bank v. Superior Court* (1973) 30 C.A.3d 962, 971, footnote 12, 106 C.R. 912 [quoting Traynor article: "It is ironic that an unsound interpretation of a statute should gain strength merely because it has stood unnoticed by the legislature. It is a mighty assumption that legislative silence means applause. It is much more likely to mean ignorance or indifference"]; 43 Cal. L. Rev. 907; 20 Am.Jur.2d (2005 ed.), *Courts* §140; *infra*, §521 et seq.)

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4. Case Well Presented and Considered.

9 Witkin Cal. Proc. Appeal § 518

[§ 518] Case Well Presented and Considered.

A court may, as an additional reason for following a precedent, note that the case was well presented or vigorously argued, and that the opinion discloses a careful study of the point or a full review of the authorities: "That case was elaborately and ably presented to the supreme court on behalf of the appellant in a large number of voluminous briefs ... all involving forceful and able support of the position of the appellant on the various points relied upon for a reversal. The supreme court, in a well-considered opinion in that case, after giving such of the points so made as it conceived were of vital importance in the determination of the appeal, held that the record was free from substantial error." (*Colusa & Hamilton R. Co. v. Glenn* (1917) 35 C.A. 205, 206, 169 P. 423.) (See *Akron v. Akron Center for Reproductive Health* (1983) 462 U.S. 416, 103 S.Ct. 2481, 2487, footnote 1, 76 L.Ed.2d 687, 696 ["There are especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*. That case was considered with special care"]; *Pioche v. Paul* (1863) 22 C. 105, 109; *People v. Shea* (1899) 125 C. 151, 153, 57 P. 885; *In re Halcomb* (1942) 21 C.2d 126, 129, 130 P.2d 384; *Zerbe v. United R. of San Francisco* (1922) 56 C.A. 583, 586, 205 P. 887.)

Similar emphasis is occasionally placed on the fact that the opinion was concurred in by the entire court or that a rehearing was sought and denied. (See *Woollacott v. Meekin* (1907) 151 C. 701, 705, 91 P. 612; *Colusa & Hamilton R. Co. v. Glenn*, *supra*.)

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E. Reasons for Departing From Precedent.

1. Decision Contrary to Statute.

a. Decision Overlooking Existing Statute.

9 *Witkin Cal. Proc. Appeal* § 519

[§ 519] Decision Overlooking Existing Statute.

Probably the strongest reason for overruling a decision is that it is contrary to a statutory provision that was either not discovered or was known but ignored in the opinion. In the leading case of *Alferitz v. Borgwardt* (1899) 126 C. 201, 58 P. 460, the court overruled *Berson v. Nunan* (1883) 63 C. 550, which had held that title passed under a chattel mortgage by failing to notice C.C. 2888, establishing the lien theory. The opinion makes several observations on the limitations of the doctrine of stare decisis: "Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits it is authority more or less persuasive according to the reasonableness of the rule. Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity." (126 C. 208.)

A number of decisions are to the same effect. (See *Duff v. Fisher* (1860) 15 C. 375, 382; *Huffman v. Hall* (1894) 102 C. 26, 32, 36 P. 417; *Harron v. Harron* (1899) 123 C. 508, 510, 56 P. 334 [disregard of constitutional provision]; *Islais & Salinas Water Co. v. Allen* (1901) 132 C. 432, 436, 64 P. 713; *Martin v. Palmer Union Oil Co.* (1920) 184 C. 386, 389, 193 P. 950; *In re Tartar* (1959) 52 C.2d 250, 258, 339 P.2d 553; *California Bank v. Schlesinger* (1958) 159 C.A.2d Supp. 854, 865, 324 P.2d 119; *American Guaranty Corp. of Calif. v. Stoodt* (1964) 230 C.A.2d 390, 394, 41 C.R. 69.)

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1. Decision Contrary to Statute.
- b. Subsequent Change in Statute.

9 *Witkin Cal. Proc. Appeal* § 520

[§ 520] Subsequent Change in Statute.

A decision correct when rendered will, of course, lose its force as a precedent if a later statute changes the rule. But difficulty may be encountered in determining whether a statute in general language, not clearly directed to the rule of the case, nevertheless undermines it to the extent that it is ripe for repudiation. (For examples of refusal to follow earlier decisions or dicta on the ground of statutory change, see *Estate of Kachigian* (1942) 20 C.2d 787, 790, 128 P.2d 865; *People v. Valentine* (1946) 28 C.2d 121, 144, 169 P.2d 1; *Hunt v. Authier* (1946) 28 C.2d 288, 295, 169 P.2d 913; *De Burgh v. De Burgh* (1952) 39 C.2d 858, 866, 250 P.2d 598; *Estate of Cohen* (1944) 66 C.A.2d 450, 459, 152 P.2d 485; *Budde v. Superior Court* (1950) 97 C.A.2d 615, 621, 218 P.2d 103; *Lane & Pyron v. Gibbs* (1968) 266 C.A.2d 61, 66, 71 C.R. 817 [statutory abrogation of presumption, undermining rule of Supreme Court decision]; cf. *Guardianship of Casad* (1951) 106 C.A.2d 134, 145, 149, 151, 234 P.2d 647 [full discussion of this point, but only in opinion of a single justice].)

The earlier case receives the same treatment where the statute (or constitutional provision) on which it was based is subsequently repealed. (See *In re Jones* (1962) 57 C.2d 860, 862, footnote 2, 22 C.R. 478, 372 P.2d 310, 7 *Summary* (10th), *Constitutional Law*, §520 [inadvertent reliance on previously repealed provision of California Constitution].)

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2. Decision Wrong on Principle or Policy.

a. In General.

1. Governing Rules.

9 Witkin Cal. Proc. Appeal § 521

[§ 521] Governing Rules.

(1) *In General.* It has been seen that a court is almost never willing to overturn a rule of property even though, if the question were newly raised, it would be decided differently on principle. (See *supra*, §513.) But where no property rights will be affected by a change in decision, the desirability of retaining a long-established rule and of maintaining consistency in decision must be weighed against the evil of perpetuating a bad principle of law.

Despite the tendency to overturn a case where upholding it would perpetuate an incorrect principle, the doctrine of stare decisis faces its most serious test when a decision is challenged as contrary to modern social or economic policy, or productive of undesirable consequences in the administration of justice. The courts, attempting to achieve a balance between stability and progress in the law, cannot be consistent in their handling of this challenge. There are conservative and progressive courts, and conservative and progressive elements within the same court. But all recognize the necessity, at times, of abandonment of rules that have only the virtue of age, and that are, in the light of present-day beliefs and customs, unjust and unworthy of retention. (See 49 *Cal. L. Rev.* 615; 46 *Harv. L. Rev.* 361, 593, 795 [study of United States Supreme Court decisions]; 50 *Harv. L. Rev.* 20; 66 *Harv. L. Rev.* 84; 75 *Harv. L. Rev.* 463 [creative continuity in tort law]; 88 *Harv. L. Rev.* 1057 [hard cases; arguments of principle and policy in cases involving constitutional provisions, statutes and common law precedents]; 7 *U.C.L.A. L. Rev.* 571; *infra*, §522 et seq.)

(2) *California Supreme Court.* California cases place its courts among the most progressive. Numerous cases demonstrate the California courts' willingness to overturn a case because of principle or policy considerations. The following are illustrative:

Hart v. Burnett (1860) 15 C. 530, 600 ["the mere fact that an error has been committed is no reason or even apology for repeating it, much less for perpetuating it"].

Raffaelli v. Committee of Bar Examiners (1972) 7 C.3d 288, 302, 101 C.R. 896, 496 P.2d 1264 ["the decision in *Large* no longer reflects current constitutional reality, and it is hereby overruled"].

Ramirez v. Brown (1973) 9 C.3d 199, 206, 107 C.R. 137, 507 P.2d 1345 [prior California Supreme Court decision only 7 years old was rejected in view of later development in United States Supreme Court and California Supreme Court of stricter test of equal protection in voting rights cases].

(3) *United States Supreme Court*. A number of United States Supreme Court cases are of note:

Gelfert v. National City Bank of New York (1941) 313 U.S. 221, 61 S.Ct. 898, 904, 85 L.Ed. 1299, 1305 ["We cannot permit the broad language which those early decisions employed to force legislatures to be blind to the lessons which another century has taught"].

Michelin Tire Corp. v. Wages (1976) 423 U.S. 276, 96 S.Ct. 535, 547, 548, 46 L.Ed.2d 495, 511, 512, 9 Summary (10th), *Taxation*, §58 [leading case of *Low v. Austin* established "original package doctrine" in "misplaced" reliance on earlier dictum in *Brown v. Maryland*; *Low* was "wrongly decided" and is overruled].

National League of Cities v. Usery (1976) 426 U.S. 833, 96 S.Ct. 2465, 2475, 49 L.Ed.2d 245, 259, 7 Summary (10th), *Constitutional Law*, §3 ["we do not believe the reasoning in *Wirtz* may any longer be regarded as authoritative"].

Monell v. Department of Social Services of New York City (1978) 436 U.S. 658, 98 S.Ct. 2018, 2038, 56 L.Ed.2d 611, 638 ["we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes"].

Puerto Rico v. Branstad (1987) 483 U.S. 219, 107 S.Ct. 2802, 2809, 97 L.Ed.2d 187, 197 [overruling *Kentucky v. Dennison* (1861) 65 U.S. 66, 24 How. 66, 16 L.Ed. 717: "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development"].

Solorio v. United States (1987) 483 U.S. 435, 107 S.Ct. 2924, 2933, 97 L.Ed.2d 364, 378 [overruling *O'Callahan v. Parker* (1969) 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291: "That case's novel approach to court-martial jurisdiction must bow 'to the lessons of experience and the force of better reasoning' "].

Gulfstream Aerospace Corp. v. Mayacamas Corp. (1988) 485 U.S. 271, 108 S.Ct. 1133, 1142, 99 L.Ed.2d 296, 312 ["The case against perpetuation of this sterile and antiquated doctrine seems to us conclusive"].

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2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 522

[§ 522] Illustrations.

There are many cases that have overturned earlier decisions at least partly on grounds of principle or policy. The following are representative, but by no means exhaustive:

Sei Fujii v. California (1952) 38 C.2d 718, 242 P.2d 617, holding the former California Alien Land Law unconstitutional, is illustrative. Decisions of the United States Supreme Court in 1923, upholding the legislation, had been generally regarded by lawyers and courts (including the California Supreme Court) as foreclosing such an attack. (38 C.2d 725.) But the court, pointing to dicta in more recent majority and dissenting opinions disparaging the conclusions reached in the prior cases, said: "It thus appears that the decisions of the United States Supreme Court do not foreclose, but rather invite, further consideration of the constitutional issues which have been raised." (38 C.2d 727.) The court then proceeded to analyze the statute and the arguments in favor of its constitutionality, and concluded that its object was racial discrimination and relegation of a class of aliens to an inferior economic status. Hence, "the constitutional theories upon which the *Porterfield* case was based are today without support and must be abandoned." (38 C.2d 737.) A strong dissent contends that the majority opinion merely follows the personal social views of the justices. (38 C.2d 753.) (See 26 *So. Cal. L. Rev.* 175.)

Moragne v. States Marine Lines (1970) 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339, gives this problem careful and extended treatment. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors." (90 S.Ct. 1789, 26 L.Ed.2d 358.) The court found such reasons for overruling *The Harrisburg* (1886) 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358, a decision that the maritime law does not afford a cause of action for wrongful death.

(a) The first factor (the "mainstay of *stare decisis*") was absent. "The confidence of people in their ability to predict

the legal consequences of their actions ... is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior." (90 S.Ct. 1789, 26 L.Ed.2d 358.)

(b) None of the other factors was opposed to overruling. "We do not regard the rule of *The Harrisburg* as a closely arguable proposition--it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus* [*The Tungus v. Skovgaard* (1959) 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524], has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy. Respect for the process of adjudication should be enhanced, not diminished, by our ruling today." (90 S.Ct. 1790, 26 L.Ed.2d 359.)

In *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 C.3d 564, 214 C.R. 424, 699 P.2d 835, the court, on an elaborate review of the case law and the views of modern commentators, abrogated the common law rule generally accepted in the United States, that public employees have no right to strike. The opinion summarized the justifications for the traditional rule (38 C.3d 574), analyzed and criticized them (38 C.3d 575), rejected the argument that legislative silence precluded reevaluation of the common law doctrine (38 C.3d 584; see supra, §516), and reaffirmed the court's duty to abolish a court-created rule when its underlying principles are no longer justifiable in modern society (38 C.3d 584).

In *Cianci v. Superior Court* (1985) 40 C.3d 903, 221 C.R. 575, 710 P.2d 375, the court, overruling *Willis v. Santa Ana Community Hosp. Assn.* (1962) 58 C.2d 806, 26 C.R. 640, 376 P.2d 568, 1 Summary (10th), *Contracts*, §592, said: "Willis should be reexamined because it is inconsistent with our otherwise liberal construction of the Cartwright Act and its underlying policy of consumer welfare. ... Willis clearly stands merely as an aberration, an obstacle to the attainment of the legislative goal of free and open competition." (40 C.3d 924.)

A similar view was expressed where the cases creating a precedent relied on a mistaken headnote in a prior published opinion. "We search in vain within the body of the opinion or within the facts of the case for any justification for this publisher's note. Yet this unwarranted headnote generated the peculiar rule that only in legal malpractice cases does the statute of limitations begin to run before damage and before discovery." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 183, 98 C.R. 837, 491 P.2d 421.)

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b. Cases on Practice and Procedure.

1. Evidence.

9 *Witkin Cal. Proc. Appeal* § 523

[§ 523] Evidence.

"[A]s the purpose of all rules of evidence is to aid in arriving at the truth, if it shall appear that any rule tends rather to hinder than to facilitate this result, to promote rather than to repress fraud, it should be abrogated without hesitation." (*Williams v. Kidd* (1915) 170 C. 631, 649, 151 P. 1.) (See *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 1689, 6 L.Ed.2d 1081, 1089, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §5; *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 1492, 12 L.Ed.2d 653, 657; *Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 913, 63 L.Ed.2d 186, 196, 2 Cal. Evidence (4th), *Witnesses*, §170 [modifying *Hawkins* rule on husband-wife privilege: witness spouse alone has privilege to refuse to testify]; *People v. Ashley* (1954) 42 C.2d 246, 262, 265, 267 P.2d 271; *People v. Cahan* (1955) 44 C.2d 434, 442, 282 P.2d 905 [overruling prior decisions that held admissible evidence unconstitutionally obtained]; *Los Angeles v. Faus* (1957) 48 C.2d 672, 679, 312 P.2d 680 [evidence of other sales on issue of value of land; "The former rule was contrary to logic, unrealistic, and followed in only a few other states. ... [I]t becomes our duty not to follow decisions that we are convinced are erroneous and obsolete"]; *People v. Spriggs* (1964) 60 C.2d 868, 869, 36 C.R. 841, 389 P.2d 377, 1 Cal. Evidence (4th), *Hearsay*, §149.)

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b. Cases on Practice and Procedure.

2. Other Rules of Practice and Procedure.

9 Witkin Cal. Proc. Appeal § 524

[§ 524] Other Rules of Practice and Procedure.

In *Parker v. Womack* (1951) 37 C.2d 116, 230 P.2d 823, the court had approved an instruction in an ordinary negligence case on "unavoidable accident" after reviewing many prior cases. (37 C.2d 121.) In *Butigan v. Yellow Cab Co.* (1958) 49 C.2d 652, 320 P.2d 500, on further extended consideration, it was held that the theory is unsound and the instruction confusing. Hence, giving the instruction--in the absence of some special situation--was disapproved and the *Parker* case overruled. (49 C.2d 660.)

In *Wennerholm v. Stanford University School of Medicine* (1942) 20 C.2d 713, 128 P.2d 522, plaintiffs, after demurrer sustained without leave to amend, failed to ask leave. Under the existing decisions, error in the ruling was not reviewable on appeal; by a nonretroactive statute, the Legislature had meanwhile changed the law. *Held*, the legislative policy should be given immediate effect by rejecting the prior case law. "The problem is one of procedure and there are no vested rights which would be impaired by a change in the applicable rule of law. Furthermore, since the rule ... was judicial in its origin, there is no impropriety in our conclusion that it should no longer be followed. The fact that the Legislature saw fit to exclude pending cases from the operation of the statute does not prevent this court from modifying its rule so as to secure uniformity in procedure." (20 C.2d 720.)

In *People v. Thayer* (1965) 63 C.2d 635, 47 C.R. 780, 408 P.2d 108, the rule that a search warrant cannot authorize seizure of mere "evidence," established by the United States Supreme Court in *Gouled v. United States* (1921) 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §81, was repudiated as a "legal absurdity," with a rationale that "has never been satisfactorily articulated." The court pointed out that *Gouled* was decided before *Mapp v. Ohio* (1961) 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, hence was "a particularly apt candidate" for reinterpretation in light of the demands of the federal system. For good measure, the court observed that *Gouled* had been "distinguished to the point of extinction ... by the use of technical exceptions." (63 C.2d 639, 642.) (See *People v. Butler* (1966) 64 C.2d 842, 845, 52 C.R. 4, 415 P.2d 819, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §139 [challenge of validity of search warrant; see dissent, criticizing departure from "unbroken line of cases"].)

In *Quail Botanical Gardens Foundation v. Encinitas* (1994) 29 C.A.4th 1597, 35 C.R.2d 470, the Court of Appeal overruled its prior holding in *Uhler v. Encinitas* (1991) 227 C.A.3d 795, 278 C.R. 157, regarding the standard of review applied in reviewing agency decisions that no environmental impact report (EIR) is required under the California Environmental Quality Act (*Pub.Res.C. 21000* et seq.) for a proposed project. The reviewing court's function in these cases is to determine whether substantial evidence supports the agency's conclusion whether a fair argument can be made that significant impacts or effects may occur; deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. This standard of review involves a question of law requiring a certain degree of independent review of the record and is in contrast to the typical substantial evidence standard, mistakenly applied in *Uhler*, which usually results in great deference being given to the factual determinations of an agency. "Accordingly, we candidly admit the *Uhler* standard of review cannot be reconciled with the correct standard of review we adopt in this case, and, as a result, we now abandon the erroneous standard we applied in *Uhler*." (29 C.A.4th 1602, 1603.)

In *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 C.4th 489, 87 C.R.2d 702, 981 P.2d 543, 3 Cal. Proc. (5th), Actions, §329, the court overruled *Alexander v. State Personnel Bd.* (1943) 22 C.2d 198, 137 P.2d 433, which held that the doctrine of administrative remedies requires an application to the agency for reconsideration. Because it does not hinge on the meaning of specific words used in a particular statute, the *Alexander* rule is not a matter of statutory interpretation, but rather a rule of procedure. Thus, the Legislature has not had the opportunity to affirmatively acquiesce in the *Alexander* rule by reenacting or reaffirming exact statutory language. Moreover, the Legislature's failure to enact a statute of general applicability repudiating the *Alexander* rule does not, standing alone, establish legislative acquiescence, and there is no explicit evidence supporting acquiescence. (21 C.4th 505.)

Other cases also deal with procedural issues. (See *Phelan v. Superior Court* (1950) 35 C.2d 363, 370, 217 P.2d 951 [prior line of Supreme Court decisions was overruled in part on ground that technical rule had led to confusion and difficult distinctions, and "is a trap for unwary counsel and places a needless burden upon the appellate courts"]; *Jefferson v. J.E. French Co.* (1960) 54 C.2d 717, 719, 7 C.R. 899, 355 P.2d 643 [statute of limitations]; *Isrin v. Superior Court* (1965) 63 C.2d 153, 163, 45 C.R. 320, 403 P.2d 728, 3 Cal. Proc. (5th), Actions, §429; *Jehl v. Southern Pac. Co.* (1967) 66 C.2d 821, 828, 59 C.R. 276, 427 P.2d 988, 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §120 [additur by trial judge where damages were inadequate]; *People v. Hutchinson* (1969) 71 C.2d 342, 346, 351, 78 C.R. 196, 455 P.2d 132, 7 Cal. Proc. (5th), Trial, §382 [impeachment of verdict by jurors]; 8 *Stanf. L. Rev.* 293.)

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1. Torts.

9 *Witkin Cal. Proc. Appeal* § 525

[§ 525] Torts.

In the field of tort law, reexamination of principles and policy and overruling of older cases is probably more necessary and common than in any other. (See 66 *Harv. L. Rev.* 84.)

A most striking example is the case of *Muskopf v. Corning Hosp. Dist.* (1961) 55 C.2d 211, 11 C.R. 89, 359 P.2d 457, overruling a long line of cases and abrogating the doctrine of sovereign immunity from tort liability as "mistaken and unjust," and "an anachronism, without rational basis." (55 C.2d 213, 216.) The majority, answering the contention that such a fundamental change in the rule was a legislative matter, reasoned as follows: (a) This was not a situation in which the Legislature adopted an established judicial interpretation by repeated reenactment of a statute. (b) There was no comprehensive legislative enactment designed to cover a field, but only a series of sporadic statutes creating exceptions to the immunity doctrine where its evil was most serious, and leaving the courts free to follow their own rules in the remaining areas. (c) Because of the constant legislative and judicial modifications that have taken place, the long existence of the rule was not a strong reason for retention. (55 C.2d 219.) The opinion concludes:

"Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend." (55 C.2d 221.) (See extremely critical dissent, noting that prior late decisions of the court repeatedly held this to be a legislative matter, and there was no good reason for the holding other than change in personnel of the court.)

Another excellent illustration is furnished by *Silva v. Providence Hosp. of Oakland* (1939) 14 C.2d 762, 97 P.2d 798. The issue was the immunity of a charitable hospital. The court pointed out that the California rule granting immunity originated in dicta of the Supreme Court followed by holdings in Court of Appeal cases on conflicting theories, and that the earlier English and American cases stating the rule proceeded on a misconception of the nature

and operations of charitable institutions and on illogical theories of implied contract. The court then declared that "[n]o rule of law may be justified if the theories advanced to support it lack a foundation of legal principle" and concluded that the rule of liability is not only the modern view, "but the one required by every principle of common justice." (14 C.2d 776.)

In *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, the Supreme Court overruled its prior holding in *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, to the extent that that case had applied the doctrine of strict products liability to a residential landlord who is not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury in question.

(a) Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. (10 C.4th 1195.) Although the doctrine serves important values, it should not shield court-created errors from correction. (10 C.4th 1196.)

(b) The court's decision in *Becker* drastically altered established rules governing a landlord's liability for injuries caused by defects in the leased premises. (10 C.4th 1196.) The effect of imposing liability without fault on landlords is to compel them to insure the safety of their tenants in situations in which injury is caused by a defect of which the landlord neither knew nor should have known. Every other jurisdiction that has considered this issue has rejected the approach followed by *Becker*. (10 C.4th 1197.) Also, most of the reasons for imposing strict liability on a retailer of a defective product do not apply to landlords or hotel proprietors who rent residential premises. (10 C.4th 1198.)

There are numerous other examples. (See *Malloy v. Fong* (1951) 37 C.2d 356, 366, 231 P.2d 241 [policy "requiring individuals to be just before generous" noted in abandoning doctrine of immunity of charitable institution from tort liability]; *West v. San Diego* (1960) 54 C.2d 469, 477, 6 C.R. 289, 353 P.2d 929, 6 Summary (10th), Torts, §1678 [loss of consortium]; *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 388, 115 C.R. 765, 525 P.2d 669, *infra*, §531; *Molien v. Kaiser Foundation Hosp.* (1980) 27 C.3d 916, 927, 167 C.R. 831, 616 P.2d 813; *Sprecher v. Adamson Cos.* (1981) 30 C.3d 358, 371, 178 C.R. 783, 636 P.2d 1121, 6 Summary (10th), Torts, §1089 [rejecting common law rule that possessor of land is not liable for injury caused by natural condition on his or her land to persons or property not on land]; *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 297, 303, 304, 250 C.R. 116, 758 P.2d 58, *infra*, §552 [overruling *Royal Globe*, which created private cause of action for violation of *Ins.C.* 790.03]; *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 100, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (5th), Actions, §170 [overruling *Seaman's*, which recognized generally applicable tort action for bad faith denial of contract; citing *Moradi-Shalal*]; *Scott v. McPheeters* (1939) 33 C.A.2d 629, 637, 92 P.2d 678 [tort action for injury to unborn child; "Precedents are valuable so long as they do not obstruct justice or destroy progress"]; *Follansbee v. Benzenberg* (1954) 122 C.A.2d 466, 476, 265 P.2d 183; *Tate v. Canonica* (1960) 180 C.A.2d 898, 909, 5 C.R. 28 [wrongful death; suicide not superseding cause]; *Beard v. Atchison, Topeka & Santa Fe Ry. Co.* (1970) 4 C.A.3d 129, 139, 140, 84 C.R. 449 [tort action by trespasser injured on moving freight train boxcar].)

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2. Workers' Compensation.

9 *Witkin Cal. Proc. Appeal* § 526

[§ 526] Workers' Compensation.

The same influences are at work in the field of workers' compensation. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1945) 26 C.2d 286, 287, 158 P.2d 9 [prior Supreme Court decisions holding injuries arising out of horseplay were noncompensable were overruled, under modern view, taking into account changing concepts on workers' compensation]; *State Comp. Ins. Fund v. Industrial Acc. Com. of Calif.* (1952) 38 C.2d 659, 660, 242 P.2d 311 [repudiating prior California rule that aggressor is not entitled to workers' compensation; case was decided on basis of "modern trend" of minority decisions and some text writers]; *Smith v. Work. Comp. App. Bd.* (1968) 69 C.2d 814, 825, 73 C.R. 253, 447 P.2d 365, 2 Summary (10th), *Workers' Compensation*, §216 [overruling prior Supreme Court decision: "Surely in this day of highly motorized society we cannot cast the going and coming rule as a protective cloak over the shoulders of the employer who, for his own advantage, demands that the employee furnish the car on the job"]; *Los Angeles v. Work. Comp. App. Bd.* (1981) 30 C.3d 391, 398, 179 C.R. 214, 637 P.2d 681, 2 Summary (10th), *Workers' Compensation*, §185; *Azevedo v. Industrial Acc. Com.* (1966) 243 C.A.2d 370, 374, 52 C.R. 283, 2 Summary (10th), *Workers' Compensation*, §43 [repudiating prior rule that commission lacks jurisdiction to award compensation for injury intentionally inflicted by employer].)

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3. Family Law.

9 *Witkin Cal. Proc. Appeal* § 527

[§ 527] Family Law.

De Burgh v. De Burgh (1952) 39 C.2d 858, 250 P.2d 598, overruled *Conant v. Conant* (1858) 10 C. 249, and other cases following it, and greatly limited the defense of recrimination in California's former action for divorce. Among other matters emphasized by the court were "the considerations of policy that prompt the state to consent to a divorce" (39 C.2d 864), and the rising divorce rate which "has compelled a growing recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault" (39 C.2d 867).

Many other cases are illustrative:

Estate of Brooks (1946) 28 C.2d 748, 755, 171 P.2d 724 [conflicting California cases construing statute on family allowance to wife after interlocutory decree; decided on consideration of underlying policy of statute].

Hudson v. Hudson (1959) 52 C.2d 735, 745, 344 P.2d 295 [former wife allowed to recover alimony after ex parte foreign divorce; two prior Supreme Court cases overruled].

Hull v. Superior Court (1960) 54 C.2d 139, 145, 5 C.R. 1, 352 P.2d 161, 11 Summary (10th), *Husband and Wife*, §108 [denial of final decree for misconduct would be contrary to public policy of this state: "That policy is not to discourage final and permanent severance of marriages that have failed"].

Estate of Neilson (1962) 57 C.2d 733, 741, 22 C.R. 1, 371 P.2d 745, 11 Summary (10th), *Community Property*, §128 [overruling *In Estate of Pepper* (1910) 158 C. 619, 112 P. 62, which had refused to permit apportionment of community property in farming operation on husband's separate property].

Gibson v. Gibson (1971) 3 C.3d 914, 922, 92 C.R. 288, 479 P.2d 648, *infra*, §531 ["In deciding to abrogate parental immunity, we are also persuaded by several policy factors"].

In re Marriage of Brown (1976) 15 C.3d 838, 847, 126 C.R. 633, 544 P.2d 561, *infra*, §554 [rejecting theory of prior decision that nonvested pension rights were mere expectancies and not community property assets subject to

division on dissolution of marriage].

Franklin Life Ins. Co. v. Kitchens (1967) 249 C.A.2d 623, 629, 57 C.R. 652 [rule limiting divorce court to simple division of community property between the parties "has been rendered obsolete by the development of complex procedures for the deferred disposition of intricate community property interests"].

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4. Crimes.

9 *Witkin Cal. Proc. Appeal* § 528

[§ 528] Crimes.

Similar considerations apply to crimes cases. (See *People v. Vogel* (1956) 46 C.2d 798, 804, 299 P.2d 850 [overruling prior decision that rejected good faith belief of defendant as defense in bigamy prosecution]; *People v. Camodeca* (1959) 52 C.2d 142, 146, 338 P.2d 903 [false pretenses]; *People v. Pierce* (1964) 61 C.2d 879, 882, 40 C.R. 845, 395 P.2d 893 [conspiracy of husband and wife; ancient fiction abandoned]; *People v. Drew* (1978) 22 C.3d 333, 347, 348, 149 C.R. 275, 583 P.2d 1318, 1 Cal. Crim. Law (3d), *Defenses*, §13 [abolishing *M'Naghten* test of insanity and adopting American Law Institute formulation]; *Hawkins v. Superior Court* (1978) 22 C.3d 584, 593, 150 C.R. 435, 586 P.2d 916, footnote 7, 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §168 [declaring constitutional right to postindictment preliminary hearing, and quoting observation in earlier case that in criminal actions, "courts should not adhere to precedents unjust to the accused"].)

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5. Property.

9 *Witkin Cal. Proc. Appeal* § 529

[§ 529] Property.

In *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168, supra, §485, the court said: "In summary, we have concluded that the traditional common law rule which imposed no warranty of habitability in residential leases is a product of an earlier, land-oriented era, which bears no reasonable relation to the social or legal realities of the landlord-tenant relationship of today. The United States Supreme Court has observed that 'the body of private property law ... , more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.' ... and on previous occasions in recent years our own court has responded to the changes wrought by modern conditions by discarding outworn common law property doctrines. ... In taking a similar step today, we do not exercise a novel prerogative, but merely follow the well-established duty of common law courts to reflect contemporary social values and ethics. As Justice Cardozo wrote ... : 'A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. ... This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.' " (10 C.3d 639.)

In *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, the court repudiated the common law majority rule that a commercial lessor can arbitrarily refuse assent to an assignment of the lease. (See *infra*, §552.) In answer to the argument that valuable property rights were created in reliance on the majority rule and should not be disturbed (see *supra*, §§513, 514), the court said: "[T]he majority viewpoint has been far from universally held and has never been adopted by this court. Moreover, the trend in favor of the minority rule should come as no surprise to observers of the changing state of real property law in the 20th century. The minority rule is part of an increasing recognition of the contractual nature of leases and the implications in terms of contractual duties that flow therefrom." (40 C.3d 504.)

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a. Authorities Elsewhere.

1. Relation to Other Grounds.

9 Witkin Cal. Proc. Appeal § 530

[§ 530] Relation to Other Grounds.

Closely related to the factors of principle and policy (supra, §521 et seq.) is the factor of general law throughout the country. In other words, a decision that is unsupported by authority or is contrary to the great weight of present authority is probably wrong in principle or inconsistent with modern social or economic policy. Hence, the rejection of a precedent as opposed to the authorities is usually accompanied by additional criticism of the injustice of the rule laid down or the incorrectness of the principle involved. Counsel should bear this in mind in any attack on a minority rule as such; precedents are not overturned merely on a showing that more states are against the rule than for it. The challenger should go into the reasons for rejection of the rule as they appear in the opposing authorities, and should bolster up his or her argument with reference to other critical authorities such as textbooks, law reviews, and the Restatements.

The following cases are illustrative:

San Francisco v. Spring Valley Water Works (1874) 48 C. 493, 517 ["counsel have failed to produce ... a single adjudicated case, or an extract from any work on constitutional law, which lends the slightest support to the ruling"].

In re Ford (1911) 160 C. 334, 348, 116 P. 757 [case not supported by weight of authority, based on repudiated doctrine, and "not consonant with justice"].

Speck v. Wylie (1934) 1 C.2d 625, 627, 36 P.2d 618 [repudiating prior Supreme Court decision and Restatement rule].

De Burgh v. De Burgh (1952) 39 C.2d 858, 870, 250 P.2d 598 ["[W]e have given the most serious consideration not only to judicial precedent but also to the work of leading scholars and practitioners. Few rules of law have been more widely condemned by the legal profession"].

Vogel v. Los Angeles (1967) 68 C.2d 18, 21, 64 C.R. 409, 434 P.2d 961 [change in viewpoint of United States Supreme Court, rejecting earlier decision on which California Supreme Court formerly relied].

Smith v. Work. Comp. App. Bd. (1968) 69 C.2d 814, 825, 73 C.R. 253, 447 P.2d 365 [prior Supreme Court decision, representing weight of authority at time of pronouncement, now against trend, overruled].

Morris v. Municipal Court (1982) 32 C.3d 553, 564, 186 C.R. 494, 652 P.2d 51 [on review of later federal court precedents, prior California Supreme Court decision overruled].

McHugh v. Santa Monica Rent Control Bd. (1989) 49 C.3d 348, 358, 261 C.R. 318, 777 P.2d 91 ["the intervening five decades of case law show that unquestioning and rigid adherence to *Jersey Maid's* holding would place us out of step with every sister-state court of this country that has considered administrative awards of 'restitutive' damages"].

Peterson v. Superior Court (1995) 10 C.4th 1185, 1197, 43 C.R.2d 836, 899 P.2d 905, supra, §525 ["every other jurisdiction that has considered this issue expressly has rejected the approach followed by *Becker*"].

Freeman & Mills v. Belcher Oil Co. (1995) 11 C.4th 85, 98, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (5th), Actions, §170 [other jurisdictions qualify or decline to recognize generally applicable tort action for bad faith denial of contracts recognized in *Seaman's*; citing *Moradi-Shalal*].

In re Hadley (1943) 57 C.A.2d 700, 703, 135 P.2d 381 [prior Court of Appeal decision rejected because it "is contrary to the great weight of authority and is not supported by sound reasoning"].

First Nat. Bank of Stockton v. Pomona Tile Mfg. Co. (1947) 82 C.A.2d 592, 608, 186 P.2d 693 [after examination of cases, texts, and Restatement, prior Court of Appeal opinion repudiated as "not only wrong in principle but contrary also to authority"].

Hunter v. Sparling (1948) 87 C.A.2d 711, 724, 197 P.2d 807 [prior Court of Appeal case rejected as precedent where "out of line with the overwhelming weight of authority" and "severely criticized" by Washington case].

People v. One 1950 Cadillac 2-Door Club Coupe Engine No. 506236120 (1955) 133 C.A.2d 311, 316, 284 P.2d 118 [early U.S. case not followed because "it is very doubtful indeed if much of the original holding remains intact," and later federal cases suggest that "only the shibboleth of 'stare decisis' has saved it from express repudiation"].

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2. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 531

[§ 531] Illustrations.

In *Gibson v. Gibson* (1971) 3 C.3d 914, 915, 922, 92 C.R. 288, 479 P.2d 648, the court overruled *Trudell v. Leatherby* (1931) 212 C. 678, 300 P. 7, and repudiated the doctrine of parental immunity for personal torts. The opinion commences with a general observation concerning the policy ground of *Trudell* (avoidance of discord in the family): "If this rationale ever had any validity, it has none today. We have concluded that parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this court. Lacking the support of authority and reason, the rule must fall." (3 C.3d 915.) The court then traces the origin of the rule, "an invention of the American courts" (3 C.3d 916), the development of qualifications and exceptions (3 C.3d 918), the rejection of its underlying rationale in later decisions (3 C.3d 919), and follows the modern trend. "By our decision today we join 10 other states which have already abolished parental tort immunity. We think it is significant that since 1963, when the Wisconsin Supreme Court drove the first wedge ... , other jurisdictions have steadily hacked away at this legal deadwood." (3 C.3d 922.)

Vesely v. Sager (1971) 5 C.3d 153, 95 C.R. 623, 486 P.2d 151, also attacked an existing rule on principle and as contrary to the current of decisions elsewhere. "Since *Cole*, various courts in other jurisdictions have reevaluated the common law rule that the vendor of intoxicating liquor cannot be held liable for injuries resulting from intoxication, and in particular the rule that the seller cannot be held liable for furnishing alcoholic beverages to a customer who injures a third person. A substantial number, if not a majority, have decided that the sale of alcoholic beverages may be the proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person." (5 C.3d 161.) And "we are persuaded by the reasoning of the cases that have abandoned that rule. The decisions ... invoke principles of proximate cause similar to those established in this state by cases dealing with matters other than the furnishing of alcoholic beverages." (5 C.3d 163.) (For legislative repudiation of *Vesely*, see 6 *Summary* (10th), *Torts*, §1070.)

Several of the important reasons for departing from precedent were presented in *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 C.3d 382, 115 C.R. 765, 525 P.2d 669. California, in *Deshotel v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 50 C.2d 664, 328 P.2d 449, and *West v. San Diego* (1960) 54 C.2d 469, 6 C.R. 289, 353 P.2d 929, had adopted

the rule that a married person whose spouse was injured by a third party's negligence had no cause of action for loss of consortium, i.e., conjugal fellowship and sexual relations. (See 6 *Summary* (10th), *Torts*, §1678.) The *Rodriguez* court overruled these decisions and established the right to recover.

(a) *Weight of authority.* At the time of the *Deshotel* decision, the majority of states denied the wife's right; but in the ensuing 16 years, 31 states allowed it, and the change in trend was recognized in the Second Restatement of Torts, stating the present majority rule supporting recovery. "In these circumstances we may fairly conclude that the precedential foundation of *Deshotel* has been not only undermined but destroyed. In its place a new common law rule has arisen, granting either spouse the right to recover for loss of consortium caused by negligent injury to the other spouse." (12 *C.3d* 392.)

(b) *Legislative inaction.* The argument that a departure from a well-settled rule should be left to the Legislature "has fared badly in our decisions" (see *supra*, §517). (12 *C.3d* 393.) In a common law jurisdiction, the judiciary has a responsibility for the growth of the law and the constant reexamination of rules in the light of current conditions. "Although the Legislature may of course speak to the subject ... the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." (12 *C.3d* 394.) Other state courts, departing from the *Deshotel* rule, have expressed the same views. (12 *C.3d* 396.)

(c) *Consideration of merits.* On an examination of the issue on its merits, nothing in the reasoning of *Deshotel* is convincing. Its holding is unsound in principle and contrary to policy. (12 *C.3d* 399.)

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3. Decision Contrary to Authority.

b. Resolving Conflicts in Authority.

1. Higher Court Prevails.

9 Witkin Cal. Proc. Appeal § 532

[§ 532] Higher Court Prevails.

Where the decisions of the California courts or of other courts are in conflict, counsel, trial judges, and appellate courts alike are faced with the problem of selecting the controlling precedent or the preferable rule. The circumstances are too variable to permit the development of any standard practice. However, this and the following sections set forth what appear to be appropriate methods of dealing with the situation.

Where the conflict is between decisions of the Supreme Court and Courts of Appeal, the court may disregard the lower appellate decisions and accept the Supreme Court decisions as controlling. (See *Lane v. Starkey* (1922) 59 C.A. 140, 143, 210 P. 277; *Wogman v. Wells Fargo Bank* (1954) 123 C.A.2d 657, 664, 267 P.2d 423; *Cereghino v. Superior Court* (1960) 177 C.A.2d 328, 332, 2 C.R. 159.) This method is now compelled by *Auto Equity Sales v. Superior Court* (1962) 57 C.2d 450, 20 C.R. 321, 369 P.2d 937, *supra*, §483.

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2. Latest Case Governs.

9 *Witkin Cal. Proc. Appeal* § 533

[§ 533] Latest Case Governs.

Another rule to guide the courts is to follow the latest pronouncements and disregard the earlier cases as impliedly overruled. (See, e.g., *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 839, 205 P.2d 1037; *Quanchi v. Ben Lomond Wine Co.* (1911) 17 C.A. 565, 570, 120 P. 427 [former Supreme Court case "was decided in the early history of our jurisprudence, and has not since been cited or adopted by our courts ... and in view of the contrary expressions in subsequent cases in this state just referred to, it can hardly be relied on as a precedent"]; *Palvutjian v. Terkanian* (1920) 47 C.A. 47, 52, 190 P. 503 [latest opinion of Supreme Court]; *Kenney v. Antioch Live Oak School Dist.* (1936) 18 C.A.2d 226, 231, 63 P.2d 1143 [latest opinion of Court of Appeal]; *Jensen v. Friedman* (1947) 79 C.A.2d 494, 503, 179 P.2d 855; *Walls v. System Freight Service* (1949) 94 C.A.2d 702, 703, 211 P.2d 306; *Bauer v. Helene Curtis Industries* (1953) 117 C.A.2d 66, 68, 254 P.2d 931; *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 C.A.3d 605, 619, 136 C.R. 187, 7 Summary (10th), *Constitutional Law*, §74 [where two Supreme Court decisions are in apparent conflict, Court of Appeal may examine alternatives and reconcile their holdings]; *People v. Moreno* (1977) 67 C.A.3d 962, 969, 134 C.R. 322, citing the text; *Angell v. Rowlands* (1978) 85 C.A.3d 536, 542, 149 C.R. 574 [early conflicting Supreme Court cases, later Court of Appeal decision followed].)

In *People v. Rappard* (1972) 28 C.A.3d 302, 104 C.R. 535, the court held the alien gun law (former P.C. 12021) unconstitutional, notwithstanding *In re Rameriz* (1924) 193 C. 633, 226 P. 914, which had upheld the same statute against the same constitutional challenge (equal protection). The dissenting justice argued that the existing precedent was binding unless expressly overruled by *California's Supreme Court.* (28 C.A.3d 307, 308.) But the majority found *Rameriz* not controlling: first, because some of its grounds were expressly rejected in a later California Supreme Court decision; and second, because later United States Supreme Court decisions and California Supreme Court decisions introduced a stricter standard of equal protection in classifications based on the suspect factor of alienage. (28 C.A.3d 305.)

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b. Resolving Conflicts in Authority.

3. Adopt the Better Rule.

9 *Witkin Cal. Proc. Appeal* § 534

[§ 534] Adopt the Better Rule.

Courts faced with conflicting decisions have the option of treating the question as open and deciding it by adopting the better rule as if there were no controlling precedent. (See, e.g., *People v. Valentine* (1946) 28 C.2d 121, 139, 169 P.2d 1; *Estate of Brooks* (1946) 28 C.2d 748, 755, 171 P.2d 724; *Phelan v. Superior Court* (1950) 35 C.2d 363, 368, 217 P.2d 951; *People v. Ashley* (1954) 42 C.2d 246, 262, 267 P.2d 271 [where California precedents conflict, better policy may be followed]; *Gibson v. Gibson* (1971) 3 C.3d 914, 918, 92 C.R. 288, 479 P.2d 648, supra, §531 ["we believe that a trilogy of recent California cases in this area of intra-family tort immunity has weakened, if not eroded, the doctrinal underpinnings of the rule"]; *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 496, 497, 498, 220 C.R. 818, 709 P.2d 837, infra, §552 [conflicting decisions of Court of Appeal; adopting modern rule of Restatement of Property 2d and minority of state jurisdictions]; *Kneeland v. Ethicon Suture Laboratories* (1952) 113 C.A.2d 335, 337, 248 P.2d 447; *Stafford v. Ware* (1960) 187 C.A.2d 227, 236, 9 C.R. 706; *Bridges v. Bridges* (1978) 82 C.A.3d 976, 977, 147 C.R. 471 [following one of two conflicting Court of Appeal decisions, with suggestion to loser that he seek hearing in Supreme Court]; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 C.A.3d 641, 642, 645, 650, 148 C.R. 80; *Connecticut Printers v. Gus Kroesen* (1982) 134 C.A.3d 54, 61, 184 C.R. 436, quoting the text; *Quail Botanical Gardens Foundation v. Encinitas* (1994) 29 C.A.4th 1597, 1603, 35 C.R.2d 470, supra, §524 [overruling prior decision of same court and acknowledging conflict with another court; "correct standard of review" adopted]; cf. *Engleman v. Green* (1954) 125 C.A.2d Supp. 882, 887, 270 P.2d 127 [court disposes of two earlier Supreme Court and earlier Court of Appeal cases as "out of harmony with the great majority of cases"].)

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4. Weakness of Prior Decision.

a. In General.

9 Witkin Cal. Proc. Appeal § 535

[§ 535] In General.

In disposing of an objectionable precedent, the courts occasionally look for internal evidence of its weakness as an authority. It may be found, e.g., to be one of the following:

- (1) That the opinion was badly presented, with little or no argument on the particular point. (See *infra*, §536.)
- (2) That the opinion discloses little or no consideration given to the point. (See *infra*, §538.)
- (3) That the opinion overlooked contrary decisions on the point or failed to make any adequate examination of the available authorities. (See *infra*, §537.)
- (4) That the decision was by a divided court. (See *infra*, §538.)
- (5) That no hearing in the Supreme Court was sought. (See *infra*, §539.)

Seldom are these matters sufficient in themselves to justify overruling a prior decision, but they take on considerable importance when some other factor is present (see *supra*, §519 et seq.).

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4. Weakness of Prior Decision.

b. Case Poorly Presented.

9 *Witkin Cal. Proc. Appeal* § 536

[§ 536] Case Poorly Presented.

In *Becker v. Superior Court* (1907) 151 C. 313, 90 P. 689, the court said: "And there is the more justification for reconsidering the doctrine ... since it appears from the opinion in that case that the Department in reaching its conclusion was not aided by any argument or presentation of authorities on behalf of the respondents." (151 C. 315.) (See *Hahn v. Kelly* (1868) 34 C. 391, 404 [point conceded by eminent counsel and therefore assumed by court without consideration]; *Meehan v. Hopps* (1955) 45 C.2d 213, 217, 288 P.2d 267 [point not raised or considered]; *General Motors Acceptance Corp. v. Kyle* (1960) 54 C.2d 101, 114, 4 C.R. 496, 351 P.2d 768 [point not disputed or argued]; *Peterson v. Lamb Rubber Co.* (1960) 54 C.2d 339, 343, 5 C.R. 863, 353 P.2d 575 [same]; *Berkeley v. Superior Court* (1980) 26 C.3d 515, 528, 162 C.R. 327, 606 P.2d 362; *Carpenter v. Santa Monica* (1944) 63 C.A.2d 772, 786, 147 P.2d 964 [point conceded by eminent counsel and therefore assumed by court without consideration].)

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4. Weakness of Prior Decision.

c. Case Poorly Considered.

9 *Witkin Cal. Proc. Appeal* § 537

[§ 537] Case Poorly Considered.

In *Briscoe v. Reader's Digest Assn.* (1971) 4 C.3d 529, 93 C.R. 866, 483 P.2d 34, 5 Summary (10th), *Torts*, §692, the court, in upholding a complaint for invasion of privacy, had added the observation that no action for libel could be maintained because of failure to comply with the retraction statute. This statement, extending the coverage of C.C. 48a to *magazines*, was held not controlling in *Montandon v. Triangle Publications* (1975) 45 C.A.3d 938, 952, 120 C.R. 186, 5 Summary (10th), *Torts*, §611, for the following reasons: (a) *Briscoe* did not discuss prior cases holding the section inapplicable to magazines; (b) the opinion did not explain the statement; (c) the cases cited were newspaper cases, which did not discuss magazines; (d) the decision was solely on pleading, i.e., that the plaintiff had stated a cause of action. (45 C.A.3d 952.)

In *I.J. Weinrot & Son v. Jackson* (1985) 40 C.3d 327, 220 C.R. 103, 708 P.2d 682, the court disapproved the dictum in a 1933 Court of Appeal decision that an employer may, under C.C. 49(c), recover damages from a third person who causes injuries to a business employee. About the disapproved case, the court said: "Although the issue whether such a cause of action existed under California law was a question of first impression, the court offered no discussion of the common law or of precedents from other jurisdictions. Nor did it consider the grave policy implications of subjecting a negligent tortfeasor to consequential damages for injuring a potentially irreplaceable business employee." (40 C.3d 336.)

In *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 C.4th 903, 13 C.R.2d 245, 838 P.2d 1198, the court reexamined its prior holding in *Citizens Against Forced Annexation v. Local Agency Formation Com.* (1982) 32 C.3d 816, 187 C.R. 423, 654 P.2d 193, and declared that "we conclude in hindsight that the reasoning in that case was questionable." (3 C.4th 920.) "Of course we do not lightly disagree with a comparatively recent decision of this court. The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible. ... Nevertheless, stare decisis compels less deference to precedent when constitutional principles are applied to deny effect to an enactment." (3 C.4th 921.)

In *United States v. Dixon* (1993) 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556, the Court, overruling a 3-year-old

decision, explained its action as follows: "We do not lightly reconsider a precedent, but, because *Grady* contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and has produced 'confusion,' we do so here. ... We would mock *stare decisis* and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not." (113 S.Ct. 2864, 125 L.Ed.2d 577.)

Many other cases illustrate this practice. (See *San Francisco v. Spring Valley Water Works* (1874) 48 C. 493, 517 ["In the annals of American jurisprudence, that case ... stands as the sole exponent of the propositions which it enunciates"]; *Jaffe v. Stone* (1941) 18 C.2d 146, 154, 114 P.2d 335; *People v. Collup* (1946) 27 C.2d 829, 839, 167 P.2d 714; *Phelan v. Superior Court* (1950) 35 C.2d 363, 367, 217 P.2d 951 [cases departed from general rule and earlier decisions without citing contrary authority]; *Robinson v. Superior Court* (1950) 35 C.2d 379, 385, 218 P.2d 10 [misconception of prior decision]; *De Burgh v. De Burgh* (1952) 39 C.2d 858, 867, 250 P.2d 598 [cases followed early erroneous decision with "little analysis or discussion of the principles" and thus "enabled the thinking engendered" by that case "to survive by default"]; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 374, 273 P.2d 897, supra, §477 [case followed mistaken syllabus in prior decision]; *Worthley v. Worthley* (1955) 44 C.2d 465, 472, 283 P.2d 19 [report of case indicates that it was argued and decided solely on question of full faith and credit; authority as precedent limited to decision on that question]; *In re Bandmann* (1958) 51 C.2d 388, 393, 333 P.2d 339; *Cothran v. San Jose Water Works* (1962) 58 C.2d 608, 612, 25 C.R. 569, 375 P.2d 449 ["The artificiality of the court's reasoning"]; *Gibson v. Gibson* (1971) 3 C.3d 914, 917, 92 C.R. 288, 479 P.2d 648, supra, §531 ["After a discussion of barely one page on the issue of parental immunity"]; *Liodas v. Sahadi* (1977) 19 C.3d 278, 292, 137 C.R. 635, 562 P.2d 316; *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 188, 151 C.R. 837, 588 P.2d 1261; *Berkeley v. Superior Court* (1980) 26 C.3d 515, 533, 162 C.R. 327, 606 P.2d 362 ["The summary and conclusory nature of the decision of the issues in *Knudson*, virtually devoid of reasoning, undermines its status as substantial authority"]; *Martinez v. Traubner* (1982) 32 C.3d 755, 760, 187 C.R. 251, 653 P.2d 1046 [prior decision was not followed where point was erroneously assumed without discussion or citation of authority]; *Ritzman v. Los Angeles* (1940) 38 C.A.2d 470, 474, 101 P.2d 541; *Engleman v. Green* (1954) 125 C.A.2d Supp. 882, 887, 270 P.2d 127; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 C.A.3d 641, 648, 650, 148 C.R. 80; *Nunez v. Superior Court* (1983) 143 C.A.3d 476, 479, footnote 4, 191 C.R. 893 [reliance on erroneous dicta]; *Howard v. Lufkin* (1988) 206 C.A.3d 297, 302, 253 C.R. 422.)

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4. Weakness of Prior Decision.

d. Decision of Divided Court.

9 *Witkin Cal. Proc. Appeal* § 538

[§ 538] Decision of Divided Court.

If an even division of justices occurs, the result is an affirmance of the judgment for lack of a majority to reverse it. The decision "possesses no dignity as a judicial precedent, but carries upon its face a badge that precludes any application of it in the future under the doctrine of *stare decisis*." (*Luco v. De Toro* (1891) 88 C. 26, 28, 25 P. 983; see *United States v. Pink* (1942) 315 U.S. 203, 62 S.Ct. 552, 558, 86 L.Ed. 796, 810; *Ohio v. Price* (1960) 364 U.S. 263, 80 S.Ct. 1463, 1464, 4 L.Ed.2d 1708, 1709; 20 *Am.Jur.2d* (2005 ed.), *Courts* §138.) Thus, it is correct to say that the decision of an equally divided United States Supreme Court, for example, is without force as precedent. (*People v. Robinson* (1989) 209 C.A.3d 1047, 1054, 257 C.R. 772.)

Going a step further, there may be a majority or even unanimous concurrence in the decision (judgment), but a difference in reasons expressed in separate opinions. No opinion has any value as a precedent on points as to which there is no agreement of a majority of the court. (See *Regents of Univ. of Calif. v. Bakke* (1978) 438 U.S. 265, 98 S.Ct. 2733, 2735, 57 L.Ed.2d 750, 754, 8 *Summary* (10th), *Constitutional Law*, §969; *Farrell v. Board of Trustees of Sacramento* (1890) 85 C. 408, 415, 24 P. 868; *Del Mar Water, Light & Power Co. v. Eshleman* (1914) 167 C. 666, 682, 140 P. 591 ["any proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices"]; *Oakland v. Buteau* (1919) 180 C. 83, 88, 179 P. 170 [one opinion with three judges, two separate concurring opinions on other grounds, and dissent]; *Scott v. Times-Mirror Co.* (1919) 181 C. 345, 359, 184 P. 672; *People v. Newland* (1940) 15 C.2d 678, 681, 104 P.2d 778; *Fuentes v. Tucker* (1947) 31 C.2d 1, 6, 187 P.2d 752 [Supreme Court opinion; four opinions, but only three justices agreeing on point]; *Adoption of Kelsey S.* (1992) 1 C.4th 816, 841, 4 C.R.2d 615, 823 P.2d 1216, 8 *Summary* (10th), *Constitutional Law*, §776; *Carpenter v. Santa Monica* (1944) 63 C.A.2d 772, 775, 147 P.2d 964; 65 *A.L.R.3d* 504 [United States Supreme Court plurality opinions]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §159.)

In *Smith v. Evans* (1974) 42 C.A.3d 154, 116 C.R. 684, 7 *Summary* (10th), *Constitutional Law*, §259, the court said: "The absence of a majority opinion in *Thompson v. Mellon* ... causes lack of firm decisional guidance. The leading opinion (by Sullivan, J., with Tobriner, J., concurring) nullifies a two-year residence requirement and suggests that a charter or statute may constitutionally require no more than 30 days' residence before the candidate files his nominating papers. An opinion signed by Wright, C.J., and Molinari, J., concurs in the judgment of invalidity without suggesting

what would be a constitutionally permissible demand. A concurring opinion by Mosk, J., concludes that any person eligible to vote at the election should be eligible for candidacy at that election. A dissenting opinion (signed by Burke, J., and McComb, J.,) would have sustained the two-year provision as a valid exercise of home rule. Five of the seven participating justices joined in nullifying the two-year residence provision, but less than a majority joined in expressions reflecting adversely upon a one-year residence requirement. The latter expressions thus have no precedential force." (42 C.A.3d 157.)

In *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 C.4th 903, 13 C.R.2d 245, 838 P.2d 1198, the court, in arriving at a unanimous opinion, reached a conclusion contrary to its own prior decision in *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 C.3d 779, 187 C.R. 398, 654 P.2d 168, and added this explanation: "*Fullerton's* reasoning is embodied in a plurality opinion signed by three justices. ... The case thus lacks authority as precedent ... , and the doctrine of stare decisis does not require us to defer to it." (3 C.4th 918.)

In the foregoing situations, the decision is not a precedent at all. However, even though a majority concur on the point in question, the strength of the precedent may be lessened by the fact that a bare majority (4-3 in the California Supreme Court, or 5-4 in the United States Supreme Court) are on the main opinion. Also, the value of an opinion as precedent may be lessened by a well-reasoned dissent. The dissent may pave the way for a future departure from the rule, or it may be used for its persuasive value, much as dicta are used. (See, e.g., *Golden Gate Tile Co. v. Superior Court* (1911) 159 C. 474, 481, 114 P. 978; *Miller v. McKinnon* (1942) 20 C.2d 83, 90, 124 P.2d 34; *Desny v. Wilder* (1956) 46 C.2d 715, 731, 733, 299 P.2d 257; 56 Harv. L. Rev. 472; 4 Hastings L. J. 118.)

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4. Weakness of Prior Decision.

e. No Hearing Sought.

9 *Witkin Cal. Proc. Appeal* § 539

[§ 539] No Hearing Sought.

The older practice of the Supreme Court sitting in departments produced decisions not rendered by the entire court. These have occasionally been disparaged as authority, particularly where no hearing en banc was requested. (See *People v. Collup* (1946) 27 C.2d 829, 838, 167 P.2d 714; *Palvutjian v. Terkanian* (1920) 47 C.A. 47, 51, 190 P. 503.)

The same view has been expressed as to a Court of Appeal opinion in which there was no petition for hearing in the Supreme Court. (See *Hunter v. Sparling* (1948) 87 C.A.2d 711, 724, 197 P.2d 807; *Wogman v. Wells Fargo Bank* (1954) 123 C.A.2d 657, 664, 267 P.2d 423.) (On current practice of review by Supreme Court, see *infra*, §913.)

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F. Overruling Prior Decisions.

1. Forms and Methods of Overruling.

a. Overruling Expressly.

9 *Witkin Cal. Proc. Appeal* § 540

[§ 540] Overruling Expressly.

The clearest and most desirable method of noting departure from a precedent is to state that the prior case is "overruled" on the point in question. (See *People v. Valentine* (1946) 28 C.2d 121, 141, 169 P.2d 1 [two conflicting lines of California authority; "Fairness to the profession in general, and in particular to the courts of lower jurisdiction, demands that one group or the other of these cases may be squarely overruled"]; *People v. Vogel* (1956) 46 C.2d 798, 805, 299 P.2d 850; *Los Angeles v. Faus* (1957) 48 C.2d 672, 680, 312 P.2d 680; *People v. Camodeca* (1959) 52 C.2d 142, 147, 338 P.2d 903; *Trabin v. Title Ins. & Trust Co.* (1959) 52 C.2d 149, 153, 339 P.2d 136; *Flores v. Arroyo* (1961) 56 C.2d 492, 497, 15 C.R. 87, 364 P.2d 263; *Smith v. Work. Comp. App. Bd.* (1968) 69 C.2d 814, 819, 73 C.R. 253, 447 P.2d 365.)

Formerly, no distinction was made between the form of statement overruling prior decisions of the Supreme Court and Court of Appeal. But under the former hearing procedure, the Supreme Court became particularly conscious of the fact that it did not review the *decisions* of the intermediate appellate court, which were superseded by the granting of a hearing, and thus not available to be overruled. Instead, it only granted or denied a hearing in a *cause*. This led to elimination of the practice of filing an opinion on denial of hearing that withheld approval of a point. (See *supra*, §502.) And it had the further effect of developing a new form of statement when the Supreme Court rejected a precedent: Prior Court of Appeal opinions, except by inadvertence, were no longer "overruled"; they were "disapproved." (See, e.g., *La Mar v. La Mar* (1947) 30 C.2d 898, 903, 186 P.2d 678; *Fuentes v. Tucker* (1947) 31 C.2d 1, 7, 187 P.2d 752; *Pacific Mut. Life Ins. Co. of Calif. v. McConnell* (1955) 44 C.2d 715, 725, 726, 285 P.2d 636; *People v. Snyder* (1958) 50 C.2d 190, 197, 324 P.2d 1; *People v. Quinn* (1964) 61 C.2d 551, 554, 39 C.R. 393, 393 P.2d 705; *People v. Pierce* (1964) 61 C.2d 879, 882, 40 C.R. 845, 395 P.2d 893 ["we overrule *People v. Miller* ... and disapprove *People v. MacMullen*"]; *Vesely v. Sager* (1971) 5 C.3d 153, 167, 95 C.R. 623, 486 P.2d 151, *supra*, §531 ["we overrule *Cole v. Rush* ... and *Lammers v. Pacific Railway Company* ... we disapprove of *Fleckner v. Dionne* ... and *Hitson v. Dwyer*"]; *Los Angeles v. Work. Comp. App. Bd.* (1981) 30 C.3d 391, 403, 179 C.R. 214, 637 P.2d 681 [Supreme Court decision "overruled" and its "progeny" (Court of Appeal decisions) "disapproved"]; cf. *Tabata v. Murane* (1944) 24 C.2d 221, 231, 148 P.2d 605 [including Court of Appeal case in list of decisions "overruled"]; *Phelan v. Superior Court* (1950) 35 C.2d 363, 371, 217 P.2d 951 [same]; *People v. Castillo* (1969) 70 C.2d 264, 271, 74 C.R. 385, 449 P.2d 449; *In re Marriage of Brown*

(1976) 15 C.3d 838, 851, footnote 14, 126 C.R. 633, 544 P.2d 561, *infra*, §554 [including Supreme Court cases in list of decisions "disapproved"]; *Tenzer v. Superscope* (1985) 39 C.3d 18, 31, 216 C.R. 130, 702 P.2d 212 ["We disapprove of *Kroger v. Baur* and its progeny"].)

The current practice of Supreme Court "review" instead of "hearing" (see *infra*, §913), where it is the Court of Appeal decision itself that is reviewed, may call for a reexamination of this practice.

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1. Forms and Methods of Overruling.

b. Overruling Indirectly.

9 Witkin Cal. Proc. Appeal § 541

[§ 541] Overruling Indirectly.

Courts often employ euphemisms to soften the blow of direct repudiation of a prior case. (See *Olsen v. Nebraska* (1941) 313 U.S. 236, 61 S.Ct. 862, 864, 85 L.Ed. 1305, 1308 ["The drift away from *Ribnik v. McBride* ... has been so great that it can no longer be deemed a controlling authority"]; *Benton v. Maryland* (1969) 395 U.S. 784, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707, 716 ["*Palko's* roots had thus been cut away years ago. We today only recognize the inevitable"]; *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 358 ["*Quaker City Cab Co. v. Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review"]; *Estate of Rattray* (1939) 13 C.2d 702, 716, 91 P.2d 1042 ["we are convinced that the holding in that case was in error"]; *Slater v. Blackwood* (1975) 15 C.3d 791, 796, 126 C.R. 225, 543, P.2d 593 ["We consider the *Greenfield* doctrine of doubtful validity and it has been severely criticized. ... While we find it is unnecessary for our present purposes to reach the question of whether *Greenfield* itself should be directly overruled, we expressly hold that the rule of that case is inapplicable"]; *McWilliams v. Hudson* (1929) 98 C.A. 185, 189, 276 P. 598, 277 P. 529 [prior cases "can no longer be considered as authority"]; *Everett v. Everett* (1976) 57 C.A.3d 65, 71, 129 C.R. 8 ["If *Stevens v. Kelly* ever correctly stated California law, it surely did not survive *Berry v. Chaplin*, ... which simply ignored it. The two cases cannot coexist in a jurisdiction which purports to decide disputes on a rational basis"].)

Overruling may also occur in two stages: (1) A prior authority may be first overlooked, ignored, or purportedly distinguished on untenable grounds. (2) Then, in a later decision, it may be recognized that the early case was "impliedly overruled" by the later one. "[I]t is settled that the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it." (*Sei Fujii v. California* (1952) 38 C.2d 718, 728, 242 P.2d 617.) (See *James v. United States* (1961) 366 U.S. 213, 81 S.Ct. 1052, 1053, 6 L.Ed.2d 246, 251 ["examination of the reasoning used in *Rutkin* leads us inescapably to the conclusion that *Wilcox* was thoroughly devitalized"]; *Lane v. Pacific Greyhound Lines* (1945) 26 C.2d 575, 583, 160 P.2d 21; *Davenport v. Davenport Foundation* (1950) 36 C.2d 67, 76, 222 P.2d 11; *Malloy v. Fong* (1951) 37 C.2d 356, 364, 232 P.2d 241; *Snyder v. Southern Calif. Edison Co.* (1955) 44 C.2d 793, 803, 285 P.2d 912 [decision "contrary to the later cases" "is of doubtful authority"]; *People v. Benford* (1959) 53 C.2d 1, 7, 345 P.2d 928 [in view of later Supreme Court decision, earlier Court of Appeal opinion "cannot be considered to represent existing law"]; *In re Lane* (1962) 58 C.2d 99, 105, 22 C.R. 857, 372 P.2d 897 ["It is

an established rule of law that a later decision overrules prior decisions which conflict with it, whether such prior decisions are mentioned and commented upon or not"; *Tenzer v. Superscope* (1985) 39 C.3d 18, 31, 216 C.R. 130, 702 P.2d 212 ["We disapprove of *Kroger v. Baur* and its progeny"]; *Hargrove v. Henderson* (1930) 108 C.A. 667, 677, 679, 681, 292 P. 148; *Jones v. South San Francisco* (1950) 96 C.A.2d 427, 438, 216 P.2d 25; *Norwood v. Judd* (1949) 93 C.A.2d 276, 288, 209 P.2d 24; *In re Dowding* (1961) 188 C.A.2d 418, 423, 10 C.R. 392 [prior decisions, not mentioned in recent Supreme Court opinion, "cannot be squared with the reasoning of the Supreme Court"]; *St. Louis v. De Bon* (1962) 204 C.A.2d 464, 466, 22 C.R. 443 [prior Supreme Court decision, "[a]lthough never expressly disapproved," is contrary to later decisions and "is not a sound statement of the applicable rule"]; *People v. Bass* (1963) 225 C.A.2d Supp. 777, 781, 33 C.R. 365 [observing that certain unoverruled cases "have become overruled by the later cases"]; *Kinoshita v. Horio* (1986) 186 C.A.3d 959, 965, 231 C.R. 241 ["Whether or not *Zappettini* is distinguishable from the present case, it appears to have been not only 'modified' but impliedly overruled by the contrary authorities noted above"].) (See concurring opinion in *Speck v. Wylie* (1934) 1 C.2d 625, 629, 36 P.2d 618 [listing cases impliedly overruled by majority opinion].)

A pointed criticism of this practice was offered by the concurring justice in *Bennett v. Superior Court* (1933) 218 C. 153, 21 P.2d 946: "This intolerable confusion has resulted from the simple fact that the *Stone* case, while plainly contrary to prior decisions of this court, did not expressly disapprove of such decisions, with the result that two appellate courts have felt at liberty to rely upon them. The majority opinion in the instant case relies upon these earlier decisions, but fails to disapprove of the *Stone* case, and hence invites further confusion." (218 C. 165.) (cf. *McCall v. Superior Court* (1934) 1 C.2d 527, 538, 36 P.2d 642 [politely, but finally, overruling the case: "the *Stone* case must give way in order to prevent further confusion"].)

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F. Overruling Prior Decisions.

2. Retroactive Effect of Overruling Decision.

a. General Rule: Retroactivity.

9 *Witkin Cal. Proc. Appeal* § 542

[§ 542] General Rule: Retroactivity.

The theory that the court merely declares and does not make law has a drastic corollary: Rights and interests founded on a prior decision may be swept away by the overruling decision, which wipes out the legal rule held to be erroneous. There is no constitutional objection to giving retroactive effect to a decision, even though contractual obligations are impaired. (See *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 44 S.Ct. 197, 199, 68 L.Ed. 382, 386; *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 [theory and practice]; *Harper v. Virginia Dept. of Taxation* (1993) 509 U.S. 86, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74, 87 [following *Beam*]; *In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 865, 257 P.2d 1; *Los Angeles v. Faus* (1957) 48 C.2d 672, 681, 312 P.2d 680 [rule of evidence; neither contract nor property rights vested in reliance on prior decision]; *Willard v. First Church of Christ, Scientist* (1972) 7 C.3d 473, 479, 102 C.R. 739, 498 P.2d 987, 12 *Summary* (10th), *Real Property*, §14 [change in rule of property]; *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1207, 246 C.R. 629, 753 P.2d 585; *Newman v. Emerson Radio Corp.* (1989) 48 C.3d 973, 974, 258 C.R. 592, 772 P.2d 1059, *infra*, §546; *Droeger v. Friedman, Sloan & Ross* (1991) 54 C.3d 26, 45, 283 C.R. 584, 812 P.2d 931; *Waller v. Truck Ins. Exchange* (1995) 11 C.4th 1, 24, 44 C.R.2d 370, 900 P.2d 619, *supra*, §340; *Citizens for Covenant Compliance v. Anderson* (1995) 12 C.4th 345, 367, 47 C.R.2d 898, 906 P.2d 1314, 12 *Summary* (10th), *Real Property*, §449 [former rule unsettled; new rule that real property purchasers are bound by previously recorded covenants, conditions, and restrictions applied retroactively]; *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 C.4th 489, 509, 87 C.R.2d 702, 981 P.2d 543 [overruling decision]; *In re McNeer* (1959) 173 C.A.2d 530, 533, 343 P.2d 304 [criminal procedure]; *Pimental v. Safeway Stores* (1987) 196 C.A.3d 92, 97, 241 C.R. 568; *La Bato v. State Farm Fire & Cas. Co.* (1989) 215 C.A.3d 336, 343, 263 C.R. 382 [rejecting argument that controlling case declared new rule of law and should be applied prospectively]; *Faria v. Northwestern Nat. Life Ins. Co.* (1989) 216 C.A.3d 1129, 1133, 1134, 265 C.R. 309; *Douglas v. Ostermeier* (1991) 1 C.A.4th 729, 730, 2 C.R.2d 594, *infra*, §544; *McCarthy v. Martinson* (1996) 51 C.A.4th 632, 636, 59 C.R.2d 149, *infra*, §550; *Gentis v. Safeguard Business Systems* (1998) 60 C.A.4th 1294, 1305, 71 C.R.2d 122 [appellate decision affirming trial court judgment was retroactively applied where there was no California decisional authority on point; California was not bound by decisions in other jurisdictions]; *In re Retirement Cases* (2003) 110 C.A.4th 426, 441, 1 C.R.3d 790 [retroactive application of California Supreme Court opinion overruling prior judicial interpretation of statute]; 40 *Cal. L. Rev.* 585; 56 *Cal. L. Rev.* 1612; 29 *Harv. L. Rev.* 80; 60 *Harv. L. Rev.* 437; 105

Harv. L. Rev. 339 [*Beam*]; 107 *Harv. L. Rev.* 312 [*Harper*]; 20 *Am.Jur.2d* (2005 ed.), *Courts* §150 et seq.) (For discussion of retroactive application sought by petitioner for his or her own benefit, see *Monroe v. Trustees of the Calif. State Colleges* (1971) 6 C.3d 399, 406, 99 C.R. 129, 491 P.2d 1105, 3 *Cal. Proc.* (5th), *Actions*, §435; *Barber v. State Personnel Bd.* (1976) 18 C.3d 395, 400, 134 C.R. 206, 556 P.2d 306.)

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F. Overruling Prior Decisions.

2. Retroactive Effect of Overruling Decision.

b. Illustrations.

1. Punitive Damages: Intoxicated Driver Acting in Conscious Disregard of Safety of Others.

9 Witkin Cal. Proc. Appeal § 543

[§ 543] Punitive Damages: Intoxicated Driver Acting in Conscious Disregard of Safety of Others.

The factors governing full retroactivity in civil cases were definitively restated in *Peterson v. Superior Court* (1982) 31 C.3d 147, 181 C.R. 784, 642 P.2d 1305. Plaintiffs sought compensatory and punitive damages against defendant, an intoxicated driver, alleging that he acted in conscious disregard of the safety of plaintiff and others. These allegations brought the case within the rule of *Taylor v. Superior Court* (1979) 24 C.3d 890, 157 C.R. 693, 598 P.2d 854, 6 Summary (10th), Torts, §1575, if *Taylor* applied. The accident occurred in April 1979. *Taylor* was decided in August 1979, and the complaint was filed in April 1980. *Held*, the *Taylor* rule is applicable to accidents occurring or complaints filed before the decision.

(a) *Exceptions to general rule of full retroactivity.* The exceptions where contracts have been made or property rights acquired in accordance with the prior decision (see *infra*, §554) do not apply; hence, retroactivity depends on considerations of fairness and public policy. (31 C.3d 152.) The issue turns primarily on (1) the extent of the public reliance on the former rule, and (2) the ability of litigants to foresee the coming change in the law. (31 C.3d 153.)

(b) *Rejection of arguments against retroactivity.*

(1) Defendant's contention that punitive damages cannot have a deterrent effect when the prohibited conduct is already complete was accepted in *Mau v. Superior Court* (1980) 101 C.A.3d 875, 161 C.R. 895, but was rejected in *Busboom v. Superior Court* (1980) 113 C.A.3d 550, 169 C.R. 886. (31 C.3d 155.) The *Busboom* approach is correct: Punitive damages not only deter others, but deter the particular wrongdoer from repeating the antisocial conduct; and each such defendant will serve as an example to others. "The sooner knowledge of the potential liability saturates the collective consciousness of the driving public, the better the deterrent purpose of the rule is served." (31 C.3d 156.) *Mau* is disapproved to the extent inconsistent. (31 C.3d 156.)

(2) The argument that insurance companies may have relied on the old rule is not a justification for requiring prospective application of the *Taylor* rule. Insurance policies do not cover punitive damages (see 6 Summary (10th),

Torts, §1564); hence, there could be no detrimental reliance by insurers on the expectation that punitive damages are not recoverable from a drunk driver. (31 C.3d 157.)

(3) Defendant further argued that if drunkenness justifies the imposition of punitive damages, the act would be wilful and that, therefore, the indemnification of *compensatory* damages would be banned under *Ins.C.* 533, prohibiting indemnification where such an act is involved. However, an act can justify an award of punitive damages without being "wilful" within the meaning of *Ins.C.* 533. Driving with the conscious disregard of the safety of others is such an act. Hence, just because the recovery of punitive damages is allowed for drunk driving (although indemnification of these damages is denied for public policy reasons), the conduct is not *wilful*, and the policy would still cover the compensatory damage portion of plaintiff's recovery. (31 C.3d 158, 159.)

(c) *Ex post facto prohibition inapplicable.* This constitutional doctrine applies in the criminal area, not to a case involving only civil penalties. (31 C.3d 161.)

(d) *No unfairness in retroactive application.* California courts have applied overruling decisions retroactively even though the decisions redefined the conduct prohibited. "Although one could draw a distinction between expansion of liability for compensatory damages and increasing punishment by imposition of punitive damages, the effect is the same: exposure to a form of damages for which the defendant was not previously liable. ... [T]he increased liability is merely a change in the remedy for enforcing defendant's obligation to refrain from drunk driving, not a change in the nature of the obligation itself. Defendant undoubtedly had fair warning that his conduct--driving while intoxicated--was prohibited." (31 C.3d 161.)

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2. Punitive Damages: Evidence of Defendant's Financial Condition.

9 Witkin Cal. Proc. Appeal § 544

[§ 544] Punitive Damages: Evidence of Defendant's Financial Condition.

In *Douglas v. Ostermeier* (1991) 1 C.A.4th 729, 2 C.R.2d 594, plaintiffs purchased a used Mercedes automobile from defendant. The car was a composite of previously wrecked cars that had been salvaged by defendant and sold as a used model worth \$ 29,000. Actually it was worth less than half of its purchase price of \$ 24,354. Plaintiffs sued for rescission of the contract, alleging fraudulent misrepresentation and requesting compensatory and punitive damages. The jury brought in a verdict for rescission and restitution of the sale price, compensatory damages of \$ 10,624, and punitive damages of \$ 187,000. Defendant appealed, contending that the punitive damages award was excessive.

During the pendency of the appeal, the Supreme Court rendered its opinion in *Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, holding that as a prerequisite to an award of punitive damages the plaintiff must present evidence of the defendant's financial condition. (See 6 *Summary* (10th), *Torts*, §1619.) *Held*, the *Adams* holding was applicable to this case.

(a) *The general rule and exceptions.* An overruling decision of the highest court is retrospective in its application. (1 C.A.4th 740; see *supra*, §542.) Exceptions are recognized when considerations of fairness, foreseeability, and public policy preclude full retroactivity. (1 C.A.4th 740, discussing *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, *infra*, §552, and *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 C.2d 573, 12 C.R. 257, 360 P.2d 897, *infra*, §552.) In *Peterson v. Superior Court* (1982) 31 C.3d 147, 181 C.R. 784, 642 P.2d 1305, *supra*, §543, the court summarized the factors: "Public policy considerations include the purpose to be served by the new rule, and the effect on the administration of justice of retroactive application. Considerations of fairness would measure the reliance on the old standards by the parties or others similarly affected, as well as 'the ability of litigants to foresee the coming change in the law.'" (1 C.A.4th 742.)

(b) *The Newman case.* There are several parallels between *Newman v. Emerson Radio Corp.* (1989) 48 C.3d 973, 258 C.R. 592, 772 P.2d 1059, *infra*, §546, and the present case that point to retroactive application of *Adams*.

(1) "First, considerations of fairness--reliance on the old standards and foreseeability of a change in the law--on

balance weigh in favor of retroactive application. Retroactive application of the rule will not deprive a plaintiff of a property or contract right. Nor will a plaintiff be denied any remedy whatsoever. A plaintiff is still entitled to punitive damages, although proof of entitlement will be much more burdensome. The *Adams* decision did not overrule a prior decision of the state's highest court. ... Nor did the *Adams* decision overrule a series of unanimous and consistent Court of Appeal decisions on the issue." (1 C.A.4th 743.) "Thus, because of the lack of unanimity in Court of Appeal decisions on such an important and controversial matter, it was foreseeable the state's highest court would at some point need to address the issue directly. What was not particularly foreseeable, however, was that the Supreme Court would adopt the conclusion and rationale of the minority position among the Courts of Appeal that had considered the question." (1 C.A.4th 744.) On balance, however, considerations of fairness do not compel the conclusion that an exception to the general rule of retroactivity is warranted. (1 C.A.4th 745.)

(2) The purposes of the new rule are twofold: First, evidence of financial condition will assist an appellate court in determining whether the amount of an award is appropriate; and second, that evidence will assist the jury in determining what amount it will require to punish past misconduct and deter future misconduct. (1 C.A.4th 745.)

(3) In the minority of cases, the amount of punitive damages has been segregated from the question of entitlement to these damages, and the amount may be retried without disturbing the jury's other findings. (1 C.A.4th 746.) Many cases may have taken advantage of the procedures allowing for bifurcation. Under this procedure the jury first decides whether to impose liability for compensatory damages and whether the defendant acted with fraud, malice, or oppression. The jury is then separately asked whether to impose punitive damages, and, if so, in what amount. Because the award of punitive damages is separated from findings on general liability and the amount of compensatory damages, it should be unnecessary to retry any issue other than the amount of punitive damages in cases affected by the decision in *Adams*. (1 C.A.4th 746.)

(4) Nevertheless, retrial of even the limited issue may require extensive discovery, jury trials, and examination of witnesses, all of which will result in duplication of efforts by counsel, higher costs to litigants, and an increased demand on court personnel and resources. "Thus, retroactive application of the *Adams* decision will have a definite negative impact on judicial resources." (1 C.A.4th 747.) On the other hand, "[a] somewhat dated study" indicates that retroactive application might affect only two or three hundred cases and possibly fewer. (1 C.A.4th 747.)

(5) "On balance and by a narrow margin, fairness and public policy concerns as defined and explained in decisions of our highest court indicate retroactive application of its decision in *Adams v. Murakami* is appropriate." (1 C.A.4th 748.)

(c) *No retrial required in the present case.* (1) Evidence of defendant's financial condition was presented by witnesses from both sides for evaluation by the jury and trial judge. (1 C.A.4th 749.) (2) The award of punitive damages was not so grossly disproportionate to the award of compensatory damages as to raise the presumption that it was the result of passion and prejudice. (1 C.A.4th 750.) (3) "Also a critical factor for consideration is the egregiousness of the defendant's conduct. Here, the nature of appellants' acts, quite possibly criminal in nature, were at a minimum fraudulent and despicable. ... This is a particularly fitting case for an award of punitive damages to punish misconduct and to deter similar acts in the future." (1 C.A.4th 751.)

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3. Plaintiff's Burden of Proving That Interference With Expectancy Was Wrongful.

9 Witkin Cal. Proc. Appeal § 545

[§ 545] Plaintiff's Burden of Proving That Interference With Expectancy Was Wrongful.

In *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 45 C.R.2d 436, 902 P.2d 740, an action by an automobile wholesaler against an automobile manufacturer for intentional interference with prospective economic advantage, the Supreme Court's holding that the plaintiff in such an action bears the burden of pleading and proving that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself, was held to apply retroactively, even though former holdings by the same court were to the contrary.

(a) The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation. (11 C.4th 391, footnote 4, citing *Peterson v. Superior Court* (1982) 31 C.3d 147, 181 C.R. 784, 642 P.2d 1305, supra, §543.)

(b) Although there are exceptions to this general rule, founded on fairness and public policy, the circumstances of this case do not support their application here. Litigants and counsel could have foreseen that a change in the rules regulating the pleading and burden of proof requirements in economic relations litigation was in the wind well before the time this case was tried in 1992: The relevant modifications of the Restatement Second of Torts occurred in 1965; most of the opinions of the high courts of other American jurisdictions cited in support of the holding were decided before well before 1992; and the related evolution in the decisions of the Court of Appeal began in 1983. The prospect of a modification of the former rule thus could fairly have been foreseen by plaintiffs and the legal profession at the time this case was tried. No unfairness can be discerned in applying the usual rule of full retroactivity. (11 C.4th 391, footnote 4.) (See 24 *Pepperdine L. Rev.* 359 [*Della Penna*].)

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4. No Tort Action for Violation of Covenant of Good Faith and Fair Dealing.

9 *Witkin Cal. Proc. Appeal* § 546

[§ 546] No Tort Action for Violation of Covenant of Good Faith and Fair Dealing.

In *Newman v. Emerson Radio Corp.* (1989) 48 C.3d 973, 258 C.R. 592, 772 P.2d 1059, a 4-3 decision, the court examined the retroactivity issue left open in *Foley v. Interactive Data Corp.* (1988) 47 C.3d 654, 254 C.R. 211, 765 P.2d 373. *Foley* held that a tort cause of action would not lie against an employer for breach of the implied covenant of good faith and fair dealing in an employment contract (see 3 *Cal. Proc.* (5th), *Actions*, §149). *Newman* makes *Foley* fully retroactive, applying to all cases not yet final on January 30, 1989, the date that *Foley* became final.

(a) The "Blackstonian" theory that a judicial decision merely declares what the law has always been has fallen into disrepute, but the general rule that decisions are given retroactive effect has retained its vitality. (48 C.3d 979.) Justice Traynor recognized that overruling may entail hardship on those who have relied on a precedent, but nevertheless asserted that "it is my opinion that the hardship on parties who would be saddled with an unjust precedent if the overruling was not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation." (48 C.3d 981.)

(b) "With few exceptions and even after expressly considering suggestions to the contrary, California courts have consistently applied tort decisions retroactively even when those decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decision." (48 C.3d 981, 982, listing many cases.) It is not significant that *Foley* circumscribed the potential liability of defendants extended under *Cleary v. American Airlines* (1980) 111 C.A.3d 443, 454, 168 C.R. 722, and other Court of Appeal decisions; the decision represented no greater "surprise" than that in many of the other tort cases given retroactive application. (48 C.3d 984.) "[T]he *Cleary* doctrine stood for less than six years before we granted review to consider the issue. We are not persuaded that this is the kind of 'longlasting' lower court rule that justifies nonretroactivity in the absence of compelling additional reasons." (48 C.3d 986.) And *Foley* dealt with an unsettled area: The Court of Appeal decisions following *Cleary* either uncritically adopted the rule or undertook incomplete analyses. (48 C.3d 987.)

(c) The Courts of Appeal never reached a consensus on what sufficed for a claim of tortious breach of the implied covenant in the employment context, and *Foley* referred to the virtually impossible task of formulating a rule that would

assure tort relief only to deserving cases. "Obviously, such difficulties and uncertainties would persist if we were to deny *Foley* retroactivity and allow all pending cases to continue to work their way through the system. Even if we were to establish one theoretical model for tort recovery in pending cases, as noted, that would most likely require retrial in a significant number of cases due to the substantial number and variety of approaches adopted in the trial and intermediate appellate courts. Put simply, we can see little to be gained by the expenditure of additional judicial resources refining and clarifying what we have already recognized as bad law." (48 C.3d 993.)

A strong dissenting opinion of three justices argues as follows:

(a) The majority make no attempt to distinguish *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, "the most recent and pertinent precedent." (48 C.3d 994; see *infra*, §552.)

(b) *Foley* established a new rule of tort law overruling seven Court of Appeal decisions. "When this court declines to review a consistent line of Court of Appeal decisions (finally granting review only when a decision adopts an extremely restrictive view of tort liability), permits those decisions to remain published, cites those cases without hint of disapproval, and goes so far as to approve the theory on which they rest, I conclude that we have impliedly sanctioned the practice in question." (48 C.3d 996.)

(c) "[W]hen Court of Appeal opinions conflict, it is our function to resolve that conflict. In *Moradi-Shalal*, after abolishing the cause of action for bad faith refusal to settle, we went on to establish the essential requisites of that tort for those actions still viable under our prospective decision. We could have done the same thing in *Foley*. We could do it today. We cannot justify retroactive abolition of the cause of action for bad faith discharge by our own failure to resolve conflicts in the courts below and to settle the essential elements of that cause of action." (48 C.3d 1000.) (See *Industrial Indem. Co. v. Touche Ross & Co.* (1993) 13 C.A.4th 1086, 1092, 17 C.R.2d 29 [applying *Newman* analysis and holding that recent Supreme Court decision applied retroactively].)

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5. No Tort Action for Bad Faith Denial of Existence of Contract.

9 *Witkin Cal. Proc. Appeal* § 547

[§ 547] No Tort Action for Bad Faith Denial of Existence of Contract.

In *Norager v. Nakamura* (1996) 42 C.A.4th 1817, 50 C.R.2d 481, the trial judge entered a judgment for plaintiff that included damages for his tort cause of action for the bad faith denial of the existence of a contract. On the basis of *Seaman's Direct Buying Service v. Standard Oil Co.* (1984) 36 C.3d 752, 206 C.R. 354, 686 P.2d 1158, 3 Cal. Proc. (5th), Actions, §169, this cause of action had been added by amending the complaint. Then, while this appeal was pending, the Supreme Court decided *Freeman & Mills v. Belcher Oil Co.* (1995) 11 C.4th 85, 44 C.R.2d 420, 900 P.2d 669, 3 Cal. Proc. (5th), Actions, §170, which overruled *Seaman's*. Held, the *Freeman* decision was retroactive. There was no unfairness in applying it retroactively, because plaintiff was not relying on *Seaman's* when he filed his complaint. It was only at the end of the trial when he amended his complaint to add the tort cause of action that reliance occurred. Nor is there any public policy for giving continued effect to *Seaman's*, because the California Supreme Court, in *Freeman*, made it clear that the earlier decision was incorrectly decided, that it generated much confusion, costly litigation, and inequitable results, and that it would continue to produce such effects until overruled. (42 C.A.4th 1820.)

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6. Tax Not Approved by Local Electorate.

9 Witkin Cal. Proc. Appeal § 548

[§ 548] Tax Not Approved by Local Electorate.

In *McBrearty v. Brawley* (1997) 59 C.A.4th 1441, 69 C.R.2d 862, defendant city passed a utility tax in 1991 and began collecting it. In 1986, the voters had approved Proposition 62, which resulted in statutes being passed that prohibited any general tax unless it was approved by the local electorate. This aspect of the Proposition was held unconstitutional shortly after it was adopted but, in 1995 the Supreme Court ruled that it was constitutional. In this action to enforce the election requirement, defendant contended that the overruling decision did not apply to taxes that had been enacted without a vote in reliance on the then existing law. *Held*, the overruling decision was retroactive. Although defendant reasonably relied on the overruled state of the law, it did not establish that conditioning future collectibility of the utility tax on an election would create inequitable results or cause undue hardship. In fact, although requiring an election may have some negative impact on defendant's ability to collect the tax, this is the very result intended by the adoption of Proposition 62. (59 C.A.4th 1448.)

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7. Settlement Must Be Signed by Parties.

9 *Witkin Cal. Proc. Appeal* § 549

[§ 549] Settlement Must Be Signed by Parties.

In *Burckhard v. Del Monte Corp.* (1996) 48 C.A.4th 1912, 56 C.R.2d 569, the parties entered into various settlements that were signed by counsel, rather than by the parties. Plaintiffs then moved to enter judgment on the settlements under C.C.P. 664.6 (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §113 et seq.). Interpreting the phrase "signed by the parties," as used in that statute, to include counsel, the trial judge granted the motion. However, while this appeal was pending, the California Supreme Court decided *Levy v. Superior Court* (1995) 10 C.4th 578, 41 C.R.2d 878, 896 P.2d 171, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §120, which held that this phrase referred only to the actual parties to the action, not to counsel. *Held*, judgment reversed; *Levy* was retroactive.

(a) In determining whether to apply a case retroactively, the court must first ask whether it represents a new standard or rule of law, and if the answer is "no," it must automatically apply the decision retroactively. Here, the case resolved a conflict among the lower courts, and such a case does not create a new standard or rule of law. (48 C.A.4th 1917.)

(b) Defendant argued that, because of this conflict, it had justifiably relied on prior law. However, the very existence of the conflict meant that there was no clear rule on which anybody could have justifiably relied. Also, defendant claimed that it relied on the most recent decision, which had held that counsel could sign settlements, but that decision did nothing to create a uniform rule on which defendant could rely. (48 C.A.4th 1917.)

The holding in *Levy* has been modified by C.C.P. 664.7, added in 1998, which authorizes the court in a construction defect action where a party's contribution is paid on its behalf pursuant to an insurance policy to enter judgment pursuant to a settlement even though the parties stipulate to that settlement through their counsel instead of personally.

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8. Residential Landlord Is Not Strictly Liable for Latent Defects.

9 *Witkin Cal. Proc. Appeal* § 550

[§ 550] Residential Landlord Is Not Strictly Liable for Latent Defects.

In *McCarthy v. Martinson* (1996) 51 C.A.4th 632, 59 C.R.2d 149, plaintiff tenant sued defendant landlords for strict liability, negligence, and breach of the implied warranty of habitability to recover for injuries sustained when she inadvertently walked through an untempered glass door in her apartment. About a week before trial, the California Supreme Court in *Peterson v. Superior Court* (1995) 10 C.4th 1185, 43 C.R.2d 836, 899 P.2d 905, supra, §525, 12 Summary (10th), Real Property, §654, had reversed its 1985 holding in *Becker v. IRM Corp.* (1985) 38 C.3d 454, 213 C.R. 213, 698 P.2d 116, 12 Summary (10th), Real Property, §653, that a residential landlord could be held strictly liable to a tenant for latent defects in an apartment. On defendants' in limine motion, the trial judge gave *Peterson* retroactive effect, and ordered that references to strict liability be excluded at trial. Thereafter, a jury returned defense verdicts on the other two causes of action. *Held*, affirmed.

(a) *Principles of retroactivity.* A time-honored rule of jurisprudence is that judicial decisions operate retroactively. (51 C.A.4th 635.) However, that rule is a general one. Exceptions may be made where the retroactive effect would be unfair or would violate public policy. To determine whether an exception is warranted, an analysis should consider the purpose of the new rule, the extent of the public's reliance on the former law, the public's ability to foresee the coming change, and the effect of a retroactive application of the new rule on the administration of justice. (51 C.A.4th 636.)

(b) *Purpose of new rule.* The purpose of the new rule announced in *Peterson* is to correct an unwarranted extension of the doctrine of products liability and to return California to the mainstream of judicial reasoning relative to the issue involved in the case. (51 C.A.4th 636.)

(c) *Extent of reliance on earlier decision.* Although the public may have relied on *Becker* for almost 10 years, that decision had simply added one cause of action to others that were already available. (51 C.A.4th 637.) Full retroactivity would still allow a plaintiff to proceed against a property owner under general tort principles, and against the manufacturer, distributor, or retailer of a defective product under strict liability principles. Moreover, the parties would not have actually relied on *Becker* in entering into their standard apartment lease. (51 C.A.4th 638.)

(d) *Foreseeability of change in law.* The change in law was foreseeable because *Becker* was not followed in other jurisdictions and was consistently criticized. Thus, it is not surprising that the Supreme Court would revisit the issue. When *Peterson* was taken on review in December of 1993, "an alarm bell should have gone off inside the head" of every plaintiff's lawyer contemplating such an action. (51 C.A.4th 638.)

(e) *Effect of retroactivity on administration of justice.* Although retroactivity took away plaintiff's strongest cause of action on the eve of trial, the new rule simply returned her to remedies that existed under the law prior to *Becker*. She did indeed pursue those remedies against defendants based on the traditional theory of negligence and the not quite so traditional theory of implied warranty of habitability. Assuming that appellant's injuries were as serious as alleged, the litigation would have likely gone forward from its inception whether or not a cause of action for strict liability was feasible. (51 C.A.4th 639.)

(f) *Full retroactivity.* Although plaintiff may have relied on *Becker* in formulating her litigation strategy, it was not necessary, as urged by plaintiff, to limit retroactivity in these cases to those in which discovery was not yet complete. There is nothing unique in a tenant's action against a landlord for injuries incurred on the premises that would preclude giving full retroactivity to all cases not yet final before *Peterson* itself became final. A plaintiff in this type of action, as in the sort of action involved in *Newman v. Emerson Radio Corp.* (1989) 48 C.3d 973, 258 C.R. 592, 772 P.2d 1059, supra, §546, is able to proceed on other, alternative causes of action. (51 C.A.4th 640.)

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3. Prospective Effect of Overruling Decision.

a. Power Recognized.

9 *Witkin Cal. Proc. Appeal* § 551

[§ 551] Power Recognized.

Whatever may be the logic of the proposition that overruling is necessarily retroactive (see *supra*, §542), the retrospective effect of an overruling decision can cause a great deal of harm to innocent persons. And it would seem that the court, which by its former erroneous decision induced the conduct or action now condemned, ought to do something to protect these persons. The solution that has attracted considerable support is for the reviewing court, in circumstances where retroactivity would cause great hardship, to make its decision expressly prospective; i.e., overrule the prior case for the future, but follow it in the case at hand.

That this practice is constitutional was authoritatively declared in *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.* (1932) 287 U.S. 358, 53 S.Ct. 145, 148, 77 L.Ed. 360, 366: "We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that the decisions of its highest court, though later overruled, are law none the less for intermediate transactions. ... On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. ... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. ... The state of Montana has told us by the voice of her highest court that, with these alternative methods open to her, her preference is for the first. ... If this is the common-law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the Constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process." (53 S.Ct. 148, 77 L.Ed. 366.)

A number of decisions are in accord. (See *Cipriano v. Houma* (1969) 395 U.S. 701, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647, 652; *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 92 S.Ct. 349, 355, 30 L.Ed.2d 296, 305, *infra*, §552; *Lemon v. Kurtzman* (1973) 411 U.S. 192, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151, 160; *Westbrook v. Mihaly* (1970) 2 C.3d 765, 800, 87 C.R. 839, 471 P.2d 487, 7 Summary (10th), *Constitutional Law*, §308; *Moss v. Superior Court* (1998) 17 C.4th 396, 428, 71 C.R.2d 215, 950 P.2d 59, 10 Summary (10th), *Parent and Child*, §437 [due process precludes retroactive application of decision disapproving prior authority on which person could have reasonably relied in

determining what conduct would subject him to penalties]; *In re Marriage of Curtis* (1992) 7 C.A.4th 1, 8, 9 C.R.2d 145, 11 Summary (10th), *Community Property*, §246; 40 Cal. L. Rev. 587; 29 Cal. Western L. Rev. 53 [The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction]; 60 Harv. L. Rev. 437; 104 Harv. L. Rev. 1733 [New Law, Non-Retroactivity, and Constitutional Remedies]; 28 Hastings L. J. 533 [origin and history of theory, and discussion of judicial responsibility]; 11 Stanf. L. Rev. 769, 773; 10 A.L.R.3d 1371 [prospective or retroactive operation of overruling decision].)

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b. Policy Considerations.

9 *Witkin Cal. Proc. Appeal* § 552

[§ 552] Policy Considerations.

Most jurisdictions today recognize exceptions to the general rule of retroactivity, and hold that the choice of retroactive or prospective operation "turns on considerations of fairness and public policy." (*Forster Shipbuilding Co. v. Los Angeles* (1960) 54 C.2d 450, 459, 6 C.R. 24, 353 P.2d 736, *infra*, §553 [collecting decisions and law review notes]; see *Conti v. Board of Civil Service Commrs.* (1969) 1 C.3d 351, 366, footnote 18, 82 C.R. 337, 461 P.2d 617, 8 Cal. Proc. (5th), *Extraordinary Writs*, §153, citing the text; *Atlantic Richfield Co. v. Work. Comp. App. Bd.* (1982) 31 C.3d 715, 728, 182 C.R. 778, 644 P.2d 1257; *Woods v. Young* (1991) 53 C.3d 315, 330, 279 C.R. 613, 807 P.2d 455 [considering relevant factors and stressing point that change is only in procedure]; *Mitchell v. National Auto. & Cas. Ins. Co.* (1974) 38 C.A.3d 599, 604, 113 C.R. 391; *In re Marriage of Sheldon* (1981) 124 C.A.3d 371, 377, 177 C.R. 380; *People v. Hicks* (1983) 147 C.A.3d 424, 427, 195 C.R. 127; 53 Cal. L. Rev. 17; cf. *Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 C.4th 376, 391, footnote 4, 45 C.R.2d 436, 902 P.2d 740, *supra*, §545 [fairness and public policy considerations were not found applicable]; *West Shield Investigations & Sec. Consultants v. Superior Court* (2000) 82 C.A.4th 935, 954, 98 C.R.2d 612 [decision holding that statute tolling limitations period during minority was not applicable once minor was emancipated did not create exception to general rule of retroactivity].)

In *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 C.2d 573, 12 C.R. 257, 360 P.2d 897, the trial judge and counsel relied on prior Court of Appeal decisions upholding the sufficiency of a particular form of order granting a new trial for insufficiency of evidence. In overruling these decisions (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §79), the Supreme Court declared that it would be unfair to give this procedural interpretation retroactive effect. Accordingly, it reviewed the order as if the overruled cases governed. (55 C.2d 579.)

In *Parrott v. Furesz* (1957) 153 C.A.2d 26, 314 P.2d 47, a personal injury case, the trial judge improperly refused to instruct on last clear chance, and, after verdict and judgment for defendant, plaintiff appealed. Defendant contended that plaintiff's proposed BAJI instruction, though good in law at the time of trial, had since been held erroneous in form by a controlling Supreme Court decision. The court pointed out that the BAJI instruction had been approved for many years, and that plaintiff was entitled to a trial on the issue of last clear chance. "It would be manifestly unfair and a mockery of justice to deprive him of one because his counsel lacked the gift of prophecy and could not foresee that in 1957 the Supreme Court in *Brandelius* would have pointed out to it an error in the instruction which had theretofore escaped the

combined observation of several appellate courts and numerous able attorneys." (153 C.A.2d 30.)

In *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296, a controlling decision making applicable a state statute of limitations would have wholly deprived the plaintiff of his remedy. In determining that it should not be retroactively applied, the court summarized the three significant factors to be considered:

(a) The decision to be applied prospectively "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed." (92 S.Ct. 355, 30 L.Ed.2d 306.)

(b) The court must look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (92 S.Ct. 355, 30 L.Ed.2d 306.)

(c) The court must weigh the inequity of retroactive application; if it would produce substantial inequitable results, a holding of nonretroactivity is proper. (92 S.Ct. 355, 30 L.Ed.2d 306.) (See *American Trucking Assn. v. Smith* (1990) 496 U.S. 167, 110 S.Ct. 2323, 2331, 110 L.Ed.2d 148, 159 [applying *Chevron Oil* test and rejecting retroactive application].)

In *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 C.3d 287, 250 C.R. 116, 758 P.2d 58, the court overruled *Royal Globe Ins. Co. v. Superior Court* (1979) 23 C.3d 880, 153 C.R. 842, 592 P.2d 329, which had recognized a private cause of action by an injured plaintiff against a liability insurer for violation of *Ins.C. 790.03(h)* (see 2 *Summary* (10th), *Insurance*, §253). But the holding was made prospective: "[I]n the interest of fairness to the substantial number of plaintiffs who have already initiated their suits in reliance on *Royal Globe*, we hold that our decision overruling that case will not apply to those cases seeking relief under section 790.03 filed before our decision here becomes final." (46 C.3d 305.)

In *Kreisher v. Mobil Oil Corp.* (1988) 198 C.A.3d 389, 243 C.R. 662, plaintiff service station franchisee had sued defendant franchisor for termination of the franchise after refusal to consent to plaintiff's assignment to another. Plaintiff relied on the new rule limiting the power of a lessor to refuse consent laid down in *Kendall v. Ernest Pestana* (1985) 40 C.3d 488, 220 C.R. 818, 709 P.2d 837, 12 *Summary* (10th), *Real Property*, §552. Defendant argued that *Kendall* should not be retroactively applied to prior transactions.

The Court of Appeal, applying the factors of foreseeability, reliance, and fairness (198 C.A.3d 399), concluded that the decision should have only prospective application: "At all relevant times, the prevailing rule of law was that a lessor could withhold assent to a proposed assignment for any reason whatsoever. Mobil displayed considerable and justifiable reliance on that rule, which did not alter until two years later. The strength and extent of that reliance is only partially offset by Mobil's inability to foresee the nonjudicial portents of a change in the rule. By contrast, there is no evidence that plaintiff had any inkling of a *judicial* change of the rule. He was aware of the *legislative* modification of the rule embodied in *Business and Professions Code section 21148*. That modification, however, was accompanied by a solemn determination by the Legislature that it should *not* be retroactive. Public policy supporting the change will not be advanced by applying the change to completed contractual arrangements involving the stability of real property titles. As regards the fairness factor, we perceive no satisfying basis for making plaintiff the windfall beneficiary of a change he did not foresee or help bring about. Conversely, it is patently unfair to penalize Mobil for its nonconformity with standards which took effect only after it conscientiously determined the state of the law and relied upon it in reasonable good faith. Upon full reflection of the problem, we believe that it is appropriate to follow the Legislature's lead and adhere to its decision respecting the relative hardships and advantages of implementing the new standard." (198 C.A.3d 404.)

In *Smith v. Rae-Venter Law Group* (2002) 29 C.4th 345, 127 C.R.2d 516, 58 P.3d 367, the court's decision changing a settled rule for assessment of costs on an unsuccessful appeal of a Labor Commissioner's wage decision was given prospective effect only. The newly announced rule was that when an employer or an employee elects a trial de

novo after the Labor Commissioner issues a wage decision and is unsuccessful in the appeal, that party is liable for the other party's fees and costs, unless the resulting trial court judgment is more favorable to the appealing party than was the administrative award from which the appeal was taken. This rule was a clear break from the prior statutory construction that the fee-shifting provision becomes operative only when the judgment of the trial court completely eliminates the commissioner's administrative award. The court stated the governing considerations: "Although as a general rule judicial decisions are to be given retroactive effect ... , there is a recognized exception when a judicial decision changes a settled rule on which the parties below have relied. ... '[C]onsiderations of fairness and public policy may require that a decision be given only prospective application. ... Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule.' " (29 C.4th 372.) A 2003 amendment to the governing statute overturned the holding in *Smith v. Rae-Venter Law Group* and restored the earlier rule. (See *Lab.C.* 98.2(c).)

In *Camper v. Work. Comp. App. Bd.* (1992) 3 C.4th 679, 12 C.R.2d 101, 836 P.2d 888, the court held that the 45-day period of *Lab.C.* 5950 to petition for review of a decision of the WCAB was jurisdictional, and consequently was not extended by the provisions of *C.C.P.* 1013 on documents served by mail. (See 2 *Summary* (10th), *Workers' Compensation*, §438.) The decision resolved a conflict in prior decisions of the Court of Appeal; but the new rule was made prospective, for the following reasons:

(a) Litigants had reasonably relied on the rule established in *Villa v. Work. Comp. App. Bd.* (1984) 156 C.A.3d 1076, 203 C.R. 26, a 1984 decision of the Court of Appeal. (3 C.4th 688.)

(b) The rule involved is essentially procedural; the change affects only the calculation of the date for filing a petition for a writ. (3 C.4th 689.)

(c) Concern for the administration of justice also supports prospective application: many pending compensation proceedings could be adversely affected by the decision. (3 C.4th 689.)

(d) The purpose of the new rule was to resolve a division of authority in the Courts of Appeal, and this important objective is not compromised by prospective application. (3 C.4th 689.)

On the other hand, in *Scala v. Jerry Witt & Sons* (1970) 3 C.3d 359, 90 C.R. 592, 475 P.2d 864, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §87, the defendant asked for a prospective ruling, contending that the trial judge's order granting a new trial was in accord with controlling Court of Appeal decisions at the time it was entered, even though a later Supreme Court decision was contra. The court said: "We cannot agree. The order was made almost a full year after our ruling in *Mercer*, which prescribed in as much detail as feasible the duty of a trial court to comply with section 657. Today's decision is no new departure in the law, but simply reiterates the *Mercer* construction of the statutory intent and the manner of translating that intent into action." (3 C.3d 371.)

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SUPPLEMENT: [This section is current through the latest supplement]



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XIII. STARE DECISIS

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3. Prospective Effect of Overruling Decision.

c. Tax Cases.

9 *Witkin Cal. Proc. Appeal* § 553

[§ 553] Tax Cases.

The hardship of imposing retroactive liability for taxes on persons who relied on an overruled decision has influenced some courts to give prospective effect to decisions determining increased tax liability. (See *Texas Co. v. Los Angeles* (1959) 52 C.2d 55, 65, 338 P.2d 440.)

In *Forster Shipbuilding Co. v. Los Angeles* (1960) 54 C.2d 450, 6 C.R. 24, 353 P.2d 736, upholding Rev.C. 107.1 (see 9 *Summary* (10th), *Taxation*, §221), the court held that the Legislature may also exercise this power. "Such temporary application of the rule of an overruled case may be prescribed by appropriate legislation as well as by judicial decision, for the Legislature is no less competent than the court to evaluate the hardships involved and decide whether considerations of fairness and public policy warrant the granting of relief." (54 C.2d 459.) (See *Schettler v. Santa Clara* (1977) 74 C.A.3d 990, 998, 141 C.R. 731 [amendment to former Rev.C. 226, providing that ad valorem property tax on imported goods should be governed by law prior to United States Supreme Court decision abolishing original package doctrine; 9 *Summary* (10th), *Taxation*, §58]; *Kawasaki Motors Corp. v. Orange* (1983) 146 C.A.3d 780, 783, 194 C.R. 608 [following *Schettler*].)

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d. Limited Retroactivity.

9 Witkin Cal. Proc. Appeal § 554

[§ 554] Limited Retroactivity.

Several California cases have taken a middle course between complete prospectivity and complete retroactivity, making the decision apply to any case in which no final judgment has yet been rendered. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C.3d 176, 193, 194, 98 C.R. 837, 491 P.2d 421, 3 Cal. Proc. (5th), Actions, §627; *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 829, 119 C.R. 858, 532 P.2d 1226, 6 Summary (10th), Torts, §1330; *Safeway Stores v. Nest-Kart* (1978) 21 C.3d 322, 333, 146 C.R. 550, 579 P.2d 441; *Wellenkamp v. Bank of America* (1978) 21 C.3d 943, 954, 148 C.R. 379, 582 P.2d 970; *Ventura v. Camarillo* (1978) 80 C.A.3d 1019, 1023, 144 C.R. 296, citing the text; *Calvert v. Yuba* (2006) 145 C.A.4th 613, 630, 51 C.R.3d 797, citing the text.)

In re Marriage of Brown (1976) 15 C.3d 838, 126 C.R. 633, 544 P.2d 561, held that nonvested pension rights of a spouse, acquired in employment during marriage, were community property and subject to division on dissolution. The court overruled *French v. French* (1941) 17 C.2d 775, 112 P.2d 235, which had held these rights to be mere expectancies, i.e., not property subject to division. (See 11 Summary (10th), *Community Property*, §78.) In explanation of its choice of limited retroactivity, the court applied the two factors set forth in *Neel*:

(a) "In the present case both factors militate against a purely prospective overruling of *French v. French*. It is unlikely that a layman would rely upon the *French* rule or even know of that doctrine; attorneys familiar with the decision in *French v. French* would also realize from our opinion in *Marriage of Wilson*, ... that the *French* rule was ripe for reconsideration. The unjust distribution of property engendered by the *French* rule should not be perpetuated by denial of any retroactive effect to our decision." (15 C.3d 850.)

(b) On the other hand, complete retroactivity might open controversies long settled by final judgment, because property not listed is subject to future litigation (see 11 Summary (10th), *Community Property*, §244). (15 C.3d 851.)

(c) "We conclude that our decision today should not apply retroactively to permit a nonemployee spouse to assert an interest in nonvested pension rights when the property rights of the marriage have already been adjudicated by a decree of dissolution or separation which has become final as to such adjudication, unless the decree expressly reserved jurisdiction to divide such pension rights at a later date. ... Our decision will apply retroactively, however, to any case in

which the property rights arising from the marriage have not yet been adjudicated, to such rights if such adjudication is still subject to appellate review, or if in such adjudication the trial court has expressly reserved jurisdiction to divide pension rights." (15 C.3d 851.)

Another type of limited retroactivity was devised in *Berkeley v. Superior Court* (1980) 26 C.3d 515, 162 C.R. 327, 606 P.2d 362, involving the application of the tidelands public trust doctrine to land between high and low water in navigable lakes and streams. "We could, like the court in *California Fish*, declare that all grants made under the 1870 act are subject to the public trust or we could hold that our decision is prospective only. ... We choose, instead, an intermediate course: the appropriate resolution is to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances. In the harmonizing of these claims, the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors shall prevail insofar as the tidelands have been rendered substantially valueless for those purposes." (26 C.3d 534.)

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XIV. NOTICE OF APPEAL

A. In General.

1. Jurisdictional Requirement: Filing in Trial Court.

9 Witkin Cal. Proc. Appeal § 555

[§ 555] Jurisdictional Requirement: Filing in Trial Court.

(1) *In General.* The first step in taking an appeal in a civil case is to file the jurisdictional notice of appeal in the trial court. "To appeal from a superior court judgment or an appealable order of a superior court, other than in a limited civil case, an appellant must serve and file a notice of appeal in that superior court." (C.R.C., Rule 8.100(a)(1); see C.R.C., Rule 8.750(a), *infra*, §1006 [appeals in limited civil cases]; Cal. Civil Practice, 5 Procedure, §37:23 et seq.; C.E.B., 1 Civil Appellate Practice 3d, Chap. 7; Rutter Group, 1 Civil Appeals and Writs, Chap. 3; 17 So. Cal. L. Rev. 83; 5 Am.Jur.2d (2007 ed.), Appellate Review §292 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error §55, 56; cf. F.R. App. P., Rule 3(a); 2A Federal Procedure, L.Ed., §§3:628, 3:629; 16A Federal Practice & Procedure (Wright & Miller) §3949; on content and form of notice, see *infra*, §560 et seq.; on time of filing, see *infra*, §574 et seq.; on notice in criminal appeals, see C.R.C., Rules 8.304, 8.782; 6 Cal. Crim. Law (3d), §75 et seq.; on entry of order authorizing consent to sterilization as having effect of notice of appeal, see *supra*, §151.)

(2) *Meaning of Filing.* Filing means lodging with the clerk before the time expires (*infra*, §575 et seq.). A notice of appeal is filed when delivered to the court clerk during office hours, even if the clerk erroneously refuses to file it. (*Eliceche v. Federal Land Bank Assn.* (2002) 103 C.A.4th 1349, 1361, 128 C.R.2d 200.)

C.C.P. 1013, providing that service of ordinary notices is complete on deposit in the mail (see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §22), has no application to filing a notice of appeal. (*Estes v. Chimes* (1940) 40 C.A.2d 41, 42, 104 P.2d 74; see 17 So. Cal. L. Rev. 85.)

(3) *Service.* The notice of appeal must be served on the other parties. Failure of service neither prevents filing of the notice of appeal nor affects the validity of the appeal. However, the appellant, on reasonable notice, may be required to remedy the failure. (C.R.C., Rule 8.100(a)(3).)

(4) *Meaning of Judgment.* In C.R.C., Rule 8.100, the reference to "judgment" is intended to include part of a judgment, and the explicit reference to "appealable order" ensures that litigants do not overlook the applicability of this rule to these orders. (Advisory Committee Comment to C.R.C., Rule 8.100(a)(1).) For purposes of C.R.C., Rule 8.104 (see *infra*, §§575, 620), " 'judgment' includes an appealable order if the appeal is from an appealable order." (C.R.C., Rule 8.104(f).) Thus, in cases of an appeal from an appealable order instead of a final judgment, questions involving the

timing of the appeal are measured from the entry or notice of entry of the appealable order, instead of from the entry or notice of entry of the judgment.

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.750(a) was repealed in 2008. Notice of appeal in limited civil cases is now treated in C.R.C., Rule 8.821. C.R.C., Rule 8.782 was repealed in 2008. Notice of appeal in misdemeanor cases is now treated in C.R.C., Rule 8.852.

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3949.



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XIV. NOTICE OF APPEAL

A. In General.

2. Payment of Fees.

9 *Witkin Cal. Proc. Appeal* § 556

[§ 556] Payment of Fees.

(1) *In General.* Unless otherwise provided by law, a notice of appeal must be accompanied by the filing fee, an application for a waiver of court fees and costs, or an order granting the fee waiver application. (C.R.C., Rule 8.100(b)(1).) (On application for waiver, see C.R.C., Rule 3.50 et seq.; 3 *Cal. Proc.* (5th), *Actions*, §426 et seq.; on waiver in indigent appeals, see *infra*, §558.) (On payment of fee in limited civil case appeals, see *infra*, §1006.)

(2) *Form of Payment.* The fee must be paid by check or money order payable to "Clerk, Court of Appeal." If the fee is paid in cash, the clerk must give a receipt. (C.R.C., Rule 8.100(b)(1).)

(3) *Amount of Fee.* The fee is \$ 655. (C.R.C., Rule 8.100(b)(1).) (See *Govt.C.* 68926 [\$ 485 for appeal in civil case]; *Govt.C.* 68926.1(b) [\$ 170 for Appellate Court Trust Fund].)

(4) *Transcript Deposit.* The appellant must also deposit a fee of \$ 100 unless otherwise required by law or the superior court waives the deposit under C.R.C., Rule 3.50 et seq. (C.R.C., Rule 8.100(b)(1).) The deposit is credited against the amount chargeable for the preparation of the clerk's transcript or processing the appeal. (*Govt.C.* 68926.1(a).)

(5) *Duties of Clerk.* The clerk of the superior court then transmits the filing fee to the clerk of the reviewing court with a notification of the filing of the notice of appeal (see *infra*, §559). (C.R.C., Rule 8.100(e)(5).)

(6) *Failure To Deposit Fees.* The clerk must file the notice of appeal even if the appellant does not present the fee, the deposit, the application, or the order for waiver. (C.R.C., Rule 8.100(b)(3).)

(7) *Cross-Appeal.* The provisions of C.R.C., Rule 8.100 apply to a cross-appeal. (C.R.C., Rule 8.100(e).)

West's Key Number Digest, Appeal and Error 370

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See Judicial Council Form Nos. APP-015 [Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)]; APP-016 [Order on Court Fee Waiver (Court of Appeal or

Supreme Court)].

(4) *Transcript Deposit*. C.R.C., Rule 8.100(b)(1) was amended in 2009 to specify that the deposit waived is under C.R.C., Rule 8.26.



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XIV. NOTICE OF APPEAL

A. In General.

3. Effect of Nonpayment.

9 *Witkin Cal. Proc. Appeal* § 557

[§ 557] Effect of Nonpayment.

(1) *Duties of Reviewing Court Clerk.* The reviewing court clerk must "promptly" notify the appellant in writing if (a) the reviewing court receives a notice of appeal without the required filing fee, a certificate of cash payment, or an application or order for a fee waiver under C.R.C., Rule 3.50 et seq. (see 3 *Cal. Proc.* (5th), *Actions*, §426 et seq.); (b) a check for the filing fee is dishonored; or (c) an application for a waiver is denied. (C.R.C., Rule 8.100(c)(1).) The notice must state that the court may dismiss the appeal unless, within 15 days after the notice is sent, the appellant either pays the fee or files an application for a waiver under C.R.C., Rule 3.50 et seq. if an application has not previously been filed. (C.R.C., Rule 8.100(c)(2).)

(2) *Duties of Superior Court Clerk.* If the appellant fails to pay the deposit to the superior court required under C.R.C., Rule 8.100(b)(2), the superior court clerk must "promptly" notify the appellant in writing that the reviewing court may dismiss the appeal unless, within 15 days after the notice is sent, the appellant either makes the deposit or files an application in the superior court for a waiver under C.R.C., Rule 3.50 et seq. if the appellant has not previously filed this application. (C.R.C., Rule 8.100(d)(1).) If the appellant fails to comply, the superior court clerk must notify the reviewing court of the default. (C.R.C., Rule 8.100(d)(2).) The reviewing court may then dismiss the appeal, but, for good cause, may vacate the dismissal. (C.R.C., Rule 8.100(d)(3).)

(3) *Dismissal of Appeal.* If the appellant fails to take the action specified in the notice of nonpayment of the filing fee, the reviewing court may dismiss the appeal. However, the dismissal may be vacated for good cause. (C.R.C., Rule 8.100(c)(3).) (See C.E.B., 2 Civil Appellate Practice 3d, §7.24; Rutter Group, 1 Civil Appeals and Writs §§3:136, 3:157 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §704; on relief from default for failing to file the transcript deposit, see C.R.C., Rule 8.140, *infra*, §688 et seq.)

(4) *Noncompliance Does Not Render Timely Notice Ineffective.* In *Rapp v. Golden Eagle Ins. Co.* (1994) 24 C.A.4th 1167, 30 C.R.2d 126, defendant attempted to file a notice of appeal within the 60-day period for timely filing (see *supra*, §555). However, the check for the filing fee was less than the required sum. Because of the deficiency, the superior court clerk refused to accept the notice of appeal. Six days later, which was beyond the 60-day filing period, defendant tendered the proper amount, and the notice of appeal was accepted. Plaintiff then moved to dismiss the appeal as untimely. *Held*, motion denied; the appeal was timely.

(a) Former C.R.C., Rule 1(c) (now C.R.C., Rule 8.100(b)) specifically provides that the notice of appeal must be accepted even though the filing fee is not paid. And former C.R.C., Rule 10(a) (now C.R.C., Rule 8.140) merely establishes a procedure for dismissal of the appeal if the fee is not paid within the designated time. *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 C.A.3d 491, 193 C.R. 25, the only decision to interpret the effect of former C.R.C., Rule 1(c), held that the fact that the filing fee check was made out to the wrong court did not affect the timeliness of the notice of appeal. (24 C.A.4th 1170.)

(b) Here, defendant failed to post the deposit required by Govt.C. 68926.1, but that failure is irrelevant. The deposit is used to defray record preparation expenses, and former C.R.C., Rule 10(c) (now C.R.C., Rule 8.140), which specifies the procedural mechanism for insuring payment of record preparation fees (see *infra*, §688), provides for dismissal if the fee is not paid within the designated period. (24 C.A.4th 1170.) There is nothing in the court rules stating that the failure to post the deposit requires that the notice of appeal not be filed. Just as the failure to pay the filing fee triggers the provisions of former C.R.C., Rule 10(a), the fact that an appellant does not deposit the specified amount requires the clerk to issue a notice of default pursuant to former C.R.C., Rule 10(c), not refuse to file the notice of appeal. (24 C.A.4th 1171.)

(c) Plaintiff argued that, under *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 125 C.R. 757, 542 P.2d 1349, *infra*, §591, the appellate court lacked jurisdiction to hear the appeal, even though the clerk violated his duty by refusing to accept the notice of appeal without the correct fee. This contention is without merit. *Hollister* did not repeal the decisions relating to constructive filing of a notice of appeal. Instead, it specifically recognized situations where the applicable rules of construction and interpretation require that the notice "be deemed in law" to have been timely filed. Here, the notice of appeal was presented to the clerk within the 60-day period, and that act constituted the act of filing (see *supra*, §555). Hence, under *Hollister*, the notice must be deemed in law to have been timely filed. (24 C.A.4th 1172.)

SUPPLEMENT: [This section is current through the latest supplement]



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XIV. NOTICE OF APPEAL

A. In General.

4. Waiver of Fees in Indigent Appeal.

9 *Witkin Cal. Proc. Appeal* § 558

[§ 558] Waiver of Fees in Indigent Appeal.

(1) *Inherent Power of Courts.* Prior to 1963, the filing fees in the Court of Appeal were \$ 10 for an appeal and \$ 7.50 for an original writ proceeding. To help defray rising costs and also to discourage frivolous appeals, the fees were steadily increased. Some years after the initial increase to \$ 50, a number of appellants, claiming indigence, petitioned for writs of mandamus to compel filing of records without fee. After conflicting decisions by the Courts of Appeal, the Supreme Court resolved the issue in *Ferguson v. Keys* (1971) 4 C.3d 649, 94 C.R. 398, 484 P.2d 70, holding that the Supreme Court and Courts of Appeal have inherent power to grant relief.

(a) *Cost of transcript distinguished.* In *Rucker v. Superior Court* (1930) 104 C.A. 683, 286 P. 732, the court refused to order preparation of clerk's and reporter's transcripts without cost to a party seeking to appeal in pro. per. The decision was followed in *Agnew v. Contractors Safety Assn.* (1963) 216 C.A.2d 154, 156, 30 C.R. 690, and other cases, but this question of "third-party charges" was not involved in the present proceeding. (4 C.3d 654.)

(b) *Inherent power of reviewing court.* The *Rucker* opinion dictum that the *in forma pauperis* power applies only to actions in the lower court is wrong; appellate courts have the same power. And, until the Judicial Council or the Legislature acts to declare the circumstances and conditions on the right, the courts may exercise their inherent power to grant relief. (4 C.3d 656.)

(c) *Policy objections are unsound.* The object of discouraging frivolous or unnecessary litigation does not justify refusal to permit an indigent's access to appellate courts. The courts may prevent abuses of the privilege and may impose reasonable conditions on the grant of relief. (4 C.3d 657.)

(d) *Judicially imposed conditions.* The right to proceed *in forma pauperis* in the trial court may be conditioned on some kind of showing of meritorious case and indigence. (4 C.3d 658.) The same conditions may be imposed for relief from payment of filing fees on appeal: "[W]e believe that the applicant should, at a minimum, submit (1) the certificate of his counsel, declaring that he is familiar with the facts underlying the action or appeal, that in his opinion his client's contentions have merit, and that the action or appeal is brought in good faith and not for purposes of delay or harassment, and (2) the declaration of the applicant, executed under penalty of perjury, stating that he is unable to pay the requisite filing fee without depriving himself or his dependents of the necessities of life, and briefly setting forth the

facts which disclose his indigence." (4 C.3d 658.)

(e) *Mere showing of inconvenience is not sufficient.* Counsel's certificate need not actually set forth the facts or contentions underlying the action or appeal (4 C.3d 658, footnote 7); and the applicant need not establish total destitution to qualify for relief (4 C.3d 658, footnote 8). "Nevertheless, in view of the relatively modest sums required to file appellate actions, the applicant may be required to show more than that payment of the fee would be burdensome or inconvenient to him." (4 C.3d 658, footnote 8.) (See 60 Cal. L. Rev. 785; 23 Hastings L. J. 683.)

(2) *Rules and Forms.* C.R.C., Rule 3.50 et seq. now provide a procedure whereby an indigent's filing fee may be waived. (See C.R.C. 8.750(d) [waiver of filing fee in limited civil cases]; 3 Cal. Proc. (5th), *Actions*, §426 et seq.) And the Judicial Council has approved the following forms for use by indigents in making applications for waiver of filing fees:

Judicial Council Form No. FW-001 [Application for Waiver of Court Fees and Costs].

Judicial Council Form No. FW-001-INFO [Information Sheet on Waiver of Court Fees and Costs].

Judicial Council Form No. FW-002 [Application for Waiver of Additional Court Fees and Costs].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Rules and Forms.* C.R.C., Rule 8.750(d) was repealed in 2008. Waiver of the filing fee in limited civil cases is now treated in C.R.C., Rule 8.821(b).



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XIV. NOTICE OF APPEAL

A. In General.

5. Notification by Clerk.

9 *Witkin Cal. Proc. Appeal* § 559

[§ 559] Notification by Clerk.

(1) *Background.* The original requirement of service of the notice of appeal on the adverse party or his or her attorney was abolished as to superior court appeals in 1921. Getting rid of this jurisdictional step avoided much wrangling and saved many appeals from dismissal. But the benefits to the appellant were accompanied by great inconvenience to the successful respondent, who had to make periodic examinations of the court files (or inquiries of clerks) to ascertain whether an appeal had been taken. (See C.E.B., 1 Civil Appellate Practice 3d, §7.17; Rutter Group, 1 Civil Appeals and Writs §3:139; 30 *Cal. L. Rev.* 436; 15 *So. Cal. L. Rev.* 233; 17 *So. Cal. L. Rev.* 83; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§174, 175; cf. *F.R. App. P.*, Rule 3(d); 16A Federal Practice & Procedure (Wright & Miller) §3949.1; 2A Federal Procedure, L.Ed., §3:632; on necessity of service where notice of appeal and notice for record are included in same document, see C.R.C., Rule 8.124(a), *infra*, §651; on notification in sterilization cases, see C.R.C., Rule 8.482, *supra*, §151; on limited civil appeals, see C.R.C., Rule 8.750(b).) The Rules of Court solved this problem by following the federal plan of a nonjurisdictional notification by the clerk.

(2) *Contents of Notification.* The superior court clerk must "promptly" mail a notification of the filing of the notice of appeal to the attorney of record for each party, to any unrepresented party, and to the reviewing court clerk. (C.R.C., Rule 8.100(e)(1).) The notification must show the date that it was mailed, and must state the number and title of the case and the date the notice of appeal was filed. If available, the notification must include the name, address, telephone number, and California State Bar number of each attorney of record in the case; the name of the party each attorney represented in the superior court; and the name, address, and telephone number of any unrepresented party. (C.R.C., Rule 8.100(e)(2).) The requirement that the notification show the date of mailing is intended to establish the date when the 20-day extension of the time to file a cross-appeal under C.R.C., Rule 8.108(f) (*infra*, §592) begins to run. (Advisory Committee Comment to C.R.C., Rule 8.100.)

(3) *Notice of Appeal as Sufficient Notification by Clerk.* A copy of the notice of appeal is sufficient notification if the required information is on the copy or is added by the superior court clerk. (C.R.C., Rule 8.100(e)(3).)

(4) *Death of Party or Absence of Attorney.* The mailing of a notification is a sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney. (C.R.C., Rule 8.100(e)(4).)

(5) *Transmission of Fee of Waiver.* With the notification of the appeal, the superior court clerk must send the reviewing court the filing fee or an application or order for a waiver of that fee. If the fee was paid in cash, the clerk must send the reviewing court a certificate of payment and thereafter a check for the amount of the fee. (C.R.C., Rule 8.100(e)(5).)

(6) *Failure To Comply.* Failure to comply with any of these requirements does not affect the validity of the notice of appeal. (C.R.C., Rule 8.100(e)(6).)

(7) *Cross-Appeal.* The provisions of C.R.C., Rule 8.100 apply to cross-appeals. (C.R.C., Rule 8.100(e).)

West's Key Number Digest, Appeal and Error 413.1, 414, 424

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Background.* C.R.C., Rule 8.750(b) was repealed in 2008. Notification by the clerk in limited civil cases is now covered in C.R.C., Rule 8.821(d).

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3949.1.



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B. Content, Form, and Construction of Notice.

1. Statement That Party Appeals.

9 Witkin Cal. Proc. Appeal § 560

[§ 560] Statement That Party Appeals.

The notice of appeal must be liberally construed. It is sufficient if it identifies the particular judgment or order being appealed, but it need not specify the court to which the appeal is taken. The appeal will be treated as taken to the Court of Appeal for the district in which the superior court is located. (C.R.C., Rule 8.100(a)(2).) (See C.E.B., 1 Civil Appellate Practice 3d, §7.8 et seq.; Rutter Group, 1 Civil Appeals and Writs §3:130 et seq.; Judicial Council Form No. APP-002 [Notice of Appeal/Cross-Appeal (Unlimited Civil Case)]; 17 So. Cal. L. Rev. 82; 5 Am.Jur.2d (2007 ed.), Appellate Review §293; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§55, 56; cf. F.R. App. P., Rule 3(c); 16A Federal Practice & Procedure (Wright & Miller) §3949; 2A Federal Procedure, L.Ed., §3:614; on combining notice of appeal with notice to prepare clerk's and reporter's transcripts, see C.R.C., Rules 8.121(a), 8.754(a).)

The statement should be that appellant "appeals" or "does appeal," i.e., the language should be of present appeal and not mere future intention. However, long usage and many decisions have allowed the following technically defective form, i.e., "plaintiff desires and intends to appeal." (See *Mamer v. Superior Court* (1940) 15 C.2d 569, 571, 103 P.2d 961; *In re Tracy Z.* (1987) 195 C.A.3d 107, 112, 240 C.R. 445, citing the text; 29 Cal. L. Rev. 219; 30 Cal. L. Rev. 439.)

Mamer was followed in an extremely liberal decision, *Wilbur v. Cull* (1954) 127 C.A.2d 655, 274 P.2d 424. Plaintiffs failed to give proper notice of appeal, i.e., their notice referred to the nonappealable order denying a new trial made May 14. On the same day that they filed the defective notice of appeal, they gave notice to the clerk to prepare a transcript, which contained the recital that plaintiffs "are about to file a Notice of Appeal from an order" made and entered March 30. The "order" actually entered on March 30 was the judgment. A motion to dismiss the appeal was denied. *Held*, the notice to prepare a transcript could be construed as a notice of appeal. "We are unable to perceive any substantial difference between a notice and demand for transcript which contains language stating that the party filing the document desires and intends, or desires or intends, to appeal, and one which recites that such party 'is about to file a notice of appeal.' If the first recital is good, even though no notice of appeal is filed, then we think the second recital is equally effective." (127 C.A.2d 657.)

In *Department of Industrial Relations v. Nielsen Const. Co.* (1996) 51 C.A.4th 1016, 59 C.R.2d 785, counsel for respondents was timely served with an unconformed copy of appellant's notice of appeal, which was mistakenly not

filed with the court. Still within the 60-day period for filing the notice of appeal (infra, §575), counsel for appellant requested the superior court clerk to prepare transcripts "on appeal," including documents entitled "Notice of Appeal" and "Judgment by Court under [Code of Civil Procedure section] 437c." *Held*, appellant's request for the transcripts, with its references to a previously filed notice of appeal and a specific judgment being appealed, was a sufficient notice of appeal, because respondents, having timely received their own copy of appellant's notice of appeal, were neither misled nor prejudiced. (51 C.A.4th 1023.)

In *Moyal v. Lanphear* (1989) 208 C.A.3d 491, 256 C.R. 296, A, an attorney, filed a complaint for plaintiff M against defendant L. The trial judge dismissed the complaint and imposed monetary sanctions on A for failing to comply with statutes and rules governing fast track cases. A filed a single notice of appeal, including himself as an appellant. *Held*, he had a right to appeal from the order as a collateral matter (see supra, §99); and, although it would have been better practice for him to have filed a separate notice (because he was not a party to the action), the notice should be liberally construed in favor of its sufficiency. (208 C.A.3d 497.)

West's Key Number Digest, Appeal and Error 417.1

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.754(a) was repealed in 2008. The provision on combining the notice of appeal and the notice of designation in limited civil cases is now in C.R.C., Rule 8.831(a).

See *Bosetti v. United States Life Ins. Co. in New York* (2009) 175 C.A.4th 1208, 1223, 96 C.R.3d 744 [in insured's action against insurer and claims administrator challenging termination of disability benefits, notice of appeal from judgment for insurer could not be construed as notice of appeal from order sustaining administrator's demurrer, even though insured designated briefing on demurrer for inclusion in record on its appeal of judgment for insurer]; 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3949.



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B. Content, Form, and Construction of Notice.

2. Specification of Judgment.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 561

[§ 561] In General.

The notice is sufficient if it "identifies" the particular judgment or order being appealed.; (C.R.C., Rules 8.100(a)(2), 8.750(a).) The notice must describe the judgment or order in such a manner as to make its identification reasonably certain. This part of the notice calls for some care in drafting. (See 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §147 et seq.)

Under the rule of liberal construction, ambiguities will be resolved in favor of validity of the notice. (See *Estate of Smead* (1932) 215 C. 439, 441, 10 P.2d 462; *Title Guarantee & Trust Co. v. Lester* (1932) 216 C. 372, 374, 14 P.2d 297 [erroneous date of judgment]; *Kellett v. Marvel* (1936) 6 C.2d 464, 472, 58 P.2d 649 [separate cases consolidated for trial only; notice of appeal referred only to one, but held sufficient]; *Adams v. Talbott* (1942) 20 C.2d 415, 417, 126 P.2d 347; *Wallace v. Carlin* (1928) 92 C.A. 31, 32, 267 P. 596 [surplusage disregarded]; *Sharick v. Galloway* (1936) 12 C.A.2d 733, 736, 55 P.2d 1196; *Chinnis v. Pomona Pump Co.* (1940) 36 C.A.2d 633, 636, 98 P.2d 560; *Balkins v. Norrby* (1943) 61 C.A.2d 413, 415, 142 P.2d 958; *Royat v. Roberts* (1951) 107 C.A.2d 447, 449, 237 P.2d 25 [notice stating that it was "from the whole of said judgment" construed as appeal from part, where some benefits had been accepted]; *Vallis v. Canada Dry Ginger Ale* (1961) 190 C.A.2d 35, 36, footnote 1, 11 C.R. 823 [record contained only appealable minute order granting motion for nonsuit; notice of appeal "from the said Judgment" was treated as taken from order]; *D'Avola v. Anderson* (1996) 47 C.A.4th 358, 359, 54 C.R.2d 689, quoting the text [notice that identified order appealed from was adequate despite listing wrong case number, where there was no evidence that opposing party was misled by mistake].)

But a notice specifically describing a certain part of the judgment will not bring up the whole judgment. This is not a case of misdescription, but instead a clear intention to appeal from only a part of the judgment. (*Glassco v. El Sereno Country Club* (1932) 217 C. 90, 91, 17 P.2d 703.)

The following decisions are illustrative:

Dimity v. Dixon (1925) 74 C.A. 714, 718, 241 P. 905 ["In a case where several defendants are joined and separate judgments are entered as to each a notice of appeal specifically designating one of these judgments cannot be

interpreted to include others not mentioned"].

Long Beach v. Crocker Nat. Bank (1986) 179 C.A.3d 1114, 1118, footnote 7, 225 C.R. 227, quoting the text [where party's intent was to appeal only from judgment, notice of appeal from judgment would not be treated as notice of appeal from order denying motion to vacate].

Norman I. Krug Real Estate Inv. v. Praszker (1990) 220 C.A.3d 35, 36, 269 C.R. 228 [notice of appeal expressly limited to May 5 judgment was not adequate for appeal from May 9 order allowing litigation costs and attorneys' fees].

Unilogic v. Burroughs Corp. (1992) 10 C.A.4th 612, 625, 12 C.R.2d 741, citing the text [notice of cross-appeal from judgment on cross-complaint's tenth cause of action entered on October 9, 1990, was not adequate for appeal from judgment on eighth cause of action].

Sole Energy Co. v. Petrominerals Corp. (2005) 128 C.A.4th 212, 239, 26 C.R.3d 798 [notice of appeal specifying that it was from judgment entered on certain date, but not mentioning order granting new trial, could not be construed as appeal from new trial order].

West's Key Number Digest, Appeal and Error 419

SUPPLEMENT: [This section is current through the latest supplement]

See *Etheridge v. Reins Int. Calif.* (2009) 172 C.A.4th 908, 913, 91 C.R.3d 816 [dismissal of plaintiff's first appeal did not bar plaintiff from pursuing second appeal, where plaintiff allowed first appeal to be dismissed in mistaken belief that order of dismissal appealed from was not appealable, and then purported to appeal from document entitled "Judgment"; plaintiff's mistake in pursuing second appeal instead of first was harmless].

C.R.C., Rule 8.750(a) was repealed in 2008. The identification requirement in limited civil cases is now stated in C.R.C., Rule 8.821(a)(2).



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2. Specification of Judgment.

b. Erroneous Designation of Parties.

9 *Witkin Cal. Proc. Appeal* § 562

[§ 562] Erroneous Designation of Parties.

Mistakes in the designation of parties will not be fatal. (See *Estate of Strong* (1937) 10 C.2d 389, 391, 74 P.2d 231 [appellant erroneously described herself as executrix, but appeal was properly taken in her individual capacity]; *Ferry v. North Pac. Stages* (1931) 112 C.A. 348, 350, 296 P. 679 [erroneous designation of respondent]; *Poggetto v. Bowen* (1936) 18 C.A.2d 173, 176, 63 P.2d 857 [plaintiff was inadvertently designated "defendant"].)

In *Girard v. Monrovia City School Dist.* (1953) 121 C.A.2d 737, 264 P.2d 115, separate judgments had been entered in favor of each defendant. Plaintiff mistakenly assumed that only one judgment had been entered, and the notice, though it recited a judgment in favor of "defendants," referred to the book and page of the judgment for a codefendant. *Held*, nevertheless, the other defendant was not misled and the notice was good as to both. (121 C.A.2d 740.)

In *Boynton v. McKales* (1956) 139 C.A.2d 777, 294 P.2d 733, after judgment for plaintiff against defendants B (employee) and M (employer), both defendants moved for a new trial, but only B set forth the ground of newly discovered evidence. The trial judge by a single order and single minute entry granted the motion of both defendants, and plaintiff's notice referred only to "That certain Minute Order granting the defendant Arthur Brooks motion for new trial on the ground of newly discovered evidence." *Held*, the notice was good as to both defendants; defendant M was not misled, for he filed a cross-appeal from the order denying his motion for judgment notwithstanding the verdict. (139 C.A.2d 788.)

In *Beltram v. Appellate Dept.* (1977) 66 C.A.3d 711, 136 C.R. 211, plaintiff, an arrested person, recovered the statutory penalty of \$ 500 for denial of her right to see an attorney (P.C. 825). The judgment was against police officer D and the city of Los Angeles. The city filed a notice of appeal, and, over 7 months after entry of the judgment, sought to amend the notice to add the name of D as an appellant. *Held*, the lower court did not exceed its jurisdiction in allowing the amendment.

(a) A notice of appeal must be liberally construed in favor of its sufficiency (66 C.A.3d 714, quoting the text), and defects in the designation of parties will not be fatal when the respondent is not prejudiced or misled (66 C.A.3d 715,

citing the text). Here, the liability of the city is derivative from the liability of its employee D, and the issues as to each party are identical. (66 C.A.3d 715.)

(b) The problem presented is similar to that where an amendment is allowed to a complaint after the statute of limitations has run. "With regard to both situations--the amendment of a complaint or the amendment of a notice of appeal--the courts adopt a rule of liberal construction in a situation where no one is misled or prejudiced, in order to further the policy of hearing legal disputes on their merits and avoid a windfall for one party as the result of another's technical procedural mistake." (66 C.A.3d 715.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Specification of Judgment.

c. Erroneous Specification of Nonappealable Decision.

1. Former Strict Rule of Dismissal.

9 Witkin Cal. Proc. Appeal § 563

[§ 563] Former Strict Rule of Dismissal.

The most difficult cases of improper specification are those in which the appellant mistakenly treats a nonappealable order, determination, or process as the appealable judgment or order itself. The traditional view, consistent with the theory that appellate jurisdiction is wholly dependent on statute (*supra*, §§2, 4), calls for dismissal of the purported appeal.

In *Estate of Roberson* (1952) 114 C.A.2d 267, 250 P.2d 179, a will contest resulted in a verdict and judgment denying admission to probate. The proponents (a) filed a notice of appeal from the verdict, and (b) served and filed a notice of request for transcripts that recited that they had filed notice of appeal from the judgment. In an opinion dismissing the appeal, the court reasoned as follows: (a) Former C.R.C., Rule 1(a) (now C.R.C., Rule 8.100(a)), although liberally construed, "seems to refer to and require that the notice affirmatively state, in some form, a present intention to appeal from a designated judgment or order." Here, there was no mention of a judgment. (114 C.A.2d 269.) (b) The notice to prepare a transcript merely contained a reference to a prior notice of appeal, and could not be construed as such a notice. "The most that can be said concerning this notice, respecting an appeal from the judgment, is that the one who prepared it thought he had theretofore appealed from the judgment by appealing from the verdict. In our opinion, it would open the door to all manner of abuses to hold that a substantial compliance with the rule here appears." (114 C.A.2d 270.)

Estate of Smith (1959) 175 C.A.2d 803, 1 C.R. 46, follows *Roberson*. The lower court admitted a will to probate and ordered issuance of letters (appealable). Appellant moved to vacate and also for a new trial; both motions were denied (nonappealable). He gave notice of appeal "from the Order Denying Motion to Vacate Order and for New Trial," i.e., he gave notice of appeal from the nonappealable order instead of the existing appealable order. The appeal was dismissed. (175 C.A.2d 806.)

Contemporary and later cases are directly *contra*, and the present rule appears to be that the appeal may be saved if it is not too premature (see *infra*, §620 et seq.) or too late (see *infra*, §614 et seq.), and if the notice of appeal can be construed to refer to an appealable judgment or order (see *infra*, §564 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]



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c. Erroneous Specification of Nonappealable Decision.

2. Appeal Saved by Construction.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 564

[§ 564] In General.

(1) *Basic Principle.* Notices of appeal are liberally construed so as to protect the right of appeal if it is reasonably clear what the appellant was trying to appeal from, and if the respondent could not possibly have been misled or prejudiced. (*In re Joshua S.* (2007) 41 C.4th 261, 271, 59 C.R.3d 460, 159 P.3d 49 [where notice of appeal specified order appealed from and comments by trial court supported view that children involved were not eligible for public assistance, notice was sufficient despite ambiguous language indicating that right-to-assistance issue had not been resolved].) Accordingly, a notice of appeal that specifies a nonappealable order or other interlocutory determination may be construed to refer to an existing appealable judgment or order that could and should have been specified. Indeed, in view of the formidable array of authorities giving effect to all sorts of imperfect designations, it is difficult to regard the requirement of specifying the judgment or order as mandatory. And even more difficult to understand is the suggestion in *Shonkoff v. Dant Inv. Co.* (1968) 258 C.A.2d 101, 65 C.R. 463, that liberal construction is a matter of discretion, and that sometimes the appeal will not be saved: "We warn the bar generally that counsel cannot with any degree of assurance ignore the formal requirements when drawing notices of appeal. ... The right way, obviously, is the only safe way." (258 C.A.2d 102.)

(2) *Notice Specifying One Appealable Order Construed To Include Related Order.* In *Creed v. Schultz* (1983) 148 C.A.3d 733, 196 C.R. 252, an appeal was taken from an order for child support in a designated action. *Held*, "[i]n the interest of justice and of minor children," the notice will be construed, as obviously intended, to include an appeal from a contemporaneous order in a related action. (148 C.A.3d 736, citing the text.)

(3) *Notice Construed To Specify Correct Entry.* In *Monreal v. Tobin* (1998) 61 C.A.4th 1337, 72 C.R.2d 168, an "Amended Referee's Decision" was entered as the purported "judgment" on January 31. Following an ex parte proceeding on June 16 to amend this "judgment" to include costs and interest under a ruling on plaintiff's earlier motion to tax costs, the court filed an "Amended Judgment." The Amended Judgment was then entered on June 22, and a notice of appeal was filed 5 weeks later. *Held*, under the rule of liberal construction, the notice was timely. The period commenced on entry of the Amended Judgment, rather than on entry of the Amended Referee's Decision. The Amended

Judgment, unlike the Amended Referee's Decision, contained standard judgment language, added amounts awarded by the court as costs and interest, included a detailed assessment of the allocation of damages in favor of each plaintiff and against each defendant, and was signed by the court. (61 C.A.4th 1348.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Basic Principle*. See *Morton v. Wagner* (2007) 156 C.A.4th 963, 967, 67 C.R.3d 818 [rule of liberal construction of notice of appeal does not mean that notice specifically excluding judgment can be construed to include judgment if doing so would prejudice other party].



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c. Erroneous Specification of Nonappealable Decision.

2. Appeal Saved by Construction.

bb. Notice Specifying Verdict or Decision.

9 Witkin Cal. Proc. Appeal § 565

[§ 565] Notice Specifying Verdict or Decision.

In *Jackson v. Lovas* (1951) 106 C.A.2d 426, 235 P.2d 232, notice was from "the verdict of the jury." The court, construing the notice of appeal together with the notice to prepare a transcript, said: "[W]e will treat the appeal as one from the judgment." (106 C.A.2d 427.)

In *Bailey v. Simpson* (1963) 215 C.A.2d 532, 30 C.R. 701, the notice of appeal was from "the verdict and decision." The court said: "[W]e will construe the word 'decision' in the notice of appeal to include the 'judgment' in respondents' favor." (215 C.A.2d 536.) (See *Grubb & Ellis Co. v. Spengler* (1983) 143 C.A.3d 890, 892, 192 C.R. 637.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Appeal Saved by Construction.

cc. Notice Specifying Wrong Entry.

9 *Witkin Cal. Proc. Appeal* § 566

[§ 566] Notice Specifying Wrong Entry.

(1) *Dismissal*. In *Holden v. California Emp. Stabilization Com.* (1950) 101 C.A.2d 427, 430, 225 P.2d 634, an order of dismissal was entered in the minutes on December 12, and on December 14 a formal judgment was entered. Under the law at that time, the minute entry was the appealable order. (See *supra*, §144.) Appellant's notice was promptly filed, but referred only to the superfluous judgment of December 14. *Held*, the appeal was good. "Where it is perfectly apparent, as it is here, that appellant seeks a review of an order of dismissal, and where, as here, the notice of appeal is filed in ample time from either the entry of the order or judgment, and where, as here, the notice of appeal is addressed to all respondents and to their attorneys so that no one is misled, and where, as here, no prejudice to respondents exists, the notice of appeal should be treated as being from the appealable order even if the notice incorrectly designates the 'order' as a 'judgment,' and erroneously gives the date of the entry of the judgment rather than that of the order." (101 C.A.2d 431.)

(2) *Summary Judgment*. In *Helper v. Hubert* (1962) 208 C.A.2d 22, 25, 24 C.R. 900, an appeal from the nonappealable order granting a motion for summary judgment (see *supra*, §145) was treated as if it referred to the summary judgment entered. (See *Lieding v. Commercial Diving Center* (1983) 143 C.A.3d 72, 73, 191 C.R. 559.)

Los Angeles v. Stone (1961) 198 C.A.2d 640, 18 C.R. 72, another summary judgment case, reached the same result on a different theory. Plaintiff sued to condemn property, naming as defendants the owner and lessee. Defendant lessee filed an answer claiming a share in the award, defendant owner moved to strike the answer and for summary judgment against the lessee, and the judge granted the motion. *Held*, the lessee's notice of appeal from that order was good. The court applied the doctrine that an order striking a cross-complaint of a party other than the plaintiff is a judgment final as to that party (see *supra*, §113). (198 C.A.2d 643.)

SUPPLEMENT: [This section is current through the latest supplement]



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9 Witkin Cal. Proc. Appeal § 567

[§ 567] Notice Specifying Wrong Judgment.

In eminent domain proceedings, the "interlocutory judgment" is final for purposes of appeal (see *supra*, §138), but a mistaken notice of appeal from the final judgment, if timely, may be construed as referring to the appealable interlocutory judgment. (*Baldwin Park Redevelopment Agency v. Irving* (1984) 156 C.A.3d 428, 433, 202 C.R. 792, citing the text.)

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ee. Notice Specifying Writ.

9 Witkin Cal. Proc. Appeal § 568

[§ 568] Notice Specifying Writ.

In *Karrell v. Watson* (1953) 116 C.A.2d 769, 772, 254 P.2d 651, 255 P.2d 464, a mandamus proceeding in which an order revoking a broker's license was overturned, the real estate commissioner gave notice of appeal from the "Peremptory Writ of Mandate." *Held*, the notice should be construed to refer to the judgment directing that the writ issue. "It follows that appellant's clerical error which was an ostensible appeal from the writ was in truth an appeal from the judgment." (116 C.A.2d 773.) This construction was necessary to save the appeal; the court distinguished prior cases in which the notice referred to both the judgment and the writ, and in which the dismissal was merely of the superfluous appeal from the writ.

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ff. Notice Specifying Order Sustaining Demurrer.

9 *Witkin Cal. Proc. Appeal* § 569

[§ 569] Notice Specifying Order Sustaining Demurrer.

In *Smith v. Smith* (1954) 126 C.A.2d 194, 272 P.2d 118, an order sustaining a demurrer without leave to amend was entered May 20, and a notice of appeal was filed from this order. Then, on October 15, judgment for defendant was entered on the demurrer. *Held*: "Since no appeal lies from an order sustaining demurrer ... we interpret the notice of appeal as intended to take an appeal from the judgment as that is what the parties have assumed." (126 C.A.2d 195.) (See *Vibert v. Berger* (1966) 64 C.2d 65, 67, 48 C.R. 886, 410 P.2d 390, *infra*, §616; *Collins v. San Francisco* (1952) 112 C.A.2d 719, 723, 247 P.2d 362; *A.L. Castle v. San Benito* (1964) 227 C.A.2d 602, 604, 38 C.R. 855, citing the text; *Pulver v. Avco Financial Services* (1986) 182 C.A.3d 622, 631, 227 C.R. 491; *cf. Seven Up Bottling Co. of Los Angeles v. Grocery Drivers Local Union No. 848* (1950) 97 C.A.2d 623, 624, 218 P.2d 41 [notice referring to order sustaining objection to introduction of all evidence was construed as referring to judgment subsequently entered].)

In *Forsyth v. Jones* (1997) 57 C.A.4th 776, 67 C.R.2d 357, the notice of appeal referred exclusively to the order sustaining respondent's demurrer and was filed before the judgment was entered. Nevertheless, the actual judgment was entered soon thereafter, and there was no confusion as to the scope of the appeal. *Held*, the notice of appeal was sufficient. Under the Rules of Court, a notice of appeal must be "liberally construed." "In accordance with that mandate, a notice of appeal which erroneously purports to appeal from an order sustaining a demurrer will be deemed to be sufficient if (1) a judgment of dismissal was actually entered either before or after the filing of the notice of appeal, (2) there is no doubt as to which ruling the appellant seeks to have reviewed, and (3) the respondent could not possibly have been misled to its prejudice." (57 C.A.4th 780, citing *Vibert*.)

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gg. Notice Specifying Order Denying New Trial.

9 *Witkin Cal. Proc. Appeal* § 570

[§ 570] Notice Specifying Order Denying New Trial.

An order denying a new trial is not appealable (see *supra*, §164), but a notice specifying the order may be deemed to constitute an appeal from the judgment. (*Shonkoff v. Dant Inv. Co.* (1968) 258 C.A.2d 101, 102, 65 C.R. 463.)

In *Walker v. Los Angeles County Metropolitan Trans. Authority* (2005) 35 C.4th 15, 23 C.R.3d 490, 104 P.3d 844, plaintiff filed a wrongful termination action based on a violation of the whistle-blower statute (*Lab.C. 1102.5*; see 3 *Summary* (10th), *Agency and Employment*, §284 et seq.). Judgment was entered for defendant, and plaintiff's motion for a new trial was denied. Plaintiff's timely notice of appeal, which specified that it was from the order denying the new trial motion, was dismissed by the Court of Appeal on the ground that the denial of a new trial is not an appealable order. *Held*, judgment of the Court of Appeal reversed.

(a) Where it is reasonably clear what the appellant was trying to appeal from and where no prejudice accrues to the respondent, the Court of Appeal should treat the notice as an appeal from the underlying judgment. (35 C.4th 18.) Here, plaintiff has presented a colorable argument that she intended to appeal from the underlying judgment and that defendant, which filed a respondent's brief on the merits in the Court of Appeal as well as a counterdesignation of the record on appeal, would not be prejudiced by allowing the appeal to go forward. However, whether plaintiff's notice of appeal satisfies the test is for the Court of Appeal to decide on remand. (35 C.4th 21.)

(b) Contrary to defendant's contention, construing a notice of appeal to encompass the underlying judgment does not violate the appellate jurisdiction provisions of the California Constitution (Cal. Const., Art. VI, §11). Although a reviewing court lacks jurisdiction on direct appeal in the absence of an appealable order or judgment, the basis for jurisdiction was established here by the entry of an appealable judgment. That judgment distinguishes this case from those in which a party attempted to appeal from other types of nonappealable orders when no appealable judgment or order had been entered. None of these cases suggests that a reviewing court lacks discretion to construe a notice of appeal from an order denying a new trial to encompass the existing judgment. (35 C.4th 21.)

(c) Defendant's suggestion that granting appellate courts discretion in this area will undermine the one final judgment rule is also rejected. This rule is not endangered here, because construing a notice of appeal from an order denying a new trial to be an appeal from the one final judgment risks neither piecemeal disposition nor multiple appeals. Moreover, defendant's claim that construing the notice of appeal to apply to the underlying judgment would needlessly cause uncertainty in state appellate courts cannot withstand scrutiny. Federal and sister state cases, as well as practice guides (quoting the text) uniformly treat a notice of appeal from an order denying a new trial as being an appeal from the underlying judgment. "Our decision thus does no more than ratify existing practice here and elsewhere." (35 C.4th 22, disapproving *Estate of Roberson* (1952) 114 C.A.2d 267, 250 P.2d 179, supra, §563, *Wilbur v. Cull* (1954) 127 C.A.2d 655, 274 P.2d 424, and *Estate of Smith* (1959) 175 C.A.2d 803, 1 C.R. 46, supra, §563, and approving *Vibert v. Berger* (1966) 64 C.2d 65, 48 C.R. 886, 410 P.2d 390, infra, §616.)

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hh. Notice Specifying Order Denying Motion To Vacate.

9 Witkin Cal. Proc. Appeal § 571

[§ 571] Notice Specifying Order Denying Motion To Vacate.

In *Luz v. Lopes* (1960) 55 C.2d 54, 10 C.R. 161, 358 P.2d 289, the notice expressly mentioned only the denial of a motion to vacate under C.C.P. 473, but it also referred to "all orders and rulings made and entered by said Court which are adverse to them." *Held*, the latter general reference could be construed to refer to the only other adverse ruling, the judgment itself. (55 C.2d 59.)

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3. Where No Judgment Was Entered.

9 *Witkin Cal. Proc. Appeal* § 572

[§ 572] Where No Judgment Was Entered.

Under the decisions discussed in the preceding sections, most of the troubles of an appellant who cannot distinguish between appealable judgments and nonappealable orders disappear, but not all. In *Schmidt v. Townsend* (1951) 103 C.A.2d 185, 229 P.2d 488, on June 21, the opening day of trial, counsel for plaintiffs objected to the absence of a jury. His request was denied and the trial proceeded. On July 1, he filed a notice of appeal "from that certain order" of June 21 denying the right to a jury trial. Findings were made and judgment entered July 29, but no appeal was taken from the judgment. The appeal from the nonappealable interlocutory order was dismissed. This was not a problem of construction, but of jurisdiction, for, at the time the notice of appeal was filed, judgment had not even been rendered, nor had the intended judgment been announced. (103 C.A.2d 186.) (See *Futlick v. F.W. Woolworth Co.* (1957) 149 C.A.2d 296, 298, 308 P.2d 405 [notice of appeal from order sustaining demurrer without leave to amend; following *Schmidt* and dismissing appeal]; *Winter v. Rice* (1986) 176 C.A.3d 679, 682, 222 C.R. 340, citing the text [appeal from nonappealable order denying motion to set aside default was dismissed where no judgment of default had been entered].)

However, this result, while still correct in principle, is no longer likely in practice:

(1) The parties may stipulate to a nunc pro tunc entry of judgment in the superior court. (See *Carroll v. Hanover Ins. Co.* (1968) 266 C.A.2d 47, 48, 71 C.R. 868; *Donohue v. California* (1986) 178 C.A.3d 795, 800, 224 C.R. 57.)

(2) Under the theory of *Gombos v. Ashe* (1958) 158 C.A.2d 517, 322 P.2d 933, *supra*, §124, and cases following it, the appellate court may itself amend the nonappealable order to make it a final appealable judgment, and then construe the notice of appeal as applying to that judgment. (See *Beazell v. Schrader* (1963) 59 C.2d 577, 579, 30 C.R. 534, 381 P.2d 390, *infra*, §623; *Reyna v. San Francisco* (1977) 69 C.A.3d 876, 879, 138 C.R. 504 [following *Beazell*]; *Velasco v. Commercial Bldg. Maintenance Co.* (1985) 169 C.A.3d 874, 876, 215 C.R. 504 [following *Beazell*; appellate court amended nonappealable order sustaining demurrer to make it appealable order of dismissal, and construed notice of appeal as applying to order of dismissal].)

An exception to *Gombos v. Ashe* was recognized in *Winter v. Rice*, *supra*, an action to quiet title and impose a constructive trust, in which defendant failed to answer and a default was entered against him. In dismissing defendant's appeal from the nonappealable order denying his motion to set aside the default, the court distinguished the *Gombos* theory, which is invoked in appeals from orders sustaining demurrers (see *supra*, §124), on the following reasoning:

(a) Where a defendant's demurrer is sustained without leave to amend, the only proper judgment is one of dismissal of the action, and the defendant has a right to have judgment of dismissal entered. In that case, the nonappealable order sustaining the demurrer may be deemed to incorporate a judgment of dismissal, and the notice of appeal may be construed to refer to that judgment. (176 C.A.3d 682, 683; see *supra*, §§124, 564 et seq.)

(b) The plaintiff in this case had no similar right to entry of judgment in his favor as a matter of course. The action was to quiet title, and the court could not enter judgment by default under C.C.P. 764.010 (6 Cal. Proc. (5th), *Proceedings Without Trial*, §137); it had to require evidence of plaintiff's title. (176 C.A.3d 683.)

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3. Signature of Party or Attorney.

9 *Witkin Cal. Proc. Appeal* § 573

[§ 573] Signature of Party or Attorney.

(1) *In General.* The notice must be signed by "[t]he appellant or the appellant's attorney." (C.R.C., Rule 8.100(a)(1), see C.R.C., Rule 8.750(a).)

It is normally signed by the appellant's attorney of record, and early cases held that the attorney of record alone could sign. But the rule is satisfied with a signature by the appellant only or by "the appellant's attorney," i.e., an attorney duly authorized, even though he or she may not have been substituted or have appeared as attorney of record. (See *Estate of Hultin* (1947) 29 C.2d 825, 832, 178 P.2d 756; *Taylor v. Powell* (1962) 200 C.A.2d 780, 783, 19 C.R. 536; *Downey v. Johnson* (1968) 263 C.A.2d 775, 780, 69 C.R. 830 [valid notice signed by party himself]; 35 Cal. L. Rev. 478; 17 So. Cal. L. Rev. 83.)

In re Malcolm D. (1996) 42 C.A.4th 904, 50 C.R.2d 148, was a dependency hearing in which the dependent child's mother was represented by a public defender. At the permanency planning hearing, this attorney was allowed to withdraw, and the subsequent notice of appeal from an order terminating the mother's parental rights was apparently signed by an attorney in the former attorney's office. *Held*, the signature was valid. Notices of appeal are to be construed liberally in favor of sufficiency. Also, there is a strong public policy favoring consideration of appeals on their merits, rather than depriving a party of his or her appellate rights because of technical improprieties. Thus, in the absence of a satisfactory showing that the mother did not authorize the attorney to sign, it is assumed that counsel had the necessary authority. (42 C.A.4th 910.) (See *In re Helen W.* (2007) 150 C.A.4th 71, 79, 57 C.R.3d 914 [presumption that attorney is authorized to represent his or her client extends to attorney's authority to file notice of appeal].)

It has been held that the requirement is satisfied if the notice is signed by any person, attorney or not, who is authorized to act on the appellant's behalf. (*Seeley v. Seymour* (1987) 190 C.A.3d 844, 853, 237 C.R. 282 [authorized signature by appellant's son].)

(2) *Unauthorized Attorney.* The signature of an unauthorized attorney is improper and wholly ineffectual. (*Edlund v. Los Altos Builders* (1951) 106 C.A.2d 350, 357, 235 P.2d 28 [notice signed by discharged attorney, where substitution of new attorney was on file; appeal dismissed]; *In re Sean S.* (1996) 46 C.A.4th 350, 353, 53 C.R.2d 766 [no consent for trial attorney's signature]; cf. *United States of Mexico v. Rask* (1930) 109 C.A. 497, 500, 293 P. 108

[respondent may challenge authority of attorney, but presumption of authority will prevail in absence of strong showing]; *In re Asia L.* (2003) 107 C.A.4th 498, 505, 132 C.R.2d 733 [facts were insufficient to establish lack of consent]; see 1 Cal. Proc. (5th), Attorneys, §§237, 256.)

In re Alma B. (1994) 21 C.A.4th 1037, 26 C.R.2d 592, involved an appeal from a juvenile court order identifying adoption as the permanent placement goal for a mother's two minor children. Because the mother's location was unknown, the notice of appeal was signed by her attorney, who stated his belief that she would desire review of this case. *Held*, appeal dismissed.

(a) The appellant or his or her attorney may sign the notice of appeal. However, because an attorney cannot appeal without the client's consent, a notice of appeal that is shown to have been signed without the client's consent is one signed by an unauthorized attorney, and is ineffectual in preserving the right to appeal. (21 C.A.4th 1043.)

(b) Here, the attorney, who did not know the mother's whereabouts, did not state that he had been specifically authorized by her to sign the notice of appeal. Instead, he merely stated his belief that she would want to appeal. However, that belief is undermined by the mother's absconding from her drug rehabilitation program, failing to appear at the hearing at which the order appealed from was issued, and abandoning her children numerous times. Under these circumstances, it is not possible to impute the mother's authorization for her counsel to appeal from an order made after her disappearance. (21 C.A.4th 1043.)

West's Key Number Digest, Appeal and Error 348, 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Toal v. Tardif* (2009) 178 C.A.4th 1208, 1216, 101 C.R.3d 97 [appeal from confirmation of arbitration award against husband and wife was construed as having been taken by both husband and wife, even though only husband signed notice of appeal, and even though space on Judicial Council form for name of appealing party was left blank, absent evidence that husband was not authorized to act for wife].

C.R.C., Rule 8.750(a) was repealed in 2008. The signature requirement for limited civil cases is now stated in C.R.C., Rule 8.821(a)(1).



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C. Normal Time for Filing Notice.

1. Alternative Time Limits.

9 Witkin Cal. Proc. Appeal § 574

[§ 574] Alternative Time Limits.

(1) *Former Law.* In appeals from the superior court, former C.R.C., Rule 2(a) prescribed that, except in rare cases where other times were specified by special statute, notice had to be filed within 60 days from the date of entry of judgment. Extensions were allowed, however, first for a motion for new trial, then also for a motion to vacate. (See *17 So. Cal. L. Rev. 84*; *infra*, §586 et seq.)

The 60-day period ran from entry of the judgment. Notice of entry, which starts the time running on a motion for new trial (see *8 Cal. Proc. (5th), Attack on Judgment in Trial Court*, §58, was not required, and if given, had no effect on the time to appeal from the superior court). (See *Simmons v. Superior Court (1959) 52 C.2d 373, 376, 341 P.2d 13*; *17 So. Cal. L. Rev. 85*.) In municipal court appeals, however, former C.R.C., Rule 122(a) permitted shortening of the 60-day period by giving notice of entry: Time expired 30 days after that notice.

(2) *Current Law.* Unless the time is extended (see *infra*, §586 et seq.), a notice of appeal must be filed on or before the earliest of the following times:

(a) Sixty days after the superior court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed. (C.R.C., Rule 8.104(a)(1).)

(b) Sixty days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service. (C.R.C., Rule 8.104(a)(2).)

(c) One hundred and eighty days after entry of judgment. (C.R.C., Rule 8.104(a)(3).)

Similar, but shorter, alternatives exist for limited civil cases. (See C.R.C., Rule 8.751(a) [30 days, 30 days, 90 days], *infra*, §1008.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Current Law.*

(a) *Sixty days after clerk mails notice of entry of file-stamped copy:* See *Citizens for Civic Accountability v. Danville* (2008) 167 C.A.4th 1158, 1161, 84 C.R.3d 684 [60-day filing period after clerk "mails" file-stamped copy of judgment is triggered only by mailing through U.S. Postal Service, and not by electronic notice of judgment through electronic filing service provider; term "mailed" in rule does not include "e-mailed" in these circumstances, any ambiguity in rule is resolved in favor of preserving right to appeal, and rules authorizing electronic service in place of service by mail discuss "service" rather than "mail"].

C.R.C., Rule 8.104(a)(1) was amended in 2009 to refer to service by the clerk, rather than mailing.

(*New*) *Method of service:* Service under C.R.C., Rule 8.104(a)(1) and (a)(2) may be by any method permitted by the Code of Civil Procedure, including authorized electronic service. (C.R.C., Rule 8.104(a)(4), added in 2009.)

Limited civil cases: C.R.C., Rule 8.751(a) was repealed in 2008. The time limits for limited civil cases are now stated in C.R.C., Rule 8.822(a).



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C. Normal Time for Filing Notice.

2. Sixty Days After Notice of Entry of Judgment.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 575

[§ 575] In General.

(1) *Alternative Time limits.* C.R.C., Rule 8.104(a) states two alternative time limits for filing the notice of appeal: one long period starting from the date of entry of the judgment (*infra*, §581), and a shorter period starting from notice of entry of the judgment. This notice may be by mailing or service.

(2) *Sixty-Day Period.* With respect to the period starting from notice of entry of the judgment, except as otherwise provided by *C.C.P.* 870 or other statute, or by C.R.C., Rule 8.108, a notice of appeal from a judgment or appealable order must be filed on or before the earlier of (a) 60 days after the date of mailing by the clerk of the court of a document entitled "notice of entry of judgment" (or a file-stamped copy of the judgment) showing the date of mailing; or (b) 60 days after the date of service of such a document by any party on the party filing the notice of appeal, or by the party filing the notice of appeal, accompanied by proof of service. (C.R.C., Rule 8.104(a); see *Casado v. Sedgwick, Detert, Moran & Arnold* (1994) 22 *C.A.4th* 1284, 1286, 27 *C.R.2d* 719 [rejecting contention that 60-day period commenced on date notice of entry was filed, instead of on date of service]; *Engel v. Worthington* (1997) 60 *C.A.4th* 628, 630, 70 *C.R.2d* 526 [being nonappealable, neither minute order nor notice of ruling entered on same day was sufficient to start 60-day period]; *Glasser v. Glasser* (1998) 64 *C.A.4th* 1004, 1009, 75 *C.R.2d* 621 [facts established adequate service of notice of entry of judgment; notice of appeal was untimely]; 7 *Cal. Proc.* (5th), *Judgment*, §57 et seq.)

"A document is deemed filed on the date the clerk receives it." (C.R.C., Rule 8.25(b)(1).) Thus, if a notice of appeal is presented for filing within the 60-day period, but is not stamped "filed" until that period has expired, it may nevertheless be timely, if there is no lawful basis for refusing to file the notice. (*Lezama-Carino v. Miller* (2007) 149 *C.A.4th* 55, 57, 56 *C.R.3d* 671 [notice of appeal was timely notwithstanding file stamp dated 2 days after 60-day period, where process server stated that he delivered timely notice of appeal but that clerk would not file it due to waiver of fee request, court clerk conceded that notice was not filed on day received, and pending fee waiver was not valid basis for refusing to file notice].)

(3) *Exceptions.* The introductory phrase of C.R.C., Rule 8.104 refers to a very few special statutes that prescribe a different time for filing a notice of appeal (see *infra*, §582) and to extensions of the time for filing a notice of appeal

(see *infra*, §586 et seq.).

(4) *Limited Civil Case*. In limited civil case appeals, C.R.C., Rule 8.751(a) is similar, but the period is shorter: 30 days after mailing of notice by the clerk or service of notice by a party.

(5) *Federal Rule*. In federal court, notice of appeal must be filed within 30 days after entry of the judgment or order appealed from unless the United States or a federal agency or officer is a party, in which case notice must be filed within 60 days. (*F.R. App. P., Rule 4(a)*; see 16A Federal Practice & Procedure (Wright & Miller) §3950; 2A Federal Procedure, L.Ed., §3:632 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Alternative Time Limits*. C.R.C., Rule 8.104(a) was amended in 2009 to provide only for service.

(2) *Sixty-Day Period*. C.R.C., Rule 8.104(a) was amended in 2009 to refer to service by the clerk, rather than mailing. (4) *Limited Civil Case*. C.R.C., Rule 8.751(a) was repealed in 2008. The 30-day provision is now stated in C.R.C., Rule 8.822(a)(1).

(5) *Federal Rule*. See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3950.



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2. Sixty Days After Notice of Entry of Judgment.

b. Who May Give Notice of Entry.

9 *Witkin Cal. Proc. Appeal* § 576

[§ 576] Who May Give Notice of Entry.

(1) *In General.* Notice of entry may be given by a party or by the clerk. (*C.C.P.* 664.5; see 7 *Cal. Proc.* (5th), *Judgment*, §57 et seq.) (See *Van Beurden Ins. Services v. Customized Worldwide Weather Ins. Agency* (1997) 15 *C.4th* 51, 56, 61 *C.R.2d* 166, 931 *P.2d* 344, *infra*, §577 [notice must affirmatively state that it was given on order of court or under *C.C.P.* 664.5]; on what constitutes sufficient notice of entry, see *infra*, §577 et seq.)

(2) *Where Prevailing Party Is Represented.* In any contested action or special proceeding (other than proceeding for dissolution or nullity of marriage, legal separation, small claims action, or action or proceeding in which a prevailing party is not represented by counsel), "the party submitting an order or judgment for entry shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service by mail." (*C.C.P.* 664.5(a); on notice of entry of judgment under Family Code, see *C.R.C.*, Rules 5.134, 5.136; 11 *Summary* (10th), *Husband and Wife*, §110.)

(3) *Where Prevailing Party Is Not Represented.* Promptly on entry of a judgment in a contested action or special proceeding in which a prevailing party is not represented by counsel, the clerk must mail the notice of entry to all parties who appeared and execute a certificate of mailing and place it in the court's file. (*C.C.P.* 664.5(b).)

(4) *Order of Court.* "Upon order of the court in any action or special proceeding, the clerk shall mail notice of entry of any judgment or ruling, whether or not appealable." (*C.C.P.* 664.5(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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c. What Constitutes Sufficient Notice.

1. In General.

9 Witkin Cal. Proc. Appeal § 577

[§ 577] In General.

Prior to 1989, there were numerous questions concerning what constituted sufficient "notice of entry," such as, did the notice have to be specifically designated "notice of entry," and was a separate document required or was a mere copy of the judgment or order appealed from sufficient. There was also confusion concerning whether the answer to these questions depended on whether the notice of entry was given by the clerk or party or, if given by the clerk, whether it was given under court order. (See, e.g., *Call v. Los Angeles County General Hosp.-USC Med. Center* (1978) 77 C.A.3d 911, 915, 143 C.R. 845 [party's service of written notice of ruling that demurrer had been sustained without leave to amend was insufficient notice of entry]; *Tri-County Elevator Co. v. Superior Court* (1982) 135 C.A.3d 271, 276, 185 C.R. 208 ["any notice in writing which will convey to a losing party that the judgment has been entered is sufficient in California"]; *National Advertising Co. v. Rohnert Park* (1984) 160 C.A.3d 614, 618, 206 C.R. 696 [respondent's service of copy of judgment was sufficient notice of entry]; *In re Marriage of Kepley* (1987) 193 C.A.3d 946, 950, 238 C.R. 691 [time for filing notice of appeal did not begin to run in absence of express written indication of court's intent that clerk serve notice of order on parties]; *SM Trading v. Kono* (1988) 198 C.A.3d 749, 754, 243 C.R. 707 [clerk's mailing of file-endorsed copy of judgment was not sufficient notice of entry]; *Ramirez v. Moran* (1988) 201 C.A.3d 431, 436, 247 C.R. 117 [defendant's attorney mailed conformed copy of judgment to plaintiff's attorney; held sufficient notice of entry].) (On current requirements, see *infra*, §§578, 579.)

In *Van Beurden Ins. Services v. Customized Worldwide Weather Ins. Agency* (1997) 15 C.4th 51, 61 C.R.2d 166, 931 P.2d 344, the court clerk mailed notice of entry of the judgment, which was rendered for defendant on July 28. The notice did not affirmatively state that it was given on order of the court, and the evidence whether the court did in fact order that the notice be given was ambiguous. On August 8, plaintiff filed notice of intention to move for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial judge denied the motion on October 7. On November 4, plaintiff filed notice of appeal. The Court of Appeal dismissed the appeal as untimely. *Held*, reversed.

(a) *Governing statutes and rules.* Ordinarily, under former C.R.C., Rule 2(a) (now C.R.C., Rule 8.104(a)), an appeal must be filed on or before the earliest of several dates. If, however, a party files a timely new trial motion, former C.R.C., Rule 3(d) (now C.R.C., Rule 8.108(d)) extends the time for appeal until the earlier of 30 days after entry of the

order denying the motion for a new trial or its denial by operation of law, or 180 days after the entry of the judgment. Under *C.C.P. 660* (8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §73), a trial court retains jurisdiction to rule on a valid new trial motion for "60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial." Under *C.C.P. 664.5(d)*, "[u]pon order of the court," the clerk must mail notice of entry of the judgment. (15 *C.4th* 56.)

(b) *Timeliness of appeal depends on sufficiency of clerk's notice of entry of judgment.* The clerk of the court mailed notice of entry of the judgment. Defendant did not thereafter serve notice of entry. Plaintiff filed a timely new trial motion. The timeliness of plaintiff's appeal thus depends on whether the clerk's mailing of the copy of the judgment commenced the time for the trial court to rule on plaintiff's new trial motion, i.e., whether it was mailed "pursuant to Section 664.5" under *C.C.P. 660*. If so, the motion was denied by operation of law on September 26, 1994--60 days after the notice was mailed by the clerk--and the appeal, filed more than 30 days thereafter, was untimely. If, however, the clerk's mailing of the file-stamped copy of the judgment was not "pursuant to section 664.5," it did not constitute "notice of entry of judgment." In that case, the trial court had 60 days from the time defendant first filed the new trial motion to rule on the motion--or until October 7, 1994--and, the motion having been denied by order of the superior court on that date, the appeal was timely because it was filed within 30 days thereafter. (15 *C.4th* 57.)

(c) *Subject to statutory exceptions, clerk's notice of entry must affirmatively state that it is ordered by court.* Subject to the specified exceptions under *C.C.P. 664.5(a)* and (b) (*supra*, §576), which make notice by the clerk mandatory, when the clerk of the court mails a file-stamped copy of a judgment, the time for ruling on a motion for a new trial is shortened only when the order itself indicates that the court directed the clerk to mail notice of entry of judgment. To qualify as a notice of entry of judgment under *C.C.P. 664.5(d)*, the clerk's mailed notice must affirmatively state that it was given "upon order by the court" or at least that it was given under *C.C.P. 664.5*, and a certificate of mailing the notice must be executed and placed in the file. Neither parties nor appellate courts should be required to speculate about jurisdictional time limits. There must be some indication in the record that an order by the court was, in fact, made. (15 *C.4th* 64; disapproving *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd.* (1983) 148 *C.A.3d* 223, 195 *C.R.* 776, to extent it holds that order of court may be implied from language or conduct of court.) The clerk's notice of entry was therefore insufficient to shorten the time to file a notice of appeal. (15 *C.4th* 65.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. File-Stamped Copy of Judgment.

aa. Used in Place of Notice of Entry.

9 Witkin Cal. Proc. Appeal § 578

[§ 578] Used in Place of Notice of Entry.

To eliminate the type of confusion illustrated by the aforementioned cases (*supra*, §577), former C.R.C., Rule 2(a) (now C.R.C., Rule 8.104(a)) was amended in 1989 to provide (a) that the 60-day period commences when the clerk mails, or a party serves, a document entitled "notice of entry" of judgment; and (b) that a file-stamped copy of the judgment may be used in place of that document. (See *Hughey v. Hayward* (1994) 24 C.A.4th 206, 210, 30 C.R.2d 678 [mailing copy of minute order that was neither entitled "notice of entry" nor file-stamped was insufficient to commence 60-day period].)

The effect of the amendment was considered in *Estate of Crabtree* (1992) 4 C.A.4th 1119, 6 C.R.2d 224. Judgment was entered on October 26, and respondents served appellant's counsel with a copy of the judgment on October 29. This copy had a stamp from the court clerk indicating that it was filed on October 26, but it did not indicate when the judgment was entered. Appellant's notice of appeal was not filed within 60 days after October 29. *Held*, appeal dismissed; the copy served on appellant's counsel was sufficient to trigger the 60-day period even though it did not indicate the date of entry.

(a) Under *National Advertising Co. v. Rohnert Park* (1984) 160 C.A.3d 614, 206 C.R. 696, and *Tri-County Elevator Co. v. Superior Court* (1982) 135 C.A.3d 271, 185 C.R. 208, the copy served on the appellant must indicate when the judgment was entered. However, those cases were decided before the 1989 amendment providing that a "file-stamped copy" of the judgment is sufficient to provide "notice of entry." "We interpret the rule change literally: by its terms it no longer requires that the document served give notice of when an appealable judgment or order was entered but only requires notice of when the judgment or order was filed." (4 C.A.4th 1123.)

(b) In permitting the period for appeal to commence running on service of a document that does not mention entry of judgment, the drafters of the amended rule did not alter the requirement of C.C.P. 664 that a judgment be entered before it can be effective for any purpose. Because under C.C.P. 664 the time between filing and entry is usually very short, the drafters could reasonably have concluded that service of a judgment stamped "filed" will accurately advise the

recipient that a judgment has in fact been entered. Hence, the amended rule eliminates confusion over whether service of a file-stamped copy is meant to serve as a notice of entry of judgment, and provides a uniform manner of giving notice of the fact of entry. (4 C.A.4th 1124.)

20th Century Ins. Co. v. Superior Court (1994) 28 C.A.4th 666, 33 C.R.2d 674, interpreted nearly identical language in former C.R.C., Rule 122(a) (now C.R.C., Rule 8.751(a)), which provides for a 30-day period (instead of a 60-day period) for filing a notice of appeal. The municipal court denied an insurance company's motion to intervene. Five days later, on March 23, the clerk mailed a "Clerk's Notice of Ruling." In the notice the clerk enclosed a copy of the minute order, which was not file-stamped. The insurance company filed a notice of appeal on April 30, but the appeal was dismissed in accordance with a local policy that the time to file a notice of appeal runs from the date that the clerk mails a notice of *ruling*. The insurance company then sought mandamus. *Held*, granted; the policy conflicted with the rule.

(a) The rule is explicit and unambiguous. The 30-day period begins to run when the clerk mails either a document entitled "notice of entry" of judgment or appealable order or a file-stamped copy of the judgment or order. Here, the document mailed by the clerk was captioned "notice of ruling," not "notice of entry." Hence, on its face it failed to satisfy the specific requirement of the first alternative provision. And although the clerk enclosed a copy of the minute order, it bore no file stamp, i.e., it failed to satisfy the alternative manner of satisfying the first alternative provision. (28 C.A.4th 671.)

(b) "It might seem that the difference between a 'notice of ruling' and a 'notice of entry' is hypertechnical. In another context it might be. ... Since the time within which an appeal must be filed is jurisdictional, rules that measure that time must stand by themselves without embroidery. The Judicial Council has promulgated a rule to guide counsel and courts: if the clerk sends out a document styled 'notice of entry' of judgment or an appealable order, or sends out a date-stamped copy of the judgment or order, the 30-day period ... starts to run. Otherwise it does not." (28 C.A.4th 672, citing the text.) (See *Filipescu v. California Housing Finance Agency* (1995) 41 C.A.4th 738, 740, 48 C.R.2d 736 [service, on plaintiff's counsel by mail, of file-stamped copy of judgment, which stated time that judgment had been filed, commenced running of 60-day period, even though stamped copy did not contain date of entry of judgment].)

Generally, a statement or memorandum of decision does not trigger the running of the 60-day period, because courts typically embody their final rulings not in statements of decision but in orders or judgments. However, reviewing courts have discretion to treat statements of decision as appealable when they must, as when a statement of decision is signed and filed and does, in fact, constitute the court's final decision on the merits. (*Alan v. American Honda Motor Co.* (2007) 40 C.4th 894, 901, 905, 55 C.R.3d 534, 152 P.3d 1109 [two documents mailed by court clerk and consisting of statement of decision and minute order that was not file-stamped could not be viewed as requisite single document that complied with rule triggering 60-day period for filing notice of appeal, because minute order did not purport to incorporate statement of decision].)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.104(a) was amended in 2009 to refer to service by the clerk, rather than mailing.

C.R.C., Rule 8.751(a) was repealed in 2008. The provision discussed in the text is now in C.R.C., Rule 8.822(a)(2).



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bb. As Equivalent to Notice of Entry.

9 *Witkin Cal. Proc. Appeal* § 579

[§ 579] As Equivalent to Notice of Entry.

In *Hughes v. Pomona* (1998) 63 C.A.4th 772, 74 C.R.2d 344, a mandamus proceeding, the court, after taking the matter under advisement, denied the petition. The clerk then mailed a file-stamped copy of the judgment, and plaintiff filed a notice of appeal 63 days later. Normally, the notice of appeal would clearly have been beyond the 60-day period established by former C.R.C., Rule 2(a) (now C.R.C., Rule 8.104(a)). However, plaintiff argued that a file-stamped copy of the judgment was not sufficient to activate the 60-day period, because the case had been taken under advisement, and former C.R.C., Rule 309 (now C.R.C., Rule 3.1109) was applicable (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §45). Plaintiff argued that, under the rule, notification by the clerk did not commence the 60-day period unless the clerk had been ordered to mail a formal notice of entry of judgment under *C.C.P.* 664.5, not a mere file-stamped copy, a condition that was not met here. *Held*, the file-stamped copy was adequate, and the notice of appeal was late.

(a) In establishing the 60-day period, former C.R.C., Rule 2(a) makes no exception for matters taken under submission, and makes no reference to former C.R.C., Rule 309. (63 C.A.4th 774.)

(b) Former C.R.C., Rule 309 was intended to require that the clerk notify the parties of the court's ruling when the matter is taken under submission. However, its statement that the clerk's notification "shall constitute service of notice only if the clerk is required to give notice" under *C.C.P.* 664.5 in no way affects the provision in former C.R.C., Rule 2(a) that the clerk's mailing of a file-stamped copy of the judgment commences the 60-day period. While the distinction between a file-stamped copy and a formal notice of entry of judgment, and the determination whether the clerk was required to give notice under *C.C.P.* 664.5, remain significant issues under other circumstances, they make no difference under the circumstances of the present case. (63 C.A.4th 776.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.104(a) was amended in 2009 to refer to service by the clerk, rather than mailing.



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3. Erroneous or Inadequate Notice.

9 *Witkin Cal. Proc. Appeal* § 580

[§ 580] Erroneous or Inadequate Notice.

In *Delmonico v. Laidlaw Waste Systems* (1992) 5 C.A.4th 81, 6 C.R.2d 599, the judgment was filed on July 13 and entered on July 20. However, the notice of entry of judgment, which was served on appellant's counsel on July 23, incorrectly stated that judgment was entered on July 13. Attached to the notice was an accurate copy of the judgment showing July 13 as the filing date, but not reflecting the date of entry. Appellant's notice of appeal was not filed within 60 days after July 23. *Held*, appeal dismissed; the erroneous notice of entry was sufficient to trigger the 60-day period.

(a) Former C.R.C., Rule 2(a)(2) (now C.R.C., Rule 8.104(a)(2)) clearly states that the 60-day appeal period runs from the date the notice of entry of judgment is served. It does not require that the notice reflect the date on which the judgment was entered. Hence, provided the judgment was entered before service of the notice of entry, as was the situation here, the date on which the judgment was actually entered is irrelevant. (5 C.A.4th 85.)

(b) Even though the notice here incorrectly stated the date on which judgment was entered, the information contained in that notice satisfied the requirement that appellant be told that the judgment had been entered. It is the notice itself that triggers the appeal period, not the date of entry. Hence, there is no rational way that the inaccuracy could have misled appellant. "In light of the language and purpose of the rule, the date on which the judgment is entered is surplusage when notice is given by using the document entitled 'notice of entry of judgment.' " (5 C.A.4th 86.)

(c) This holding does not necessarily reflect disagreement with the statement in *Tri-County Elevator Co. v. Superior Court* (1982) 135 C.A.3d 271, 185 C.R. 208, *supra*, §578, that the separate document must state the date of entry. *Tri-County* was decided before the rule was amended to provide that a file-stamped copy of the judgment may be used in place of the document entitled "notice of entry." Hence, when *Tri-County* was decided, it is arguable that it was necessary to interpret the rule as requiring that the date of entry be shown on the notice. But in view of the change, it is no longer necessary to consider whether *Tri-County's* statement is still correct. (5 C.A.4th 85.)

However, notice of entry that is totally inadequate does not start the time running. In *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 C.A.2d 172, 63 C.R. 78, judgment was entered against three parties, and the

clerk mailed notice to all. But one of the notices was misaddressed, and the attorney for that party filed a declaration stating that he never received it. Thus, there was no compliance with *C.C.P.* 664.5, and the appellants were entitled to wait until service of notice by a party (see *supra*, §§575, 576) or until 180 days after actual entry (see *infra*, §581). (255 *C.A.2d* 173.) (See *In re Marriage of Eben-King & King* (2000) 80 *C.A.4th* 92, 114, 95 *C.R.2d* 113 [typographical error in notice of entry of judgment mistakenly showing date of entry as October 11, 1997, rather than August 11, 1997, did not excuse appellant's lack of timeliness in filing notice of appeal, where it was clear that appellant had actual notice of entry of judgment; citing *Delmonico*]; *Erickson v. R.E.M. Concepts* (2005) 126 *C.A.4th* 1073, 1080, 25 *C.R.3d* 39 [electronic service of minute order was not sufficient to trigger commencement of 60-day period; copies of electronic documents entitled "Filing & Service Details" did not include copies of document entitled "Notice of Entry" of minute order or "filed-stamped copy" of that order]; *Sunset Millennium Associates, LLC v. Le Songe, LLC* (2006) 138 *C.A.4th* 256, 257, 41 *C.R.3d* 273 [minute order granting special motion to strike, which contained required "notice of entry of judgment" on page 13 of 14 pages, did not trigger 60-day period for plaintiff to appeal, because document was not entitled "notice of entry" of judgment, as required; distinguishing *Marriage of Eben-King*, because it involved technical defect, rather than failure to properly entitle crucial document].)

SUPPLEMENT: [This section is current through the latest supplement]

See *InSyst, Ltd. v. Applied Materials* (2009) 170 *C.A.4th* 1129, 1140, 88 *C.R.3d* 808 [judgment was not served where attorney was notified by electronic service provider that judgment had been electronically filed and was given instructions for accessing document, absent evidence that judgment was electronically transmitted to attorney]; *Bi-Coastal Payroll Services v. California Ins. Guarantee Assn.* (2009) 174 *C.A.4th* 579, 582, 94 *C.R.3d* 562 [service of minute order entitled "Court Order Re: Stipulated Judgment" rather than "Notice of Entry" of judgment or order, which was not file stamped, did not start running of 60-day period].



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3. One Hundred Eighty Days After Entry of Judgment.

9 *Witkin Cal. Proc. Appeal* § 581

[§ 581] One Hundred Eighty Days After Entry of Judgment.

The rules contemplate that prompt notice of entry of judgment will normally be given, thus starting the 60-day period (or 30 days in limited civil case appeals). (See *supra*, §575.) But in the rare event that proper notice is not given, an overall limit is placed on the time to appeal, starting from the entry of judgment:

(1) In unlimited civil case appeals, "180 days after entry of judgment." (C.R.C., Rule 8.104(a)(3); see *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 C.A.3d 428, 433, 202 C.R. 792; *In re Marriage of Kepley* (1987) 193 C.A.3d 946, 949, 238 C.R. 691; *Carpiaux v. Peralta Community College Dist.* (1989) 215 C.A.3d 1220, 1223, 264 C.R. 208.)

(2) In limited civil case appeals, "90 days after the date of entry of the judgment." (C.R.C., Rule 8.751(a)(3).)

Both rules, referring to the alternative periods, i.e., 60 (or 30) days after notice of entry or 180 (or 90) days after entry of judgment, state that the notice of appeal must be filed on or before the earliest of the specified dates. (C.R.C., Rules 8.104(a), 8.751(a).)

In *Laraway v. Pasadena Unified School Dist.* (2002) 98 C.A.4th 579, 120 C.R.2d 213, plaintiff, seeking public records from defendant school district, filed a petition for mandamus and prohibition, as well as for injunctive and declaratory relief. On August 23, 2000, the trial judge entered an order resolving all issues between the parties. Within the maximum 180-day period, no notice of appeal was filed from this order. However, on January 29, 2001, the parties caused the trial judge to enter a judgment to the same effect as the earlier order, and both parties filed timely appeals from this judgment. *Held*, appeal dismissed. The order of August 23, 2000, was appealable. Once an appealable order is filed, the time to appeal begins to run, and that time cannot be restarted or extended by filing a subsequent judgment or appealable order making the same decision. (98 C.A.4th 582.) (See *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co.* (2000) 81 C.A.4th 356, 371, 97 C.R.2d 44 [deadline for filing notice of appeal was 180 days after entry of judgment, not 60 days after clerk mailed file-stamped copy of judgment; although it appeared more likely than not that clerk mailed file-stamped copy of judgment on date of entry of judgment, there was no evidence in record that this was so].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limited civil case*: C.R.C., Rule 8.751(a) was repealed in 2008. The provision quoted in the text is now in C.R.C., Rule 8.822(a)(3) without substantive change.



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4. Special Statutes.

9 *Witkin Cal. Proc. Appeal* § 582

[§ 582] Special Statutes.

C.R.C., Rules 8.104(a) and 8.751(a) refer to the very few special statutes that prescribe a different time and to C.R.C., Rules 8.108 and 8.752, respectively, which provide for extending the time to file a notice of appeal (see *infra*, §586 et seq.). (See 17 *So. Cal. L. Rev.* 85.) The following statutes are illustrative of those that provide special time limits:

(1) *C.C.P.* 329.5 (judgment in proceeding contesting validity of assessment against real property for public improvements: 30 days from entry of judgment). (See *Bliler v. San Diego* (1976) 61 *C.A.3d* 530, 533, 535, 132 *C.R.* 185.)

(2) *C.C.P.* 870 (judgment in validating proceeding by a public agency under *C.C.P.* 860 et seq.: 30 days after notice of entry of judgment or, if there is no answering party, 30 days after entry of judgment). (See *Planning & Conservation League v. Department of Water Resources* (1998) 17 *C.4th* 264, 268, 70 *C.R.2d* 635, 949 *P.2d* 488 [although *C.C.P.* 870, by its language, deals only with appeals from "judgments," it includes appeals from appealable orders as well]; *California Commerce Casino v. Schwarzenegger* (2007) 146 *C.A.4th* 1406, 1418, 53 *C.R.3d* 626 [in order to determine timeliness of appeal, it was first necessary to determine whether underlying action was governed by statutes pertaining to validation proceedings; thus, although appeal was dismissed as untimely under *C.C.P.* 870, appellants nevertheless received plenary review of merits of their contentions].)

(3) *C.C.P.* 921 ("An appeal by a party who has levied an attachment shall not continue in force the attachment," unless the appeal is perfected within 5 days "after written notice of entry of the order appealed from").

(4) *Elec.C.* 16702 (judgment annulling or setting aside election: 10 days from entry of judgment). (See *Sheets v. Cleveland* (1942) 51 *C.A.2d* 148, 149, 124 *P.2d* 200.)

(5) *Govt.C.* 53341 (judgment in action attacking levy, or increase, of special tax under Mello-Roos Community Facilities Act of 1982: 30 days from entry of judgment). (See *New Davidson Brick Co. v. Riverside* (1990) 217 *C.A.3d* 1146, 1150, 266 *C.R.* 432.)

(6) *Sts. & H.C.* 10400 (judgment in proceeding contesting validity of assessment: 30 days from entry of judgment).

(See *Vogel v. Millbrae* (1959) 167 C.A.2d 403, 404, 334 P.2d 620.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.751(a) was repealed in 2008. The "special statutes" provision is now in C.R.C., Rule 8.822(a), which refers to C.R.C., Rule 8.823.



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5. Where Judgment Is Modified.

9 *Witkin Cal. Proc. Appeal* § 583

[§ 583] Where Judgment Is Modified.

(1) *Nature of Modification.* The effect of an amended judgment generally on the time for filing notice of appeal "depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error." When the trial judge makes a substantial modification of the judgment by a valid motion under *C.C.P.* 662, the amended judgment supersedes the original and becomes the appealable judgment. Therefore, a new appeal period starts to run from notice of entry or entry of the amended judgment. A correction in the name of the losing party is a substantial modification in the judgment. (*CC-Calif. Plaza Associates v. Paller & Goldstein* (1996) 51 *C.A.4th* 1042, 1048, 59 *C.R.2d* 382 [correction to reflect that losing party in indemnity action was owner as assignee of contractor's rights against subcontractor]; see *Neff v. Ernst* (1957) 48 *C.2d* 628, 634, 311 *P.2d* 849; *Stone v. Regents of Univ. of Calif.* (1999) 77 *C.A.4th* 736, 743, 92 *C.R.2d* 94 [where writ of mandamus directing regents to provide defense to professor was modified to require additional payment of legal expenses, change materially affected regents' rights and extended time to file notice of appeal]; *supra*, §98.)

(2) *Unauthorized Judgment.* If, however, the purported modification is unauthorized and void, the original judgment is the only appealable judgment, and the time runs from notice of its entry or from the entry itself. (See *Kamper v. Mark Hopkins* (1947) 78 *C.A.2d* 885, 888, 178 *P.2d* 767; 35 *Cal. L. Rev.* 479.)

(3) *Addition of Costs, Fees, and Interest.* Where the judgment is modified merely to add costs, attorneys' fees, and interest, the original judgment is not substantially changed and the time to appeal it is not affected. (*Torres v. San Diego* (2007) 154 *C.A.4th* 214, 221, 64 *C.R.3d* 495 [resolution obligating city to reimburse employees for expenses incurred in lawsuits against them arising from performance of their duties was not limited to fees and costs incurred in city's underlying suits against employees, but also entitled employees to recover fees and costs in suit to enforce city's obligation to reimburse; thus, time to appeal summary judgment awarding employees expenses was not extended by order awarding employees fees and costs in action to enforce city's obligation].)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Where Motion Is Renewed.

9 *Witkin Cal. Proc. Appeal* § 584

[§ 584] Where Motion Is Renewed.

Something akin to an extension of time was approved in *Majors v. Merced* (1962) 207 C.A.2d 427, 24 C.R. 610. Appellant moved for leave to substitute as administrator of the deceased plaintiff. After denial of the motion, she renewed it and appealed from the second order of denial. *Held*, although the time for appeal from the first order had expired, the notice was good, for (a) the renewed motion was with the implied consent of the court, and (b) the first ruling, on an insufficient showing, was not a determination on the merits. (207 C.A.2d 435.)

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7. Where Judgment Is Reinstated After Appeal.

9 *Witkin Cal. Proc. Appeal* § 585

[§ 585] Where Judgment Is Reinstated After Appeal.

In *Lippert v. AVCO Community Developers* (1976) 60 C.A.3d 775, 131 C.R. 730, plaintiffs brought a tort action against defendants and received a verdict and judgment for damages. Defendants moved for judgment notwithstanding the verdict and for a new trial in the alternative, and the judge granted both motions and entered a new judgment in favor of defendants. Plaintiffs appealed, and the appellate court reversed, reinstating judgment on the verdict. Defendants then filed a notice of appeal from that judgment. Plaintiffs contended that, when they filed their appeal from the judgment notwithstanding the verdict and for a new trial, defendants should have taken a precautionary cross-appeal from the original judgment, and that the time had run on their right to appeal from the reinstated judgment. *Held*, the appeal was timely.

(a) The cross-appeal rule, former C.R.C., Rule 3(c) (now C.R.C., Rule 8.108(f); *infra*, §592), does not provide for the situation where an appeal is taken from a judgment notwithstanding the verdict. (60 C.A.3d 778.) Nor does the appeal from the alternative grant of a new trial support a cross-appeal. (60 C.A.3d 779.)

(b) For some purposes, such as calculation of postjudgment interest, a reinstated judgment is effective from the date of its original entry (see *Espinoza v. Rossini* (1967) 257 C.A.2d 567, 569, 65 C.R. 110, 7 Cal. Proc. (5th), *Trial*, §442). This rule, however, will not be applied where injustice will result, and in the present case, the governing principle is that a party's right to appeal cannot be cut off by entry of a judgment *nunc pro tunc* (see *Phillips v. Phillips* (1953) 41 C.2d 869, 875, 264 P.2d 926, 7 Cal. Proc. (5th), *Judgment*, §61). "As defendants had no effective right of appeal until the judgment notwithstanding the verdict in their favor was reversed by this court, *nunc pro tunc* reinstatement of the judgment on the verdict would result in a complete denial of defendants' right to appeal from that judgment. ... We conclude that where a judgment notwithstanding the verdict is reversed on appeal, the reinstated judgment on the verdict is a new judgment for purposes of appeal and the time for filing notice of appeal from the reinstated judgment commences to run upon the issuance of remittitur from the appellate court." (60 C.A.3d 779.)

(c) The choice of procedure by defendants--to seek relief in the trial court instead of to take an immediate appeal--was "understandable and commendable." Trial court remedies are speedier and cheaper. And if their motions had been denied, defendants could still have filed a timely notice of appeal under former C.R.C., Rule 3(2) (now C.R.C., Rule 8.108(a); *infra*, §587). (60 C.A.3d 777.) (See *Matera v. McLeod* (2006) 145 C.A.4th 44, 57, 51 C.R.3d 331

[60-day period for sublessees to appeal default judgment in favor of sublessors commenced when default judgment was reinstated upon trial court's entry of order denying, on reconsideration, sublessees' motion for relief].)

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D. Extension of Time and Cross-Appeal.

1. In General.

9 Witkin Cal. Proc. Appeal § 586

[§ 586] In General.

(1) *Extension Provisions.* The normal periods within which a notice of appeal must be filed (*supra*, §575 et seq.) are subject to the following extension provisions:

(a) For good cause, or on an exceptional showing of good cause (when required by the Rules of Court), the Chief Justice or the presiding justice may extend the time to do any act required or permitted under the rules. (C.R.C., Rule 8.60(b); on extensions in limited civil case appeals, see C.R.C., Rules 8.767(c), 8.766.)

(b) Time is extended for long periods by the pendency of a motion for new trial (*infra*, §587 et seq.) or a motion to vacate (*infra*, §§595, 596).

(c) Additional time is allowed to file a cross-appeal after granting of a motion for new trial (*infra*, §592 et seq.) or a motion to vacate (*infra*, §597) or after another party files a notice of appeal (*infra*, §§604, 605).

(d) The time to appeal from an order denying a motion for judgment notwithstanding the verdict is extended when an appeal is taken from an order granting a new trial. (See *infra*, §599.)

(e) Additional time to appeal is allowed when there is a motion to reconsider. (See *infra*, §§600, 603.)

(2) *Date on Which Extension Begins.* An order or notice mailed by the clerk under C.R.C., Rule 8.108 must show the date of mailing, and an order or notice served by a party under that rule must be accompanied by proof of service. (C.R.C., Rule 8.108(g).) These requirements are intended to establish the date when an extension of the time to appeal begins to run. The requirement that an order or notice mailed by the clerk show the date on which the document is mailed is analogous to the clerk's "certificate of mailing" currently in use in many superior courts. (Advisory Committee Comment to C.R.C., Rule 8.108.)

(3) *What Does Not Extend Time.* The time in which to file a notice of appeal is not extended by the following provisions:

(a) *C.C.P. 1054*, the general statute on extension of time for procedural steps (see 4 *Cal. Proc.* (5th), *Pleading*, §10

et seq.) and the mandatory extension of time to legislators (see 4 *Cal. Proc.* (5th), *Pleading*, §11; 7 *Cal. Proc.* (5th), *Trial*, §26 et seq.). (*C.C.P.* 1054.1.)

(b) *C.C.P.* 1013, on service complete at time of deposit in the mail. (*Nu-Way Associates v. Keefe* (1971) 15 C.A.3d 926, 928, 93 C.R. 614.)

(c) *Ev.C.* 641, on presumption of receipt of a mailed letter in the ordinary case of mail. (*Nu-Way Associates v. Keefe, supra.*)

West's Key Number Digest, Appeal and Error 352 et seq., 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Extension Provisions.*

(a) C.R.C., Rules 8.766 and 8.767 were repealed in 2008. Extension in limited civil cases is now covered in C.R.C., Rule 8.806 [applications for extension] and C.R.C., Rule 8.810 [extending time]. (On shortening time, see C.R.C., Rule 8.813.)



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a. Extension Where Motion Is Denied.

1. Purpose of Rule.

9 Witkin Cal. Proc. Appeal § 587

[§ 587] Purpose of Rule.

When the right to appeal from an order denying a new trial was abolished in 1915, the order became reviewable only on appeal from the judgment. If the former 60-day period for appeal ran, without extension, immediately on entry of judgment, it could expire before determination of the motion for a new trial, thus depriving the aggrieved party of a review of the order of denial. On the other hand, because the normal time to move for a new trial does not start running until notice of entry of judgment (*C.C.P.* 659), undesirable delay in appeals from judgments might result from an unqualified extension.

In its original form, former C.R.C., Rule 3(a) (now C.R.C., Rule 8.108(b)) adopted the existing statutory and case law with some clarifying changes, by providing for a limited extension: Time to file a notice of appeal from the judgment was extended for all parties until 30 days after entry of the order denying the motion or its denial by operation of law. (See *35 Cal. L. Rev.* 481; *17 So. Cal. L. Rev.* 92.) The rule was subsequently revised to place an overall time limit (180 days) dating from the entry of judgment. (For provisions of current rules, see *infra*, §589.)

The basic 60-day period of C.R.C., Rule 8.104(a) (*supra*, §575) is not affected by an early motion for new trial; i.e., C.R.C., Rule 8.108(b) operates only to extend the time to appeal, not to cut it down. Thus, where the motion was made and denied before entry of judgment, this did not start a 30-day period for appeal. (*Brice v. Department of Alcoholic Beverage Control* (1957) *153 C.A.2d* 315, 320, *314 P.2d* 807 [decided under former rule; citing draftsman's comments; see C.R.C., Rule 8.108(a); *17 So. Cal. L. Rev.* 94].)

West's Key Number Digest, Appeal and Error 345.1, 352, 425, 428(2)

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2. Valid Notice of Motion.

9 Witkin Cal. Proc. Appeal § 588

[§ 588] Valid Notice of Motion.

C.R.C., Rules 8.108(b) and 8.752(a), stating former case law, refer to "a valid notice of intention to move for a new trial." The purpose and effect of this provision are to restrict the extension to effective new trial proceedings. If the notice of intention is made in a proceeding in which the motion does not lie, or it is premature or late, it does not give the trial judge jurisdiction to consider it and likewise does not extend the time for appeal. (See *Reeves v. Reeves* (1949) 34 C.2d 355, 359, 209 P.2d 937 [1 day late]; *Lynch v. Watson* (1945) 69 C.A.2d 51, 52, 158 P.2d 250 [motion did not lie]; *Middle Fork Gold Mining Co. v. Green* (1947) 79 C.A.2d 350, 351, 179 P.2d 363 [notice 11 days after notice of entry of judgment, 1 day late]; *Estate of Raahauge* (1949) 91 C.A.2d 615, 617, 205 P.2d 1122 [same]; *King v. Wilson* (1950) 101 C.A.2d 242, 243, 225 P.2d 270 [late]; *Bryant v. Los Angeles Transit Lines* (1953) 116 C.A.2d 473, 474, 253 P.2d 731 [premature]; *Kientz v. Harris* (1953) 117 C.A.2d 787, 789, 257 P.2d 41 [late]; *Estate of Welch* (1956) 146 C.A.2d 534, 538, 304 P.2d 57 [motion did not lie]; *Radford v. Crown City Lumber & Mill Co.* (1958) 165 C.A.2d 18, 20, 331 P.2d 438, citing the text [late]; *In re Marriage of Patscheck* (1986) 180 C.A.3d 800, 802, 225 C.R. 787, citing the text [same]; *Ramirez v. Moran* (1988) 201 C.A.3d 431, 437, 247 C.R. 117 [same].)

However, the rule that a motion for new trial lies after determination of an issue of law has rendered some of the cases on this point obsolete. (See *Carney v. Simmonds* (1957) 49 C.2d 84, 88, 315 P.2d 305, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §23 [disapproving such decisions as *Lynch*]; *In re Marriage of Beilock* (1978) 81 C.A.3d 713, 719, 146 C.R. 675, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §23 [discussing *Carney*].)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.752(a) was repealed in 2008. Extending the time to file a notice of appeal in limited civil cases is now covered in C.R.C., Rule 8.823, which contains the language quoted in the text.



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3. Period of Extension.

9 Witkin Cal. Proc. Appeal § 589

[§ 589] Period of Extension.

Under former C.R.C., Rule 3(a), one of the events starting the running of the extension of the time to appeal was the entry of an order denying a new trial, and *Long Beach v. Crocker Nat. Bank* (1986) 179 C.A.3d 1114, 225 C.R. 227, held that *service of the notice of entry* was insufficient for this purpose. (179 C.A.3d 1117.) (See *Wenzoski v. Central Banking System* (1987) 43 C.3d 539, 542, 237 C.R. 167, 736 P.2d 753 [notice of appeal filed more than 30 days after entry of minute order denying first motion for new trial but less than 30 days after entry of order denying second motion for new trial was untimely].) However, the rule was amended in 2001 to emphasize receipt of notice of the order of denial. (See *ECC Const. v. Oak Park Calabasas Homeowners Assn.* (2004) 118 C.A.4th 1031, 1035, 13 C.R.3d 580 [automatic stay caused by filing bankruptcy petition (11 U.S.C., §108) extended period for ruling on new trial motion, which in turn extended 30-day extension under rule].)

If any party serves and files a valid notice of intention to move for a new trial and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.108(b)(1)(A).)

(2) 30 days after denial of the motion by operation of law. (C.R.C., Rule 8.108(b)(1)(B).)

(3) 180 days after entry of judgment. (C.R.C., Rule 8.108(b)(1)(C).)

If any party serves an acceptance of a conditionally ordered additur or remittitur of damages pursuant to a trial court finding of excessive or inadequate damages, the time to appeal is extended until 30 days after the date the party serves the acceptance. (C.R.C., Rule 8.108(b)(2).)

C.R.C., Rule 8.752(a), applicable to limited civil case appeals, refers to "entry" of the order or denial by operation of law and has shorter time periods: 15 days and 90 days.

SUPPLEMENT: [This section is current through the latest supplement]

Limited civil case: C.R.C., Rule 8.752(a) was repealed in 2008. The time periods are now stated in C.R.C., Rule 8.823.



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4. Forms of Extension.

9 Witkin Cal. Proc. Appeal § 590

[§ 590] Forms of Extension.

The extension following denial of a motion for new trial may take one of three forms:

(1) *Notice of order denying motion.* The superior court clerk must mail, or a party must serve, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.108(a)(1).) This provision is intended to make the rule consistent with the primary rule on the time to appeal from the judgment. (Advisory Committee Comment to C.R.C., Rule 8.108.)

C.R.C., Rule 8.57(a)(4) provides that, when a motion to dismiss an appeal is made before the record is filed in the reviewing court, the clerk's certificate, a declaration, or both must state "[t]he factual basis of any extension of the time to appeal" under C.R.C., Rule 8.108. But delayed receipt of written notice of the disposition of a new trial motion does not lengthen the 30-day extension period. (*Chase v. Glynn* (1973) 35 C.A.3d 29, 31, 110 C.R. 566.)

(2) *Denial of motion by operation of law.* The jurisdictional period for ruling on a motion for new trial expires 60 days after service of notice of entry of judgment, and at that time the motion, if not acted on, is denied by operation of law. (See *Mellin v. Trousdell* (1949) 33 C.2d 858, 859, 205 P.2d 1036; *Millsap v. Hooper* (1949) 34 C.2d 192, 193, 208 P.2d 982; *Freiberg v. Mission Viejo* (1995) 33 C.A.4th 1484, 1486, 39 C.R.2d 802 [appeal was untimely, where new trial motion was deemed denied by operation of law over 30 days before notice of appeal was filed]; 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §72 et seq.)

(3) *Overall 180-day period.* The overall limit of 180 days after entry of judgment, prescribed by C.R.C., Rule 8.104(a)(3) (*supra*, §581), is repeated in C.R.C., Rule 8.108(a)(3). The result is this: Where no notice of entry of judgment is served, a party may move for new trial within 180 days after entry of judgment. (C.C.P. 659.) But a motion made just before the end of this period will not operate to extend the time to appeal. (See *San Diego Gas & Elec. Co. v. 3250 Corp.* (1988) 205 C.A.3d 1075, 1087, 252 C.R. 853.)

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5. Entry of Order in Minutes.

9 *Witkin Cal. Proc. Appeal* § 591

[§ 591] Entry of Order in Minutes.

The entry date of an appealable order entered in the minutes is the date that it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under C.R.C., Rule 3.1312 or a similar local rule is not an order prepared by direction of a minute order. (C.R.C., Rule 8.104(d)(2).) (See *Strathvale Holdings v. E.B.H.* (2005) 126 C.A.4th 1241, 1248, 25 C.R.3d 372 [entry date of order quashing service of summons was date it was entered in permanent minutes for purposes of determining timeliness of notice of appeal; no minute order directed preparation of written order].) There is no similar provision for the date of entry of a nonappealable order, such as an order denying a motion for new trial, but the same rule has been declared by judicial decision.

In *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 125 C.R. 757, 542 P.2d 1349, plaintiff received judgment against defendants for damages for breach of contract. The judgment was entered December 19, 1974, and written notice of entry was served by the clerk on that day. On January 2, 1975, defendants moved for a new trial and to vacate the judgment; both motions were denied on February 4, 1975, and the orders of denial were entered in the permanent minutes on that day. Plaintiff's counsel prepared a formal written order that was signed by the judge on February 6, 1975, and a copy was served on that day. Defendants filed notice of appeal March 7, 1975, the 31st day following entry of the order denying their motions. *Held*, appeal dismissed. (a) As to the motion to vacate, which is appealable, former C.R.C., Rule 2(b)(2) (now C.R.C., Rule 8.104(d)(2)) applies. (b) As to the nonappealable order denying a new trial, the date of entry in the permanent minutes controls under the rule recognized in *Slawinski v. Mocettini* (1965) 63 C.2d 70, 45 C.R. 15, 403 P.2d 143, *infra*, §616. In that case, the court held that where there is a conflict between the permanent minutes and the formal order, it should be resolved in favor of granting the right to appeal. Here, there was no conflict; the minute entry was clearly February 4 and the formal order so indicated; hence, the basis for the *Slawinski* holding was absent and the appeal could not be sustained. (15 C.3d 665.)

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b. Cross-Appeal Where Motion Is Granted.

1. Nature of Rule.

9 Witkin Cal. Proc. Appeal § 592

[§ 592] Nature of Rule.

If the losing party's motion for a new trial is granted, he or she needs no other review unless the adverse party appeals from the order granting a new trial and has it reversed. At that stage, the losing party would like to appeal from the judgment, but it is too late. To avoid this predicament, C.R.C., Rules 8.108(f) and 8.752(c) allow the losing party to take a precautionary cross-appeal from the judgment along with the adverse party's appeal from the order granting a new trial. (See *People v. McCullough* (1950) 100 C.A.2d 101, 103, 223 P.2d 37; *Upper v. Poteet* (1953) 116 C.A.2d 5, 7, 253 P.2d 486; 35 Cal. L. Rev. 482; 17 So. Cal. L. Rev. 94.)

"If an appellant timely appeals from an order granting a motion for new trial, ... the time for any other party to appeal from the original judgment ... is extended until 20 days after the clerk mails notification of the first appeal." (C.R.C., Rule 8.108(f)(2).) C.R.C., Rule 8.752(c) is similar except that the period is 10 days. (On clerk's notification, see C.R.C., Rule 8.100(d) and (e), *supra*, §§557, 559; on cross-appeal keeping attachment in force, see 6 Cal. Proc. (5th), *Provisional Remedies*, §216.)

Unless a cross-appeal is taken, the judgment is automatically reinstated on reversal of the new trial order. (*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C.3d 689, 696, footnote 7, 106 C.R. 1, 505 P.2d 193, citing the text.)

West's Key Number Digest, Appeal and Error 345.1, 352, 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.752(c) was repealed in 2008. The 10-day period for cross-appeals in limited civil cases is now stated in C.R.C., Rule 8.823(f)(2).



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b. Cross-Appeal Where Motion Is Granted.

2. Procedure in Appellate Court.

9 *Witkin Cal. Proc. Appeal* § 593

[§ 593] Procedure in Appellate Court.

The reviewing court will first consider the main appeal from the order granting a new trial and will decide the cross-appeal from the judgment only if it reverses the order. (See *Mercer v. Perez* (1968) 68 C.2d 104, 124, 65 C.R. 315, 436 P.2d 315, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §79.) But if, as is usual, the order granting a new trial is affirmed, the effect is that there is no longer a final judgment. Hence, the merits of the cross-appeal will not be considered, and the appropriate order is a dismissal of that appeal. (See *Brignoli v. Seaboard Trans. Co.* (1947) 29 C.2d 782, 792, 178 P.2d 445; *People v. McCullough* (1950) 100 C.A.2d 101, 103, 111, 223 P.2d 37; *Freeman v. La Morte* (1957) 148 C.A.2d 670, 675, 307 P.2d 734 [dismissed with costs to plaintiff-appellant on both appeals]; *Kubowitz v. Canon* (1961) 194 C.A.2d 378, 385, 14 C.R. 824, citing the text; *Alhambra Consol. Mines v. Alhambra Shumway Mines* (1966) 239 C.A.2d 590, 600, 49 C.R. 38, citing the text; 35 Cal. L. Rev. 483.)

Sometimes, however, it may be necessary to depart from the normal procedure and consider the cross-appeal from the judgment first; e.g., where the cross-appellant shows that the allegations and proof of the plaintiff are insufficient to establish liability. In that case, affirmance of the order granting a new trial will simply continue wasteful litigation, while reversal of the judgment will terminate it on the merits. (See *Milton v. Hudson Sales Corp.* (1957) 152 C.A.2d 418, 441, 313 P.2d 936 [citing the text on normal procedure, but departing for the reason stated]; *Adams v. Fremont* (1998) 68 C.A.4th 243, 262, footnote 15, 80 C.R.2d 196 [following *Milton*].)

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3. Valid New Trial Order.

9 Witkin Cal. Proc. Appeal § 594

[§ 594] Valid New Trial Order.

In *Garcia v. Lucido* (1961) 191 C.A.2d 303, 12 C.R. 601, plaintiff sued for personal injuries, and judgment was for defendant. Plaintiff moved for a new trial on a fatally defective notice of motion, the motion was granted, and defendant appealed from the order (this appeal was good). Plaintiff then cross-appealed from the judgment. The date that this cross-appeal was filed was beyond the time allowed by former C.R.C., Rule 2 (now C.R.C., Rule 8.104), but was within the 20-day extension allowed by former C.R.C., Rule 3 (now C.R.C., Rule 8.108). *Held*, the cross-appeal was too late; because the defective notice of motion was not a "valid notice of intention to move for a new trial" under the extension provision, it did not extend the time. (191 C.A.2d 307.)

Garcia is still good law on the point that a defective notice does not extend time, but the defect involved is no longer fatal. (See 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §49.)

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D. Extension of Time and Cross-Appeal.

3. Motion To Vacate.

a. Extension Where Motion Is Denied.

1. Nature of Motion.

9 Witkin Cal. Proc. Appeal § 595

[§ 595] Nature of Motion.

The losing party may, before appealing, seek relief in the trial court not only by motion for new trial but by various kinds of motions to vacate. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§139, 144, 206.) The general policy favoring applications for relief in the trial court suggests that the same protection should be given to the party who moves to vacate as is given to the party who moves for a new trial (*supra*, §587 et seq.). Accordingly, C.R.C., Rules 8.108(c) and 8.752(b) provide for extension in these situations. (See *Duncan v. Sunset Agricultural Minerals* (1969) 273 C.A.2d 489, 491, 78 C.R. 339 [C.C.P. 473 motion]; 35 *Cal. L. Rev.* 483; 17 *So. Cal. L. Rev.* 97.)

The time limits are designed to correspond to the maximum periods possible under the new trial procedure (*supra*, §589 et seq.).

If, within the time prescribed by C.R.C., Rule 8.104 to appeal from the judgment, any party serves and files a valid notice of intention to move (or a valid motion) to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.108(c)(1).)

(2) 90 days after the first notice of intention to move (or motion) is filed. (C.R.C., Rule 8.108(c)(2).)

(3) 180 days after entry of judgment. (C.R.C., Rule 8.108(c)(3).)

A number of decisions are of note. (See *In re Marriage of Eben-King & King* (2000) 80 C.A.4th 92, 109, 95 C.R.2d 113 [in dissolution case, motion to vacate judgment, which was timely filed within 6-month period of C.C.P. 473, was nevertheless untimely, under former C.R.C., Rule 3(b) (now C.R.C., Rule 8.108(c)), for purpose of extending time to appeal from underlying judgment of dissolution, because it was not timely filed under that rule]; *English v. IKON Business Solutions* (2001) 94 C.A.4th 130, 135, 114 C.R.2d 93 [time for filing notice of appeal is not extended by filing

motion to vacate judgment, where notice to vacate is itself not timely filed].)

For limited civil case appeals, where the motion is denied or not decided within 75 days after entry of judgment, the period of extension is the lesser of 15 days after entry of order denying the motion to vacate or 90 days after entry of judgment. (C.R.C., Rule 8.752(b).)

Under C.R.C., Rule 8.104(a) (supra, §575), the losing party must file a notice of appeal within 60 days of being served with the notice of entry of judgment. Under C.R.C., Rule 8.108(c), the notice of appeal must be filed within 90 days after filing a notice of intent to move to vacate the judgment. What happens in the unlikely event that the 60-day, but not the 90-day, period is met? In *Maides v. Ralphs Grocery Co.* (2000) 77 C.A.4th 1363, 92 C.R.2d 542, the trial judge granted defendant's summary judgment motion. As allowed by C.C.P. 663a (see 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §141), plaintiff filed a notice of intent to move to vacate before the judgment was entered, so that the summary judgment for defendant was not entered until after the motion to vacate was denied. Plaintiff's notice of appeal was filed within 60 days after the notice of entry of judgment was served, but more than 90 days after her notice of intent to move to vacate was filed. *Held*, the notice of appeal was timely. Former C.R.C., Rule 3(b) (now C.R.C., Rule 8.108(c)) provides that the time periods in former C.R.C., Rule 2(a) (now C.R.C., Rule 8.104(a)) shall be "extended" under enumerated circumstances. Because an extension denotes an additional period of time to meet an obligation, the rule unambiguously operates only to expand the ordinary time within which an appeal must be brought, and this extension cannot be used to truncate the 60-day period for a timely notice of appeal. (77 C.A.4th 1369, citing *Brice v. Department of Alcoholic Beverage Control* (1957) 153 C.A.2d 315, 314 P.2d 807, supra, §587.)

West's Key Number Digest, Appeal and Error 346, 346.1, 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

See *Shapiro v. Clark* (2008) 164 C.A.4th 1128, 1136, 80 C.R.3d 398 [assuming that defendant's motion to set aside default judgment extended time to appeal from judgment until 30 days after service of notice of entry of order on motion, time period for defendant to appeal from default judgment began to run when counsel for plaintiff served notice of entry of order denying motion to set aside default judgment; even as extended, appeal was untimely]; *Carmel, Ltd. v. Tavoussi* (2009) 175 C.A.4th 393, 398, 95 C.R.3d 694 [appeal from judgment filed within 180-day period of C.R.C., Rule 8.104, but not within 30-day period of C.R.C., Rule 8.108, regarding denial of motion to vacate, was timely].

Limited civil case: C.R.C., Rule 8.752(b) was repealed in 2008. Extensions resulting from the denial of motions to vacate are now treated in C.R.C., Rule 8.823(c), which sets forth extensions of 15 days, 45 days, and 90 days. (*New*) *Validity of motion to vacate:* Under C.R.C., Rule 8.108(c), the motion must be "valid." For purposes of extending the time for filing a notice of appeal, a "valid" motion to vacate means a motion based on some recognized grounds for vacation; it cannot be stretched to include any motion, regardless of the basis for it. (See *Payne v. Rader* (2008) 167 C.A.4th 1569, 1574, 85 C.R.3d 174 [motion to vacate judgment of dismissal after trial court sustained demurrer without leave to amend did not extend time to appeal, because motion was not valid (there had been no fact findings or special verdict); in words of C.C.P. 663, there could not have been any "incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts," or any "judgment or decree not consistent with or not supported by the special verdict"].)



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3. Motion To Vacate.

a. Extension Where Motion Is Denied.

2. Motion on Any Ground.

9 *Witkin Cal. Proc. Appeal* § 596

[§ 596] Motion on Any Ground.

C.R.C., Rule 8.108(c) (*supra*, §595) applies to any valid notice of intention to move to vacate a judgment on any ground. (*Estate of Lacy* (1975) 54 C.A.3d 172, 177, 126 C.R. 432 [motion "to set aside submission" and reopen cause, challenging order settling account of testamentary trustees].)

There must, however, be a "valid" motion, i.e., a motion based on some recognized grounds for vacation. (*Lamb v. Holy Cross Hosp.* (1978) 83 C.A.3d 1007, 1010, 148 C.R. 273 [appeal dismissed; motion not based on C.C.P. 473 or 663]; see Advisory Committee Comment to C.R.C., Rule 8.108 [C.R.C., Rule 8.108(c) applies whether motion is statutory under C.C.P. 473 or 663, or based on recognized nonstatutory ground].) (On motion to reconsider, see *infra*, §600 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Motion To Vacate.

b. Cross-Appeal Where Motion Is Granted.

9 Witkin Cal. Proc. Appeal § 597

[§ 597] Cross-Appeal Where Motion Is Granted.

The same reasons for cross-appeal from the judgment after a motion for new trial has been granted (*supra*, §592) are present when a motion to vacate has been granted. Accordingly, the cross-appeal provisions of C.R.C., Rule 8.108(f) (*supra*, §592) also apply to an order granting, within 150 days after entry of judgment, a motion to vacate the judgment. (See *17 So. Cal. L. Rev.* 97; cf. C.R.C., Rule 8.752(c) [appeals in limited civil cases, 75 days].)

In *Richter v. Aetna Life Ins. & Annuity Co.* (2002) 96 C.A.4th 1143, 117 C.R.2d 737, defendants successfully moved, on November 19, 2001, to vacate a judgment that had been entered on September 4, 2001, and substitute a "new and different" judgment pursuant to C.C.P. 664 (7 Cal. Proc. (5th), *Judgment*, §49 et seq.). On December 28, 2001, defendants were notified that plaintiff had appealed from the new and different judgment, and on January 16, 2002, they filed a cross-appeal from those portions of the original September 4 judgment with which they disagreed. *Held*, because defendants filed the notice of cross-appeal "from the original judgment" within 20 days of being notified of plaintiff's appeal from the November 19 judgment, they complied with the 20-day requirement of former C.R.C., Rule 3(e)(2) (now C.R.C., Rule 8.108(f)(2)). (96 C.A.4th 1144.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.752(c) was repealed in 2008. Extensions in limited civil cases resulting from granting a motion to vacate are now covered in C.R.C., Rule 8.823(f)(2).



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4. Motion for Judgment Notwithstanding Verdict.

a. Extension Where Motion Is Denied.

9 Witkin Cal. Proc. Appeal § 598

[§ 598] Extension Where Motion Is Denied.

The extension of the time to appeal from the judgment after denial of a motion for judgment notwithstanding the verdict is identical to the extension allowed after denial of a new trial motion (see *supra*, §§577, 588).

If any party serves and files a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.108(d)(1).)

(2) 30 days after denial of the motion by operation of law. (C.R.C., Rule 8.108(d)(2).)

(3) 180 days after entry of judgment. (C.R.C., Rule 8.108(d)(3).)

However, unless extended by the cross-appeal provision (see C.R.C., Rule 8.108(f)(2), *infra*, §597), the time to appeal from an *order* denying a motion for judgment notwithstanding the verdict is governed by the 60-day period of C.R.C., Rule 8.104 (see *supra*, §575). (C.R.C., Rule 8.108(d)(2).)

The Advisory Committee Comment to C.R.C., Rule 8.108 explains the effect of these provisions as follows:

(1) C.R.C., Rule 8.108(d)(1) provides an extension of time after an order denying a motion for judgment notwithstanding the verdict regardless of whether the moving party also moved unsuccessfully for a new trial. C.R.C., Rule 8.108(d) further specifies the times to appeal when, as often occurs, a motion for judgment notwithstanding the verdict is joined with a motion for new trial and both motions are denied. Under C.R.C., Rule 8.108(a), the appellant has 30 days after notice of the denial of the new trial motion to appeal from the judgment. C.R.C., Rule 8.108(d) allows the appellant the longer time provided by C.R.C., Rule 8.104 to appeal from the order denying the motion for judgment notwithstanding the verdict, subject to that time being further extended in the circumstances covered by C.R.C., Rule 8.108(f)(2).

(2) Under C.R.C., Rule 8.108(d)(1)(A), the 30-day extension of the time to appeal from the judgment begins when the superior court clerk mails, or a party serves, the order denying the motion or notice of entry of that order.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Motion for Judgment Notwithstanding Verdict.

b. Cross-Appeal Where Motion Is Granted.

9 Witkin Cal. Proc. Appeal § 599

[§ 599] Cross-Appeal Where Motion Is Granted.

A cross-appeal from the judgment is permitted when an appeal is taken from an order granting a new trial (see *supra*, §592) or an order granting a motion to vacate the judgment (see *supra*, §597). There was formerly no provision for cross-appeal from an order granting a motion for judgment notwithstanding the verdict, but C.R.C., Rule 8.108(f)(2) now permits a cross-appeal within 20 days after mailing of notification of the first appeal. (See C.E.B., 1 Civil Appellate Practice 3d, §7.74; Rutter Group, 1 Civil Appeals and Writs §§3:105, 3:106.)

C.R.C., Rule 8.752(c), in contrast, does not apply to the granting of a motion notwithstanding the verdict.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.752(c) was repealed in 2008. C.R.C., Rule 8.823(f)(2) now applies to granting a judgment notwithstanding the verdict in limited civil cases.



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5. Motion To Reconsider.

a. In General.

9 Witkin Cal. Proc. Appeal § 600

[§ 600] In General.

Blue Mountain Dev. Co. v. Carville (1982) 132 C.A.3d 1005, 1009, 183 C.R. 594, held that, for purposes of extending the time to appeal (supra, §§589, 595), a valid motion for reconsideration brought under C.C.P. 1008 is to be treated like a motion for new trial or a motion to vacate. (See C.E.B., 1 Civil Appellate Practice 3d, §7.62 et seq. [criticism of *Blue Mountain* holding]; Rutter Group, 1 Civil Appeals and Writs §3:92 et seq.) *Blue Mountain* was followed in *Rojes v. Riverside General Hosp.* (1988) 203 C.A.3d 1151, 1158, 250 C.R. 435, and *Stratton v. First Nat. Life Ins. Co.* (1989) 210 C.A.3d 1071, 1080, 1083, 258 C.R. 721.

In *Stratton*, the court noted that *Blue Mountain* was premised on the notion that motions for reconsideration are directed only at appealable orders (210 C.A.3d 1080); and concluded that extension provisions of former C.R.C., Rule 3 (now C.R.C., Rule 8.108) do not apply where the order is not appealable due to lack of finality (210 C.A.3d 1082). "Where an order or ruling is clearly an interim order *only* in the sense that the filing and entry of a subsequent formal judgment is required, and reconsideration is sought, the prevailing party or parties can invoke rule 3(b) by filing the formal document before the motion is heard. Nothing in the court rules prevents the trial court from still reconsidering its ruling and making an appropriate order should it change its mind. The formal judgment filed would then, of course, have no lasting effect. More routinely, however, motions for reconsideration are denied, and our discussion here hopefully will encourage equal treatment, for appellate purposes, of such motions along with other statutory motions directed at appealable judgments, so that all similarly situated parties will receive the limited extension provided by rule 3(b)." (210 C.A.3d 1082.)

In *Miller v. United Services Auto. Assn.* (1989) 213 C.A.3d 222, 261 C.R. 515, the court held that denial of a motion by operation of law, as applied to an extension under former C.R.C., Rule 3(a) (now C.R.C., Rule 8.108(a)) where the motion is for new trial (supra, §590), is also applicable where the motion is for reconsideration. Hence, a notice of appeal filed after expiration of the allowable 30-day extension from the date of the denial by operation of law was late, and the appeal was dismissed. (213 C.A.3d 227, 228.)

In *re Marriage of Burgard* (1999) 72 C.A.4th 74, 84 C.R.2d 739, a dissolution proceeding, involved the timeliness of an appeal from a sanctions order entered on August 12. A motion for reconsideration was denied on October 31, and

a notice of appeal of the sanctions order was filed on November 25. *Held*, the appeal was untimely.

(a) If the motion for reconsideration were treated as a motion for new trial, and if only the 30-day extension allowed by former C.R.C., Rule 3(a) (now C.R.C., Rule 8.108(a)) were considered, the appeal would be timely, because it was filed within 30 days after the denial of the motion for reconsideration. However, as *Miller* makes clear, in cases involving a new trial motion, the rule must be considered with *C.C.P. 660* (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §72), allowing 60 days for denial of a new trial order by operation of law. Thus, the maximum time to appeal in cases involving a new trial is 90 days. (72 *C.A.4th* 80.)

(b) Applying the *Miller* rule to the present case, the August 12 sanction order was deemed denied by operation of law on October 11. Because the notice of appeal was not filed within the allowable 30-day extension period starting on that date, it was time-barred. Nor was it filed within the maximum 90-day period. (72 *C.A.4th* 80.)

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5. Motion To Reconsider.

b. Postjudgment Motion Does Not Extend Time.

9 Witkin Cal. Proc. Appeal § 601

[§ 601] Postjudgment Motion Does Not Extend Time.

In *Passavanti v. Williams* (1990) 225 C.A.3d 1602, 275 C.R. 887, the Court of Appeal that decided *Blue Mountain Dev. Co. v. Carville* (1982) 132 C.A.3d 1005, 183 C.R. 594, supra, §600, *Rojas v. Riverside General Hosp.* (1988) 203 C.A.3d 1151, 250 C.R. 435, and *Dockter v. Santa Ana* (1968) 261 C.A.2d 69, 67 C.R. 686, reexamined these decisions. Distinguishing between appealable orders and judgments with respect to a court's power of reconsideration, the court concluded that, while *Blue Mountain* was correctly decided, *Rojas* and *Dockter* were incorrect to the extent that they suggest that a postjudgment motion for reconsideration will extend the time to file a notice of appeal. (225 C.A.3d 1605.) The court also disagreed with the holdings in *Stratton v. First Nat. Life Ins. Co.* (1989) 210 C.A.3d 1071, 1080, 258 C.R. 721, supra, §600, and *Miller v. United Services Auto. Assn.* (1989) 213 C.A.3d 222, 261 C.R. 515, supra, §600. (225 C.A.3d 1607.)

(a) *Postjudgment motion for reconsideration does not extend time to appeal.*

(1) An order is any direction by the court or judge made or entered in writing and not included in a judgment, while a judgment is a final determination of the parties' rights. (225 C.A.3d 1606, citing the text.) This distinction affects the court's power to reconsider, as follows: "A court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the court may not reconsider it, and loses its *unrestricted* power to change the judgment. It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment." (225 C.A.3d 1606.)

(2) In *Rojas*, the "order" was one denying a petition for relief from the claim filing requirements. But the order was actually a judgment, and the postjudgment motion for reconsideration was not proper and, therefore, should not have extended the time to appeal. (225 C.A.3d 1608.) Language in *Stratton* and *Miller*, suggesting that a postjudgment motion for reconsideration will extend the time to appeal, is likewise incorrect. (225 C.A.3d 1607, 1608, footnote 5.)

(3) In *Blue Mountain*, plaintiff filed a motion to reconsider an order denying his application for a writ of execution on a dwelling. Because the order denying the writ was appealable, not because it was equivalent to a judgment, but

instead because of express statutory authority, the motion for reconsideration was properly brought and did extend the time to appeal from the order until 30 days after the order denying reconsideration. (225 C.A.3d 1607, footnote 5.)

(b) *Construction of motion for reconsideration as motion to vacate or motion for new trial.*

(1) Some cases suggest that trial courts may consider a motion regardless of its label (225 C.A.3d 1608), but it does not necessarily follow that an appellate court should do so. For an appellate court to construe a motion merely to "save" the appeal from dismissal may result in further problems and cannot be justified. (225 C.A.3d 1609.) The timeliness of an appeal is not merely a matter of policy; it is fundamental to the court's jurisdiction, and the time to file cannot be extended by waiver or estoppel. (225 C.A.3d 1609, citing the text.)

(2) "If the record clearly indicates that the parties and the trial court ignored the label and treated the motion as one for new trial or to vacate the judgment, good cause might exist for this court to also ignore the label. Where, however, there is no such indication in the record, an appellate court construing a motion for reconsideration to be some other motion would lead only to further complications." (225 C.A.3d 1610.) If, e.g., the appellate court construes a motion for reconsideration to be a motion for new trial or motion to vacate for purposes of the time to appeal, should the court also construe it as such a motion for purposes of review; and if it does, what standard of review should be employed? (225 C.A.3d 1610.) For these reasons, unless good cause is shown, "we are disinclined to engage in the practice of 'construing' motions and will hold counsel to the label they attach to their motions." (225 C.A.3d 1610.)

(3) However, in view of the court's prior decisions in *Dockter* and *Rojas*, which approved the procedure used here by plaintiff, "good cause exists and fairness requires us to construe plaintiff's motion for reconsideration in this case to be a motion for new trial or a motion to vacate the judgment." (225 C.A.3d 1610.) Accordingly, the notice of appeal filed within 30 days after the trial court denied the motion for reconsideration was timely. (225 C.A.3d 1610.) (For other decisions holding that a postjudgment motion to reconsider does not extend time, but not discussing the effect of a motion to reconsider an appealable order, see *Crotty v. Trader* (1996) 50 C.A.4th 765, 770, 57 C.R.2d 818; *Ramon v. Aerospace Corp.* (1996) 50 C.A.4th 1233, 1236, 58 C.R.2d 217; *Kasper v. Cedars-Sinai Med. Center* (1998) 62 C.A.4th 780, 782, 72 C.R.2d 835; *Conservatorship of Coombs* (1998) 67 C.A.4th 1395, 1398, 79 C.R.2d 799; *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited* (2005) 134 C.A.4th 1477, 1479, 36 C.R.3d 754.)

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5. Motion To Reconsider.

c. Motion Denied by Entry of Judgment.

9 Witkin Cal. Proc. Appeal § 602

[§ 602] Motion Denied by Entry of Judgment.

In *Nave v. Taggart* (1995) 34 C.A.4th 1173, 40 C.R.2d 714, the trial judge granted summary judgment for defendant in a civil action, and plaintiff filed a motion for reconsideration. The judgment was entered, and notice of entry of judgment was mailed. Plaintiff filed a notice of appeal more than 60 days after the notice of entry of judgment. *Held*, appeal dismissed.

(a) Plaintiff's notice of appeal was not timely even though the motion for reconsideration had been filed before entry of judgment and had not been acted on by the trial judge. The subsequent entry of judgment was an implied denial of the motion for reconsideration. (34 C.A.4th 1176.)

(b) A prejudgment motion does not survive a judgment subsequently entered. (34 C.A.4th 1176.) The "concept of a trial court with unlimited power to reconsider its orders even after entry of a judgment, and without any postjudgment request for relief from the judgment, does violence to fundamental principles of jurisdiction as revealed in our statutes and the case law interpreting them." (34 C.A.4th 1177.)

(c) The purpose of a judgment is to limit litigation and clearly establish the rights of the parties found by the court to exist. After judgment, a trial court cannot correct judicial error except in accordance with statutory proceedings. A motion for reconsideration is not such a motion. Because plaintiff was made expressly aware that a formal order and judgment were forthcoming, it was incumbent on him to apprise the court by his motion that he was requesting that judgment not be entered or once judgment was entered, to have timely filed a motion to vacate the judgment. (34 C.A.4th 1177.)

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5. Motion To Reconsider.

d. Reconsideration of Appealable Order.

9 Witkin Cal. Proc. Appeal § 603

[§ 603] Reconsideration of Appealable Order.

If any party serves and files a valid motion to reconsider an appealable order under *C.C.P. 1008(a)*, the time to appeal from that order is extended for all parties until the earliest of the following:

(1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.108(e)(1).)

(2) 90 days after the first motion to reconsider is filed. (C.R.C., Rule 8.108(e)(2).)

(3) 180 days after entry of the appealable order. (C.R.C., Rule 8.108(e)(3).)

The scope of the rule is explained by the Advisory Committee Comment to C.R.C., Rule 8.108 as follows:

(1) The rule applies to any "appealable order," whether made before or after judgment, but extends only the time to appeal "from that order." The rule thus takes no position on whether a judgment is subject to a motion to reconsider, or whether an order denying a motion to reconsider is itself appealable.

(2) The rule applies only when a "party" makes a valid motion to "reconsider" an appealable order under *C.C.P. 1008(a)*. It therefore does not apply when a court reconsiders an order on its own motion (see *C.C.P. 1008(c)*) or when a party makes "a subsequent application for the same order" under *C.C.P. 1008(b)*. (See *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited (2005) 134 C.A.4th 1477, 1479, 36 C.R.3d 754* [trial court issued order granting summary judgment, plaintiff filed motion for reconsideration, judgment was entered before ruling denying motion; entry of judgment divested trial court of authority to rule on motion, thereby rule was ineffective to extend time to appeal].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Branner v. Regents of Univ. of Calif. (2009) 175 C.A.4th 1043, 1047, 96 C.R.3d 690* [plaintiff's motion to reconsider order granting defendants' special motion to strike was not valid when filed because it failed to contain

affidavit or declaration in support of motion; thus, motion did not extend time for plaintiff to file notice of appeal from order].



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6. Other Party's Appeal.

a. In General.

9 Witkin Cal. Proc. Appeal § 604

[§ 604] In General.

A party often is willing to let a judgment stand, even though it is subject to challenge for error, rather than go through the effort and expense of appeal. But if the adverse party appeals, the other party may also wish to appeal and present his or her own grounds for reversal. The difficulty is that the adverse party may file his or her notice of appeal on or near the last day, with the result that the other party cannot file an appeal in time. (See 32 *A.L.R.3d* 1290 [right to perfect appeal, against party who has not appealed, by cross-appeal filed after time for direct appeal has passed].) The only recourse that the other party had under the original rules was to file a precautionary notice in all cases in which he or she could possibly anticipate an appeal by the adverse party.

This choice between lost rights of appeal or wasted effort in filing notices that were ordinarily not intended to be pursued was most unsatisfactory, and in 1970 the Judicial Council, acting on suggestions from the State Bar, remedied the situation by adopting former C.R.C., Rule 3(c) (now C.R.C., Rule 8.108(f)(1)).

"If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk mails notification of the first appeal." (C.R.C., Rule 8.108(f)(1).) (See C.R.C., Rule 8.752(c) [10 days for limited civil case appeals]; *Commercial & Farmers Nat. Bank v. Edwards* (1979) 91 *C.A.3d* 699, 703, 704, 154 *C.R.* 345, quoting the text; *Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 *C.A.4th* 422, 438, 103 *C.R.2d* 305 [cross-appeal was timely filed under 20-day provision].)

An appeal by the adverse party from a postjudgment order does not extend the time for appealing from the judgment. The rule impliedly refers to other party's appeal from the judgment itself. A contrary interpretation would significantly undermine the finality of judgments. (*CC-Calif. Plaza Associates v. Paller & Goldstein* (1996) 51 *C.A.4th* 1042, 1047, 59 *C.R.2d* 382 [appeal from postjudgment order denying attorneys' fees did not reopen time for appealing from underlying judgment].)

SUPPLEMENT: [This section is current through the latest supplement]

Extension of time to appeal: See *Termo Co. v. Luther* (2008) 169 *C.A.4th* 394, 403, 86 *C.R.3d* 687 [C.R.C., Rule 8.108(f) applies to any appeal filed after first appeal and does not differ- tiate between cross-appeals that are

protective and those that are independent].

Limited civil case: C.R.C., Rule 8.752(c) was repealed in 2008. The 10-day period is now stated in C.R.C., Rule 8.823(f)(1).



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6. Other Party's Appeal.

b. First Appeal Need Not Be Valid.

9 Witkin Cal. Proc. Appeal § 605

[§ 605] First Appeal Need Not Be Valid.

In *Life v. Los Angeles* (1990) 218 C.A.3d 1287, 267 C.R. 557, plaintiff, in a single action, sued a county hospital for medical malpractice and his former attorney for legal malpractice. After the hospital obtained a summary judgment, defendant attorney filed a timely, but invalid, notice of appeal (no standing; see supra, §39). Plaintiff then filed a notice of cross-appeal within the 20-day extension provided by former C.R.C., Rule 3(c) (now C.R.C., Rule 8.108(f)(1)). *Held*, the cross-appeal was timely; the rule does not require that the first appeal be valid. Unlike the other subdivisions of the rule, which condition extension on the filing of a valid notice, this provision requires only that the first appeal be timely. "Such a drastic difference in the wording of adjacent subdivisions cannot be deemed meaningless and without design. ... Accordingly, we cannot read rule 3(c) as implicitly requiring an appeal to be valid as well as timely in order to extend the time for filing notice of cross-appeal." (218 C.A.3d 1297.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Judgment Against Public Entity.

9 *Witkin Cal. Proc. Appeal* § 606

[§ 606] Judgment Against Public Entity.

Where a judgment has been entered against a public entity, the Judicial Council is required to adopt rules providing for a reasonable extension of the time for filing the notice of appeal for the following purposes:

(1) To permit the public entity to request a postjudgment settlement conference and to permit the court to hold the conference. (*Govt.C.* 962 [settlement conference may be requested where verdict in personal injury or wrongful death action is in excess of \$ 100,000]; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §433.)

(2) To permit the public entity to elect to pay a judgment in installments and to permit the court to hold a hearing on the election. (*Govt.C.* 984(g); see C.R.C., Rules 8.104(c), 3.1804; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §434.)

(3) To permit the public entity to request a reduction in the judgment for collateral source payments and to permit the court to hold a hearing on the request. (*Govt.C.* 985(k); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §435.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. What Constitutes Entry.

1. Nature of Rules.

9 Witkin Cal. Proc. Appeal § 607

[§ 607] Nature of Rules.

The early law was in great confusion on the nature of "entry" of various kinds of judgments and orders, insofar as its effect in starting the time for appeal was concerned. (See *17 So. Cal. L. Rev. 85.*) C.R.C., Rule 8.104(d) is designed to stabilize the situation by stating four separate definitions of the date of entry for purposes of the rule:

(1) Entry of a judgment (see *infra*, §608).

(2) Entry of an appealable order in the minutes (see *infra*, §609). The rule has no application to a minute order that is not appealable. (See *infra*, §612 et seq.)

(3) Entry of an appealable order signed and filed (see *infra*, §610 et seq.).

(4) Entry of a decree of distribution (see *infra*, §608).

C.R.C., Rule 8.751(b), on limited civil case appeals, differs in that only two kinds of entries are involved:

(1) Entry of a judgment (see *infra*, §608).

(2) Entry of an order signed and filed (see *infra*, §611).

West's Key Number Digest, Appeal and Error 347, 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

Limited civil case: C.R.C., Rule 8.751(b) was repealed in 2008. C.R.C., Rule 8.822(b) now contains three kinds of entries. In addition to the entries discussed in the text, the new rule states that (1) the date of entry of an appealable order that is entered in the minutes is the date that it is entered in the permanent minutes, but (2) if the minute order directs that a written order be prepared, the entry date is the date that the signed order is filed; however, a written order prepared under C.R.C., Rule 3.1312 or a similar local rule is not such an order prepared by direction of a minute order. (C.R.C., Rule 8.822(b)(2).)



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2. Judgment and Decree of Distribution.

9 Witkin Cal. Proc. Appeal § 608

[§ 608] Judgment and Decree of Distribution.

(1) *Judgment: Entry in Judgment Book.* "The entry date of a judgment is the date ... it is entered in the judgment book." (C.R.C., Rule 8.104(d)(1).) Except where a filing procedure is used (see *infra*, this section), the rule applies to all judgments entered in accordance with a verdict, or where a statement of decision is required for rendition of judgment. (See *Trubowitch v. Riverbank Canning Co.* (1947) 30 C.2d 335, 346, 182 P.2d 182; *Phillips v. Phillips* (1953) 41 C.2d 869, 873, 264 P.2d 926; 7 Cal. Proc. (5th), *Judgment*, §49 et seq.; 35 Cal. L. Rev. 480; 17 So. Cal. L. Rev. 86; cf. F.R. App. P., Rule 36 [notation in docket]; 2A Federal Procedure, L.Ed., §§3:907, 3:912; 4 Am.Jur.2d (2007 ed.), *Appellate Review* §90 et seq.)

The date of actual entry governs. In *Verdier v. Verdier* (1953) 118 C.A.2d 279, 257 P.2d 723, the judgment book showed an entry dated October 16, but appellant contended, and offered affidavits to show, that the entry was really made on October 17 and back-dated. The appellate court referred the disputed question of fact to the superior court for determination (see *infra*, §681). "We feel called upon to condemn strongly the practice of any clerk's office in placing on the record any date of entry other than the actual date. Section 664 ... provides that a judgment on a jury verdict must be entered within 24 hours after the rendition of the verdict and that where there is a court trial the judgment must be entered *immediately* upon the filing of the judgment. If because of pressure of business, shortage of clerks or otherwise, this mandate cannot be strictly complied with, there is no possible excuse for showing a different date of entry than the actual one." (118 C.A.2d 282.) (See *Wilson v. Los Angeles County Employees Assn.* (1954) 127 C.A.2d 285, 289, 273 P.2d 824, 7 Cal. Proc. (5th), *Judgment*, §51 [discussing clerk's practices and following *Verdier*].)

(2) *Judgment: Filing With Clerk.* C.C.P. 668.5 permits the filing of judgments in case files in superior courts that make microfilm copies of their judgments or enter judgments into the court's electronic data processing system. (See 7 Cal. Proc. (5th), *Judgment*, §51.) In these cases, the date of filing the judgment with the clerk constitutes the date of its entry. (C.C.P. 668.5; C.R.C., Rule 8.104(d)(1).) A judgment book is not required. (C.C.P. 668.) (See *Hott v. Southern Pac. Pipe Lines* (1977) 75 C.A.3d 826, 828, 142 C.R. 507 [C.C.P. 668.5 and former C.R.C., Rule 2(b) (now C.R.C., Rule 8.104(d)(1)) applied; appeal dismissed]; *Ten Eyck v. Industrial Forklifts* (1989) 216 C.A.3d 540, 544, 545, 265 C.R. 29 [under C.C.P. 668.5 and former C.R.C., Rule 2(b)(1) (now C.R.C., Rule 8.104(d)(1)), date of entry is date of filing judgment with clerk, and "filing" does not include microfilming judgment or entering it in register of actions or court's electronic data processing system].)

(3) *Limited Civil Case*. C.R.C., Rule 8.751(b)(1), on limited civil case appeals, is different: "The date of entry of a judgment shall be the date of its entry in the minute book or docket unless the entry expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order."

(4) *Decree of Distribution*. "The entry date of a decree of distribution in a probate proceeding is the date it is entered at length in the judgment book or other permanent court record." (C.R.C., Rule 8.104(d)(4).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Limited Civil Case*. C.R.C., Rule 8.751(b)(1) was repealed in 2008. C.R.C., Rule 8.822(b)(1) now provides that the entry date of a judgment is the date the judgment is filed under *C.C.P.* 668.5 or the date the judgment is entered in the judgment book.



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3. Appealable Order.

a. Order Entered in Minutes.

9 *Witkin Cal. Proc. Appeal* § 609

[§ 609] Order Entered in Minutes.

(1) *Former Law.* The early law on time for appeal reached its highest state of uncertainty in connection with the time to appeal from orders normally evidenced by minute entries. No difficulty was encountered if the proper practice was employed of oral pronouncement followed by the clerk's entry. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §44; 7 *Cal. Proc.* (5th), *Judgment*, §54.) In that case, the date of entry in the minutes was the only proper date of entry for the purpose of starting the time running for notice of appeal.

A difficult problem arose, however, where the trial judge orally pronounced an order effective on entry in the minutes, which the clerk duly entered, but later, on request of counsel or on his or her own initiative, the judge signed and filed a written order evidencing the same decision. "Which act--the notation in the minutes or the filing of the order--was the 'entry'? The statute furnished no answer to this question, and under the decisions the determinative factor was *what the judge had in mind* when he announced his decision." (17 *So. Cal. L. Rev.* 86.)

(2) *Objective Test.* The framers of the rules repudiated the notion that the judge's undisclosed intention, ascertained long afterwards in ruling on a motion to dismiss the appeal, could determine the running of time to appeal. Instead, they established an objective test: "The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed." (C.R.C., Rule 8.104(d)(2); see *In re Marriage of Adams* (1987) 188 C.A.3d 683, 689, 233 C.R. 534 ["Although a written order was prepared by husband's counsel and relied upon by wife's counsel, since preparation of a written order was not required by the minute order, it cannot alter the date of entry of judgment"]; *In re Marriage of Lechowick* (1998) 65 C.A.4th 1406, 1410, 77 C.R.2d 395 [unsigned minute order as basis of appeal]; 35 *Cal. L. Rev.* 479; 36 *Cal. L. Rev.* 483; 17 *So. Cal. L. Rev.* 87.)

Former C.R.C., Rule 2(b)(2) (now C.R.C., Rule 8.104(d)(2)) was the ground of dismissal of a number of appeals taken by parties who ignored its plain language and failed to file the notice within 60 days from the minute entry. (See *Gwinn v. Ryan* (1949) 33 C.2d 436, 437, 202 P.2d 51 [order of dismissal under former law]; *Pessarar v. Pessarar* (1947) 80 C.A.2d 965, 966, 183 P.2d 279 [order granting motion to set aside interlocutory and final divorce decrees]; *Costa v. Regents of Univ. of Calif.* (1951) 103 C.A.2d 491, 492, 229 P.2d 867 [order granting motion for nonsuit].) But

its effect has been limited to situations in which an appealable order may be made by a minute entry; where a formal order is required by statute, rule, or judicial decision, C.R.C., Rule 8.104(d)(2) has no application. (See *infra*, §612.)

(3) *Permanent Minutes*. In the trial court, the entry of a minute order usually proceeds in two stages: The courtroom clerk takes "rough minutes" or notes, often abbreviated or cryptic, of what was ordered. These are later transferred, by the courtroom clerk or another clerk, to a permanent record variously called "smooth minutes," "minute book," or "permanent minutes." A time differential between the two entries is inevitable, and the lag may be as great as several days. (See *Jablon v. Henneberger* (1949) 33 C.2d 773, 774, 205 P.2d 1; *Beresford v. Pacific Gas & Elec. Co.* (1952) 113 C.A.2d 622, 624, 248 P.2d 773 [county clerk's affidavit describing practice]; 2 Cal. Proc. (5th), Courts, §365.) The case law long ago established the rule that the notes of the courtroom clerk are not official entries of orders and that the only entry is in the permanent record. (*Brownell v. Superior Court* (1910) 157 C. 703, 705, 109 P. 91; 17 So. Cal. L. Rev. 87.) C.R.C., Rule 8.104(d)(2) incorporates this interpretation, namely, that time does not begin to run until the date that the order is "entered in the permanent minutes." (See *Beresford v. Pacific Gas & Elec. Co.*, *supra*.) (On meaning of "entered in the permanent minutes" under C.C.P. 660, governing time for hearing on motion for new trial, see *Desherow v. Rhodes* (1969) 1 C.A.3d 733, 738, 82 C.R. 138, 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §125.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Appealable Order.

b. Signed Order.

1. By Direction in Minute Order.

9 Witkin Cal. Proc. Appeal § 610

[§ 610] By Direction in Minute Order.

Even where a minute order may be an appealable order, the judge may nevertheless elect to evidence his or her decision again by a later written order, signed and filed. (See 7 *Cal. Proc.* (5th), *Judgment*, §54.) Formerly, this duplication gave rise to difficult problems of interpretation (see *supra*, §609). These problems have been solved by C.R.C., Rule 8.104(d)(2), which provides that the date of entry is the date of entry in the permanent minutes, but "if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed."

This direction makes the formal order the appealable order (see *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 458, 322 P.2d 600); and, until the formal order is signed and filed, the time does not begin to run. (See *Estate of Carr* (1947) 82 C.A.2d 780, 783, 187 P.2d 912; *Sheta v. Grahm* (1957) 156 C.A.2d 77, 79, 318 P.2d 756 [formal order filed on August 1 and entered on August 14; notice of appeal, filed October 11, was too late]; *In re Marriage of Taschen* (2005) 134 C.A.4th 681, 685, 36 C.R.3d 286 [date of filing written order reflecting trial court's ruling granting wife's forum non conveniens motion in dissolution proceeding, rather than earlier date of minute order memorializing ruling, governed husband's deadline for filing notice of appeal]; *Barak v. Quisenberry Law Firm* (2006) 135 C.A.4th 654, 658, 37 C.R.3d 688.) However, C.R.C., Rule 3.1312 requires the party prevailing on a motion to prepare a proposed written order in all cases, unless the parties waive notice or the court orders otherwise, or unless the motion was unopposed and a proposed order was submitted with the moving papers. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §44.) This raises the following question: Because C.R.C., Rule 3.1312 usually requires preparation of a written order, should a minute order be deemed to direct that preparation, even though it contains no words to that effect? (See *Hughey v. Hayward* (1994) 24 C.A.4th 206, 209, 30 C.R.2d 678 [involving former rule and requesting clarification by Judicial Council].) C.R.C., Rule 8.104(d)(2) answers in the negative: "[A] written order prepared under rule 3.1312 or similar local rule is not such an order prepared by direction of a minute order."

SUPPLEMENT: [This section is current through the latest supplement]

See *Russell v. Foglio* (2008) 160 C.A.4th 653, 660, 73 C.R.3d 87 [time for plaintiff to appeal from signed anti-SLAPP order began to run at time court clerk mailed file-stamped copy of order to plaintiff, even though defendant never

submitted proposed form of judgment ordered by court; appealable anti-SLAPP order was "judgment," and thus was not within terms of C.R.C., Rule 8.104(d)(2)].



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3. Appealable Order.

b. Signed Order.

2. Without Minute Entry.

9 Witkin Cal. Proc. Appeal § 611

[§ 611] Without Minute Entry.

Where the judge evidences his or her decision by a signed order without a prior minute entry, no difficulty is encountered: "The entry date of an appealable order that is not entered in the minutes is the date the signed order is filed." (C.R.C., Rule 8.104(d)(3); see *Estate of Tierney* (1944) 63 C.A.2d 295, 301, 146 P.2d 700; *Hirschberg v. Oser* (1947) 82 C.A.2d 282, 287, 186 P.2d 53; *Maxwell v. Perkins* (1953) 116 C.A.2d 752, 756, 255 P.2d 10; 17 So. Cal. L. Rev. 86; 7 Cal. Proc. (5th), *Judgment*, §§48, 54; on limited civil case appeals, see C.R.C., Rule 8.751(b)(2) [similar, but without word "appealable"].)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.751(b)(2) was repealed in 2008. The provision referred to in the text is now in C.R.C., Rule 8.822(b)(3).



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4. Distinction: Nonappealable Minute Order.

a. Where Formal Order Is Required.

9 *Witkin Cal. Proc. Appeal* § 612

[§ 612] Where Formal Order Is Required.

C.R.C., Rule 8.104(d) merely states the procedural factors determining the time to appeal; it does not deal with the "substantive" matter of what orders are appealable. If the oral pronouncement, properly interpreted, is an order, i.e., an actual decision of the court granting or denying requested relief, and the minute entry contains no direction for a signed order, the time to appeal runs from the entry in the minutes. (See *supra*, §609.) But if the oral pronouncement is a mere preliminary statement of the judge's intention to rule in a particular manner (an "order for judgment," see 7 *Cal. Proc.* (5th), *Judgment*, §9), it does not constitute the rendition of a judgment or order. In that case, there is, as yet, no appealable order (see *supra*, §161) and any so-called entry in the minutes has no significance.

The problem is presented in aggravated form where the judge, not intending a mere preliminary order for judgment but an actual decision, makes an oral order that is entered in the minutes. But the statutory requisites of a decision in that particular proceeding may not be satisfied by a minute order; a statement of decision, or some other formal provision, may be essential to rendition of that judgment or order.

Decisions interpreting former C.R.C., Rule 2(b)(2) (now C.R.C., Rule 8.104(d)(2)) made it clear that the rule "never comes into operation at all until there is an appealable judgment or order." (35 *Cal. L. Rev.* 480; see *Lavine v. Jessup* (1957) 48 *C.2d* 611, 613, 311 *P.2d* 8, citing the text ["The Rules on Appeal, dealing with practice and procedure, fix the time to appeal and also state what constitutes the procedural act of entry which starts the time running, but they do not affect the statutory requisites of an appealable judgment or order"]; 36 *Cal. L. Rev.* 483.) In 1951, the rule was amended to insert the word "appealable" before "order."

Where the minute entry is not an appealable order at all, it does not start the time running; time begins to run when the judgment, order, or decree, in the form required by statute, is entered. (See *Trubowitch v. Riverbank Canning Co.* (1947) 30 *C.2d* 335, 346, 182 *P.2d* 182 [findings required]; *Hirschberg v. Oser* (1947) 82 *C.A.2d* 282, 287, 186 *P.2d* 53 [partition; statute requires formal order or decree]; *Estate of Dow* (1949) 91 *C.A.2d* 420, 423, 205 *P.2d* 698 [findings required]; *People v. Gordon* (1951) 105 *C.A.2d* 711, 716, 234 *P.2d* 287 [preliminary injunction requiring detailed information]; *Estate of Mills* (1952) 111 *C.A.2d* 83, 84, 243 *P.2d* 889 [probate order; statute requires finding that notice of hearing was given]; *Delany v. Toomey* (1952) 111 *C.A.2d* 570, 574, 245 *P.2d* 26 [findings required]; *Griffin v. Lima*

(1954) 124 C.A.2d 697, 703, 269 P.2d 191 [preliminary injunction, minute order did not provide details]; *Lassen v. Alameda* (1957) 150 C.A.2d 44, 48, 309 P.2d 520 [mandamus proceeding in superior court, findings required]; *Estate of Shaffer* (1968) 268 C.A.2d 522, 523, 74 C.R. 39.)

In *Freese v. Freese* (1956) 138 C.A.2d 867, 292 P.2d 547, defendant made a statutory claim of exemption from execution. On April 6, the trial judge made a minute order denying it without directions, and on June 6, he signed and entered an "Order Denying Defendant's Claim for Exemption." The notice of appeal was filed August 5, too late if the minute order was appealable but timely if the written order of June 6 was the appealable order. *Held*, the appeal was timely, because the exemption statute states that the "court shall give judgment." Even though the statute expressly dispenses with findings, this language requires a judgment in its precise sense of one written and signed and entered in the judgment book. (138 C.A.2d 868.)

In *Ezer v. Fuchsloch* (1979) 99 C.A.3d 849, 160 C.R. 486, the trial judge, on November 10, 1977, made a minute order granting a mandatory injunction against certain defendants; on January 4, 1978, he signed and filed a formal order entitled "Mandatory Injunction." *Held*, defendants' notice of appeal, filed March 3, 1978, was timely. The minute order was simply an announcement of the intended decision, not a judgment. The document signed by the judge and filed was a final determination of the rights of the parties; hence, it was an appealable judgment. (99 C.A.3d 856, 857.)

Dismissals ordered by the court must be in the form of a written order signed and filed. (C.C.P. 581d; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §312; 7 Cal. Proc. (5th), *Judgment*, §§48, 52.) Minute orders of dismissal are not appealable, and the time starts running from the filing of the signed order.

SUPPLEMENT: [This section is current through the latest supplement]



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4. Distinction: Nonappealable Minute Order.

b. Where Written Order Is Directed.

9 Witkin Cal. Proc. Appeal § 613

[§ 613] Where Written Order Is Directed.

The same limiting requirement of appealability (see *supra*, §612) applies where the trial judge, under C.R.C., Rule 8.104(d)(2), expressly directs that a formal written order be prepared. His or her intention not to render judgment except by this means is clearly manifested, and the situation is the same as if a statute called for a formal order, i.e., there is no appealable order until it is signed and filed.

This was made clear in *Herrscher v. Herrscher* (1953) 41 C.2d 300, 259 P.2d 901, where a motion to strike or dismiss a cross-complaint was granted. The order was in the class of appealable judgments final as to a particular party (see *supra*, §109), and, under then existing law, it would normally have been effective on entry in the minutes. But the judge's minute order added: "Defendant to prepare, serve and file formal order." No order was prepared, and defendant's appeal was dismissed. (41 C.2d 305.)

Other cases holding the minute entry not an appealable order are *Sproul v. Cuddy* (1953) 121 C.A.2d 197, 201, 263 P.2d 92 [appeal dismissed for further proceedings in trial court], and *Grattan v. Silbaugh* (1953) 121 C.A.2d 684, 685, 264 P.2d 53.

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F. Time Is Jurisdictional.

1. Late Notice.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 614

[§ 614] In General.

The time to file notice of appeal, both in civil and criminal cases, has always been held jurisdictional in California. A late notice is void; the time cannot be extended by waiver or estoppel, and the failure to file cannot be excused by the trial judge's mistake or the adverse party's fraud. (See *Estate of Hanley* (1943) 23 C.2d 120, 122, 142 P.2d 423; 30 Cal. L. Rev. 448; 15 So. Cal. L. Rev. 358.)

The rules are explicit on this point. (See C.R.C., Rule 8.104(a) ["must be filed on or before the earliest of" specified dates]; C.R.C., Rule 8.104(b) [except as provided in C.R.C., Rule 8.66 (specified emergencies; see *supra*, §16), "no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal"]; C.R.C., Rule 8.60(d) [reviewing court may not relieve party from default for failure to file timely notice of appeal]; 35 Cal. L. Rev. 484; 36 Cal. L. Rev. 303; 17 So. Cal. L. Rev. 91; for similar provisions governing appeals in limited civil cases, see C.R.C., Rules 8.751(a), 8.767(c), 8.772(b).)

A number of decisions affirm the jurisdictional rule. (See *Adoption of Alexander S.* (1988) 44 C.3d 857, 864, 245 C.R. 1, 750 P.2d 778, 3 Cal. Proc. (5th), Actions, §74 [two separate judgments; timely appeal from second judgment did not confer jurisdiction to consider first judgment, for which no notice of appeal was filed]; *Kamper v. Mark Hopkins* (1947) 78 C.A.2d 885, 888, 178 P.2d 767; *Anderson v. Anderson* (1948) 87 C.A.2d 327, 328, 197 P.2d 65; *Estate of Welch* (1956) 146 C.A.2d 534, 538, 304 P.2d 57 [dismissal on informal suggestion of respondent without formal motion]; *Schisler v. Mitchell* (1959) 174 C.A.2d 27, 29, 344 P.2d 61; *Carver v. Platt* (1960) 179 C.A.2d 140, 142, 3 C.R. 687, citing the text; *Los Angeles v. Jamison* (1961) 189 C.A.2d 267, 269, 11 C.R. 309 [notice filed on 61st day; "this court does not have jurisdiction"]; *Nu-Way Associates v. Keefe* (1971) 15 C.A.3d 926, 928, 93 C.R. 614 [neither party mentioned fact of late notice, but appellate court, on examining record, concluded that appeal was not timely and dismissed on its own motion]; *In re Frederick E.H.* (1985) 169 C.A.3d 344, 346, 215 C.R. 171; *Freiberg v. Mission Viejo* (1995) 33 C.A.4th 1484, 1488, 39 C.R.2d 802 [no relief from default in giving timely notice of appeal]; *In re Marriage of Lloyd* (1997) 55 C.A.4th 216, 220, 64 C.R.2d 37; *infra*, §617.)

If a late appeal is taken from a judgment in a limited civil case, the appeal is void even though the appellate division denies a motion to dismiss. A court cannot create nonexistent appellate jurisdiction; hence, it is subject to

control by extraordinary writ from either the Court of Appeal or the Supreme Court. (See *Reber v. Superior Court* (1961) 189 C.A.2d 622, 625, 11 C.R. 534 [prohibition issued "restraining respondent from taking any steps in the matter other than to dismiss the appeal"].)

Vigorous attacks on the jurisdictional requirement, and attempts to create exceptions to it based on fraud, mistake, or hardship, have been made. (See *Estate of Hanley*, *supra* [dissent]; *People v. Slobodion* (1947) 30 C.2d 362, 368, 181 P.2d 868 [concurring opinion]; 36 Cal. L. Rev. 303.) The California courts resisted these pressures, believing that more harm than good would result from relaxing the strict rule, and that other remedies, such as equitable relief against the judgment, are sufficient. (See 35 Cal. L. Rev. 484; 36 Cal. L. Rev. 309; 17 So. Cal. L. Rev. 92; cf. *F.R. App. P.*, Rule 4(a)(5)(C) [court may extend time not longer than 30 days]; 16A Federal Practice & Procedure (Wright & Miller) §3950; 9 Moore 2d, Chap. 4; 2A Federal Procedure, L.Ed., §3:632 et seq.)

An exception has been declared for criminal appeals (see *infra*, §615), and several decisions sanctioned departures from the jurisdictional rule in civil cases (see *infra*, §616), but these were later disapproved and the strict rule was restored (see *infra*, §617 et seq.). However, based upon the remedial nature of the right of appeal, it is the policy of the courts to accord that right in a doubtful case when this can be accomplished without doing violence to applicable rules. (*Warmington Old Town Associates, L.P. v. Tustin Unified School Dist.* (2002) 101 C.A.4th 840, 848, 124 C.R.2d 744 [debatable timeliness issue was resolved in favor of right to appeal].)

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See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3950.

Limited civil cases: C.R.C., Rules 8.751(a), 8.767(c), and 8.772(b) were repealed in 2008. Comparable provisions are now in C.R.C., Rules 8.822(d), 8.810(c), and 8.812.



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b. Exception for Criminal Appeal.

9 *Witkin Cal. Proc. Appeal* § 615

[§ 615] Exception for Criminal Appeal.

In *People v. Slobodion* (1947) 30 C.2d 362, 365, 181 P.2d 868, defendant, a convicted prisoner, deposited his notice of appeal in the prison mail box, properly addressed, well within the 10-day period for a criminal appeal (now 60 days). The letter was not received by the superior court clerk until after the period had run, and the court found that this was due to some oversight in handling the mail by the prison officials. *Held*, the delivery of his notice to these officials was a constructive filing that satisfied the jurisdictional requirement. The opinion was carefully limited to the special facts (criminal appeal, imprisoned appellant properly diligent and wholly dependent on state employees to assist in compliance). (See C.R.C., Rule 8.308(a) [notice of criminal appeal must be filed with superior court clerk "within 60 days after the rendition of the judgment or the making of the order"]; 35 Cal. L. Rev. 485; 36 Cal. L. Rev. 307; 20 *Hastings L. J.* 935 [late notice of appeal in criminal cases in federal court]; for subsequent cases upholding the "prison delivery" rule despite the fact that the filing period is now 60 days, see 6 Cal. Crim. Law (3d), *Criminal Appeal*, §84.)

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c. No Exception for Civil Appeal.

1. Cases Departing From Jurisdictional Rule.

9 Witkin Cal. Proc. Appeal § 616

[§ 616] Cases Departing From Jurisdictional Rule.

In *Slawinski v. Mocettini* (1965) 63 C.2d 70, 45 C.R. 15, 403 P.2d 143, the trial judge granted a nonsuit, judgment was entered on May 21, and notice of entry was served on May 22. Plaintiffs' motion for a new trial was heard on July 10, and the clerk's minutes recited its denial on that day. The notice of appeal was filed August 12. This was 83 days after entry of judgment (too late), and 33 days after entry of the order denying a new trial (too late). However, on July 13, after the minute entry, the judge signed a formal order of denial; that order and the notice served on plaintiffs recited that the denial was made and entered July 13. This would make the appeal timely (30 days later), if July 13 were the effective date of the order. But the cases hold that the effective date of an order denying a new trial is the date of the minute entry, and *C.C.P. 660* provides that entry of the order in the permanent minutes constitutes a determination even though it expressly directs that a written order be prepared. (See 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §72 et seq.; supra, §591.) Thus, under the established law, the appeal should have been dismissed, but it was held timely on the following reasoning:

(a) The right of appeal is favored, and "in doubtful cases" it should be granted. (63 C.2d 72.)

(b) *C.C.P. 660* is not controlling, because it was not intended to govern the time for taking an appeal. (63 C.2d 73.)

(c) In the "analogous situation" of a criminal appeal, former C.R.C., Rule 31(a) (now C.R.C., Rule 8.320(a)) gives relief, and even before that rule, relief was given where the defendant was lulled into a false sense of security by the state. (63 C.2d 73, citing *People v. Slobodion* (1947) 30 C.2d 362, 181 P.2d 868, supra, §615.)

(d) Relief may be given by treating the entry as made on July 13 instead of July 10, because of plaintiffs' justifiable reliance on the notice. "Plaintiffs apparently relied upon the written order of the judge and the notice prepared and sent by defense counsel, and no circumstances are shown which should have indicated to them that these instruments might be defective. Moreover, an attorney should be entitled to accept such documents at face value where they appear to be proper and consistent with the proceedings. In the absence of any statute, rule, or other circumstance it is not required that he search the permanent minutes of the court to check for an earlier minute entry, and certainly he could not

reasonably be expected to do so. To hold that the 30-day period within which to file an appeal commenced to run on the entry of the instant minute order would only promote injustice." (63 C.2d 72.)

In *Deward v. La Rue* (1965) 235 C.A.2d 59, 44 C.R. 886, plaintiff sued C and the city of Sacramento. The city had summary judgment on September 26; C had judgment on a verdict January 7; motion for a new trial as to C was denied February 19. Plaintiff's notice of appeal, filed March 1, described the September 26 judgment in favor of the city; it was too late, and the clerk so advised plaintiff's counsel. The latter told the clerk and other attorneys that he meant to appeal from the judgment for C; but, though he had until March 22 (30 days after denial of new trial), he did not file a correct notice until March 23, too late. *Held*, nevertheless, the appeal was good. The reference to the wrong judgment was a mere "misdescription," nobody was misled, and mandamus issued to compel the clerk to "correct the misdescription." (235 C.A.2d 63.) A less charitable view of *Deward* would be that there was no misdescription because the notice plainly and accurately referred to an appealable judgment; there was a negligent mistake on the part of counsel; hence, the appeal was saved not by construction of the notice but by giving relief from default, contrary to the Rules of Court.

In *Vibert v. Berger* (1966) 64 C.2d 65, 48 C.R. 886, 410 P.2d 390, defendant's demurrer was sustained without leave on February 25, and judgment of dismissal was entered on March 10. Plaintiff filed his first notice of appeal on March 12, from the order sustaining the demurrer. He filed a second notice, from the judgment of dismissal, on November 4, after obtaining the transcript and discovering the mistake in the original notice. *Held*, motion to dismiss appeal denied. Both parties assumed that a proper appeal had been taken and that no prejudice was suffered; hence: "Whether the error ... was merely one in describing the order or judgment or whether it was caused by appellant's ignorance, the notice may without prejudice to respondent reasonably be interpreted to apply to an appealable order or judgment rendered before the appeal was noticed." (64 C.2d 70.)

In *Desherow v. Rhodes* (1969) 1 C.A.3d 733, 82 C.R. 138, the court, holding that the clerk's entry of an order granting a new trial was substantial compliance with the statute (see 2 Cal. Proc. (5th), Courts, §364; 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §72), relied heavily on the substantial compliance and estoppel theories of *Slobodion* and *Slawinski*.

The most startling of the cases is *In re Morrow* (1970) 9 C.A.3d 39, 88 C.R. 142. The natural mother, the losing party in an adoption proceeding, moved for a new trial, in ignorance of former C.C. 238 (now Family C. 7894), which apparently prohibits it. The matter was heard without objection and denied on the merits. Within the 30-day period (supra, §589), the mother filed a notice of appeal. It would have been timely if the new trial proceeding had been valid, but an invalid motion does not extend time (supra, §§577, 578), and the normal 60-day period from entry of the order had expired. Nevertheless, the adverse parties made no motion to dismiss the appeal, and did not raise the point until they filed their reply brief. *Held*, they were estopped to object to late filing. Quoting *Slawinski*, the court declared that "[t]he case is generally viewed as recognizing that late filing of a notice of appeal may be relieved by proof of estoppel." (9 C.A.3d 45, citing the text, *Desherow*, and other cases.) "For the purposes of this case, and pursuant to the policy enunciated in *Slawinski v. Mocettini*, supra, it is sufficient to determine that the petitioners, having failed to raise the point before, are now estopped to urge a construction of *Civil Code section 238* which would preclude this appeal." (9 C.A.3d 46.)

The suggestion that the statute could be construed to permit a new trial motion lends some plausibility to the opinion, but the quoted statement goes far beyond any of the other decisions in repudiating the rule that appellate jurisdiction cannot be conferred by consent. (See supra, §86.) Clearly, no elements of estoppel were present; the adverse parties were guilty of no representations or acts inducing new trial proceedings or the late filing; the ground for relief was a simple waiver by failure to object. But whether or not the case can be correctly classified as one of waiver rather than estoppel, it is clear that it represents not a rule but an illustration of uncontrolled discretion: Under settled law, the reviewing court could have dismissed the appeal on its own motion. (See supra, §86 and infra, §739.)

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2. Jurisdictional Rule Reaffirmed.

9 *Witkin Cal. Proc. Appeal* § 617

[§ 617] Jurisdictional Rule Reaffirmed.

The jurisdictional rule was applied, and the estoppel cases distinguished, in *Thompson, Curtis, Lawson & Parrish v. Thorne* (1971) 21 C.A.3d 797, 98 C.R. 753. Defendant mailed his notice of appeal from a municipal court judgment, and it arrived 1 day late. The superior court granted a motion to dismiss, then certified the case to the Court of Appeal. *Held*, appeal dismissed. The court described the holding of *In re Morrow* (1970) 9 C.A.3d 39, 88 C.R. 142, *supra*, §616, as "the most significant departure from the strict jurisdictional view," and emphasized the absence of essential elements of estoppel in both *Morrow* and the present case. Then, in an attempt to state the present effect of decisions on this loose "quasi-estoppel" exception, the court said: "An appellate court may grant relief from the late filing of a notice of appeal, in a civil case, if the appellant establishes (1) that he was justifiably in doubt regarding the time within which the notice was required to be filed; and (2) that this doubt was caused by his reliance upon some conduct by the respondent, *at least some part of which occurred prior to the filing of the notice.*" (21 C.A.3d 803.)

In *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 125 C.R. 757, 542 P.2d 1349, defendants' notice of appeal was filed 1 day after expiration of the period as extended by their motion for new trial. (See *supra*, §589.) They sought relief from default on a showing that inquiries of the clerk had elicited the advice that the date of entry of the order denying the new trial motion was February 6, rather than the recorded date of February 4. *Held*, no relief could be granted.

(a) *Jurisdictional rule.* *Estate of Hanley* (1943) 23 C.2d 120, 142 P.2d 423, *supra*, §614, and former C.R.C., Rule 45(e) (now C.R.C., Rule 8.60(d); *supra*, §614) positively state the jurisdictional time limit and preclude relief from default. (15 C.3d 666, 667.)

(b) *Slawinski and later Supreme Court decisions.* The suggestion that the jurisdictional rule of *Hanley* was diluted by *Slawinski v. Mocettini* (1965) 63 C.2d 70, 45 C.R. 15, 403 P.2d 143, *supra*, §616, is based on dicta in the case rather than on its holding. "It is quite true that in that decision we used language which might be interpreted--and in fact has been interpreted by some Courts of Appeal--to reflect a drawing away from the jurisdictional rule in favor of a more lenient standard under which compelling excuse, such as fraud, mistake, disability, or estoppel would operate to forgive

noncompliance." (15 C.3d 668.) But no Supreme Court case has relied on that broad language; the case has never been cited in the Supreme Court, and *Hanley* has been cited in three later cases for its jurisdictional rule. (15 C.3d 669.) "While applying principles of construction and interpretation in a manner consistent with the policy ... of granting the right of appeal in doubtful cases, we have steadfastly adhered to the fundamental precept that the timely filing of an appropriate notice of appeal or its legal equivalent is an absolute prerequisite to the exercise of appellate jurisdiction." (15 C.3d 669.)

(c) *Court of Appeal decisions relying on Slawinski dicta.* The "panoramic dicta" (15 C.3d 670), "erroneous dicta" (15 C.3d 671), "ill-considered dicta" (15 C.3d 672), "persistent dicta" (15 C.3d 673), and "unnecessary and overbroad dicta" (15 C.3d 674) of *Slawinski* were followed in several Court of Appeal decisions that nevertheless reached correct results on their facts. *In re Morrow*, however, reached "an arguably erroneous result," as indicated in *Thompson*. (15 C.3d 672, 673.)

(d) *Restatement of traditional rule.* "We agree with the *Thompson* court that *Morrow* reaches an improper result and is wrongly decided; we hasten to disapprove it. It is manifest, however, from the review just completed, that more than this is needed to restore the message of *Hanley* to its former clarity. Because much of the present uncertainty can be traced directly to our unnecessary and overbroad dicta in *Slawinski*, we must also express our disagreement with any language in that case which suggests that the notion of estoppel has any place in determining whether a timely notice of appeal has been filed within the jurisdictional period therefor. The expiration of a jurisdictional period is not, and by its nature cannot, be affected by the actions of the parties." (15 C.3d 674.)

(e) *Conclusion.* "We simply hold today that when such notice has not in fact been filed within the relevant jurisdictional period--and when applicable rules of construction and interpretation fail to require that it be deemed in law to have been so filed--the appellate court, absent statutory authorization to extend the jurisdictional period, lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to considerations of estoppel or excuse." (15 C.3d 674.)

Two justices vigorously dissented:

(a) "We created the time limits on the filing of a notice of appeal for a purpose: to promote the speedy and efficient administration of justice. We should interpret and apply those limits not blindly, as do the majority, but with a sensitivity to the objectives which those limits serve." (15 C.3d 675.)

(b) The unanimous opinion in *Slawinski* should be followed; the majority's position, that an attorney cannot reasonably rely on representations from court or counsel and must personally examine the minutes of the court, is "legal pedantry ... the time limit on filing a notice of appeal is only as jurisdictional as we want it to be." (15 C.3d 677.) The "legal fiction" of constructive filing merely disguises a doctrine of reasonable reliance. Also, the majority opinion goes far beyond the present case in overruling *Morrow* and declaring that estoppel can never justify late filing. (15 C.3d 678.)

(c) If timely notice is jurisdictional, the matter can be raised at any time; the respondent might prefer to wait until the court files its opinion on the merits, and then act before the opinion becomes final. "The majority opinion leaves the appellate courts without effective sanctions to prevent such tactics." (15 C.3d 679.)

Later cases apply the jurisdictional rule without extended discussion. (See *Pressler v. Donald L. Bren Co.* (1982) 32 C.3d 831, 835, 837, 187 C.R. 449, 654 P.2d 219 [applying jurisdictional rule to special appeal from decision of Labor Commissioner under *Lab.C.* 98.2]; *Hott v. Southern Pac. Pipe Lines* (1977) 75 C.A.3d 826, 828, 142 C.R. 507; *Fawn v. Holiday Inv. Corp.* (1978) 81 C.A.3d 582, 584, 146 C.R. 512; *In re Marriage of Patscheck* (1986) 180 C.A.3d 800, 803, 804, 225 C.R. 787; *Stuart Whitman v. Cataldo* (1986) 180 C.A.3d 1109, 1110, 226 C.R. 42; *In re Marriage of Adams* (1987) 188 C.A.3d 683, 690, 233 C.R. 534; *Ramirez v. Moran* (1988) 201 C.A.3d 431, 437, 247 C.R. 117; *In re A.M.* (1989) 216 C.A.3d 319, 321, 264 C.R. 666; *Mauro B. v. Superior Court* (1991) 230 C.A.3d 949, 953, 281 C.R. 507, *infra*, §619; *UAP-Columbus JV 326132 v. Nesbitt* (1991) 234 C.A.3d 1028, 1034, 1039, 285 C.R. 856; *Sharp v.*

Union Pac. R. Co. (1992) 8 C.A.4th 357, 361, 9 C.R.2d 925; *Rapp v. Golden Eagle Ins. Co.* (1994) 24 C.A.4th 1167, 1171, 30 C.R.2d 126, supra, §557; *Freiberg v. Mission Viejo* (1995) 33 C.A.4th 1484, 1488, 39 C.R.2d 802; *Los Angeles v. Glair* (2007) 153 C.A.4th 813, 819, 63 C.R.3d 280.)

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3. Late Appeal Is Not Treated as Writ Application.

9 *Witkin Cal. Proc. Appeal* § 618

[§ 618] Late Appeal Is Not Treated as Writ Application.

The innovative method of saving an appeal from a nonappealable order or judgment by treating it as a petition for a writ of mandamus (see *supra*, §128 et seq.) cannot be employed where the order or judgment is appealable but the notice of appeal is too late. (*In re Marriage of Patscheck* (1986) 180 C.A.3d 800, 804, 225 C.R. 787; *Mauro B. v. Superior Court* (1991) 230 C.A.3d 949, 953, 281 C.R. 507, *infra*, §619.) *Patscheck* states the reasons for this distinction:

(a) A writ petition should be entertained only where there is no adequate remedy by appeal, "and the remedy by appeal is not made inadequate by a party's having neglected to submit his notice of appeal for filing within the time allowed." (180 C.A.3d 804, citing *Simmons v. Superior Court* (1959) 52 C.2d 373, 341 P.2d 13.)

(b) "Moreover, even in the case of nonappealable interim orders, the device of treating a purported appeal as a writ petition is employed sparingly and only under unusual circumstances. ... Appellate courts have taken great care to impose limits on the practice of treating faulty appeals as writ petitions and we see no policy justification for breaching these limits by expanding the practice to permit review where a notice of appeal was filed late." (180 C.A.3d 804.)

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4. No Writ Review Where Petitioner Failed To Appeal.

9 *Witkin Cal. Proc. Appeal* § 619

[§ 619] No Writ Review Where Petitioner Failed To Appeal.

In *Mauro B. v. Superior Court* (1991) 230 C.A.3d 949, 281 C.R. 507, real parties William and Mary S. filed a petition to adopt a child born out of wedlock. Unaware of that petition, Mauro B. filed an action under the Uniform Parentage Act to declare the existence of a father and child relationship between himself and the child. The trial judge denied Mauro's request and granted real parties' petition for adoption without Mauro's consent. Mauro did not appeal from the judgment; instead, 82 days after announcement of the decision, he filed the present petition for an extraordinary writ in the Court of Appeal seeking to vacate the judgment. *Held*, petition dismissed.

(a) The judgment was appealable, and timely filing of a notice of appeal is a jurisdictional requirement. (230 C.A.3d 953; see *supra*, §614.) However, in special circumstances, it has been held that an extraordinary writ will lie despite the failure to employ the appellate remedy. (230 C.A.3d 953.)

(b) No special circumstances were shown here. "Petitioner appeared at trial with counsel and was present when respondent court announced its ruling from the bench. The petition contains no factual allegations explaining why an appeal was not taken or justifying the delay in filing it. At oral argument, petitioner's counsel argued he was waiting for preparation of the reporter's transcript of the lower court's proceedings before filing the petition. This is no excuse. ... Neither can petitioner argue the delay in hearing an appeal makes that remedy inadequate where he waited so long before filing his writ petition." (230 C.A.3d 954.)

(c) A dissenting justice contends that the facts did establish special circumstances (230 C.A.3d 957), and that the failure of Mauro's counsel to file an appeal was a sufficient excuse (230 C.A.3d 959, 960). This approach is unsound. "The required special circumstances must relate to the delay and justify the petitioner's failure to employ the appeal remedy." (230 C.A.3d 955.)

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2. Premature Notice.

a. Notice After Rendition: Appeal Is Valid.

9 Witkin Cal. Proc. Appeal § 620

[§ 620] Notice After Rendition: Appeal Is Valid.

Uncertainty as to what constitutes the rendition of a judgment or order, and as to the time of entry (see *supra*, §607 et seq.), may result in a premature appeal. Under a strict view of appellate jurisdiction, a notice filed before there is any appealable judgment or order is a nullity. (See *Spencer v. Troutt* (1901) 133 C. 605, 608, 65 P. 1083 ["This conclusion seems to have been based largely upon the necessity of a rule by which it can be determined whether the trial court still retains jurisdiction of the case"]; *Phillips v. Phillips* (1953) 41 C.2d 869, 874, 264 P.2d 926; *supra*, §612.) But a notice given too soon involves none of the policy objections of a late appeal. "A premature appeal harms no one; at its worst it offends the sense of legal propriety." (17 So. Cal. L. Rev. 89.)

This harsh rule of invalidity was first repudiated by statute antedating the rules, and then incorporated in the rules. "A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment." (C.R.C., Rule 8.104(e)(1); see C.R.C., Rule 8.751(c) [similar].) As used in C.R.C., Rule 8.104(e), "judgment" includes an appealable order if the appeal is from such an order. (C.R.C., Rule 8.104(f); see *supra*, §555.) Thus, if an appealable judgment or order has been rendered (see 7 Cal. Proc. (5th), *Judgment*, §44), the notice of appeal is given full effect even though that judgment or order has not yet been entered. (See *Driskill v. Thompson* (1956) 141 C.A.2d 479, 481, 296 P.2d 834; *Fazzino v. Insurance Co. of North America* (1957) 152 C.A.2d 304, 305, 313 P.2d 178, citing the text; *Eckhart v. Genuine Parts Distributors* (1997) 53 C.A.4th 1340, 1344, 62 C.R.2d 487; cf. *First Amer. Title Co. v. Mirzaian* (2003) 108 C.A.4th 956, 960, 134 C.R.2d 206 [notice of appeal from nonappealable order denying motion to set aside default was not premature notice of appeal under rule; notice was not filed after judgment was rendered]; 17 So. Cal. L. Rev. 88.)

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C.R.C., Rule 8.751(c) was repealed in 2008. The provision referred to in the text is now in C.R.C., Rule 8.822(c)(1).



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2. Premature Notice.

b. Notice Before Rendition: Discretionary Relief.

1. In General.

9 Witkin Cal. Proc. Appeal § 621

[§ 621] In General.

The "rendition" exception (supra, §620) did not protect an appeal taken in a case requiring a particular form of rendition; e.g., where findings were required, their filing constituted the rendition of judgment. (See *Estate of Pala* (1942) 55 C.A.2d 647, 650, 131 P.2d 593; 17 So. Cal. L. Rev. 89; 7 Cal. Proc. (5th), Trial, §389; 7 Cal. Proc. (5th), Judgment, §47.)

C.R.C., Rule 8.104(e)(2) now provides for discretionary relief where a notice is filed before rendition by an appellant who mistakes a preliminary statement of intention for the judgment or order itself. "The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." (See *Allabach v. Santa Clara County Fair Assn.* (1996) 46 C.A.4th 1007, 1011, 54 C.R.2d 330 [where parties briefed merits and defendants failed to attack plaintiffs' premature notice of appeal, rule was properly invoked in interests of judicial economy]; *First Amer. Title Co. v. Mirzaian* (2003) 108 C.A.4th 956, 960, 134 C.R.2d 206 [because notice of appeal from nonappealable order denying motion to set aside default was not filed after superior court announced its intended ruling as required by rule, it did not qualify as premature notice]; 17 So. Cal. L. Rev. 89 [discussing original proposal for this relief]; on "judgment" as including "appealable order," see supra, §620; on limited civil case appeals, see C.R.C., Rule 8.751(c) [similar].)

West's Key Number Digest, Appeal and Error 337(2), 425, 428(2)

SUPPLEMENT: [This section is current through the latest supplement]

Limited civil case: C.R.C., Rule 8.751(c) was repealed in 2008. The provision referred to in the text is now in C.R.C., Rule 8.822(c)(2).



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2. Good Cause Requirement.

9 Witkin Cal. Proc. Appeal § 622

[§ 622] Good Cause Requirement.

Former C.R.C., Rule 2(c) authorized relief "for good cause." Although the "good cause" language has not been carried forward into C.R.C., Rule 8.104(e)(2), the "good cause" requirement is implied from the discretionary nature of the power granted. It is thus difficult to see how the appellate court can find that good cause exists without something brought to its attention by the appellant. However, under *Hohn v. Hohn* (1964) 229 C.A.2d 336, 40 C.R. 125, this appears to be unnecessary. Appellant's notice referred to a nonappealable order confirming an arbitrators' award, instead of to the judgment later entered. The court first construed the reference to the order as a reference to the judgment (see supra, §564 et seq.), and then said: "We therefore feel constrained to treat the record as showing 'good cause' ... though no good cause was actually shown by or on behalf of appellants." (229 C.A.2d 340.) (See *American Motorists Ins. Co. v. Cowan* (1982) 127 C.A.3d 875, 883, 179 C.R. 747 [no claim that respondent was misled or prejudiced, and respondent failed to raise problem by motion to dismiss at time when defect could have been cured by timely filing of notice of appeal]; *Pulver v. Avco Financial Services* (1986) 182 C.A.3d 622, 630, 631, 227 C.R. 491 [following *American Motorists Ins. Co.*; notice referring to nonappealable order was treated as premature but valid notice of appeal from subsequent judgment]; on limited civil case appeals, see C.R.C., Rule 8.751(c) ["good cause" language retained].)

SUPPLEMENT: [This section is current through the latest supplement]

Limited civil case: C.R.C., Rule 8.751(c) was repealed in 2008. The provision referred to in the text is now in C.R.C., Rule 8.822(c)(2), but the "good cause" language was omitted.



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3. Relief Granted.

9 *Witkin Cal. Proc. Appeal* § 623

[§ 623] Relief Granted.

The relief rule has been applied, often in conjunction with the policy of liberal construction (*supra*, §564 *et seq.*), to support appellate jurisdiction where the notice was not only premature but also wholly failed to specify an appealable order. This practice has already been discussed in connection with the construction or correction of the notice (see *supra*, §§124 *et seq.*, 563 *et seq.*), and the cases considered here show how relief under C.R.C., Rule 8.104(e)(2) is an essential part of the process.

In *Zellers v. California* (1955) 132 C.A.2d 56, 281 P.2d 296, the trial court found in favor of plaintiff against one defendant, but held defendants O not liable. After plaintiff's appeal, it appeared that no judgment in favor of defendants O had been entered, and they sought dismissal of the appeal as to them. *Held*, the appeal should not be dismissed; instead, it was ordered that the trial court amend its judgment nunc pro tunc to include a judgment in favor of defendants O, and that plaintiff's notice of appeal should then be considered as filed immediately after entry of the amended judgment. (132 C.A.2d 57.) (See *Powers v. Sissoev* (1974) 39 C.A.3d 865, 870, 114 C.R. 868 [citing the text and following *Zellers*]; *Dominguez v. Alhambra* (1981) 118 C.A.3d 237, 242, 173 C.R. 345 [citing *Powers* and the text].) (For another practical solution to a similar problem, see *Gombos v. Ashe* (1958) 158 C.A.2d 517, 524, 322 P.2d 933, and cases following it, *supra*, §124 *et seq.*)

In *Evola v. Wendt Const. Co.* (1958) 158 C.A.2d 658, 323 P.2d 158, plaintiff filed a notice of appeal "from the Order Sustaining Demurrer." Defendant argued that the rule was only intended to apply where the notice describes or reasonably refers to the judgment subsequently entered, and not to the situation where, as here, it clearly refers to a nonappealable order. *Held*, the rule is not so limited. The court conceded that there may be situations where doubt exists as to just what the appellant is seeking to review, and, as to these, the notices of appeal from the nonappealable orders cannot be cured. But here, a demurrer was sustained without leave; plaintiff sought a review of the propriety of that order; his mistake, in not waiting until judgment was entered, neither misled nor prejudiced the defendant. Hence, exercising its discretion under former C.R.C., Rule 2(c) (now C.R.C., Rule 8.104(e)(2)), the court treated the defective notice as a notice of appeal from the later judgment. (158 C.A.3d 660.)

Bezell v. Schrader (1963) 59 C.2d 577, 30 C.R. 534, 381 P.2d 390, goes even further. Plaintiff's appeal from an order sustaining a demurrer without leave to amend was dismissed. (*Bezell v. Schrader* (1962) 205 C.A.2d 673, 23 C.R. 189.) Then the trial judge filed an order entitled "Order Sustaining Demurrer Without Leave to Amend," which stated that "plaintiff take nothing from defendant." The Supreme Court took two unusual steps in sustaining plaintiff's appeal from this order:

(a) There was still no appealable judgment, but, because the only proper procedure for the trial judge would have been to enter a judgment of dismissal, his inept language ("plaintiff take nothing") was actually amended by "interpretation": "For the purposes of this appeal we will deem the foregoing order to incorporate an order of dismissal." (59 C.2d 580.)

(b) The notice of appeal obviously did not refer to this judgment of dismissal, which was created by the reviewing court and was not in existence at the time of the notice. But this defect was also cured by interpretation; the quoted language above continues, "and will interpret plaintiff's notice of appeal as applying to the dismissal." (59 C.2d 580.)

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4. Relief Denied.

9 Witkin Cal. Proc. Appeal § 624

[§ 624] Relief Denied.

In re Ricky H. (1992) 10 C.A.4th 552, 558, 12 C.R.2d 578, supra, §131, was a dependency proceeding in which a mother challenged two sets of orders: those made on March 12 terminating reunification services and setting the matter for a permanency planning hearing, and those made on July 12 terminating her parental rights over one child and placing the other child in long-term foster care. When the appeal from the July 12 orders was dismissed as untimely, the mother attempted to have the appeal from the March 12 orders treated as a premature appeal from the July 12 orders. *Held*, this could not be done. "Typically, premature appeals are deemed to be timely when the decision being appealed from has been made preliminarily, but is not yet final." Here, in contrast:

(a) At the time the initial notice of appeal from the March 12 orders was filed, there had been no preliminary decision regarding the orders later rendered at the July 12 hearing. (10 C.A.4th 559.)

(b) It did not appear that the mother intended her initial notice of appeal to encompass the possible orders that could result from the July 12 hearing. Instead, her notice of appeal clearly described the orders that were rendered on March 12. (10 C.A.4th 559.)

(c) For both of these reasons, there was no good cause for considering her initial notice of appeal to be an appeal from the orders made at the July 12 hearing. (10 C.A.4th 559.)

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G. Case Information Statement.

9 *Witkin Cal. Proc. Appeal* § 625

[§ 625] Case Information Statement.

(1) *Requirement of Statement.* On receiving notice of the filing of a notice of appeal under C.R.C., Rule 8.100(e)(1) (*supra*, §559), the reviewing court clerk must promptly mail the appellant a copy of the "civil case information statement" form prescribed by the Judicial Council and a notice that the statement must be filed within 10 days. Within 10 days after the clerk mails the notice, the appellant must serve and file in the reviewing court a completed civil case information statement, attaching a copy of the judgment or order being appealed that shows the date that it was entered. If the appellant fails to timely file the statement, the reviewing court clerk may either impose monetary sanctions or dismiss the appeal. If the appellant fails to file the statement as specified in the notice, the court may impose the sanctions specified. (C.R.C., Rule 8.100(g)(3).)

(2) *Judicial Council Form.* The Judicial Council has adopted a mandatory form for the statement. It directs the appellant to attach both (a) a copy of the judgment or order being appealed showing the date that it was entered and (b) proof of service of the form on all parties to the appeal. (See Judicial Council Form No. APP-004 [Civil Case Information Statement (Appellate)].)

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A. In General.

1. Nature of Record.

9 Witkin Cal. Proc. Appeal § 626

[§ 626] Nature of Record.

(1) *Content.* The record on appeal is a collection of papers that reflects the proceedings in the lower court and is physically transmitted to the reviewing court. It may consist of three types of material: (a) the oral proceedings, transcribed or restated in narrative form; (b) the pleadings, judgment, and other formal papers constituting the judgment roll, either brought up as originals or copies; (c) evidentiary documents or exhibits introduced in the lower court, either copied or brought up as originals. (See C.R.C., Rule 8.120 et seq.; C.E.B., 1 Civil Appellate Practice 3d, Chap. 9; Rutter Group, 1 Civil Appeals and Writs, Chap. 4; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §441 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), Appeal and Error, §401 et seq.; on record in sterilization appeals, see C.R.C., Rule 8.482, *supra*, §151.)

(2) *Permissible Types of Record.* Originally, the sole method of preparing a record on appeal, except on the judgment roll alone, was the bill of exceptions--a narrative statement of the proceedings with specifications of the errors. In 1907, an alternative method was authorized, the record consisting of a reporter's transcript of the proceedings. The alternative method was carried into the rules, but with the following major change: formerly, the transcript had to be complete; now, in the interests of economy, the parties may elect to bring up less than the entire proceedings. (On penalty for excessive record, see *infra*, §687.) The rules provide for appeals on four different types of records:

(a) Clerk's and reporter's transcripts. (See *infra*, §635 et seq.)

(b) Settled statement, a modernized version of the bill of exceptions. (See *infra*, §657 et seq.)

(c) Agreed statement. (See *infra*, §664 et seq.)

(d) Judgment roll alone. (See *infra*, §667 et seq.)

Where there is no reporter at the trial, and no transcript is possible, the only choices are an agreed or settled statement, or clerk's transcript (judgment roll appeal). (*Arruda v. Arruda* (1963) 218 C.A.2d 410, 414, 32 C.R. 257, *infra*, §668.)

(3) *Administrative Proceedings.* If an appellant intends to raise any issue requiring consideration of the record of an

administrative proceeding that was admitted in evidence, refused, or lodged in the superior court, the record must include the administrative record. (C.R.C., Rule 8.120(a)(2); on records of administrative proceedings, see *infra*, §634.)

(4) *Oral Proceedings.* If an appellant intends to raise any issue requiring consideration of the oral proceedings in the superior court, the record must include a record of the oral proceedings in the form of a reporter's transcript, an agreed statement, or a settled statement. (C.R.C., Rule 8.120(b).)

West's Key Number Digest, Appeal and Error 493 et seq.

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A. In General.

2. Notice Designating Record.

9 *Witkin Cal. Proc. Appeal* § 627

[§ 627] Notice Designating Record.

(1) *Time To File.* "Within 10 days after filing the notice of appeal, an appellant must serve and file a notice in the superior court designating the record on appeal. The appellant may combine its notice designating the record with its notice of appeal." (C.R.C., Rule 8.121(a).) (See C.E.B., 1 Civil Appellate Practice 3d, §§9.41, 10.30, 10.31; Rutter Group, 1 Civil Appeals and Writs §4:122 et seq.; Cal Civil Practice, 5 Procedure §§38.48, 38.54 et seq.; 2 Am.Jur. P.P. Forms (2000 ed), Appeal and Error, §408 et seq.; Judicial Council Form No. APP-003 [Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)].)

(2) *Contents.* The notice must do the following:

(a) Specify the date when the notice of appeal was filed. (C.R.C., Rule 8.121(b)(1)(A).)

(b) Specify which form of the record of the written documents that the appellant elects to use (if a clerk's transcript is elected, the notice must also designate the documents to be included). (C.R.C., Rule 8.121(b)(1)(B).)

(c) Specify whether the appellant elects to proceed with or without a record of the oral proceedings. If the appellant elects to proceed with a record of the oral proceedings, the notice must specify the form of the record to be used (if a reporter's transcript is elected, the notice must designate the proceedings to be included). (C.R.C., Rule 8.121(b)(1)(C).)

(d) If an appellant intends to raise any issue requiring consideration of the record of an administrative proceeding that was admitted in evidence, refused, or lodged in the superior court, the notice must request that this administrative record be transmitted to the reviewing court. (C.R.C., Rule 8.121(b)(2).)

(3) *Copy to Reviewing Court.* The clerk must "promptly" send the reviewing court a copy of the notice. (C.R.C., Rule 8.121(c).)

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3. Duty of Appellant To Furnish Record.

9 *Witkin Cal. Proc. Appeal* § 628

[§ 628] Duty of Appellant To Furnish Record.

The appellant must affirmatively show error by an adequate record. (See *Erikson v. Sullivan* (1947) 81 C.A.2d 790, 791, 185 P.2d 31 [fragmentary transcript, not in compliance with rules, useless for review; appeal dismissed]; *Utz v. Aureguy* (1952) 109 C.A.2d 803, 806, 241 P.2d 639; *Barry v. Rodgers* (1962) 199 C.A.2d 298, 301, 18 C.R. 723; *Berg v. Investors Real Estate Loan Co.* (1962) 207 C.A.2d 808, 818, 24 C.R. 701, citing the text; *Rossiter v. Benoit* (1979) 88 C.A.3d 706, 712, 152 C.R. 65, citing the text; *Cosenza v. Kramer* (1984) 152 C.A.3d 1100, 1102, 200 C.R. 18, citing the text; *Buckhart v. San Francisco Residential Rent Stabilization & Arbitration Bd.* (1988) 197 C.A.3d 1032, 1036, 243 C.R. 298, citing the text; *In re Marriage of Ditto* (1988) 206 C.A.3d 643, 648, 253 C.R. 770 [memorandum of intended decision is not part of record, and cannot be used to impeach judgment]; *Null v. Los Angeles* (1988) 206 C.A.3d 1528, 1532, 1535, 254 C.R. 492, citing the text; supra, §416 et seq.; *Protect Our Water v. Merced* (2003) 110 C.A.4th 362, 373, 1 C.R.3d 726 [mandamus granted directing county to set aside approval of environmental impact report, because record was so poorly prepared that appellate court could not tell if required findings had been made]; *McAtee v. Realty Executives* (2004) 121 C.A.4th Supp. 1, 5, 17 C.R.3d 172 [transcript of trial proceedings allegedly prepared from audiotapes could not be accepted as accurate record, where trial was neither reported by court reporter nor recorded pursuant to trial court order, and transcripts were not certified by trial court]; *Moreno v. King* (2005) 127 C.A.4th 17, 30, 25 C.R.3d 29 [on appeal from order granting motion to tax costs, it was presumed that trial court was presented with sound basis at hearing on motion to support its implied findings, where record was silent as to trial court's reasoning]; for exception where appeal is from order granting new trial without specification of reasons, see *infra*, §669.)

Calhoun v. Hildebrandt (1964) 230 C.A.2d 70, 40 C.R. 690, illustrates the importance of "making a record" at the trial in order to have a record of errors to bring up. Plaintiff, appealing from a personal injury judgment on the ground of inadequacy of damages, asserted that defense counsel was guilty of prejudicial misconduct in an argument disparaging her race. However, this ground of appeal was rejected because both counsel had agreed not to report the arguments, and the record therefore failed to show the alleged error. Plaintiff's attempt to solve the problem by a motion for a settled statement failed because the trial judge, 6 months later, could not recall the details of the argument and denied the motion. (230 C.A.2d 72.)

However, when an opinion is urgently needed for the guidance of bench and Bar, this fundamental rule bends to the breaking point. In *Scala v. Jerry Witt & Sons* (1970) 3 C.3d 359, 90 C.R. 592, 475 P.2d 864, the court reviewed prior

decisions and rendered a definitive opinion on the statutory requirement of specification of reasons for granting a new trial. (See 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §83 et seq.) A footnote points out, however, that the vehicle was poorly designed for the purpose served:

(a) "This appeal is before us on an extremely abbreviated record. Neither party requested that the oral proceedings--although apparently reported--be transcribed, and the clerk's transcript contains little more than the complaint, the motion for new trial, and the minute order ruling on that motion. Ordinarily, of course, such an appeal would fail for want of an adequate record, as it is an appellant's burden to properly present his case. ... In this instance, however, we deem the shortcoming to be outweighed by the need for this court to resolve the growing conflict among Court of Appeal opinions." (3 *C. 3d*, 367, footnote 4.)

(b) "We are empowered to order on our own motion that portions of the oral proceedings be transcribed or that an agreed or settled statement be prepared. ... But either procedure would entail additional expense and delay which appear unjustifiable in view of the limited scope of inquiry on this type of appeal. On the other hand, the record does contain defendant's points and authorities in support of the motion for new trial; this document includes detailed summaries of the testimony upon which the trial court was asked to rule the verdict to be against the weight of the evidence. For our present purpose, therefore, a sufficient acquaintance with the facts and issues of the case may be derived from the analysis set forth in these points and authorities." (3 *C.3d* 367, footnote 4.)

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A. In General.

4. Record Furnished Without Cost.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 629

[§ 629] In General.

(1) *Criminal Cases*. In both felony and misdemeanor cases, the record is furnished without cost to an indigent appellant. (See 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §§107, 108.) And this right is not limited to appeals from criminal convictions; it extends to coram nobis appeals (see *In re Paiva* (1948) 31 *C.2d* 503, 508, 190 *P.2d* 604), and appeals from insanity and narcotic commitments (see *People v. Victor* (1965) 62 *C.2d* 280, 288, 42 *C.R.* 199, 398 *P.2d* 391; 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §109).

(2) *Civil Cases*. In an ordinary civil action, an indigent litigant is not entitled to a free transcript. (See *Leslie v. Roe* (1974) 41 *C.A.3d* 104, 107, 116 *C.R.* 386 [personal injury plaintiff]; *Graziano v. Appellate Dept.* (1978) 84 *C.A.3d* 799, 801, 149 *C.R.* 40, 3 *Cal. Proc.* (5th), *Actions*, §423 [indigent had alternative means of obtaining relief sought].)

By statute or judicial declaration, a free transcript is authorized in certain types of cases, including the following:

(a) When a juvenile appellant is unable to afford counsel. (See *Welf.C.* 395, 800; *Smith v. Superior Court* (1974) 41 *C.A.3d* 109, 114, 115 *C.R.* 677 [Welf.C. 800 applies to appeal from denial of request to withdraw consent to adoption but does not necessarily require complete reporter's transcript].)

(b) On appeal from an order freeing a minor from parental control. (See *Family C.* 7895.)

(c) In Lanterman-Petris-Short conservatorship proceedings. (See *infra*, §630.)

(3) *Distinction: Free Clerk's Transcript*. In *Rohnert Park v. Superior Court* (1983) 146 *C.A.3d* 420, 193 *C.R.* 33, 3 *Cal. Proc.* (5th), *Actions*, §423, the court held that the language in former *C.R.C.*, Rule 985(j)(6) (now *C.R.C.*, Rule 3.62(6)), permitting waiver of "[o]ther fees or expenses" did not authorize waiver of clerk's or reporter's transcripts on appeal. However, in *Mehdi v. Superior Court* (1989) 213 *C.A.3d* 1198, 261 *C.R.* 919, the court interpreted the decision in *Rohnert Park* as being limited to the reporter's transcript, and held that former *C.R.C.*, Rule 985(i) (now *C.R.C.*, Rule 3.61(9)), providing for waiver of clerk's fees for copying, certification, and transmittal of papers, authorizes waiver of clerk's transcript fees for indigent appellants. (213 *C.A.3d* 1203.)

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4. Record Furnished Without Cost.

b. Lanterman-Petris-Short Conservatorship Proceeding.

9 Witkin Cal. Proc. Appeal § 630

[§ 630] Lanterman-Petris-Short Conservatorship Proceeding.

In *Waltz v. Zumwalt* (1985) 167 C.A.3d 835, 213 C.R. 529, the court invoked constitutional guarantees to create a right to a free transcript without express statutory authorization.

(a) Although proceedings under the Lanterman-Petris-Short Act (see 3 *Cal. Proc.* (5th), *Actions*, §97 et seq.) are civil in nature, the conservatee may be involuntarily committed to a mental hospital. If he or she is found to be "gravely disabled," the confinement may continue for years or for life. Persons so confined are deprived of personal freedom, and the confinement "is no less incarceration because it is called civil or because it is deemed to be remedial or beneficial." (167 C.A.3d 837.) Moreover, because of the potential for loss of liberty and the social stigma associated with these proceedings, there must be 12 jurors who reach a unanimous verdict, and the standard of proof is proof beyond reasonable doubt. (167 C.A.3d 837.)

(b) The statute requires appointment of appellate counsel for an indigent wishing to appeal from a grave disability commitment, and appointed counsel cannot act without a transcript of the trial proceedings. The "constitutional right to effective counsel includes the right to reasonably necessary ancillary services. ... Indigent persons appealing grave disability proceedings must be provided with the necessary record for appeal free of charge." (167 C.A.3d 838.)

(c) Due process likewise calls for a free transcript where the conservatee is in danger of losing his or her liberty by a commitment. (167 C.A.3d 838.)

(d) Equal protection furnishes an additional constitutional basis for the holding. Where liberty is at stake, the strict scrutiny test is required (see 8 *Summary* (10th), *Constitutional Law*, §704), and "this court is unable to discern any possible state interest in not providing a transcript." (167 C.A.3d 839.) The county's suggestion that conditions be imposed (e.g., a determination by the trial judge whether a complete or partial transcript is necessary or whether a settled statement would suffice) is untenable: "[W]e deal with persons threatened with loss of liberty and exposure to social stigma, persons similarly situated to defendants in criminal matters. As such they must be granted the same benefits as if the proceedings were truly criminal." (167 C.A.3d 839.)

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XV. RECORD ON APPEAL

A. In General.

5. Form of Record.

9 *Witkin Cal. Proc. Appeal* § 631

[§ 631] Form of Record.

(1) *In General.* C.R.C., Rules 8.144 and 8.758 cover the form of the record. (See 17 *So. Cal. L. Rev.* 287.) Agreed or settled statements must conform with C.R.C., Rule 8.144 insofar as practicable. (C.R.C., Rule 8.144(f).)

Records that do not conform to the rules may not be filed, except as the rules provided otherwise. (C.R.C., Rule 8.18.) (See 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error* §398 et seq. [record on appeal].)

(2) *Format.* C.R.C., Rule 8.144(a)(1) sets forth the following requirements for both a clerk's transcript and a reporter's transcript: (a) the paper must be white or unbleached, recycled, 8 1/2 by 11 inches, and of at least 20-pound weight; (b) the text must be reproduced as legibly as printed matter; (c) the contents must be arranged chronologically; (d) the pages must be consecutively numbered, except in multi-reporter cases (see *infra*, this section); (e) The margin must be at least 1 1/4 inches on the bound edge of the page.

In the clerk's transcript, only one side of the paper may be used. In the reporter's transcript, both sides may be used, but the margins must be 1 1/4 inches on each edge. (C.R.C., Rule 8.144(a)(2).) In the reporter's transcript, the lines on each page must be consecutively numbered, and must be double-spaced or one-and-a-half-spaced (double-spaced means three lines to a vertical inch). (C.R.C., Rule 8.144(a)(3).) Daily or other certified transcripts may be used for all or part of the reporter's transcript, but the pages must be renumbered consecutively and the required indexes and covers must be added. (C.R.C., Rule 8.144(d).)

(3) *Indexes.* Indexes must appear at the beginning of the first volume. (C.R.C., Rule 8.144(b).) A clerk's transcript must contain alphabetical and chronological indexes listing each document and the volume and page where it first appears. (C.R.C., Rule 8.144(b)(1).) A reporter's transcript must contain alphabetical and chronological indexes listing the volume and page where each witness' direct, cross, and any other examination begins (C.R.C., Rule 8.144(b)(2)) and must contain an index listing the volume and page where any exhibit is marked for identification and where it is admitted or refused (C.R.C., Rule 8.144(b)(3)). The index must identify each exhibit by number or letter and a brief description. (C.R.C., Rule 8.144(b)(3).)

(4) *Binding.* Clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300

sheets. (C.R.C., Rule 8.144(c)(1).)

(5) *Cover*. Each volume's cover, preferably of recycled stock, must state the title and trial court number of the case, the names of the trial court and each participating trial judge, the names and addresses of appellate counsel for each party, the volume number, and the inclusive page numbers of that volume. (C.R.C., Rule 8.144(c)(2).) In the case of a reporter's transcript, the cover of each volume must additionally state the dates of the proceedings reported in that volume. (C.R.C., Rule 8.144(c)(3).)

(6) *Pagination in Multi-Reporter Cases*. In a multi-reporter case, each reporter must estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment. If a segment exceeds the assigned number of pages, the reporter must number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively. If a segment has fewer than the assigned number of pages, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number, and state "(next page number is ____)." (C.R.C., Rule 8.144(e).)

(7) *Recycled Paper*. For both clerk's and reporter's transcripts, recycled paper must be used. (C.R.C., Rule 8.144(a)(1)(A); on use of recycled paper for transcripts on appeal in limited civil cases, see *infra*, §1011.) For volume covers in both types of transcripts, recycled paper is preferable. (C.R.C., Rule 8.144(c)(2).) (See C.R.C., Rule 1.6(22) ["recycled" defined].)

(8) *Sealed Records*. C.R.C., Rule 8.160 provides standards and procedures for filing sealed records in the reviewing court. (See 2 *Cal. Proc.* (5th), *Courts*, §§41, 44.)

West's Key Number Digest, Appeal and Error 516 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Doppes v. Bentley Motors* (2009) 174 C.A.4th 967, 989, 94 C.R.3d 802 [although "not trivial," violation of four formatting rules for appellant's appendices did not warrant sanctions, where violations did not cause prejudice, confusion, or additional work for court clerk's office]. (8) *Sealed Records*. C.R.C., Rule 8.160 was renumbered C.R.C., Rule 8.46 in 2009.



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XV. RECORD ON APPEAL

A. In General.

6. Time Limitations and Extension.

9 Witkin Cal. Proc. Appeal § 632

[§ 632] Time Limitations and Extension.

(1) *Time Provisions.* The Rules of Court contain a number of specific time provisions dealing with the record on appeal, which are noted in appropriate places in this chapter. (On nature of provisions, see generally 35 *Cal. L. Rev.* 498; 17 *So. Cal. L. Rev.* 288; 27 *U.S.F. L. Rev.* 301 [Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?].)

The time limitations relating to the record are not jurisdictional and hence may be extended; but they are mandatory, and, unless properly extended, result in loss of the right to a record and consequent dismissal of the appeal. (On relief from default, see *infra*, §689 et seq.; on shortening time, see C.R.C., Rule 8.68.)

(2) *Former Power of Extension by Trial Judge.* Prior to 1989, the presiding judge of the superior court, or a judge designated by the presiding judge, could extend the time for doing any act involved in the preparation of the record on appeal in a civil case. However, the power was not unlimited. In addition to specified restrictions, the power could be used to extend time only before the period had run. In other words, it could not relieve from a default that has already occurred. (See *Averill v. Lincoln* (1944) 24 *C.2d* 761, 763, 151 *P.2d* 119; *Peebler v. Olds* (1945) 26 *C.2d* 656, 659, 160 *P.2d* 545; *Jarkieh v. Badagliacco* (1945) 68 *C.A.2d* 426, 430, 156 *P.2d* 969; *Brock v. Southern Pac. Co.* (1946) 74 *C.A.2d* 806, 808, 169 *P.2d* 402; on reviewing court's power to relieve from default, see *infra*, §689 et seq.)

(3) *Removal of Trial Court's Power To Grant Extensions.* The power of the superior court to grant extensions was removed by an amendment that became effective July 1, 1989. "Except as these rules provide otherwise, a superior court may not extend the time to do any act to prepare the appellate record." (C.R.C., Rule 8.60(e); see C.E.B., 1 Civil Appellate Practice 3d, §§9.36, 9.50; Rutter Group, 1 Civil Appeals and Writs §4:287; 2 *Am.Jur. P.P. Forms* (2000 ed.), Appeal and Error, §641 et seq.; cf. C.R.C., Rule 8.767(b) [in limited civil case, presiding judge may, subject to specified exceptions, extend time for doing any act involved in preparation of record on appeal in civil cases].)

(4) *Extension by Chief Justice or Presiding Justice.* The power to extend the time for doing any act involved in the preparation of the record on appeal now resides solely in the reviewing court. "[F]or good cause--or on an exceptional showing of good cause, when required by these rules--the Chief Justice or presiding justice may extend the time to do any act required or permitted under these rules." (C.R.C., Rule 8.60(b); on standards for extending time, see C.R.C.,

Rule 8.63, *infra*, §715.)

(5) *Extension to Attorney-Legislator.* An attorney of record who is a member of the Legislature is entitled to an extension. (*C.C.P.* 1054.1; see 35 *Cal. L. Rev.* 499; 4 *Cal. Proc.* (5th), *Pleading*, §11 [discussing limits on right].)

(6) *Notification of Client.* Counsel must deliver to the client a copy of any stipulation or application to extend time. He or she must then either attach evidence of the delivery to the stipulation or application or certify therein that the copy has been delivered. (C.R.C., Rule 8.60(f)(1).)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Removal of Trial Court's Power To Grant Extensions.* C.R.C., Rule 8.767(b) was repealed in 2008. The power of the presiding judge to grant extensions in appellate division proceedings is now stated in C.R.C., Rule 8.810(b)(1).



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A. In General.

7. Use of Copy of Record.

9 *Witkin Cal. Proc. Appeal* § 633

[§ 633] Use of Copy of Record.

(1) *Sharing of Copies.* The rules require preparation of an original and one copy of the record. (See C.R.C., Rules 8.130(f)(1) [reporter's transcript], 8.122(d)(1)(A) [clerk's transcript].) The original is filed in the reviewing court. Formerly, the copy remained with the trial court clerk, for the use of the parties under the direction of the clerk or judge. The clerk must now transmit the copy "forthwith" to the appellant. (C.R.C., Rule 8.150(a).) Within 20 days after the original record is filed in the reviewing court, a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy. The other party must comply with this request when it serves its brief. (C.R.C., Rule 8.153(a).) The borrowing party must return the copy when it serves its brief or when the time to file its brief has expired (C.R.C., Rule 8.153(b)) and must bear the cost of sending the copy to and from it (C.R.C., Rule 8.153(c)).

(2) *One Copy for Multiple Appellants.* In *Delta Inv. Research Corp. v. Union Bank* (1978) 77 C.A.3d 211, 143 C.R. 403, three parties appealed, and the cost of the reporter's transcript was \$ 15,010.65. The reporter insisted that each appellant pay \$ 6,671.40 for an individual copy; appellant T, having arranged to share the copy of another appellant, moved for an order permitting waiver of its copy and allowing it to pay only one-third the cost of the original (\$ 5,003.55). *Held*, motion granted. "We conclude that the California Rules of Court do not require each appellant in a multiple party civil appeal to purchase an individual copy. The same flexibility which allows both appellant and respondent to use a single copy should be extended to multiple appellants. Every effort, in every case, should be made to reduce the costs of bringing an appeal." (77 C.A.3d 212.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Administrative Proceedings.

9 *Witkin Cal. Proc. Appeal* § 634

[§ 634] Administrative Proceedings.

(1) *Designation by Parties.* If an appellant's notice designating the record on appeal under C.R.C., Rule 8.121 (see *supra*, §627) requests that a record of an administrative proceeding admitted in evidence, refused, or lodged in the superior court be transmitted to the reviewing court, the notice must identify the administrative record by the title and date or dates of the administrative proceedings. (C.R.C., Rule 8.123(a), (b)(1).)

If an appellant does not request that an administrative record be transmitted to the reviewing court, the respondent, within 10 days after the appellant serves its notice designating the record on appeal, may serve and file in the superior court a notice requesting that an administrative record be transmitted to the reviewing court. (C.R.C., Rule 8.123(b)(2).)

(2) *Transmittal to Reviewing Court.* If any administrative record is designated by a party, the superior court clerk must transmit the original administrative record with the clerk's transcript or reporter's transcript sent to the reviewing court. If the appellant has elected to use neither a clerk's transcript nor a reporter's transcript, the clerk must transmit any administrative record designated by a party to the reviewing court no later than 45 days after the respondent files a designation or the time for filing it expires, whichever occurs first. (C.R.C., Rule 8.123(d).)

(3) *Return of Administrative Record.* If the superior court has returned a designated administrative record to a party, the party in possession must deliver it to the superior court clerk within 15 days after the notice designating the record on appeal is served. (C.R.C., Rule 8.123(c).)

On request, the reviewing court may return an administrative record to the superior court. However, when the remittitur issues, an administrative record must be returned. (C.R.C., Rule 8.123(e).)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Reporter's Transcript.

1. Notice.

9 *Witkin Cal. Proc. Appeal* § 635

[§ 635] Notice.

(1) *Appellant's Notice.* If in the notice designating the record on appeal under C.R.C., Rule 8.121 (*supra*, §627) the appellant elects to use a reporter's transcript, in that notice the appellant must specify the date of each proceeding to be included in the transcript. (C.R.C., Rule 8.130(a)(1).) (See C.E.B., 1 Civil Appellate Practice 3d, §9.17; Rutter Group, 1 Civil Appeals and Writs §4:70 et seq.; Cal. Civil Practice, 5 Procedure, §§38:47, 38:55 et seq.; 17 *So. Cal. L. Rev.* 100; Judicial Council Form No. APP-003 [Notice Designating Record on Appeal (Unlimited Civil Case)]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§403, 468 et seq.; on *F.R. App. P.*, Rule 10(b), see 16A Federal Practice & Procedure (Wright & Miller) §3957; 2A Federal Procedure, L.Ed., §3:684.)

The notice must be served on each known reporter of the designated proceedings. (C.R.C., Rule 8.130(a)(5).)

The notice may specify the portions of the designated proceedings that are not to be included. (C.R.C., Rule 8.130(a)(1).) If the appellant designates less than all the testimony, the notice must state the points to be raised on appeal. The appeal is then limited to those points unless, on motion, the reviewing court permits otherwise. (C.R.C., Rule 8.130(a)(2).) (See *Van Cise v. Lencioni* (1951) 106 C.A.2d 341, 349, 235 P.2d 236 [misconduct; point was not considered because of failure to include oral arguments]; *Kaufman v. Brown* (1951) 106 C.A.2d 686, 688, 235 P.2d 632 [no right to partial transcript where no statement of points is made]; *Marshallan Mfg. Co. of Calif. v. Brack* (1959) 172 C.A.2d 22, 24, 342 P.2d 26 [same]; *Skoglie v. Crumley* (1972) 26 C.A.3d 294, 297, 103 C.R. 205.)

(2) *Respondent's Notice.* Within 10 days after service of a notice of designation, the respondent may serve and file a notice in superior court designating any additional proceedings that he or she wants included in the transcript. (C.R.C., Rule 8.130(a)(3); see C.E.B., 1 Civil Appellate Practice 3d, §9.21.) However, if the appellant elects to proceed without a reporter's transcript, the respondent cannot require that a reporter's transcript be prepared. But the reviewing court, on its own motion or on the respondent's motion, may order the record augmented (see *infra*, §681 et seq.) to prevent a miscarriage of justice. Unless the court orders otherwise, the appellant is responsible for the cost of any reporter's transcript that the court may order under this subdivision. (C.R.C., Rule 8.130(a)(4).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appellant's Notice.* See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3957.(2)

Respondent's Notice. See Judicial Council Form No. APP-010 [Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)].



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B. Reporter's Transcript.

2. Effect of Pretrial Order.

9 *Witkin Cal. Proc. Appeal* § 636

[§ 636] Effect of Pretrial Order.

There is a presumption that the appellate record includes all matters material to deciding the issues raised. (C.R.C., Rule 8.163; see *supra*, §357 et seq.) But if a pretrial order is included in the record, and it contains evidentiary matter, the purpose of the appeal on a short record, e.g., on the judgment roll (see *supra*, §356 et seq. and *infra*, §667 et seq.) or a partial reporter's transcript, may be frustrated. Evidentiary matter contained in a pretrial order should not be considered at all on a judgment roll appeal (see *infra*, §668), and should not be considered on a designated partial transcript appeal unless specifically designated, for the evidence may be beyond the scope of the stated points to be raised. Thus, C.R.C., Rule 8.163 provides that if the appeal proceeds without a reporter's transcript, the presumption of a complete record applies "only if the claimed error appears on the face of the record." (See *Dumas v. Stark* (1961) 56 C.2d 673, 674, 16 C.R. 368, 365 P.2d 424 [limitation makes clear that there was no intent to allow unwarranted presumptions against judgment].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Reporter's Transcript.

3. Deposit.

a. Deposit, or Substitute, for Cost.

9 *Witkin Cal. Proc. Appeal* § 637

[§ 637] Deposit, or Substitute, for Cost.

(1) *Approximate Cost.* With its notice of designation, a party must deposit with the superior court clerk the approximate cost of transcribing the proceedings it designates. "Approximate cost" may be either based on the reporter's written estimate or computed at "\$ 325 per fraction of the day's proceedings that did not exceed three hours, or \$ 650 per day or fraction that exceeded three hours." (C.R.C., Rule 8.130(b)(1); cf. C.R.C., Rule 8.753(a), (c) [limited civil case appeals: deposit based on reporter's estimate]; see *Bitters v. Networks Electronic Corp.* (1997) 54 C.A.4th 246, 250, 62 C.R.2d 675 [appellant assumed risk of loss from reporter's failure to prepare transcript, where appellant paid reporter directly, rather than depositing fees with court, and reporter absconded with fees]; Cal. Civil Practice, 5 Procedure, §38:64 [application and order to delay deposit of reporter's estimate]; 17 *So. Cal. L. Rev.* 109; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §477.)

(2) *Substitute.* Instead of a deposit, the party may substitute (a) the reporter's written waiver of a deposit, (b) a copy of a Transcript Reimbursement Fund application (see *infra*, §639), or (c) a certified transcript of the designated proceedings. A reporter may waive the deposit for, and a party may submit a certified transcript of, a part of the designated proceedings, but such a waiver or transcript replaces the deposit for only that part. (C.R.C., Rule 8.130(b)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.753(a) was repealed in 2008. The deposit requirement in limited civil cases is now stated in C.R.C., Rule 8.834.



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3. Deposit.

b. Failure To Make Deposit.

9 Witkin Cal. Proc. Appeal § 638

[§ 638] Failure To Make Deposit.

If a party does not present the deposit or a substitute with its notice of designation, the clerk must file the notice and promptly issue a notice of default under C.R.C., Rule 8.140 (*infra*, §688). (C.R.C., Rule 8.130(d)(2); cf. C.R.C., Rules 8.753(c), 8.754(c) [limited civil case appeals: notice "shall not be effective for any purpose"].) The clerk must promptly notify the reporter if a check for a deposit is dishonored or an appeal is abandoned or dismissed before the reporter has filed the transcript. (C.R.C., Rule 8.130(d)(3).)

Failure to deposit the approximate cost of preparing the transcript requires dismissal of the appeal, unless relief from default is obtained on a sufficient showing of excuse. (See *Whelpton v. Taylor* (1947) 81 C.A.2d 949, 951, 185 P.2d 391; *Heatly v. Heatly* (1948) 83 C.A.2d 677, 679, 189 P.2d 748; *Yurkas v. O'Neill* (1948) 87 C.A.2d 885, 886, 198 P.2d 103; *Myers v. Johnson* (1949) 89 C.A.2d 800, 802, 201 P.2d 884; *infra*, §688 et seq.)

If the reporter believes that the deposit is inadequate, within 15 days after the clerk mails the notice of designation and of the deposit or substitute (*supra*, §637, and *infra*, §640), the reporter may file with the clerk, and mail to the designating party, an estimate of the additional deposit required. Within 10 days after the reporter mails the estimate, the party must deposit the additional sum. (C.R.C., Rule 8.130(b)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rules 8.753(c) and 8.754(c) were repealed in 2008. C.R.C., Rule 8.832 now governs the clerk's transcript and C.R.C., Rule 8.834 now governs the reporter's transcript in limited civil cases. (On notice of default for failure to procure record in limited civil case, see C.R.C., Rule 8.842, *Supp.*, *infra*, §1016.)



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3. Deposit.

c. Exception: Transcript Reimbursement Fund.

9 Witkin Cal. Proc. Appeal § 639

[§ 639] Exception: Transcript Reimbursement Fund.

A Transcript Reimbursement Fund has been established under *B. & P.C. 8030.2* et seq. to provide transcription services for low-income litigants. (*B. & P.C. 8030.2(a)*.) C.R.C, Rule 8.130(c) establishes the procedure as follows:

(1) With its notice of designation, a party may serve and file a copy of its application to the Court Reporters Board for payment or reimbursement from the Fund. (C.R.C, Rule 8.130(c)(1).)

(2) If the Court Reporters Board approves the application, the reporter's time to prepare the transcript begins when the reporter receives notice of the approval. (C.R.C, Rule 8.130(c)(2).)

(3) If the Court Reporters Board denies the application, the party's time to deposit the reporter's fee or substitute (see *supra*, §637), or to file an agreed or settled statement (see *infra* §§657 et seq., 664 et seq.), is extended until 30 days after the board mails notice of the denial. (C.R.C, Rule 8.130(c)(3).)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Reporter's Transcript.

4. Clerk's Notification to Reporter.

9 Witkin Cal. Proc. Appeal § 640

[§ 640] Clerk's Notification to Reporter.

If a party designates proceedings to be included in a reporter's transcript and has presented the fee deposit or a substitute under C.R.C., Rule 8.130(b)(3) (see *supra*, §637), the clerk must "promptly" mail the reporter notice of the designation and of the deposit or substitute. The notice must show the date that it was mailed. (C.R.C., Rule 8.130(d)(1); cf. C.R.C., Rule 8.753(a) [limited civil case appeals: clerk, "without delay," transmits copy of notice to reporter]; see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §479.)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.753(a) was repealed in 2008. The clerk's notification is now discussed in C.R.C., Rule 8.834(a), which provides that the clerk must "promptly" mail a copy of each notice to the reporter. (C.R.C., Rule 8.834(a)(4).)



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B. Reporter's Transcript.

5. Contents of Transcript.

9 Witkin Cal. Proc. Appeal § 641

[§ 641] Contents of Transcript.

The reporter must transcribe all designated proceedings for which a certified transcript has not been substituted under C.R.C., Rule 8.130(b)(3) (*supra*, §637), and must note in the transcript where any proceedings were omitted and the nature of those proceedings. The reporter must also note where any exhibit was marked for identification and where it was admitted or refused, identifying exhibits by number or letter. (C.R.C., Rule 8.130(e)(1).) If a party designates a portion of a witness' testimony to be transcribed, the reporter must transcribe the witness' entire testimony, unless the parties stipulate otherwise. (C.R.C., Rule 8.130(e)(2).) The reporter must not copy any document includable in the clerk's transcript (*infra*, §646 et seq.). (C.R.C., Rule 8.130(e)(3).) This requirement is not intended to relieve the reporter of the duty to report all oral proceedings, including the reading of instructions or other documents. (Advisory Committee Comment to C.R.C., Rule 8.130.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Reporter's Transcript.

6. Preparation and Filing.

9 *Witkin Cal. Proc. Appeal* § 642

[§ 642] Preparation and Filing.

(1) *Completion and Filing.* Within 30 days after notice of designation of the transcript is mailed, the reporter must prepare and certify the original transcript and file it with the superior court. The reporter must also file one copy, or more than one copy if multiple appellants equally share the cost of preparing the record (see *infra*, §671). Only the reviewing court may extend the time to prepare the reporter's transcript (see *supra*, §632). (C.R.C., Rule 8.130(f)(1); cf. C.R.C., Rule 8.753(d) [limited civil case appeals: 20 days; original only]; see *Cartwright v. Superior Court* (1950) 98 C.A.2d 300, 302, 219 P.2d 862 [upholding rule and duty of appellant to pay for copy]; for form of certification, see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §485 et seq.) The original is later transmitted to the reviewing court. (See *infra*, §679.) The copy is delivered to the appellant. (See *supra*, §633.)

(2) *Transcript Reimbursement Fund.* Notwithstanding the 30-day period, the reporter does not have to begin preparation of the transcript until he or she receives notice from the Court Reporters Board that an application for payment to or reimbursement from the Transcript Reimbursement Fund has been approved. (C.R.C., Rule 8.130(f)(1).) The 30-day period to prepare the transcript begins to run from the receipt of that notice. (C.R.C., Rule 8.130(c)(2), (f)(1).) (See *supra*, §639.)

(3) *Payment From Deposited Funds.* When the transcript is completed, the reporter must bill each designating party at the statutory rate and send a copy of the bill to the superior court clerk, who must pay the reporter from that party's deposited funds and refund any excess deposit or notify the party of any additional funds needed. In a multiple-reporter case, the clerk must pay each reporter who certifies under penalty of perjury that his or her transcript portion is completed. (C.R.C., Rules 8.130(f)(2), 8.753(d).)

(4) *Effect of Abandonment or Dismissal of Appeal.* If the appeal is abandoned or dismissed before the reporter has filed the transcript, the reporter must inform the superior court clerk of the cost of the portion of the transcript that he or she has completed. The clerk must then pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit. (C.R.C., Rule 8.130(f)(3).)

(5) *Copies in Computer-Readable Format.* On request, and unless the superior court orders otherwise, the reporter must provide any party with a copy of the reporter's transcript in computer-readable format. (C.R.C., Rule 8.130(f)(4).)

In recognition of the fact that in some instances the reporter may be unable to provide a copy in computer-readable format, C.R.C., Rule 8.130(f)(4) authorizes the reporter to apply to the superior court for relief from this requirement. (Advisory Committee Comment to C.R.C., Rule 8.130.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Completion and Filing.* C.R.C., Rule 8.753(d) was repealed in 2008. C.R.C., Rule 8.834(d)(1) now provides for an original and one copy in limited civil cases.(3) *Payment From Deposited Funds.* C.R.C., Rule 8.753(d) was repealed in 2008. Payment requirements for limited civil cases are now stated in C.R.C., Rule 8.834(d)(2).



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B. Reporter's Transcript.

7. Delinquent Clerk or Reporter.

9 *Witkin Cal. Proc. Appeal* § 643

[§ 643] Delinquent Clerk or Reporter.

(1) *Former Law.* The original Rules on Appeal did not deal with neglectful officers, except indirectly in making clear that a diligent appellant would not be penalized for default. (See 17 *So. Cal. L. Rev.* 109, 128.) The cases indicated that the appropriate remedy was mandamus to compel the officer to perform his or her official duty. (*Darcy v. Moore* (1942) 49 *C.A.2d* 694, 701, 122 *P.2d* 281 [reporter]; *Cross v. Superior Court* (1951) 104 *C.A.2d* 594, 595, 232 *P.2d* 255 [writ issued to compel reporter to refund overcharge].) And a recalcitrant reporter could also be held in contempt for failing to transcribe a record after being ordered to do so. (*Rappaport v. Superior Court* (1940) 39 *C.A.2d* 15, 22, 102 *P.2d* 526.)

(2) *Grounds for Disciplinary Action Against Reporter.* Under *B & P.C. 8025*, a reporter's certificate may be suspended, revoked, or denied, or other disciplinary action may be imposed, for one or more of the following causes:

(a) Conviction of any felony, or of any misdemeanor if the misdemeanor is substantially related to the functions and duties of a court reporter. The record of conviction, or a certified copy, is conclusive evidence of the conviction. (*B & P.C. 8025(a).*)

(b) Failure to notify the reporter's board of a conviction. (*B & P.C. 8025(b).*)

(c) Fraud or misrepresentation in obtaining a certificate. (*B & P.C. 8025(c).*)

(d) Fraud, dishonesty, corruption, wilful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct directly related to reporting. (*B & P.C. 8025(d).*)

(e) Repeated unexcused failure, whether or not wilful, (1) to transcribe notes of cases pending on appeal, and (2) to file the transcripts of those notes, or to transcribe or file notes of other proceedings, within the time required by law or agreed to by contract. (*B & P.C. 8025(e).*)

(f) Loss or destruction of stenographic notes that negligently prevents the production of a transcript. (*B & P.C. 8025(f).*)

(g) Failure to comply with, or to pay a monetary sanction imposed by, any court for failure to provide timely transcripts. The record of the court order, or a certified copy, is conclusive evidence that the sanction was imposed. (*B & P.C. 8025(g).*)

(h) Failure to pay a civil penalty dealing with the provision of court reporting services or products. (*B & P.C. 8025(h).*)

(i) The revocation of, suspension of, or other disciplinary action against a license to act as a certified shorthand reporter by another state. A certified copy of these actions by the other state is conclusive evidence of the action. (*B & P.C. 8025(i).*)

(3) *Prohibition on Acting as Reporter.* Under *Govt.C. 69944*, a reporter is incompetent "to act as official reporter in any court" until the reporter has completed and filed all transcriptions of his or her notes in all appeals, not merely criminal appeals. *Govt.C. 69944* further provides that violation of *B. & P.C. 8025(e)* (authorizing suspension or revocation of a reporter's certificate for fraud, dishonesty) renders the reporter incompetent to act in any court. (See *In re Watson (1985) 38 C.3d 655, 656, 214 C.R. 458, 699 P.2d 869* [order to show cause was discharged where, after numerous delays, reporter finally completed transcript and declared intention to refrain from future court reporting]; *Malick v. Contra Costa County Flood Control & Water Conservation Dist. (1982) 131 C.A.3d 50, 53, 182 C.R. 386* [declaring incompetency of official reporter to act in any court until he completed and filed required transcriptions].)

(4) *Rule Sanctions Against Reporter or Clerk.* "The failure of a court reporter or clerk to perform any duty imposed by statute or these rules that delays the filing of the appellate record is an unlawful interference with the reviewing court's proceedings. It may be treated as an interference in addition to or instead of any other sanction that may be imposed by law for the same breach of duty. This rule does not limit the reviewing court's power to define and remedy any other interference with its proceedings." (C.R.C., Rule 8.23.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Reporter's Transcript.

8. Remedies Against Judge.

9 Witkin Cal. Proc. Appeal § 644

[§ 644] Remedies Against Judge.

In *Sullivan v. Superior Court* (1954) 128 C.A.2d 476, 275 P.2d 595, a judgment for injunction and damages was entered against petitioners. They appealed and asked for a transcript, but meanwhile appealed from an order of the trial judge requiring a \$ 5,000 bond to stay execution. The judge then ordered the clerk and reporter not to prepare the transcript on the main appeal from the judgment until the appeal from the order was decided. *Held*, mandamus issued against the judge, clerk, and reporter. It was the duty of the clerk and reporter to prepare and file the transcripts, and "it is the duty of the superior court to make such orders as will aid the perfection of the record--not orders which will deny the right to have a record on appeal." (128 C.A.2d 479.)

In *Summers v. Superior Court* (1959) 53 C.2d 295, 1 C.R. 324, 347 P.2d 668, plaintiff obtained an estimate from the reporter of \$ 625, which he deposited. After completion of the transcript, the reporter demanded \$ 680.62, on the theory of an implied contract to pay for a second copy of the transcript instead of just the original and one copy required by the rules. Plaintiff filed "exceptions" to the charges. The trial judge held a hearing and decided against plaintiff, entering an order denying the relief sought. Plaintiff then filed this proceeding "to review" the order. *Held*, "review is the only remedy available to petitioner" and the "order under review is annulled." Contrary to *Cross v. Superior Court* (1951) 104 C.A.2d 594, 232 P.2d 255, the trial judge had no jurisdiction over the controversy presented by the exceptions; the issue involved contract rights and liabilities of the litigant and reporter, and could only be adjudicated in an action brought for that purpose. "If the opinion in that case implies that the trial court in an auxiliary proceeding in the main action has jurisdiction to settle a controversy between the reporter and the appellant over fees, such implication is wrong, and is disapproved." (53 C.2d 298.)

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B. Reporter's Transcript.

9. Electronic Recording of Proceeding.

9 *Witkin Cal. Proc. Appeal* § 645

[§ 645] Electronic Recording of Proceeding.

(1) *Recording As Substitute for Reporter's Transcript.* "On stipulation of the parties approved by the reviewing court, the original reels or electronic copies of them may be transmitted as the record of oral proceedings without being transcribed, in which case the reels or copies satisfy the requirements in the California Rules of Court or in any statute for a reporter's transcript." (C.R.C., Rule 2.952(j)(1).)

(2) *Request for, and Preparation of, Transcript.* In the absence of a court-approved stipulation, the appellant must, within 10 days after filing a notice of appeal, serve and file with the clerk directions indicating the portions of the oral proceedings to be transcribed and must, at the same time, deposit with the clerk the approximate cost (see *supra*, §637). The rules governing the reporter's transcript (see *supra*, §635 et seq.) and the clerk's transcript (see *infra*, §646 et seq.) must be followed as closely as possible. (C.R.C., Rule 2.952(j)(2).) On receiving directions to have a transcript prepared, the clerk may have the material transcribed by a court employee, but should ordinarily send the reels in question to a professional recording service that has been certified by the federal court system or the Administrative Office of the Courts, or verified by the clerk to be skilled in producing transcripts. (C.R.C., Rule 2.952(j)(3).)

(3) *Uncertified Videotape Is Not Part of Record.* In *Moustakas v. Dashevsky* (1994) 25 C.A.4th 752, 30 C.R.2d 753, no reporter was present, and the trial was recorded on videotape. The record on appeal consisted of a certified transcription of the audio portion of the videotape and an uncertified copy of the videotape, which contained running subtitles showing the hour, minute, and second of recording. In support of his claims of trial judge error, e.g., spending only 43 seconds to examine 6 documentary exhibits, one of which was 7 pages long, appellant cited specific portions of the videotape. *Held*, this was improper. Former C.R.C., Rule 980.5(i) (now C.R.C., Rule 2.952(j)) provides that a videotape may be made part of the record on appeal upon stipulation of the parties and approval by the reviewing court. "The rules of court do not address the most important implication of the videotaping of trial proceedings. Many aspects of the time-honored rules limiting the scope of appellate review are based on the trial judge's opportunity to see and hear witnesses, attorneys, and jurors. A drastic change in the principles of appellate review would be needed before we could base our decisions on appeal on our own evaluation of the sights and sounds of the trial courtroom. Because of the far-reaching implications, any such change must come from the Legislature or from higher judicial authority. Accordingly, we do not regard the videotape as part of the record on this appeal." (25 C.A.4th 754.)

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C. Clerk's Transcript and Original Papers.

1. Matters Automatically Included.

9 Witkin Cal. Proc. Appeal § 646

[§ 646] Matters Automatically Included.

The designation system, as applied to the clerk's transcript, allows the parties to omit unnecessary papers. (See *infra*, §647.) But certain papers are deemed essential to the determination of any appeal, and must always be included. (C.R.C., Rules 8.122(b), 8.754(d); see C.E.B., 1 Civil Appellate Practice 3d, §9.39; Rutter Group, 1 Civil Appeals and Writs §4:126; 17 *So. Cal. L. Rev.* 104, 107; 2 *Am.Jur. P.P. Forms* (2000 ed.), Appeal and Error §450 et seq.) These are the following:

(1) The notice of appeal. (C.R.C., Rule 8.122(b)(1)(A).)

(2) Any judgment appealed from and any notice of its entry. (C.R.C., Rule 8.122(b)(1)(B).)

(3) Any order appealed from and any notice of its entry. (C.R.C., Rule 8.122(b)(1)(C).)

(4) Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, with any supporting or opposing papers, and any order on the motion and any notice of its entry. (C.R.C., Rule 8.122(b)(1)(D).)

(5) Any notices or stipulations to prepare clerk's or reporter's transcripts or to proceed by an agreed or settled statement. (C.R.C., Rule 8.122(b)(1)(E).)

(6) The register of actions, if any. (C.R.C., Rule 8.122(b)(1)(F).)

The notice of appeal, the judgment or order appealed from, and any notice of intention to move for a new trial, etc., must show the date necessary to determine the timeliness of the appeal. (C.R.C., Rule 8.122(b)(2); on time for appeal, see *supra*, §574 et seq.)

A party introducing an electronic recording into evidence must provide (unless otherwise ordered) a typewritten transcript, which becomes part of the clerk's transcript in the event of an appeal. (C.R.C., Rule 2.1040(a).)

West's Key Number Digest, Appeal and Error 594, 607

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.754(d) was repealed in 2008. The papers that must be automatically included in the clerk's transcript in limited civil cases are now specified in C.R.C., Rule 8.832(a)(1).



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C. Clerk's Transcript and Original Papers.

2. Matters Designated.

9 *Witkin Cal. Proc. Appeal* § 647

[§ 647] Matters Designated.

(1) *In General.* If designated by a party, the clerk's transcript must include the following:

(a) Any document filed or lodged in the case in superior court. (C.R.C., Rule 8.122(b)(3)(A).)

(b) Any exhibit admitted in evidence, refused, or lodged. (C.R.C., Rule 8.122(b)(3)(B).)

(c) Any jury instruction that a party submitted in writing, the cover page indicating the party requesting it, and any written jury instructions given by the court. (C.R.C., Rule 8.122(b)(3)(C).)

C.R.C., Rule 8.122(b)(3)(A) makes clear the abandonment of the former restriction of the clerk's transcript to the formal papers constituting the judgment roll. Any relevant papers in the clerk's file or in his or her custody may be included. Thus, for example, the clerk's minutes may be designated. (See C.R.C., Rule 8.122(a)(1).)

(2) *Exhibits.* Exhibits admitted in evidence, refused, or lodged are generally deemed part of the record, but a party wanting an exhibit copied in the transcript must specify that exhibit by number or letter in its notice of designation. (C.R.C., Rule 8.122(a)(3).)

(3) *Depositions.* Depositions are not to be copied or transmitted unless the parties stipulate or the reviewing court orders it. (C.R.C., Rule 8.122(b)(4)(A).)

(4) *Administrative Proceedings.* The record of an administrative proceeding is not included in the transcript unless the parties stipulate or the reviewing court orders it. (C.R.C., Rule 8.122(b)(4)(B); on transmitting administrative records to reviewing court, see C.R.C., Rule 8.123.)

(5) *Sufficiency of Designation.* A notice designating a clerk's transcript must identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed. The notice may specify portions of designated documents that are not to be included in the transcript. For minute orders, it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates. For instructions, it is sufficient to designate all written instructions given, refused, or withdrawn. (C.R.C., Rule 8.122(a)(1).)

(6) *Designation by Respondent.* Within 10 days after the appellant serves its notice designating a clerk's transcript, the respondent may serve and file a notice designating any additional documents that it wants included in the transcript. (C.R.C., Rule 8.122(a)(2); see Cal. Civil Practice, 5 Procedure §38:60.)

West's Key Number Digest, Appeal and Error 594, 607

SUPPLEMENT: [This section is current through the latest supplement]



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C. Clerk's Transcript and Original Papers.

3. Original Papers.

9 *Witkin Cal. Proc. Appeal* § 648

[§ 648] Original Papers.

(1) *Limited Civil Cases*. In limited civil cases, practically the entire clerk's file comes up without copying; i.e., the only papers copied are those that cannot be transmitted. (C.R.C., Rule 8.754(e); see 17 *So. Cal. L. Rev.* 106 [proposal for allowing this to be done in superior court appeals]; cf. *F.R. App. P., Rules 10(a), 11(e)*; 16A Federal Practice & Procedure (Wright & Miller) §§3956, 3957; 2A Federal Procedure, L.Ed., §3:659.)

(2) *Unlimited Civil Cases*. In unlimited civil cases, the only original papers allowed are exhibits. These may be brought up without copying, or, at the election of either party, may be copied in the clerk's transcript. (C.R.C., Rule 8.122(a)(3); see 17 *So. Cal. L. Rev.* 107; *infra*, §649.)

In *Landfield v. Gardner* (1948) 88 C.A.2d 320, 198 P.2d 717, a quiet title action involving the validity of a tax deed, original exhibits accompanying a settled statement (see *infra*, §657 et seq.) included voluminous tax records introduced at the trial. Only minute portions of the mass of material were relevant. The court criticized this practice as follows: "The privilege extended by the rule of transmitting originals to the reviewing court does not justify attorneys in following that procedure where only brief passages or provisions of bulky documents are necessary for the purposes of the appeal and these can be easily extracted from the exhibits and incorporated in the settled statement. The rule is designed to save labor, expense and inconvenience and should not be followed blindly where the result will be to place unnecessary burdens on the county clerk and the reviewing court." (88 C.A.2d 322.) The criticism was supplemented by some advice: "The foregoing observations are ... for the general benefit of attorneys who may be confronted with the problem of deciding whether it would not be better practice to include the pertinent portions of given exhibits in a settled statement than to have the originals transmitted to the reviewing court. Where the exhibits are of great size or length and the portions thereof which are relied upon by the parties can be incorporated in the record at a trivial expenditure of time and labor, transmission of the originals is unnecessary and inadvisable." (88 C.A.2d 323.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Limited Civil Cases*. C.R.C., Rule 8.754(e) was repealed in 2008.

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §§3956, 3957.



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C. Clerk's Transcript and Original Papers.

4. Cost and Preparation.

9 *Witkin Cal. Proc. Appeal* § 649

[§ 649] Cost and Preparation.

(1) *Clerk's Charges.* Within 30 days after the respondent files a designation, or the time for filing it expires, whichever first occurs, the superior court clerk must send (a) to the appellant, notice of the estimated cost to prepare an original and one copy of the clerk's transcript; and (b) to each other party, notice of the estimated cost to prepare a copy of the clerk's transcript for that party's use. (C.R.C., Rule 8.122(c)(1); see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §464.) The notice must show the date it was sent. (C.R.C., Rule 8.122(c)(2).) Within 10 days after the clerk sends the notice, the appellant and any party wanting to purchase a copy of the clerk's transcript must deposit the estimated cost with the clerk, unless otherwise provided by law or unless the party submits an application or order for a waiver of the cost under C.R.C., Rule 3.50 et seq. (3 *Cal. Proc.* (5th), *Actions*, §426 et seq.). (C.R.C., Rule 8.122(c)(3); on appellant's duty, on filing notice of appeal, to deposit \$ 100 to be credited against amount chargeable for preparation of clerk's transcript, see *Govt.C. 68926.1(a)*.) If the appeal is abandoned or dismissed before the clerk has completed preparation of the transcript, the clerk must refund any portion of the deposit exceeding the preparation cost actually incurred. (C.R.C., Rule 8.122(d)(2).)

(2) *Original and Copies.* Within 30 days after the appellant deposits the estimated cost of the transcript or the court files an order waiving that cost, the clerk must prepare an original and one copy of the transcript, and certify the original. (C.R.C., Rule 8.122(d)(1)(A).) Also, the clerk must prepare additional copies for which the parties have made deposits. (C.R.C., Rule 8.122(d)(1)(B); see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §435.) The original is later transmitted to the reviewing court (see *infra*, §679), and the copy is delivered to the appellant (see *supra*, §633).

SUPPLEMENT: [This section is current through the latest supplement]



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D. Appendixes.

1. Nature and Purpose of Appendix.

9 Witkin Cal. Proc. Appeal § 650

[§ 650] Nature and Purpose of Appendix.

C.R.C., Rule 8.124 authorizes appendixes. The procedure offers two main advantages: (a) It permits an appellant to avoid delays that may arise when the clerk's office is preparing the transcript; (b) it may be more economical, for it will not be necessary to designate the contents at the outset; counsel may determine, while writing the brief, which documents are relevant to the points raised, and include only those documents in the appendix. Generally, the appendix resembles a clerk's transcript. (Drafter's Note to former Rule 5.1.) (See Rutter Group, 1 Civil Appeals and Writs §4:181 et seq.)

Although an appellant's appendix (C.R.C., Rule 8.124(b)(1), (e)(2)), a respondent's appendix (C.R.C., Rule 8.124(b)(4), (e)(3)) and an appellant's reply appendix (C.R.C., Rule 8.124(b)(5), (e)(4)) are authorized, the parties are "encouraged to stipulate to a joint appendix." (C.R.C., Rule 8.124(a)(3).) (See Cal. Civil Practice, 5 Procedure §38:70 [stipulation for joint appendix].)

Each party must pay for its own appendix. (C.R.C., Rule 8.124(f)(1).) The cost of a joint appendix must be paid (a) by the appellant (or by the appellants equally if there is more than one appellant); or (b) as the parties may agree. (C.R.C., Rule 8.124(f)(2).)

West's Key Number Digest, Appeal and Error 579 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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D. Appendixes.

2. Notice of Election.

9 Witkin Cal. Proc. Appeal § 651

[§ 651] Notice of Election.

If in the notice designating the record on appeal (see *supra*, §627), the appellant elects to use an appendix, or if, within 10 days after the notice of appeal is filed, the respondent serves and files a notice in the superior court electing to use an appendix, then C.R.C., Rule 8.124 governs, unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served. (C.R.C., Rule 8.124(a)(1); see Cal. Civil Practice, 5 Procedure §§38:66, 38:67.)

A respondent's timely election to use an appendix will govern unless the superior court orders otherwise. This election procedure differs from all other appellate rules, because normally the appellant's designation or the stipulation of the parties determines the type of record on appeal. (Advisory Committee Comment to C.R.C., Rule 8.124.)

When a party files a notice of election, the superior court clerk must "promptly" send a copy of the register of actions, if any, to the attorney of record for each party and to any unrepresented party. (C.R.C., Rule 8.124(a)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.124(a)(1) was subdivided and amended in 2009. It now provides that, unless the superior court orders otherwise on a motion served and filed within 10 days after the notice of election is served, C.R.C., Rule 8.124 governs in either of the following circumstances:

(1) The appellant elects to use an appendix in the notice designating the record on appeal. (C.R.C., Rule 8.124(a)(1)(A).)

(2) Within 10 days after the notice of appeal is filed, the respondent serves and files a notice in the superior court electing to use an appendix and the appellant has not been granted a waiver of the fee for a clerk's transcript. (C.R.C., Rule 8.124(a)(1)(B).) (See Judicial Council Form No. APP-011 [Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case)].)



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3. Contents and Form.

9 *Witkin Cal. Proc. Appeal* § 652

[§ 652] Contents and Form.

(1) *In General.* Under C.R.C., Rule 8.124(b)(1), a joint appendix or an appellant's appendix must contain the following:

(a) All items required for a clerk's transcript (see *supra*, §646), showing the dates required to determine the timeliness of the appeal.

(b) Any item that may be designated for inclusion in a clerk's transcript (see *supra*, §647) that is necessary for proper consideration of the issues, including, for an appellant's appendix, any item that the appellant should reasonably assume the respondent will rely on.

(c) The notice of election.

(d) For a joint appendix, the stipulation designating its contents.

All exhibits admitted in evidence or refused are deemed part of the appendix, whether or not it contains copies of them. (C.R.C., Rule 8.124(b)(3).)

(2) *Prohibited Documents.* An appendix may not do the following:

(a) Contain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues. (C.R.C., Rule 8.124(b)(2)(A).)

(b) Contain transcripts of oral proceedings that may be designated for the reporter's transcript. (C.R.C., Rule 8.124(b)(2)(B).)

(c) Contain records of an administrative proceeding that was admitted in evidence, refused, or lodged in the trial court. (C.R.C., Rule 8.124(b)(2)(C).)

(d) Incorporate any document by reference except the record on appeal in another case pending in the reviewing

court or the record in a prior appeal in the same case. (C.R.C., Rule 8.124(b)(2)(D).)

In support of or opposition to pleadings or motions, the parties may have filed a number of lengthy documents in the proceedings in superior court, including, for example, declarations, points and authorities, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and photocopies of judicial opinions or other publications. C.R.C., Rule 8.124(b)(2)(A) prohibits the inclusion of these documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. (Advisory Committee Comment to C.R.C., Rule 8.124.)

(3) *Respondent's Appendix and Appellant's Reply Appendix.* A respondent's appendix may contain any document that could have been included in the appellant's appendix or a joint appendix (C.R.C., Rule 8.124(b)(4)), and an appellant's reply appendix may contain any document that could have been included in the respondent's appendix (C.R.C., Rule 8.124(b)(5)).

(4) *Arrangement and Form of Appendix.* An appendix must comply with the requirements of C.R.C., Rule 8.144(a), (b), and (c) for the form of a clerk's transcript (see *supra*, §631). (C.R.C., Rule 8.124(d)(1).)

In addition to the information required on the cover of a brief, the cover of an appendix must prominently display the title "Joint Appendix" or "Appellant's Appendix" or "Respondent's Appendix" or "Appellant's Reply Appendix." (C.R.C., Rule 8.124(d)(2).)

An appendix may not be bound with a brief. (C.R.C., Rule 8.124(d)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* An appendix may incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case. (C.R.C., Rule 8.124(b)(2), added in 2009 [specifying procedure].)

(2) *Prohibited Documents.* C.R.C., Rule 8.124(b)(2) was renumbered C.R.C., Rule 8.124(b)(3) in 2009.(3) *Respondent's Appendix and Appellant's Reply Appendix.* In 2009, C.R.C., Rule 8.124(b)(4) and (b)(5) were renumbered C.R.C., Rule 8.124(b)(5) and (b)(6).



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D. Appendixes.

4. Exhibit Held by Other Party.

9 Witkin Cal. Proc. Appeal § 653

[§ 653] Exhibit Held by Other Party.

The following procedure applies when a party preparing an appendix wants the appendix to contain a copy of an exhibit in the possession of another party:

(1) The party must first ask the party possessing the exhibit to provide a copy or lend it for copying. All parties should reasonably cooperate with these requests. (C.R.C., Rule 8.124(c)(1).)

(2) If the request is unsuccessful, the party may serve and file in the reviewing court a notice specifying the exhibit's trial court designation and requesting the party possessing the exhibit to deliver it to the requesting party or, if the possessing party prefers, to the reviewing court. The possessing party must comply with the request within 10 days after the notice is served. (C.R.C., Rule 8.124(c)(2).)

(3) If the party possessing the exhibit sends it to the requesting party, that party must copy and return it to the possessing party within 10 days after receiving it. (C.R.C., Rule 8.124(c)(3).)

(4) If the party possessing the exhibit sends it to the reviewing court, that party must (a) send with the exhibit a copy of the notice served by the requesting party and (b) "immediately" notify the requesting party that it has sent the exhibit to the reviewing court. (C.R.C., Rule 8.124(c)(4).)

(5) On request, the reviewing court may return an exhibit to the party that sent it. When the remittitur issues, the reviewing court's duty to return all exhibits to the parties that sent them is mandatory. (C.R.C., Rule 8.124(c)(5).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.124(c) was amended in 2009 to apply to documents as well as exhibits.



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D. Appendixes.

5. Filing and Service.

9 *Witkin Cal. Proc. Appeal* § 654

[§ 654] Filing and Service.

A party preparing an appendix must serve the appendix on each party, unless otherwise agreed by the parties or ordered by the reviewing court, and file the appendix in the reviewing court. (C.R.C., Rule 8.124(e)(1).) The time requirements are as follows:

(1) *Joint appendix.* A joint appendix must be served and filed with the appellant's opening brief. (C.R.C., Rule 8.124(e)(2).)

(2) *Appellant's appendix.* An appellant's appendix must be served and filed with the appellant's opening brief. (C.R.C., Rule 8.124(e)(2).)

(3) *Respondent's appendix.* A respondent's appendix must be served and filed with the respondent's brief. (C.R.C., Rule 8.124(e)(3).)

(4) *Appellant's reply appendix.* An appellant's reply appendix must be served and filed with the appellant's reply brief. (C.R.C., Rule 8.124(e)(4).)

"The appendix filing date is tied to that of the corresponding brief. If an appendix is substituted for the clerk's transcript but there is still a reporter's transcript, then time for the first brief runs from filing of the reporter's transcript alone. If there is an appendix and no reporter's transcript, however, the notice of election to use the appendix method must be used to measure the due date of the opening brief." (Draftman's Note to former rule.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Appendixes.

6. Sanctions for Improper Appendix.

9 *Witkin Cal. Proc. Appeal* § 655

[§ 655] Sanctions for Improper Appendix.

"Filing an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file. The reviewing court may impose monetary or other sanctions for filing an appendix that contains inaccurate copies or otherwise violates this rule." (C.R.C., Rule 8.124(g).) "[S]anctions do not depend on the degree of culpability of the filing party--i.e., on whether the party's conduct was willful or negligent--but on the nature of the inaccuracies and the importance of the documents they affect." (Advisory Committee Comment to C.R.C., Rule 8.124.) (See *In re Marriage of Green* (1984) 159 C.A.3d 1163, 1164, 206 C.R. 286, *infra*, §699 [document entitled "Opening Brief/Appendix" failed to contain notice of appeal, conformed copies, and required indices and incorrectly numbered pages; appeal dismissed and sanction of \$ 500 imposed]; *Committee To Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 C.A.3d 633, 637, 639, 280 C.R. 329 [defective appendix would justify rejection of appeal, but enough material was presented to consider appeal on relatively narrow grounds].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Termo Co. v. Luther* (2008) 169 C.A.4th 394, 404, 86 C.R.3d 687 [under C.R.C., Rule 8.124(g), it was proper to strike from appendix copies of documents that were not in superior court file]; *Doppes v. Bentley Motors* (2009) 174 C.A.4th 967, 988, 94 C.R.3d 802 [appendix included motion for sanctions and supporting exhibits that were not file-stamped or conformed copies, although motion and exhibits had been before trial court; error was excusable considering busy nature of trial and did not require dismissing appeal or striking portions of brief].



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E. Superior Court File in Lieu of Clerk's Transcript.

9 *Witkin Cal. Proc. Appeal* § 656

[§ 656] Superior Court File in Lieu of Clerk's Transcript.

(1) *Authorization.* If a local rule of the reviewing court permits, the parties may stipulate to use the original superior court file instead of a clerk's transcript (see *supra*, §646 et seq.). This rule and any supplemental provisions of the local rule then govern, unless the superior court orders otherwise after notice to the parties. (C.R.C., Rule 8.128(a)(1).) Parties intending to proceed under this rule must (a) file their stipulation in superior court with the appellant's notice designating the record on appeal under C.R.C., Rule 8.121 (*supra*, §627), and (b) serve the reviewing court with a copy of the stipulation. (C.R.C., Rule 8.128(a)(2).)

(2) *Cost Estimate.* Within 10 days after the filing of a stipulation to use the original superior court file, the superior court clerk must mail the appellant an estimate of the cost of preparation, including the cost of sending the index. The appellant must deposit the cost within 10 days after the clerk mails the estimate. (C.R.C., Rule 8.128(b)(1).)

(3) *Content.* Within 10 days after the appellant deposits the cost, the superior court clerk must "put the superior court file in chronological order, number the pages, and attach a chronological index and a list of all attorneys of record, the parties they represent, and any unrepresented parties." (C.R.C., Rule 8.128(b)(2).)

(4) *Transmittal.* The clerk must send copies of the index to all attorneys of record and any unrepresented parties for their use in paginating their copies of the file to conform to the index. (C.R.C., Rule 8.128(b)(3).) The clerk must also send the prepared file to the reviewing court with the reporter's transcript, but, if the appellant elected to proceed without a reporter's transcript, the clerk must "immediately" send the prepared file to the reviewing court. (C.R.C., Rule 8.128(b)(4).)

(5) *Purpose and Effect.* In *Bernard v. Hartford Fire Ins. Co.* (1991) 226 C.A.3d 1203, 1205, 277 C.R. 401, the court made the following observations on the purpose and effect of the rule:

(a) "Since the purpose of the procedure is to reduce the time and expense of preparing a clerk's transcript, the parties receive from the superior court only a chronological index indicating the beginning page of each named document. Each party then composes its own working copy of a clerk's transcript using the copies of the documents it already possesses, arranging them in the order set out in the index." (226 C.A.3d 1205.)

(b) "Unless the parties add pagination to their working copies, as the rule clearly intends that they do, their versions of the clerk's transcript will not be sequentially numbered, although the file of original documents transmitted to this court will be." (226 C.A.3d 1205.)

(c) "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations. ... Briefs which do not meet this requirement may be stricken. ... As a practical matter, the appellate court is unable to adequately evaluate *which facts* the parties believe support their position when nothing more than a block page reference is offered in the briefs--e.g., 'C.T. pp. 1-20', which upon examination turns out to be 20 nonsequential pages of deposition testimony." (226 C.A.3d 1205.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cost Estimate*. C.R.C., Rule 8.128(b)(1) was amended in 2009 to provide that the appellant must either deposit the cost or file an application for a waiver of the cost or an order granting a waiver within the allotted time.

(3) *Content*. C.R.C., Rule 8.128(b)(2) was amended in 2009 to provide that the required acts must be performed within 10 days after the appellant deposits the cost or the court files an order waiving the cost.



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F. Settled Statement.

1. Nature of Record.

9 *Witkin Cal. Proc. Appeal* § 657

[§ 657] Nature of Record.

The settled statement is a modernized version of the bill of exceptions. (See C.R.C., Rules 8.137, 8.756; *Western States Const. Co. v. Municipal Court* (1951) 38 C.2d 146, 151, 238 P.2d 562 [approving former rule as means of shortening records]; *Keller v. Superior Court* (1950) 100 C.A.2d 231, 236, 223 P.2d 309 [same]; *Singh v. Kashian* (1954) 124 C.A.2d Supp. 879, 881, 268 P.2d 768 [municipal court rule]; *Sloan v. Stearns* (1955) 137 C.A.2d 289, 293, 290 P.2d 382 [presumption in favor of judgment applies]; *Hawley v. Orange County Flood Control Dist.* (1963) 211 C.A.2d 708, 710, 27 C.R. 478 [illustration quoted in full]; C.E.B., 1 Civil Appellate Practice 3d, §9.87 et seq.; Rutter Group, 1 Civil Appeals and Writs §4:227 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §447; 2 *Am.Jur.* P.P. Forms (2000 ed.), *Appeal and Error*, §601 et seq.; on *F.R. App. P.*, *Rule 10* et seq., abolishing bill of exceptions, see 16A *Federal Practice & Procedure* (Wright & Miller) §3956 et seq.; 2A *Federal Procedure*, L.Ed., §3:659 et seq.)

West's Key Number Digest, *Appeal and Error* 556 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.756 was repealed in 2008. The settled statement is now discussed in C.R.C., Rule 8.837, and is referred to as the "statement on appeal."

See 16A *Federal Practice & Procedure* (Wright, Miller, Cooper & Struve) §3956 et seq.



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F. Settled Statement.

2. Motion.

9 *Witkin Cal. Proc. Appeal* § 658

[§ 658] Motion.

An appellant intending to proceed by way of a settled statement must serve and file in superior court with its notice designating the record on appeal under C.R.C., Rule 8.121 (*supra*, §627) a motion to use a settled statement instead of a reporter's transcript or both reporter's and clerk's transcripts. (C.R.C., Rule 8.137(a)(1); see C.R.C., Rule 8.756(a) [limited civil case appeals: similar]; *Averill v. Lincoln* (1944) 24 C.2d 761, 764, 151 P.2d 119; *Brock v. Southern Pac. Co.* (1946) 74 C.A.2d 806, 809, 169 P.2d 402; C.E.B., 1 Civil Appellate Practice 3d, §§9.90, 10.43; 35 *Cal. L. Rev.* 486; 17 *So. Cal. L. Rev.* 117; Rutter Group, 2 Civil Appeals and Writs §4:232 et seq.; *Cal. Civil Practice*, 5 Procedure §§38:50, 38:77 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §603 et seq.)

The motion must be supported by a showing that (a) a substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court; (b) the designated oral proceedings were not reported or cannot be transcribed; or (c) the appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund (see *supra*, §639). A party proceeding *in forma pauperis* is deemed unable to pay for a transcript. (C.R.C., Rule 8.137(a)(2).)

Within 30 days after the superior court clerk mails, or a party serves, an order granting a motion to use a settled statement, the appellant must file his or her proposed statement. (C.R.C., Rule 8.137(b)(1); cf. C.R.C., Rule 8.756(a) [limited civil case appeals; 20 days]; see C.E.B., 1 Civil Appellate Practice 3d, §§9.91, 10.43; Rutter Group, 2 Civil Appeals and Writs §4:234 et seq.; *Cal. Civil Practice*, 5 Procedure §38:80; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§609 et seq., 618 et seq.; on contents of proposed statement, see *infra*, §659.)

If the court denies the motion, the appellant must, within 10 days after the superior court clerk mails, or a party serves, the order of denial, file a new notice designating the record on appeal. (C.R.C., Rule 8.137(a)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.756(a) was repealed in 2008. C.R.C., Rule 8.837(b)(1) now requires the appellant in a limited civil case to serve and file a proposed statement.



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3. Appellant's Proposed Statement.

9 Witkin Cal. Proc. Appeal § 659

[§ 659] Appellant's Proposed Statement.

The appellant's proposed statement (see *supra*, §658), which must be served and filed in superior court, consists of "a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal." Subject to the court's approval in settling the statement (see *infra*, §661), the appellant may present some or all of the evidence by question and answer. (C.R.C., Rules 8.137(b)(1), 8.756(a).) (See *Sweet v. Markwart* (1953) 115 C.A.2d 735, 743, 252 P.2d 751; *Committee To Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 C.A.3d 633, 637, 280 C.R. 329 [specifying inadequacies in appellants' settled statement].)

If the condensed narrative describes less than all the testimony, the appellant must state the points to be raised on appeal. The appeal is then limited to those points unless, on motion, the reviewing court permits otherwise. (C.R.C., Rule 8.137(b)(2).)

An appellant intending to use a settled statement instead of both a reporter's transcript and a clerk's transcript must accompany the condensed narrative with copies of all items required to be included in a clerk's transcript (see *supra*, §646), showing the dates necessary to determine the timeliness of the appeal. (C.R.C., Rule 8.137(b)(3).) The proposed statement may be accompanied by copies of any document includable in the clerk's transcript (see *supra*, §647). (C.R.C., Rule 8.137(b)(5); see *Landfield v. Gardner* (1948) 88 C.A.2d 320, 322, 198 P.2d 717, *supra*, §648.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.756(a) was repealed in 2008. The contents of the proposed statement for limited civil cases are now set forth in C.R.C., Rule 8.837(c).



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4. Respondent's Proposed Amendments.

9 Witkin Cal. Proc. Appeal § 660

[§ 660] Respondent's Proposed Amendments.

(1) *Right and Time To File.* Within 20 days after the appellant serves the condensed narrative, the respondent may serve and file proposed amendments. (C.R.C., Rule 8.137(b)(4); see C.R.C., Rule 8.756(a) [limited civil case appeals: 10 days]; *Sweet v. Markwart* (1953) 115 C.A.2d 735, 741, 252 P.2d 751 [duty of respondent to propose proper amendments]; C.E.B., 1 Civil Appellate Practice 3d, §9.93; Rutter Group, 1 Civil Appeals and Writs §4:239; Cal. Civil Practice, 5 Procedure §38:81; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §622 et seq.) The proposed amendments may be accompanied by copies of any document includable in the clerk's transcript (see *supra*, §647). (C.R.C., Rule 8.137(b)(5).)

(2) *Respondent's Challenge of Defective Statement.* Under the former practice, if a proposed bill of exceptions was a mere "skeleton," or so unfair as to make correction by amendment unreasonably burdensome, the court would, on motion, strike it out. (See *Nichols v. Smith* (1938) 25 C.A.2d 94, 97, 76 P.2d 525.) Although no express reference to this practice is made in the rules, the order is doubtless still possible. (See 17 So. Cal. L. Rev. 116; cf. *Sweet v. Markwart*, *supra*, 115 C.A.2d 742 ["a motion to strike is not a means of testing the propriety or sufficiency of the proposed statement except in extreme cases where it can be said that the statement is fraudulent or sham"].)

A more expeditious procedure, however, is to require the appellant to furnish the trial judge with a transcript, on the basis of which the judge may order incorporated, either in question-and-answer form or in narrative restatement, any additional material deemed essential. (See *Lande v. Southern Calif. Freight Lines* (1947) 78 C.A.2d 417, 420, 177 P.2d 936.) Moreover, even where the proposed statement is not unfair, and its defects may be readily corrected by amendment, the trial judge is not necessarily forced to rely on his or her recollection, and may require that the appellant furnish a transcript. (See *Averill v. Lincoln* (1944) 24 C.2d 761, 765, 151 P.2d 119; 35 Cal. L. Rev. 486; cf. *Western States Const. Co. v. Municipal Court* (1951) 38 C.2d 146, 148, 238 P.2d 562, *infra*, §662; *Keller v. Superior Court* (1950) 100 C.A.2d 231, 235, 223 P.2d 309; on settlement and engrossment method of challenging proposed statement, see *infra*, §661.)

In limited civil case appeals, an appellant who uses a transcript to prepare his or her proposed statement must make the transcript available to the respondent. (C.R.C., Rule 8.756(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Report and Time To File*. C.R.C., Rule 8.756(a) was repealed in 2008. The respondent's proposed amendments in limited civil cases are now discussed in C.R.C., Rule 8.837(d)(1).

(2) *Respondent's Challenge of Defective Statement*. C.R.C., Rule 8.756(b) was repealed in 2008.



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5. Settlement and Certification.

9 *Witkin Cal. Proc. Appeal* § 661

[§ 661] Settlement and Certification.

(1) *Time and Notice.* After the filing of the respondent's proposed amendments or the expiration of the time for doing so, the clerk sets a time (not more than 10 days later) for settlement by the trial judge and gives notice to all parties (not less than 5 days). (C.R.C., Rules 8.137(c)(1), 8.756(c); see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §625.)

(2) *Hearing and Settlement.* At the time set, the judge must hold a hearing to settle the statement and fix the times within which the appellant must prepare, serve, and file it. (C.R.C., Rules 8.137(c)(2); see Cal. Civil Practice, 5 Procedure §38:82; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §626.)

(3) *Certification.* The respondent has 5 days after the prepared statement is filed to object. If the respondent does not do so, the statement will be deemed properly prepared, and the clerk must present it to the judge for certification. (C.R.C., Rules 8.137(c)(3).)

In *Williams v. Goldberg* (1944) 66 C.A.2d 40, 151 P.2d 853, appellant's proposed statement did not summarize the testimony but, by conclusions, stated his theory of the evidence. Respondent proposed amendments that, though more factual and detailed, were likewise argumentative. The trial judge allowed all amendments and ordered engrossment. The judge then settled, and appellant filed, an "Engrossed Statement on Appeal" containing his original statement and the proposed amendments separately. *Held*, this was improper. "[I]t is contemplated that the appellant will prepare a statement of the facts in accordance with the amendments allowed by the trial court. ... The rule does not permit each party to prepare a statement containing his version of the facts, and, after settlement by the trial court, to place both these inconsistent statements before the appellate court and ask that court, on such a record, to determine whether the findings are supported. In the instant case, the trial court, by allowing the proposed amendments of respondent, obviously intended to settle the statement in accordance with the proposed amendments of respondent. For that reason, all inconsistencies between appellant's and respondent's statements must be resolved in favor of respondent." (66 C.A.2d 46.) (See *Quail v. Municipal Court* (1985) 171 C.A.3d 572, 575, 576, 217 C.R. 361 [settled statement was ordered stricken, where statement was engrossed by respondent rather than appellant, was not served on appellant, and was signed but not certified by trial judge].)

(4) *Stipulation.* "The parties' stipulation that the statement as originally served or as prepared is correct is equivalent

to the judge's certification." (C.R.C., Rules 8.137(c)(4); see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§627, 628.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Time and Notice*. C.R.C., Rule 8.756(c) was repealed in 2008. Settlement and certification in limited civil cases are now discussed in C.R.C., Rule 8.837(d), (e), (f).



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F. Settled Statement.

6. Refusal of Judge To Settle.

a. Mandamus.

9 *Witkin Cal. Proc. Appeal* § 662

[§ 662] Mandamus.

If the proposed statement is sufficient in form and content, and no specific amendments are proposed, it is the duty of the trial judge to settle it. Under the case law dealing with bills of exceptions, mandamus was the appropriate remedy to compel settlement. This is also the remedy under the rules. (See *Western States Const. Co. v. Municipal Court* (1951) 38 C.2d 146, 149, 238 P.2d 562; *Eisenberg v. Superior Court* (1956) 142 C.A.2d 12, 18, 297 P.2d 803.)

In *Keller v. Superior Court* (1950) 100 C.A.2d 231, 223 P.2d 309, appellant proposed a statement in reasonably good form, and offered to make every specific correction suggested by respondents and the trial judge. Nevertheless, the judge still refused to settle on the ground that he could not certify it as correct without the aid of a reporter's transcript, which appellant did not furnish. *Held*, this was an abuse of discretion. "Before a litigant can be compelled to expend the sum of \$ 325 for a complete reporter's transcript surely the trial judge, in the interests of justice, should specify wherein the statement as offered and amended is deficient. While a trial judge has undisputed power to settle as the record anything he wants therein, he cannot arbitrarily refuse to settle the record without disclosing a single item of relevant testimony that was omitted from the proffered statement on appeal. Under the facts here present, the respondent judge should either have allowed the amendments and ordered the statement prepared accordingly, or required such other changes as would make it conform to the facts. In ordering amendments to the statement on appeal the trial judge has available (1) the suggestions of the respondents on appeal; (2) the judge's own memory. ... ; (3) notes made by the judge during the trial ... ; and (4) the right to recall a witness to repeat testimony ... ; and (5) the right to have the reporter reread such of his notes as may prove helpful. If the foregoing prove insufficient, then it should be made to clearly appear from the record, and reasons given therefor, why the trial judge was convinced of his inability to settle a satisfactory statement, agreed to by both appellant and respondents on appeal, without the benefit of a complete reporter's transcript." (100 C.A.2d 235.)

In *Western States*, defendant-appellant proposed a statement, and counsel for plaintiff-respondent asserted his inability to offer amendments on the ground that his associate, principal trial counsel, had died. The trial judge then refused to settle without a transcript. Appellant sought mandamus, pointing to the greatly disproportionate cost of a transcript (nearly half the amount of the judgment) and to respondent's insolvency. The Supreme Court granted the writ, quoting *Keller* with approval, and adding that "the absence of proposed amendments, from whatever cause, did not

relieve the trial judge of his duty to settle the proposed statement with such corrections and additions as might be necessary." (38 C.2d 151.)

Keller was again followed in *Eisenberg*, an 8-day trial of an action for damages for fraud in the sale of an apartment house, with judgment for defendants. Plaintiffs offered a settled statement and defendants proposed many changes and omissions. Several hearings were held, plaintiffs agreed to nearly all of the proposed changes and offered to furnish partial reporter's transcripts on nearly all of the other items, and as to a few, agreed that the judge could either refer to his memory or have the reporter read his notes. The judge ruled that he would not settle the statement without a complete transcript and refused, though requested, to state his particular objections to the proposed record. *Held*, mandamus should issue: "[I]t was not a proper exercise of the discretion vested in respondent judge to require petitioners herein to incur an expense of some \$ 1,300 in furnishing a complete transcript of the reporter's notes as a condition for settling the statement on appeal." (142 C.A.2d 20.)

A complete misconception of the judge's function was corrected in *Stevens v. Superior Court* (1958) 160 C.A.2d 264, 325 P.2d 204. Petitioner claimed a share in an estate as a pretermitted heir, and was denied recovery under the will's disinheritance clause. She appealed, but the trial judge struck out all of her narration of the evidence as irrelevant to the legal point on appeal--the validity and effect of the clause. *Held*, mandamus issued. "[I]t is the duty of the trial court to settle a proposed statement, not to make one. ... It was not for the trial court to decide in passing on the record that its order of dismissal was correct because the oral evidence could not be used to interpret the will. By purporting to so decide the trial court assumed the functions of the appellate court. ... Even if the decided cases without question held that oral testimony cannot be considered, and we do not so construe them, the petitioner has the legal right to seek a reversal of those cases." (160 C.A.2d 269.)

Mandamus will be denied where the judge's refusal to settle is based on a reasonable objection to specified omissions or defects in the record that the appellant, with the ability to do so, fails to correct. (See *St. George v. Superior Court* (1949) 93 C.A.2d 815, 817, 209 P.2d 823; *Sweet v. Markwart* (1953) 115 C.A.2d 735, 745, 252 P.2d 751; *Trowbridge v. Superior Court* (1958) 161 C.A.2d 621, 622, 327 P.2d 8 [refusal to substitute reporter's transcript for inadequate statement, and refusal to incorporate by reference proceedings in main related action]; *Sidebotham v. Superior Court* (1958) 161 C.A.2d 624, 626, 326 P.2d 890 [refusal to prepare reporter's transcript where trial lasted 40 days during 7 months, and appellants' proposed statement was fragmentary and distorted]; 23 So. Cal. L. Rev. 579.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Refusal of Judge To Settle.

b. No Settlement by Reviewing Court.

9 Witkin Cal. Proc. Appeal § 663

[§ 663] No Settlement by Reviewing Court.

The normal remedy of an appellant when the trial judge arbitrarily refuses to settle a statement is mandamus. (See *infra*, §662.)

In *Cross v. Tustin* (1951) 37 C.2d 821, 236 P.2d 142, the trial judge rejected appellant's proposed statement and settled another prepared by respondent. Appellant's application to have her own statement settled by the appellate court was denied. (*Cross v. Tustin* (1950) 96 C.A.2d 207, 214 P.2d 565.) She then moved under C.C.P. 473 and C.C.P. 1916 "to impeach and vacate" the settled statement for fraud and collusion in its procurement, and appealed from the denial of this motion. *Held*, the motion was improper and the order of denial was nonappealable. "The motion is appropriate here if a purported settled statement was surreptitiously prepared and filed without any proceedings for settlement and without the knowledge of the plaintiff and the court. But if the plaintiff seeks by the motion to correct the order settling the statement after proceedings duly taken in which she has been heard, the attempt by the indirect method would render the order thereon nonappealable as an unauthorized method of obtaining a review of a nonappealable order." (37 C.2d 825.) Appellant showed no fraud or collusion; she rejected an offer by respondent to include allegedly omitted matter by stipulation; and "the sole alleged objective of the motion was to obtain a corrected settled statement to accord with her version of the oral proceedings." (37 C.2d 826.)

The reviewing court can, however, give relief from default (*infra*, §690). Hence, if settlement proceedings fail, and there is no reasonable prospect of relief by mandamus, the simplest solution for the frustrated appellant is to abandon the attempt to obtain a settled statement and start new proceedings to prepare a transcript record. Because the time has long since elapsed, he or she will have to apply for relief from default, but the reviewing court should, and normally will, grant this relief. (See *Averill v. Lincoln* (1944) 24 C.2d 761, 765, 151 P.2d 119; *Burns v. Brown* (1946) 27 C.2d 631, 636, 166 P.2d 1; 35 Cal. L. Rev. 487.)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Agreed Statement.

1. Nature of Record.

9 Witkin Cal. Proc. Appeal § 664

[§ 664] Nature of Record.

"The record on appeal may consist wholly or partly of an agreed statement." This statement "should recite only those facts needed to decide the appeal and must be signed by the parties." (C.R.C., Rules 8.134(a), 8.755(a); see *Hutchins v. Waters* (1975) 51 C.A.3d 69, 71, 123 C.R. 819; *Institoris v. Los Angeles* (1989) 210 C.A.3d 10, 17, 258 C.R. 418 ["Facts recited in an agreed statement take the place of factual findings, and bind the parties"]; C.E.B., 1 Civil Appellate Practice 3d, §§9.83 et seq., 10.51 et seq.; Rutter Group, 1 Civil Appeals and Writs §4:248 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §613.) This rule is partly based on *F.R. App. P., Rule 10(d)*. (See 16A Federal Practice & Procedure (Wright & Miller) §3956.3; 2A Federal Procedure, L.Ed., §§3:670, 3:671.)

Unlike the rule on a settled statement (*supra*, §657 et seq.), C.R.C., Rules 8.134 and 8.755 do not call for a condensed, narrative statement of the oral proceedings. The agreed statement may be in the same form as a settled statement, or it may be in the form of a stipulation of essential facts, or it may be a combination of the two. Parties with a legal issue to present on facts that are not in serious dispute, or in cases in which the rule of conflicting evidence precludes any effective review of the facts (*supra*, §366), may cut appellate expense and effort to a minimum by the use of this method. (See 17 So. Cal. L. Rev. 112; on interpretation to avoid unwarranted concessions by appellant, see *Burdette v. Rollefson Const. Co.* (1959) 52 C.2d 720, 726, 344 P.2d 307.)

West's Key Number Digest, Appeal and Error 573, 587

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.755(a) was repealed in 2008. The agreed statement in limited civil cases is now covered in C.R.C., Rule 8.836.

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3956.3.



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G. Agreed Statement.

2. Requirements.

9 *Witkin Cal. Proc. Appeal* § 665

[§ 665] Requirements.

Although relatively complete freedom is allowed in the selection of facts and form of statement (see *supra*, §664), there are a few basic requirements of content necessary for an intelligent consideration of the appeal. These are of two kinds:

(1) *Facts*. "The statement must explain the nature of the action, the basis of the reviewing court's jurisdiction, and how the superior court decided the points to be raised on appeal." (C.R.C., Rule 8.134(a); see C.R.C., Rule 8.755(a).)

(2) *Records and Papers*. If the statement replaces a clerk's transcript, it must be accompanied by copies of all items required for inclusion in the transcript, showing the dates necessary to determine the timeliness of the appeal (see *supra*, §646). (C.R.C., Rule 8.134(a)(2); see C.R.C., Rule 8.755(a) [records and papers on appeal in limited civil case].) The statement may be accompanied by copies of any document permitted to be included in a clerk's transcript (see *supra*, §647). (C.R.C., Rule 8.134(a)(3); on transmission of original exhibits, see *infra*, §680.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Facts*. C.R.C., Rule 8.755(a) was repealed in 2008. The substance of the language quoted in the text is now in C.R.C., Rule 8.836(b)(1).

(2) *Records and Papers*. C.R.C., Rule 8.755(a) was repealed in 2008. The requirements for records and papers on appeal in limited civil cases are now covered in C.R.C., Rule 8.836(b)(2) and (b)(3).



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G. Agreed Statement.

3. Statement or Stipulation.

9 Witkin Cal. Proc. Appeal § 666

[§ 666] Statement or Stipulation.

An appellant intending to proceed under C.R.C., Rule, 8.134 must file either (1) an agreed statement, or (2) a stipulation that the parties are attempting to agree on a statement in superior court with its notice designating the record on appeal under C.R.C., Rule 8.121 (*supra*, §627). (C.R.C., Rule, 8.134(b)(1); cf. C.R.C., Rule 8.755(a) [limited civil case appeals: original statement; filed within 30 days].) The purpose of this provision is to prevent issuance of a notice of default while the parties are preparing an agreed statement. (Advisory Committee Comment to C.R.C., Rule, 8.134.) (See C.E.B., 1 Civil Appellate Practice 3d, §§9.85, 10.51 et seq.; Rutter Group, 1 Civil Appeals and Writs §4:249 et seq.; Cal. Civil Practice, 5 Procedure §§38:49, 38:75, 38:76; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §613.)

If a stipulation is filed by the appellant and the parties can agree on the statement, the appellant must file the statement within 40 days after filing the notice of appeal. (C.R.C., Rule, 8.134(b)(2).) However, if there is a stipulation but the parties cannot agree on the statement, the appellant, within 50 days after filing the notice of appeal, must file a new notice designating the record on appeal. (C.R.C., Rule, 8.134(b)(3).) (See C.R.C., Rule 8.755(b) [limited civil case appeals: 40-day extension]; C.E.B., 1 Civil Appellate Practice 3d, §§9.85, 10.53; Rutter Group, 1 Civil Appeals and Writs §4:250; 17 *So. Cal. L. Rev.* 113; *supra*, §626 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.755(a) was repealed in 2008. The time for filing the statement in limited civil cases is now stated in C.R.C., Rule 8.836(c).



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H. Judgment Roll or Clerk's Transcript.

1. Nature of Record.

9 Witkin Cal. Proc. Appeal § 667

[§ 667] Nature of Record.

(1) *In General.* The judgment roll consists of the pleadings and certain other formal papers filed with the clerk of the trial court. (See *C.C.P. 670* [civil actions generally]; *Prob.C. 1050* [probate proceedings]; *C.C.P. 1077* [certiorari], *C.C.P. 1134* [confession of judgment], *C.C.P. 1139* [submission of controversy].) Its statutory scope is significant in the law of collateral attack: Only defects as shown by the judgment roll may be raised on such an attack. (See *8 Cal. Proc. (5th), Attack on Judgment in Trial Court*, §12.) And its scope was formerly important in appeals because it was certified only by the clerk, and papers not within the statutory list would not be considered on appeal unless brought up in a bill of exceptions or transcript with the judge's certification. (See *17 So. Cal. L. Rev. 104.*)

The rules, however, have abolished the judge's certification requirement, and the proper place for papers not part of the judgment roll is a matter of mechanical arrangement without hazards. (See *infra*, §681; *17 So. Cal. L. Rev. 104.*) (On recognition of appeal on judgment roll, see *C.R.C., Rule 8.754(f)*; *Schein v. Holbrook (1952) 111 C.A.2d Supp. 972, 974, 245 P.2d 708*; *C.E.B., 1 Civil Appellate Practice 3d, §9.80 et seq*; *1 So. Cal. L. Rev. 110.*)

(2) *Contents.* The statutes list the contents of the judgment roll in three main classes of proceedings:

(a) *A civil action with judgment by default:* (1) summons, with affidavit or proof of service; (2) complaint; (3) request for entry of default, with endorsed memorandum of entry of default; (4) copy of judgment; (5) if defendant appeared by demurrer and demurrer was overruled, notice of overruling served on defendant's attorney, with proof of service; (6) if summons was served by publication, affidavit for publication and order directing it. (*C.C.P. 670(a).*)

(b) *A civil action, with judgment after answer:* (1) pleadings; (2) orders striking out all or part of any pleading; (3) copy of verdict of jury, statement of decision of the court, or finding of the referee; (4) copy of any order made on demurrer, or relating to a change of parties; (5) copy of judgment; (6) if there are two or more defendants and any has allowed judgment to go against him or her by default, the summons, proof of service, and, if by publication, the affidavit and order. (*C.C.P. 670(b).*)

(c) *Probate proceedings:* *Prob.C. 1050(a)* is the basic section applicable to most probate proceedings, including those where there is no answer or written opposition, i.e., those analogous to civil default judgments. *Prob.C. 1050(b)*

applies where there is opposition. *Prob.C. 1050(c)*, (d), and (e) cover particular proceedings (probate of will, will contest, revocation of probate, distribution under will, settlement of final account, and final distribution of an estate), and list additional papers for those proceedings.

West's Key Number Digest, Appeal and Error 597(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.754(f) was repealed in 2008. C.R.C., Rule 8.832, governing limited civil cases, no longer recognizes appeal on the judgment roll.



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H. Judgment Roll or Clerk's Transcript.

2. No Review of Evidence.

9 *Witkin Cal. Proc. Appeal* § 668

[§ 668] No Review of Evidence.

The attempt to appeal on a clerk's transcript and then to seek review of evidentiary matters will be unsuccessful. (See *supra*, §§360, 366, 423.)

In *Williams v. Inglewood Bd. of Realtors* (1963) 219 C.A.2d 479, 33 C.R. 289, appellant produced a hybrid: a clerk's transcript, to which he added designated exhibits--documentary evidence. *Held*, this was a judgment roll appeal, and he could not attack the sufficiency of the evidence. (219 C.A.2d 481.)

In *Ducray v. Ducray* (1967) 257 C.A.2d 480, 64 C.R. 825, appellant, after a trial without a reporter, offered a narrative statement of oral proceedings not settled by the trial judge or agreed to by stipulation of respondent. *Held*, it was a judgment roll appeal, and sufficiency of the evidence could not be challenged. (257 C.A.2d 482.)

Arruda v. Arruda (1963) 218 C.A.2d 410, 32 C.R. 257, illustrates a questionable appellate practice of relaxing procedural rules for no discernible reason. In a divorce trial without a reporter, the judge awarded divorces to both parties, determined that the community property should be equally divided, and made a division. Plaintiff wife appealed, contending that the division was unequal. Her record was a clerk's transcript, a memorandum opinion of the judge, and some exhibits. She also attempted to bring up arguments in trial memoranda that the trial judge considered in making his decision; the clerk omitted them, so she attached them to her brief as exhibits. The court pointed out that this was highly improper, that the appeal was on the judgment roll, and that the sufficiency of the evidence was not open to attack. (218 C.A.2d 414.) Having thus correctly declared the law, the court proceeded to ignore its violation and to give the appellant the benefit of her bootlegged material: "We have reviewed the record in the light of each of plaintiff's contentions, however, and shall discuss them individually." (218 C.A.2d 415.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Designation by Respondent.

9 *Witkin Cal. Proc. Appeal* § 669

[§ 669] Designation by Respondent.

(1) *In General.* The respondent may not change the form of the record by demanding a reporter's transcript (C.R.C., Rule 8.130(a)(4)), but the respondent may designate any additional documents that he or she wants included in a clerk's transcript (C.R.C., Rule 8.122(a)(2)). In other words, the respondent is entitled to as complete a clerk's transcript as he or she desires. (Cf. C.R.C., Rule 8.754(f) [limited civil case appeals: respondent "counter-designates"].)

(2) *Appeal From Order Granting New Trial.* If a new trial is granted on the ground of insufficiency of the evidence or excessive or inadequate damages, it cannot be sustained on appeal unless the ground is stated and the reasons are specified in the order. (C.C.P. 657; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§93, 94.) However, if some other ground is supported by the record, the order will be affirmed on appeal despite the failure to state the proper ground or specify the reasons. (C.C.P. 657; see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§93, 95.)

This presents a practical problem for the respondent. The appeal comes up on a clerk's transcript showing that the trial judge failed to state the sustainable ground or to specify the reasons. If the evidence would support the order on that ground, the appellate court will affirm, but there is no record of that evidence before it. In this situation, the general rule that the appellant must furnish an adequate record (see *supra*, §628) cannot apply; the respondent, to protect his or her new trial order despite its defects in form, must bring up by counter-designation the portion of the oral proceedings that supports it. (See *Tagney v. Hoy* (1968) 260 C.A.2d 372, 375, 67 C.R. 261; *Gaskill v. Pacific Hosp. of Long Beach* (1969) 272 C.A.2d 128, 132, 77 C.R. 373; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §95.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.754(f) was repealed in 2008. Designation by the respondent in limited civil cases is now covered in C.R.C., Rule 8.832(b).



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H. Judgment Roll or Clerk's Transcript.

4. Augmentation.

9 *Witkin Cal. Proc. Appeal* § 670

[§ 670] Augmentation.

(1) *Augmentation by Respondent.* An appeal on the papers and records in the clerk's file, without any oral proceedings, may be unfair to the respondent in this respect: Some defects appearing on the face of the judgment roll, e.g., in the pleadings or findings, may not be reversible error because of estoppel, waiver, or curative steps taken at the trial and not reflected in the formal papers or clerk's minutes. Obviously, the respondent should not be permitted to load up the record with useless oral proceedings that do not affect the determination of the issues on appeal. Just as obviously, the respondent should be allowed to bring up oral proceedings that do affect the determination of those issues. The rule on the reporter's transcript solves the problem by allowing an application for augmentation. "[T]he reviewing court, on its own or the respondent's motion, may order the record augmented. ... to prevent a miscarriage of justice." (C.R.C., Rule 8.130(a)(4); see C.R.C., Rule 8.754(f); 35 *Cal. L. Rev.* 495; 17 *So. Cal. L. Rev.* 111, 124; on augmentation procedure, see *infra*, §683 et seq.)

The respondent's motion based on a *prima facie* showing should, in nearly all cases, be granted. The reviewing court is scarcely in a position to say that the requested additions would be unnecessary. And, if the appellant in opposition contends that the new material would require further augmentation to overcome it, the court should order that as well. (See *Kuhn v. Ferry & Hensler* (1948) 87 *C.A.2d* 812, 814, 197 *P.2d* 792 ["When it appears that proceedings were had or evidence was introduced which should be considered on appeal a denial of the right to augment would be an abuse of discretion"].)

(2) *No Augmentation by Appellant.* The augmentation procedure cannot be invoked by the appellant to bring up evidentiary matter that properly belongs in a reporter's transcript or settled or agreed statement. Having elected to appeal on the judgment roll alone, the appellant is bound by his or her choice. "The motion to 'augment' cannot be used to create a record. Its function is to supplement an incomplete but existing record." (*Estate of Larson* (1949) 92 *C.A.2d* 267, 269, 206 *P.2d* 852; see *Russi v. Bank of America* (1945) 69 *C.A.2d* 100, 101, 158 *P.2d* 252; 35 *Cal. L. Rev.* 492.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Augmentation by Respondent.* C.R.C., Rule 8.754(f) was repealed in 2008. C.R.C., Rule 8.832, governing the clerk's transcript in limited civil cases, no longer contains an augmentation provision. (On augmentation of record in limited civil cases, see C.R.C., Rule 8.841(a), Supp., *infra*, §1014.)



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XV. RECORD ON APPEAL

I. Record in Multiple Appeals.

1. Cross-Appeals.

9 Witkin Cal. Proc. Appeal § 671

[§ 671] Cross-Appeals.

The former requirement that every appellant furnish his or her own record led to much wasteful duplication where separate or successive appeals were reviewable on substantially the same record. C.R.C., Rule 8.147 eliminates this waste in all of the important situations. If more than one appeal is taken from the "same judgment or a related order," only one record need be prepared, which must be filed within the time allowed for filing the record in the latest appeal. (C.R.C., Rule 8.147(a)(1); cf. C.R.C., Rule 8.760 [limited civil case appeals: similar]; see *17 So. Cal. L. Rev. 129*; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §445 et seq.)

If there is more than one separately represented appellant, all the appellants must equally share the cost of preparing the record, unless otherwise agreed by the appellants or ordered by the superior court. Appellants equally sharing the cost are each entitled to a copy of the record. (C.R.C., Rule 8.147(a)(2).)

C.R.C., Rule 8.147 is based on the federal rule, but it has been considerably enlarged by amendment. (See *F.R. App. P., Rule 11(a)*; 16A Federal Practice & Procedure (Wright & Miller) §3957; 2A Federal Procedure, L.Ed., §3:678.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.760 was repealed in 2008. The record in multiple appeals in limited civil cases is now covered in C.R.C., Rule 8.839.

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3957.



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I. Record in Multiple Appeals.

2. Successive Appeals.

9 *Witkin Cal. Proc. Appeal* § 672

[§ 672] Successive Appeals.

(1) *Appeals in Same Case.* Where, in the same case, separate appeals are taken from distinct judgments or orders, the appeals may be heard at different times and even in different courts. The solution is to allow the use of an abbreviated record in the subsequent appeals, incorporating by reference the necessary material in the record on the earlier appeal. (See C.E.B., 1 Civil Appellate Practice 3d, §§9.11, 9.12; Cal. Civil Practice, 5 Procedure §§38:95, 38:96; 17 *So. Cal. L. Rev.* 129.) The Rules of Court authorize the following procedure:

(a) In an appeal on a reporter's or clerk's transcript, a party wanting to incorporate by reference parts of a record in a prior appeal in the same case must specify those parts in its designation of the record, with page numbers if available. (C.R.C., Rule 8.147(b)(1).) (See *Brown v. Guy* (1959) 167 C.A.2d 211, 214, 334 P.2d 67 [it cannot be partially settled statement and partially reporter's transcript incorporated by reference].)

(b) A party desiring any incorporated parts of a prior record to be copied into the later record must serve and file a notice designating those parts and must deposit the estimated copying cost within 10 days after the clerk mails notice of that cost. (C.R.C., Rule 8.147(b)(2).)

(2) *Consolidated Cases or Appeals.* C.R.C., Rule 8.147 does not authorize a single record or incorporation by reference where (a) cases are consolidated for trial but result in separate judgments; or (b) separate appeals from separate judgments are taken, but are consolidated on appeal. It has been held that these must, except by stipulation, be presented on separate records. (*Silver v. Bank of America* (1941) 43 C.A.2d 835, 838, 111 P.2d 666.) And each appellant must still give the proper notices for his or her own record in order to avoid dismissal for default. (*Beresford v. Pacific Gas & Elec. Co.* (1952) 113 C.A.2d 622, 626, 248 P.2d 773.)

It seems clear, however, that the reviewing court has power to authorize a departure from the strict requirement in the interests of economy and convenience. Thus, in *Thornburg v. Rais* (1950) 100 C.A.2d 735, 736, 224 P.2d 806, on motion of appellant, the appellate court directed that an appeal from an order appointing a receiver be heard on a single transcript prepared for the appeal from final judgments in consolidated cases. (See *General Elec. Co. v. Federal Employees' Distr. Co.* (1954) 122 C.A.2d 509, 511, 265 P.2d 19.)

(3) *Valid Appeal After Ineffective Appeal.* In *Scarbery v. Bill Patch Land & Water Co.* (1960) 184 C.A.2d 87, 7 C.R. 408, a first appeal was dismissed as premature because the judgment was interlocutory. Then an appeal was taken from the final judgment, and, by agreement of counsel, the record in the prior appeal was incorporated by reference, so that for practical purposes the two constituted one record on appeal. (184 C.A.2d 90.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appeals in Same Case.* C.R.C., Rule 8.147 is now applicable only to appeals in which the parties are using either a clerk's transcript or a reporter's transcript. (C.R.C., Rule 8.147(b), as amended in 2009.) The procedure is as follows:

(a) The prior appeal must be identified by its case name and number. If only part of a record is being incorporated, that part must be identified by citation to the volume and page numbers and either the title of the document or documents or the date of the oral proceedings to be incorporated. The parts incorporated by reference must be identified in a separate section at the end of the designation of the record. (C.R.C., Rule 8.147(b)(1)(A), added in 2009.)

(b) If the transcript incorporates all or part of a prior appeal, its cover must prominently display the notice "Record in case number: ____ incorporated by reference," identifying the number of the case from which the record is incorporated. (C.R.C., Rule 8.147(b)(1)(B), added in 2009.)

(c) On request of the reviewing court or any party, the designating party must provide a copy of the incorporated materials, or lend them as provided in C.R.C., Rule 8.153 (see text, §633). (C.R.C., Rule 8.147(b)(1)(C), added in 2009.)

(d) A party wanting any parts of a clerk's transcript or other record of the written documents from a prior appeal in the same case to be copied into the clerk's transcript in a later appeal must specify those parts in its designation of the record. The estimated cost of copying these materials must be included in the clerk's estimate of the cost of preparing the transcript. On request of the trial court clerk, the designating party must provide a copy of or lend the materials to be copied to the clerk. The parts of any record from a prior appeal that are copied into a clerk's transcript must be placed in a separate section at the end of the transcript and identified in a separate section at the end of the indexes. (C.R.C., Rule 8.147(b)(2), as amended in 2009.)



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J. Transcript Wholly or Partially Unavailable.

1. Agreed or Settled Statement.

9 Witkin Cal. Proc. Appeal § 673

[§ 673] Agreed or Settled Statement.

A transcript may be wholly or partially unavailable where the reporter dies or becomes incapacitated; where his or her notes are lost or destroyed; where the reporter refuses to transcribe; where no reporter was present at the particular proceeding; or where the reporter for some reason failed to take notes of a part of the proceeding. C.R.C., Rules 8.130(g) and 8.753(e) (settled statements only) and *C.C.P. 914* (infra, §674) provide alternative and cumulative remedies for some but not all of the situations. (See C.R.C., Rule 8.130(g)(3); *17 So. Cal. L. Rev. 117* [discussing gaps in coverage].)

If any portion of the designated proceedings cannot be transcribed, the superior court clerk must notify the designating party by mail (the notice must show the date it was mailed). The party may then substitute an agreed or settled statement for that portion of the designated proceedings by complying with one of the following requirements:

(1) *Agreed statement.* Within 10 days after the notice is mailed, the party may file in superior court an agreed statement (see supra, §664 et seq.) or a stipulation that the parties are attempting to agree on a statement. If the party files a stipulation, within 30 days thereafter the party must file the agreed statement, move to use a settled statement, or proceed without such a statement. (C.R.C., Rule 8.130(g)(1)(A).)

(2) *Settled statement.* Within 10 days after the notice is mailed, the party may move in superior court to use a settled statement (supra, §657 et seq.). If the court grants the motion, the statement must be served, filed, and settled, but the order granting the motion must fix the times for doing so. (C.R.C., Rule 8.130(g)(1)(B).) (See Rutter Group, 1 Civil Appeals and Writs §4:266 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §603 et seq.; on *F.R. App. P., Rule 10(c)*, see 16A Federal Practice & Procedure (Wright & Miller) §3956; 2A Federal Procedure, L.Ed., §§3:667, 3:668.)

If the agreed or settled statement contains all the oral proceedings, it will substitute for the reporter's transcript. If it contains a portion of the proceedings, it will be incorporated into that transcript. (C.R.C., Rule 8.130(g)(2).)

West's Key Number Digest, Appeal and Error 556 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.753(e) was repealed in 2008. C.R.C., Rule 8.834(e), governing limited civil cases, is no longer limited to agreed statements.(2) *Settled statement*. See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3956.



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J. Transcript Wholly or Partially Unavailable.

2. New Trial.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 674

[§ 674] In General.

(1) *Death or Disability of Reporter or Loss of Notes.* When the right to a phonographic report has not been waived and when it is impossible to have a phonographic report of the trial transcribed (because of reporter's death or disability or loss of reporter's notes), the trial court or a judge of the trial court, or the reviewing court has the power to set aside and vacate the judgment, order, or decree from which an appeal has been taken or is to be taken and to order a new trial. (*C.C.P.* 914; see 57 *A.L.R.4th* 1049 [court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial].)

The remedy provided by this statute is restricted to cases of loss of notes, death, or actual physical or mental disability that renders the reporter incapable of preparing the transcript. A showing that a recalcitrant reporter, after long wrangling, prepared a transcript containing innumerable errors was held insufficient. (*Williams v. Davis* (1944) 67 *C.A.2d* 274, 276, 154 *P.2d* 22 ["it is conceded that he has prepared a transcript which may or may not contain inaccuracies"]; see 35 *Cal. L. Rev.* 489.)

(2) *Distinct From Ordinary New Trial Procedure.* *C.C.P.* 914 is a part of the laws dealing with civil appeals. Being thus conceptually different from the laws relating to new trial, it is not governed by the time limitation on ordinary new trial motions. For example, an appellant may file a notice of appeal on the 60th day after judgment (long after the time for a new trial motion has passed), order a transcript, find in due time that the reporter cannot furnish a transcript, and still move for a new trial under *C.C.P.* 914. (*Hennigan v. United Pac. Ins. Co.* (1975) 53 *C.A.3d* 1, 6, 125 *C.R.* 408.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. New Trial.

b. No Partial New Trial.

9 *Witkin Cal. Proc. Appeal* § 675

[§ 675] No Partial New Trial.

In *Hennigan v. United Pac. Ins. Co.* (1975) 53 C.A.3d 1, 125 C.R. 408, defendant moved for a new trial under C.C.P. 914 on the ground that the reporter had lost his notes. The trial judge, observing that liability was clear and that the only controversial issue was damages, granted the motion for a new trial on the issue of damages only. *Held*, reversed with directions to grant the new trial on all issues. (a) The statute on its face is unambiguous ("to order a new trial of the action or proceeding"). (b) At the time of the adoption of the statute in 1968, the Legislature had already amended the ordinary new trial statute (C.C.P. 657) to authorize a partial new trial, but C.C.P. 914 contains no such authorization. (53 C.A.3d 7, 8.)

However, in the following eminent domain case, consideration of a single issue, which was clear despite the missing transcript, was permitted without ruling on the new trial motion. In *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 C.A.4th 141, 43 C.R.2d 366, plaintiff redevelopment agency filed a complaint in eminent domain against defendant property owners. There was a 2-day trial on plaintiff's right to take, the trial judge ruled that plaintiff possessed the right to take, compensation was set, and a condemnation judgment was entered. Defendants appealed, and then moved under C.C.P. 914 to vacate the judgment and remand for a new trial, based on the fact that the reporter inadvertently lost or destroyed the transcript for the first day of trial. However, one of defendants' issues on appeal could be decided without the missing transcript, and it required reversal. *Held*, the Court of Appeal would proceed to consider the merits of that issue without ruling on the new trial motion. (37 C.A.4th 146, 147.)

(a) For a new trial to be granted because of destruction of the reporter's transcript, the moving party must show the impossibility of securing the transcript and the presence of substantial issues establishing the necessity of a transcript, and must demonstrate reasonable diligence. The motion should ordinarily be granted where a reasonable showing is made that the transcript is necessary to present substantial issues. (37 C.A.4th 147.)

(b) To determine if the reporter's transcript is necessary to present substantial issues, a reasonable test of substantiality is whether questions appellant desired to raise on appeal can be properly considered without the lost portion of the transcript. If they can, then the loss will not be considered substantial. (37 C.A.4th 147, citing *Lilienthal v. Hastings Clothing Co.* (1954) 123 C.A.2d 91, 266 P.2d 56, *infra*, §678.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. New Trial.

c. No Reopening of Trial To Recover Lost Testimony.

9 *Witkin Cal. Proc. Appeal* § 676

[§ 676] No Reopening of Trial To Recover Lost Testimony.

In *Weinstein v. E.F. Hutton & Co.* (1990) 220 C.A.3d 364, 269 C.R. 443, plaintiffs sued to recover investment losses. After a 3-day nonjury trial, the judge entered judgment in favor of defendants, and plaintiffs appealed. It then appeared that the reporter's notes of the first day of the trial had been lost, and plaintiffs moved for a new trial, on the following showing: The missing notes contained the entire direct examination and a substantial portion of the cross-examination of W, the key plaintiff; and the missing testimony was too detailed and complex to make a settled statement possible. Defendants then suggested that the trial be reopened to permit W to again give his direct testimony, and the judge so ordered in denying the motion for new trial. *Held*, reversed.

(a) Where a reporter's notes are lost and the parties cannot reach an agreed statement of facts or stipulation concerning the missing testimony, there are two basic remedies: a settled statement, or a new trial under C.C.P. 914. However, there is no authority authorizing the innovative procedure imposed here over plaintiffs' objection. (220 C.A.3d 368, 369, citing the text.)

(b) *Lilienthal v. Hastings Clothing Co.* (1954) 123 C.A.2d 91, 266 P.2d 56, *infra*, §678, is distinguishable. There, the appellant arbitrarily refused to consider concessions or stipulations that would have completely protected the appellant's interests on appeal. Here: (1) Plaintiffs' six supporting witnesses who testified on the second and third day of the trial constantly referred back to W's testimony, and they would not have the opportunity to testify again. (2) W's new testimony would inevitably differ in some respects from his prior testimony, and he might testify to new matter that had not been addressed by defendant's witnesses. (220 C.A.3d 370.)

(c) Cases holding that a trial judge in settling a statement may recall witnesses to repeat their testimony are not helpful. "These cases allow the taking of testimony only as an 'aid' to assist the trial judge to remember and reconstruct the prior testimony in order to 'settle' what the prior testimony stated. They do not support the trial court's order in this case, where it appears the new testimony would stand independently in place of the old, without the trial judge's performance of the necessary function of settling a statement of the prior testimony." (220 C.A.3d 370.)

(d) The cause is remanded to the trial court "to reconsider the permissible alternatives of reaching an agreed or

settled statement or granting a new trial." (220 C.A.3d 370.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. New Trial.

d. Circumstances Justifying Relief.

9 *Witkin Cal. Proc. Appeal* § 677

[§ 677] Circumstances Justifying Relief.

Some of the earlier cases mistakenly conceived of the former statute as an ordinary new trial statute, and the appellate courts were reluctant to disturb the discretionary denial of the motion. (See, e.g., *Kroeker v. Jack* (1942) 51 C.A.2d 272, 273, 124 P.2d 619; *Smith v. Orange Belt Supply Co.* (1943) 58 C.A.2d 848, 849, 137 P.2d 845.)

The danger of this approach, which would give a trial judge extraordinary power to prevent a review of his or her own judgment or order, was recognized in *Weisbecker v. Weisbecker* (1945) 71 C.A.2d 41, 161 P.2d 990. Appellant made a showing that a slight delay in proceedings for a transcript occurred with the consent of both parties, that it did not prejudice the respondent, and that the motion for a new trial was made promptly after discovering that the reporter had died. In reversing the order of denial, the court said: "If trial courts become committed to the practice of summarily denying motions for new trial ... , and if on appeal from such denial reviewing courts take the course of least resistance and affirm the order of denial because the matter is deemed one within the discretion of the trial court," the relief afforded by the statute "is as effectually denied the appellant as it would be if no such statute existed." (71 C.A.2d 47; see 35 Cal. L. Rev. 489.)

Similar liberality and approval of *Weisbecker* appears in *Fickett v. Rauch* (1947) 31 C.2d 110, 187 P.2d 402. "The appellant should, of course, indicate substantial controversial issues concerning which a judgment on the merits would depend; but it is not required that he show that on a retrial the result would be different." (31 C.2d 115.) (See *Aylmer v. Aylmer* (1956) 139 C.A.2d 696, 703, 294 P.2d 98; *Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 C.A.4th 141, 147, 43 C.R.2d 366, supra, §675 [summarizing circumstances justifying relief].)

In *Feldman v. Katz* (1958) 160 C.A.2d 836, 325 P.2d 597, new counsel was engaged by appellant after judgment; the reporter became disabled and died, and no one could be found capable of transcribing her notes; appellant's former counsel had no recollection of the detailed facts and the judge who tried the case became district attorney; the only support for the new judge's denial of the motion was a general statement by respondent's counsel that he thought an agreed statement could be prepared, though none was offered. *Held*, reversed. (160 C.A.2d 839.)

In re Andrew M. (1977) 74 C.A.3d 295, 141 C.R. 350, applies the reasoning of the criminal appeal cases (see 6 Cal.

Crim. Law (3d), *Criminal Appeal*, §125 et seq.) to an appeal by a minor from a declaration of wardship based on the commission of felonies. The court reporter failed to perform his duty to report the closing arguments of counsel (Welf.C. 677). The minor's court-appointed counsel moved for a new trial under *C.C.P. 914. Held*, motion granted.

(a) *Necessity of missing record.* A contention that may be raised on an appeal is incompetency of trial counsel, and a transcript of the closing argument might support this contention. (74 C.A.3d 297.)

(b) *Possibility of "fair substitute."* The criminal cases hold that a new trial may be denied where a "fair substitute" for the transcript can be had, i.e., an agreed statement or a settled statement. (74 C.A.3d 298; see 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §127.) Whether this is true in a juvenile court appeal need not be decided; no fair substitute is possible in this case because the minor's trial counsel is dead, and no statement on appeal can properly be prepared without the assistance of trial counsel. (74 C.A.3d 298.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. New Trial.

e. Insufficient Showing.

9 *Witkin Cal. Proc. Appeal* § 678

[§ 678] Insufficient Showing.

A denial of the motion will be upheld if the appellant's showing is defective, e.g., where the appellant was not diligent in seeking to obtain a record before the reporter's death or disability intervened. (*Caminetti v. Edward Brown & Sons* (1943) 23 C.2d 511, 514, 144 P.2d 570; *Duarte v. Rivers* (1949) 90 C.A.2d 152, 155, 202 P.2d 612.) And the appellant is not entitled to this relief where it may still be possible to procure a satisfactory record. (See *Rambo v. Rambo* (1948) 84 C.A.2d 632, 634, 191 P.2d 480 [evasive affidavit that appellant could not locate reporter or "procure" notes].)

In *Lilienthal v. Hastings Clothing Co.* (1954) 123 C.A.2d 91, 266 P.2d 56, a personal injury action took 12 trial days, judgment was for defendants, and plaintiff appealed. The reporter lost his notes of the 11th day of the trial (part of defendants' case), but defendants offered to stipulate to the nature of the evidence presented, and served a proposed settled statement covering that day's testimony. Plaintiff refused to stipulate or to discuss a substitute record. *Held*, the trial judge abused his discretion in granting a new trial. The statute "contemplates that the lost notes must constitute at least a *substantial* part of the transcript. It would seem that a reasonable test of substantiality would be whether the questions which an appellant desired to raise on appeal could be properly considered without them. If they could, the loss would not be substantial and hence there would be an abuse of discretion in granting a new trial because of their loss." (123 C.A.2d 93.) And "where, as here, no attempt was made by plaintiff to obviate the necessity of a new trial, where every offer of defendants to help work out a statement or stipulation was arbitrarily refused, where plaintiff's rights are fully protected on appeal by the concessions made by defendants, we have no alternative." (123 C.A.2d 96.)

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K. Transmission of Record to Reviewing Court.

1. Record.

9 *Witkin Cal. Proc. Appeal* § 679

[§ 679] Record.

All of the rules dealing with the different kinds of record provide for filing the completed record with the trial court clerk. (C.R.C., Rules 8.130, 8.122, 8.134, 8.137, 8.753, 8.754, 8.755, 8.756.) Then, the superior court clerk must, when the record is complete, "promptly" send the original to the reviewing court and the copy to the appellant. (C.R.C., Rule 8.150(a); see *17 So. Cal. L. Rev. 125*; cf. C.R.C., Rule 8.759 [limited civil case appeals: record transmitted to the county clerk for filing]; on *F.R. App. P., Rule 11*, see 2A Federal Procedure, L.Ed., §3:678 et seq.)

On receipt, the reviewing court clerk must promptly file the original record and mail notice of the filing date to the parties. (C.R.C., Rule 8.150(b).)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rules 8.753, 8.754, 8.755, 8.756, and 8.759 were repealed in 2008. Comparable provisions governing limited civil cases are now in C.R.C., Rule 8.832 [clerk's transcript], C.R.C., Rule 8.834 [reporter's transcript], C.R.C., Rule 8.836 [agreed statement], C.R.C., Rule 8.837 [statement on appeal], and C.R.C., Rule 8.840 [transmission].



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K. Transmission of Record to Reviewing Court.

2. Original Exhibits.

9 Witkin Cal. Proc. Appeal § 680

[§ 680] Original Exhibits.

(1) *Designation.* The trial court clerk sends up the transcript or the agreed or settled statement, but the exhibits are kept in his or her custody. This delay allows the parties to use them during the brief-writing period. However, even when the date of the calendar hearing approaches, they are not sent up automatically. Some are bulky and difficult to store in the offices of the reviewing court clerk; many, though originally designated by the parties, may not really be needed for examination by the justices. Accordingly, within 10 days after the last respondent's brief is filed or could be filed under C.R.C., Rule 8.220 (infra, §720), a party wanting the reviewing court to consider any original exhibits that were admitted in evidence, refused, or lodged must serve and file a notice in superior court designating these exhibits. (C.R.C., Rule 8.224(a)(1).) Within 10 days after the notice is served, any other party wanting the reviewing court to consider additional exhibits must serve and file a notice in superior court designating them. (C.R.C., Rule 8.224(a)(2).) A party filing either type of notice must serve a copy on the reviewing court. (C.R.C., Rule 8.224(a)(3).) (See *Kipp v. Warriner* (1948) 86 C.A.2d 814, 815, 195 P.2d 888; *Brown v. Copp* (1951) 105 C.A.2d 1, 9, 232 P.2d 868; C.E.B., 1 Civil Appellate Practice 3d, §9.55 et seq.; Rutter Group, 1 Civil Appeals and Writs §4:278 et seq.; Cal. Civil Practice, 5 Procedure §38:86; 17 So. Cal. L. Rev. 125; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §497 et seq.)

After the specified time periods for designation have expired, a party may nevertheless apply to the reviewing court for permission to send an exhibit to that court. (C.R.C., Rule 8.224(c).) For example, when the appellant makes a point in its reply brief that the respondent reasonably believes justifies the reviewing court's consideration of an exhibit it had not previously designated, but the point is made after expiration of the relevant time period, C.R.C., Rule 8.224(c) authorizes the party to apply to the reviewing court for permission to send the exhibit on a showing of good cause. (Advisory Committee Comment to C.R.C., Rule 8.224.)

(2) *Transmittal Procedure.* Unless the reviewing court orders otherwise, within 20 days after the first notice of designation is filed, the superior court clerk must put any designated exhibits in his or her possession into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, he or she must sign and return one copy to the superior court clerk. (C.R.C., Rule 8.224(b)(1).) Similarly, within the same 20-day period unless otherwise ordered, any party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, he or she

must sign and return one copy to the party. (C.R.C., Rule 8.224(b)(2).)

(3) *Effect of Noncompliance.* At any time, the reviewing court may direct the superior court or a party to send it an exhibit. (C.R.C., Rule 8.224(d).) The reviewing court may relieve a party from his or her default in failing to make the second designation. (*Lyons v. Lyons* (1951) 105 C.A.2d 839, 840, 234 P.2d 64.) Furthermore, the court may regard noncompliance as an abandonment of any contention based on the exhibits. (See *Kipp v. Warriner*, *supra*, 86 C.A.2d 815; *Brown v. Copp*, *supra*, 105 C.A.2d 9 ["failure to have the exhibits relied on transmitted to this court may result in decision of the appeal upon the record before us without the exhibits"].)

(4) *Return of Papers.* On request, the reviewing court may return an exhibit to the superior court or to the party that sent it. When the remittitur issues, the reviewing court must return all exhibits to the superior court or to the party that sent them. (C.R.C., Rule 8.224(d).)

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L. Correction and Augmentation of Record.

1. Correction.

a. Correction of Record on Appeal.

9 *Witkin Cal. Proc. Appeal* § 681

[§ 681] Correction of Record on Appeal.

(1) *In General.* C.R.C., Rules 8.155 and 8.761 state a broad power in the reviewing court, and an extremely simple procedure, subject to no time limitations, for the correction of mistakes or formal defects in the record or the addition of omitted matters (*infra*, §683). (See *People v. Gross* (1955) 44 C.2d 859, 861, 285 P.2d 630, *supra*, §191; 35 Cal. L. Rev. 492; 17 So. Cal. L. Rev. 130; Cal. Civil Practice, 5 Procedure §§38:87, 38:93, 38:94; 5 Am.Jur.2d (2007 ed.), *Appellate Review* §462 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §632 et seq.; on *F.R. App. P.*, *Rule 10(e)*, see 16A Federal Practice & Procedure (Wright & Miller) §3956.4; 2A Federal Procedure, L.Ed., §672 et seq.)

"On motion of a party, on stipulation, or on its own motion," the reviewing court may order the correction or certification of any part of the record. (C.R.C., Rule 8.155(c)(1); see C.R.C., Rule 8.761(b) [limited civil case appeals; similar]; C.E.B., 1 Civil Appellate Practice 3d, §§9.36, 9.50, 9.100 et seq., 10.78; Rutter Group, 1 Civil Appeals and Writs §4:300 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §663 et seq.) The reviewing court may also order the superior court to settle disputes about omissions or errors in the record. (C.R.C., Rules 8.155(c)(2), 8.761(c); *Prescott v. Ralphs Grocery Co.* (1952) 114 C.A.2d 655, 657, 250 P.2d 690; *Prescott v. Ralphs Grocery Co.* (1953) 115 C.A.2d 466, 467, 252 P.2d 61 [dispute about form in which instruction was given].)

The reviewing court clerk must send all parties notice of the receipt and filing of any matter under these provisions. (C.R.C., Rule 8.155(d).)

(2) *Limited Civil Case Appeal.* The procedure established for limited civil case appeals is as follows:

(a) Immediately on completion of the transcripts, the clerk gives mailed notice to all parties, and, if no request for correction is filed, the clerk certifies the record as correct. (C.R.C., Rule 8.757(a).)

(b) If a request for correction is filed within 10 days after the mailing, a hearing before the judge who tried the case is held on notice, and he or she determines the request, orders the correction if any, and then certifies the record as correct. (C.R.C., Rule 8.757(b); see 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §663 et seq.)

(c) Alternatively, the parties may stipulate to correctness of all or part of the record, "and such stipulation shall render unnecessary the certification by either the clerk or judge of the record or the portion stipulated to by the parties." (C.R.C., Rule 8.757(b); see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§665, 670.)

West's Key Number Digest, Appeal and Error 634 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.761 was repealed in 2008. Comparable provisions governing limited civil cases are now in C.R.C., Rule 8.841.

See 16A Federal Practice & Procedure (Wright, Miller, Cooper & Struve) §3956.4.

(2) *Limited Civil Case Appeal.* C.R.C., Rule 8.757 was repealed in 2008. (On correction of record in limited civil cases, see C.R.C., Rule 8.841(b), Supp., infra, §1014.)



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1. Correction.

b. Distinction: Trial Court Record.

9 Witkin Cal. Proc. Appeal § 682

[§ 682] Distinction: Trial Court Record.

C.R.C., Rules 8.155 and 8.761 (*supra*, §681) deal solely with correction of the record on appeal, to make it conform to the actual records and proceedings in the trial court. If the clerical error is in the trial court record itself, the trial judge has exclusive jurisdiction to correct it, and may do so notwithstanding the pendency of an appeal. (See *supra*, §23; *Verdier v. Verdier* (1953) 118 C.A.2d 279, 281, 257 P.2d 723 [date of entry of judgment].) If the trial judge refuses to rule on a request for correction, mandamus may issue to compel the exercise of the power, but an application to the reviewing court to act under these rules is wholly improper. (*Boylan v. Marine* (1951) 104 C.A.2d 321, 322, 231 P.2d 92.)

If application is made to the trial judge, he or she must seek correction of the trial court record. In *Shellhaas v. Petrolane, Ltd.* (1950) 98 C.A.2d 171, 219 P.2d 797, defendants, appealing from an order granting a new trial, contended that the minutes did not correctly state the grounds of the order. Instead of moving for a correction of the minutes, they proceeded before a successor judge (the trial judge having died) to make the change in the transcript on appeal. *Held*, the successor judge's order of correction was void. "The transcript on appeal must be a true and precise copy of the proceedings in the trial court. If it is not a true copy it is a false certification and is not a transcript at all. An appellate court's decision must be based on the record of the trial court and it cannot be so unless the court of appeal has before it the exact, authentic and true record of the action of the trial court." (98 C.A.2d 174.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.761 was repealed in 2008. Correction of the record in limited civil cases is now covered in C.R.C., Rule 8.841(b) (Supp., *infra*, §1014).



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2. Augmentation.

a. Nature of Remedy.

9 *Witkin Cal. Proc. Appeal* § 683

[§ 683] Nature of Remedy.

(1) *In General.* At any time, on motion of a party or its own motion, the reviewing court may order the record augmented to include the following:

(a) A document filed or lodged in the case in superior court. (C.R.C., Rule 8.155(a)(1)(A).)

(b) A certified transcript--or agreed or settled statement--of oral proceedings not designated under C.R.C., Rule 8.130 (see *supra*, §635). The appellant is responsible for the cost of any additional transcript. (C.R.C., Rule 8.155(a)(1)(B); see C.R.C., Rule 8.761(a) [limited civil case appeals; similar]; Cal. Civil Practice, 5 Procedure, §38:88 et seq.; C.E.B., 1 Civil Appellate Practice 3d, §9.53, 9.100 et seq., 10.77; 35 *Cal. L. Rev.* 492; 17 *So. Cal. L. Rev.* 130; 2 *Am.Jur. P.P. Forms* (2000 ed.), Appeal and Error, §661 et seq.)

The power should be liberally exercised. (See *McCarthy v. Mobile Cranes* (1962) 199 *C.A.2d* 500, 502, 18 *C.R.* 750 [clerk's file ordered sent up where appellant filed inadequate partial transcript].) (For limitations, see *infra*, §§684, 685.)

(2) *Unreported Matters.* The augmentation procedure is not confined to bringing up matters reported; it may be used in any way that will make the record conform to the truth. Thus, in *Gibson v. Southern Pac. Co.* (1955) 137 *C.A.2d* 337, 290 *P.2d* 347, an appeal from a judgment notwithstanding the verdict, the appellate court in its first opinion assumed that no motion for directed verdict had been made. On rehearing, the record was augmented to show that counsel asked leave to make the motion outside the presence of the jury, and that the judge called counsel, the clerk, and the reporter into chambers for this purpose. (137 *C.A.2d* 345.) (See *Ev.C.* 459, 1 *Cal. Evidence* (4th), *Judicial Notice*, §45 et seq. [judicial notice in reviewing court]; *Lipka v. Lipka* (1963) 60 *C.2d* 472, 480, 35 *C.R.* 71, 386 *P.2d* 671 [augmentation to make record show that in conferences in chambers, alimony was waived and language in decree referring to support was put in by husband's attorney for tax purposes]; *South Shore Land Co. v. Petersen* (1964) 226 *C.A.2d* 725, 742, 38 *C.R.* 392 [augmentation to bring up documents of which reviewing court may take judicial notice, even though they were not brought to attention of trial judge].)

West's Key Number Digest, Appeal and Error 634 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.761(a) was repealed in 2008. Augmentation of the record in limited civil cases is now covered in C.R.C., Rule 8.841(a) (Supp., infra, §1014).



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2. Augmentation.

b. Proper Part of Record.

9 *Witkin Cal. Proc. Appeal* § 684

[§ 684] Proper Part of Record.

The procedure is available only to add matters that were a proper part of the record in the lower court and could therefore have formed a part of the record on appeal. (*Howard v. Howard* (1953) 119 C.A.2d 122, 123, 259 P.2d 41 [motion to include party's draft of proposed findings, superseded by court's findings; motion denied].) Thus, augmentation was held improper where documentary evidence was discovered after judgment and denial of a motion for new trial, and was therefore not before the trial court at the time of its ruling. (*Rollins v. San Francisco* (1974) 37 C.A.3d 145, 148, 112 C.R. 168, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §4.) (See *Doers v. Golden Gate Bridge, Highway & Trans. Dist.* (1979) 23 C.3d 180, 184, footnote 1, 151 C.R. 837, 588 P.2d 1261 [augmentation was denied where document could have been brought to attention of trial court]; *Olen Commercial Realty Corp. v. Orange* (2005) 126 C.A.4th 1441, 1449, 24 C.R.3d 609 [on taxpayers' appeal from judgment upholding property tax assessment, record could not be augmented with declaration of real estate appraiser that had been filed but was excluded at trial; counsel was attempting to challenge on appeal evidentiary ruling that should have been subject of timely objection below].)

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2. Augmentation.

c. Requirement of Diligence.

9 *Witkin Cal. Proc. Appeal* § 685

[§ 685] Requirement of Diligence.

The draftsman of the Rules on Appeal observed that "[e]ven where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons." (17 *So. Cal. L. Rev.* 130.)

In *Russi v. Bank of America* (1945) 69 *C.A.2d* 100, 158 *P.2d* 252, the appeal was taken on the judgment roll and exhibits. After the briefs were on file and the case was on the calendar, appellant moved to augment the record to include all the oral testimony. The motion was denied. The court quoted the draftsman's comment, and rejected the theory that the augmentation rule allows circumvention of the other rules specifying the procedure for obtaining particular kinds of records. Nothing in the rule "can justify the appellant's contention that he may at his pleasure change his judgment roll form of appeal to one which includes a reporter's transcript." (69 *C.A.2d* 102.)

The *Russi* case merely illustrates the discretion of the court to deny augmentation when it would violate the policy of the rules; it does not hold that an appellant who starts with only a clerk's transcript can never change to a reporter's transcript appeal. On a sufficient showing, the appellant may obtain relief from default so as to give notice to prepare a reporter's transcript (*infra*, §690), and he or she may accomplish the same object by augmentation. Thus, in *Kalmus v. Kalmus* (1950) 97 *C.A.2d* 74, 217 *P.2d* 64, counsel for appellant gave notice for a clerk's transcript and papers, but not for a reporter's transcript. He died, and new counsel sought to bring up a reporter's transcript by motion to augment. The court granted the motion, observing that the attorneys might have had different theories as to the handling of the appeal. (97 *C.A.2d* 77.)

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2. Augmentation.

d. Procedure.

9 *Witkin Cal. Proc. Appeal* § 686

[§ 686] Procedure.

(1) *Augmentation by Court Order.* The reviewing court may order augmentation "at any time" on motion by a party or its own motion. (C.R.C., Rule 8.155(a)(1).)

A party must attach to its motion a copy, if available, of any document or transcript the party wants added to the record. The pages of the attachments must be consecutively numbered, beginning with the number 1. If the reviewing court grants the motion, it may augment the record with the copy. (C.R.C., Rule 8.155(a)(2).) If the party cannot attach a copy of the matter to be added, the party must identify it as required under C.R.C., Rules 8.122 and 8.130 (relating to designation of matters to be included in transcripts, *supra*, §§635, 647). (C.R.C., Rule 8.155(a)(3).)

(2) *Distinction: Omission of Designated Material.* If the clerk or reporter has omitted a required or designated portion of the record, two options are available: The party may request formal augmentation by court order, or may serve and file a notice in superior court specifying the omitted portion and requesting that it be prepared, certified, and sent to the reviewing court. The party must serve a copy of the notice on the reviewing court. (C.R.C., Rule 8.155(b)(1).) The clerk or reporter must comply with the notice within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment, attaching a copy of the notice. (C.R.C., Rule 8.155(b)(2).)

(3) *Mailing Order and Notice of Receipt.* The reviewing court clerk must send all parties notice of the receipt and filing of any matter under these provisions. (C.R.C., Rule 8.155(d).)

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M. Penalty for Excessive Record.

9 Witkin Cal. Proc. Appeal § 687

[§ 687] Penalty for Excessive Record.

C.R.C., Rule 8.276(a)(2) introduces an innovation derived from former F.R. App. P., Rule 75(e): A Court of Appeal may, on a party's motion or its own motion, impose sanctions, including the award or denial of costs, on a party or an attorney for "[i]ncluding in the record any matter not reasonably material to the appeal's determination." (See C.R.C., Rule 8.764(a) [limited civil case appeals; similar]; *17 So. Cal. L. Rev. 102*; on imposition of sanctions by Supreme Court, see *infra*, §§953, 954, 983.)

The rule is not easy to administer (see *17 So. Cal. L. Rev. 102*), but one case did apply it in an aggravated situation. In *Garcia v. Lucido* (1961) 191 C.A.2d 303, 12 C.R. 601, appellant appealed from an order granting a new trial. The successful moving party cross-appealed from the judgment, and insisted on a complete reporter's transcript of 1,118 pages, although appellant showed that for the limited points raised on his appeal, eight pages would have been enough, and appellant made an affidavit of indigence for leave to file typewritten briefs. The only ground raised on the cross-appeal was insufficiency of the evidence, totally without merit in view of the limited scope of review on appeal. The order granting a new trial was reversed, the cross-appeal was dismissed, and appellant was awarded costs, including the expense of preparing 1,110 pages of the transcript, from the cross-appellant and her counsel. (191 C.A.2d 308.) (Cf. *In re Marriage of Green* (1989) 213 C.A.3d 14, 26, 261 C.R. 294, *infra*, §699 [respondent's designation of additional portions of reporter's transcript did not warrant sanctions, where she could not reasonably have foreseen appellant's subsequent abandonment of certain issues on appeal].)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.764(a) was repealed in 2008. Sanctions in limited civil cases are now authorized by C.R.C., Rule 8.891(e).



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XV. RECORD ON APPEAL

N. Default and Relief From Default.

1. Sanctions for Default.

9 *Witkin Cal. Proc. Appeal* § 688

[§ 688] Sanctions for Default.

(1) *In General.* Where a party fails to timely do an act required to procure the record, the superior court clerk must promptly notify the party by mail that it must do the act specified in the notice within 15 days after the notice is mailed, and that if the party fails to comply, the reviewing court may impose one of the following sanctions:

(a) If the defaulting party is the appellant, the appeal may be dismissed. (C.R.C., Rule 8.140(a)(1).)

(b) If the defaulting party is the respondent, the appeal may proceed on the record designated by the appellant. (C.R.C., Rule 8.140(a)(2).)

If a party fails to take the action specified in a notice of default, the superior court clerk must "promptly" notify the reviewing court of the default, and the reviewing court may impose whichever of the sanctions is appropriate. (C.R.C., Rule 8.140(b).)

If the superior court clerk fails to give the notice of default, a party may serve and file a motion for sanctions in the reviewing court, but the motion must be denied if the defaulting party cures the default within 15 days after the motion is served. (C.R.C., Rule 8.140(c).) (See C.R.C., Rule 8.762(c) [limited civil case appeals: defaulting party is not afforded opportunity to cure default]; C.E.B., 1 Civil Appellate Practice 3d, §§9.105, 10.80; Rutter Group, 1 Civil Appeals and Writs §4:294 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §771 et seq.)

Under this provision, an appeal may be dismissed if the appellant has allowed the time to expire without an adequate excuse. (See *Whelpton v. Taylor* (1947) 81 C.A.2d 949, 981, 185 P.2d 391; *Heatly v. Heatly* (1948) 83 C.A.2d 677, 678, 189 P.2d 748; *Clyde v. Clyde* (1948) 85 C.A.2d 249, 251, 193 P.2d 9; *Yurkas v. O'Neill* (1948) 87 C.A.2d 885, 886, 198 P.2d 103; *Estate of Dougherty* (1951) 101 C.A.2d 576, 578, 225 P.2d 613; *Schein v. Holbrook* (1952) 111 C.A.2d Supp. 972, 974, 245 P.2d 708 [municipal court appeal]; *Smith v. McLaren* (1952) 112 C.A.2d 566, 567, 246 P.2d 994; *Jablon v. Javasile* (1956) 146 C.A.2d 106, 109, 303 P.2d 580 [failure to deposit sum required for record]; 17 So. Cal. L. Rev. 127, 500; on motion to dismiss, see *infra*, §740 et seq.)

(2) *Relief.* While the reviewing court may dismiss the appeal where the appellant fails to comply with the notice of

default, it may "vacate the dismissal for good cause." (C.R.C., Rule 8.140(b)(1).) And although the reviewing court may, on noncompliance by the respondent, order the appeal to proceed on the record designated by the appellant, the respondent may "obtain relief from default" under C.R.C., Rule 8.60(d) (*infra*, §689 et seq.). (C.R.C., Rule 8.140(b)(2).)

West's Key Number Digest, Appeal and Error 557, 580, 594, 619, 626

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.762(c) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.842(b).



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N. Default and Relief From Default.

2. Relief From Default.

a. Procedure.

9 *Witkin Cal. Proc. Appeal* § 689

[§ 689] Procedure.

(1) *Power of Reviewing Court.* To avoid dismissal (*supra*, §688), the appellant must apply to the reviewing court, which alone has the power to excuse delay. For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a timely notice of appeal or a timely statement of reasonable grounds in support of a certificate of probable cause. (C.R.C., Rule 8.60(d); see C.R.C., Rule 8.772(b) [limited civil case appeals: only exception is failure to file timely notice of appeal]; *Averill v. Lincoln* (1944) 24 C.2d 761, 763, 151 P.2d 119; 35 Cal. L. Rev. 500; 17 So. Cal. L. Rev. 292.) As the court said in *Jarkieh v. Badagliacco* (1945) 68 C.A.2d 426, 156 P.2d 969: "Before the adoption of these rules the control over, and responsibility for, the preparation of the record was in the trial court, and its discretion in relieving from default or in terminating would not be disturbed in the absence of a manifest abuse. ... That discretion is now conferred on the appellate courts." (68 C.A.2d 431.)

(2) *Application or Opposition to Motion To Dismiss.* The appellant may seek relief either directly by application or motion, or indirectly by opposition to the respondent's motion to dismiss. (See Cal. Civil Practice, 5 Procedure §§38:53, 38:98 et seq.; 35 Cal. L. Rev. 500.) Obviously, the showing of diligence will be stronger if the appellant makes the application himself or herself instead of waiting for the respondent's motion to dismiss.

Under the old practice, an appellant in default, either in connection with the record or his or her brief, was allowed to defeat a motion to dismiss simply by having the necessary papers on file at the time of the notice of motion, or, perhaps, at the time of the hearing of the motion. It has been stated that this indulgence is no longer appropriate under the rules. (See *Heatly v. Heatly* (1948) 83 C.A.2d 677, 679, 189 P.2d 748.) However, such indulgence was displayed by *Pulver v. Avco Financial Services* (1986) 182 C.A.3d 622, 227 C.R. 491, where the record on appeal was filed more than a year after expiration of the time to do so. In denying respondent's motion to dismiss, the court emphasized that the motion was not made until more than 21/2 months after the record was filed. Without discussion of *Heatly*, the court then added: "The fact that the clerk's transcript was on file at the time respondent's motion for dismissal was presented is a sufficient reason for denying the motion." (182 C.A.3d 631.)

(3) *Conditional Order.* A typical method of exercising discretion in favor of relief appears in cases that follow the procedure adopted in *Tobin v. Casaus* (1954) 128 C.A.2d 588, 275 P.2d 792, *supra*, §81. The court recites the

appellant's default (e.g., failure to order transcript or deposit charges), concludes that no prejudice will result to the moving party from conditional relief, and orders that, if the appellant performs (e.g., gives the notice or deposits the sum required within 30 days), the motion to dismiss will be denied; otherwise, it will be granted without further hearing or opinion. (128 C.A.2d 593.) (See *Jeffers v. Screen Extras Guild* (1956) 140 C.A.2d 604, 609, 295 P.2d 417 [Reporter's Note recites compliance and denial of motion to dismiss]; *Oppenheim v. Reiter* (1956) 142 C.A.2d 545, 548, 298 P.2d 868 [Reporter's Note recites ultimate failure to comply and dismissal ordered]; *Marshallan Mfg. Co. of Calif. v. Brack* (1959) 172 C.A.2d 22, 24, 342 P.2d 26, *infra*, §690.)

West's Key Number Digest, Appeal and Error 628, 629

SUPPLEMENT: [This section is current through the latest supplement]



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N. Default and Relief From Default.

2. Relief From Default.

b. Relief Granted.

9 *Witkin Cal. Proc. Appeal* § 690

[§ 690] Relief Granted.

The power to relieve from default under the rules has been exercised freely and liberally, particularly in the initial period of unfamiliarity with the strict provisions of the new rules. In *Jarkieh v. Badagliacco* (1945) 68 C.A.2d 426, 156 P.2d 969, the court suggested the proper approach to the problem: "There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the rules, to have the appeal dismissed. ... In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value." (68 C.A.2d 431.) (See 35 Cal. L. Rev. 501.)

The following are illustrative of situations in which relief has been granted:

(1) Failure to serve preliminary notice of election to proceed by settled statement (*supra*, §658). (*Averill v. Lincoln* (1944) 24 C.2d 761, 764, 151 P.2d 119 [disregard of instructions by counsel's secretary; no showing of injury to respondent from delay].)

(2) Defective form of notice of election to proceed by settled statement. (*Burns v. Brown* (1944) 66 C.A.2d 142, 146, 151 P.2d 899.)

(3) Slight delay in giving notice requesting a transcript. (*Estate of Cochems* (1952) 110 C.A.2d 27, 29, 242 P.2d 56 [1 day late, mistake in computing time].)

(4) Inability to obtain settlement of a statement, necessitating further time to commence proceedings to obtain a transcript instead. (*Averill v. Lincoln, supra*, 24 C.2d 765 [dictum]; *Brown v. Guy* (1959) 167 C.A.2d 211, 215, 334 P.2d 67.)

(5) Reasonable delay occasioned by negotiations for a compromise of the case. (*Jarkieh v. Badagliacco*, *supra*, 68 C.A.2d 433 ["Assuming defendant was careless in not having a formal understanding concerning the record, nevertheless she was, in a sense, lulled into a state of security by plaintiff's participation in the settlement conferences"].)

(6) Delay occasioned by reliance on clerk or reporter. "It is common knowledge that court reporters frequently assume the responsibility of securing additional time to enable them to transcribe the evidence of lengthy trials." (*Clement v. Reclamation Bd.* (1948) 89 C.A.2d 115, 117, 200 P.2d 196; see *Amoruso v. Carley* (1948) 89 C.A.2d 119, 122, 200 P.2d 199.)

(7) Delay in proceedings to obtain transcript, for appeal from order appointing receiver, in order to use transcripts on appeals from the judgments on the merits in related cases. (*Thornburg v. Rais* (1950) 100 C.A.2d 735, 736, 224 P.2d 806.)

(8) Delay occasioned by refusal of appellant's trustee in bankruptcy to prosecute appeal or abandon cause of action so as to revest it in appellant. (*Roberts v. Bank of America* (1952) 112 C.A.2d 823, 824, 247 P.2d 356.)

(9) Delay occasioned by successful efforts to borrow money to pay for transcript. (See *Jeffers v. Screen Extras Guild* (1956) 140 C.A.2d 604, 605, 295 P.2d 417.)

(10) Delay occasioned by unsuccessful attempt to obtain reporter's transcript at public expense. (See *Leslie v. Roe* (1974) 41 C.A.3d 104, 108, 116 C.R. 386.)

In *Marshallan Mfg. Co. of Calif. v. Brack* (1959) 172 C.A.2d 22, 342 P.2d 26, relief was granted where appellant brought up a partial record without stating the points to be raised (*supra*, §635), despite the frank admission of no excuse at all. The relief was a conditional order (*supra*, §689), giving 10 days to comply; then the appeal was dismissed for failure to comply. (172 C.A.2d 24.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Relief From Default.

c. Relief Denied.

9 *Witkin Cal. Proc. Appeal* § 691

[§ 691] Relief Denied.

The following are illustrative of situations in which relief was denied:

(1) Unjustifiable change to another form of record. Where the appellant elects the settled statement method, there is a possibility that disputes will preclude settlement, and relief from default will ordinarily be granted so that he or she may proceed by the transcript method. (See *supra*, §690.) But if the appellant commences with the transcript method, there are no such hazards, and a belated decision to abandon this method and commence a new proceeding to obtain a settled statement is not a ground for relief. Thus, it was held that the time limitation of former C.R.C., Rule 7 (now C.R.C., Rule 8.137) was intended to permit the preparation of a condensed statement of the oral proceedings while the evidence was fresh in the memories of counsel. "It would be improper, and unfair to the respondent as well as a plain disregard of the rules, to permit an appellant long after his time has expired to give notices for a type of record which he voluntarily chose not to request within the time allowed." (*Brock v. Southern Pac. Co.* (1946) 74 C.A.2d 806, 809, 169 P.2d 402.)

(2) Unreasonably long and unwarranted delay during negotiations for a compromise. (See *Snyder v. Cotton* (1950) 98 C.A.2d 491, 492, 220 P.2d 572; *Wilkins v. Wilkins* (1951) 108 C.A.2d 12, 14, 237 P.2d 684.)

(3) Failure to inquire into neglect of court officer. "Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed." (*Flint v. Board of Med. Examiners of Calif.* (1946) 72 C.A.2d 844, 846, 165 P.2d 694.) (See *Caldwell v. Harvey* (1948) 85 C.A.2d 104, 108, 192 P.2d 62 ["though the reporter was plainly in default appellant took no steps to compel him to perform his duty"]; *Myers v. Johnson* (1949) 89 C.A.2d 800, 803, 201 P.2d 884; 35 Cal. L. Rev. 503.)

(4) Failure to act diligently after prior order granting relief. (See *Andreas v. California Milling Corp.* (1959) 170 C.A.2d 228, 229, 338 P.2d 560.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVI. BRIEFS IN COURT OF APPEAL

A. In General.

1. Nature and Types of Briefs.

a. In General.

9 Witkin Cal. Proc. Appeal § 692

[§ 692] In General.

Each party must ordinarily file a brief, consisting of points raised on appeal and legal argument and authorities in support of them. (See C.R.C., Rule 8.200(a) ["Each appellant" and "Each respondent"]; C.R.C., Rule 8.706(a) ["the appellant" and "the respondent"]; *Electric Util. Co. v. Smallpage* (1934) 137 C.A. 640, 641, 31 P.2d 412 [party with attorney of record cannot file brief in pro. per.]; C.E.B., 1 Civil Appellate Practice 3d, Chaps. 12, 13; Rutter Group, 2 Civil Appeals and Writs §§9:1 et seq., 13:130 et seq.; 13 So. Cal. L. Rev. 286; 17 So. Cal. L. Rev. 132; 34 U.S.F. L. Rev. 197 [use of nonlegal materials in appellate briefs]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error §707 et seq.; on form, see *infra*, §694 et seq.; on style and method, see *infra*, §705 et seq.; on defective briefs, see *infra*, §709 et seq.; on legal argument, see *infra*, §701 et seq.; on briefs in Supreme Court, see *infra*, §§936, 937; on briefs in appellate division of superior court, see *infra*, §1015.)

Each appellant must serve and file an appellant's opening brief (C.R.C., Rule 8.200(a)(1)), each respondent must serve and file a respondent's brief (C.R.C., Rule 8.200(a)(2)), and each appellant may serve and file a reply brief (C.R.C., Rule 8.200(a)(3)). Generally, no other brief may be filed except with permission of the presiding justice. (C.R.C., Rule 8.200(a)(4).) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same appeal or a related appeal. (C.R.C., Rule 8.200(a)(5).) (On briefs of particular parties, see *infra*, §716 et seq.; on supplementary briefs, see *infra*, §693.)

Briefs of amici curiae may ordinarily only be filed with permission of the presiding justice or judge. (C.R.C., Rules 8.200(c)(1), 8.706(b); see *infra*, §725 et seq.) However, the Attorney General may file an amicus curiae brief without permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. (C.R.C., Rules 8.200(c)(6), 8.706(b).)

West's Key Number Digest, Appeal and Error 755 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.706(a) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.882(a). C.R.C., Rule 8.706(b) was repealed in 2008. Amicus briefs in limited civil cases are now covered in C.R.C., Rule 8.882(d).

C.R.C., Rule 8.200(c)(6) was renumbered C.R.C., Rule 8.200(c)(7) in 2008.



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A. In General.

1. Nature and Types of Briefs.

b. Supplementary Briefs.

9 *Witkin Cal. Proc. Appeal* § 693

[§ 693] Supplementary Briefs.

(1) *Point Raised by Party: Optional.* Supplementary briefs, before or after oral argument, are occasionally ordered by the court or allowed on request of counsel, where further elaboration of the argument or discussion of new authorities is desirable. (See C.R.C., Rule 8.200(a)(4) ["[n]o other brief may be filed except with the permission of the presiding justice"]; *Waller v. Truck Ins. Exchange* (1995) 11 C.4th 1, 24, 44 C.R.2d 370, supra, §340 [supplemental briefing may be ordered or allowed whenever the court "wishes to consider a point of law following the regular briefing of a case on appeal"]; *Estate of Walters* (1950) 99 C.A.2d 552, 558, 222 P.2d 100 [observing that court is lenient in allowing supplementary briefs, but refusing filing where counsel was inexcusably late]; *Phillips v. Bartolomie* (1975) 46 C.A.3d 346, 352, 121 C.R. 56 [brief after oral argument, by permission, to raise constitutional question and meet unanticipated issues considered in another Court of Appeal case decided after briefs were filed]; on supplemental briefs after retransfer from Supreme Court, see *infra*, §945.) Sometimes the oral argument is transcribed and printed by counsel, and filed with leave of court, as a sort of supplementary brief. And a mild evasion of the required permission rule is countenanced when an attorney writes a letter to the court, with copy to opposing counsel, calling attention to some new decision.

(2) *Point Raised by Court: Mandatory.* An appellate court has the power to raise issues on its own motion, but in that event it must afford the parties the opportunity to submit supplementary briefs on the new issues. (*Walton v. Red Bluff* (1991) 2 C.A.4th 117, 129, 3 C.R.2d 275, citing Witkin, Manual on Appellate Court Opinions.)

This principle was codified in 1986. "Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." (*Govt.C. 68081*; see *Adoption of Alexander S.* (1988) 44 C.3d 857, 864, 245 C.R. 1, 750 P.2d 778, 3 Cal. Proc. (5th), Actions, §74 [court made no attempt to comply with *Govt.C. 68081*; fact that parties did not petition for rehearing did not relieve court of duty to allow supplemental briefing].)

Similarly, before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied on by the trial court, the reviewing court must afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based on the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing must be ordered on timely petition of any party. (*C.C.P.* 437c(m)(2).)

West's Key Number Digest, Appeal and Error 763

SUPPLEMENT: [This section is current through the latest supplement]



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XVI. BRIEFS IN COURT OF APPEAL

A. In General.

2. Form.

a. Separate Points and Headings.

9 *Witkin Cal. Proc. Appeal* § 694

[§ 694] Separate Points and Headings.

Each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (C.R.C., Rule 8.204(a)(1)(B); see C.R.C., Rule 8.706(c) [limited civil case appeals; similar]; *Barnes v. Cocke* (1929) 101 C.A. 170, 171, 281 P. 503 [sufficient]; 17 So. Cal. L. Rev. 138.)

Briefs have been found insufficient in many cases. (See *Estate of Hartson* (1933) 218 C. 536, 539, 24 P.2d 171 [headings "A," "B," etc.]; *Richmond Terminal Corp. v. Parr Terminal Co.* (1931) 116 C.A. 368, 369, 118, 2 P.2d 579 [headings "Point 1," "Point 2," etc., with no description of points]; *Milano v. Bulleri* (1932) 125 C.A. 72, 73, 13 P.2d 521 [no heading except "Appellant's Opening Brief" on first page]; *Landa v. Steinberg* (1932) 126 C.A. 324, 326, 14 P.2d 532 [headings "Excessive damages," "Defendant demurs to Plaintiff's Complaint," and "Appellant's Grounds of Appeal"]; *Iske v. Stockwell-Kling Corp.* (1932) 128 C.A. 192, 193, 17 P.2d 203 [headings "Statement of the case" and "Argument"]; *Porter v. Granich* (1933) 131 C.A. 211, 213, 20 P.2d 972 [no headings except "Statement of Facts" and "Conclusion"]; *Richard v. Richard* (1954) 123 C.A.2d 900, 901, 267 P.2d 867; *People v. Dougherty* (1982) 138 C.A.3d 278, 280, 188 C.R. 123; *Tilbury Constructors v. State Comp. Ins. Fund* (2006) 137 C.A.4th 466, 482, 40 C.R.3d 392 [during argument dealing with covenant of good faith and fair dealing, plaintiff incorrectly inserted additional claims].)

In *Hawkins v. Doolittle* (1931) 113 C.A. 619, 298 P. 862, the headings were "The Pleadings," "The Employment," "That Hawkins Effected an Exchange," "The Agreement by Appellant," etc. The court said: "Where in the headings do we find even a suggestion of the nature of the point to be discussed? In fact, the points are not presented in the headings at all. We can gather no conception of the discussion to follow. For the purpose of complying with the rule the headings employed might just as well be eliminated." (113 C.A. 620.)

In *Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 C.A.3d 343, 122 C.R. 434, the court said: "Our burden in connection with this appellate review has been unfortunately compounded by an utter disregard for the Rules of Court in the brief submitted on appellants' behalf. It is nothing more than what amounts to a random and somewhat garbled recital of alleged grievances, without a statement of facts, topical index, or any separate statement of points or classification of claimed errors by headings, titles, or otherwise. We would be derelict in our duty if we failed

to censure counsel for appellants for not even making a token attempt to comply with rule 15(a)" (now C.R.C., Rule 8.204(a)(1)(B)) and this "failure alone would justify a dismissal of the appeal." (48 C.A.3d 347.) However, despite this censure, the opinion deals with all the issues "in the interests of justice." (48 C.A.3d 347.)

West's Key Number Digest, Appeal and Error 756

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.706(c) was repealed in 2008. The separate statement requirement for limited civil cases is now in C.R.C., Rule 8.883(a)(1)(A).



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A. In General.

2. Form.

b. References to Record.

9 *Witkin Cal. Proc. Appeal* § 695

[§ 695] References to Record.

Each brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears." (C.R.C., Rule 8.204(a)(1)(C); see C.R.C., Rule 8.706(c) [limited civil case appeals; similar].)

"Appellate courts will not act as counsel for either party to an appeal and will not assume the task of initiating and prosecuting a search of the record for the purpose of discovering errors not pointed out in the briefs. It is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby. ... The fact that it would be burdensome and cumbersome to appellant's counsel who are familiar with the record is a sufficient reason for their assistance to the court." (*Fox v. Erickson* (1950) 99 C.A.2d 740, 742, 222 P.2d 452.)

Many cases emphasize the importance of the requirement and deplore the frequency with which brief writers fail to comply with it. (See *Landfield v. Gardner* (1948) 88 C.A.2d 320, 322, 198 P.2d 717 [criticizing failure to refer to relevant parts of voluminous exhibits]; *Pfingst v. Mayer* (1949) 93 C.A.2d 265, 270, 208 P.2d 1002; *Metzenbaum v. Metzenbaum* (1950) 96 C.A.2d 197, 198, 214 P.2d 603; *Richard v. Richard* (1954) 123 C.A.2d 900, 902, 267 P.2d 867; *Grayson v. Grayson* (1955) 132 C.A.2d 471, 473, 282 P.2d 565; *County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard* (1955) 136 C.A.2d 205, 222, 288 P.2d 880; *Devers v. Greenwood* (1956) 139 C.A.2d 345, 351, 293 P.2d 834; *Grand v. Griesinger* (1958) 160 C.A.2d 397, 403, 325 P.2d 475, citing the text; *Du Zeff's Hollywood v. Wald* (1965) 235 C.A.2d 678, 682, 45 C.R. 584; *Haynes v. Gwynn* (1967) 248 C.A.2d 149, 151, 56 C.R. 82 ["Publication of this opinion has for its purpose notice to the lawyers practicing before this court that we will no longer tolerate deliberate disregard of established court rules"]; *Schulz v. Wulfing* (1967) 251 C.A.2d 776, 777, 60 C.R. 53 [attorney guilty of violation of rule after warning was fined \$ 100]; *People v. Dougherty* (1982) 138 C.A.3d 278, 282, 283, 188 C.R. 123; *Nwosu v. Uba* (2004) 122 C.A.4th 1229, 1245, 19 C.R.3d 416 [if party fails to support appellate argument with necessary citations to record, argument will be deemed to have been waived].)

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SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.706(c) was repealed in 2008. The reference requirement is now in C.R.C., Rule 8.883(a)(1)(B).

See *Schmidlin v. Palo Alto* (2007) 157 C.A.4th 728, 737, 69 C.R.3d 365 [failure in appellate brief to present full and fair summary of evidence supporting jury's verdict that police officers used excessive force effectively waived any challenge officers had to sufficiency of evidence]; *Doppes v. Bentley Motors* (2009) 174 C.A.4th 967, 990, 94 C.R.3d 802 [because of appellant's failure to provide record citations for statement of facts in opening brief, appellate court declined to consider four paragraphs and six other sentences, but violations were not substantial enough to justify striking brief or dismissing appeal].



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CHAPTER XIII - Appeal

Witkin Summary of California Law

XVI. BRIEFS IN COURT OF APPEAL

A. In General.

2. Form.

c. Index and Tables.

9 Witkin Cal. Proc. Appeal § 696

[§ 696] Index and Tables.

Each brief must "[b]egin with a table of contents and a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited." (C.R.C., Rule 8.204(a)(1)(A); see C.E.B., 2 Civil Appellate Practice 3d, §12.11 et seq.; Rutter Group, 2 Civil Appeals and Writs §9:110.)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law XVI. BRIEFS IN COURT OF APPEAL

A. In General.

2. Form.

d. Format.

9 Witkin Cal. Proc. Appeal § 697

[§ 697] Format.

(1) *In General.* A brief may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 8 1/2 by 11 inches, and of at least 20-pound weight. (C.R.C., Rule 8.204(b)(1).) (See Rutter Group, 2 Civil Appeals and Writs §9:213 et seq.; on length limitations, see *infra*, §699.) Both sides of the paper may be used. (C.R.C., Rule 8.204(b)(4).)

(2) *Typeface and Size.* Any conventional typeface may be used, and the typeface may be either proportionally spaced or monospaced. (C.R.C., Rule 8.204(b)(2).) The type style must be Roman; but, for emphasis, italics or boldface may be used, or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters. (C.R.C., Rule 8.204(b)(3).) Except for typewritten briefs (see *infra*, this section), the type size, including footnotes, must not be smaller than 13-point. (C.R.C., Rule 8.204(b)(4).)

(3) *Line Spacing.* The lines of text must be unnumbered and at least one-and-a-half-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced (i.e., six lines to a vertical inch). (C.R.C., Rule 8.204(b)(5).)

(4) *Margins.* The margins must be at least 1 1/2 inches on the left and right and 1 inch on the top and bottom. (C.R.C., Rule 8.204(b)(6).)

(5) *Numbering.* The pages must be consecutively numbered. However, the tables and the body of the brief may have different numbering systems. (C.R.C., Rule 8.204(b)(7).)

(6) *Binding.* The brief must be bound on the left margin. If the brief is stapled, the bound edge and staples must be covered with tape. (C.R.C., Rule 8.204(b)(8).)

(7) *Signature.* The brief need not be signed. (C.R.C., Rule 8.204(b)(9).) (See C.E.B., 2 Civil Appellate Practice 3d, §12.53 et seq.)

(8) *Cover.* The cover, preferably of recycled stock, must be in the color prescribed by C.R.C., Rule 8.40(b) and

must state the following: (a) the title of the brief; (b) the title, trial court number, and Court of Appeal number of the case; (c) the names of the trial court and each participating trial judge; (d) the name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief, but the cover need not state the State Bar number of any supervisor of the attorney responsible for the brief; (e) the name of the party that each attorney on the brief represents. (C.R.C., Rule 8.204(b)(10).)

(9) *Typewritten Briefs*. A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies. (C.R.C., Rule 8.204(b)(11)(A).) Both sides of the paper may be used if a photocopy is filed. Only one side may be used if a typewritten original and carbon copies are filed. (C.R.C., Rule 8.204(b)(11)(B).) The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters. (C.R.C., Rule 8.204(b)(11)(C).) (See C.E.B., 2 Civil Appellate Practice 3d, §12.58; Rutter Group, 2 Civil Appeals and Writs §9:216.)

(10) *Limited Civil Case Appeals*. In limited civil case appeals, the briefs must be prepared in accordance with the requirements of C.R.C., Rule 8.204(b), except that the briefs must be bound at the top. (C.R.C., Rule 8.706(d); on use of recycled paper for briefs filed in the appellate division, see *infra*, §1011.)

(11) *Authority To Reject Briefs*. The reviewing court clerk may decline to file a brief not in compliance with these form and content requirements. (C.R.C., Rule 8.204(e)(1); see *infra*, §709.)

SUPPLEMENT: [This section is current through the latest supplement]

(10) *Limited Civil Case Appeals*. C.R.C., Rule 8.706(d) was repealed in 2008. C.R.C., Rule 8.883(c)(8) now provides that briefs must be bound on the left margin, except that briefs may be bound at the top if required by a local rule of the appellate division.



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A. In General.

2. Form.

e. Filing and Service of Original and Copies.

9 Witkin Cal. Proc. Appeal § 698

[§ 698] Filing and Service of Original and Copies.

(1) *Filing.* With respect to the filing of briefs, and except as the rules provide otherwise, C.R.C., Rule 8.44 provides as follows:

(a) *Supreme Court: Brief on merits, amicus curiae brief, answer to amicus curiae brief.* An original and 13 copies. (C.R.C., Rule 8.44(a)(1).)

(b) *Court of Appeal: Brief, amicus curiae brief, answer to amicus curiae brief.* An original and four copies and, in civil appeals, proof of delivery of four copies to the Supreme Court. (C.R.C., Rule 8.44(b)(1).)

(2) *Service.* "One copy of each brief must be served on the superior court clerk for delivery to the trial judge." (C.R.C., Rule 8.212(c)(1).)

One electronic copy or four paper copies of each brief must be served on the Supreme Court. (C.R.C., Rule 8.212(c)(2).) One copy may be served on the Supreme Court electronically by sending the copy to the Supreme Court's electronic notification address (see C.R.C., Rule 2.250). (C.R.C., Rule 8.212(c)(2)(A).) The copy must be a single computer file in text-searchable Portable Document Format (PDF), and it must exactly duplicate the appearance of the paper copy. By electronically serving, the filer certifies that the copy complies with these requirements and that all reasonable steps have been taken to ensure that the copy does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system. (C.R.C., Rule 8.212(c)(2)(A)(i).)

If the Court of Appeal has ordered the brief sealed, the party serving the brief electronically must include as the first page in the PDF document a cover sheet containing the information required by C.R.C., Rule 8.204(b)(10) (see *supra*, §697) and labeling the contents as "CONDITIONALLY UNDER SEAL." The Court of Appeal clerk must promptly notify the Supreme Court of any court order unsealing the brief. In the absence of this notice, the Supreme Court clerk must keep all copies of the brief under seal. (C.R.C., Rule 8.212(c)(2)(A)(ii).)

Instead of serving an electronic copy, four paper copies of each brief may be served on the Supreme Court. If the

Court of Appeal has ordered the brief sealed, the party serving the brief must place all four copies in a sealed envelope and generally comply with the requirements for electronic service. (C.R.C., Rule 8.212(c)(B).)

In C.R.C., Rule 8.212(c)(2), the word "brief" means only (a) an appellant's opening brief, (b) a respondent's brief, (c) an appellant's reply brief, (d) a petition for rehearing, (e) an answer to a petition for rehearing, or (f) an amicus curiae brief. It follows that no other documents or papers filed in the Court of Appeal, whatever their nature, should be served on the Supreme Court. Further, only briefs filed in the Court of Appeal "in a civil appeal" must be served on the Supreme Court. It follows that no briefs filed in the Court of Appeal in criminal appeals or in original proceedings should be served on the Supreme Court. (Advisory Committee Comment to C.R.C., Rule 8.212.)

One copy of each brief must be served on a public officer or agency when required by C.R.C., Rule 8.29 (see *infra*, §717). (C.R.C., Rule 8.212(c)(3).)

SUPPLEMENT: [This section is current through the latest supplement]

Corrections: Page 768, last line of first full paragraph, "C.R.C., Rule 8.212(c)(B)" should be "C.R.C., Rule 8.212(c)(2)(B)".



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2. Form.

f. Limitations on Length.

1. In General.

9 Witkin Cal. Proc. Appeal § 699

[§ 699] In General.

(1) *Word or Page Limit.* A brief produced on a computer may not exceed 14,000 words, including footnotes. The brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief. (C.R.C., Rule 8.204(c)(1).) A brief produced on a typewriter may not exceed 50 pages. (C.R.C., Rule 8.204(c)(2).) A combined brief in an appeal in which a party is both appellant and respondent (see *infra*, §724) may not exceed double these limits. (C.R.C., Rule 8.204(c)(4).)

(2) *Excluded Documents.* The tables, the certificate of the number of words, and any attachment to the brief (see *infra*, §700) are excluded from these limits. (C.R.C., Rule 8.204(c)(3).)

(3) *Permission To Exceed Limits.* On application, the presiding justice may permit a longer brief for good cause. (C.R.C., Rule 8.204(c)(5).)

In re Marriage of Green (1989) 213 C.A.3d 14, 261 C.R. 294, denounced a flagrant violation of former C.R.C., Rule 15(e) (now C.R.C., Rule 8.204(c)) by a party who acted as his own attorney and requested permission to file a 72-page opening brief. "We denied his request to exceed the 50-page limit ... , finding no reason for such a lengthy brief. Thereafter, he filed a brief which constitutes a travesty of the 50-page limit it purports to satisfy. The brief contains an unnumbered 'Introduction' and 10 unnumbered pages of 'exhibits.' The exhibits consist largely of the text of footnotes which, if correctly placed within the brief, would have made it too long. Moreover, large chunks of textual material have been placed, single-spaced in 50 footnotes, contrary to formal stylistic conventions, for the sole purpose of reducing the number of pages in the brief. Such sleight of hand is an insult to this court." (213 C.A.3d 28.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Form.

f. Limitations on Length.

2. Attachments.

9 Witkin Cal. Proc. Appeal § 700

[§ 700] Attachments.

A party filing a brief may attach (1) copies of exhibits or other materials in the appellate record, (2) copies of relevant local, state, or federal regulations or rules, (3) out-of-state statutes, or (4) other similar citable materials that are not readily accessible. These attachments must not exceed a combined total of 10 pages, but on application the presiding justice, for good cause, may permit additional pages of attachments. A copy of an opinion required to be attached under C.R.C., Rule 8.1115(c) (see *infra*, §§824, 825) does not count toward this 10-page limit. (C.R.C., Rule 8.204(d).)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

3. Legal Argument.

a. Waiver of Point Not Urged.

1. General Rule.

9 *Witkin Cal. Proc. Appeal* § 701

[§ 701] General Rule.

The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. (See *Estate of Hunt* (1939) 33 C.A.2d 358, 361, 91 P.2d 609; *People v. Paramount Citrus Assn.* (1957) 147 C.A.2d 399, 407, 305 P.2d 135, citing the text; *Wilson v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1957) 156 C.A.2d 195, 212, 319 P.2d 426, citing the text; *Sutter v. Gamel* (1962) 210 C.A.2d 529, 531, 26 C.R. 880, citing the text; *Coronet Credit Corp. v. West Thrift Co.* (1966) 244 C.A.2d 631, 642, 53 C.R. 433, citing the text; *Henderson v. Security Nat. Bank* (1977) 72 C.A.3d 764, 769, 140 C.R. 388, citing the text; *Mansell v. Board of Administration* (1994) 30 C.A.4th 539, 545, 546, 35 C.R.2d 574 [waiver by failure to brief issue on appeal; "it is not this court's function to serve as ... backup appellate counsel"]; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 C.A.4th 863, 867, footnote 1, 63 C.R.3d 514.)

This is particularly true where the general assertion is made, without a specific showing, that the evidence does not support the findings. Thus, in *Duncan v. Ramish* (1904) 142 C. 686, 76 P. 661, the argument consisted of such statements as, "Finding II is not sustained by the evidence," followed by reference to the transcript. (142 C. 689.) The opinion states: "The court and counsel for respondents are left to discover, if they can, the particular point upon which the evidence fails to support the respective findings. ... We will treat the error as waived where the argument is limited to such a skeleton as that above quoted, and consider only those specifications of insufficiency which are more fully stated and argued." (142 C. 689.) (See *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 152, 135 C.R. 802, citing the text.)

In *Title Guarantee & Trust Co. v. Fraternal Finance Co.* (1934) 220 C. 362, 30 P.2d 515, it was said that the courts "will notice only those assignments pointed out in the brief of an appellant, all others are deemed to have been waived or abandoned." (220 C. 363.) A similar statement is made in *Estate of Randall* (1924) 194 C. 725, 230 P. 445: "Appellate courts cannot be expected to assume the task of searching the record for the purpose of discovering errors not pointed out by counsel. It is the duty of counsel by argument and the citation of authorities to show that the claimed

error exists." (194 C. 728.)

Numerous decisions illustrate this principle:

Sutro Heights Land Co. v. Merced Irr. Dist. (1931) 211 C. 670, 687, 296 P. 1088 [general assertion that evidence does not support findings is bad; must point out particulars].

Follett v. Brown (1931) 118 C.A. 198, 199, 5 P.2d 51 [long quotations from record and only brief comments by counsel].

Goldring v. Goldring (1949) 94 C.A.2d 643, 645, 211 P.2d 342 [warning to counsel that court will henceforth disregard claim].

Estate of Palmer (1956) 145 C.A.2d 428, 430, 431, 302 P.2d 629 [statement of facts consisted exclusively of evidence favorable to the appellant; "a mere challenge to respondents to prove that the court was right"; "entitled to no consideration"].

Estate of Good (1956) 146 C.A.2d 704, 706, 304 P.2d 196 ["Such extreme inadequacy of the briefs evidences a misconception of the respective duties of counsel and the courts"].

Miller v. Hassen (1960) 182 C.A.2d 370, 376, 377, 6 C.R. 202 [brief criticized as making a "blunderbuss contention"].

Sprague v. Equifax (1985) 166 C.A.3d 1012, 1050, 213 C.R. 69, citing the text [brief recited instructions refused by trial judge but failed to argue applicability of such instructions to the case at hand or to show that any prejudicial error resulted].

In re Marriage of Ananeh-Firempong (1990) 219 C.A.3d 272, 278, 268 C.R. 83 [brief criticized as "almost devoid of legal authority" and as "little more than an invitation to reweigh the evidence"].

Guthrey v. California (1998) 63 C.A.4th 1108, 1115, 75 C.R.2d 27, citing the text [brief cited only general legal principles without relating them to specific facts or admissible evidence].

Toigo v. Ross (1998) 70 C.A.4th 309, 317, 82 C.R.2d 649 [when appellants challenge sufficiency of evidence, all material evidence must be set forth, not merely their own evidence].

Roe v. McDonald's Corp. (2005) 129 C.A.4th 1107, 1113, 29 C.R.3d 127 [plaintiff waived claim that her expert witness' opinion raised factual issues, where her brief failed to affirmatively challenge trial court's evidentiary ruling sustaining defendants' objections].

Christoff v. Union Pac. R. Co. (2005) 134 C.A.4th 118, 125, 36 C.R.3d 6 [failure, in brief, to argue issue of causation forfeited challenge to finding that defendant's conduct was not legal cause of injuries].

Tilbury Constructors v. State Comp. Ins. Fund (2006) 137 C.A.4th 466, 482, 40 C.R.3d 392 [specifying various claims without providing legal analysis necessary to determine whether complaint stated cause of action under any of these theories was inadequate].

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SUPPLEMENT: [This section is current through the latest supplement]

See *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 C.A.4th 209, 218, 99 C.R.3d 158 [in sexual abuse case, plaintiff waived argument that findings regarding personal jurisdiction over diocese located in Ireland were not supported by substantial evidence, where plaintiff's appellate brief set forth only his version of evidence and asserted

that facts were not in conflict, ignoring trial court's findings supporting lack of personal jurisdiction].



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3. Legal Argument.

a. Waiver of Point Not Urged.

2. Relaxation of Rule.

9 *Witkin Cal. Proc. Appeal* § 702

[§ 702] Relaxation of Rule.

The rule requiring an adequate legal argument (see *supra*, §701) is largely for the convenience of the reviewing court. And, because the court may decide a case on any proper points or theories, whether urged by counsel or not, there is nothing preventing it from examining the record, doing its own research on the law, or accepting a belated presentation.

It is not surprising, therefore, to find that occasionally, for good reason, it will do so. (See *Fawkes v. Reynolds* (1922) 190 C. 204, 209, 211 P. 449 [point raised by Court of Appeal]; *Philbrook v. Randall* (1924) 195 C. 95, 105, 231 P. 739; *Dominguez Land Corp. v. Daugherty* (1925) 196 C. 453, 483, 238 P. 697 [relief sought was within original jurisdiction of reviewing court]; *Hill v. Barner* (1908) 8 C.A. 58, 68, 96 P. 111; *Maguire v. Cunningham* (1923) 64 C.A. 536, 540, 222 P. 838 [jurisdictional question, state policy involved, authorities belatedly given]; *Mercantile Trust Co. v. Reay* (1929) 96 C.A. 568, 571, 274 P. 401; *McColgan v. Scoble* (1931) 115 C.A. 165, 166, 1 P.2d 36 [point considered because appeal was taken in pro. per.]; *Brown v. Southern Calif. Edison Co.* (1932) 120 C.A. 102, 110, 7 P.2d 770 [point first raised at hearing, orally argued by both sides; "it is deemed most fair to the parties, as well as in the interest of the administration of justice" that question be considered]; *Gold v. Maxwell* (1959) 176 C.A.2d 213, 218, 1 C.R. 226 ["Notwithstanding defendant's flagrant violation of the rules, we have examined the record"]; *Balesteri v. Holler* (1978) 87 C.A.3d 717, 720, 151 C.R. 229 [brief incorporated by reference arguments and authorities set forth in trial brief; "in view of the absence of a specific rule or authority" on propriety of incorporation, and simple facts and issue of law, defect was disregarded]; *Tan v. California Fed. Savings & Loan Assn.* (1983) 140 C.A.3d 800, 811, 189 C.R. 775, citing the text [excusable oversight and issue of law]; *Banco Do Brasil, S.A. v. Latian* (1991) 234 C.A.3d 973, 999, footnote 41, 285 C.R. 870, quoting the text; *McManis v. San Diego Postal Credit Union* (1998) 61 C.A.4th 547, 558, 71 C.R.2d 617 [fact that defendant credit union did not show it had complied with applicable statutes governing lender's right to repossess security could be used to reverse summary judgment for credit union, even though plaintiff had failed to cite applicable statutes].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Bourgi v. West Covina Motors* (2008) 166 C.A.4th 1649, 1663, 83 C.R.3d 758 [instructional error, although not

raised by brief, was sufficiently raised and preserved by appellant's argument on appeal that trial court erred in denying motion for summary judgment].



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3. Legal Argument.

b. Thoroughness of Research.

9 Witkin Cal. Proc. Appeal § 703

[§ 703] Thoroughness of Research.

The quality of legal argument and of the research that produced it are generally thought to be matters best left to counsel. As the Draftsman of the Rules on Appeal observed, in commenting on the rejection of rules governing content of the brief, "lawyers are distrustful of the systems proposed by forensic experts and want the unrestricted right to argue their cases in their own way, with loss of the decision as the only penalty." (*17 So. Cal. L. Rev. 134*; see *infra*, §705.)

A different view was expressed, however, in *Tate v. Canonica* (1960) 180 C.A.2d 898, 5 C.R. 28, a case of first impression (see 5 *Summary* (10th), *Torts*, §461). The court set up a high standard for appellate lawyers: "Beyond advising us that no reported California case has passed upon the questions presented, appellant's brief is of no help to us. If appellants' counsel was aware of any authority on the questions elsewhere, he has not troubled to call it to our attention. Counsel's duty to assist the court includes a duty to study and to discuss the available authorities, both in California and, at least where there are none in California, in other jurisdictions. We would have more confidence in the completeness and sufficiency of our own research if counsel had performed this duty. We have had some help from defendants' counsel." (*180 C.A.2d 900*.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Admissions in Briefs.

9 *Witkin Cal. Proc. Appeal* § 704

[§ 704] Admissions in Briefs.

An express concession or assertion in a brief is frequently treated as an admission of a legal or factual point, controlling in the disposition of the case. (See *Estate of Stevens* (1945) 27 C.2d 108, 115, 162 P.2d 918; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 C.3d 946, 951, footnote 7, 192 C.R. 123, 663 P.2d 893, citing the text; *Harmon v. Keough* (1919) 41 C.A. 773, 775, 183 P. 201; *Kashow v. Plant* (1929) 97 C.A. 696, 697, 276 P. 117; *Morris v. Board of Education* (1932) 119 C.A. 750, 753, 7 P.2d 364; *Hospelhorn v. Newhoff* (1941) 43 C.A.2d 678, 679, 111 P.2d 688; *Kohn v. Kohn* (1950) 95 C.A.2d 708, 716, 717, 719, 214 P.2d 71 [admission that corporation was formed by husband and another for express purpose of minimizing income subject to property settlement agreement]; *Arruda v. Arruda* (1963) 218 C.A.2d 410, 417, 32 C.R. 257, citing the text; *Williams v. Superior Court* (1964) 226 C.A.2d 666, 674, 38 C.R. 291, quoting the text [Attorney General's concession that mandamus should issue to compel appointment of counsel for defendant]; *Estate of Kretschmer* (1965) 232 C.A.2d 789, 790, 43 C.R. 121 [purported statements of facts unsupported by any record references were treated as stipulations when adverse to party making them and disregarded when self-serving]; *Federer v. Sacramento* (1983) 141 C.A.3d 184, 186, 190 C.R. 187, citing the text; *Bell v. Tri-City Hosp. Dist.* (1987) 196 C.A.3d 438, 449, 241 C.R. 796, citing the text; *DeRose v. Carswell* (1987) 196 C.A.3d 1011, 1019, footnote 3, 242 C.R. 368, citing the text.)

Browne v. Superior Court (1940) 16 C.2d 593, 107 P.2d 1, furnishes an unusual illustration. A petition for habeas corpus was filed in the superior court on behalf of an incompetent woman under guardianship, alleging that she was not mentally unsound and was unlawfully restrained. A writ of prohibition was sought by the guardian to prevent the lower court from acting. An examination of the briefs disclosed that counsel only wanted to change the residence and nature of the ward's custody, and this fact was confirmed by statements at the oral argument. It was held that these admissions constituted "an abandonment of the only proper ground" on which the writ of habeas corpus could issue, and that prohibition should be granted. (16 C.2d 599.)

Janes v. LeDeit (1964) 228 C.A.2d 474, 39 C.R. 559, is irreconcilable with the long line of decisions treating admissions as controlling. In a boundary dispute, the crucial issue was whether there had been an agreement to the boundary by G, predecessor of plaintiffs. If the property was then separately owned by G, his sole consent was sufficient. But both parties in their briefs conceded that the property was acquired by G and Mrs. G in joint tenancy. The

appellate court, calling this a "cavalier concession" with nothing in the record to sustain it, disregarded it and, pointing out that this property had not been included in the wife's estate, drew the inference that it was separate property of G. (228 C.A.2d 487.) But where counsel does not ask to withdraw his concession, and opposing counsel relies on it in briefs and argument, this approach seems highly questionable.

The reviewing court need not, of course, accept a concession as establishing the applicable law on a recurring problem of general importance. (See *Desny v. Wilder* (1956) 46 C.2d 715, 729, 299 P.2d 257 [noting that here the concession was "for purposes of argument"]; *Morse v. E.A. Robey & Co.* (1963) 214 C.A.2d 464, 470, 29 C.R. 734; *Bell v. Tri-City Hosp. Dist.* (1987) 196 C.A.3d 438, 449, 241 C.R. 796 [citing *Desny*].)

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4. Style and Method.

a. In General.

9 Witkin Cal. Proc. Appeal § 705

[§ 705] In General.

The methods of presenting a case on appeal, by brief or oral argument, are too varied and individual to be subject to fixed rules. (See *17 So. Cal. L. Rev. 134*.) A few matters have, however, inspired comment or criticism by reviewing courts. (See *infra*, §706 [decorum]; §707 [brevity]; §708 [honesty and fairness].)

Instructive discussions of techniques, and illustrations of briefs, will be found in a number of books. (See *Re, Brief Writing and Oral Argument*; *Peck, Writing Persuasive Briefs*; *Mellinkoff, Legal Writing: Sense and Nonsense*; *C.E.B., 2 Civil Appellate Practice 3d*, §§12.21 et seq., 12.33 et seq., 13.16 et seq.; *Rutter Group, 2 Civil Appeals and Writs* §9:10 et seq.; *20 Loyola L.A. L. Rev. 301* [Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing]; *21 San Diego L. Rev. 371* [brief-writing for California appellate courts]; *34 U.C.L.A. L. Rev. 431* [The Seven Sins of Appellate Brief Writing and Other Transgressions]; *U.S.F. L. Rev 197* [use of nonlegal materials in appellate briefs].)

West's Key Number Digest, Appeal and Error 756

SUPPLEMENT: [This section is current through the latest supplement]
See *38 Southwestern U. L. Rev. 221* [Seven Virtues of Appellate Brief Writing].



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4. Style and Method.

b. Decorum.

9 *Witkin Cal. Proc. Appeal* § 706

[§ 706] Decorum.

Statements that are scandalous, abusive, or disrespectful to the court, counsel, or litigants may cause the court to castigate the writer or strike the brief from the files. (See *Sears v. Starbird* (1888) 75 C. 91, 92, 16 P. 531 [submission was set aside and brief was stricken with permission to file another]; *San Diego Water Co. v. San Diego* (1897) 117 C. 556, 558, 49 P. 582; *Gage v. Gunther* (1902) 136 C. 338, 350, 68 P. 710 [brief was examined, so that appellant might not suffer, but thereafter stricken from court's records]; *Estate of Randall* (1918) 177 C. 363, 367, 170 P. 835 [same]; *Shimpones v. Stickney* (1934) 219 C. 637, 644, 28 P.2d 673 [improper language was merely criticized]; *Carpenter v. Pacific Mut. Life Ins. Co. of Calif.* (1937) 10 C.2d 307, 314, 74 P.2d 761 [court commented on power to strike, but denied motion because of public importance of case]; *Rogers v. Transamerica Corp.* (1939) 36 C.A.2d 233, 240, 97 P.2d 517 [personal abuse of party was characterized as "pernicious, unwarranted and inexcusable"]; *Ruby v. Superior Court* (1951) 104 C.A.2d 175, 176, 230 P.2d 860, 231 P.2d 868 [petition for rehearing attacking trial and appellate courts, refused filing]; *Lazzarotto v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 157 C.A.2d 455, 462, 321 P.2d 29 [reference to trial judge's orders as "a wanton abuse of discretion" and as "arbitrary, intemperate, flagrant and capricious" was highly improper and inexcusable]; *Pilch v. Milikin* (1962) 200 C.A.2d 212, 216, footnote 1, 19 C.R. 334 ["Neither side is to be commended, however, for the use of certain language, critical of his opponent's advocacy, which has no place in the lexicon of an attorney at this or any other level"].)

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4. Style and Method.

c. Brevity.

9 *Witkin Cal. Proc. Appeal* § 707

[§ 707] Brevity.

Briefs that are unnecessarily long and detailed, or are loaded with repetitive discussion or cumulative quotations are frequently criticized as imposing improper burdens on the court. (See *Couts v. O'Neill* (1921) 51 C.A. 152, 158, 196 P. 109; *Antioch College of Yellow Springs, Greene County, Ohio v. Barnhart* (1942) 49 C.A.2d 171, 174, 121 P.2d 521; *Achen v. Pepsi-Cola Bottling Co. of Los Angeles* (1951) 105 C.A.2d 113, 115, 233 P.2d 74 ["we have literally been bombarded by having the 'law books thrown at us'"]; cf. *Miller v. Midway Fishing Tool Co.* (1951) 106 C.A.2d 612, 616, 235 P.2d 630 [commending counsel's plan of stating cases without detail in body of argument, but digesting and quoting liberally from them in appendix to brief]; 13 So. Cal. L. Rev. 281; 17 So. Cal. L. Rev. 137.) (On length limitations, see *supra*, §699.)

Heavy sarcasm occasionally appears as a substitute for criticism, as in *King v. Gildersleeve* (1889) 79 C. 504, 21 P. 961: "We are inclined to doubt the correctness of the ruling of the court below, on account of the extreme length of the brief of learned counsel for respondent in its support. Knowing the ability of counsel and their accurate knowledge of the law, a brief of *eighty-five* pages coming from them in support of a single ruling of the court below casts great doubt upon such ruling. However, the learned counsel may not have had *time* to prepare a *short* brief, and for that reason have cast upon us the unnecessary labor of reading and extracting therefrom the points made. If we overlook any of them counsel will readily understand the reason." (79 C. 507.)

However, the following remarks in *Bell v. Germain* (1910) 12 C.A. 375, 107 P. 630, indicate that brevity can be carried too far: "It is apparent that counsel for appellant has been somewhat misled in the preparation of his brief by the repeated requests of the supreme court and this court for brevity and succinctness in the presentation of cases. While 'simplicity of statement' in the brief of counsel has met, and always will meet, with the approval of these courts, the effort in this direction should not go so far as to eliminate or exclude all specification or mention of the errors upon which an appellant relies for a reversal. The simplicity of presentation desired is that which avoids prolixity, verbosity and repetition; which omits theoretical disquisitions on abstract principles of law, needless presentation of questions of fact as to which the action of the trial court is final, the citation of innumerable authorities indicative of an examination of the subject which has never passed the digest stage, etc., etc. A brief is supposed to be the vehicle of counsel to convey to the court the essential facts of his client's case, a statement of the questions of law involved, the law he would

have applied, and the application he desires made of it by the court. When the brief is presented to an appellate court, it should point out to that court which of the many objections and exceptions usually found in the transcript it is the wish of appellant to have the court review. ... These should be pointed out clearly, even at the hazard of encroaching upon the ideal simplicity of statement which the appellate courts have approved." (12 C.A. 378.) (See *Conaway v. Yolo Water & Power Co.* (1928) 204 C. 125, 127, 266 P. 944 [court comments favorably on brief of great length]; *Graham v. Los Angeles First Nat. Trust & Savings Bank* (1935) 3 C.2d 37, 41, 43 P.2d 543 [two-page argument on abstract principles criticized]; *Colkins v. Doolittle* (1920) 45 C.A. 776, 778, 188 P. 601 ["[r]espondents' brief, though a model of brevity, is lamentably lacking in comprehensiveness".].)

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4. Style and Method.

d. Honesty and Fairness.

9 Witkin Cal. Proc. Appeal § 708

[§ 708] Honesty and Fairness.

A former A.B.A. Canon expressly called for "candor and fairness" in conduct before the court, and stated that it is not candid or fair "knowingly to misquote ... the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled." *Rule 5-200 of the Rules of Professional Conduct* requires use of "such means only as are consistent with truth," but does not specifically require disclosure of opposing authority. (See 1 *Cal. Proc.* (5th), *Attorneys*, §461.)

The standard of conduct thus set seems higher than is generally recognized. Skillful brief writers may note opposing authority in order to make the first attack on it; sometimes they receive kudos for candor. (See *Carter v. Garetson* (1922) 56 C.A. 238, 241, 204 P. 1090 ["The appellant, with a fairness which is quite unusual, has cited the court to a long line of cases" which he then proceeded to distinguish]; *Hugony v. La Guardia* (1952) 110 C.A.2d 433, 435, 242 P.2d 893 ["While an independent inquiry disclosed them, this court appreciates the fact that plaintiff's counsel called attention to cases favoring defendant, thereby rendering a service in keeping with the high principles and conduct of the great majority of the members of the California bar"].) But there is little evidence that experienced appellate advocates habitually practice an austere impartiality in presenting their authorities.

Of course, a biased and argumentative statement of the evidence is improper and unwise. (See *Bones v. Fusco* (1937) 21 C.A.2d 476, 479, 69 P.2d 911; *Kruckow v. Lesser* (1952) 111 C.A.2d 198, 200, 244 P.2d 19; *Californians for Safe Prescriptions v. California State Bd. of Pharmacy* (1993) 19 C.A.4th 1136, 1156, 23 C.R.2d 755.)

So is the use of material outside the record. In *Love v. Wolf* (1964) 226 C.A.2d 378, 38 C.R. 183, a malpractice case based on furnishing a dangerous drug, plaintiff's counsel included in his brief a reproduction of photographs of plaintiff, taken before and after use of the drug. The picture was not a copy of one in evidence, but was reproduced from a national magazine; nevertheless, the brief represented that it "vividly" depicted the "deplorable change" in plaintiff's appearance. The court said: "Perhaps it does, but it also vividly depicts a deplorable departure from the record unquestionably designed as an ad hominem appeal to win the sympathies, and thus influence the deliberations, of this court. It was an effort not appreciated." (226 C.A.2d 392, footnote 4.) (On matter outside record, see *supra*, §334.)

Misquotation is properly considered a serious offense: "In at least four instances counsel for the appellant in her brief either deliberately or with the grossest carelessness has misquoted the authorities cited to this court. Such conduct is inexcusable upon the part of any lawyer, and places additional burdens upon this court." (*Weinfeld v. Weinfeld* (1958) 159 C.A.2d 608, 612, 324 P.2d 342; see 1 Cal. Proc. (5th), Attorneys, §497; infra, §772.)

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5. Penalties for Defective Brief.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 709

[§ 709] In General.

The methods of control over the form and content of briefs are stated in C.R.C., Rule 8.204. The reviewing court clerk may decline to file a brief that does not comply with form and content requirements. The clerk must then mark it "received but not filed" and return it to the party. (C.R.C., Rule 8.204(e)(1).)

If a noncomplying brief is filed, the reviewing court may, on its own motion or a party's motion, with or without notice, do any of the following:

- (1) Order the brief returned for corrections and refile within a specified time. (C.R.C., Rule 8.204(e)(2)(A).)
- (2) Strike the brief with leave to file a new brief within a specified time. (C.R.C., Rule 8.204(e)(2)(B).)
- (3) Disregard the noncompliance. (C.R.C., Rule 8.204(e)(2)(C).)

C.R.C., Rule 8.204(e)(2) "does not purport to limit the inherent power of the reviewing court to fashion other sanctions for such noncompliance." (Advisory Committee Comment to C.R.C., Rule 8.204.) (See *Burns v. Renaker Co.* (1931) 116 C.A. 139, 140, 2 P.2d 408 [respondent's brief was stricken with leave to file new brief]; *Pfingst v. Mayer* (1949) 93 C.A.2d 265, 270, 208 P.2d 1002 [failure to refer to record was criticized, but appeal was considered on merit "in the interests of justice"]; *Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 C.A.3d 343, 347, 122 C.R. 434, supra, §694 [defects disregarded]; *Matuz v. Gerardin Corp.* (1989) 207 C.A.3d 203, 207, 254 C.R. 725 [same]; 17 So. Cal. L. Rev. 143; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§744, 745; on dismissal of appeal for failure to correct brief, see *infra*, §710; on defective brief as abandonment of appeal, see *infra*, §711.)

Another practice, employed where the brief meets formal requirements but is deficient in content or method of presentation of the argument, is to include a criticism of counsel in the opinion of the court. (See *Tropical Inv. Co. v. Brown* (1919) 45 C.A. 205, 206, 187 P. 133; 117 Sales Corp. v. Olsen (1978) 80 C.A.3d 645, 652, 145 C.R. 778 ["The briefs on appeal ... are models of improper appellate writing, replete with archaic legalese, with improper references to matters outside the record"]; *Pick v. Santa Ana-Tustin Community Hosp.* (1982) 130 C.A.3d 970, 978, 182 C.R. 85

[contention that findings are not supported by substantial evidence may be deemed waived where brief is grossly deficient, with citations sparse, and the facts stated and inferences drawn are those most favorable to appellant with no attempt to fairly state all of evidence]; supra, §705 et seq.)

In *People v. Dougherty* (1982) 138 C.A.3d 278, 188 C.R. 123, the court castigated counsel for filing a three-page brief in a felony appeal that was defective in virtually every element. The following excerpts from the opinion are illustrative: the brief "reads like an all-out, frontal assault on the rules on appeal." (138 C.A.3d 280.) "Appellant's counsel has condensed the facts into two sentences supported by two references to three pages of the reporter's transcript." (138 C.A.3d 281.) Apart from a futile attack on sufficiency of the evidence with no attempt to set forth any evidence, appellant's contentions "are bereft of factual underpinning, record references, argument, and/or authority." (138 C.A.3d 282.)

In *re Marriage of Green* (1989) 213 C.A.3d 14, 261 C.R. 294, denouncing an evasion of length limits by a party acting as his own attorney (see supra, §699), also criticizes the content and style: "Footnote numbers, typed in such a way they are easily confused with citations to the record, refer the reader to the bottom of the page, which in turn refers to an 'exhibit' or to other pages of the brief itself, where the process is repeated. Record and case citations are often absent, inaccurate, irrelevant, or misleading. From the point of view of grammar and syntax as well as logic, James's briefs are almost impenetrable. Contrary to rules of appellate practice, James cites only evidence supporting his contentions on appeal, entirely ignoring facts which support the judgment." (213 C.A.3d 28.)

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5. Penalties for Defective Brief.

b. Dismissal for Failure To Correct.

9 Witkin Cal. Proc. Appeal § 710

[§ 710] Dismissal for Failure To Correct.

In *Berger v. Godden* (1985) 163 C.A.3d 1113, 210 C.R. 109, appellant's opening brief failed to comply with the Rules of Court, and the court struck the brief on its own motion. The order allowed 30 days to file a new brief, directed that the new brief address certain significant issues, and concluded: "If appellant fails or elects not to file a new brief as specified above, this appeal shall be dismissed." Appellant filed a second brief consisting of three pages, with no references to the record on appeal, no citation of authority, and no pertinent or intelligible argument. *Held*, appeal dismissed.

(a) *Rules of court.* The Draftsman of the Rules on Appeal viewed former C.R.C., Rule 18 (now C.R.C., Rule 8.204; see *supra*, §709) as continuing the prior rule precluding dismissal for filing a defective brief. This view appears to be correct with respect to the initial filing of a defective brief, for the rule provides that the order striking be with leave to file a new brief. (163 C.A.3d 1118.) But nothing in the rules precludes dismissal where the second brief is defective. "Obviously implicit in such an order is the directive that the new brief comply with the rules." (163 C.A.3d 1118.)

(b) *Inherent power of court.* A court has inherent power to adopt a suitable method of practice if procedure is not specified by statute or rule. (163 C.A.3d 1119; see 2 Cal. Proc. (5th), Courts, §183.) "As no statute or rule specifies a procedure to be followed upon the striking of an initial appellant's brief and the filing of a second (or subsequent) brief which fails to conform to the rules of court governing the preparation of briefs, this court may, in its discretion, dismiss an appeal in which such a brief is filed." (163 C.A.3d 1119.) The court may also dismiss for failure to address the significant issues specified in its order. "An appellant who fails to address such an issue acts at his or her peril, just as does the appellant who more than once files a brief which is not in conformity with the rules. To order dismissal is within the discretion of the court in either circumstance." (163 C.A.3d 1119.)

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5. Penalties for Defective Brief.

c. Defective Brief as Abandonment of Appeal.

9 Witkin Cal. Proc. Appeal § 711

[§ 711] Defective Brief as Abandonment of Appeal.

In *Berger v. Godden* (1985) 163 C.A.3d 1113, 210 C.R. 109, supra, §710, the court, as an additional ground for dismissal, held that the brief's lack of any legal argument constituted an abandonment of appeal.

(a) The court need not consider an issue or alleged error where the appellant fails to offer pertinent argument on it; i.e., the court may consider the point as abandoned. (163 C.A.3d 1119; see supra, §701.) "[W]e also hold that failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal justifying dismissal." (163 C.A.3d 1119.)

(b) "Although we are considering a second brief in this case, we know of nothing to preclude an appeal from being deemed abandoned by virtue of an initial brief's failure to present pertinent or comprehensible argument. Some, though certainly not all, initial briefs which fail to comply with the rules may also fail to present such argument. In such situations dismissal for abandonment may be appropriate although dismissal for filing a nonconforming brief is precluded" by former C.R.C., Rule 18 (now C.R.C., Rule 8.204(e)). (163 C.A.3d 1120, footnote 7.)

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6. Filing.

a. When Filing Occurs.

9 Witkin Cal. Proc. Appeal § 712

[§ 712] When Filing Occurs.

C.R.C., Rule 8.212(a) states the time periods in which the appellant's opening brief, the respondent's brief, and the appellant's reply brief, if any, must be filed. (See *infra*, §§717, 719, 722.) The date on which the filing actually occurs is covered in C.R.C., Rule 8.25(b). "A document is deemed filed on the date the clerk receives it." (C.R.C., Rule 8.25(b)(1).) However, except in an original proceeding (C.R.C., Rule 8.25(b)(4)), a brief is timely if the time to file it has not expired on the date of (1) its mailing by priority or express mail as shown on the postmark or the postal receipt; or (2) its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt. (C.R.C., Rule 8.25(b)(3).)

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6. Filing.

b. Extension of Time By Stipulation.

9 Witkin Cal. Proc. Appeal § 713

[§ 713] Extension of Time By Stipulation.

The parties may extend the filing period by up to 60 days "by filing one or more stipulations in the reviewing court before the brief is due." The stipulations must be signed by and served on all parties. The original signature of at least one party must appear on the stipulation filed in the reviewing court, but the signatures of the other parties may be in the form of facsimile copies of the signed signature page of the stipulation. (C.R.C., Rule 8.212(b)(1); see Cal. Civil Practice, 5 Procedure §40:25 [stipulation for extending time of filing]; *17 So. Cal. L. Rev. 291*.) A stipulation is effective on filing. The reviewing court may not shorten a stipulated extension. (C.R.C., Rule 8.212(b)(2).)

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6. Filing.

c. Extension of Time for Good Cause.

1. In General.

9 Witkin Cal. Proc. Appeal § 714

[§ 714] In General.

Before a brief is due, a party may apply to the presiding justice for an extension on a showing that there is good cause and that either (1) the applicant was unable to obtain--or it would have been futile to seek--the extension by stipulation, or (2) the parties have stipulated to the maximum extension (60 days; see *supra*, §713), and the applicant seeks a further extension. (C.R.C., Rule 8.212(b)(3); Cal. Civil Practice, 5 Procedure §40:26; on factors considered in determining good cause, see *infra*, §715.)

A party need not apply for an extension or relief from default if it can file its brief within the time prescribed by C.R.C., Rule 8.220 (*infra*, §§718, 720). The clerk must file a brief submitted within that time if it otherwise complies with the rules. (C.R.C., Rule 8.212(b)(4).)

An application to extend time must include a declaration "stating facts, not mere conclusions" and must be served on all parties. For good cause, the Chief Justice or presiding justice may excuse advance service. (C.R.C., Rule 8.60(c)(1).) The application must state (1) the due date of the document to be filed; (2) the length of the extension requested; (3) whether any earlier extensions have been granted and, if so, their lengths and whether granted by stipulation or by the court; and (4) good cause--or exceptional good cause when required by the rules--for granting the extension, consistent with the factors in C.R.C., Rule 8.63(b) (*infra*, §715). (C.R.C., Rule 8.60(c)(2).)

However, the matter may be governed by a local rule. For example, in the First Appellate District, an application for an extension of time to file a brief in a civil case must be in substantially the form of "Application for Extension of Time to File Brief (Civil Case)." (Local Rules of First Appellate District, Rule 11(b).) (See Judicial Council Form No. APP-006 [Application for Extension of Time to File Brief (Civil Case)].)

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6. Filing.

c. Extension of Time for Good Cause.

2. Standards for Determining Good Cause.

9 Witkin Cal. Proc. Appeal § 715

[§ 715] Standards for Determining Good Cause.

C.R.C., Rule 8.63(b) provides that, in determining good cause (or exceptional good cause when required by the rules), the court must consider the following factors when applicable:

(1) "The degree of prejudice, if any, to any party from a grant or denial of the extension. A party claiming prejudice must support the claim in detail." (C.R.C., Rule 8.63(b)(1).)

(2) "In a civil case, the positions of the client and any opponent with regard to the extension." (C.R.C., Rule 8.63(b)(2).)

(3) "The length of the record, including the number of relevant trial exhibits. A party relying on this factor must specify the length of the record. In a civil case, a record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record." (C.R.C., Rule 8.63(b)(3).)

(4) "The number and complexity of the issues raised. A party relying on this factor must specify the issues." (C.R.C., Rule 8.63(b)(4).)

(5) "Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed." (C.R.C., Rule 8.63(b)(5).)

(6) "Whether the case is entitled to priority." (C.R.C., Rule 8.63(b)(6).)

(7) "Whether counsel responsible for preparing the document is new to the case." (C.R.C., Rule 8.63(b)(7).)

(8) "Whether other counsel or the client needs additional time to review the document." (C.R.C., Rule 8.63(b)(8).)

(9) "Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business

will not suffice. Good cause requires a specific showing of other obligations of counsel that ... [h]ave deadlines that as a practical matter preclude filing the document by the due date without impairing its quality, or ... [a]rise from cases entitled to priority." (C.R.C., Rule 8.63(b)(9).)

(10) "Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange." (C.R.C., Rule 8.63(b)(10).)

(11) "Any other factor that constitutes good cause in the context of the case." (C.R.C., Rule 8.63(b)(11).)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Appellant's Opening Brief.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 716

[§ 716] In General.

(1) *Requirement of Brief.* "Each appellant must serve and file an appellant's opening brief." (C.R.C., Rule 8.200(a)(1).) However, "[i]nstead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal." (C.R.C., Rule 8.200(a)(5); see C.R.C., Rule 8.706(a) [limited civil case appeals; similar]; C.E.B., 2 Civil Appellate Practice 3d, §§12.1, 12.2; Rutter Group, 2 Civil Appeals and Writs §§9:191, 9:192.)

(2) *Form and Content.* Under C.R.C., Rule 8.204(a)(2), an appellant's opening brief must do all of the following:

(a) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from. (C.R.C., Rule 8.204(a)(2)(A).)

(b) State that the judgment appealed from is final, or explain why the order appealed from is appealable. (C.R.C., Rule 8.204(a)(2)(B).) (See *Save the Welwood Murray Memorial Library Committee v. City Council* (1989) 215 C.A.3d 1003, 1011, 263 C.R. 896.)

(c) Provide a summary of the significant facts limited to matters in the record. (C.R.C., Rule 8.204(a)(2)(C).) (See 17 *So. Cal. L. Rev.* 134; on impropriety of reference to matters outside record, see *supra*, §334; on form, style and content generally, see *supra*, §694 et seq.; cf. C.R.C., Rule 8.706(c) [limited civil case appeals; each brief must "state concisely the propositions of both law and fact"].)

A lengthy digest of the testimony of the witnesses is not the summary of the facts required by the rule. (See *Lord v. Henderson* (1951) 105 C.A.2d 426, 443, 234 P.2d 197 [warning that future briefs may be stricken for failure to comply].)

In *Sebago v. Alameda* (1989) 211 C.A.3d 1372, 259 C.R. 918, the court noted that the opening brief was mostly copied from two trial memoranda without editing. "This approach can be a serious mistake. The outcome of an appeal is often determined by the applicable standard of appellate review, which is not taken into account in trial arguments. The focus of appellate review can be quite different than at trial, and appellate counsel should adjust to the shift in focus. ... We take this opportunity to advise appellate attorneys who use material from trial memoranda to take care in adapting

the material to the altered focus of appellate review. Points that are irrelevant to the appeal should be omitted. Subsequent pertinent legal authorities should be addressed. Arguments should be tailored according to the applicable standard of appellate review." (211 C.A.3d 1387.)

West's Key Number Digest, Appeal and Error 755

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement of Brief*. C.R.C., Rule 8.706(a) was repealed in 2008. Briefs by parties in limited civil case appeals are now covered in C.R.C., Rule 8.882(a).

(2) *Form and Content*. C.R.C., Rule 8.706(c) was repealed in 2008. The requirement of a summary in limited civil cases is now in C.R.C., Rule 8.883(a)(2)(C).



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B. Appellant's Opening Brief.

2. Service and Filing.

9 Witkin Cal. Proc. Appeal § 717

[§ 717] Service and Filing.

(1) *In General.* Unless the time is extended by stipulation or by order (see supra, §§713, 714), an appellant must serve and file its opening brief within (a) 30 days after the record or the reporter's transcript, if an election to proceed by an appendix under C.R.C., Rule 8.124 (see supra, §650 et seq.), is filed in the reviewing court; or (b) 70 days after a C.R.C., Rule 8.124 election is filed, if the appeal proceeds without a reporter's transcript. (C.R.C., Rule 8.212(a)(1); cf. C.R.C., Rule 8.706(a) [limited civil case appeals; 20 days]; see 27 *U.S.F. L. Rev.* 301 [Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?]; on when filing occurs, see supra, §712.) Service must be made on each party represented by separate counsel. (C.R.C., Rule 8.25(a)(1).)

(2) *Service on Nonparty Public Officer or Agency.* One copy must be served on a public officer or agency when required by C.R.C., Rule 8.29. (C.R.C., Rule 8.212(c)(3).)

When a statute or this rule requires a party to serve any brief or document on a nonparty public officer or agency, the party must file proof of the service with the document, unless a statute permits service after the document is filed, in which case the proof of service must be filed "immediately" after the document is served. (C.R.C., Rule 8.29(a).) The cover of the document must contain a statement that identifies the statute or rule requiring service of the document on the public officer or agency in substantially the following form: "Service on [insert name of the officer or agency] required by [insert citation to the statute or rule]." (C.R.C., Rule 8.29(b).)

(3) *Service on Attorney General.* In addition to any statutory requirements for service of briefs on public officers or agencies, a party must serve its brief on the Attorney General if the brief (a) questions the constitutionality of a state statute; or (b) is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in a criminal case, a case in which the state or a state officer in his or her official capacity is a party or a case in which a county is a party, unless the county's interest conflicts with that of the state or a state officer in his or her official capacity. (C.R.C., Rule 8.29(c).)

(4) *Service on Solicitor General.* Where a party alleges a violation of specified statutes involving civil rights or the rights of the disabled, or where application or construction of the statutes is in issue, in a proceeding in the California Supreme Court, a Court of Appeal, or the appellate division of a superior court, each party must serve a copy of the

party's brief or petition and brief on the state Solicitor General at the office of the Attorney General. No brief in these matters may be accepted for filing unless the proof of service shows service on the Solicitor General. However, a party failing to comply with this requirement must be given a reasonable opportunity to cure the failure before the court imposes sanctions and, in that instance, the court must allow the Attorney General reasonable time to file a brief in the matter. (See C.C. 51.1, C.C. 55.2, *Govt.C. 4461*, *Health & Saf.C. 19954.5*, *19959.5*, listing statutes.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a)(1), governing limited civil cases, now requires service within 30 days.

C.R.C., Rule 8.124(a)(1)(A) was amended in 2009 to increase the time allowed for serving and filing the appellant's opening brief from 30 to 40 days.



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B. Appellant's Opening Brief.

3. Late Filing: Dismissal and Relief From Default.

9 *Witkin Cal. Proc. Appeal* § 718

[§ 718] Late Filing: Dismissal and Relief From Default.

(1) *Dismissal for Late Filing.* The reviewing court clerk must, where the appellant fails to timely file an opening brief, "promptly" notify the appellant by mail that the brief must be filed within 15 days after the notice is mailed and that failure to comply *may* result in dismissal of the appeal. (C.R.C., Rule 8.220(a)(1).) (See C.E.B., 1 Civil Appellate Practice 3d, §11.59; C.E.B., 2 Civil Appellate Practice 3d, §12.65; Rutter Group, 2 Civil Appeals and Writs §9:270 et seq.) Under this rule, most dilatory and abandoned appeals are eliminated by minute orders, on the court's own initiative, without the necessity of a motion to dismiss and calendar hearing. (See *Sanders v. Warden* (1951) 106 C.A.2d 707, 708, 236 P.2d 19; 35 Cal. L. Rev. 503; 17 So. Cal. L. Rev. 142.)

Within the 15-day period, the appellant may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may dismiss the appeal without further notice. (C.R.C., Rule 8.220(d); see C.R.C., Rule 8.706(e) [limited civil case appeals; presiding judge may extend time for filing "in his discretion"]; *Black Historical Soc. v. San Diego* (2005) 134 C.A.4th 670, 675, 36 C.R.3d 378 [party need not file for extension or relief from default if brief can be filed within extension prescribed by rule]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §716 et seq.)

(2) *Relief From Default.* C.R.C., Rule 8.60(d), the general provision for relief from default for good cause, applies to delinquency in filing briefs. (See C.E.B., 1 Civil Appellate Practice 3d, §11.59; Rutter Group, 2 Civil Appeals and Writs §§9:255, 9:256.) The policies and practice have already been discussed in connection with late records. (See *supra*, §688 et seq.; for similar liberality in connection with briefs, see *Peebler v. Olds* (1945) 26 C.2d 656, 657, 160 P.2d 545; *Lundy v. Lakin* (1949) 89 C.A.2d 849, 851, 202 P.2d 369; 35 Cal. L. Rev. 504.)

Relief may be granted even after the court has dismissed the appeal under C.R.C., Rule 8.220. (See *Lundy v. Lakin*, *supra*, 89 C.A.2d 850 [motion to reinstate appeal granted].) But it has been held that this extraordinary relief must come from the court and that an ex parte order of the Presiding Justice, vacating the dismissal without a showing of good cause, is void. (*Sanders v. Warden*, *supra*, 106 C.A.2d 707.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Dismissal for Late Filing.* Extension: C.R.C., Rule 8.706(e) was repealed in 2008. The presiding judge's general

power to extend time periods in appellate division proceedings is stated in C.R.C., Rule 8.810(c).



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C. Respondent's Brief.

1. In General.

9 Witkin Cal. Proc. Appeal § 719

[§ 719] In General.

"Each respondent must serve and file a respondent's brief." (C.R.C., Rule 8.200(a)(2); see C.R.C., Rule 8.706(a) [limited civil case appeals; no service requirement]; C.E.B., 2 Civil Appellate Practice 3d, Chap. 13; Rutter Group, 2 Civil Appeals and Writs §9:193 et seq.) However, instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal. (C.R.C., Rule 8.200(a)(5).)

A respondent must serve and file its brief within 30 days after the appellant files its opening brief. (C.R.C., Rule 8.212(a)(2); on extensions, see *supra*, §713 et seq.; on service of brief on Solicitor General, see *supra*, §717; cf. C.R.C., Rule 8.706(a) [limited civil case appeals; 20 days after filing of opening brief].)

A party that is both an appellant and respondent under C.R.C., Rule 8.216 (*infra*, §724) may file its combined respondent's brief and appellant's reply brief within the period specified in the clerk's notice. (C.R.C., Rule 8.220(b).)

Although it is the appellant's task to show error, there is a corresponding obligation on the part of the respondent to aid the appellate court in sustaining the judgment. "It is as much the duty of the respondent to assist the court upon the appeal as it is to properly present a case, in the first instance, in the court below." (*Mosher v. Johnson* (1921) 51 C.A. 114, 116, 196 P. 84; for criticisms of failure to file a brief or of inadequate or improper brief, see *Harvey v. Meigs* (1911) 17 C.A. 353, 360, 119 P. 941; *Lapique v. Plummer* (1921) 51 C.A. 207, 211, 196 P. 300 ["censurable conduct"]; *Burns v. Renaker Co.* (1931) 116 C.A. 139, 140, 2 P.2d 408 [defective brief stricken]; *Larimer v. Smith* (1933) 130 C.A. 98, 101, 19 P.2d 825 ["dereliction of duty"]; *Zeigler v. Bonnell* (1942) 52 C.A.2d 217, 218, 126 P.2d 118; *Weinfeld v. Weinfeld* (1958) 159 C.A.2d 608, 612, 324 P.2d 342; on form, style, and content generally, see *supra*, §694 et seq.)

West's Key Number Digest, Appeal and Error 755

SUPPLEMENT: [This section is current through the latest supplement]

Service: C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a)(2) now provides that the respondent's brief must be *served* and filed. *Time:* C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a)(2) now allows service within 30 days after the appellant's opening brief is filed.



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C. Respondent's Brief.

2. Penalties for Failure To File.

a. Appellant's Statement of Facts Accepted.

9 Witkin Cal. Proc. Appeal § 720

[§ 720] Appellant's Statement of Facts Accepted.

The reviewing court clerk must, where the respondent fails to timely file a respondent's brief, "promptly" notify the respondent by mail that the brief must be filed within 15 days after the notice is mailed and that failure to comply may result in the court's deciding the appeal "on the record, the opening brief, and any oral argument by the appellant." (C.R.C., Rule 8.220(a)(2); see C.E.B., 2 Civil Appellate Practice 3d, §13.27; Rutter Group, 2 Civil Appeals and Writs §9:277 et seq.; 17 *So. Cal. L. Rev.* 143.) If the respondent fails to comply with the notice, the court may impose this sanction. (C.R.C., Rule 8.220(c).)

Within the 15-day period, the respondent may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may impose the sanction without further notice. (C.R.C., Rule 8.220(d).)

Application of this sanction may take one of two forms:

(a) The court may, without making an independent study of the record, accept as true the statement of facts in the appellant's opening brief. (See *Sullivan v. Sullivan* (1934) 219 C. 734, 735, 28 P.2d 914; *Merritt v. Merritt* (1934) 220 C. 85, 87, 29 P.2d 190; *Frank Graves Sash, Door & Mill Co. v. Orange County Bond & Mortg. Corp.* (1931) 111 C.A. 475, 476, 295 P. 859; *Zeigler v. Bonnell* (1942) 52 C.A.2d 217, 218, 126 P.2d 118; *Guardianship of Brazeal* (1953) 117 C.A.2d 59, 61, 254 P.2d 886.)

(b) In a few opinions, it is said that the court, without looking at the record, will assume that the appellant's points are well taken and will reverse the judgment. (See *Richter v. Fresno Canal & Irr. Co.* (1894) 101 C. 582, 583, 36 P. 96; *Bullock v. Bullock* (1916) 29 C.A. 463, 464, 155 P. 1009; *MacGregor v. Kawaoka* (1955) 132 C.A.2d 407, 409, 282 P.2d 130; *Grand v. Griesinger* (1958) 160 C.A.2d 397, 407, 325 P.2d 475, citing the text; *Mann v. Andrus* (1959) 169 C.A.2d 455, 458, 337 P.2d 473; *Moreno v. Mihelis* (1962) 207 C.A.2d 449, 450, 24 C.R. 582; *Roth v. Keene* (1967) 256 C.A.2d 725, 727, 64 C.R. 399.)

In *Berry v. Ryan* (1950) 97 C.A.2d 492, 217 P.2d 1015, the judgment was reversed for insufficiency of the evidence

to support the findings, in a brief opinion consisting of little more than the following statement: "Since respondent has not filed a brief we assume that (1) the facts as stated in appellant's brief are true, (2) the evidence is insufficient to support material findings of fact of the trial court, and (3) respondent has abandoned any attempt to support the judgment, and that the ground urged by appellant for reversing the judgment is meritorious." (97 C.A.2d 493.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Respondent's Brief.

2. Penalties for Failure To File.

b. Rule Relaxed.

9 *Witkin Cal. Proc. Appeal* § 721

[§ 721] Rule Relaxed.

Even in cases of flagrant disregard of the requirement of a respondent's brief (*supra*, §§719, 720), there is some reason to question the extreme penalty of automatic reversal. It is one thing to accept the appellant's statement of facts as correct; it is quite a different thing to reverse a judgment without a showing of error. After all, the judgment is presumed correct (see *supra*, §355), and the constitutional doctrine of reversible error places the burden on the appellant to make an affirmative showing (see *supra*, §417).

Accordingly, the court may content itself with reprimanding counsel or calling attention to the rule, and nevertheless exercise its discretion to consider the case on its merits. (See *Larimer v. Smith* (1933) 130 C.A. 98, 101, 19 P.2d 825 ["Lest an injustice should result from the negligence of respondents' counsel, we have undertaken to make an independent examination of the record"]; *Greer v. Freitas* (1944) 66 C.A.2d 335, 337, 339, 152 P.2d 15; *Baldwin v. Baldwin* (1944) 67 C.A.2d 175, 176, 153 P.2d 567 ["The submission for decision upon appellant's brief is discretionary"]; *James v. James* (1954) 125 C.A.2d 417, 419, 270 P.2d 538; *Perfection Paint Products v. Johnson* (1958) 164 C.A.2d 739, 740, 330 P.2d 829 [even though point may be assumed meritorious, record will be examined to see whether error was prejudicial]; *Estate of Plum* (1967) 255 C.A.2d 357, 360, 63 C.R. 241; *Walker v. Porter* (1974) 44 C.A.3d 174, 177, 118 C.R. 468 ["We think the better rule is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found"]; *Votaw Precision Tool Co. v. Air Canada* (1976) 60 C.A.3d 52, 55, 131 C.R. 335 [same]; *In re Marriage of Schultz* (1980) 105 C.A.3d 846, 853, 164 C.R. 653 [same]; *In re Marriage of Davies* (1983) 143 C.A.3d 851, 854, 192 C.R. 212 [same]; *Acebo v. Real Estate Education Research & Recovery Fund* (1984) 155 C.A.3d 907, 909, 202 C.R. 518 ["We choose *not* to treat [A]'s nonappearance as in the nature of a default and to summarily reverse the judgment"]; *Miles v. Speidel* (1989) 211 C.A.3d 879, 881, 259 C.R. 582 ["while we accept plaintiff's factual recitation in his opening brief as correct this does not obviate his burden of affirmatively demonstrating error"].)

Kriegler v. Eichler Homes (1969) 269 C.A.2d 224, 74 C.R. 749, is an instructive example of the discretion of the reviewing court in this situation. Plaintiff homeowner obtained a judgment against defendant contractor on theories of negligence and strict liability. Defendant appealed and plaintiff did not file respondent's brief. The court, after insisting that it is "under no duty to look up the law" (269 C.A.2d 226), nevertheless did so in this case of first impression,

extending the doctrine of strict products liability to a mass-produced home (see 6 *Summary* (10th), *Torts*, §1501 et seq.). Then, having established this firm basis of liability, the court ordered the trial judge's findings on negligence stricken, applying the general rule that the respondent had abandoned any attempt to support the judgment on that ground. (269 C.A.2d 227.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Appellant's Reply Brief.

1. Right To File.

9 Witkin Cal. Proc. Appeal § 722

[§ 722] Right To File.

An appellant "may serve and file a reply brief." (C.R.C., Rule 8.200(a)(3); C.R.C., Rule 8.706(a) [limited civil case appeals; no service requirement]; see C.E.B., 2 Civil Appellate Practice 3d, §12.67; Rutter Group, 2 Civil Appeals and Writs §§9:196, 9:197; on service of brief on Solicitor General, see *supra*, §717.)

The brief is due within 20 days after filing of the respondent's brief. (C.R.C., Rule 8.212(a)(3); cf. C.R.C., Rule 8.706(a) [limited civil case appeals; 10 days]; on extension of time, see *supra*, §713 et seq.; on when filing occurs, see *supra*, §712.)

West's Key Number Digest, Appeal and Error 762

SUPPLEMENT: [This section is current through the latest supplement]

Service: C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a)(3) now provides that the respondent's reply brief must be *served* and filed. *Time:* C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a)(3) now allows service within 20 days after the respondent's brief is filed.



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D. Appellant's Reply Brief.

2. New Points Are Improper.

9 *Witkin Cal. Proc. Appeal* § 723

[§ 723] New Points Are Improper.

(1) *General Rule.* Obvious considerations of fairness in argument demand that the appellant present all of his or her points in the opening brief. To withhold a point until the closing brief would deprive the respondent of an opportunity to answer it or require the effort and delay of an additional brief by permission. Hence, the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.

(*Kahn v. Wilson* (1898) 120 C. 643, 644, 53 P. 24; *Hibernia Savings & Loan Soc. v. Farnham* (1908) 153 C. 578, 584, 96 P. 9; *Monk v. Ehret* (1923) 192 C. 186, 190, 219 P. 452; *Wong Ah Sure v. Ty Fook* (1918) 37 C.A. 465, 468, 174 P. 64; *Haley v. Traeger* (1928) 92 C.A. 360, 365, 268 P. 459; *Newcomb v. Title Guarantee & Trust Co.* (1933) 131 C.A. 329, 333, 21 P.2d 456; *Utz v. Aureguy* (1952) 109 C.A.2d 803, 808, 241 P.2d 639; *Richard v. Richard* (1954) 123 C.A.2d 900, 903, 267 P.2d 867; *Wilson v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1957) 156 C.A.2d 195, 207, 319 P.2d 426, citing the text; *Ganahl v. Certain Individuals Doing Business Under Name of Underwriters at Lloyd's London* (1962) 204 C.A.2d 571, 582, 22 C.R. 520; *Duncanson-Harrelson Co. v. Travelers Indem. Co.* (1962) 209 C.A.2d 62, 70, 25 C.R. 718, quoting the text; *Crowder v. Lyle* (1964) 225 C.A.2d 439, 450, 37 C.R. 343, citing the text; *In re Marriage of Millet* (1974) 41 C.A.3d 729, 732, 116 C.R. 390, citing the text; *Younger v. California* (1982) 137 C.A.3d 806, 813, 187 C.R. 310; *Balboa Ins. Co. v. Aguirre* (1983) 149 C.A.3d 1002, 1010, 197 C.R. 250, citing the text; *Neighbours v. Buzz Oates Enterprises* (1990) 217 C.A.3d 325, 335, footnote 8, 265 C.R. 788, quoting the text; *American Drug Stores v. Stroh* (1992) 10 C.A.4th 1446, 1453, 13 C.R.2d 432; *Scott v. CIBA Vision Corp.* (1995) 38 C.A.4th 307, 322, 44 C.R.2d 902.)

(2) *Rule Relaxed.* This rule is relaxed for good reason shown, and of course there is nothing to prevent the court from considering the point if it wishes to do so, because it can consider points not raised at all. (See *Burns v. Ross* (1923) 190 C. 269, 275, 212 P. 17 [point considered without any excuse found]; *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 423, footnote 1, 71 C.R. 903, 445 P.2d 519, citing the text [while case was pending in Court of Appeal after closing briefs were filed, decisive Supreme Court opinion was rendered]; *Fratessa v. Roffy* (1919) 40 C.A. 179, 188, 180 P. 830 [rule is obviously inapplicable where point made is in answer to one made in respondent's brief]; *California Nat. Supply Co. v. O'Brien* (1921) 51 C.A. 606, 612, 197 P. 414 [point based on Supreme Court decision filed after submission of case]; *Bardeen v. Commander Oil Co.* (1941) 48 C.A.2d 355, 358, 119 P.2d 967 [point considered because case was before court for second time].)

However, where the appellant could have raised the point earlier, the rule prohibiting its being raised initially in the reply brief still applies. For example, In *Reichardt v. Hoffman* (1997) 52 C.A.4th 754, 60 C.R.2d 770, an action involving an easement dispute, appellant's reply brief was filed 8 months after the opening brief, 6 months after new counsel was retained, and 3 months after respondents filed their brief. It raised a number of significant issues that had not been not raised in the opening brief. *Held*, these issues would not be considered on appeal, appellant having failed to show good cause for not raising the issues earlier.

(a) Although points raised for the first time in a reply brief will ordinarily not be considered, in exceptional cases an appellant may be allowed to discuss new questions in his or her final brief on an application showing meritorious reasons why the points were not made in the opening brief. An application may be based on sickness, inadvertence, or other excusable neglect. If the practice were allowed without substantial reason, however, it would lead to irregularity and delay. "In such event the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed." (52 C.A.4th 765.)

(b) Appellant here had the opportunity to frame the issues at the time he filed his opening brief. If he were dissatisfied with his counsel at that time, he should then have sought an extension of time to obtain new counsel before filing that brief. Moreover, the subsequent 3-month period between the new counsel's substitution and respondents' brief would have permitted enough time to review the record and the opening brief, which were not particularly lengthy, discover that new issues would need to be addressed, and seek permission to file a supplemental opening brief. (52 C.A.4th 765.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVI. BRIEFS IN COURT OF APPEAL

E. Briefs of Party Who Is Both Appellant and Respondent.

9 Witkin Cal. Proc. Appeal § 724

[§ 724] Briefs of Party Who Is Both Appellant and Respondent.

(1) *Scope and Purpose of Rule.* C.R.C., Rule 8.216 governs briefs in appeals in which a party is both an appellant and a respondent. (C.R.C., Rule 8.216(a).) Thus, the rule applies, first, to all cases in which opposing parties both appeal from the judgment. In addition, it applies to all cases in which one party appeals from the judgment and another party appeals from any appealable order arising from or related to the judgment, i.e., not only orders such as those denying a motion for judgment notwithstanding the verdict, but also, for example, post-trial orders granting or denying attorneys' fees. The purpose of the rule is to provide, in all such appeals, a single unified procedure for resolving uncertainties as to the order in which the parties must file their briefs. As used in this rule, "appellant" includes cross-appellant and "respondent" includes cross-respondent. (Advisory Committee Comment to C.R.C., Rule 8.216.)

(2) *Proposed Briefing Sequence.* The parties must jointly--or separately if unable to agree--submit a proposed briefing sequence to the reviewing court within 20 days after the second notice of appeal is filed. (C.R.C., Rule 8.216(a)(1).) The burden is thus placed on the parties in the first instance to propose a briefing sequence, jointly if possible but separately if not. The purpose of this requirement is to assist the reviewing court by giving it the benefit of the parties' views on what is the most efficient briefing sequence in the circumstances of the case. (Advisory Committee Comment to C.R.C., Rule 8.216.)

(3) *Court Order.* After receiving the proposal, the reviewing court must order a briefing sequence and prescribe briefing periods consistent with C.R.C., Rule 8.212(a) (supra, §§712, 717, 719, 722). (C.R.C., Rule 8.216(a)(2).) The reviewing court will thus decide on the briefing sequence, prescribe briefing periods, and notify the parties of both. The court, of course, may thereafter modify its order just as it may do in a single-appeal case. (Advisory Committee Comment to C.R.C., Rule 8.216.)

(4) *Extension.* Extensions of time are governed by C.R.C., Rule 8.212(b) (supra, §§713, 714). (C.R.C., Rule 8.216(a)(3).)

(5) *Form and Content.* A party that is both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence ordered by the reviewing court. (C.R.C., Rule 8.216(b)(1).) A combined brief must address each appeal separately. (C.R.C., Rule 8.216(b)(3).)

(6) *Scope of Reply Brief.* A party must confine its reply brief to points raised in its own appeal. (C.R.C., Rule 8.216(b)(2).) For example, a cross-appellant may not use its *cross-appellant's* reply brief to answer points raised in the *appellant's* reply brief. (Advisory Committee Comment to C.R.C., Rule 8.216.)

SUPPLEMENT: [This section is current through the latest supplement]

Corrections: Page 792, last line of page, "C.R.C., Rule 8.216(b)(3)" should be "C.R.C., Rule 8.216(b)(2)". Page 793, second line of page, "C.R.C., Rule 8.216(b)(2)" should be "C.R.C., Rule 8.216(b)(3)".



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XVI. BRIEFS IN COURT OF APPEAL

F. Briefs of Amici Curiae.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 725

[§ 725] In General.

Amici curiae briefs have evoked both praise and criticism, and many suggestions have been made to control abuses in the practice. (See *Eggert v. Pacific States Savings & Loan Co.* (1943) 57 C.A.2d 239, 251, 136 P.2d 827 [refusal to consider points made by amici curiae that were not raised by parties]; *Pratt v. Coast Trucking* (1964) 228 C.A.2d 139, 143, 39 C.R. 332 [same]; *Younger v. California* (1982) 137 C.A.3d 806, 813, 187 C.R. 310 [same]; 70 A.B.A.J. 16; 13 So. Cal. L. Rev. 288; 17 So. Cal. L. Rev. 140.)

However, the rule that amici curiae cannot raise new points may be relaxed by the reviewing court. In *E.L. White v. Huntington Beach* (1978) 21 C.3d 497, 146 C.R. 614, 579 P.2d 505, two grounds were stated for allowing new issues to be raised: (a) The appeal was from a judgment of dismissal following sustaining of a general demurrer without leave to amend, and affirmance of the judgment is required if it is correct on any theory. (b) "[A] question of jurisdictional dimension appears to be involved." (21 C.3d 511.) (See *Lavie v. Procter & Gamble Co.* (2003) 105 C.A.4th 496, 502, 129 C.R.2d 486 [new issue may be raised in amicus curiae brief if issue is one of law based on undisputed facts and involves important questions of public policy; standard to be used in evaluating whether advertisement is deceptive satisfied both criteria]; cf. *Costa v. Work. Comp. App. Bd.* (1998) 65 C.A.4th 1177, 1187, 77 C.R.2d 289 [issues initially raised in amici curiae briefs did not contain jurisdictional issues and could not be considered].)

Sometimes a court goes out of its way to comment on the help given by amici curiae who have no personal interest in the outcome and present a brief on a question of public interest. (See *Agran v. Shapiro* (1954) 127 C.A.2d Supp. 807, 813, 816, 273 P.2d 619.) And permission to file amici curiae briefs has occasionally been granted to persons whose interest in a test case did not meet the criteria for intervention in the action. (See *Jersey Maid Milk Products Co. v. Brock* (1939) 13 C.2d 661, 665, 91 P.2d 599, 4 Cal. Proc. (5th), Pleading, §236.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Briefs of Amici Curiae.

2. Amicus Briefs in Court of Appeal or Appellate Division.

9 *Witkin Cal. Proc. Appeal* § 726

[§ 726] Amicus Briefs in Court of Appeal or Appellate Division.

(1) *Court of Appeal.* Within 14 days after the last appellant's reply brief is filed or could have been filed, whichever is earlier, any person or entity may serve and file an application for permission of the presiding justice to file an amicus curiae brief. For good cause, the presiding justice may allow later filing. (C.R.C., Rule 8.200(c)(1).) The application must state the applicant's interest and explain how the proposed brief will assist the court in deciding the matter. (C.R.C., Rule 8.200(c)(2).)

The proposed brief must be served. It must accompany the application and may be combined with it. (C.R.C., Rule 8.200(c)(3).) The covers of the application and proposed brief must identify the party that the applicant supports, if any. (C.R.C., Rule 8.200(c)(4).)

If the court grants the application, any party may file an answer within the time that the court specifies. It must be served on all parties and the amicus curiae. (C.R.C., Rule 8.200(c)(5).)

The Attorney General may file an amicus curiae brief without the presiding justice's permission, unless the brief is submitted on behalf of another state officer or agency. The Attorney General must serve and file the brief within 14 days after the last appellant's reply brief is filed or could have been filed, whichever is earlier. As with amici curiae briefs generally, the application must state the Attorney General's interest and explain how the proposed brief will assist the court in deciding the matter, and the covers of the application and proposed brief must identify the party that the Attorney General supports, if any. Any party may serve and file an answer within 14 days after the brief is filed. (C.R.C., Rule 8.200(c)(6); on similar requirements for Attorney General's amicus curiae briefs in writ proceedings in reviewing courts, see C.R.C., Rule 8.490(j).)

(2) *Appellate Division.* An amicus curiae brief may be filed in the appellate division of the superior court, generally on permission first obtained from the presiding judge and subject to conditions he or she may prescribe. If the brief is in support of the position of one of the parties, that fact must be noted in the brief's heading. The Attorney General may file an amicus curiae brief without obtaining the presiding judge's permission, unless the brief is presented on behalf of another state officer or agency, but the presiding judge may prescribe reasonable conditions for filing and answering the brief. (C.R.C., Rule 8.706(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Court of Appeal*. In 2008, C.R.C., Rules 8.200(c)(3), (c)(4), (c)(5), (c)(6) were renumbered C.R.C., Rule 8.200(c)(4), (c)(5), (c)(6), and (c)(7), respectively.

An application to file an amicus brief must also identify any party or counsel who authored the proposed brief in whole or in part or made a monetary contribution to its preparation or submission and every person or entity (other than the amicus curiae, its members, or its counsel in the pending appeal) who made a monetary contribution. (C.R.C., Rule 8.200(c)(3), added in 2008.)

C.R.C., Rule 8.490(j) was repealed in 2008. Amicus briefs of the Attorney General are now covered in C.R.C., Rule 8.487(c).

(2) *Appellate Division*. C.R.C., Rule 8.706(b) was repealed in 2008. C.R.C., Rule 8.882(d) establishes a new procedure for amicus briefs in the appellate division. The following provisions apply:

(a) Within 14 days after the appellant's reply brief is filed or was required to be filed, whichever is earlier, any person or entity may serve and file an application for permission of the presiding judge to file an amicus curiae brief. For good cause, the presiding judge may allow later filing. The application must state the applicant's interest and explain how the proposed brief will assist the court in deciding the matter. (C.R.C., Rule 8.882(d)(1), (d)(2).)

(b) The application must also identify any party or counsel who authored the proposed brief or made a monetary contribution to its preparation and every person or entity (other than the amicus curiae, its members, or its counsel in the pending appeal) who made a monetary contribution. (C.R.C., Rule 8.882(d)(3).)

(c) The proposed brief must be served and must accompany the application and may be combined with it. (C.R.C., Rule 8.882(d)(4).)

(d) The Attorney General may file an amicus curiae brief without the presiding judge's permission, unless the brief is submitted on behalf of another state officer or agency, but the presiding judge may prescribe reasonable conditions for filing and answering the brief. (C.R.C., Rule 8.882(d)(5).)



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Witkin Summary of California Law XVII. MOTIONS AND APPLICATIONS

A. Noticed Motions.

1. Filing.

9 *Witkin Cal. Proc. Appeal* § 727

[§ 727] Filing.

(1) *Form and Content.* Unless the rules provide otherwise, a party wanting to make a motion in a reviewing court must serve and file a written motion stating the grounds and relief requested and identifying any documents on which the motion is based. (C.R.C., Rule 8.54(a)(1).) (See C.E.B., 1 Civil Appellate Practice 3d, §11.40 et seq.; 17 *So. Cal. L. Rev.* 287; Rutter Group, 1 Civil Appeals and Writs §5:238 et seq.; Cal. Civil Practice, 5 Procedure §35:21 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §7 et seq.; on form of papers, see C.R.C., Rule 8.40.)

(2) *Memorandum and Supporting Papers.* A motion must be accompanied by a memorandum and, if based on matters outside the record, by declarations or other supporting evidence. (C.R.C., Rule 8.54(a)(2).)

A motion made before the record is filed in the reviewing court (a) must be accompanied by "a declaration or other evidence necessary to advise the court of the facts relevant to the relief requested" and (b), if it is a motion to dismiss the appeal (see *infra*, §740), must be accompanied by "a certificate of the superior court clerk, a declaration, or both" setting forth specified information. (C.R.C., Rule 8.57.)

(3) *Number of Copies.* Except as the rules provide otherwise, C.R.C., Rule 8.44 makes separate provision for the Supreme Court and Courts of Appeal as follows:

(a) *Motion filed in Supreme Court:* original and eight copies. (C.R.C., Rule 8.44(a)(5).)

(b) *Motion filed in Court of Appeal:* original and three copies. (C.R.C., Rule 8.44(b)(4).)

SUPPLEMENT: [This section is current through the latest supplement]



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XVII. MOTIONS AND APPLICATIONS

A. Noticed Motions.

2. Opposition.

9 Witkin Cal. Proc. Appeal § 728

[§ 728] Opposition.

Any opposition must be served and filed within 15 days after the motion is filed. (C.R.C., Rule 8.54(a)(3).) The number of copies of the opposition or other response is the same as that required for the motion. (C.R.C., Rule 8.44; see *supra*, §727.)

Failure to serve and file written opposition to a motion to dismiss an appeal or to appear and oppose that motion after notification by the clerk of a hearing (see *infra*, §741) may be deemed an abandonment of the appeal authorizing its dismissal. The failure to oppose any other motion may be deemed consent to granting the motion. (C.R.C., Rule 8.54(c); see *17 So. Cal. L. Rev.* 285; on summary dismissal for appellant's failure to appear at calendar hearing to oppose motion to dismiss, see *infra*, §741.) C.R.C., Rule 8.54(c) is not intended to indicate a position on the question whether there is an implied right to a hearing to oppose a motion to dismiss an appeal. (Advisory Committee Comment to C.R.C., Rule 8.54.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVII. MOTIONS AND APPLICATIONS

A. Noticed Motions.

3. Hearing and Determination.

9 *Witkin Cal. Proc. Appeal* § 729

[§ 729] Hearing and Determination.

Originally, motions were placed on the court's calendar for argument, but the rules allowed the court to dispose of them without argument, treating the written notice as the motion. (See *17 So. Cal. L. Rev.* 284.)

C.R.C., Rule 8.54 now provides for decisions without a hearing unless a hearing is ordered:

(1) "The court may rule on a motion at any time after an opposition or other response is filed or the time to oppose has expired." (C.R.C., Rule 8.54(b)(1).)

(2) The court, on a party's request or on its own motion, may place a motion on calendar for a hearing. In that event, the clerk must "promptly" send each party a notice of the date and time of the hearing. (C.R.C., Rule 8.54(b)(2).) (See C.R.C., Rule 8.705(b) [limited civil case appeals].)

Where an explanation is necessary, denial of a motion may be made in a memorandum opinion by "The Court." (*Bozung v. Local Agency Formation Com.* (1975) 13 C.3d 483, 484, 119 C.R. 215, 531 P.2d 783.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *The court:* C.R.C., Rule 8.705(b) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.808(b).



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XVII. MOTIONS AND APPLICATIONS
B. Routine Applications.

9 *Witkin Cal. Proc. Appeal* § 730

[§ 730] Routine Applications.

(1) *Service, Filing, and Excuse.* Unless the rules provide otherwise, parties must serve and file all applications in the reviewing court. For good cause, the Chief Justice or presiding justice may excuse advance service. (C.R.C., Rule 8.50(a); see C.E.B., 1 Civil Appellate Practice 3d, §11.14 et seq.; Rutter Group, 1 Civil Appeals and Writs §5:262 et seq.; 17 *So. Cal. L. Rev.* 282; Cal. Civil Practice, 5 Procedure §35:24 et seq.) Most of the applications are of a routine nature, e.g., applications to extend time for filing records and briefs, to shorten time for notice of a motion, to augment or correct the record, to file a typewritten brief, etc.

(2) *Necessary Showing.* The application must state facts showing good cause (or exceptional good cause when required by the rules) for granting the application and must identify any previous application filed by any party. (C.R.C., Rule 8.50(b).)

(3) *Clerk's Mailing of Copies to All Parties.* An application "to a Court of Appeal" must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties. (C.R.C., Rule 8.50(c).)

(4) *Disposition.* "Unless the court determines otherwise, the Chief Justice or presiding justice may rule on the application." (C.R.C., Rule 8.50(d).)

(5) *Address and Phone Number.* In any case pending before the court, the court will use the address and telephone number that an attorney or unrepresented party provides on the first document filed in the case as the address and phone number of record, unless the attorney or party files a notice of change. (C.R.C., Rule 8.32(a).)

(6) *Notice of Change of Address and Phone Number.* An attorney or unrepresented party is required to serve and file written notice informing the reviewing court of a change of address or telephone number occurring during the pendency of an appeal. (C.R.C., Rule 8.32(b)(1).) (On content of notice, see C.R.C., Rule 8.32(b)(2).)

West's Key Number Digest, Appeal and Error 794, 815, 820, 821

SUPPLEMENT: [This section is current through the latest supplement]



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

1. Abandonment Before Record Is Filed.

a. In General.

9 Witkin Cal. Proc. Appeal § 731

[§ 731] In General.

"Before the record is filed in the Court of Appeal, the appellant may serve and file in superior court an abandonment of the appeal or a stipulation to abandon the appeal. The filing effects a dismissal of the appeal and restores the superior court's jurisdiction." (C.R.C., Rule 8.244(b)(1).) (See *Conservatorship of Oliver (1961)* 192 C.A.2d 832, 836, 13 C.R. 695, citing the text; C.E.B., 1 Civil Appellate Practice 3d, §11.102 et seq.; 17 So. Cal. L. Rev. 233; Rutter Group, 1 Civil Appeals and Writs §5:8 et seq.; Cal. Civil Practice, 5 Procedure §37:29 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §780 et seq.; Judicial Council Form No. APP-005 [Abandonment of Appeal (Unlimited Civil Case)]; on limited civil case appeals, see C.R.C., Rule 8.762(a), (d).) After receiving a written abandonment, the superior court clerk must send notice to the clerk of the reviewing court and to the parties. (C.R.C., Rule 8.244(b)(2).)

Before the record is transmitted and filed, the reviewing court, though vested with jurisdiction upon filing of the notice of appeal, has no information concerning the appeal. If dismissal were sought in the reviewing court, a showing (by certificate of the lower court clerk) of the court's jurisdiction, the parties, and other matters would have to be made. All this information is available in the files of the lower court clerk, and the request for a voluntary dismissal can be expeditiously handled there without bothering the reviewing court. This is the reason for C.R.C., Rule 8.244(b).

West's Key Number Digest, Appeal and Error 776, 777, 805

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.762 was repealed in 2008. Abandonment of appeal in limited civil cases is now discussed in C.R.C., Rule 8.825.



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

1. Abandonment Before Record Is Filed.

b. Partial Abandonment.

9 Witkin Cal. Proc. Appeal § 732

[§ 732] Partial Abandonment.

Former C.R.C., Rule 19(a) (now C.R.C., Rule 8.244(b); see *supra*, §731) was given a significant extension in *Dow v. Superior Court* (1956) 140 C.A.2d 399, 297 P.2d 30. After filing his notice of appeal, appellant filed another notice entitled "amendment and supplementation of notice of appeal and limitation, withdrawal and abandonment of designations of appeal heretofore taken." This latter notice specified in detail the portions of the judgment as to which the appeal was being abandoned. *Held*, this was a valid procedure under the provision of the rule authorizing the appellant to file "a written abandonment of the appeal." (140 C.A.2d 402.) "We interpret the quoted portion of the rule as authorizing abandonment in whole or in part, if in the latter case the resultant delimited appeal is from severable portions of the judgment. ... It seems right and proper to encourage an appellant, when he finds that his original notice is broader in scope than need be, to relinquish suitable portions thereof and thus at an early stage of the proceeding narrow the issues which the respondent must prepare to meet and the reviewing court to consider. In many such cases it should be possible thereby greatly to reduce the bulk and cost of the record upon appeal." (140 C.A.2d 402.) (On appeal after acceptance of benefits from severable part of judgment, see *supra*, §72.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

1. Abandonment Before Record Is Filed.

c. Vacation of Abandonment.

9 *Witkin Cal. Proc. Appeal* § 733

[§ 733] Vacation of Abandonment.

(1) *Excusable Mistake*. Where an abandonment has been filed under excusable mistake, the trial judge may give relief by granting a motion to vacate the abandonment, thereby revesting jurisdiction of the appeal in the reviewing court. In *Evola v. Wendt Const. Co.* (1958) 158 C.A.2d 658, 323 P.2d 158, the abandonment was filed "without prejudice to any future appeal" in the belief (after search of the file) that no final judgment had yet been entered. Subsequently, the final judgment was discovered and the motion to vacate was made and granted. (158 C.A.2d 662.)

(2) *Matter of Public Interest*. In *re Marriage of Dade* (1991) 230 C.A.3d 621, 281 C.R. 609, involved a request by defendant wife that the county district attorney represent her in plaintiff husband's action to reduce child support. In an order filed in August, the trial judge granted plaintiff's motion to recuse the district attorney and to recover attorneys' fees incurred in connection with the recusal motion, and found that several child support statutes were unconstitutional. In an order filed in December, the trial judge ordered the district attorney to pay plaintiff's attorneys \$ 11,922 for attorneys' fees and \$ 1,744 for costs. Defendant then filed a notice of appeal from the August order and thereafter a notice of abandonment of her appeal. The district attorney filed a notice of appeal from the December order and successfully moved to vacate defendant's abandonment of her appeal. Plaintiff argued that the vacation of the abandonment of the appeal was improper and that, therefore, the reviewing court should not consider the issues resolved by the August order, i.e., the recusal of the district attorney, the constitutionality of certain statutes, and the award of attorneys' fees against the district attorney's office. *Held*, vacating defendant's abandonment of her appeal was a proper exercise of the trial judge's discretion.

(a) The district attorney could not have anticipated that defendant would abandon her appeal. Hence, there was no reason for him to have filed an appeal on behalf of the county at the time of the *August order*. (230 C.A.3d 627.)

(b) Defendant stated that she had no interest in the appeal because (1) she had no stake in the legal issues involved in the appeal, and (2) plaintiff had made it clear that if the appeal proceeded, he would seek attorneys' fees and costs from her. Hence, there appears to have been an element of coercion, though lawful, to force defendant to abandon her appeal. (230 C.A.3d 627.)

(c) Appellate courts have refused to dismiss appeals that raise issues of continuing public interest. (*230 C.A.3d 627*, citing the text.) There is no reason why trial courts, after regaining jurisdiction under former C.R.C., Rule 19(a) (now C.R.C., Rule 8.244(b); see *supra*, §731), should not have similar power to vacate the abandonment of an appeal that raises issues of continuing public interest, thereby revesting jurisdiction of the appeal in the reviewing court. Here, the public's interest in the outcome of an appeal that will affect the county's ability to pursue child support modification orders is manifest. (*230 C.A.3d 627*.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

2. Dismissal After Record Is Filed.

9 Witkin Cal. Proc. Appeal § 734

[§ 734] Dismissal After Record Is Filed.

After the record is filed in the reviewing court, it has all the information necessary to act on an application for dismissal. Accordingly, "the appellant may serve and file in that court a request or a stipulation to dismiss the appeal." (C.R.C., Rule 8.244(c)(1); see C.E.B., 1 Civil Appellate Practice 3d, §11.107 et seq.; Rutter Group, 1 Civil Appeals and Writs §5:46.5; Judicial Council Form No. APP-007 [Request for Dismissal of Appeal (Civil Case)]; *17 So. Cal. L. Rev.* 233; on limited civil case appeals, see C.R.C., Rule 8.762(b), (d).) "On receipt of a request or stipulation to dismiss, the court may dismiss the appeal and direct immediate issuance of the remittitur." (C.R.C., Rule 8.244(c)(2); on notification of parties, see C.R.C., Rule 8.244(b)(2), *supra*, §731; C.R.C., Rule 8.264(a)(1), *infra*, §831.)

West's Key Number Digest, Appeal and Error 776, 777

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.762 was repealed in 2008. Dismissal after the record is filed is now discussed in C.R.C., Rule 8.825(b)(2).



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

3. Discretion To Deny Dismissal.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 735

[§ 735] In General.

C.R.C., Rule 8.244(b) (*supra*, §731), authorizing voluntary abandonment before the record is filed, apparently gives the appellant an absolute right to dismiss, on the theory that the reviewing court will not be concerned with a dismissal unless its order is requested. (See *17 So. Cal. L. Rev.* 234.) C.R.C., Rule 8.244(c)(2) (*supra*, §734) is not mandatory in terms; it provides that, after filing of the record, the reviewing court "may" dismiss.

This verbal distinction is less important than the problem of power. The reviewing court in both situations has jurisdiction of the cause from the time the notice of appeal is filed. Does it have the power, and if so, will it exercise the power, to deny dismissal despite a request by the appellant or a stipulation of both parties?

A few opinions suggest that the right of voluntary dismissal cannot or should not be infringed by the court. (See *San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevinson* (1921) 53 C.A. 756, 757, 200 P. 767 [appeal by both parties; held that remaining appellant can only urge his own assertions of error]; *Muller v. Union Traction Co.* (1924) 68 C.A. 239, 243, 228 P. 731.)

The better view is, however, that the reviewing court has the power to refuse, and should exercise it, in the interests of justice, to prevent injury to coappellants or to others beneficially interested in the litigation. "An appellant may not dismiss his appeal as a matter of right; whether he will be permitted to do so is within the discretion of the court. And where the dismissal of the appeal of one of several appellants will prejudice his co-appellants, it may be properly refused. ... Nor should a court allow a litigant to dismiss his appeal when it appears that the effect of such an order would make it possible for the respondent to obtain the benefits of a judgment to which, in equity and good conscience, he is not entitled." (*De Garmo v. Goldman* (1942) 19 C.2d 755, 768, 123 P.2d 1; on vacation of abandonment of appeal, see *supra*, §733.)

West's Key Number Digest, Appeal and Error 776

SUPPLEMENT: [This section is current through the latest supplement]



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XVIII. DISMISSAL OF APPEAL

A. Voluntary Abandonment or Dismissal.

3. Discretion To Deny Dismissal.

b. Dismissal Sought To Avoid Precedent.

9 *Witkin Cal. Proc. Appeal* § 736

[§ 736] Dismissal Sought To Avoid Precedent.

A perplexing problem is presented by dismissal deliberately designed to get rid of an unfavorable precedent or other undesired opinion. During the period allowed for rehearing or review in the Supreme Court (*infra*, §§832 et seq., 907, 927), the unsuccessful litigant may compromise the claim under an arrangement whereby both parties stipulate to the granting of a rehearing or review and a subsequent order of dismissal of the moot case. The original opinion is thus eliminated (see *infra*, §§910, 948), and no new opinion is written. Objections to this practice readily come to mind (see 17 *So. Cal. L. Rev.* 234), and the Supreme Court has indicated that, where the issue is one of sufficient public importance, it will exercise its discretionary power (*supra*, §735) to deny dismissal.

In *D.I. Chadbourne v. Superior Court* (1964) 60 *C.2d* 723, 36 *C.R.* 468, 388 *P.2d* 700, which involved the right of inspection of documents claimed to be privileged, the decision became a landmark in this field. (See 2 *Cal. Evidence* (4th), *Witnesses*, §132.) But it nearly foundered at the outset. The court noted that in a prior case (*Atlas Heating & Ventilating Co., Ltd.*), the Court of Appeal rendered its decision, a hearing in the Supreme Court was granted, but, before it could be heard, "Atlas caused it to become moot by either complying with the order to allow inspection, or by settling the action. A motion to dismiss was filed and, there being no objection, was granted." Then the court said: "In this action, as in *Atlas* ... , after a hearing was granted, petitioner complied with the order of the trial court, and then sought to have the proceeding dismissed as moot. That motion was opposed by the real parties and by the respondent court (the latter pointing out that there are many cases currently being held in abeyance pending our decision here). This court in the exercise of its discretionary power ... denied the motion to dismiss." (60 *C.2d* 731, footnote 5.)

In *Liberty Mut. Ins. Co. v. Fales* (1973) 8 *C.3d* 712, 106 *C.R.* 21, 505 *P.2d* 213, plaintiff insurer sued defendant uninsured motorist under its subrogation right, and defendant cross-complained for affirmative relief. The action, brought 14 months after the accident, was within the 3-year statute of limitations for subrogation claims (*Ins.C.* 11580.2(g)), but the cross-complaint was apparently barred by the 1-year statute on personal injury claims (*C.C.P.* 340(3)). Defendant contended that *Ins.C.* 11580.2(g) was unconstitutionally discriminatory. The trial judge upheld the statute and gave judgment for plaintiff insurer. When defendant appealed, plaintiff moved to dismiss on the ground that the judgment had been satisfied of record and that the action was therefore moot (see *infra*, §§749, 751). In fact, defendant had not paid the judgment, but the insurer argued that it was proper for it to record a satisfaction in order to

avoid the useless effort and expense of defending the judgment on this appeal when it was uncollectable. In response, defendant filed declarations of two attorneys stating that the insurers in their cases had dismissed actions against uninsured motorists who challenged the constitutionality of the statute on appeal. *Held*, the appeal was not moot. The court has discretion to deny dismissal of a seemingly moot case where the issue is one of continuing public interest (see *infra*, §759); "appellate review has been and may continue to be thwarted by the filing of a notice of satisfaction of judgment by the insurer (as occurred here) or the acquiescence by the insurer in dismissal of the action (as occurred in other cases)." (8 C.3d 716.) (For the decision on the merits, see 3 Cal. Proc. (5th), Actions, §451.)

In *Okuda v. Superior Court* (1983) 144 C.A.3d 135, 192 C.R. 388, the appeal involved an important question of real property law--lis pendens and good faith improver (see 3 Cal. Proc. (5th), Actions, §399). Three days after the case was scheduled for oral argument, the parties informed the court that the parties had stipulated for a settlement and requested dismissal. Refusing to dismiss, the court said: "If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot." (144 C.A.3d 137, footnote 1.)

In *California v. Superior Court (Lovelace)* (1995) 11 C.4th 50, 44 C.R.2d 399, 900 P.2d 648, an action between a landowner and the state involving the application of the artificial accretion rule (see 12 Summary (10th), Real Property, §238) to accretion caused by 19th century hydraulic mining, the Supreme Court exercised its discretion to decide the case despite a joint motion by the parties to dismiss based on their settlement. Both the settlement and joint motion were conditioned on the Supreme Court ordering that the Court of Appeal opinion "shall remain unpublished." Because of the public interest in having important and continuing legal issues decided, and because the order denying the dismissal motion did not set out the court's reasoning, and could not serve as precedent in other cases, it was determined appropriate to explain the basis for the order.

(a) In the petition for review, the Attorney General, representing the state, had declared that review "is necessary to settle an important question of law affecting a longstanding rule of property designed to protect the public trust title to thousands of acres along the shorelines of California's tide and submerged lands," and that "the respective title interests of the State and thousands of persons owning property bordering on navigable waterways is at stake." "Unless resolved by this Court," the petition stated, "these conflicts and uncertainties present an untenable situation for the State Lands Commission in the carrying out of its statutory mandate to protect and administer the public trust title in California's sovereign tide and submerged lands and navigable waters in an equitable statewide fashion." Review was granted partly due to these representations. The papers submitted with the motion to dismiss do not suggest that the compelling reasons the Attorney General stated for the Supreme Court to resolve the issue have evaporated. There appears no reason to believe that similar disputes will not arise in other cases. Indeed, the settlement and motion to dismiss are expressly conditioned on there being no precedent-establishing appellate decision in this case, even though there has been one. There is a well-established line of judicial authority recognizing an exception to the mootness doctrine and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties, where the appeal raises issues of continuing public importance. (11 C.4th 61, citing *D.I. Chadbourne v. Superior Court*, and *Liberty Mut. Ins. Co. v. Fales*.)

(b) The court's refusal to dismiss is not contrary to *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, *infra*, §893, which held that, when the parties agree to settle their dispute and stipulate to a reversal of the trial court judgment, the Court of Appeal should grant the request absent a showing of extraordinary circumstances. (11 C.4th 61.) There, the rule arose in the context of settlement following a trial court judgment, while here the settlement occurred after the Court of Appeal had rendered its opinion. There are two critical differences between the stipulated reversal of a trial judgment in *Neary* and the dismissal motion here. First, in *Neary*, the Supreme Court stressed the efficiency of effectuating settlements and thereby avoiding further litigation. As a case proceeds further in the appellate process, however, especially after an appellate decision is actually rendered, more is eradicated by a settlement, and less is gained by the avoidance of further litigation. Second, stipulating that the Court of Appeal opinion not be published and that the Supreme Court not render its own decision would effectively eliminate a precedent-setting appellate decision. (11 C.4th 62.)

(c) Moreover, even under the *Neary* rule, an appellate court may refuse to accept a stipulated reversal if the refusal would further a specific, demonstrable, well-established, and compelling public interest. The public interest in the legal issue presented and in the outcome of the present case is a compelling reason to refuse to accept the stipulation. (11 C.4th 62.)

(d) This is not to say that appellate courts, including the Supreme Court, do not have discretion to agree to dismiss a case at any stage of the proceeding. Obviously, they do. But, for the reasons stated, "we have exercised our discretion in favor of deciding this important legal issue of statewide importance." (11 C.4th 62.) (See *Lucich v. Oakland* (1993) 19 C.A.4th 494, 502, 23 C.R.2d 450 [following *Chadbourn*, *Liberty Mut. Ins. Co.*, and *Okuda*, where stipulated settlement and motion to dismiss appeal came after matter was submitted for decision and parties had received the decision in the mail].)

In *Fireman's Fund Ins. Cos. v. Quackenbush* (1997) 52 C.A.4th 599, 60 C.R.2d 732, the Insurance Commissioner appealed from the trial court's order directing the commissioner to set aside an evidentiary ruling on the ground that it had been made by him during the course of the insurer's Proposition 103 rate reduction hearing, rather than after its conclusion. After the appeal was argued and supplemental briefing received, the parties settled the matter and stipulated to a dismissal. *Held*, the appeal would nevertheless not be dismissed. Appellate courts may refuse to dismiss a pending appeal pursuant to stipulation where oral argument has been held and the matter submitted for decision, and considerations of public interest or the potential for collateral estoppel may militate against a stipulated reversal. Both considerations were present in this case. The continuing nature and number of rollback hearings involve substantial public interest considerations of economy and efficiency. The potential for collateral estoppel was also present. (52 C.A.4th 608, citing *Neary* and *Lucich*.)

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4. Compromise of Claim of Minor or Incompetent.

9 Witkin Cal. Proc. Appeal § 737

[§ 737] Compromise of Claim of Minor or Incompetent.

After the adoption of the original rules, a special problem arose: What should be done when the claim of a minor or incompetent is compromised after an appeal is taken? The compromise must have the approval "of the court in which the action or proceeding is pending." (*C.C.P. 372(a)*.) If the reviewing court (in which the proceeding is pending on appeal) were to pass on the desirability of the compromise, it would have to undertake a burdensome examination of the record, and perhaps prejudge the merits of the case without the benefit of briefs and oral argument.

The legislative intention was obviously to have the trial judge exercise his or her discretion, but the trial judge lacks the technical jurisdiction to act. C.R.C., Rule 8.244(d) solves the problem by obtaining the trial judge's recommendation as a referee, which is then followed by the reviewing court's order: "If a guardian or conservator seeks approval of a proposed compromise of a pending appeal, the Court of Appeal may, before ruling on the compromise, direct the trial court to determine whether the compromise is in the minor's or the conservatee's best interests and to report its findings." (On limited civil case appeals, see C.R.C., Rule 8.762(e).)

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C.R.C., Rule 8.762(e) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.825(c).



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5. Notice of Settlement.

9 Witkin Cal. Proc. Appeal § 738

[§ 738] Notice of Settlement.

If a civil case settles after notice of appeal has been filed, either as a whole or as to any party, the appellant who has settled must immediately serve and file a notice of settlement in the Court of Appeal. Where the parties have designated a clerk's transcript or a reporter's transcript and the record has not been filed in the Court of Appeal, the appellant must also immediately serve a copy of the notice on the superior court clerk. (C.R.C., Rule 8.244(a)(1).)

Where the case settles after the appellant receives a notice setting oral argument or a prehearing conference, the appellant must immediately notify the Court of Appeal of the settlement by telephone or other expeditious method. (C.R.C., Rule 8.244(a)(2).)

Within 45 days after filing a notice of settlement--unless the court has ordered a longer time period on a showing of good cause--the appellant who filed the notice of settlement must file either an abandonment under C.R.C., Rule 8.244(b) (*supra*, §731) if the record has not yet been filed in the Court of Appeal, or a request to dismiss under C.R.C., Rule 8.244(c) (*supra*, §734) if the record has already been filed in the Court of Appeal. (C.R.C., Rule 8.244(a)(3).)

If the appellant does not file an abandonment, a request to dismiss, or a letter stating good cause why the appeal should not be dismissed within the time period specified under C.R.C., Rule 8.244(a)(3), the court may dismiss the appeal as to that appellant and order each side to bear its own costs on appeal. (C.R.C., Rule 8.244(a)(4).)

These provisions do not apply to settlements requiring findings to be made by the Court of Appeal under *C.C.P. 128(a)(8)* (stipulation to reverse; see *infra*, §896). (C.R.C., Rule 8.244(a)(5).)

SUPPLEMENT: [This section is current through the latest supplement]

See *Huschke v. Slater* (2008) 168 C.A.4th 1153, 1160, 86 C.R.3d 187 [counsel's unsigned letter representing that she "will dismiss her appeal" after "the settlement agreement is fully and properly executed," which was likely to occur within week, did not constitute "notice of settlement" within meaning of C.R.C., Rule 8.244; failure to comply with rule was sanctionable].



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1. Nature of Power.

9 *Witkin Cal. Proc. Appeal* § 739

[§ 739] Nature of Power.

The reviewing court has inherent power, on the motion of a party or on its own motion, to dismiss an appeal that it cannot or should not hear and determine. This is as accurate a generalization as can be made; no statute or rule deals with the subject except indirectly by recognizing its effect (see *C.C.P.* 913, *infra*, §762) or by stating grounds (*infra*, §745 *et seq.*) and procedure (*infra*, §740 *et seq.*). (See 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error* §754 *et seq.*; for alternative methods of handling frivolous appeal, see *infra*, §747.)

The power to dismiss rests solely in the reviewing court; the trial judge cannot order a party to dismiss. (See *Shaw v. Johnson* (1935) 4 *C.2d* 99, 100, 47 *P.2d* 698 [probate court attempted to give such an order to executor].)

The court will deny a new motion made after a previous denial, if the ground was available at the time of the first motion and no sufficient excuse is given for its belated presentation. (*Cohen v. Cohen* (1951) 103 *C.A.2d* 275, 276, 229 *P.2d* 464.)

West's Key Number Digest, *Appeal and Error* 778, 792

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2. Procedure on Motion To Dismiss.

a. In General.

9 Witkin Cal. Proc. Appeal § 740

[§ 740] In General.

(1) *After Record Is Filed.* Like other motions (see *supra*, §730 et seq.), a respondent seeking a dismissal after the record is filed in the reviewing court must, unless the rules provide otherwise, "serve and file a written motion stating the grounds and the relief requested and identifying any documents on which the motion is based." (C.R.C., Rule 8.54(a)(1); see *American Alternative Energy Partners II v. Windridge* (1996) 42 C.A.4th 551, 557, 49 C.R.2d 686, citing the text; C.E.B., 1 Civil Appellate Practice 3d, §11.40 et seq.; 17 So. Cal. L. Rev. 284, 287; Rutter Group, 1 Civil Appeals and Writs §5:44 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §761 et seq.; on proper form, see C.R.C., Rule 8.44.)

"A motion must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence." (C.R.C., Rule 8.54(a)(2).)

Routine dismissals on the court's own motion for failure to file a record or brief require no hearing. (See *supra*, §§688, 718.) A motion to dismiss, like other motions, is disposed of without a hearing unless the court calendars the motion for hearing. (See *supra*, §729.) Whether the motion is placed on the calendar or not, the appellant, after being served with a copy of the notice of motion, may file an opposition. (C.R.C., Rule 8.54(a)(3); see *supra*, §728.)

(2) *Before Record Is Filed.* If the motion is made before the record is filed, the reviewing court must be given certain information as to the nature of the case that ordinarily would be obtained from the record. Accordingly, C.R.C., Rule 8.57(a) requires that the motion be accompanied by a certificate of the superior court clerk, a declaration, or both, setting forth the nature of the action and relief demanded, the judgment, the filing dates of any notices of appeal, steps to prepare a record, etc. (See 17 So. Cal. L. Rev. 284; *supra*, §727.)

West's Key Number Digest, Appeal and Error 794 et seq.

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b. Failure To Oppose Motion.

9 *Witkin Cal. Proc. Appeal* § 741

[§ 741] Failure To Oppose Motion.

Failure to oppose a motion may be deemed consent to granting the motion. (C.R.C., Rule 8.54(c).) (See *Cunningham v. Taylor* (1948) 87 C.A.2d 701, 702, 197 P.2d 565; *Pastore v. Floyd* (1948) 88 C.A.2d 732, 734, 199 P.2d 317; *Jablon v. Javasile* (1956) 146 C.A.2d 106, 107, 303 P.2d 580; *Radford v. Crown City Lumber & Mill Co.* (1958) 165 C.A.2d 18, 21, 331 P.2d 438.)

However, it is a drastic step to dismiss an appeal summarily, without inquiry as to the merits of the motion, because of the appellant's neglect to oppose it, and some of the opinions point to circumstances of express waiver. (See *Mondo v. Schwartz* (1949) 92 C.A.2d 523, 524, 207 P.2d 60 [advice from appellants' counsel that clients had ignored requests to furnish funds for costs on appeal]; *Adoption of Williams* (1951) 106 C.A.2d 34, 35, 234 P.2d 240 [communication from appellants' counsel that their clients would not prosecute appeal further]; 17 *So. Cal. L. Rev.* 286.)

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2. Procedure on Motion To Dismiss.

c. Examination of Record.

1. General Rule: Refusal to Dismiss.

9 Witkin Cal. Proc. Appeal § 742

[§ 742] General Rule: Refusal to Dismiss.

The court will ordinarily deny a motion to dismiss if dismissal requires an examination of the record or a consideration of the merits of the appeal. The reason is stated in *Chino Land & Water Co. v. Hamaker* (1916) 171 C. 689, 154 P. 850, as follows: "This motion is made long before the appeals are reached in regular order for hearing in this court, the real purpose of the motion being, of course, to advance the hearing of the appeals in this court, over many other appeals preceding them on our calendar, when there is in fact no good reason for such advancement. ... Mere consideration of the motion necessarily involves a full examination of the record and briefs of counsel as to the merits of the appeal, precisely the same examination we would be compelled to make upon the hearing of the appeals on their merits when the cases are regularly reached for hearing. Such a course on our part in the matter of these appeals would be unfair to other litigants in this court whose appeals are entitled to priority in the matter of hearing, and would establish a precedent that would operate greatly to their disadvantage, for we would be confronted with many such motions, the mere consideration of which would occupy much time that should be devoted to the consideration of earlier cases." (171 C. 690.)

In *Jenks v. Lurie* (1925) 195 C. 582, 234 P. 370, the court said: "If we should take this motion under submission and ultimately deny it the result would be that we should thereafter have to again take the same case under submission as to the remaining questions involved in this appeal. In other words, we should be rendering two opinions in the same case upon the same appeal, each of which would determine but a portion of the case upon the merits." (195 C. 584.)

This rule, particularly applicable to motions on the grounds of moot case, frivolous appeal, or appellant's lack of right or interest, has been affirmed in many decisions. (See *Deacon v. Deacon* (1927) 201 C. 190, 192, 255 P. 798 [judgment by consent]; *United States v. Ackerman* (1929) 208 C. 99, 100, 280 P. 359 [same]; *Christin v. Story* (1931) 211 C. 381, 382, 295 P. 515 [no right to appeal]; *Estate of Sayles* (1931) 212 C. 437, 439, 298 P. 971 [same]; *Johnson v. Sun Realty Co.* (1932) 215 C. 382, 383, 10 P.2d 460 [same]; *Reed v. Norman* (1957) 48 C.2d 338, 342, 309 P.2d 809 [asserted failure of plaintiff shareholder to comply with statutory conditions governing derivative suit]; *Shultz v. O'Rourke* (1931) 118 C.A. 207, 208, 4 P.2d 797 [no right to appeal]; *Keyes v. Hurlbert* (1941) 42 C.A.2d 532, 535, 109 P.2d 364 [moot]; *Stockton Theaters v. Palermo* (1952) 109 C.A.2d 616, 617, 241 P.2d 54 [waiver by acceptance of

benefits].)

Because the court in these cases does not desire to rule on the motion at all, ordinarily, it does not enter a flat order of denial. The usual practice is to deny it without prejudice to its later renewal at the time of the hearing on the merits, or, what amounts to the same thing, to continue the motion until the calendar hearing on the merits when both may be argued together. (See *Quist v. Michael* (1908) 153 C. 365, 366, 95 P. 658 [continued]; *Jenks v. Lurie*, *supra* [denied without prejudice]; *Estate of Hultin* (1946) 28 C.2d 340, 343, 170 P.2d 16; *Keyes v. Hurlbert*, *supra*, 42 C.A.2d 535 ["the court may deny the motion with the privilege of renewal at the hearing, or continue the motion until the hearing on the merits"]; *Stockton Theaters v. Palermo*, *supra*; *Ferraro v. Southern Calif. Gas Co.* (1980) 102 C.A.3d 33, 40, 162 C.R. 238.)

West's Key Number Digest, Appeal and Error 801(5)

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2. Procedure on Motion To Dismiss.

c. Examination of Record.

2. Exception: Defect Apparent.

9 *Witkin Cal. Proc. Appeal* § 743

[§ 743] Exception: Defect Apparent.

If the ground of dismissal is readily apparent upon "inspection" of the record without an extensive study, the court may dismiss to save time and expense for all concerned. This is usually true, e.g., where the grounds are nonappealable order or late appeal. As the court said in *Shank v. Blackburn* (1923) 61 C.A. 577, 215 P. 559, where the appeal was taken too late: "The rule that this court will not ordinarily entertain a motion to dismiss which involves an examination of the record in advance of the hearing on the merits is but a rule of convenience to expedite the dispatch of business; and where a mere inspection of the record discloses that no relief can be given to the appellant, this court, to save unnecessary delay and expense to litigants, will not hesitate to make the necessary examination." (61 C.A. 580.) (See *Grey v. Brennan* (1905) 147 C. 355, 358, 81 P. 1014 [nonappealable order]; *Guigni v. Ratto* (1919) 41 C.A. 49, 50, 181 P. 809 [judgment by stipulation].)

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2. Procedure on Motion To Dismiss.

d. Vacating Order of Dismissal.

9 *Witkin Cal. Proc. Appeal* § 744

[§ 744] Vacating Order of Dismissal.

An order of dismissal may be vacated by the court and the appeal reinstated. Thus, if the dismissal was by routine order for failure to file the opening brief in time, the order vacating it is a method of giving relief from default. (See *Lundy v. Lakin* (1949) 89 C.A.2d 849, 850, 202 P.2d 369; *Sanders v. Warden* (1951) 106 C.A.2d 707, 709, 236 P.2d 19; C.E.B., 1 Civil Appellate Practice 3d, §11.60; Rutter Group, 1 Civil Appeals and Writs §5:50 et seq.; supra, §718.)

In *Krug v. Meehan* (1951) 108 C.A.2d 416, 239 P.2d 46, the court and counsel for both parties assumed that the issues raised by a cross-complaint were still undetermined, and the appeal was dismissed as premature. Shortly afterwards, before the remittitur issued, new counsel for appellant advised the court that the cross-complaint had been dismissed, a fact that counsel for respondent had forgotten. Thus, it appeared that the dismissal was made under a mistake of fact. If the remittitur had gone down, it could have been recalled on motion. (See infra, §847.) However, because the remittitur had not yet issued, the court stayed its issuance (see infra, §846) and vacated the order of dismissal. (See *Mattz v. Superior Court* (1988) 46 C.3d 355, 361, 250 C.R. 278, 758 P.2d 606, citing the text [citing *Lundy* and *Krug*, and applying rule to writ proceeding].)

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B. Involuntary Dismissal.

3. Grounds for Dismissal.

a. Lack of Jurisdiction or Other Basic Defect.

9 Witkin Cal. Proc. Appeal § 745

[§ 745] Lack of Jurisdiction or Other Basic Defect.

The main ground of dismissal is lack of jurisdiction of the appeal, which may take various forms:

(1) No appellate jurisdiction of the subject matter because of the type of case; e.g., death penalty case appealed to Court of Appeal. (See 2 *Cal. Proc.* (5th), *Courts*, §335; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §758.) However, an appeal merely taken to a wrong reviewing court is transferred, not dismissed. (See *infra*, §766.)

(2) No jurisdiction of the subject matter because of the nonappealability of the judgment or order. (See *Collins v. Corse* (1936) 8 C.2d 123, 124, 64 P.2d 137; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §758; *supra*, §85 et seq.)

(3) No jurisdiction of the subject matter because of repeal of a jurisdictional statute without a saving clause. (See *supra*, §5.)

(4) Appeal filed too late. (See *Estate of Welch* (1956) 146 C.A.2d 534, 535, 304 P.2d 57 [dismissal on informal suggestion of respondent, without formal motion]; Cal. Civil Practice, 5 Procedure §39:32 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §761 et seq.; *supra*, §614.)

(5) Appeal filed prematurely; this rule is now seldom followed. (See *supra*, §620 et seq.)

(6) Party without a right to appeal, i.e., not aggrieved, or right waived or forfeited. (See 2 Am.Jur. P.P. Forms (2000 ed.), *Appeal and Error*, §764; *supra*, §33 et seq.)

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3. Grounds for Dismissal.

b. Procedural Defaults.

9 *Witkin Cal. Proc. Appeal* § 746

[§ 746] Procedural Defaults.

The rules specify two kinds of procedural defaults as grounds for dismissal, although relief from default is frequently given:

(1) Unexcused failure to procure filing of the record, or to pay the fee within the time allowed or any extension. (C.R.C., Rules 8.140(b)(1), 8.100(c)(3); see *supra*, §688; on relief from default, see *supra*, §689 et seq.)

(2) Unexcused failure to file an appellant's opening brief within the time allowed or valid extensions, after 15 days' notice. (C.R.C., Rule 8.220(a)(1), (b), (d); on relief from default, see *supra*, §718.)

West's Key Number Digest, Appeal and Error 783, 784

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c. Frivolous Appeal.

1. Power and Illustrations.

9 *Witkin Cal. Proc. Appeal* § 747

[§ 747] Power and Illustrations.

That an appellate court has inherent power to dismiss a frivolous appeal can scarcely be denied, and the power has been declared and exercised independently of statute or rule. (See *McFadden v. Dietz* (1897) 115 C. 697, 698, 47 P. 777; *James v. James* (1954) 125 C.A.2d 417, 418, 270 P.2d 538; *Zimmerman v. Drexel Burnham Lambert* (1988) 205 C.A.3d 153, 161, 252 C.R. 115, *infra*, §748; *People v. Brar* (2004) 115 C.A.4th 1315, 1318, 9 C.R.3d 844; Cal. Civil Practice, 5 Procedure §§39:35, 39:36, 39:38; cf. *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 C.A.4th 343, 349, 22 C.R.3d 724 [appeal by employees' retirement association board, from order denying motion to strike complaint challenging board's decision on retirement benefits as SLAPP suit, was not frivolous; board's position was not clearly foreclosed by statute, no published case was precisely on point, and some premises for board's arguments were well taken].)

Sometimes the order is one of affirmance, but summary affirmance without a calendar hearing and determination on the merits is the equivalent of dismissal. (For examples of summary affirmance, see *McKeon v. Sambrano* (1927) 200 C. 739, 743, 255 P. 178 [prior motion had familiarized court with issues, and "a mere cursory glance at the complaint sufficiently indicates the correctness of the trial court's order"; motion to affirm granted]; *Lierly v. McEwen* (1930) 208 C. 645, 646, 283 P. 943 [issues were clearly decided by prior appeal; motion to dismiss was treated as motion to affirm and granted].)

The power is properly exercised when the frivolous character of the appeal is apparent on a "mere inspection" without an extended examination of the record. (See *McFadden v. Dietz*, *supra*, 115 C. 699 [uncontradicted affidavit of appellant's own admissions that appeal was taken for delay; dismissed on motion, with \$ 100 penalty]; *Pengelly v. Pengelly* (1927) 200 C. 381, 382, 253 P. 323 [dismissed on own motion as moot and frivolous]; *Sternbeck v. Valinder* (1939) 36 C.A.2d 346, 348, 97 P.2d 997 [appeal from order granting new trial on ground of insufficiency of evidence, record disclosed substantial conflict; dismissed]; *Toohey v. Toohey* (1950) 97 C.A.2d 84, 85, 217 P.2d 108 [dismissal with \$ 50 penalty]; *McKenna v. McCardle* (1950) 97 C.A.2d 304, 305, 217 P.2d 433 [fatal pleading defect was apparent from inspection of judgment roll]; *Christian v. Christian* (1960) 183 C.A.2d 720, 722, 7 C.R. 154 [appeal in pro. per., on clerk's transcript without findings or judgment and no reporter's transcript, asserting errors in connection with evidence;

dismissed]; *Olsen v. Harbison* (2005) 134 C.A.4th 278, 284, 35 C.R.3d 909 [dismissal of appeal from denial of anti-SLAPP motion; appeal was frivolous because motion was untimely].)

The Supreme Court has indicated that the power may also be exercised in indigent cases where a reviewing court is induced to waive the filing fee for the record on appeal on a preliminary showing of meritorious appeal (see *supra*, §558), which turns out to be unfounded: "[W]e emphasize that the appellate courts possess the further inherent power to summarily dismiss any action or appeal which has as its object to delay, vex or harass the opposing party or the court, or is based upon wholly sham or frivolous grounds." (*Ferguson v. Keays* (1971) 4 C.3d 649, 658, 94 C.R. 398, 484 P.2d 70, citing the text.)

West's Key Number Digest, Appeal and Error 786

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c. Frivolous Appeal.

2. Practical Considerations.

9 *Witkin Cal. Proc. Appeal* § 748

[§ 748] Practical Considerations.

Recognition of the power to dismiss or summarily affirm (*supra*, §747) tells us little of the practice. Except for a brief and unsuccessful experiment between 1932 and 1939 with summary affirmance or dismissal by rule (see *17 So. Cal. L. Rev.* 259), the courts have dismissed few appeals as frivolous. The reason is that to determine the unsubstantial character of the appeal almost always requires an examination of the record, and this results in double labor for the court or unwarranted advancement of the case on the calendar. (See *Randall v. Duff* (1894) 105 C. 271, 272, 38 P. 739; *Chino Land & Water Co. v. Hamaker* (1916) 171 C. 689, 690, 154 P. 850 [motion to affirm]; *Jenks v. Lurie* (1925) 195 C. 582, 584, 234 P. 370 [motion to dismiss]; *Estate of Wunderle* (1947) 30 C.2d 274, 279, 181 P.2d 874; *Casseta v. Del Frate* (1931) 113 C.A. 297, 299, 298 P. 55; *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service* (1931) 118 C.A. 371, 373, 5 P.2d 20; *Crook v. Crook* (1960) 184 C.A.2d 745, 751, 7 C.R. 892, citing the text [holding that case raised substantial issue requiring more than cursory inspection]; *supra*, §742.)

The conflicting policies that may be involved in the handling of a motion to dismiss are neatly illustrated by *Robbins v. Sonoma County Flood Control & Water Conservation Dist.* (1956) 138 C.A.2d 291, 292 P.2 52. Respondents moved to dismiss the appeal. The court pointed out that ordinarily, the consideration of the motion requires about the same examination of the record as a determination on the merits, and merely results in an unfair advancement on the calendar. On the other hand, "grave public interest" can justify relaxation of the usual rule. So here, appellants sought to enjoin the issuance and sale of bonds of a flood control district; the trial court sustained a general demurrer without leave to amend, and the demurrer was good; the appeal was therefore devoid of merit, and the order was that "the appeal is dismissed and the judgment appealed from is affirmed." (138 C.A.2d 303.)

All this seems reasonable enough at first glance, but, in reaching its conclusion, the court wrote an 11-page opinion discussing the law in relation to the allegations of the complaint. The decision was therefore only nominally a dismissal or summary affirmance; in substance, it was a determination on the merits. And the significance of the case is that, where compelling considerations of policy exist, a motion for dismissal or summary affirmance may result not merely in an advancement but in actual bypassing of the calendar and an immediate decision.

Despite the problems with the *Robbins* procedure, it was followed under unusual circumstances in *Zimmerman v. Drexel Burnham Lambert* (1988) 205 C.A.3d 153, 252 C.R. 115. Plaintiffs, former customers of defendant stock brokerage firm, brought suit in 1982 for damages for fraudulent mismanagement of their securities accounts between 1974 and 1981. After 6 years of litigation, and shortly before the fourth continued trial date of June 20, 1988, defendant moved to compel arbitration, relying on a clause in the customer's agreement signed by plaintiffs in 1970. The trial judge denied the motion on the ground of waiver by prejudicial delay (see 3 Cal. Proc. (5th), Actions, §316). Defendant immediately filed a notice of appeal, thereby staying trial proceedings. *Held*, appeal dismissed.

(a) Plaintiffs, four of whom were in their late 60's, sought an immediate dismissal, pointing out that the short record, already before the appellate court, involved only the limited issue of the motion to compel arbitration; and they contended that the acts of defendant disclosed a strategy of obstruction of the case. Defendant contended that it was entitled to full briefing and the normal appellate process. Although appellate courts do not normally dismiss an appeal as frivolous, they have inherent power to do so where the interests of justice require it. (205 C.A.3d 161.)

(b) In *Robbins*, the court found it appropriate to consider the merits pursuant to a motion to dismiss, and dismissed the appeal. (205 C.A.3d 161.) Similarly, the unusual circumstances here "justify considering the appeal on the merits and dismissing it at this time." (205 C.A.3d 162.)

The common practice today is not dismissal but affirmance with a penalty. (See *infra*, §983 et seq.) It should be noted, however, that a reviewing court exercising its power to dismiss a frivolous appeal may also impose sanctions. In other words, "both dismissal and the award of damages for a frivolous appeal may occur at an early stage of the appeal and need not await an opinion affirming the judgment." (*Agricultural Lab. Rel. Bd. v. Tex-Cal Land Management* (1987) 43 C.3d 696, 706, footnote 8, 238 C.R. 780, 739 P.2d 140; see *Coleman v. Gulf Ins. Group* (1986) 41 C.3d 782, 790, footnote 5, 226 C.R. 90, 718 P.2d 77; *Zimmerman v. Drexel Burnham Lambert*, *supra*, 205 C.A.3d 162.)

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d. Moot Case: In General.

1. Basic Rule.

9 *Witkin Cal. Proc. Appeal* § 749

[§ 749] Basic Rule.

An action that involves only abstract or academic questions of law cannot be maintained. (See 3 *Cal. Proc.* (5th), *Actions*, §§21, 22, 32.) And an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal would be without practical effect, and the appeal will therefore be dismissed. As the court said in *Consolidated Vultee Aircraft Corp. v. United Auto., Aircraft & Agricultural Implement Workers* (1946) 27 C.2d 859, 167 P.2d 725, quoting from a United States Supreme Court decision: "[W]hen, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." (27 C.2d 863.)

The rule has been frequently restated and applied. (See *Sorenson v. Coddington* (1926) 79 C.A. 199, 200, 249 P. 37; *California Pac. Title & Trust Co. v. California Mining & Dredging Syndicate* (1936) 17 C.A.2d 353, 354, 61 P.2d 1181; *Estate of Tierney* (1944) 63 C.A.2d 295, 299, 146 P.2d 700; *Guardianship of Thomas* (1954) 125 C.A.2d 135, 137, 269 P.2d 947; *Hidden Harbor v. American Federation of Musicians* (1955) 134 C.A.2d 399, 402, 285 P.2d 691; *Feder v. Lahanier* (1962) 200 C.A.2d 483, 484, 19 C.R. 638; *Jordan v. Los Angeles* (1968) 267 C.A.2d 794, 798, 73 C.R. 516, quoting the text; *Los Angeles (City) v. Los Angeles (County)* (1983) 147 C.A.3d 952, 958, 959, 195 C.R. 465; *Finnie v. Tiburon* (1988) 199 C.A.3d 1, 10, 244 C.R. 581, citing the text; *In re Jesse C.* (1989) 215 C.A.3d 1384, 1387, 263 C.R. 811; *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 C.A.4th 914, 921, 45 C.R.2d 1, *infra*, §760 [restating rule and citing *Consolidated Vultee Aircraft*, but applying public interest exception]; *In re Dani R.* (2001) 89 C.A.4th 402, 404, 106 C.R.2d 926; *MHC Operating Ltd. Partnership v. San Jose* (2003) 106 C.A.4th 204, 214, 130 C.R.2d 564; C.E.B., 1 Civil Appellate Practice 3d, §11.50 et seq.; 62 *Cal. L. Rev.* 1385 [Mootness in Judicial Proceedings: Toward a Coherent Theory]; 34 *Harv. L. Rev.* 416; 83 *Harv. L. Rev.* 1672; Rutter Group, 1 Civil Appeals and Writs §5:21 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §767; *infra*, §751 et seq.) (On doctrine in United States Supreme Court, see *infra*, §750.)

The motion may be made at any time when the ground appears. (*Hild v. Justice's Court* (1936) 11 C.A.2d 235, 236,

53 P.2d 763, 55 P.2d 198.) And the appeal will not be retained solely to determine the question of liability for costs. (*In re Blythe* (1895) 108 C. 124, 128, 41 P. 33; *Nelson v. Nelson* (1908) 153 C. 204, 205, 94 P. 880; *Turner v. Markham* (1909) 156 C. 68, 71, 103 P. 319; *Paul v. Milk Depots* (1964) 62 C.2d 129, 134, 41 C.R. 468, 396 P.2d 924, *infra*, §756.) However, the wisdom of mechanically denying review on this ground where the costs awarded are substantial was questioned in *Cinnamon Square Shopping Center v. Meadowlark Enterprises* (1994) 24 C.A.4th 1837, 30 C.R.2d 697. The court interpreted the *Paul* case, not as requiring dismissal, but instead as granting discretion to the appellate court to refuse to decide a moot case where the only remaining issue is cost. (24 C.A.4th 1843, footnote 2.)

There are two practical qualifications to the dismissal rule:

(1) The usual limitation applies that, if it cannot be determined that the case is moot without examination of the record, the motion will be denied. (See *Gogerty v. Coachella Valley Junior College Dist.* (1962) 57 C.2d 727, 729, 21 C.R. 806, 371 P.2d 582; *supra*, §742.)

(2) Where, though the case is moot, dismissal would accomplish the wrong result, the correct order should be summary affirmance or reversal with directions. (See *infra*, §761.)

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d. Moot Case: In General.

2. Mootness in United States Supreme Court.

9 Witkin Cal. Proc. Appeal § 750

[§ 750] Mootness in United States Supreme Court.

In *DeFunis v. Odegaard* (1974) 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164, petitioner, W, was denied admission to the University of Washington Law School. He sought injunctive relief in the state court, contending that the school used an admission policy giving certain preferences to members of racial minority groups. The trial judge granted a mandatory injunction, and petitioner was admitted. The Washington Supreme Court reversed the judgment, and the United States Supreme Court granted certiorari. At the time of argument it appeared that petitioner was registered for the final quarter of the third year, and respondents gave assurances that he would be allowed to graduate regardless of the outcome of the appeal. *Held*, the case was moot, and the issue could not be decided by the United States Supreme Court.

(a) Even though a state court might apply the public interest exception (see *infra*, §759), the United States Supreme Court will make its own determination and will refuse jurisdiction when its decision could not affect the rights of litigants. (94 S.Ct. 1706, 40 L.Ed.2d 169.)

(b) The cases holding that mere voluntary cessation of allegedly illegal conduct does not deprive the court of power to decide the case (see *United States v. W.T. Grant Co.* (1953) 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303, 3 Cal. Proc. (5th), *Actions*, §32) are inapplicable. There was no cessation of the admission practices; petitioner was merely allowed to complete his studies. (94 S.Ct. 1707, 40 L.Ed.2d 170.)

(c) This was not a case involving a question capable of repetition but evading review; if the admissions procedures remain unchanged, subsequent cases can come to the court with relative speed, "now that the Supreme Court of Washington has spoken." (94 S.Ct. 1707, 40 L.Ed.2d 170.)

Four justices dissented, deploring the Court's successful attempt to get rid of a vitally important controversy, with a fully developed factual record and sharply defined legal issues. "Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases." (94 S.Ct. 1722, 40 L.Ed.2d 188.) (See 62 Cal. L.

Rev. 1385 [*De Funis*]; 88 *Harv. L. Rev.* 373 [The Mootness Doctrine in the Supreme Court]; 88 *Harv. L. Rev.* 392 [*De Funis*]; 17 *U.C. Davis L. Rev.* 7 [Mootness on Appeal in Federal Courts]; cf. *Honig v. Doe* (1988) 484 U.S. 305, 108 S.Ct. 592, 601, 603, 98 L.Ed.2d 686, 703, 704 [applying "capable of repetition" exception where there was reasonable expectation that respondent would again engage in objectionable misconduct; concurring and dissenting opinions explore meaning and scope of exception].)

In *Los Angeles v. Davis* (1979) 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642, another 5-4 decision, the Court set forth the governing principles for determining mootness. A civil rights class action under 42 U.S.C., §1981 was brought in the federal district court on behalf of black and Mexican-American applicants for positions as county fire fighters. The complaint alleged that hiring procedures were discriminatory. The district court enjoined future discrimination and ordered remedial hiring, and the county complied. *Held*, the action should be dismissed as moot. The court recognized the general rule of *United States v. W.T. Grant Co.* that voluntary cessation of allegedly illegal conduct does not make the case moot but restated the two major exceptions: (a) when it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; (b) when interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." (99 S.Ct. 1383, 59 L.Ed.2d 649.)

The dissenting justices thought that the majority misapplied the mootness principle to avoid resolving an important new issue, leaving plaintiffs without protection against the resumption of the alleged discrimination and defendant without a conclusive determination of the legality of its conduct. (99 S.Ct. 1386, 1390, 59 L.Ed.2d 651, 653.) (See *Kremens v. Bartley* (1977) 431 U.S. 119, 97 S.Ct. 1709, 1714, 52 L.Ed.2d 184, 192 [subsequent statutory change]; *Lewis v. Continental Bank Corp.* (1990) 494 U.S. 472, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400, 411 [dispute over out-of-state bank's right to operate bank in Florida was rendered moot by amendment to federal statute expanding definition of "bank" to include all banks with FDIC insurance].)

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3. Acts or Events Rendering Case Moot.

aa. Compromise or Settlement.

9 Witkin Cal. Proc. Appeal § 751

[§ 751] Compromise or Settlement.

If the parties compromise or settle their differences after the appeal is taken, it becomes moot. (See *Armstrong v. Sacramento Valley Realty Co.* (1919) 179 C. 648, 649, 178 P. 516; *Cappellino v. Moore* (1929) 207 C. 36, 38, 276 P. 575; *General Petroleum Corp. of Calif. v. Beilby* (1931) 213 C. 601, 603, 2 P.2d 797 [novation superseding contract in dispute]; *Burch v. George* (1994) 7 C.4th 246, 253, footnote 4, 27 C.R.2d 165, 866 P.2d 92, *infra*, §760 [settlement rendered matter "technically moot"]; *Sorenson v. Coddington* (1926) 79 C.A. 199, 249 P. 37 [appeal from order denying motion to set aside execution sale was rendered moot when trial court, on stipulation of parties and purchasers, annulled sale and restored property to appellant]; *Leroy v. Bella Vista Inv. Co.* (1963) 222 C.A.2d 369, 378, 35 C.R. 128, citing the text; *Muccianti v. Willow Creek Care Center* (2003) 108 C.A.4th 13, 23, 133 C.R.2d 1, *infra*, §899; *Ebensteiner Co. v. Chadmar Group* (2006) 143 C.A.4th 1174, 1178, 49 C.R.3d 825, citing the text [appeal from demurrer dismissing complaint was subject to dismissal after parties settled while appeal was pending; settlement agreement explicitly required that appeal be dismissed, and it rendered moot issue whether demurrer should have been entered].)

However, where there are two defendant-respondents not in privity, and the plaintiff-appellant settles with one of them, the other is not entitled to a dismissal. (*McCartney v. Campbell* (1930) 208 C. 647, 648, 284 P. 220.) (See *Landberg v. Landberg* (1972) 24 C.A.3d 742, 746, 101 C.R. 335 [case was not moot where respondent's counsel wrote appellant's counsel offering to stipulate to reversal, but final settlement would require order of court].)

West's Key Number Digest, Appeal and Error 781(6)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Compromise or settlement before appeal:* In *Larner v. Los Angeles Doctors Hosp. Associates, LP* (2008) 168 C.A.4th 1291, 86 C.R.3d 324, plaintiff nurse, purporting to represent a class of current and former employees, sued defendant hospital, her employer, for failure to pay for overtime hours. The trial court granted in part defendant's motion for summary adjudication of this claim, but gave plaintiff leave to amend. Nearly 16 months later, plaintiff filed an amended complaint, stating individual and class claims for failure to calculate overtime pay rates properly and for

failure to keep accurate and complete wage records. Approximately a year later, plaintiff moved for certification of two separate classes, one for each of these two issues. After the trial court denied plaintiff's motion for class certification, the parties entered into a settlement agreement and stipulated to the entry of final judgment in favor of defendant. In accordance with a stipulation provision specifically reserving her right to appeal the summary adjudication of her overtime hours' claim and the denial of her certification motion, plaintiff appealed both rulings. *Held*, appeal dismissed as moot.

(a) Generally, when a case has settled, dismissal of the appeal is the appropriate disposition, because the settlement is decisive of the parties' rights and bars reopening the settled issues. Here, the stipulation purported to preserve the right to appeal the two rulings in question, but the mutual intention of the parties does not control whether an appeal is moot. The parties' intent cannot compel a court to issue an advisory opinion on matters in which, after the settlement, the plaintiff no longer retains any individual, personal stake. The issue here is how this general rule applies in the context of plaintiff's class action. (168 C.A.4th 1296.)

(b) A plaintiff who sues on behalf of a class assumes a fiduciary obligation to the members of the class, surrendering any right to compromise the group action in return for an individual gain. Thus, even if the named plaintiff receives all the benefits that he or she seeks in the complaint, this success does not divest the plaintiff of the duty to continue the action for the benefit of others similarly situated. If the trial court concludes that the named plaintiff is no longer a suitable representative, the court should grant the plaintiff leave to amend to redefine the class or add new class representatives, or both. This rule prevents a prospective defendant from avoiding a class action by settling the individual claim in an attempt to disqualify the named plaintiff as a class representative and by thereby "picking off" prospective class-action plaintiffs one by one. (168 C.A.4th 1298.)

(c) When plaintiff settled all her individual claims against defendant, she had already lost her class claim that defendant failed to pay overtime for some hours worked. When, 21/2 years later and after losing her class certification motion on different issues, plaintiff settled "all" claims, she also released her overtime hours claim. (168 C.A.4th 1299.) The trial court resolved the overtime claim on a substantive ground that would apply equally to deny relief to any nonexempt worker on the specified schedule, so the settlement could not be viewed as "picking off" plaintiff as a named plaintiff on a valid class claim by offering a small settlement. Moreover, plaintiff would receive no individual relief even if the trial court's summary adjudication were reversed. Plaintiff's settlement renders moot the appeal of the summary adjudication. (168 C.A.4th 1299.)

(d) No California case addresses the question presented here: Is a named plaintiff's appeal moot following a denial of class certification, a voluntary settlement of all claims that reserves the right to appeal, and a subsequent stipulated judgment? Thus, federal authority, where consistent with California law and policy, controls. (168 C.A.4th 1300.) Although *Deposit Guaranty Nat. Bank, Jackson, Mississippi v. Roper* (1980) 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427, 4 Cal. Proc. (5th), Pleading, §274, and *United States Parole Com. v. Geraghty* (1980) 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479, 4 Cal. Proc. (5th), Pleading, §274, allowed named plaintiffs whose individual claims were mooted to appeal from previous denials of class certification, both cases emphasized that the named plaintiffs did not settle voluntarily, and *Geraghty* specifically reserved the issue presented in this case. Furthermore, under facts similar to the present case, both the Fourth and Eighth Circuits hold that a party must retain a continuing interest in the litigation in order to appeal a denial of class certification, such as the hope of shifting costs and attorneys' fees to putative class members. (168 C.A.4th 1301.)

(e) Here, because plaintiff voluntarily settled all her claims before trial and did not assert on appeal that she reserved any right to shift attorneys' fees to other class members, she retained no justiciable interest in the litigation, and her appeal is without substance. Although California's interest in vindicating plaintiffs' rights through class actions includes preventing defendants from foisting unwanted settlements on named plaintiffs merely to "pick off" class representatives, when a named plaintiff loses a motion to certify the class and then voluntarily settles all claims against the defendant, there is no danger that the settlement is merely for the purpose of avoiding legitimate class claims. (168 C.A.4th 1304.)



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3. Acts or Events Rendering Case Moot.

bb. Performance of Challenged Act.

9 *Witkin Cal. Proc. Appeal* § 752

[§ 752] Performance of Challenged Act.

(1) *Denial of Injunction*. If the lower court refuses to restrain the defendant from doing a particular act, and pending the plaintiff's appeal the defendant does it, an appeal solely from the order denying the injunction is rendered moot. (*Foster v. Smith* (1897) 115 C. 611, 612, 47 P. 591; *Wright v. Board of Public Works of Los Angeles* (1912) 163 C. 328, 329, 125 P. 353; *California Prune & Apricot Growers' Assn. v. Pomeroy Orchard Co.* (1925) 195 C. 264, 266, 232 P. 463 [order denying injunction against sale of crop, subsequent sale of crop and land to third parties]; *Bernard v. Weber* (1913) 23 C.A. 532, 535, 138 P. 941 ["an order by this court in effect re-establishing the restraining order ... would be an idle and frivolous act"]; *Finnie v. Tiburon* (1988) 199 C.A.3d 1, 10, 244 C.R. 581, citing the text [order denying injunction against municipal election that was subsequently held while appeal was pending].)

In *Los Angeles v. Butcher* (1957) 155 C.A.2d 744, 318 P.2d 838, plaintiff county obtained a preliminary injunction prohibiting sale by the defendants of lots subdivided in violation of the Subdivision Map Act. At the trial, the preliminary injunction was dissolved and plaintiff was denied relief. Plaintiff then appealed, but defendants' motion to dismiss was granted on their showing that all the lots had been sold, either by deed or by contract. The court pointed out that contract purchasers had all the substantial rights of ownership, the injunction could only operate in the event of default by a purchaser and attempted resale by the repossessing owner, and held that this speculative possibility was not sufficient to justify determination of the issue. (155 C.A.2d 746.)

(2) *Other Situations*. In *Crangle v. City Council of Crescent City* (1933) 219 C. 239, 26 P.2d 24, plaintiff sought to cancel the award of a contract for a municipal improvement, but did not get an injunction. Meanwhile, the contractor completed the work, and bonds to pay for it were issued and sold to bona fide purchasers. Under the statute, issuance of the bonds created a conclusive presumption of regularity of the proceedings. *Held*, because a determination of invalidity of the contract could neither wipe out the improvement nor invalidate the bonds, the case was moot, and the appeal was dismissed. (219 C. 242.) (See *Morris v. Cole* (1933) 218 C. 676, 677, 24 P.2d 785 [order refusing to discharge attachment, subsequent execution, and sale thereunder]; *Hild v. Justice's Court* (1936) 11 C.A.2d 235, 237, 53 P.2d 763 [order denying mandamus to quash execution, subsequent levy, and satisfaction]; *Roscoe v. Goodale* (1951) 105 C.A.2d

271, 272, 232 P.2d 879; *Giles v. Horn* (2002) 100 C.A.4th 206, 226, 123 C.R.2d 735 [appeal from judgment that county violated its charter by making contracts with contractors without first finding that civil service could not do work more economically and efficiently was rendered moot by expiration of original contracts and by county's chief administrative officer having made required finding]; *MHC Operating Ltd. Partnership v. San Jose* (2003) 106 C.A.4th 204, 214, 130 C.R.2d 564 [city's appeal was rendered moot where it complied with appealed writ by allowing further hearings on plaintiff's application for rent increase and by amending applicable ordinance].)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Other Situations*. See *Daily Journal Corp. v. Los Angeles* (2009) 172 C.A.4th 1550, 1556, 92 C.R.3d 219 [company's petition for mandamus to order county to terminate contract with competitor because of alleged defects in bidding process and to award contract to petitioner was moot; contract had expired and there was no allegation that new bid invitation or any contracts awarded as a result were improper].



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cc. Issues Determined by Other Judgment.

9 Witkin Cal. Proc. Appeal § 753

[§ 753] Issues Determined by Other Judgment.

A final judgment in a related proceeding may determine all the issues in a pending appeal and render it moot. (See *Estate of Jackson* (1935) 2 C.2d 283, 284, 40 P.2d 505; *Bogue v. Century Indem. Co.* (1933) 130 C.A. 16, 20, 19 P.2d 525; *Swart v. Swart* (1942) 49 C.A.2d 44, 47, 120 P.2d 940.) And a final judgment may render moot an appeal from a prior order. (*Hindman v. Owl Drug Co.* (1935) 4 C.2d 451, 456, 50 P.2d 438 [appeal from order denying intervention became moot when judgment in cause became final]; see *Turner v. Markham* (1909) 156 C. 68, 69, 103 P. 319 [reversal of judgment rendered moot an appeal from order obtained in proceedings supplemental to execution]; *Keefer v. Keefer* (1939) 31 C.A.2d 335, 337, 87 P.2d 856 [subsequent judgment in another case, after consolidation for trial, rendered moot an appeal from an order denying change of venue in first case].)

In *Guardianship of Thomas* (1954) 125 C.A.2d 135, 269 P.2d 947, a mother died, and the court in a guardianship proceeding decided against petitioner grandmother and in favor of respondent father. The grandmother appealed and the father took the children to Texas after the lower court denied a stay of execution pending appeal. The Texas court, with jurisdiction not controverted, awarded permanent custody to the father. *Held*, the grandmother's appeal was moot; there was no subject matter on which the California court could operate, because the Texas judgment was entitled to credit as a final judgment here. (125 C.A.2d 135, 137.)

The foregoing rule is often applied where, after an appeal from an order granting or denying a temporary restraining order or preliminary injunction, a final judgment is rendered granting or denying a permanent injunction. (*Peoples Ditch Co. v. Foothill Irr. Dist.* (1930) 103 C.A. 321, 323, 284 P. 514 [permanent injunction denied].) The rule that appeal from an order appointing a receiver becomes moot when a final judgment is rendered in the main action is similar. (See *supra*, §177.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mercury Interactive Corp. v. Klein* (2007) 158 C.A.4th 60, 80, 70 C.R.3d 88 [in shareholder derivative action, pending settlement in related federal securities class action did not render moot issue whether trial court erred in

unsealing exhibits; settlement in federal action was not finalized, and, regardless, question whether sealed record rules applied was not affected by status of federal action].



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dd. Legislative or Constitutional Change.

9 Witkin Cal. Proc. Appeal § 754

[§ 754] Legislative or Constitutional Change.

Repeal or modification of a statute under attack, or subsequent legislation, may render moot the issues in a pending appeal. (See *Kremens v. Bartley* (1977) 431 U.S. 119, 97 S.Ct. 1709, 1714, 52 L.Ed.2d 184, 192; *Equi v. San Francisco* (1936) 13 C.A.2d 140, 141, 56 P.2d 590 [lower court held ordinance void; city appealed but ordinance was repealed pending appeal]; *O'Neal v. Seabury* (1938) 24 C.A.2d 308, 310, 74 P.2d 1082 [ordinance was superseded by regulation made under state statute]; *Jordan v. Los Angeles* (1968) 267 C.A.2d 794, 799, 73 C.R. 516, quoting the text; *Callie v. Board of Supervisors* (1969) 1 C.A.3d 13, 18, 81 C.R. 440, quoting the text; *Bell v. Board of Supervisors of San Joaquin* (1976) 55 C.A.3d 629, 636, 127 C.R. 757; *Los Angeles (City) v. Los Angeles (County)* (1983) 147 C.A.3d 952, 958, 959, 195 C.R. 465 [issue of constitutionality of property taxation mechanism was rendered inoperative by constitutional amendment adopted after trial of action]; *Sagaser v. McCarthy* (1986) 176 C.A.3d 288, 299, 221 C.R. 746 [valid retroactive statute eliminated sole issue on appeal]; cf. *Sanks v. Georgia* (1971) 401 U.S. 144, 91 S.Ct. 593, 595, 598, 27 L.Ed.2d 741, 744, 746 [change in state legislation under constitutional attack did not necessarily make case moot, because state could conceivably apply former law to parties; but, under principle of "prudent restraint," resolution of constitutional issues was unnecessary].)

The same is true of termination of administrative orders. (See *Paul v. Milk Depots* (1964) 62 C.2d 129, 133, 41 C.R. 468, 396 P.2d 924, *infra*, §756; *Nelson v. Reilly* (1948) 88 C.A.2d 303, 304, 198 P.2d 694 [issue of validity of administrative regulation became moot when statute was enacted to same effect].)

In *National Assn. of Wine Bottlers v. Paul* (1969) 268 C.A.2d 741, 74 C.R. 303, the Director of Agriculture issued a marketing order setting a bottom price for bulk dessert wine, after an unprecedented 1965 crop that depressed the price. Defendants, out-of-state buyers, obtained an injunction. The director appealed and the reviewing court granted supersedeas, but then the director terminated the order. *Held*, appeal dismissed. Although both sides sought a decision, urging the public interest exception (see *infra*, §759), the court found no general public interest: The interested parties were a small group of processors, and the peculiar conditions of overproduction, creating a chaotic market and giving rise to this kind of marketing order, were not likely to be encountered again. (268 C.A.2d 746.)

The existence of an alternative remedy does not preclude the court from granting the plaintiff effective relief, and thus does not render an appeal moot. (See *Van't Rood v. Santa Clara* (2003) 113 C.A.4th 549, 560, 6 C.R.3d 746 [landowner's appeal from denial of petition to exclude property from subdivision map was not rendered moot by later-enacted local zoning ordinance and state legislation, even though later-enacted provisions afforded landowner alternative remedy, i.e., applying for new subdivision].)

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ee. Death or Emancipation.

9 *Witkin Cal. Proc. Appeal* § 755

[§ 755] Death or Emancipation.

Where the order is rendered ineffective by the death of a party or the emancipation of a child, an appeal from it will be dismissed as moot. (See *Guardianship of Ambrose* (1915) 170 C. 160, 164, 149 P. 43 [guardianship order, child married and became emancipated]; *Estate of McSwain* (1917) 176 C. 287, 288, 168 P. 117 [guardianship order, child became of age]; *Guardianship of Crossley* (1934) 1 C.2d 460, 462, 35 P.2d 513 [incompetency order, appealing ward died]; *Estate of Henry* (1960) 181 C.A.2d 173, 178, 5 C.R. 582 [surviving widow nominated administrators, probate court appointed another, widow appealed, then died; right to nominate terminated]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §756.)

In re Katherine R. (1970) 6 C.A.3d 354, 86 C.R. 281, involved an adjudication of wardship under Welf.C. 601, on a showing that the minor girl had left home to live with a man in another state. She appealed, then married, and the juvenile court terminated the wardship. *Held*, appeal dismissed. Termination of wardship would not render the appeal moot if the minor, like an adult convicted of crime, sought to clear her name of an adjudication based on a criminal act (see *infra*, §758); here, nothing of this kind was involved. (6 C.A.3d 357.)

SUPPLEMENT: [This section is current through the latest supplement]



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ff. Miscellaneous Events.

9 *Witkin Cal. Proc. Appeal* § 756

[§ 756] Miscellaneous Events.

In *Local No. 8-6, Oil, Chemical & Atomic Workers Int. Union, AFL-CIO v. Missouri* (1960) 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed.2d 373, a Missouri statute gave the Governor power to seize a public utility affected by a work stoppage when the public interest required it. Plaintiff unions struck a natural gas company, the Governor seized the business, and the state obtained an injunction against the strike. The next day the strike terminated. Within a few months, a new agreement was negotiated and the seizure ended. On appeal, the Missouri court, despite expiration of the injunction, considered the case on the merits and held the injunction and seizure provisions constitutional. Plaintiff unions sought review, arguing that monetary penalties and loss of seniority were also involved. *Held*, the case was moot, and judgment of the Supreme Court of Missouri was vacated. The issues (other than those involved in the expired injunction) were pending in another case in Missouri, were not involved in this appeal, and could not give life to it. (80 S.Ct. 394, 4 L.Ed.2d 378.)

In *Paul v. Milk Depots* (1964) 62 C.2d 129, 41 C.R. 468, 396 P.2d 924, plaintiff state Director of Agriculture made a milk marketing order. C Co. violated the order, and plaintiff sued for an injunction and civil penalties. Judgment went for defendant and plaintiff appealed. *Held*, judgment reversed with directions to dismiss the action; the case had become moot by reason of the following events: (a) C Co.'s license to distribute milk had been revoked; hence, injunctive relief would be unnecessary and ineffectual. (b) C Co. had been adjudicated a bankrupt; hence, though the civil penalties were nondischargeable debts, there was no likelihood of ever collecting them. (c) The particular marketing order violated had been withdrawn; hence, no question of general public interest remained. (62 C.2d 133, 134.)

In *Mapstead v. Anchundo* (1998) 63 C.A.4th 246, 73 C.R.2d 602, the trial court held that a referendum petition challenging an ordinance had a sufficient number of signatures to qualify for the ballot. At the election, the referendum won. The registrar of voters, who had initially determined that the petition contained an insufficient number of valid signatures, appealed. *Held*, appeal dismissed for mootness. Although the measure would not have appeared on the ballot if the trial court had properly applied the law, the case was brought to obtain mandamus directing the registrar to verify certain signatures and to certify that a sufficient number of voters had signed the petition. These issues did not survive

once the election was held. (63 C.A.4th 273, following *Chase v. Brooks* (1986) 187 C.A.3d 657, 232 C.R. 65.)

Many other cases illustrate the wide variety of events that may make an appeal moot:

Childress v. L. Dinkelspiel Co. (1928) 203 C. 262, 263 P. 801 [order enjoining special meeting to elect additional corporate director was rendered moot by subsequent annual meeting at which entire new board was elected].

Lenahan v. Los Angeles (1939) 14 C.2d 128, 133, 92 P.2d 1014 [action to enjoin recall election; appeal was dismissed when election was held and new officer took position].

Consolidated Vultee Aircraft Corp. v. United Auto., Aircraft & Agricultural Implement Workers (1946) 27 C.2d 859, 862, 167 P.2d 725 [review of arbitration award under collective bargaining agreement was moot when new agreement superseded original].

Covina Union High School v. California Interscholastic Federation (1934) 136 C.A. 588, 589, 29 P.2d 323 [appeal from injunction decree restraining conduct during certain period was moot when period elapsed during appeal].

Chambers v. Ashley (1939) 33 C.A.2d 390, 392, 91 P.2d 932 [order denied mandamus to keep judicial candidate's name off ballot; appeal was dismissed where judge was elected and assumed office].

Estate of Reiss (1945) 68 C.A.2d 128, 129, 155 P.2d 862 [fund from which compensation was sought was distributed and no longer in existence].

Hidden Harbor v. American Federation of Musicians (1955) 134 C.A.2d 399, 402, 285 P.2d 691 [appeal from preliminary injunction against interference with plaintiff's employment of S was moot when employment contract was fully performed and expired].

Kenneally v. Knox (1960) 184 C.A.2d 262, 266, 7 C.R. 370 [order giving mother custody of children for 1 month on deposit of surety bond to insure their return; appeal from bond requirement was moot when time for custody lapsed].

Feder v. Lahanier (1962) 200 C.A.2d 483, 484, 19 C.R. 638 [petitioner sought determination of his rights under particular civil service eligibility list that had already expired].

Goldman v. Santa Barbara (1962) 203 C.A.2d 454, 457, 21 C.R. 532 [mandamus to prevent enforcement of zoning ordinance against petitioner's property was moot when petitioner sold property].

Long v. Hultberg (1972) 27 C.A.3d 606, 608, 103 C.R. 19 [mandamus to prevent recall election; appeal was dismissed after election was held].

Davenport v. Blue Cross of Calif. (1997) 52 C.A.4th 435, 445, 60 C.R.2d 641, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §530 [appeal from preliminary injunction prohibiting medical insurer from denying insured's request for coverage for follow-up treatments for ovarian cancer; appeal was moot when insured obtained treatments through her own resources pending insurer's appeal].

In re Pablo D. (1998) 67 C.A.4th 759, 761, 79 C.R.2d 247 [appeal of decision extending dependent minor's reunification services to 18-month review hearing was moot, because services had already been rendered and court was thus unable to fashion effective remedy; see 10 *Summary* (10th), *Parent and Child*, §643].

SUPPLEMENT: [This section is current through the latest supplement]

Illustrative cases: See *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 C.A.4th 231, 257, 85 C.R.3d 371 [transgender inmate's action challenging practice of housing trans- gender inmates with male inmates was rendered moot by inmate's parole; after parole, inmate was within only legal, rather than physical, custody of defendant, and challenged conduct no longer applied to her].



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1. Material Question Remaining.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 757

[§ 757] In General.

If any material question remains to be determined, the case is not entirely moot, and the appeal will not be dismissed. In *Hartke v. Abbott* (1930) 106 C.A. 388, 289 P. 206, the court quoted the following from a South Dakota case: "[W]henever the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights, such as to the validity of a contract upon which his rights are based, it cannot properly be said that there is left before the appellate court but a moot question, even though on account of changed conditions the relief originally sought by appellant cannot be granted upon the reversal of such judgment." (106 C.A. 394.) (See *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind* (1967) 67 C.2d 536, 542, 63 C.R. 21, 432 P.2d 717; *Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 C.A.3d 325, 330, 127 C.R. 525; *Motown Record Corp. v. Brockert* (1984) 160 C.A.3d 123, 128, 207 C.R. 574; *Viejo Bancorp v. Wood* (1989) 217 C.A.3d 200, 205, 265 C.R. 620, quoting the text; *Doe v. Wilson* (1997) 57 C.A.4th 296, 304, 67 C.R.2d 187, 9 Cal. Proc. (5th), *Administrative Proceedings*, §49.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Material Question Remaining.

bb. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 758

[§ 758] Illustrations.

In *Sauer v. McCarthy* (1960) 54 C.2d 295, 5 C.R. 682, 353 P.2d 290, the Department of Motor Vehicles suspended petitioner's license, and he sought mandamus to compel its reinstatement. The trial judge granted the writ, defendant director appealed, and during the appeal, the period of suspension ended. *Held*, the appeal was not moot, because petitioner also asked for damages against the state for wrongful suspension, and a decision was necessary to determine petitioner's record with the department, i.e., whether the suspension was, in fact, wrongful. (54 C.2d 297.)

In *American Civil Liberties Union of Southern Calif. v. Board of Education of Los Angeles* (1961) 55 C.2d 167, 10 C.R. 647, 359 P.2d 45, petitioners sought mandamus to compel respondent board to permit them to hold public meetings in a school auditorium from January through June 1960. This decision, that they had the right, was filed in 1961, after the period expired. *Held*, the case was not moot. A final judicial decision could seldom be rendered within the limited time of a series of proposed meeting dates. And petitioners later applied for a series of meetings through 1961; hence, "petitioner's continuing right to make application for the use of the school facilities for their meetings is properly at issue." (55 C.2d 182.)

In *re Jasmon O.* (1994) 8 C.4th 398, 33 C.R.2d 85, 878 P.2d 1297, involved an appeal from two orders: (a) a juvenile court referee order (1) setting aside an earlier order returning J, who had been in a foster home, to her father, and (2) ordering that the department file an action for termination of parental rights; and (b) the superior court order in the termination proceeding that J should be freed from parental control for adoption. The Court of Appeal reversed the order of the juvenile court referee and dismissed the appeal from the superior court judgment as moot. *Held*, this was error. An action terminating parental rights is an independent proceeding in the superior court that has a different purpose than dependency proceedings, i.e., it is intended to pave the way for adoption or other permanent, conclusive placement, rather than, as in the dependency action, to provide for temporary custody and amelioration of the family environment. The action does not function as a review of the proceedings in the juvenile court, may be brought without any order from the juvenile court authorizing or directing the filing of the action, and may be brought while dependency proceedings are still under way. The action is dependent on previous juvenile court orders only to the extent that it may

be brought only after juvenile court jurisdiction has been established over the child and an out-of-home placement has continued for at least a year. (8 C.4th 411.)

In *People v. Becker* (1952) 108 C.A.2d 764, 239 P.2d 989, defendant school director appealed from a judgment of conviction for misconduct in office, and then resigned from the board to avoid embarrassing its members. The Attorney General moved to dismiss on the theory that reversal would not restore him to the office that he voluntarily relinquished. In rejecting this obviously unsound suggestion, the court criticized loose policies of dismissal: "The rather general and oft-repeated phrases that just because a judgment by the reviewing court may 'prove ineffectual' or that there is nothing 'on which its judgment can operate' travel in a circle. ... The true rule is that an appellant has a right to have settled on appeal whether there has been a ground of complaint against him and, what is more, that such a ground may not be deemed to be waived merely because a reversal of the judgment is 'ineffectual' to reinstate the original status quo." (108 C.A.2d 768.)

In *re Linda P.* (1987) 195 C.A.3d 99, 240 C.R. 474, involved a father's appeal from an order in a dependency proceeding continuing dependency and authorizing the county counsel to institute a proceeding to terminate parental custody. While the appeal from the dependency order was pending, a judgment terminating custody became final. *Held*, the appeal from the dependency order was not moot. "Dependency proceedings are closely related to subsequent actions to terminate parental custody of the same child. Error in the former may undermine the foundation of the latter. The fact that a parental custody decision has become final should not preclude review of a significant basis for that decision." (195 C.A.3d 105, rejecting contrary view of *In re Lisa M.* (1986) 177 C.A.3d 915, 225 C.R. 7.)

In *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1996) 43 C.A.4th 1188, 51 C.R.2d 100, the Department of Finance moved to intervene in an administrative mandamus proceeding brought by plaintiff redevelopment agency to challenge a ruling by defendant Commission on State Mandates that plaintiff was not entitled to reimbursement for housing costs. The trial judge, by telephonic ruling, denied plaintiff's petition for mandamus. *Held*, despite the fact that the entire matter was rendered moot by the telephonic ruling, the judge's order denying intervention could be appealed. The issue of a state agency's status as a real party in interest when an unsuccessful claimant sues the commission is "an important question in need of clarification." Also, plaintiff's anticipated appeal makes it appropriate to decide the intervention issue at this time. (43 C.A.4th 1198.)

In *Kidd v. California* (1998) 62 C.A.4th 386, 72 C.R.2d 758, plaintiff's claim was based on defendants' affirmative action certification policy. Because this policy had been suspended, defendants claimed that the question was now moot. *Held*, the question was not moot for two reasons: (a) Plaintiffs had been denied employment before the policy had been suspended, and they deserved to be able to settle the question whether this denial was constitutional; (b) the policy, which was strongly supported by defendants, was only suspended. The remedial order expressly stated that the policy, which raised many questions of great public interest, could be reinstituted at any time. (62 C.A.4th 397.)

Many cases illustrate the principle that an appeal is not moot if a material issue remains undecided:

Boggs v. North Amer. Bond & Mortg. Co. (1936) 6 C.2d 523, 528, 58 P.2d 918 [appeal from order denying injunction against sale to bona fide purchaser was not moot where sale was voidable].

Pillsbury, Madison & Sutro v. Schectman (1997) 55 C.A.4th 1279, 1283, 64 C.R.2d 698 [appeal from preliminary injunction requiring defendant to turn over requested documents, based on ground challenged in earlier writ petition that had been summarily denied, would not be dismissed for mootness where important issues presented by appeal required illumination].

Doe v. Wilson (1997) 57 C.A.4th 296, 304, 67 C.R.2d 187, 9 Cal. Proc. (5th), *Administrative Proceedings*, §49 [question of validity of emergency regulations was not moot even though state was promulgating replacement regulations on nonemergency basis; nonemergency regulations were likely themselves to be challenged before going into effect].

Woodward Park Homeowners Assn. v. Garreks (2000) 77 C.A.4th 880, 888, 92 C.R.2d 268 [completion of project without obtaining court-required environmental impact report (EIR) did not render need for EIR moot, because appellate ruling upholding EIR requirement would provide effectual relief by modification or removal of project; in addition, holding that completion of project rendered EIR requirement moot would be bad public policy].

Vernon v. California (2004) 116 C.A.4th 114, 121, 10 C.R.3d 121 [appeal of order sustaining demurrer to firefighter's action for employment discrimination arising from state's prohibition on use of respirators by firefighters with facial hair was not moot; despite issuance of variance granting temporary exemption, controversy could recur and favorable ruling on appeal would provide firefighter with effectual relief].

In re Cassandra B. (2004) 125 C.A.4th 199, 209, 22 C.R.3d 686 [mother's appeal from juvenile court order issuing restraining order against her in dependency proceedings was not subject to dismissal as moot, even though order had expired; issuance of restraining order would have to be considered by juvenile court in any future proceeding to issue restraining order against mother].

Biosense Webster v. Superior Court (2006) 135 C.A.4th 827, 835, 37 C.R.3d 759 [whether temporary restraining order was issued without proper notice was moot question, but, because petition raised challenges to issuance of order that were separate and apart from notice issue, petition itself was not moot].

SUPPLEMENT: [This section is current through the latest supplement]

See *Hollister v. Monterey Ins. Co.* (2008) 165 C.A.4th 455, 81 C.R.3d 72 [judgment estopped insurer, for 180 days after notice of entry of judgment, from asserting contracting provision as defense to insured city's claim for functional replacement value of fire-damaged building; appeal was not moot, even though 180 days had elapsed and city had not contracted to replace building, because city could seek another declaratory judgment on ground that insurer's appeal and its continuing intransigence deprived city of fruits of judgment; thus, appellate court would modify judgment to estop insurer from raising contracting provision unless city failed to enter into contract within 180 days after judgment became final]; *Carson Citizens for Reform v. Kawagoe* (2009) 178 C.A.4th 357, 364, 100 C.R.3d 358 [recall proponents successfully challenged decertification of recall petition; appeal was not moot as to declaratory relief, even though recall election was unsuccessful, because proponents' status as successful parties for purposes of award of attorneys' fees depended on propriety of trial court's ruling on merits].



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2. Public Interest in Decision.

aa. In General.

9 *Witkin Cal. Proc. Appeal* § 759

[§ 759] In General.

The traditional view was that neither a moot action nor a moot appeal would be decided merely because of the public importance of the question presented. (See *California Prune & Apricot Growers' Assn. v. Pomeroy Orchard Co.* (1925) 195 C. 264, 266, 232 P. 463 ["those questions, it seems to us, ought not to be decided in an action which has become moot and upon what will therefore be virtually an *ex parte* presentation of the case"]; 3 *Cal. Proc.* (5th), *Actions*, §§34, 35.)

The dearth of cases supporting this supposedly basic principle, and the profusion of cases in which moot appeals have been decided in the public interest, make it clear that mootness is not really a bar to production of a much needed advisory opinion in writ proceedings and appeals. (See *Kirstowsky v. Superior Court* (1956) 143 C.A.2d 745, 749, 300 P.2d 163, 3 *Cal. Proc.* (5th), *Actions*, §34 [just proceeding]; *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 C.A.4th 141, 146, 16 C.R.2d 408, quoting the text [appeal].)

A long line of cases, involving myriad factual situations, recognizes this exception to the mootness doctrine. (See *D.I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 731, 36 C.R. 468, 388 P.2d 700, *supra*, §736; *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind* (1967) 67 C.2d 536, 542, 63 C.R. 21, 432 P.2d 717; *Diamond v. Bland* (1970) 3 C.3d 653, 657, 91 C.R. 501, 477 P.2d 733; *Zeilenga v. Nelson* (1971) 4 C.3d 716, 719, 94 C.R. 602, 484 P.2d 578; *Liberty Mut. Ins. Co. v. Fales* (1973) 8 C.3d 712, 715, 106 C.R. 21, 505 P.2d 213, *supra*, §736; *Green v. Superior Court* (1974) 10 C.3d 616, 622, footnote 6, 111 C.R. 704, 517 P.2d 1168; *Johnson v. Hamilton* (1975) 15 C.3d 461, 465, 125 C.R. 129, 541 P.2d 881; *United Farm Workers of America v. Superior Court* (1976) 16 C.3d 499, 503, 128 C.R. 209, 546 P.2d 713; *O'Hare v. Superior Court* (1987) 43 C.3d 86, 91, footnote 1, 233 C.R. 332, 729 P.2d 766; *Konig v. Fair Emp. & Housing Com.* (2002) 28 C.4th 743, 745, footnote 3, 123 C.R.2d 1, 50 P.3d 718, citing the text; *District Election of Supervisors Committee for 5% v. O'Connor* (1978) 78 C.A.3d 261, 265, 144 C.R. 442, citing the text; *Conservatorship of Buchanan* (1978) 78 C.A.3d 281, 285, 144 C.R. 241; *Yamada Bros. v. Agricultural Lab. Rel. Bd.* (1979) 99 C.A.3d 112, 119, 159 C.R. 905, citing the text; *Sierra Club v. Board of Supervisors* (1981) 126 C.A.3d 698, 708, 179 C.R. 261; *Money v. Krall* (1982) 128 C.A.3d 378, 392, 180 C.R. 376; *Wilson v. Louisiana-Pac. Resources*

(1982) 138 C.A.3d 216, 221, 187 C.R. 852; *Dority v. Superior Court* (1983) 145 C.A.3d 273, 276, 193 C.R. 288; *Alternatives for Calif. Women v. Contra Costa* (1983) 145 C.A.3d 436, 445, 193 C.R. 384; *Conservatorship of Fadley* (1984) 159 C.A.3d 440, 445, 205 C.R. 572; *Bartling v. Superior Court* (1984) 163 C.A.3d 186, 189, 209 C.R. 220; *Downtown Palo Alto Committee for Fair Assessment v. City Council* (1986) 180 C.A.3d 384, 391, 392, 225 C.R. 559; *Mann v. Superior Court* (1986) 181 C.A.3d 372, 374, 226 C.R. 263; *Chase v. Brooks* (1986) 187 C.A.3d 657, 662, 232 C.R. 65; *California Ins. Guarantee Assn. v. Liemsakul* (1987) 193 C.A.3d 433, 436, footnote 1, 238 C.R. 346; *People v. Williams* (1987) 194 C.A.3d 124, 132, 239 C.R. 375, citing the text; *Myers v. Patterson* (1987) 196 C.A.3d 130, 134, 241 C.R. 751; *North Bay Regional Center v. Sherry S.* (1989) 207 C.A.3d 449, 454, 256 C.R. 129; *Fallbrook Sanitary Dist. v. San Diego Local Agency Formation Com.* (1989) 208 C.A.3d 753, 757, 256 C.R. 590; *Farron v. San Francisco* (1989) 216 C.A.3d 1071, 1074, 265 C.R. 317; *In re Jody R.* (1990) 218 C.A.3d 1615, 1622, 267 C.R. 746; *Hebert v. Los Angeles Raiders, Ltd.* (1991) 23 C.A.4th 414, 421, 29 C.R.2d 540; *Davenport v. Blue Cross of Calif.* (1997) 52 C.A.4th 435, 445, 60 C.R.2d 641, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §530; *Fresno v. Shelton* (1998) 66 C.A.4th 996, 1006, 78 C.R.2d 272; *California Correctional Peace Officers Assn. v. California* (2000) 82 C.A.4th 294, 302, 98 C.R.2d 302; *White v. Davis* (2002) 108 C.A.4th 197, 208, 133 C.R.2d 691; *Tracy A. v. Superior Court* (2004) 117 C.A.4th 1309, 1313, 12 C.R.3d 684, quoting the text; *Californians for Fair Representation--No on 77 v. Superior Court* (2006) 138 C.A.4th 15, 22, 41 C.R.3d 148; *Corrales v. Bradstreet* (2007) 153 C.A.4th 33, 46, 62 C.R.3d 440.)

In some of the later cases in which appeals were dismissed, the basis of dismissal was not a rejection of the public interest exception, but the conclusion that the public interest was not involved in the case. (See *Paul v. Milk Depots* (1964) 62 C.2d 129, 134, 41 C.R. 468, 396 P.2d 924, *supra*, §756; *National Assn. of Wine Bottlers v. Paul* (1969) 268 C.A.2d 741, 746, 74 C.R. 303, *supra*, §754.)

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bb. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 760

[§ 760] Illustrations.

In *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, 7 *Summary* (10th), *Constitutional Law* §561, plaintiff, an unmarried pregnant woman, challenged the validity of Texas' strict anti-abortion law. Obviously, pregnancy would reach full term before effective appellate review. *Held*, therefore, "[p]regnancy provides a classic justification for a conclusion of nonmootness." It comes more than once to the same woman and, in the general population, will always be with us if humankind is to survive. A justiciable controversy is therefore presented. (93 S.Ct. 713, 35 L.Ed.2d 161.)

In *Di Giorgio Fruit Corp. v. Department of Employment* (1961) 56 C.2d 54, 13 C.R. 663, 362 P.2d 487, mandamus was issued by the superior court to compel the Department of Employment to refer agricultural workers to fruit ranches during strike conditions in the harvest season. *Held*, the department's appeal was not subject to dismissal even though the harvest season was over, for there was a continuing controversy that could never be decided on appeal if the season set a time limit on the decision; "public interest both in the operation of the employment service and in the orderly administration of justice compels a determination now." (56 C.2d 58.)

In *Madera v. Gendron* (1963) 59 C.2d 798, 31 C.R. 302, 382 P.2d 342, plaintiff county sought a declaration that defendant district attorney was illegally engaging in private practice in violation of statute. Defendant contended that the controversy became moot when he was defeated for reelection and his successor took office on January 7. *Held*, the validity of the statute could be determined by an opinion filed June 13. "The issue ... is a question of general public interest. Such questions do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action." (59 C.2d 804.)

In *Abbott Ford. v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124, plaintiffs and one of several defendants in a personal injury action entered into a "Mary Carter" agreement (a sliding-scale agreement settling defendant's liability to plaintiff dependent on the amount plaintiff recovers from nonsettling defendants). The settling defendant petitioned the Supreme Court for review to determine whether the agreement represented a "good faith" settlement within the meaning of C.C.P. 877 and 877.6, so as to relieve the settling defendant of liability for

contribution or equitable comparative indemnity to other defendants. While the matter was pending, the parties fully settled the case. The court held that it was nevertheless appropriate to retain and decide the case. "Past decisions make it clear that, in appropriate circumstances, we may retain and decide a case even when the particular controversy is technically moot. 'There is ample precedent for appellate resolution of important issues of substantial and continuing public interest which otherwise may have been rendered moot and of no further immediate concern to the initiating parties.' " (43 C.3d 868, footnote 8.)

In *Burch v. George* (1994) 7 C.4th 246, 27 C.R.2d 165, 866 P.2d 92, the widow of a decedent petitioned the probate court to determine whether she could, without violating no contest clauses in the will and trust comprising her husband's integrated estate plan, litigate her rights as a surviving spouse to certain assets in the trust under California community property law and under the federal Employee Retirement Security Act (ERISA). The probate court determined that the proposed state and federal actions would bring the no contest clause into operation, and the Court of Appeal affirmed. The Supreme Court noted that the case presented essentially three questions: whether the widow's proposed state and federal complaints would trigger the no contest clause in the trust instrument; whether, if the clause were triggered, California law provided a basis for not enforcing the clause with respect to the widow's community property rights; and whether, if the clause were enforceable against her under California law, ERISA precluded its operation to the extent pension benefits were at issue. While the matter was pending before the Supreme Court, the parties settled, but nonetheless requested that the court decide the issues "in the interest of public policy and clarification of the law." The court agreed: "We have inherent power to retain a matter, even though it has been settled and is technically moot, where the issues are important and of continuing interest." (7 C.4th 253, footnote 4.) Because the issues at hand met both criteria, it was appropriate to retain and decide the matter. (7 C.4th 253, footnote 4; on disposition of merits of case, see 14 Summary (10th), *Wills and Probate*, §573.)

People v. West Coast Shows (1970) 10 C.A.3d 462, 89 C.R. 290, contains a most candid statement of this view. The Attorney General, investigating the carnival industry, served subpoenas duces tecum on the presidents of two corporations. On failure of the parties to appear, the Attorney General, pursuant to statute (*Govt.C. 11180 et seq.*), obtained orders to show cause which were ignored, and then court orders to produce the designated papers. The corporations appealed from these orders, but, pending the appeal, the superior court set aside the orders to produce as void because of lack of proof of service of the orders to show cause. Because a court may set aside its void order despite pendency of an appeal (see *supra*, §23), the appeals were moot and subject to dismissal. (10 C.A.3d 467.) However, the briefs raised constitutional questions concerning the Government Code provisions for the investigations, and "[a]ll parties to the appeal appear to wish a decision on these questions." (10 C.A.3d 468.) This desire of parties is not, of course, controlling; the Attorney General's investigation of the carnival industry was of public importance, and it had been delayed for nearly 3 years and would have been further delayed unless the constitutional issues were decided. (10 C.A.3d 468.) It was therefore proper to pass on those issues: "It is now established law that where, as in the cases at bench, issues on appeal affect the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed, an appellate court may, although the appeal be subject to dismissal, nevertheless adjudicate the issues involved." (10 C.A.3d 468.) Then, after a careful opinion determining the constitutionality of the procedural statutes involved, the court said: "For the reasons stated the appeals are dismissed." (10 C.A.3d 471.)

In *Motown Record Corp. v. Brockert* (1984) 160 C.A.3d 123, 207 C.R. 574, the major question on appeal was whether a \$ 6,000 option clause in the contract of a recording artist satisfied the statutory requirement of minimum compensation under former C.C. 3423(5) (now C.C. 3423(e); see 13 Summary (10th), *Equity*, §51.) The court observed that this question had never been addressed by an appellate court in the 65-year history of the statute. "[I]t is a question the resolution of which will affect a large segment of California business; not only the entertainment and sports industries but virtually any enterprise where the employee's service is of 'a special, unique, extraordinary or intellectual character.' ... The resolution of this question will have ramifications on the cost of services and competition in those businesses which will ultimately impact California consumers. Further, as one commentator has noted, use of the \$ 6,000 option clause has worked in favor of the employer in negotiating contract disputes with employees. ... If this

advantage is not justified under the statute, we should act to clarify the meaning of the statute." (160 C.A.3d 129.)

In *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 C.A.4th 141, 16 C.R.2d 408, the court discussed *Mann v. Superior Court* (1986) 181 C.A.3d 372, 226 C.R. 263, and added the following comment: "Application of the public-interest-likelihood-of-repetition exception to the mootness doctrine is discretionary. In the present case, the primary issue is whether the Board illegally usurped a judicial function in refusing to place the initiative on the ballot. Such action by local government could be timed in such a way as to render the government's conduct unreviewable; and, indeed, if the trial court had failed to order the initiative onto the ballot in the present case, the time sequence may well have prevented relief from the Board's action. Since initiative and referendum matters frequently follow in response to unpopular action or inaction by the local government, the potential for misuse of power by a governmental body strongly influences our exercise of discretion to review this case on the merits." (13 C.A.4th 147.)

In *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 C.A.4th 914, 45 C.R.2d 1, plaintiff director of a homeowners association petitioned for a writ of mandamus against defendant association to compel it to permit him to inspect and copy, as was his right under *Corp.C. 8334*, ballots cast by the association's members during the association's annual election of directors. The trial judge found that plaintiff's statutory right of inspection had to be balanced against the members' privacy rights, and issued a writ to that effect. Plaintiff appealed. At the time of appeal, plaintiff was no longer on the board of directors and therefore could not assert a director's inspection rights. *Held*, the Court of Appeal would exercise its discretion to decide the appeal.

(a) An appellate court may, in appropriate circumstances, exercise its discretion to retain and decide an issue that is technically moot when that issue is of substantial and continuing public interest. This resolution is particularly appropriate when the issue is presented in the context of a controversy so short-lived as to evade normal appellate review, or when it is likely to affect the future rights of the parties. (37 C.A.4th 921.)

(b) The extent of an elected director's right to inspect ballots is of significant public interest concerning a large number of citizens. For many Californians, the homeowners association functions as a second municipal government, regulating many aspects of their daily lives. As a "mini-government," the association usually provides utility services, road maintenance, street and common area lighting, and refuse removal. It may also provide security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors clearly analogous to the governing body of a municipality. (37 C.A.4th 922.)

(c) Also, the controversy would often be so short-lived as to escape appellate review. The association's directors serve only 1-year terms, as is often the case with homeowners associations. (37 C.A.4th 922.)

In *Doe v. Wilson* (1997) 57 C.A.4th 296, 67 C.R.2d 187, 9 Cal. Proc. (5th), *Administrative Proceedings*, §49, the California Department of Health Services issued regulations concerning prenatal health care that were intended to conform existing California regulations to newly enacted federal legislation that barred states and local governments from providing or funding routine medical care for illegal aliens, and rendered California's existing program unlawful. The regulations were issued as interim emergency regulations pursuant to *Govt.C. 11346.1*, to avoid deferring compliance with the federal requirements for the full period normally required for giving statutory notice, soliciting public comments, holding public hearings, and promulgating final, nonemergency regulations. Plaintiffs sought to enjoin enforcement of the emergency regulations, contending, among other things, that the question of the validity of the emergency regulations was now moot, because the state was in the process of promulgating replacement regulations on a nonemergency basis. *Held*, the court should proceed to the merits. "[T]his will surely not be the last time that a federal or state law changes, rendering previous state regulations illegal. The question of whether the state may promulgate interim replacement regulations on an emergency basis is obviously a matter of considerable public interest and importance, which is relatively certain to recur." Also, there is no way of knowing whether the latest,

nonemergency regulations will go into effect without themselves being challenged; given the previous history of this litigation, another challenge would, in fact, seem likely. (57 C.A.4th 304, 309.)

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cc. Where Action Is Moot.

9 *Witkin Cal. Proc. Appeal* § 761

[§ 761] Where Action Is Moot.

Neither a moot action nor a moot appeal should normally be decided. There is, however, one situation in which the reviewing court should refuse to decide the merits but not dismiss the appeal: Where the action itself is moot, and the judgment was therefore improperly rendered below, dismissal of the appeal operates as an affirmance of the judgment (see *infra*, §762), the exact opposite of the reviewing court's intention. The correct order is reversal of the judgment with directions to the lower court to dismiss the action. (See *Paul v. Milk Depots* (1964) 62 C.2d 129, 134, 41 C.R. 468, 396 P.2d 924, *supra*, §756; *National Assn. of Wine Bottlers v. Paul* (1969) 268 C.A.2d 741, 747, 74 C.R. 303, *supra*, §754; *Callie v. Board of Supervisors* (1969) 1 C.A.3d 13, 19, 81 C.R. 440; *Lovret v. Seyfarth* (1972) 22 C.A.3d 841, 853, 101 C.R. 143, citing the text; *Bell v. Board of Supervisors of San Joaquin* (1976) 55 C.A.3d 629, 637, 127 C.R. 757; *Lee v. Gates* (1983) 141 C.A.3d 989, 992, 190 C.R. 682, citing the text; *San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of Southern Calif.* (1999) 71 C.A.4th 382, 402, 83 C.R.2d 836, quoting the text.)

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4. Effect of Dismissal.

9 *Witkin Cal. Proc. Appeal* § 762

[§ 762] Effect of Dismissal.

Former C.C.P. 955 declared that dismissal of an appeal is "in effect an affirmance of the judgment or order appealed from," unless expressly made without prejudice to another appeal. The case law was to the same effect. An ordinary dismissal leaves the judgment as if no appeal had been taken. (See *Howard v. Howard* (1927) 87 C.A. 20, 26, 261 P. 714; *Title Ins. & Trust Co. v. Wilson* (1927) 87 C.A. 143, 145, 261 P. 767; *Smith v. Superior Court* (1937) 21 C.A.2d 160, 164, 69 P.2d 176; *Linn v. Weinraub* (1948) 85 C.A.2d 109, 110, 193 P.2d 21; 96 A.L.R.2d 312 [dismissal of appeal for want of prosecution as bar to subsequent appeal].)

The 1968 Legislature, revising the appeal statutes, substituted C.C.P. 913: "The dismissal of an appeal shall be with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal."

The general rule is subject to two obvious exceptions:

(1) Where the appeal is void, e.g., because taken prematurely, it does not deprive the trial court of jurisdiction over the judgment and gives the appellate court no jurisdiction to affirm it. (*Estate of Kennedy* (1900) 129 C. 384, 385, 62 P. 64.)

(2) Where the appeal is taken from a void judgment or order, dismissal cannot affirm the judgment and thus validate it. (*Sullivan v. Gage* (1905) 145 C. 759, 771, 79 P. 537.)

West's Key Number Digest, Appeal and Error 803

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XIX. DETERMINATION ON MERITS

A. In General.

1. Calendars.

a. In General.

9 Witkin Cal. Proc. Appeal § 763

[§ 763] In General.

(1) *Sessions*. The sessions or calendar hearings of the Supreme Court, Courts of Appeal, and appellate divisions of the superior courts are governed by court rules and have been fully covered in an earlier chapter. (See C.R.C., Rules 8.524(b), 8.702, 8.704; 2 *Cal. Proc. (5th), Courts*, §§328, 334, 340.)

(2) *Calendar Cases*. Preparation of the calendar and the placement of cases on the calendar in the Supreme Court and Courts of Appeal were formerly governed by Supreme Court rules. These provisions were eliminated from the new rules on the theory that each reviewing court should have complete control over this procedure. (For discussion of conflicting views on this question, see 17 *So. Cal. L. Rev.* 239 et seq.; on statutory preferences, see *infra*, §764.) The Internal Operating Practices and Procedures of the California Supreme Court and the Courts of Appeal are generally published with the California Rules of Court and are available on the judicial branch website: www.courtinfo.ca.gov.

C.R.C., Rule 8.704(a) provides for mandatory and discretionary calendaring in the appellate division of the superior court as follows:

(a) The clerk, unless otherwise ordered, must place on the calendar for hearing at each regular session all appeals in which the records were filed not less than 50 days prior to the date of the session.

(b) The Presiding Judge or the department may order any appeal placed on the calendar for hearing at any session of the department.

(3) *Notice of Oral Argument*. The Court of Appeal clerk must send a notice of the time and place of oral argument to all parties at least 20 days before the argument date. The presiding justice may shorten the notice period for good cause, in which event, the clerk must immediately notify the parties by telephone or other expeditious method. (C.R.C., Rule 8.256(b); see *supra*, §680; cf. C.R.C., Rule 8.704(b) [limited civil case appeals: notice is given when record is filed and states time of hearing and time to file briefs]; see 27 *U.S.F. L. Rev.* 301 [Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?].)

West's Key Number Digest, Appeal and Error 808 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Sessions*. C.R.C., Rules 8.702 and 8.704 were repealed in 2008. Sessions of the appellate division are now covered in C.R.C., Rule 10.1108.(2) *Calendaring Cases*. C.R.C., Rule 8.704(a) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.885(a), except that the time has been shortened to 45 days.

(3) *Notice of Oral Argument*. C.R.C., Rule 8.704(b) was repealed in 2008. Notice of oral argument in limited civil cases is now covered in C.R.C., Rule 8.885(c).



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A. In General.

1. Calendars.

b. Statutory Preferences and Advancement.

9 Witkin Cal. Proc. Appeal § 764

[§ 764] Statutory Preferences and Advancement.

(1) *Statutory Preferences*. The complete control by the Supreme Court and Courts of Appeal over the order of cases and number to be placed on any particular calendar is qualified by a large number of conflicting and inconsistent statutes giving priority to certain kinds of actions and proceedings. (See *40 Cal. L. Rev.* 294, 298 [listing principal statutes]; *17 So. Cal. L. Rev.* 240.) The following are illustrative:

(a) *C.C.P. 44* [cases in which state is party; probate cases and contested election cases].

(b) *C.C.P. 45* [appeal from judgment freeing minor who is dependent child of juvenile court from parental custody, or denying recommendation to free minor from parental custody or control].

(c) *C.C.P. 1179a* [forcible entry and forcible or unlawful detainer].

(d) *C.C.P. 1260.010* [eminent domain].

(e) *Pub.Util.C. 1767* [proceedings involving Public Utilities Commission].

(f) *Welf.C. 395(a)(1)* [appeal in dependent child proceeding].

(g) *Welf.C. 800(a)* [juvenile court order declaring child its ward].

(2) *Application of Statutory Trial Preferences to Appeal*. In *Warren v. Schecter* (1997) 57 C.A.4th 1189, 67 C.R.2d 573, judgment was rendered for plaintiff in a medical malpractice action, and defendant appealed. During the briefing stage, plaintiff filed a motion seeking calendar preference. The moving papers stated that due to the filing of the appeal and the posting of an appeal bond by defendant, plaintiff was unable to rely on the judgment to pay any portion of her high medical care costs. The supporting declaration of a treating physician opined that without the funds for proper medical care, plaintiff probably would die within 6 months. *Held*, motion for preference granted.

(a) Various statutes, like *C.C.P. 44*, expressly authorize appellate calendar preference in certain types of actions.

(57 C.A.4th 1198.) However, the circumstances of this case fit most closely within C.C.P. 36 (7 Cal. Proc. (5th), Trial, §66 et seq.), dealing with trial-setting preference. That statute provides, in part, for preference where a party suffers from an illness or condition raising "substantial medical doubt of survival" beyond 6 months. (57 C.A.4th 1199.)

(b) Although C.C.P. 36 speaks only to trial-setting preference, the statute's rationale for granting calendar preference is equally applicable to appellate proceedings. Moreover, courts have inherent power to adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or Judicial Council rule. Thus, the appellate court has discretion to grant a motion for calendar preference on an appropriate showing. Clearly, the interests of justice dictate that a litigant who may not survive the delay of an appellate court backlog be afforded calendar preference. (57 C.A.4th 1199.)

(3) *Motion To Advance*. "A party seeking calendar preference must promptly serve and file a motion for preference in the reviewing court. (C.R.C., Rule 8.240.) (See *Moffitt v. Ford Motor Co.* (1931) 115 C.A. 499, 500, 1 P.2d 994; 17 So. Cal. L. Rev. 241; Cal. Civil Practice, 5 Procedure §§41:21, 41:22; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §818 et seq.) The motion requirement relieves the reviewing court of the burden of searching the record to determine if preference should be ordered. The requirement is not intended to bar the court from ordering preference without a motion when the ground is apparent on the face of the appeal. The rule is broad in scope: it includes motions for preference on the grounds (a) that a statute provides for preference in the reviewing court, (b) that the reviewing court should exercise its discretion to grant preference when a statute provides for trial preference; and (c) that the reviewing court should exercise its discretion to grant preference on a nonstatutory ground. (Advisory Committee Comment to C.R.C., Rule 8.240.

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2. Consolidation of Cases on Appeal.

9 Witkin Cal. Proc. Appeal § 765

[§ 765] Consolidation of Cases on Appeal.

Where separate actions, related in subject matter and issues, are consolidated for trial (see 4 *Cal. Proc.* (5th), *Pleading*, §341), or where actions separately tried are nevertheless so related, they may often profitably be considered together on appeal. So far as the reviewing court is concerned, it may without order place them on the calendar together, make use of briefs and arguments interchangeably, and write only one detailed opinion, deciding the other cases on the authority of the first. (See *infra*, §788.) An order of consolidation, however, goes further: It allows the parties to all the appeals to prepare a single record and set of briefs.

The practice is seldom covered by statute or rule, and in California the very few decisions indicate that the reviewing court will freely grant a motion or request for consolidation on stipulation of all the parties, but will seldom make the order on motion of one party. (See *Sharick v. Galloway* (1936) 12 C.A.2d 733, 738, 55 P.2d 1196 [granted on court's own motion]; *Samson v. Sapoznik* (1953) 117 C.A.2d 607, 608, 256 P.2d 346 [denied]; *General Elec. Co. v. Federal Employees' Distr. Co.* (1954) 122 C.A.2d 509, 510, 265 P.2d 19 [granted]; 42 U.C.L.A. L. Rev 717, 793 [effect on federal appeal of case consolidations in trial courts]; 4 *Am.Jur.2d* (2007 ed.), *Appellate Review* §136; Cal. Civil Practice, 5 Procedure §41:24 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error*, §790; cf. *Davis v. Kittle Mfg. Co.* (1933) 133 C.A. 599, 600, 24 P.2d 550 [no authority where cases were pending in different Courts of Appeal].)

In *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, two cases were decided together on appeal: (a) *Jackson v. California Coastal Com.*, involving a property owner's challenge of a specific permit condition, and (b) *Pacific Legal Foundation v. California Coastal Com.*, an action by a group of property owners challenging the Commission's public access guidelines as facially invalid. The Court of Appeal had consolidated the cases mainly because the Commission was a party to both, but the issues were fundamentally different, and consolidation was improper. However, having granted a hearing, the Supreme Court saw no reason to bifurcate the cases and accordingly considered the separate appeals in a single opinion. (33 C.3d 165, footnote 3.)

West's Key Number Digest, Appeal and Error 816, 1105

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A. In General.

3. Transfer of Cases.

9 Witkin Cal. Proc. Appeal § 766

[§ 766] Transfer of Cases.

The Supreme Court may, before decision, order a transfer from itself to a Court of Appeal, from a Court of Appeal to itself, or from one Court of Appeal or division to another. The court to which the cause is transferred has jurisdiction. (Cal. Const., Art. VI, §12(a); see Cal. Const., Art. VI, §12(d) [appeal involving judgment of death is not transferable]; on procedure for transfer, see *infra*, §923.)

West's Key Number Digest, Appeal and Error 120(7), 520(3)

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A. In General.

4. Reference.

9 *Witkin Cal. Proc. Appeal* § 767

[§ 767] Reference.

Reference procedure is commonly resorted to in trial courts where complicated accounts can more readily be examined or calculated outside of court. (See *C.C.P.* 638, 639; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §63.) In appellate courts, a reference is unusual, but serves a broader purpose. Appellate courts are not equipped to take evidence and, if the determination of controverted issues of fact becomes necessary in an original proceeding, a reference is not only convenient but essential. (See, e.g., *Holt v. Kelly* (1978) 20 *C.3d* 560, 562, 143 *C.R.* 625, 574 *P.2d* 441, citing the text [mandamus]; *In re O'Malley* (1950) 101 *C.A.2d* 80, 82, 224 *P.2d* 488 [habeas corpus; superior court judge appointed as referee]; *Cross v. Superior Court* (1951) 104 *C.A.2d* 594, 595, 232 *P.2d* 255 [mandamus; same]; *In re Robelet* (1953) 121 *C.A.2d* 598, 599, 263 *P.2d* 486 [child custody proceeding; superior court commissioner appointed as referee]; *In re Croze* (1956) 145 *C.A.2d* 492, 498, 302 *P.2d* 595 [same].)

West's Key Number Digest, Appeal and Error 1017 et seq., 1178(9); Reference 26, 35

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5. Prehearing Conference in Court of Appeal.

9 Witkin Cal. Proc. Appeal § 768

[§ 768] Prehearing Conference in Court of Appeal.

C.R.C., Rule 8.248, governing prehearing conferences in civil cases, provides as follows:

(1) After notice of appeal is filed in a civil case, the presiding justice may (a) order one or more parties to serve and file a concise statement describing the nature of the case and the issues presented; and (b) order all necessary persons to attend a conference to consider a narrowing of the issues, settlement, and other relevant matters. (C.R.C., Rule 8.248(a).) Each party is required to serve any statement it files. The service requirement is not intended to prohibit the presiding justice from ordering the parties to submit additional, confidential material in appropriate cases. (Advisory Committee Comment to C.R.C., Rule 8.248.)

(2) An agreement reached in a conference must be signed by the parties and filed. Unless the Court of Appeal orders otherwise, the agreement governs the appeal. (C.R.C., Rule 8.248(b).)

(3) Neither the presiding officer nor any court personnel present at a conference may participate in or influence the determination of the appeal. (C.R.C., Rule 8.248(c)(2).)

(4) Unless allowed by a filed agreement, no matter recited in a statement or discussed in a conference under C.R.C., Rule 8.248(a) may be considered in any subsequent proceeding in the appeal other than in another conference. (C.R.C., Rule 8.248(c)(1).)

(5) The time to file a party's brief under C.R.C., Rule 8.212(a) is tolled from the date the Court of Appeal mails notice of the conference until the date it mails notice that the conference is concluded. (C.R.C., Rule 8.248(d).) If a prehearing conference is ordered before the due date of the appellant's opening brief, the time to file the brief is not extended but tolled, so that unwarranted lengthening of the briefing process will be avoided. The tolling period continues until the Court of Appeal mails notice that the conference is concluded, and whether or not the conference concludes on the date it begins, the Court of Appeal clerk is required to mail the parties a notice that the conference is concluded. (Advisory Committee Comment to C.R.C., Rule 8.248.)

Whether to hold a prehearing conference is left to the individual court, as are the procedures for implementing a

prehearing conference program. The six appellate districts have adopted different practices, which also may differ among the divisions within a district. (See C.E.B., 2 Civil Appellate Practice 3d, Chap. 15.)

When a settlement agreement has been made, the appeal will usually be disposed of by a stipulation, either for dismissal of the appeal or for modification of the judgment. If the judgment is modified, the Court of Appeal's opinion is written in conformity with the stipulation, which may be attached to the opinion. (On disposition of case after settlement on appeal, see C.E.B., 2 Civil Appellate Practice 3d, §15.25 et seq.)

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A. In General.

6. Supervision of Progress in Court of Appeal.

9 *Witkin Cal. Proc. Appeal* § 769

[§ 769] Supervision of Progress in Court of Appeal.

(1) *Duty To Assure Prompt Completion.* "The administrative presiding justices of Courts of Appeal with more than one division in the same city and the presiding justices of all other Courts of Appeal are generally responsible for ensuring that all appellate records and briefs are promptly filed. Staff must be provided for that purpose, to the extent that funds are appropriated and available." (C.R.C., Rule 10.1012(a).)

(2) *Authority.* Notwithstanding any other provision of the rules, the administrative presiding justices and presiding justices are authorized to do the following:

(a) Grant or deny applications to extend the time for filing records on appeal and briefs. However, a presiding justice may grant an extension of time for briefs in conjunction with an order for augmentation of the record on appeal. (C.R.C., Rule 10.1012(b)(1).)

(b) Order the dismissal of an appeal, or any other authorized sanction, for a noncompliance with the rules, if no application for an extension of time or for relief from default has been filed prior to entry of the order. (C.R.C., Rule 10.1012(b)(2).)

(c) Grant relief from a default or from a sanction other than dismissal imposed for the default. (C.R.C., Rule 10.1012(b)(3).)

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B. Oral Argument.

1. Right and Waiver.

9 *Witkin Cal. Proc. Appeal* § 770

[§ 770] Right and Waiver.

(1) *Appeals and Original Proceedings.* The right of counsel to appear and orally argue a cause is generally recognized, and is assumed though not explicitly stated in the rules. Any appeal or original proceeding that must be decided on the merits by a written opinion is placed on the calendar for oral argument. (See *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 468, 122 P.2d 257 ["the right to oral argument in matters on the calendar in open sessions of the court has always been accorded"]; *Moles v. Regents of Univ. of Calif.* (1982) 32 C.3d 867, 871, 187 C.R. 557, 654 P.2d 740, *infra*, §777, quoting the Draftsman of the Rules on Appeal [the right exists "in any appeal or original proceeding which is considered on the merits and decided by a written opinion" in civil and criminal appeals in the Supreme Court and the Courts of Appeal]; C.E.B., 2 Civil Appellate Practice 3d, §16.1.) (On notice by clerk of time for hearing, see C.E.B., 2 Civil Appellate Practice 3d, §§16.8, 16.9; Rutter Group, 2 Civil Appeals and Writs §10:1 *et seq.*; 2 *Cal. Proc.* (5th), *Courts*, §334.)

(2) *Petitions.* Petitions for rehearing or for review in the Supreme Court, and petitions for extraordinary writs, are considered in chambers without the appearance of counsel. (See *Metropolitan Water Dist., of Southern Calif. v. Adams*, *supra*, 19 C.2d 468; 17 *So. Cal. L. Rev.* 243; *infra*, §§932, 949; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §203.) But if a petition for review is granted, the cause may go on the calendar. (See *infra*, §934.)

(3) *Motions.* "On a party's request or its own motion, the court may place a motion on calendar for a hearing." (C.R.C., Rule 8.54(b)(2); C.R.C., Rule 8.705(b) [appellate division]; *supra*, §729.)

(4) *Waiver.* Counsel entitled to argue an appeal may elect to waive the right, and the Court of Appeal in its notice of the date of argument may invite waiver. (See C.E.B., 2 Civil Appellate Practice 3d, §16.15 [considerations affecting decision to waive]; 17 *So. Cal. L. Rev.* 245.)

(5) *Argument by Telephone.* The Fifth and Sixth Appellate Districts have installed telephone conference call systems that afford attorneys the option of presenting oral arguments by telephone as an alternative to personal appearance in court. (See Internal Operating Practices and Procedures of the Courts of Appeal, Fifth Appellate District, IOP IV; Sixth Appellate District, IOP II(A)(3); Sixth District Teleconferencing Oral Argument Procedures Manual.) (On telephonic oral argument, see C.E.B., 2 Civil Appellate Practice 3d, §16.10 *et seq.*, Appendix F.)

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(3) *Motions*. C.R.C., Rule 8.705(b) was repealed in 2008. Motions in the appellate division are now covered in C.R.C., Rule 8.808.



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B. Oral Argument.

2. Regulation.

9 Witkin Cal. Proc. Appeal § 771

[§ 771] Regulation.

C.R.C., Rule 8.256(c) regulates oral argument in the Courts of Appeal. (On oral argument in Supreme Court, see *infra*, §935.) The following provisions apply unless the court provides otherwise by rule or order:

(1) The appellant, petitioner, or moving party has the right to open and close. If there are two or more such parties, the court must set the sequence of argument. (C.R.C., Rule 8.256(c)(1).)

(2) Counsel for each side is allowed 30 minutes for oral argument. If multiple parties who are represented by separate counsel or an amicus curiae on written request is granted permission to argue, the court may apportion or expand the time. (C.R.C., Rule 8.256(c)(2).)

(3) Only one counsel may argue for each separately represented party. (C.R.C., Rule 8.256(c)(3).)

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B. Oral Argument.

3. Practice.

9 *Witkin Cal. Proc. Appeal* § 772

[§ 772] Practice.

The methods of preparing and presenting an effective oral argument cannot be generalized or reduced to formulae, but a number of works on appellate practice contain valuable suggestions. (See, e.g., C.E.B., 2 Civil Appellate Practice 3d, Chap. 16; Rutter Group, 2 Civil Appeals and Writs, Chap. 10; 17 *So. Cal. L. Rev.* 244.)

There are, however, a few cautions that should be borne in mind:

(1) Counsel must not intentionally misquote the language of a book, statute, or decision or, with knowledge of its invalidity, cite as authority an overruled decision, a repealed statute, or a statute declared unconstitutional. (*Rules of Professional Conduct*, Rule 5-200; see 1 *Cal. Proc.* (5th), *Attorneys*, §497; *supra*, §708.)

(2) It is improper to raise new points not mentioned in the briefs. (See *Estate of Davis* (1940) 38 *C.A.2d* 579, 587, 101 *P.2d* 761 [point may be disregarded because of lack of opportunity for adverse party to consider it]; cf. *Schubert v. Lowe* (1924) 193 *C.* 291, 294, 223 *P.* 550 [point may be considered].)

(3) Statements of counsel on oral argument, like those in briefs, may be treated as admissions or waivers of points made on appeal. (See *Browne v. Superior Court* (1940) 16 *C.2d* 593, 599, 107 *P.2d* 1; *supra*, §704.)

C.E.B., 2 Civil Appellate Practice 3d, Chap. 16, contains a number of practical suggestions on effective oral argument:

(a) *Preparation for the Argument.* (See §16.19 [indexing, tabbing, or summarizing the record]; §16.20 [knowledge of issues and contentions]; §16.21 [familiarity with authorities, and preparation of "case book"]; §16.22 [determination of priority of issues to be argued in the light of time limitations or interruptions from judges]; §16.23 [preparation of detailed notes or comprehensive outline]; §16.24 [preparation of answers to anticipated questions and opposing arguments]; §16.25 [inquiries to ascertain court's preargument procedures]; §16.26 [learning judges' backgrounds]; §16.27 [preparation of argument book or notes containing copies of key cases, and critical transcript pages and exhibits]; §16.28 [preparation of visual aids].)

(b) *Making the Argument.* (See §16.29 [demeanor: tone, simplicity of language, courtesy, etc.]; §16.30 [method of

argument, issues, and pitfalls; e.g., do not use prepared speech, avoid lengthy quotations, select and limit argument to issues best suited for oral presentation, beware of stipulations or admissions of fact]; §16.31 [exercise care in answering questions from the court]; §16.32 [proper and effective use of rebuttal]; §16.33 [possible letter-brief to court after argument].)

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C. Decision and Opinion.

1. Submission of Cause.

a. Supreme Court.

9 Witkin Cal. Proc. Appeal § 773

[§ 773] Supreme Court.

(1) *Constitutional 90-Day Provision.* Usually, after the oral argument is concluded, or after all briefs are in and argument is waived, a cause is either deemed or ordered submitted for decision. Prompt decision after submission is encouraged by the constitutional provision that a judge of a court of record may not receive his or her salary "while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision." (Cal. Const., Art. VI, §19; see 2 *Cal. Proc.* (5th), *Courts*, §8; California Code of Judicial Ethics, Canon 3B(8) [judges must dispose of all judicial matters "promptly"]; *infra*, §940; on Internal Operating Practices and Procedures of Supreme Court regarding submission of cases, see IOP VII.)

(2) *Compliance with 90-day Requirement.* Because the constitutional provision makes no allowances for crowded calendars, complex cases with lengthy records and briefs, or other factors causing delay in decision, two unique procedures were developed in the Supreme Court to circumvent the 90-day requirement:

(a) *Resubmission* or setting aside the submission. (See *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 474, 122 P.2d 257.)

(b) *Delayed submission*, i.e., postponement of entry of the order submitting the cause, pending filing of further briefs or such study as the court deems necessary before arriving at a final decision and producing a signed opinion.

West's Key Number Digest, Appeal and Error 1100 et seq.

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C. Decision and Opinion.

1. Submission of Cause.

b. Court of Appeal.

9 Witkin Cal. Proc. Appeal § 774

[§ 774] Court of Appeal.

(1) *Submission and Resubmission: General Rule.* "A cause is submitted when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court." (C.R.C., Rule 8.256(d)(1).) "[T]he court may vacate submission only by an order stating its reasons and setting a timetable for resubmission." (C.R.C., Rule 8.256(e)(1).) The Constitutional provision precluding judges from receiving their salaries where a case remains undecided 90 days after having been submitted (Cal. Const., Art. VI, §19; see supra, §773) is applicable to Court of Appeal justices as well as Supreme Court justices. (See Rutter Group, 2 Civil Appeals and Writs §11:36.)

(2) *Submission and Resubmission: After Transfer From Supreme Court.* If the Supreme Court transfers a cause to the Court of Appeal and supplemental briefs may be filed under C.R.C., Rule 8.200(b) (infra, §945), the cause is submitted when the last such brief is or could be timely filed. If the parties so stipulate, the Court of Appeal may order the cause submitted at an earlier time. (C.R.C., Rule 8.256(d)(2).) An order setting oral argument vacates the submission, and the cause is resubmitted when the court has heard oral argument or approved its waiver. (C.R.C., Rule 8.256(e)(2).)

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C. Decision and Opinion.

2. Concurrence of Qualified Majority.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 775

[§ 775] In General.

In the Supreme Court, the concurrence of four judges "present at the argument is necessary for a judgment." (Cal. Const., Art. VI, §2.) In the Court of Appeal, the concurrence of two judges "present at the argument is necessary for a judgment." (Cal. Const., Art. VI, §3.)

These provisions raise problems of the effect of the disqualification or absence of a regular judge and his or her replacement by an "assigned judge" (see *infra*, §776), the effect of waiver of oral argument (see *infra*, §776), and the effect of an even division of the qualified judges (see *infra*, §778). (On invalidity of opinion in which participating justice was not present at oral argument, see *Moles v. Regents of Univ. of Calif.* (1982) 32 C.3d 867, 868, 187 C.R. 557, 654 P.2d 740, *infra*, §777; on problems faced by three-judge panel in deciding cases involving two or more issues, see 81 Cal. L. Rev. 1 [The One and the Many: Adjudication in Collegial Courts].)

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2. Concurrence of Qualified Majority.

b. Absence, Disqualification, and Waiver of Argument.

9 *Witkin Cal. Proc. Appeal* § 776

[§ 776] Absence, Disqualification, and Waiver of Argument.

(1) *Assigned Judge*. Usually, the court takes care of the situation of a judge's absence or disqualification by having the Chairperson of the Judicial Council assign a Court of Appeal justice or a superior court judge to sit in place of the regular justice for the determination of particular causes. The assigned judge was formerly called a "justice pro. tem." (See *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 467, 469, 122 P.2d 257.) To avoid confusion with a temporary judge (an attorney selected to act as a judge in a particular case; see 2 *Cal. Proc.* (5th), *Courts*, §13), the assigned judge has been designated "Judge Assigned" or "Assigned by the Chairperson of The Judicial Council." (On grounds of disqualification, see 2 *Cal. Proc.* (5th), *Courts*, §98.)

(2) *Waiver of Argument*. The constitutional language ("present at the argument," see *supra*, §775) gives the impression that oral argument is essential and that a judge not present at the argument is barred from participating in the decision. The same language in the predecessor section was, however, construed to sanction three familiar and necessary practices:

(a) Counsel who argues before a court with a judge absent may validly stipulate that the judge may nevertheless participate in the decision. (See *Straus v. Straus* (1935) 4 C.A.2d 461, 465, 41 P.2d 218.)

(b) Parties may waive oral argument, and the matter will then be submitted and decided on the briefs. (See *supra*, §770.)

(c) A party who waives oral argument waives any objection to participation by an absent judge. (See *Philbrook v. Newman* (1905) 148 C. 172, 178, 82 P. 772 ["When a cause is so submitted on briefs alone all the justices have an equal opportunity to read the argument, and all are deemed present at the argument ... and all or any of them are qualified to join in the decision"].)

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C. Decision and Opinion.

2. Concurrence of Qualified Majority.

c. Invalid Change in Panel After Argument.

9 *Witkin Cal. Proc. Appeal* § 777

[§ 777] Invalid Change in Panel After Argument.

Moles v. Regents of Univ. of Calif. (1982) 32 C.3d 867, 187 C.R. 557, 654 P.2d 740, holds that a Presiding Justice of a Court of Appeal cannot, after oral argument, alter the composition of the justices to whom a case has been assigned for decision. Plaintiff's appeal was assigned to a three-judge panel of the Court of Appeal of the Third Appellate District, consisting of Justices P, B, and R. After oral argument, Justice E was assigned to take Justice R's place, and the written decision of affirmance was signed by Justices P, B, and E.

(a) There is no express constitutional or statutory provision on the point; Cal. Const., Art. VI, §3, merely provides that the court operates as a three-judge court and that the concurrence of two justices present at the argument is necessary for a judgment. But the general rule recognized by the case law is that only justices who were present at the oral argument may participate in the decision, except by stipulation of the parties or waiver of argument. (32 C.3d 870, citing *Niles v. Edwards* (1892) 95 C. 41, 30 P. 134 and the text.) The dictum in *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 122 P.2d 257, suggesting that an absent Supreme Court justice could participate in a judgment if four justices present at the argument also participated, "was ill-advised." (32 C.3d 871, footnote 3.)

(b) The right to oral argument on appeal exists in any appeal or original proceeding that is considered on the merits and decided by a written opinion. (32 C.3d 871, 872; see *supra*, §770.) The argument provides the only opportunity for a dialogue between the litigant and the bench, and its value is attested by many authorities. Hence, permitting a justice who has not heard oral argument to participate in the decision would effectively deny the right. (32 C.3d 872, 873.)

(c) Policy and practice lead to the same conclusion. "Much of the discussion and consideration of a case takes place either before or immediately after oral argument in formal or informal judicial conferences. Although the practice varies from district to district, most Courts of Appeal do substantial amounts of work on a case *before* oral argument takes place. Often, a tentative decision will be written and circulated to other panel members for their comments. ... In many cases, a preargument conference is held, in which the justices share their views on the issues of a case. ... Further, '[m]ost courts confer after argument ... either on the same day or shortly thereafter.'" (32 C.3d 873.)

(d) "These formal and informal conferences are the forums in which much of the judicial process takes place. They

provide judges an opportunity to discuss among themselves any difficulties they might have with the issues or analyses in a particular case. A judge who has not participated in these early conferences is simply not as well prepared or as qualified to participate in the decision of a case as a judge who has. To allow one to substitute freely for the other would be nothing less than a distortion of the judicial process." (32 C.3d 873.)

(e) The contention that the error in Justice E's participation was "harmless" because two justices have the power to decide the case misses the point: "Even if this court were to assume *arguendo* that two justices *alone* could properly hear oral argument and decide an appeal, the fact remains that, in the case at hand, they did not do so. Instead, a judge who had *not* heard oral argument and had not taken part in the earlier deliberations of the panel *participated* in the decision of the case in conjunction with two justices who had." (32 C.3d 874.) The record cannot show the effect of his participation, but the outcome of the appeal "could easily have been affected" by a justice whom plaintiff never had an opportunity to address and persuade. (32 C.3d 874.)

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2. Concurrence of Qualified Majority.

d. Even Division on Differing Opinions.

9 *Witkin Cal. Proc. Appeal* § 778

[§ 778] Even Division on Differing Opinions.

A distinction must be drawn between an even division on the *decision* and on the *opinions*.

In the rare situation in which, by reason of disqualification, absence, or vacancy, the participating justices are evenly divided in the decision, i.e., half are for affirmance and half for reversal, the judgment is affirmed. This is because it takes a majority to render an effective decision nullifying the lower court's judgment. (See *supra*, §775.)

If, however, a majority concur in the decision (the appellate judgment of affirmance or reversal; see *infra*, §831), it is immaterial that they are divided, evenly or otherwise, in their opinions (the reasons for their decision; *infra*, §779).

Thus, the California Supreme Court has, on occasion, rendered decisions with three justices on one opinion reaching one decision, three justices on another opinion reaching a different decision, and the seventh judge concurring in one of the decisions but in neither of the opinions. In this 3-3-1 split, the appellate decision, either affirmance or reversal, is determined by the one judge who concurs. (See *Philbrook v. Newman* (1905) 148 C. 172, 179, 82 P. 772.) As a determination of the litigation, this appellate judgment by a divided court does not differ from one by a unanimous court.

The decision, however, is not a binding precedent on the reasons set forth in any of the opinions, for all are minority opinions. And for a brief period, it was the custom of the Reporter of Decisions to headnote only the result and not the points of law stated in the first opinion signed by only three justices. (See, e.g., *Finnegan v. Royal Realty Co.* (1950) 35 C.2d 409, 218 P.2d 17; *State Comp. Ins. Fund v. Industrial Acc. Com. of Calif.* (1952) 38 C.2d 659, 242 P.2d 311; *Guardianship of Smith* (1954) 42 C.2d 91, 265 P.2d 888.) The current practice, however, is to headnote the lead opinion and to list the justices concurring in the statements of particular headnotes. (See *People v. Robertson* (1982) 33 C.3d 21, 188 C.R. 77, 655 P.2d 279.)

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a. Constitutional Requirement.

9 *Witkin Cal. Proc. Appeal* § 779

[§ 779] Constitutional Requirement.

"Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." (Cal. Const., Art. VI, §14; on former provision, see *18 Cal. L. Rev.* 486; *29 So. Cal. L. Rev.* 395 [criticism of requirement]; and see *5 Am.Jur.2d* (2007 ed.), *Appellate Review* §§772, 773; on Internal Operating Practices and Procedures of Supreme Court regarding assignment, circulation, and filing of opinions, see IOP VIII, IX, X.)

The constitutional requirement has been attacked as burdensome and outmoded, but it survived the 1966 constitutional revision and, accordingly, its abolition seems unlikely. (See *People v. Medina* (1972) 6 C.3d 484, 490, footnote 5, 99 C.R. 630, 492 P.2d 686 ["Although the requirement has been the subject of much criticism repeated proposals to limit or abolish it have been rejected"].) It has, however, been relaxed by several exceptions (see *infra*, §780), and it may be satisfied by something less than the usual full-scale opinion (see *infra*, §§787, 788). However, as the following opinion reflects, the requirement still retains some validity.

In *Amwest Surety Ins. Co. v. Wilson* (1995) 11 C.4th 1243, 48 C.R.2d 12, 906 P.2d 1112, the Supreme Court reviewed a Court of Appeal decision in which one justice authored the opinion announcing the judgment of the court, another justice only "concurred in the result," without an opinion, and the third justice wrote a dissenting opinion. *Held*, the Court of Appeal decision failed to satisfy the constitutional requirement of a written opinion "with reasons stated." The reasons that led the concurring justice to concur in the judgment could not be determined. The California Constitution requires a written opinion or opinions reflecting the views of a majority of the justices supporting the judgment. (11 C.4th 1267.)

From the author's point of view, whether an opinion satisfies the "with reasons stated" requirement is necessarily a subjective, not an objective, determination. Thus, the author must follow his or her own judgment as to the questions to be discussed and as to the degree of elaboration. (*Lewis v. Superior Court* (1999) 19 C.4th 1232, 1262, 82 C.R.2d 85, 970 P.2d 872.)

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b. Exceptions: Decisions Not on Merits.

9 Witkin Cal. Proc. Appeal § 780

[§ 780] Exceptions: Decisions Not on Merits.

The key word in the constitutional provision (*supra*, §779) is "causes." This has been interpreted to mean decisions on the merits of a case proper for determination. Hence, the following do not require written opinions:

(1) *Dismissal or Decision on Other Motion.* An order dismissing an appeal or original proceeding. The order may be accompanied by a written opinion but often is merely a minute order. (See *People v. Brown* (1957) 149 C.A.2d 175, 176, 307 P.2d 949.) The same is necessarily true of decisions on other motions.

(2) *Denial of Application for Writ.* If an application for an extraordinary writ is granted and an alternative writ or order to show cause is issued, the matter goes on the calendar and is heard and determined on the merits with a written opinion. But if the application is denied at the outset without issuing an alternative writ or order to show cause, the order of denial is not a decision of a cause and calls for no opinion. (*Funeral Directors Assn. of Los Angeles & Southern Calif. v. Board of Funeral Directors & Embalmers of Calif.* (1943) 22 C.2d 104, 106, 136 P.2d 785; *Trabue Pittman Corp. v. Board of Supervisors of Los Angeles County* (1942) 49 C.A.2d 463, 464, 121 P.2d 746; see 8 Cal. Proc. (5th), *Extraordinary Writs*, §§185, 205, 208.)

(3) *Denial of Petition for Rehearing or Review.* Petitions for rehearing or review in the Supreme Court, if granted, may eventually result in a calendar hearing and a new written opinion, but orders of denial are made without a written opinion. (See *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 468, 122 P.2d 257; *infra*, §§932, 941 et seq., 948 et seq.; *In re Rose* (2000) 22 C.4th 430, 436, 93 C.R.2d 298, 993 P.2d 956, 1 Cal. Proc. (5th), *Attorneys*, §618.)

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c. Written Opinion Is Optional in Appellate Division.

9 Witkin Cal. Proc. Appeal § 781

[§ 781] Written Opinion Is Optional in Appellate Division.

The appellate division of the superior court is not mentioned in the constitutional section (*supra*, §779), and its rules state that "[a]ppellate division judges are not required to prepare a written opinion in any case but may do so when they deem it advisable or in the public interest." (C.R.C., Rule 8.707(b).)

The practice is to decide most cases either by a simple order or by a memorandum opinion. Occasionally, however, a detailed opinion is prepared and certified for publication (see *infra*, §813); this, if submitted to the Reporter of Decisions, is published in the Appendix to the current volume of California Appellate Reports (cited "C.A. Supp."). The total number of reported opinions is not large, but their coverage is extensive. Because they often deal with questions that do not reach the higher reviewing courts, they are of considerable value and are freely cited by the appellate divisions and Courts of Appeal. (See *supra*, §490.)

The considerations that call for full-scale written opinions are described in *People v. Alberts* (1955) 138 C.A.2d Supp. 909, 292 P.2d 90, as follows: "Now and then a case comes before us involving a question that is little likely to be solved, at any early time, by either the Supreme Court or one of the District Courts of Appeal, but which will frequently reappear before the more than 80 municipal court judges whose judgments come to us on appeal. Examples readily come to mind: the unlawful detainer actions under the rent regulations; violations of a newly created offense punishable only as a misdemeanor. In this class of cases we recognize a duty 'to declare the law.' Even in such cases we feel under no duty to comment on every contention that may be made. We do not believe that we should follow practices that add unnecessarily to the number of lawbooks that the profession must buy and provide shelves to house." (138 C.A.2d Supp. 912.)

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C.R.C., Rule 8.707(b) was repealed in 2008. The provision quoted in the text is now in C.R.C., Rule 8.887(a).



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a. In General.

9 Witkin Cal. Proc. Appeal § 782

[§ 782] In General.

(1) *Functions of Appellate Opinion.* "The function of an appellate opinion is to state the reasons that led the court to decide the case the way it did. Such a statement of reasons has value from the standpoint of the judges, litigants, and the legal profession in general." (Witkin, *Manual on Appellate Court Opinions*, §37, quoting A.B.A. Committee Report; see *36 Santa Clara L. Rev. 1* [providing draft opinions to appellate counsel in advance of oral argument].) The opinion is basically a discussion of the facts, issues, and law necessary to the determination of the appeal, but its content is not necessarily limited to those essentials. (See *infra*, §792 et seq.)

"Most commentators recognize the multiple functions of a judicial opinion and reject the notion that it should do no more than decide the controversy between the immediate parties. They agree that routine cases can be given routine treatment, but they maintain that important controversies should be decided by creative, thoughtful discussion of principles and precedents, looking beyond the particular litigants and litigation." (Witkin, *Manual on Appellate Court Opinions*, §38.)

(2) *Opinions of Supreme Court and Court of Appeal.* In a "certiorari" type of court, exercising a discretionary review to resolve conflicts of decision in the intermediate appellate courts and to establish controlling precedents on important questions of law (see *supra*, §492 et seq.), the conservative view of the opinion as a speedy and efficient determination of the issues of a controversy between the particular litigants has little application. The function of such a court as the Supreme Court of California is primarily to expound, declare, and expand the law, instead of to decide the issues of particular cases. (See Witkin, *Manual on Appellate Court Opinions*, §39.) By contrast, appeals are taken to the Court of Appeal as a matter of right, and many present familiar facts, familiar issues for review, and familiar precedents to govern the decision. These cases seldom call for lengthy opinions. (See Witkin, *Manual on Appellate Court Opinions*, §40.)

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b. By the Court Opinion.

9 *Witkin Cal. Proc. Appeal* § 783

[§ 783] By the Court Opinion.

(1) *Nature of "Per Curiam" or "By the Court" Opinion.* Most appellate opinions are signed by the justices who wrote them, and in the published version the name of the author is stated at the beginning, with the names of the justices concurring or dissenting stated at the end. Some opinions, however, are "Per Curiam," or "By the Court," with the name of the author undisclosed. California does not use the term "Per Curiam," and the opinions are labeled "The Court" (not "By the Court"). The current California practice, while not naming an author, does list the names of the participating justices in a footnote: A decision by opinion must name the participating justices, including the author of the majority opinion and of any concurring or dissenting opinion, or "the justices participating in a 'by the court' opinion." (C.R.C., Rule 8.264(a)(2).)

(2) *Memorandum Opinions.* The most common unsigned opinions are Memorandum Opinions: terse, summary dispositions, often originating in staff recommendations, and without an "author" in the accepted sense. (See *infra*, §788 et seq.)

(3) *Full-Scale Opinions.* In some situations, it seems proper and desirable to issue a full-scale opinion without designating the author; e.g., in attorney disciplinary proceedings or applications for admission to practice (see *Siegel v. Committee of Bar Examiners* (1973) 10 C.3d 156, 157, 110 C.R. 15, 514 P.2d 967; *In re Wright* (1973) 10 C.3d 374, 375, 110 C.R. 348, 515 P.2d 292), or judicial disciplinary proceedings (see *Geiler v. Commission on Judicial Qualifications* (1973) 10 C.3d 270, 274, 110 C.R. 201, 515 P.2d 1; *McCartney v. Commission on Judicial Qualifications* (1974) 12 C.3d 512, 517, 116 C.R. 260, 263, 526 P.2d 268).

In other situations in which the case would ordinarily be decided with an opinion by a disclosed author and concurring justices, intense public and partisan interest in the outcome, or the difficulty of reaching agreement on the final draft of an opinion may make anonymity the only way to achieve unanimity. Illustrations are numerous:

Gion v. Santa Cruz (1970) 2 C.3d 29, 31, 84 C.R. 162, 465 P.2d 50 [case of first impression on implied dedication of beach lands based on long-continued public use].

Englund v. Chavez (1972) 8 C.3d 572, 573, 105 C.R. 521, 504 P.2d 457 [labor case of first impression involving statute prohibiting jurisdictional strikes and issue of employer-dominated union].

Mexican-Amer. Political Assn. v. Brown (1973) 8 C.3d 733, 734, 106 C.R. 12, 505 P.2d 204 [issue whether giving incumbents first place on ballot results in unconstitutional preference].

Haman v. Humboldt (1972) 8 C.3d 922, 923, 106 C.R. 617, 506 P.2d 993 [tax on fishing boats registered out of state held unconstitutional].

Adcock v. Board of Education (1973) 10 C.3d 60, 61, 109 C.R. 676, 513 P.2d 900 [constitutional rights of teachers; review of disciplinary order of transfer to another school].

Horn v. General Motors Corp. (1976) 17 C.3d 359, 361, 131 C.R. 78, 551 P.2d 398 [majority opinion unsigned, dissenting opinion by named justice and another concurring in dissent].

Weekes v. Oakland (1978) 21 C.3d 386, 389, 146 C.R. 558, 579 P.2d 449 [majority opinion unsigned, concurring and dissenting opinions by named justices].

Stanton v. Panish (1980) 28 C.3d 107, 120, 167 C.R. 584, 615 P.2d 1372 [interpretation of constitutional provision on appointment of judge when vacancy occurs; majority opinion unsigned, one dissenting opinion on merits, another on merits and also criticizing practice of deciding important issues anonymously].

De Lancie v. Superior Court (1982) 31 C.3d 865, 866, 183 C.R. 866, 647 P.2d 142 [class action challenging surveillance practices in county jail; majority opinion unsigned, one signed concurring opinion and two signed dissenting opinions].

Morris v. Municipal Court (1982) 32 C.3d 553, 554, 186 C.R. 494, 652 P.2d 51 [ordinance banning nude entertainment was unconstitutionally overbroad; majority opinion unsigned, one signed concurring opinion, one dissenting opinion signed].

Seaman's Direct Buying Service v. Standard Oil Co. (1984) 36 C.3d 752, 753, 206 C.R. 354, 686 P.2d 1158 [majority opinion unsigned; one opinion concurring and dissenting].

In re Michael L. (1985) 39 C.3d 81, 82, 216 C.R. 140, 702 P.2d 222 [effect of erasure of videotape that enabled witnesses to identify robbery suspect; majority opinion unsigned, concurring and dissenting opinions by named justices].

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c. Adoption of Another Opinion.

1. Adoption of Court of Appeal Opinion.

9 Witkin Cal. Proc. Appeal § 784

[§ 784] Adoption of Court of Appeal Opinion.

Under the former law on hearing granted (now review granted; see *infra*, §913), the Supreme Court, after granting a hearing, sometimes concluded that both the decision and the opinion of the Court of Appeal were satisfactory, and adopted that in whole or in part. The typical method was to use brackets for deletions and insertions, eliminating quotation marks. (See *People v. Reynoso* (1966) 64 C.2d 432, 433, 436, 50 C.R. 468, 412 P.2d 812 ["On further examination of the record, we adopt the opinion of that court ... , with such omissions and additions as hereinafter appear, as and for the opinion of this court. As modified it reads:"]; *Siegal v. Superior Court* (1968) 68 C.2d 97, 98, 65 C.R. 311, 436 P.2d 311 [adoption in full without changes]; *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 517, footnote 3, 67 C.R. 761, 439 P.2d 889 [describing practice: brackets without enclosing material indicate deletions, brackets enclosing material are insertions or additions by Supreme Court]; *McCorkle v. Los Angeles* (1969) 70 C.2d 252, 255, footnote 2, 74 C.R. 389, 449 P.2d 453; *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A. G.* (1970) 3 C.3d 434, 440, footnote 1, 91 C.R. 6, 476 P.2d 406; *Zeilenga v. Nelson* (1971) 4 C.3d 716, 719, *footnote, 94 C.R. 602, 484 P.2d 578; *Bozung v. Local Agency Formation Com.* (1975) 13 C.3d 263, 267, 118 C.R. 249, 529 P.2d 1017; *Liodas v. Sahadi* (1977) 19 C.3d 278, 282, 137 C.R. 635, 562 P.2d 316; *In re Perrone C.* (1979) 26 C.3d 49, 52, 160 C.R. 704, 603 P.2d 1300; *Commercial Union Assur. Cos. v. Safeway Stores* (1980) 26 C.3d 912, 915, 164 C.R. 709, 610 P.2d 1038; *Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 232, 185 C.R. 280, 649 P.2d 922 [partial adoption]; *In re Gandolfo* (1984) 36 C.3d 889, 890, 206 C.R. 149, 686 P.2d 669 [partial adoption].)

In *People v. Ford* (1981) 30 C.3d 209, 178 C.R. 196, 635 P.2d 1176, the adoption was by an incorporation by reference of a portion of the Court of Appeal opinion. The Supreme Court decided the main issue on appeal, added that defendant's remaining contentions presented no new and important issue of law and were correctly resolved by the Court of Appeal, and then said: "For the reasons stated by the Court of Appeal, we therefore hold each of these contentions to be without merit." (30 C.3d 215.) The following explanation of this unusual procedure was offered:

"This disposition, which in effect incorporates by reference a portion of the Court of Appeal opinion, does not contravene our well-settled rule that an order granting a hearing and transferring a cause to this court operates to nullify the opinion and decision of the Court of Appeal. As we explained in a leading case on the subject, '*without some further*

express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written.' ... It is in the exercise of that power of express 'approval or adoption' that in appropriate cases we have adopted as the opinion of the court all or part of a superseded Court of Appeal opinion ... , or have adopted without republication portions of such an opinion that resolve contentions presenting no new and important question of law." (30 C.3d 216.)

The court added that the Court of Appeal opinion, though not published, is available in the records of both the *Supreme Court and Court of Appeal*. (30 C.3d 216.) The Chief Justice, however, objected to alluding to a "nonexistent Court of Appeal opinion" on the ground that the public, and future litigants, will not know what the issues were and how they were decided. (30 C.3d 219.)

The practice of adopting a Court of Appeal opinion is not confined to the former law on hearing granted; it continues under the present system of review granted. (See *O'Hare v. Superior Court* (1987) 43 C.3d 86, 90, footnote, 233 C.R. 332, 729 P.2d 766 ["Brackets together, in this manner [] *without enclosing material*, are used to indicate deletions from the opinion of the Court of Appeal; brackets *enclosing material* ... are, unless otherwise indicated, used to denote our insertions or additions"]; *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 C.4th 1126, 22 C.R.2d 504, 857 P.2d 325 [same].)

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2. Other Adoptions.

9 *Witkin Cal. Proc. Appeal* § 785

[§ 785] Other Adoptions.

(1) *Trial Judge's Opinion*. Occasionally, the Court of Appeal will adopt a trial judge's opinion in whole or in part. (For illustrations, see *supra*, §352.)

(2) *Appellate Division Opinion*. The Court of Appeal may, after transferring a case from the appellate division of the superior court under C.R.C, Rule 8.1005(a)(1) (*infra*, §1022), adopt the appellate division opinion. (See *Deyo v. Kilbourne* (1978) 84 C.A.3d 771, 777, 149 C.R. 499.)

(3) *Federal Court Opinion*. An unusual step was taken in *Paddleford v. Biscay* (1971) 22 C.A.3d 139, 99 C.R. 220: The prior judgment of a federal district court on the same controverted issues was followed, and the federal court's opinion was adopted in great part as the opinion of the Court of Appeal. (22 C.A.3d 142.) (See *KFC Western v. Meghrig* (1994) 23 C.A.4th 1167, 1173, 28 C.R.2d 676.)

(4) *Administrative Judge's Opinion*. An administrative judge's opinion on an issue of workers' compensation was adopted in *Permanente Med. Group v. Work. Comp. App. Bd.* (1977) 69 C.A.3d 770, 773, 138 C.R. 373.

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d. Short Opinions.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 786

[§ 786] In General.

(1) *Criticisms of Length.* In the early case of *Holmes v. Rogers* (1859) 13 C. 191, the Supreme Court said, in denying a petition for rehearing: "An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and of the principal reasons which have led us to them. If we were to undertake to follow the elaborate arguments on both sides, and then in addition, to give our own views, the extent of our labors may be estimated by the fact, that in this case, not fewer, probably, than one hundred pages of printed matter have been employed in the argument." (13 C. 202.)

Many commentators, on and off the bench, have expressed similar views, and have strongly criticized lengthy recitals of facts and extended discussion of issues resulting in opinions of unnecessary size. (See, e.g., *People v. Groves* (1935) 9 C.A.2d 317, 323, 49 P.2d 888, 50 P.2d 813; *Koeberle v. Hotchkiss* (1935) 8 C.A.2d 634, 638, 641, 48 P.2d 104; Witkin, *Manual on Appellate Court Opinions*, §125.)

(2) *Proposals for Reform.* "The way to reduce the length of opinions without sacrificing clarity is to include only such factual recitals as are necessary to pose and decide the legal questions; avoid the quotation of pleadings, testimony, documents, statutes, court decisions and text materials except where a brief reference or resume will not suffice; omit the multiple citation of authority except where it is important to show the continuity, weight or trend of decisional law; avoid the explanation and documentation of long-standing legal principles; hold the opinion on the track of the central questions presented, resisting all invitations to explore inconsequential side issues and the temptation to engage in dictum." (Witkin, *Manual on Appellate Opinions*, §126, quoting A.B.A. Committee Report; see §127 on particular areas of improvement.)

(3) *Sufficient Short Opinions.* Illustrations of short opinions that meet all of the criteria of a full-scale opinion (see *infra*, §792) are not numerous but are instructive. (See, e.g., *Knoke v. Swan* (1935) 2 C.2d 630, 42 P.2d 1019; *McDonald v. Severy* (1936) 6 C.2d 629, 59 P.2d 98; *Swanson v. Siem* (1936) 7 C.2d 267, 60 P.2d 281; *Allied Eastern Financial v. Goheen Enterprises* (1968) 265 C.A.2d 131, 132, 71 C.R. 126; *Jansen v. Children's Hosp. Med. Center of East Bay* (1973) 31 C.A.3d 22, 106 C.R. 883; *Suter v. Leonard* (1975) 45 C.A.3d 744, 120 C.R. 110; *United Nuclear*

Corp. v. Superior Court (1980) 113 C.A.3d 359, 169 C.R. 827.)

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2. Issues Not Requiring Discussion.

9 *Witkin Cal. Proc. Appeal* § 787

[§ 787] Issues Not Requiring Discussion.

A full-scale opinion may cover one or more controlling issues in detail, and dispose of others by the simple statement that they do not require discussion. (See *People v. Laursen* (1972) 8 C.3d 192, 205, 104 C.R. 425, 501 P.2d 1145 ["Defendant's remaining contentions are either not cognizable on appeal for failure to have preserved them or, after our careful examination of the record, deemed to be so lacking in merit that they are not deserving of any discussion"]; *Diaz v. Kay-Dix Ranch* (1970) 9 C.A.3d 588, 599, 88 C.R. 443 [listing a number of defendants' contentions and adding: "Since injunctive relief is denied for the reasons stated, we do not pass upon the additional contentions"].)

In *People v. Rojas* (1981) 118 C.A.3d 278, 173 C.R. 64, 174 C.R. 91, counsel for defendant-appellant, on petition for rehearing, contended that the failure to discuss certain issues raised in the brief was a violation of the constitutional requirement that decisions be supported by "reasons stated." In its opinion on denial of rehearing, the court quoted the text and *Holmes v. Rogers* (1859) 13 C. 191, and made the following additional observations:

(a) The constitutional provision "is designed to insure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicate that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected." (118 C.A.3d 288.)

(b) "We consider our primary role as an intermediate appellate court to review each case for 'correctness' of result and we interpret the phrase 'determines causes' to refer to disposing of the judgment or the order of the trial court and not to every corollary legal issue that may somehow be involved." (118 C.A.3d 289.)

(c) Two issues were extensively discussed; the remaining issues were either not raised in the trial court or lacked support in the record. The statement that these did not merit discussion "is an indication that we necessarily and carefully analyzed the contentions in order to reach that conclusion." And, having affirmed the judgment on the basis of the two issues that were of arguable merit, "we did not feel compelled by article VI, section 14, to lengthen the opinion by several additional paragraphs in order to say the same thing only in more words." (118 C.A.3d 290.)

(d) "We are cognizant of the fact that conscientious lawyers, in both civil and criminal cases, often feel obligated to present every imaginable issue. ... Oftentimes nonmeritorious contentions are included in briefs as 'make weight' to the main issues involved and the same point is often stated in differing ways and given separate headings in the appellant's brief. ... [W]e do not believe that article VI, section 14, requires that we must set forth and dispose of seriatim, each and every item which appellant's counsel chooses to characterize as an 'issue' in the case." (*118 C.A.3d 290.*)

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e. Memorandum Opinions.

1. Nature and Constitutional Validity.

9 *Witkin Cal. Proc. Appeal* § 788

[§ 788] Nature and Constitutional Validity.

(1) *Nature and Purpose.* The traditional and justifiable purpose of the carefully prepared full-scale judicial opinion is to serve as a precedent or guideline in later cases. But most appeals to intermediate appellate courts do not call for a discussion and statement of new principles or rules or new applications of old principles or rules. The unnecessary legal essay, requiring countless hours of precious judicial time, merely adds cumulative bulk to the digests, encyclopedias, and annotated codes.

A memorandum opinion makes no attempt to recite the facts or discuss all of the legal issues raised by the parties, but merely states briefly the reason or ground for the decision. Extended discussion is deemed unnecessary because the ground is so settled and familiar that the mere statement of it discloses the lack of merit in the appeal; e.g., the conflicting evidence rule or a controlling decision or statute. (See *infra*, §791.)

(2) *Constitutionality.* In a few instances, doubt was expressed whether the typical memorandum complies with the constitutional requirement of a written opinion (*supra*, §779). Thus, in *Vickter v. Pan Pac. Sales Corp.* (1952) 108 C.A.2d 601, 239 P.2d 463, the court, referring with apparent envy to the summary disposal of a frivolous appeal in *Pinkham v. Wemple* (1859) 12 C. 449, said: "But reviewing courts are required to state in writing the reasons for their decisions. And the right to petition the Supreme Court for hearing renders it necessary that the opinions of the District Court of Appeal state the case fully and fairly as to the controlling facts and the pertinent rules of law. Memorandum decisions, however desirable, would not meet the requirements of the present system." (108 C.A.2d 603.)

Most authorities agree, however, that the memorandum, though brief and devoid of unnecessary factual and legal detail, is a written statement of the reason for the decision within the meaning of the constitutional provisions. (See *infra*, §789 et seq.)

(3) *Types of Memorandum Opinions.* There are no uniform requirements of form or content. Some judges use prepared forms; others reject the stereotype and compose summary statements as needed; some set forth the appellant's contentions and the conclusion; others omit the contentions and give only the conclusion; and some recite the operative

facts in concise form and briefly state the applicable law, while others state the question in the abstract and give the legal answer to it. (See Witkin, Manual on Appellate Court Opinions, §§142, 143.)

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2. Appellate Judges' Recommendation.

9 Witkin Cal. Proc. Appeal § 789

[§ 789] Appellate Judges' Recommendation.

In a 1969 workshop, the judges of the California Courts of Appeal took note of the ominously increasing appellate caseload and made a number of recommendations for handling it. The heart of the program was the proposed creation of an expert staff of research attorneys to screen out obviously meritless appeals, for the court to dispose of by memorandum opinions. The following excerpts describe both the objectives and contemplated implementation:

"1. An increase in dispositions by the Courts of Appeal is essential to match the great increase in filings. This increase must be achieved without loss of any protection to the rights of litigants, without any diminution in the quality of the published opinions of the Courts of Appeal and, above all, without any dilution of judicial responsibility in the decision-making process."

"2. One means of increasing dispositions is the qualitative segregation of cases in advance of their calendaring. Then, by one of several procedures, Courts of Appeal can avoid using substantial amounts of judicial time upon cases that do not warrant such an expenditure of judicial effort."

"6. Judicial time should be conserved for cases that involve substantial issues. Many appeals raise no substantial legal issues and the present system of writing a full opinion in all of these cases is not an optimum use of judicial time. Such cases should be disposed of by procedures that will enable the Courts of Appeal to devote more of their time to the cases that involve substantial issues, many of which are now being unduly delayed."

"7. Cases that raise no substantial issues should be disposed of by memorandum opinions. These cases require no detailed exposition of the facts or law and only a brief statement of the reasons for the decision. Typical reasons might include: the applicability of a controlling statute which involves no substantial problem of interpretation, a controlling decision which does not require reexamination or restatement, and the substantial evidence rule when the only issues are factual issues. Such memorandum opinions would satisfy the California constitutional requirement (Art. VI, Sec. 14) that decisions of the Courts of Appeal shall be in writing with reasons stated."

"8. Decisions by memorandum opinion should generally be supported by a preliminary screening process and by early calendar memoranda giving an analysis of each case."

"9. The establishment of a satisfactory system for classifying cases for disposition by memorandum opinion will require a substantial increase in the Court of Appeal legal research staffs and every effort should be made to secure such an increase. Meanwhile, operating with their present staffs, the Courts of Appeal should try to identify cases that can be disposed of by memorandum opinions."

"10. The Judicial Council should review the California Rules of Court ... to determine whether amendments are needed to facilitate the use of memorandum opinions and whether a standard of judicial administration should be adopted concerning the use of such opinions."

"11. The additional research attorneys authorized for the Courts of Appeal should be organized as a central research staff for each appellate district."

"12. The central research staff should be used for prehearing research under the immediate supervision of a chief research attorney and under the overall supervision of an administrative judge or the Presiding Justice of a court of appeal that has no administrative judge."

"13. A prehearing calendar memorandum should be prepared on each ready case well in advance of its calendaring. The prehearing calendar memorandum should include:"

"a. A concise resume of the facts of the case."

"b. A statement of the issues presented by the appeal."

"c. The argument of the parties on the issues."

"d. Verification of the accuracy of the parties' statements of fact by reference to the record and verification of the applicability of the legal authorities relied upon."

"e. An analysis of the issues and the applicable law."

"f. A list of any matters that might be resolved by an appropriate inquiry at oral argument."

"g. A recommendation on whether a full or memorandum opinion is necessary to dispose of the case."

"h. If a memorandum opinion is recommended, a draft shall be included for the court's consideration."

"14. The salaries of research attorneys must be set at competitive levels that are sufficient not only to attract the ablest attorneys, but to permit the Courts of Appeal to retain them on a career basis. The Judicial Council should undertake a survey of the salary levels necessary to attract and retain the best qualified research attorneys for career positions."

"15. A program should be provided under the sponsorship of the Judicial Council for the training of research attorneys. As part of this training program a staff manual should be developed."

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3. Judicial Council Standard.

9 Witkin Cal. Proc. Appeal § 790

[§ 790] Judicial Council Standard.

The Judicial Council promptly followed the judges' recommendations (see *supra*, §789) by adopting a Standard of Judicial Administration. The relevant information is now Standard 8.1, which reads as follows:

"The Courts of Appeal should dispose of causes that raise no substantial issues of law or fact by memorandum or other abbreviated form of opinion. Such causes could include:"

"(1) An appeal that is determined by a controlling statute which is not challenged for unconstitutionality and does not present any substantial question of interpretation or application."

"(2) An appeal that is determined by a controlling decision which does not require a reexamination or restatement of its principles or rules."

"(3) An appeal raising factual issues that are determined by the substantial evidence rule."

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4. Cases Appropriate for Memorandum Disposition.

9 *Witkin Cal. Proc. Appeal* § 791

[§ 791] Cases Appropriate for Memorandum Disposition.

Appellate courts have used the memorandum form in a number of situations (see Witkin, *Manual on Appellate Court Opinions*, §136 et seq.).

(1) Where a controlling statute determines the appeal, and no substantial issue of constitutionality, interpretation, or application is raised. (See *United States v. Marshall & Ilsley Bank Stock Corp.* (1967) 387 U.S. 238, 87 S.Ct. 1706, 18 L.Ed.2d 743.)

(2) Where a controlling decision determines the appeal, and the decision is not challenged for any infirmity that calls for a reexamination of the rule or for a definitive restatement of it. (See *Nevada v. Superior Court* (1974) 10 C.3d 663, 111 C.R. 568, 517 P.2d 832; *Music Plus v. Baker* (1981) 125 C.A.3d 819, 178 C.R. 415.)

(3) Where the only issues involved are factual and the evidence is in substantial conflict, the ground of the decision is that the determination of the jury or trial judge must be accepted under the substantial evidence rule. (See *People v. Sims* (1962) 201 C.A.2d 876, 19 C.R. 786.)

(4) Where the appeal is decided on the authority of a companion case. (See *People v. Seals* (1970) 1 C.3d 574, 82 C.R. 873, 462 P.2d 993; *Cline v. Credit Bureau of Santa Clara Valley* (1970) 1 C.3d 908, 83 C.R. 669, 464 P.2d 125; *Shell Oil Co. v. Superior Court* (1975) 50 C.A.3d 489, 123 C.R. 307.)

(5) Where the decision is in compliance with a directive of the United States Supreme Court. (See *Rios v. Cozens* (1973) 9 C.3d 454, 107 C.R. 784, 509 P.2d 696; *People v. Robbins* (1981) 125 C.A.3d 818, 178 C.R. 672.)

(6) Where the respondent has confessed error and summary reversal is proper. (See *Clay v. Clay* (1937) 19 C.A.2d 589, 65 P.2d 1363; *Morales v. Ingels* (1937) 23 C.A.2d 53, 72 P.2d 172.)

(7) Where the appeal is not maintainable, e.g., where the appellant lacks standing to appeal, the appeal is not properly perfected, or the issues are moot. (See *People v. Superior Court (Lynch)* (1970) 1 C.3d 910, 83 C.R. 670, 464

P.2d 126; Ramirez v. Brown (1974) 12 C.3d 912, 117 C.R. 562, 528 P.2d 378.)

(8) Where the opinion is unpublished. (See *People v. Garcia (2002) 97 C.A.4th 847, 118 C.R.2d 662*, citing the text [exhaustive discussion of why memorandum opinions are generally desirable in unpublished opinions].)

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5. Content of Opinion.

a. Guidelines and Models.

9 *Witkin Cal. Proc. Appeal* § 792

[§ 792] Guidelines and Models.

(1) *In General.* Neither in reported decisions nor in texts can one find authoritative guidelines for the preparation of good opinions. This is in part due to the multiple functions of a judicial opinion (see *supra*, §782), but there is also a feeling that directives tend to substitute stereotyped and formal statements for original thinking and expression. Nevertheless, a few commentators have offered useful suggestions on the structure and content of full-scale opinions, and on the mechanics of drafting them. (See *Harris v. Superior Court* (1992) 3 C.A.4th 661, 665, 4 C.R.2d 564 [observations on necessity for concise and clear opinions]; Aldisert, Opinion Writing §1.1; Mellinkoff, The Language of the Law; 1 Wigmore (Tillers Rev.) §8a; Witkin, Manual on Appellate Court Opinions, Chap. IV (mechanics of drafting), Chap. V (content and form), Chap. VII (style); 49 Cal. L. Rev. 831; 105 Harv. L. Rev. 741 [Commentary on Analogical Reasoning]; 107 Harv. L. Rev. 1795 [review of Solan, The Language of Judges]; 61 So. Cal. L. Rev. 1357; 33 Stanf. L. Rev. 773 [State Supreme Courts: A Century of Style and Citation]; 33 Stanf. L. Rev. 951 [Effect of Supreme Court Structure on State Supreme Court Opinions]; 29 U.C.L.A. L. Rev. 833 [The Role of Analogy in Legal Reasoning]; 42 U.C.L.A. L. Rev. 651 ["prediction" approach in resolving issues in which court lacks final authority].)

Wigmore had this to say: "Of course, there can be no one and exclusive style, appropriate for judicial opinion. An opinion may begin by rehearsing the facts, or it may begin by stating the question of law; it may notice the arguments pro and con, or it may merely state the conclusions reached; it may pay attention to precedents distinguished, or it may not; and so on. But there is one thing that it must do, viz., it must state plainly the rule upon which the decision proceeds. This is required, in theory, because the Court's function is to declare the law; and in practice, because the Bar is entitled to know exactly what rule it can follow in advising clients and in trying cases." (Wigmore (Tillers Rev.) §8b, p. 624.)

(2) *Outlines and Topical Headings.* The preparation of an outline listing the steps in the proposed opinion in a logical and understandable sequence is a common practice. In addition, many justices include the topical headings of the outline in the final draft of the opinion, as an aid to the reader's comprehension, briefing, or excerpting. (See Witkin, Manual on Appellate Court Opinions, §§43, 44, citing opinions illustrating various types of outlines.)

(3) *Illustrative Opinions.* The appellate process does not lend itself to form books and models (except for

memorandum opinions; see *supra*, §791). But there are tested methods of handling certain kinds of problems and issues, and good ways to organize the materials; and opinions illustrating good techniques are available in abundance and can be extremely useful to justices seeking to improve their own methods and style. (See Witkin, *Manual on Appellate Court Opinions*, §53, and illustrations in Chapters V, VI, and VII.)

West's Key Number Digest, Appeal and Error 1182; Courts 106

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b. Elements of Full-Scale Opinion.

9 *Witkin Cal. Proc. Appeal* § 793

[§ 793] Elements of Full-Scale Opinion.

(1) *Traditional Five Parts.* "The ordinary appellate opinion contains statements covering the following matters: (a) the nature of the action and how it reached the appellate court, (b) the questions to be decided, (c) the essential facts, (d) a determination of the questions, and (e) the disposition of the case." (Witkin, *Manual on Appellate Court Opinions*, §54, quoting A.B.A. Committee Report.)

The Manual deals with each of the five parts in detail, with commentary and illustrations:

- (a) Nature of the action. (See *infra*, this section.)
- (b) Questions to be decided. (See *infra*, this section.)
- (c) The essential facts. (See Manual, §§61, 62.)
- (d) Determination of the questions. (See Manual, §73 et seq.)
- (e) Disposition of the case. (See Manual, §83.)

(2) *Orientation Statement.* The traditional form of the first of the five parts is a statement of the nature of the action below, the parties, and the judgment, frequently coupled with the second part (the questions to be decided on appeal). (See Witkin, *Manual on Appellate Court Opinions*, §§55, 56.) A preview of the opinion, which may cover the usual items (action, parties, and issues), always adds one element: the conclusion the opinion will reach after principles and authorities have been discussed. This advance statement of the conclusion may be extremely useful to associates on the bench who read the draft and to busy readers of the final opinion. But it is only a guide to intelligent reading, not a summary of the holding that properly comes at the end of the opinion; and in drafting, a careful writer will complete the opinion with its holding before inserting the conclusion at the beginning. (See Witkin, *Manual on Appellate Court Opinions*, §57.)

Many opinions illustrate this type of introductory statement:

(a) *Statement of legal issue and answer.* (See *Keeler v. Superior Court* (1970) 2 C.3d 619, 87 C.R. 481, 470 P.2d 617; *Serrano v. Priest* (1971) 5 C.3d 584, 96 C.R. 601, 487 P.2d 1241; *MacFadden v. Walker* (1971) 5 C.3d 809, 97 C.R. 537, 488 P.2d 1353; *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 119 C.R. 858, 532 P.2d 1226; Manual, §58.)

(b) *Statement combining facts and legal issues.* (See *Navrides v. Zurich Ins. Co.* (1971) 5 C.3d 698, 97 C.R. 309, 488 P.2d 637; *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1; *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 C.3d 773, 108 C.R. 828, 511 P.2d 1180; Manual, §59.)

(c) *Slanted or policy statement* (laying foundation for favorable reception of holding). (See *Dillon v. Legg* (1968) 68 C.2d 728, 69 C.R. 72, 441 P.2d 912; *Bareno v. Employers Life Ins. Co.* (1972) 7 C.3d 875, 103 C.R. 865, 500 P.2d 889; *Lorenzana v. Superior Court* (1973) 9 C.3d 626, 108 C.R. 585, 511 P.2d 33; Manual, §60.)

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5. Content of Opinion.

c. Authorities.

1. Cases and Statutes.

9 Witkin Cal. Proc. Appeal § 794

[§ 794] Cases and Statutes.

The use of cases as precedents is familiar to all lawyers and judges, and illustrations of various methods of handling them are available in innumerable opinions. (See Witkin, *Manual on Appellate Court Opinions*, §§91, 92 [following precedent]; §93 et seq. [reasons for departing from precedent]; §74 [analysis of cases where authorities are in conflict]; §75 [rejecting, explaining, limiting, or following dicta]; §98 [analysis of plurality opinions]; and see supra, §§509, 510 [what constitutes rule of decision]; §§511, 512 [dicta and alternative reasons for decision]; §513 et seq. [special reasons for following precedent]; §519 et seq. [reasons for departing from precedent]; §540 et seq. [forms and methods of overruling prior decisions].)

Less familiar is the use of statutes as precedents. "Cases may arise in which no statute is even in issue, and yet a statute may exist that would be of the greatest relevance as a basis for judicial analogy, and that a judge should study as closely as any judicial precedent if he is to make a rational decision." (Witkin, *Manual on Appellate Court Opinions*, §66, quoting Traynor article.) (See supra, §485.)

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2. Treatises, Restatements, and Law Reviews.

9 *Witkin Cal. Proc. Appeal* § 795

[§ 795] Treatises, Restatements, and Law Reviews.

Early opinions of high courts tended to confine citation to strictly conventional legal sources, i.e., cases and a few legal treatises. Later, the legal encyclopedias, such as *Corpus Juris* and *American Jurisprudence*, were frequently cited. Today, references to the American Law Institute's Restatements, textbooks on a wide variety of subjects, and law review articles and notes are commonly found in well-considered opinions. (See Witkin, *Manual on Appellate Court Opinions*, §§58, 69, 70; 50 *So. Cal. L. Rev.* 381 [study of citation practice of California Supreme Court in 1950, 1960, and 1970]; 6 *Stanf. L. Rev.* 613 [study of authorities cited by California Supreme Court in 1950].) The following are illustrative:

(1) *Restatements*. (See *Jaffe v. Stone* (1941) 18 C.2d 146, 156, 114 P.2d 335; *Drennan v. Star Paving Co.* (1958) 51 C.2d 409, 413, 333 P.2d 757; *Navrides v. Zurich Ins. Co.* (1971) 5 C.3d 698, 711, 712, 97 C.R. 309, 488 P.2d 637; *Botsford v. Haskins & Sells* (1978) 81 C.A.3d 780, 784, 146 C.R. 752.)

(2) *Treatises, Textbooks, and Practice Works*. (See *Dillon v. Legg* (1968) 68 C.2d 728, 730, 734, 739, 740, 741, 745, 69 C.R. 72, 441 P.2d 912 [Prosser, Fleming, Harper & James, on tort liability for emotional distress]; *Willard v. First Church of Christ, Scientist* (1972) 7 C.3d 473, 476, 102 C.R. 739, 498 P.2d 987 [Tiffany, Casner, Powell & Rohan, on property]; *Green v. Superior Court* (1974) 10 C.3d 616, 624, 111 C.R. 704, 517 P.2d 1168 [Casner, Powell & Rohan, and Williston, on lease subject to contract principles]; *Smith v. Lewis* (1975) 13 C.3d 349, 356, 118 C.R. 621, 530 P.2d 589 [local California practice works]; *Wong v. Beneficial Savings & Loan Assn.* (1976) 56 C.A.3d 286, 292, 128 C.R. 338 [C.E.B. practice work on real estate secured transactions].)

(3) *Law Review Articles and Notes*. (See *Earl v. Saks & Co.* (1951) 36 C.2d 602, 611, 226 P.2d 340; *Green v. Superior Court*, *supra*, 10 C.3d 623, footnote 7; *Daly v. General Motors Corp.* (1978) 20 C.3d 725, 740, 144 C.R. 380, 575 P.2d 1162; *Smalley v. Baker* (1968) 262 C.A.2d 824, 832, 69 C.R. 521; *Elam v. College Park Hosp.* (1982) 132 C.A.3d 332, 338, 345, 183 C.R. 156.)

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3. Other Authoritative Sources.

9 *Witkin Cal. Proc. Appeal* § 796

[§ 796] Other Authoritative Sources.

Various official studies and reports and nonlegal materials have been cited. (See Witkin, *Manual on Appellate Court Opinions*, §§71, 72.) The following are illustrations:

(1) *Code Commissioners' Notes to Original California Codes*. (See *Rader v. Thrasher* (1962) 57 C.2d 244, 251, 18 C.R. 736, 368 P.2d 360.)

(2) *California Law Revision Commission Reports*. (See *Runyan v. Pacific Air Industries* (1970) 2 C.3d 304, 313, 85 C.R. 138, 466 P.2d 682; *Volkswagen Pac. v. Los Angeles* (1972) 7 C.3d 48, 62, 63, 101 C.R. 869, 496 P.2d 1237; *Signal Oil & Gas Co. v. Bradbury* (1960) 183 C.A.2d 40, 49, 6 C.R. 736; *Kisling v. Otani* (1962) 201 C.A.2d 62, 69, 19 C.R. 913; *Chavez v. Sprague* (1962) 209 C.A.2d 101, 107, 25 C.R. 603; *Paularena v. Superior Court* (1965) 231 C.A.2d 906, 913, 42 C.R. 366; *Hertz Corp. v. Pippin* (1974) 38 C.A.3d 796, 799, 113 C.R. 698; *Heimberger v. Fairfield* (1975) 44 C.A.3d 711, 714, 117 C.R. 482.)

(3) *Legislative Reports*. (See *Jolicoeur v. Mihaly* (1971) 5 C.3d 565, 573, 96 C.R. 697, 488 P.2d 1 [U.S. Senate Report on Twenty Sixth Amendment]; *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 601, footnote 7, 146 C.R. 182, 578 P.2d 899 [State Bar's explanation of bill, adopted by Senate Judiciary Committee]; *Rice v. Alcoholic Bev. Control App. Bd.* (1978) 21 C.3d 431, 455, 146 C.R. 585, 579 P.2d 476 [California Senate Committee Report on effect of resale price maintenance law]; *Taylor v. Superior Court* (1979) 24 C.3d 890, 898, 157 C.R. 693, 598 P.2d 854 [Secretary of HEW report to Congress, and Comptroller General's report to Congress]; *Anaheim Redevelopment Agency v. Dusek* (1987) 193 C.A.3d 249, 255, 257, 239 C.R. 319 [legislative committee comments on sections of Eminent Domain Law].)

(4) *Judicial Council Reports*. (See *Anton v. San Antonio Community Hosp.* (1977) 19 C.3d 802, 817, 140 C.R. 442, 567 P.2d 1162; *Hohreiter v. Garrison* (1947) 81 C.A.2d 384, 396, 397, 184 P.2d 323; *National Life of Florida Corp. v. Superior Court* (1971) 21 C.A.3d 281, 287, footnote 3, 98 C.R. 435; *Titus v. Superior Court* (1972) 23 C.A.3d 792, 803, 100 C.R. 477.)

(5) *Attorney General's Opinions.* (See *Powell v. Department of Employ.* (1965) 63 C.2d 103, 108, 45 C.R. 136, 403 P.2d 392; *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 C.3d 945, 951, 95 C.R. 17, 484 P.2d 1361; *Raffaelli v. Committee of Bar Examiners* (1972) 7 C.3d 288, 303, 101 C.R. 896, 496 P.2d 1264; *Redevelopment Agency of San Bernardino v. San Bernardino* (1978) 21 C.3d 255, 259, 267, 145 C.R. 886, 578 P.2d 133; *Smith v. Municipal Court of Glendale Judicial Dist., Los Angeles County* (1959) 167 C.A.2d 534, 539, 334 P.2d 931; *Stark v. Alameda* (1960) 182 C.A.2d 20, 25, 5 C.R. 839; *Jaynes v. Stockton* (1961) 193 C.A.2d 47, 56, 14 C.R. 49; *People v. Smith* (1964) 231 C.A.2d 140, 144, 41 C.R. 661; *Cristmat v. Los Angeles* (1971) 15 C.A.3d 590, 595, 93 C.R. 325; *Worthington v. Unemp. Ins. App. Bd.* (1976) 64 C.A.3d 384, 388, 134 C.R. 507.)

(6) *Legislative Counsel's Digests.* (See *Maben v. Superior Court* (1967) 255 C.A.2d 708, 713, 63 C.R. 439.)

(7) *Commissioners' Notes to Uniform Laws Adopted in California.* (See *Smith v. Superior Court* (1977) 68 C.A.3d 457, 463, 137 C.R. 348.)

(8) *Legal Ethics Opinions of American Bar Association and Other Bar Associations.* (See *Crawford v. State Bar* (1960) 54 C.2d 659, 660, 7 C.R. 746, 355 P.2d 490.)

(9) *Other Official Studies and Reports.* (See *Morrison v. State Bd. of Education* (1969) 1 C.3d 214, 227, 231, 234, 235, 237, 82 C.R. 175, 461 P.2d 375; *In re William M.* (1970) 3 C.3d 16, 25, footnote 16, 89 C.R. 33, 473 P.2d 737; [Governor's Special Study Commission on Juvenile Justice]; *Sail'er Inn v. Kirby* (1971) 5 C.3d 1, 19, 95 C.R. 329, 485 P.2d 529 [President's Task Force Report on Women's Rights and Responsibilities]; *In re Waters of Long Valley Creek Stream System* (1979) 25 C.3d 339, 355, 356, 158 C.R. 350, 599 P.2d 656 [Governor's Commission to Review California Water Rights Law]; *Diaz v. Kay-Dix Ranch* (1970) 9 C.A.3d 588, 593, 88 C.R. 443 [studies of Mexican labor in United States, on issue of threat to American migratory farm worker].)

(10) *Medical, Scientific, and Other Scholarly Works.* (See *People v. Shirley* (1982) 31 C.3d 18, 56, 181 C.R. 243, 723 P.2d 1354 [scientific treatises and articles on hypnotically aided recall]; *Fellowship of Humanity v. Alameda* (1957) 153 C.A.2d 673, 690, 315 P.2d 394 [studies on meaning of "religious worship" to determine whether organization qualified for tax exemption]; *Whitney v. Whitney* (1959) 169 C.A.2d 209, 213, 337 P.2d 219 [length of pregnancy, on issue of illegitimacy].)

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d. Material Outside Main Text of Opinion.

1. Footnotes.

9 *Witkin Cal. Proc. Appeal* § 797

[§ 797] Footnotes.

Footnotes are commonly used to relieve the text of the opinion of some of the authorities, factual details, or commentary. (See Witkin, *Manual on Appellate Court Opinions*, §§45, 46.) However, a footnote is as much a part of the opinion, and has the same force and effect, as matter in the body. (See *Melancon v. Walt Disney Productions* (1954) 127 C.A.2d 213, 214, footnote 2, 273 P.2d 560; *Whittier Union High School Dist. v. Superior Court* (1977) 66 C.A.3d 504, 508, 136 C.R. 86.) And the practice of stating holdings or dicta on points of law in footnotes is well established. (See *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 185, footnote 4, 23 C.R. 375, 373 P.2d 439; *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 3, 84 C.R. 173, 465 P.2d 61; *Cronin v. J. B. E. Olson Corp.* (1972) 8 C.3d 121, 129, footnote 10, 104 C.R. 433, 501 P.2d 1153; *Guidi v. Superior Court* (1973) 10 C.3d 1, 17, 109 C.R. 684, 513 P.2d 908; *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 C.3d 665, 674, footnote 4, 111 C.R. 693, 517 P.2d 1157; *Bertero v. National General Corp.* (1974) 13 C.3d 43, 60, footnote 8, 118 C.R. 184, 529 P.2d 608; *San Diego Bldg. Contractors Assn. v. City Council of San Diego* (1974) 13 C.3d 205, 216, footnote 6, 118 C.R. 146, 529 P.2d 570; *Moran v. Superior Court* (1983) 35 C.3d 229, 234, 236, footnotes 5, 7, 197 C.R. 546, 673 P.2d 216.)

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d. Material Outside Main Text of Opinion.

2. Appendixes.

9 *Witkin Cal. Proc. Appeal* § 798

[§ 798] Appendixes.

An Appendix, placed at the end of the opinion, sometimes serves the same purpose as a footnote (see *supra*, §797), but it is used where the material is too bulky for a footnote. Illustrations are numerous:

People v. Collins (1968) 68 C.2d 319, 333, 66 C.R. 497, 438 P.2d 33 [excerpts from textbooks on mathematical probability statistics].

Carmel-by-the-Sea v. Young (1970) 2 C.3d 259, 273, 85 C.R. 1, 466 P.2d 225 [statute challenged as unconstitutional set forth in full].

Legislature v. Reinecke (1973) 10 C.3d 396, 408, 110 C.R. 718, 516 P.2d 6 [report of special masters on legislative reapportionment].

Los Angeles v. San Fernando (1975) 14 C.3d 199, 298, 123 C.R. 1, 537 P.2d 1250 [87-page opinion on water rights; appendix containing "certain footnotes which are unusually long or which contain factual data of interest to the parties but not necessary to an understanding of the opinion"].

Estate of Black (1982) 30 C.3d 880, 909, 181 C.R. 222, 641 P.2d 754 [holographic will].

Brosnahan v. Brown (1982) 32 C.3d 236, 300, 186 C.R. 30, 651 P.2d 274 [initiative statutes and constitutional amendment].

Gill v. De Sanz (1975) 52 C.A.3d 457, 463, 469, 125 C.R. 384 [draftsman's memorandum in support of interim attachment law, "the only extant extrinsic aid" to its interpretation; "[i]n view of the difficulty in locating this aid ... we reproduce it in full"].

Diaz v. Oakland Tribune (1983) 139 C.A.3d 118, 139, 188 C.R. 762 [newspaper article alleged to have invaded right of privacy].

Temple v. Velcro USA (1983) 148 C.A.3d 1090, 1096, 196 C.R. 531 [products liability action; manufacturer's warning against dangerous use of device].

Eastwood v. Superior Court (1983) 149 C.A.3d 409, 427, 428, 198 C.R. 342, 5 Cal. Proc. (5th), Pleading, §747 [newspaper article alleged to have invaded right of privacy].

Devlin v. Kearny Mesa AMC/Jeep/Renault (1984) 155 C.A.3d 381, 393, 202 C.R. 204 [listing of California cases awarding punitive damages, noting amounts and relationship to wealth].

Hulsey v. Elsinore Parachute Center (1985) 168 C.A.3d 333, 347, 348, 214 C.R. 194 [registration form for parachute jumping school and release of liability].

In re Marriage of Bergman (1985) 168 C.A.3d 742, 767, 768, 214 C.R. 661 [chart showing factors to be considered in determining community property interests in pension benefits].

Lawrence v. California (1985) 171 C.A.3d 242, 251, 253, 217 C.R. 200 [declarations of attorney and his secretary explaining why claim was filed against county, instead of state].

Estate of Brown (1985) 171 C.A.3d 1064, 1070, 1071, 218 C.R. 108 [will; letter explaining why testator's daughter was excluded].

Akers v. Kelley Co. (1985) 173 C.A.3d 633, 660, 661, 662, 219 C.R. 513 [products liability action; excerpts from manufacturer's manual for owners of adjustable dockboard].

People's Advocate v. Superior Court (1986) 181 C.A.3d 316, 334, 226 C.R. 640 [initiative legislative act, challenged in writ proceeding, set forth in its entirety].

Moylan v. Dykes (1986) 181 C.A.3d 561, 576, 226 C.R. 673 [claim of appurtenant easement, diagrams of property].

Elysian Heights Residents Assn. v. Los Angeles (1986) 182 C.A.3d 21, 35, 227 C.R. 226 [appellant's reply brief reproduced by dissenting justice in support of his views].

Fletcher v. San Jose Mercury News (1989) 216 C.A.3d 172, 193, 264 C.R. 699 [defamation suit against newspaper; series of articles reproduced].

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e. Elimination of Embarrassing Facts or Party's Name.

9 *Witkin Cal. Proc. Appeal* § 799

[§ 799] Elimination of Embarrassing Facts or Party's Name.

(1) *Embarrassing Facts*. Some cases deal with disagreeable or embarrassing acts and events in the lives of persons innocent of crime or other wrongdoing, which, if embodied in an opinion, would become a permanent record for anyone to see and republish. In most instances, the painful details are unnecessary to the determination of the cause, and there is a growing tendency to eliminate them from the opinions.

Family law litigation involving the former fault concept in divorce or rights of an illegitimate child was a familiar illustration. (See *Laugenour v. Fogg* (1942) 48 C.A.2d 848, 120 P.2d 690 [facts involved illegitimate child; sole legal issue considered in manner of certified question]; *Beksinski v. Beksinski* (1957) 151 C.A.2d 674, 676, 312 P.2d 268 [in divorce action, child custody awarded to husband for wife's misconduct; "This court will not recite that conduct in this opinion ... but will let it rest in the reporter's transcript in the files"].)

Defamation suits may call for the same restraint: "We will discuss the statements made about Thornton only to the extent that such discussion is absolutely necessary to our opinion. The entire record before us is replete with threats by everybody against everybody else to sue them on any theory which imaginative counsel can think of. There is no desire on the part of the court to act as an agent--albeit immune--who further publicizes a libel or slander and thereby adds grist to the parties' mills." (*Thornton v. Rhoden* (1966) 245 C.A.2d 80, 82, footnote 1, 53 C.R. 706.)

Elimination may not be possible, however, where the offensive language is involved in the issue. (See *Lindros v. Governing Bd. of Torrance Unified School Dist.* (1973) 9 C.3d 524, 528, 529, 108 C.R. 185, 510 P.2d 361 [review of school board's refusal to rehire English teacher who read to his students a short story he had written; full text of story, with some vulgar words, set forth in opinion].)

(2) *Name of Party*. In review of juvenile court orders concerning delinquent minors, the same protective object was accomplished by suppressing the name of the minor in both the title of the case and body of the opinion, and using initials instead. (See *In re M.G.S.* (1968) 267 C.A.2d 329, 340, footnote 4, 72 C.R. 808["Filing of an appeal under the initials of the minor is a logical extension of section 827 of the Welfare and Institutions Code providing for confidentiality of records of the juvenile court"]; cf. *In re H.L.R.* (1969) 269 C.A.2d 610, 620, footnote 11, 75 C.R. 308)

["The initials we use are a symbol only"].) More common is the use of a first name and first initial of the last name. (See *In re Gladys R.* (1970) 1 C.3d 855, 83 C.R. 671, 464 P.2d 127; *Jimmy H. v. Superior Court* (1970) 3 C.3d 709, 91 C.R. 600, 478 P.2d 32; *In re William F.* (1974) 11 C.3d 249, 113 C.R. 170, 520 P.2d 986.)

As explained in *T.N.G. v. Superior Court* (1971) 4 C.3d 767, 94 C.R. 813, 484 P.2d 981, either method may be appropriate: "To prevent the disclosure of the minor's identity in proceedings under the Juvenile Court Law, this court and the Courts of Appeal have generally used the juvenile's first name and the first initial of his last name in opinions and orders. ... Attorneys have similarly not mentioned a minor's last name in briefs and petitions. We have largely avoided the word 'anonymous' in the title of opinions because of the confusion that would result from a series of 'Anonymous' cases. Similarly, we have avoided the use of a juvenile's initials because of the possible confusion with the large number of agencies identified by their initials, e.g., C.Y.A., F.B.I., C.I.I., H.U.D., H.E.W., and O.P.D. In the present case, however, the peculiarly identifiable nature of the juvenile's first name requires that we depart from our preferred practice and use the juvenile's initials in the title of the opinion." (4 C.3d 770, footnote 1.)

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f. Use of Traditional Gender-Specific Terms.

9 *Witkin Cal. Proc. Appeal* § 800

[§ 800] Use of Traditional Gender-Specific Terms.

In *Seibert Sec. Services v. Superior Court* (1993) 18 C.A.4th 394, 22 C.R.2d 514, the majority of two justices and one dissenting justice engaged in a lively debate over the issue whether the "fireman's rule" (see 6 *Summary* (10th), *Torts*, §845) should now be called the "firefighter's rule" in order to eliminate the suggestion of gender bias.

The majority, although aware of the Legislature's employment of the neutral term "firefighter" in C.C. 1714.9, nevertheless justified retention of the original term: "At the risk of being thought deficient in sensitivity, we adhere to the traditional usage in part to render our opinion more readily accessible to electronic researchers not enlightened enough to program 'firefighter's rule' into their search requests, and in part because the term 'fireman's rule' has historic roots and remains widely used. ... We look forward to the day when society's acceptance of persons of both sexes in all occupations make technically gender-specific terminology moot." (18 C.A.4th 404, footnote 3.)

The dissenting justice strongly disagreed: "It seems to me that the real issue here is *not* whether one opines that the term 'firefighter' is currently acceptable, given the existing political and social climate, but rather, what *purpose* one believes is served by choosing to use that term rather than the term 'fireman.' " (18 C.A.4th 417.) "In my opinion, the purpose of using non-gender-specific language is to accurately acknowledge that the activity being described is not the exclusive domain of either gender. Undeniably, fire suppression activities are performed by women and men alike, not by firemen only." (18 C.A.4th 418.)

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g. Criticism of Judge.

9 *Witkin Cal. Proc. Appeal § 801*

[§ 801] Criticism of Judge.

In *People v. Pierce* (1995) 40 C.A.4th 1317, 47 C.R.2d 406, the case was remanded to a different judge for resentencing for drug violations. In criticizing the original judge, the court said: "Judge Jamar has repeatedly omitted to perform that fundamental duty in various contexts. We do not know if his conduct is intentional or negligent, but either way it is a basis for censure as a 'persistent failure or inability to perform the duties of office.' ... Short of a formal judicial disciplinary proceeding, which is not our bailiwick, we are compelled to increase our efforts to get Judge Jamar to comply with the sentencing laws by making good on our previous threat of remand for resentencing by a different judge and by publishing this opinion. A finding of harmless error would tell Judge Jamar that he can continue with impunity to ignore the sentencing rules. In the context of this case and Judge Jamar's sentencing history, that is the wrong message to send." (40 C.A.4th 1321.)

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5. Content of Opinion.

h. Suggestions to Others.

1. Suggestions of Legislative Action.

9 *Witkin Cal. Proc. Appeal* § 802

[§ 802] Suggestions of Legislative Action.

It is not uncommon for a court to add to its discussion of the law necessary to determination of the appeal a criticism of statutory gaps, outmoded rules, or social evils, with suggestions of legislative action. Many cases are illustrative:

Garfinkle v. Superior Court (1978) 21 C.3d 268, 283, footnote 22, 146 C.R. 208, 578 P.2d 925 [suggesting legislative changes in statutory notice requirements where trustor under deed of trust defaults].

People v. Wetmore (1978) 22 C.3d 318, 331, 149 C.R. 265, 583 P.2d 1308 [urging that Legislature reconsider wisdom of statutes providing for bifurcated trial where insanity defense is raised].

Stafford v. Russell (1962) 201 C.A.2d 719, 722, 20 C.R. 112 [suggested study of unreasonable burdens placed on courts by vexatious litigation].

In re Ronald S. (1977) 69 C.A.3d 866, 874, 138 C.R. 387 [criticizing provision of Juvenile Court Law, and urging that the Legislature choose between three possible approaches to subject].

Glaser v. Meyers (1982) 137 C.A.3d 770, 776, footnote 4, 187 C.R. 242 [calling attention to ambiguities in recently enacted statute].

Estate of Kime (1983) 144 C.A.3d 246, 265, 193 C.A.3d 718 [urging statutory revision to allow admission of testator's oral declarations in construction of will].

Curtis v. Los Angeles (1985) 172 C.A.3d 1243, 1253, 218 C.R. 772 [suggesting that Legislature amend statute to more precisely reflect its intent, as ascertained by the court].

People v. Landlords Professional Services (1986) 178 C.A.3d 68, 72, 223 C.R. 483, 7 Cal. Proc. (5th), Trial, §392 [recommending legislation to deal with "seemingly anomalous loophole in the law"].

Conservatorship of Smith (1986) 187 C.A.3d 903, 911, 232 C.R. 277 [concurring opinion suggesting that Legislature reexamine public policy toward mentally ill].

McCallum v. McCallum (1987) 190 C.A.3d 308, 315, footnote 4, 235 C.R. 396 [suggesting that conflict resulting from ambiguity in provisions of Sister State Money Judgment Act and Uniform Reciprocal Enforcement of Support Act calls for corrective legislation rather than Supreme Court review].

Coon v. Joseph (1987) 192 C.A.3d 1269, 1279, 237 C.R. 873 [concurring opinion suggesting that question of extending recovery for negligent infliction of emotional distress to nonmarital cohabitants was "matter of public policy demanding the attention of the Legislature"].

In re Danielle M. (1989) 215 C.A.3d 1267, 1272, 266 C.R. 352 [recommending that review of dependency proceedings be by writ petition rather than by appeal].

In re Marriage of Fini (1994) 26 C.A.4th 1033, 1040, 31 C.R.2d 749 [criticizing child support statutes for being so complex that no one, especially the affected parties, can understand them].

In re Tania R. (1995) 32 C.A.4th 447, 450, 38 C.R. 531 [recommending that review of dependency proceedings be by writ petition rather than by appeal].

In *Meritplan Ins. Co. v. Woollum* (1975) 52 C.A.3d 167, 123 C.R. 613, citing the text, the court said: "Our duty does not end with disposition of the case at bench. We have an obligation to call to the attention of the Legislature the existence of any large block of cases reaching the courts which statutory change could avoid without change in substantive rights. ... The case at bench is but one of a multitude philosophizing on the presence or absence of ambiguity by extrapolating from Supreme Court approach to similar situations. The need to do so is completely avoidable. Legislation specifying precise exclusions from policies of automobile insurance as a matter of law, unless there is a specific endorsement to the contrary, and requiring that the exclusions be written in statutorily designated language in large print upon the first page of the policy, will accomplish the desirable result. Consumers, as purchasers of insurance, will know what they are buying. Insurance carriers will be able to compute their risks actuarially without the incomputable risk of anticipating whether judicial minds will or will not find particular language ambiguous. The costs to the litigants and to the public will not, as they have undoubtedly done in the case at bench, exceed the amount potentially recoverable upon the policy." (52 C.A.3d 176.)

A similar view was expressed in *Gilbert v. Municipal Court* (1977) 73 C.A.3d 723, 140 C.R. 897: "It appears to us that the matter is of sufficient import to be of interest to the Legislature. This may seem to be a mote in the eye of the problem of judicial administration but the principle is important. Like Charles Dudley Warner's weather (in a quotation often attributed to Mark Twain), everyone talks about court reform yet little is done about it." (73 C.A.3d 733.)

Sometimes the suggestion is made to an administrative or other rule-making body. (See, e.g., *Johnson v. Work. Comp. App. Bd.* (1970) 2 C.3d 964, 974, 88 C.R. 202, 471 P.2d 1002 [recommending that Workers' Compensation Appeals Board adopt improved form for release of claims that notifies applicant of consequences in clear and nontechnical language]; *In re Stephen L.* (1984) 162 C.A.3d 257, 266, 208 C.R. 453 [concurring opinion, recommending that Judicial Council make rule changes, or take steps to obtain constitutional or statutory amendments, to reform procedures for review of juvenile court judgments]; *Hughey v. Hayward* (1994) 24 C.A.4th 206, 210, 30 C.R.2d 678 [urging Judicial Council to delineate clearly impact, if any, of possible conflict in Rules of Court]; *Warren v. Schecter* (1997) 57 C.A.4th 1189, 1199, 67 C.R.2d 573, supra, §764 [recommendation that Judicial Council amend rules to provide expressly for appellate calendar preference for ailing or elderly litigants].)

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h. Suggestions to Others.

2. Suggestions to Supreme Court.

9 Witkin Cal. Proc. Appeal § 803

[§ 803] Suggestions to Supreme Court.

Perhaps because of the binding nature of Supreme Court decisions (see *supra*, §492), the tendency of Courts of Appeal to advise the Legislature (see *supra*, §802) has not been extended to the same degree to the Supreme Court. Nevertheless, in some instances, Courts of Appeal have suggested that the Supreme Court either reconsider its prior decisions or exercise its rule-making authority to effect a change in procedure. (See *Lich v. Carlin* (1960) 184 C.A.2d 128, 139, 7 C.R. 555 [suggestion that Supreme Court change rule of procedure]; *In re Micah S.* (1988) 198 C.A.3d 557, 564, 568, 243 C.R. 756 [concurring opinion, recommending that Supreme Court adopt Canon requiring that appeals from orders terminating parental rights be taken only when good grounds exist]; *People v. Torres* (1989) 213 C.A.3d 1248, 1260, 262 C.R. 323 [describing early Supreme Court decisions as devoid of analysis, unrealistic, and unworkable, and urging Supreme Court to reassess the holdings]; *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 C.A.3d 545, 549, 263 C.R. 612 [concurring opinion, agreeing that reversal was required by Supreme Court decision, but urging Supreme Court to reconsider scope of that decision in light of dissenting opinions].)

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3. Advice to Parties or Attorneys.

9 *Witkin Cal. Proc. Appeal* § 804

[§ 804] Advice to Parties or Attorneys.

Another departure from the conventional form of opinion is the inclusion of advice to the parties or their counsel on how to proceed after the decision. The following are illustrative of the practice:

(1) *Suggestions to Parties.* (See *Coffee v. Williams* (1894) 103 C. 550, 562, 37 P. 504 [recommendation to settle complicated and expensive accounting action]; *Tuller v. Superior Court* (1932) 215 C. 352, 356, 10 P.2d 43 [suggestions on how plaintiff might proceed further]; *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 696, 268 P.2d 1041 [judgment against defendant reversed for error in instructions but theory of recovery on retrial suggested to plaintiff]; *Allen v. Bank of America* (1943) 58 C.A.2d 124, 131, 136 P.2d 345 [suggestions as to how to amend complaint; criticism in dissenting opinion]; *Unemployment Reserves Com. v. St. Francis Homes Assn.* (1943) 58 C.A.2d 271, 278, 137 P.2d 64 ["ordinarily it is not the function of a reviewing court to direct the procedure or policy of a litigant"; advice nevertheless given in view of importance of question]; *People v. Rochin* (1950) 101 C.A.2d 140, 143, 225 P.2d 1 [suggesting damage action and disciplinary measures against law enforcement officers guilty of brutality]; *Clevenger v. Clevenger* (1961) 189 C.A.2d 658, 676, 11 C.R. 707 [outlining theories of recovery]; *Van Bogaert v. Avery* (1969) 271 C.A.2d 492, 499, 76 C.R. 608 [suggesting other remedies of judgment creditor estopped to attack execution sale]; *Estate of Anderson* (1977) 68 C.A.3d 1010, 1016, 137 C.R. 727, 14 Summary (10th), *Wills and Probate*, §778 [suggesting that party denied family allowance should consider possibility of preliminary distribution].)

(2) *Suggestions to Lawyers.* (See *Valentine v. Kaiser Foundation Hosp.* (1961) 194 C.A.2d 282, 291, 292, 15 C.R. 26 [counsel should object to erroneous instructions at time of their proposal, and should also exercise care in drawing instructions].)

In *Williams v. Ward* (1971) 15 C.A.3d 381, 93 C.R. 107, the court said: "Rarely do we take a tutorial position in opinions of this court, but we think it appropriate to call attention to lawyers and trust officers who have to do with the drafting and revision of wills and trusts, the possible impact of the adult adoption law on gifts to a class. We do so not for the purpose of urging inclusion or exclusion, but for the purpose of bringing about understanding on the part of transferors. We think it not amiss to suggest to all parties concerned with adult adoptions, including judges, that the

effects of adult adoptions on rights of property should be thoroughly explored." (15 C.A.3d 388.)

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4. Suggestions to Judge.

9 *Witkin Cal. Proc. Appeal* § 805

[§ 805] Suggestions to Judge.

In *People v. Superior Court (Smith)* (1969) 70 C.2d 123, 74 C.R. 294, 449 P.2d 230, a writ of mandamus was granted to compel annulment of an order suppressing evidence under P.C. 1538.5. The decision was rendered on the procedural ground that the statute applied only to illegal search and seizure by government agents; and the opinion expressly states that, despite the urging of counsel, the court does not decide the merits of the question of admissibility of the evidence. (70 C.2d 130.) "However, for the guidance of the trial court we make the following observations on the question of the admissibility of evidence involved." (70 C.2d 130.) (See *Associated Home Builders of the Greater Eastbay v. Livermore* (1976) 18 C.3d 582, 601, 135 C.R. 41, 557 P.2d 473, 8 Summary (10th), *Constitutional Law*, §1031 [important constitutional issue not directly presented by limited record on appeal, but nevertheless discussed for guidance of trial judge]; *Marvin v. Marvin* (1976) 18 C.3d 660, 675, 134 C.R. 815, 557 P.2d 106, 11 Summary (10th), *Community Property*, §271 et seq. [holding that plaintiff stated cause of action on express contract and, accordingly, that judgment for defendant on demurrer be reversed; question whether relief could be obtained independent of contract was discussed and decided, because it would arise on retrial and Court of Appeal decisions were conflicting]; *Hasson v. Ford Motor Co.* (1977) 19 C.3d 530, 552, 138 C.R. 705, 564 P.2d 857 [determination of extent to which issues of complex case are to be limited on retrial]; *Cartwright v. Swoap* (1974) 40 C.A.3d 567, 572, 115 C.R. 402 [on remand, to avoid multiplicity of proceedings, "we suggest" that lower court initiate coordination proceedings under C.C.P. 404 et seq.].)

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h. Suggestions to Others.

5. Warning of Public Danger.

9 *Witkin Cal. Proc. Appeal* § 806

[§ 806] Warning of Public Danger.

An unusual addition to an opinion is a warning to the public, given in the form of an exposure of inimical activities. In *Janisse v. Winston Inv. Co.* (1957) 154 C.A.2d 580, 317 P.2d 48, a usury case, the court said: "We have recounted the findings and evidence at some length, not because we have any doubts that they disclose a deliberate and illegal attempt to collect a usurious rate of interest, but because we think that the public interest will be served by exposing in full this illegal attempt to mulct a necessitous borrower. ... Such tactics should not be condoned. They should be fully exposed to the end that necessitous people will not, in the future, be defrauded by such a scheme, and so that the beneficent purposes of the usury statute will not be evaded." (154 C.A.2d 586.) (See *Bixby v. Pierno* (1971) 4 C.3d 130, 151, 93 C.R. 234, 481 P.2d 242 [justifying judicial review of administrative agency decisions as a vital necessity for protection of fundamental rights threatened by "overreaching" of the state].)

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6. Concurring Opinion.

a. In General.

9 Witkin Cal. Proc. Appeal § 807

[§ 807] In General.

Sometimes a justice supporting the conclusion reached by the majority is unwilling to accept the theory of the main opinion, or objects to the inclusion of matter assertedly unnecessary, or for some other reason refuses to add his or her signature. A justice faced with this dilemma may employ the equivocal device of a simple uninformative statement, e.g., "I concur in the judgment." But the more common and useful practice is to expound his or her own views in a separate opinion setting forth the reasons for the concurring justice's decision, either different from or in addition to those of the majority. A concurring opinion may also attempt to expand the holding or to limit or qualify it. (See *Bennett v. Superior Court* (1933) 218 C. 153, 164, 21 P.2d 946; *Jolicoeur v. Mihaly* (1971) 5 C.3d 565, 582, 96 C.R. 697, 488 P.2d 1; *Hauter v. Zogarts* (1975) 14 C.3d 104, 121, 120 C.R. 681, 534 P.2d 377; *Hair v. Monterey* (1975) 45 C.A.3d 538, 548, 119 C.R. 639; *Andalon v. Superior Court* (1984) 162 C.A.3d 600, 617, 208 C.R. 899 [suggesting that result could have been reached on narrow ground, and that majority opinion contained "extraneous, interesting dissertations on a fascinating topic ... totally lacking in necessity in this proceeding and ... better suited for exposition in a law review as an expression of the writer's opinion"]; *People v. Webb* (1986) 186 C.A.3d 401, 413, 230 C.R. 755 [concurring justice, acknowledging that previous opinion of his was wrong, quotes Lord Westbury's answer to barrister who had relied on earlier opinion of his lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion"]; *Washington v. Board of Supervisors* (1993) 18 C.A.4th 981, 986, 22 C.R.2d 852 [citing Witkin, Manual on Appellate Court Opinions, and criticizing per curiam majority opinion as failing "to address the issue the parties apparently conceived to be central to the case"]; Witkin, Manual on Appellate Court Opinions, §217 et seq.; 38 A.B.A.J. 821 [proper and improper purposes of separate opinions, either concurring or dissenting].)

Occasionally, a justice, unable to produce an acceptable argument for a different decision or theory (because a controlling precedent of a higher court compels the result) writes a reluctant concurrence. (See *Remers v. Superior Court* (1970) 2 C.3d 659, 669, 87 C.R. 202, 470 P.2d 11 ["I concur in the order under the compulsion of *Cunha v. Superior Court*"]; *People v. Williams* (1982) 132 C.A.3d 920, 926, 183 C.R. 498 [satirical opinion criticizing binding California Supreme Court decision]; Witkin, Manual on Appellate Court Opinions, §116.)

West's Key Number Digest, Appeal and Error 1182; Courts 103 et seq.

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b. Concurring Opinion by Author of Main Opinion.

9 *Witkin Cal. Proc. Appeal* § 808

[§ 808] Concurring Opinion by Author of Main Opinion.

In a few instances, the author of the main opinion, unable to gain agreement on all of the views he or she wishes to express, has supplemented the lead opinion by a concurring opinion. (See *Hawkins v. Superior Court* (1978) 22 C.3d 584, 595, 150 C.R. 435, 586 P.2d 916 [quoting Jackson, J.: "It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions"]; *People v. Howard* (1984) 36 C.3d 852, 859, 206 C.R. 124, 686 P.2d 644; *Perkey v. Department of Motor Vehicles* (1986) 42 C.3d 185, 194, 228 C.R. 169, 721 P.2d 50 [discussing problems that might occur if court's construction of statute were circumvented]; *Lyons v. Wickhorst* (1986) 42 C.3d 911, 919, 231 C.R. 738, 727 P.2d 1019 ["In order to secure a majority for today's decision, I have omitted from my opinion any discussion of the implications of the trial court's actions on the constitutional jury trial guarantee. I write separately to express my concern regarding this issue"]; *Harris v. Compton* (1985) 172 C.A.3d 1, 12, 217 C.R. 884 [criticizing judicial legislation in area of comparative negligence]; *People v. Simon* (1986) 184 C.A.3d 125, 135, 228 C.R. 855.)

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c. Concurring Opinion as Majority Opinion.

9 *Witkin Cal. Proc. Appeal* § 809

[§ 809] Concurring Opinion as Majority Opinion.

It is possible for a concurring opinion, not the main opinion, to constitute the majority position of the court on a particular point. An illustration of this is found in *San Mateo v. Dell J.* (1988) 46 C.3d 1236, 252 C.R. 478, 762 P.2d 1202, 10 Summary (10th), *Parent and Child*, §512, which involved a county's right to recover from defendant parents its costs in supporting and maintaining defendants' son in foster care group homes. An earlier decision, *In re Jerald C.* (1984) 36 C.3d 1, 201 C.R. 342, 678 P.2d 917, had addressed this issue, and the lead opinion there had held that equal protection principles precluded a county from recovering its expenses, regardless of whether they were incurred for support or maintenance or for confinement and treatment. However, the concurring opinion in *Jerald C.*, authored by Justice Kaus, had concluded that the Legislature could properly distinguish between the two classes of expenses and could allow a county to recover its support and maintenance costs. In the present case, the lead opinion relied on Justice Kaus's opinion in holding that the county had a right to reimbursement.

Justice Broussard, the author of the lead opinion in *Jerald C.*, continued to adhere to his views as expressed there, but nevertheless concurred in the judgment in this case. "I concur in the judgment under the compulsion of the opinion of Justice Kaus in *In re Jerald C.* ... As the author of the lead opinion in that case, I must recognize that, although labeled by its author as a concurring opinion, Justice Kaus's opinion was a concurring and dissenting opinion in content and that it garnered the support of four justices. Insofar as it agrees with the lead opinion, the lead opinion is a majority opinion, indeed a unanimous opinion, but insofar as Justice Kaus's opinion disagrees or goes beyond the lead opinion, it is the majority view." (46 C.3d 1255.)

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a. Purpose.

9 *Witkin Cal. Proc. Appeal* § 810

[§ 810] Purpose.

A justice may object to the decision as well as the reasons, and express his or her own views of the proper disposition by filing a dissenting opinion. This practice has been the subject of much debate. (See *Priebe v. Sinclair* (1949) 90 C.A.2d 79, 87, 202 P.2d 577 [dissenter quotes criticisms of practice]; Witkin, *Manual on Appellate Court Opinions*, §118 et seq.; 38 A.B.A.J. 821; 53 Cal. L. Rev. 20 [pros and cons]; 56 Harv. L. Rev. 472 [strong criticism of extraordinary case in which majority excluded dissenting opinion from records as "scandalous, impertinent and scurrilous"]; 4 Hastings L. J. 118 [strong defense of the practice]; 5 Hastings L. J. 133 [trend of California Supreme Court decisions criticized by active dissenter].)

Sometimes a justice agrees with part of the holding and disagrees with another part; in this event, the separate opinion is both a concurrence and a dissent. (See *Pierce v. Superior Court* (1934) 1 C.2d 759, 770, 37 P.2d 460; *Desny v. Wilder* (1956) 46 C.2d 715, 752, 299 P.2d 257; *Ryman v. American Nat. Ins. Co.* (1971) 5 C.3d 620, 637, 96 C.R. 728, 488 P.2d 32.)

Sometimes the main purpose of a dissent is not to express disagreement with the point of view of the majority opinion, but instead to present a second, equally valid alternative. Thus, in *People v. Weatherill* (1989) 215 C.A.3d 1569, 264 C.R. 298, the dissenting justice said: "In no sense is this one of those instances where the dissenter thinks the majority is guilty of an egregious error in its analysis or its interpretation of the facts. Nor is it one where some fundamental constitutional or legal principle is at stake. Indeed I consider the majority has presented a well-reasoned argument in support of its resolution of the conflict between these two statutes. The problem is the conflict is so profound, the Gordian knot so tightly wound, that an equally persuasive argument--indeed in my view a marginally more persuasive argument--can be made for the opposite resolution." And "[p]erhaps ... this exchange of judicial opinions can serve as a signal to the Legislature this series of statutes has left the courts in a quandary." (215 C.A.3d 1580.)

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b. Format and Style.

9 *Witkin Cal. Proc. Appeal* § 811

[§ 811] Format and Style.

(1) *Long Form*. A dissent may be a complete opinion, with a restatement of facts and issues and a presentation of reasoning differing from that of the main opinion. This is often a result of rejection of the author's draft as an attempted main opinion. (For examples of long or complete dissents, see *Latipac v. Superior Court* (1966) 64 C.2d 278, 288, 49 C.R. 676, 411 P.2d 564 [challenging majority's interpretation of statute]; *Dillon v. Legg* (1968) 68 C.2d 728, 749, 69 C.R. 72, 441 P.2d 912 [strong criticism of decision overruling recent decision, arguing that change should be left to Legislature]; *Connor v. Great Western Savings & Loan Assn.* (1968) 69 C.2d 850, 872, 73 C.R. 369, 447 P.2d 609 [step-by-step answer to every major point in majority opinion]; *National Advertising Co. v. Monterey* (1970) 1 C.3d 875, 881, 83 C.R. 577, 464 P.2d 33 [analysis of issues, case law, and policies supporting different conclusion]; *Fracasse v. Brent* (1972) 6 C.3d 784, 793, 100 C.R. 385, 494 P.2d 9 [argument on authority and principles]; *San Jose v. Superior Court (Lands Unlimited)* (1974) 12 C.3d 447, 465, 115 C.R. 797, 525 P.2d 701 [strong argument for more liberal treatment of class actions]; *Morris v. Municipal Court* (1982) 32 C.3d 553, 570, 186 C.R. 494, 652 P.2d 51 [criticizing majority's overruling of court's earlier decision]; *Friedman v. Friedman* (1993) 20 C.A.4th 876, 890, 24 C.R.2d 892 [answer to every major point in majority opinion].)

(2) *Short Form*. The dissent may achieve all of the objectives of a full-scale opposing opinion in much shorter form, by avoiding unnecessary repetition of the facts and issues and succinctly stating the reasons for refusal to join in the majority opinion. (See *Earl v. Saks & Co.* (1951) 36 C.2d 602, 613, 226 P.2d 340; *Mexican-Amer. Political Assn. v. Brown* (1973) 8 C.3d 733, 735, 106 C.R. 12, 505 P.2d 204; *Li v. Yellow Cab Co.* (1975) 13 C.3d 804, 832, 119 C.R. 858, 532 P.2d 1226; *Harlow v. Carleson* (1976) 16 C.3d 731, 739, 129 C.R. 298, 303, 548 P.2d 698; *Parking Authority v. Nicovich* (1973) 32 C.A.3d 420, 432, 108 C.R. 137 ["This court's heavy workload militates against the luxury of a lengthy, citation-studded dissent. I do no more than sketch the bare bones of disagreement"].)

A short dissent may refer to a prior decision, or make a simple statement of reasons, in a single sentence or paragraph. (See *People v. Uhlemann* (1973) 9 C.3d 662, 670, 108 C.R. 657, 511 P.2d 609.)

(3) *Content, Form, and Style*. Some dissenting opinions plunge immediately into a discussion of the dissenter's position. (See *Earl v. Saks & Co.*, *supra*, 36 C.2d 613.) Others use some form of orientation statement to set the stage

for the discussion. (See *National Advertising Co. v. Monterey*, *supra*, 1 C.3d 881; *Fracasse v. Brent*, *supra*, 6 C.3d 793; *Southern Calif. Edison Co. v. Bourgerie* (1973) 9 C.3d 169, 175, 107 C.R. 76, 507 P.2d 964; *San Diego Bldg. Contractors Assn. v. City Council of San Diego* (1974) 13 C.3d 205, 218, 118 C.R. 146, 529 P.2d 570.)

The tone of the dissent has been the subject of some concern by commentators, who caution against assuming the role of an advocate in an attack on the majority opinion and the views of its signers. (See 39 A.B.A.J. 794.) However, strong dissents are not uncommon. (See *Fracasse v. Brent*, *supra*, 6 C.3d 796, 798, 802; *Swoap v. Superior Court* (1973) 10 C.3d 490, 525, 111 C.R. 136, 516 P.2d 840; *Nathanson v. Superior Court* (1974) 12 C.3d 355, 372, 115 C.R. 783, 525 P.2d 687; *San Jose v. Superior Court*, *supra*, 12 C.3d 465; *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 676, 125 C.R. 757, 542 P.2d 1349.)

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c. Majority's Answer to Dissent.

9 *Witkin Cal. Proc. Appeal* § 812

[§ 812] Majority's Answer to Dissent.

On rare occasions, the majority, not content with the independent statement of differing views, makes a direct answer to the dissent. This may take one of two forms:

(1) A statement inserted in the main opinion. (See *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 977, 104 C.R. 42, 500 P.2d 1386; *People v. Culver* (1973) 10 C.3d 542, 547, footnote 7, 111 C.R. 183, 516 P.2d 887; *In re Marriage of Stenquist* (1978) 21 C.3d 779, 788, footnote 10, 148 C.R. 9, 582 P.2d 96; *Isbister v. Boys' Club of Santa Cruz* (1985) 40 C.3d 72, 84, 89, footnotes 14, 19, 219 C.R. 150, 707 P.2d 212; *O'Hare v. Superior Court* (1987) 43 C.3d 86, 99, footnote 12, 233 C.R. 332, 729 P.2d 766; *Ortiz v. South Bend Lathe* (1975) 46 C.A.3d 842, 847, footnote 1, 120 C.R. 556.)

(2) A concurring opinion answering a dissenting opinion. (See *Bindrim v. Mitchell* (1979) 92 C.A.3d 61, 82, 155 C.R. 29.)

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8. Selective Publication.

a. Publication or Nonpublication.

1. In General.

9 Witkin Cal. Proc. Appeal § 813

[§ 813] In General.

(1) *Former Full Publication Practice.* Although the early history discloses constant changes of position on whether all opinions should be published, a statutory directive dating from 1909 called for publication of all Supreme Court and Court of Appeal opinions, and that was the practice until 1963.

In later years, considerable criticism was directed at the rapidly increasing bulk of reported opinions, a substantial portion of which covered settled law and lacked any value as precedents. (See *48 A.B.A.J. 134.*) The State Bar and the Judicial Council concluded that continued publication of all Court of Appeal opinions was undesirable, and that selective publication was an appropriate solution to the problem. (See Judicial Council 1963 Report, p. 21.)

(2) *Legislative and Constitutional Changes.* The 1963 Legislature adopted an enabling statute: "Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports." (*Govt.C. 68902*; see *39 So. Cal. L. Rev. 608.*) This authority was confirmed in the constitutional revision of 1966 by Cal. Const., Art. VI, §14: "The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person." (See *Schmier v. Supreme Court* (2000) *78 C.A.4th* 703, 708, *93 C.R.2d* 580 [upholding selective publication procedure against charges that it violates stare decisis, creates intolerable secrecy, and is contrary to C.C. 22.2 (supra, §484), which makes common law of England the rule of decision in all California courts].)

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8. Selective Publication.

a. Publication or Nonpublication.

2. Supreme Court Rule.

9 Witkin Cal. Proc. Appeal § 814

[§ 814] Supreme Court Rule.

(1) *In General.* Pursuant to its statutory authority (see *supra*, §813), the Supreme Court adopted former C.R.C., Rule 976 (now C.R.C., Rule 8.1105) in 1964, and since that time, the publication of opinions of the Court of Appeal and appellate division of the superior court has been on a selective basis.

Originally, the rule left the decision to publish in the hands of the appellate court, but the rule was slanted in favor of publication, because it required every Court of Appeal opinion to be published unless a majority of the court rendering the opinion specified it for nonpublication. Amendments enacted in 1972 reversed the certification process and established a uniform practice for the Court of Appeal and appellate division of the superior court. Thus, unless otherwise ordered, "an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court." (C.R.C., Rule 8.1105(b); see *People v. Cameron* (1994) 30 C.A.4th 591, 602, 603, 606, 36 C.R.2d 656 [disapproving prior opinion published through clerical error].) However, as before, all opinions of the Supreme Court are published. (C.R.C., Rule 8.1105(a).)

(2) *Experience and Later Changes.* The operation of the new rule was quantitatively a success; in 1969-1970, only 39% of the Court of Appeal opinions were published. (See Judicial Council 1971 Report, p. 98.) But the selective process was not always consistent; some opinions certified for publication seemed clearly lacking in the elements set forth in the standards (*infra*, §815). Accordingly, the Supreme Court, following the recommendation of a special committee appointed to study the operation, adopted revisions in 1972. The standards were made more explicit, and certification for nonpublication was changed to certification for publication. (See *supra*, §813, and *infra*, § 815.) And in 1983, after consideration of recommendations of the Chief Justice's Advisory Committees and the Judicial Council, the Supreme Court made additional significant changes in the rules. (See *supra*, §813, and *infra*, §§ 815, 819 et seq., 828.) (For discussions of the nonpublication practice, see Witkin, *Manual on Appellate Court Opinions*, §16 et seq.; C.E.B., 2 *Civil Appellate Practice* 3d, Chap. 21; Rutter Group, 2 *Civil Appeals and Writs*, Chap. 10; 24 *Hastings L. J.* 37; 12 *Pacific L. J.* 727; 50 *So. Cal. L. Rev.* 1181; 27 *Stanf. L. Rev.* 791; 56 *Stanf. L. Rev.* 1435 [nonpublication of cases in U.S. courts].)

(3) *Discretion of Supreme Court.* Generally, "an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing." (C.R.C., Rule 8.1105(e)(1).) However, the Supreme Court may order publication of an opinion, in whole or in part, at any time after granting review and may also order that an opinion not certified is to be published. (C.R.C., Rule 8.1105(e)(2); on standards for certification, see *infra*, §815; on decertification by Supreme Court, see *infra*, §816 et seq.; on procedure for requesting publication of uncertified opinions, see *infra*, §819.)

(4) *Mistaken Publication.* Sometimes a superseded opinion will get published inadvertently. Hence, in *People v. Cameron* (1994) 30 C.A.4th 591, 36 C.R.2d 656, 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §225, the Third District Court of Appeal disapproved its earlier opinion in *People v. Rhodes* (1989) 215 C.A.3d 470, 263 C.R. 603. In *Rhodes*, rehearing was granted, a subsequent opinion was issued but not certified for publication, and the first opinion was by clerical error reported as a published opinion. (30 C.A.4th 602, Reporter's Note.) A concurring justice in the *Cameron* case noted that "the published version of *Rhodes* ... has miraculously created a life for itself despite this court's best efforts to put a stake through its heart." (30 C.A.4th 606.)

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3. Standards for Certification.

9 Witkin Cal. Proc. Appeal § 815

[§ 815] Standards for Certification.

Former C.R.C., Rule 976(b) originally provided for publication if the opinion involved "a new and important issue of law, a change in an established principle of law, or a matter of general public interest." This abbreviated statement left much to be desired. C.R.C., Rule 8.1105(c) now provides that no opinion may be certified for publication in the Official Reports unless it does one of the following:

- (1) Establishes a new rule of law.
- (2) Applies an existing rule of law to facts significantly different from those stated in published opinions.
- (3) Modifies, explains, or criticizes (with reasons given) an existing rule of law.
- (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule.
- (5) Addresses or creates an apparent conflict in the law.
- (6) Involves a legal issue of continuing public interest.
- (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.
- (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision.
- (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the law's development.

Factors that do not affect the determination whether to publish an opinion include the court's workload and the potential embarrassment of a litigant, lawyer, judge, or other person. (C.R.C., Rule 8.1105(d).)

In *Lyon v. Western Title Ins. Co.* (1986) 178 C.A.3d 1191, 224 C.R. 385, the author of the opinion, with one justice concurring, maintained that a binding Supreme Court decision (*California v. Superior Court (Lyon)* (1981) 29 C.3d 210, 172 C.R. 696, 625 P.2d 239, 12 Summary (10th), *Real Property*, §276), though law of the case, was wrong in principle and unsupported by authority. The detailed analysis was prefaced by the statement that "[w]e have certified this opinion for publication for, respectfully, it criticizes with reasons given the rule announced by *Lyon*." (178 C.A.3d 1194.) A third justice, concurring and dissenting, said: "I cannot endorse the lengthy dicta, sought to be justified in the guise of publishable criticism of an existing [Supreme Court] rule, which merely amounts in substance to no more than a reargument of the minority opinion. ... I believe that whatever heuristic value lies in the contrary position can be adequately resurrected by a footnote reference to the *Lyon* dissent appended to the dispositive portion (three to four pages at most) of the lead opinion." (178 C.A.3d 1205.)

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8. Selective Publication.

b. Depublication by Supreme Court.

1. In General.

9 Witkin Cal. Proc. Appeal § 816

[§ 816] In General.

(1) *Purpose of Practice.* Beginning in 1971, the Supreme Court, acting under its constitutional power over the publication of opinions (see *supra*, §813), has ordered "decertification" (or "depublishing" or "nonpublication") of many Court of Appeal opinions that had been certified for publication by the Court of Appeal. No criteria for decertification have been stated in any court rule; typically, the order is made not because the court disagrees with the Court of Appeal's application of the standards for certification (see *supra*, §815), but because the opinion is thought to contain erroneous or mistaken statements of law and should not be citable as a precedent. (See 62 *Cal. L. Rev.* 309; 72 *Cal. L. Rev.* 514; on request for depublishing of opinion, see *infra*, §817; on effect of Supreme Court order for depublishing, see *infra*, §818.)

The order of depublishing is noted in the Cumulative Subsequent History Table of the Advance Sheets of California Official Reports as follows: "Review den. [date] and Reporter of Decisions directed not to publish this opn. in the Official Reports (Cal. Const., art. VI, §14; *rule 8.1105, Cal. Rules of Ct.*)."

(2) *Criticism of Practice.* The exercise of this unrestricted power without criteria or guidelines has been subjected to strong criticism from the Bar and commentators. (See Witkin, *Manual on Appellate Court Opinions*, §22; 72 *Cal. L. Rev.* 520 [analysis of criticisms and answers by an associate justice of the Supreme Court]; 30 *Hastings L. J.* 1577; 45 *Hastings L. J.* 519 [Depublishing Deflating; The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct]; 25/26 *Lincoln L. Rev.* 71 [criticism of Supreme Court's depublishing practice in environmental cases]; 50 *So. Cal. L. Rev.* 1181.) And the Chief Justice's Advisory Committee for an Effective Publication Rule in its 1979 Report recommended abandonment of decertification and revival of the opinion on denial of hearing, withholding approval of erroneous portions of a Court of Appeal opinion (see *supra*, §502). (See 72 *Cal. L. Rev.* 524.)

(3) *Confirmation of Practice by Rule.* The Advisory Committee's recommendation was not accepted. "The Supreme Court may order that an opinion certified for publication is not to be published." (C.R.C., Rule 8.1105(d)(2).)

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2. Request for Depublication.

9 Witkin Cal. Proc. Appeal § 817

[§ 817] Request for Depublication.

C.R.C., Rule 8.1125 provides the following procedure for requesting depublication:

(1) *Letters and Supporting Papers.* Any person may request that the Supreme Court order that an opinion certified for publication not be published. (C.R.C., Rule 8.1125(a)(1).) The request must be made by a separate letter to the Supreme Court not exceeding 10 pages; it may not be made as part of a petition for review. (C.R.C., Rule 8.1125(a)(2).) The request must concisely state the requester's interest and the reason why the opinion should not be published. (C.R.C., Rule 8.1125(a)(3).) Within 30 days after the decision is final in the Court of Appeal, the request must be delivered to the Supreme Court. (C.R.C., Rule 8.1125(a)(4).) It must be served on the rendering court and all parties. (C.R.C., Rule 8.1125(a)(5).)

(2) *Response.* Within 10 days after the Supreme Court receives a request to depublish, the rendering court or any person may submit a response in support or opposition. If a response is submitted by anyone other than the rendering court, it must state the person's interest. (C.R.C., Rule 8.1125(b)(1).) A response must not exceed 10 pages and must be served on the rendering court, all parties, and any person requesting depublication. (C.R.C., Rule 8.1125(b)(2).)

(3) *Action on Request.* The Supreme Court may order the opinion depublished or deny the request, and must send notice of its action to the rendering court, all parties, and any person requesting depublication. (C.R.C., Rule 8.1125(c)(1).)

(4) *Power of Supreme Court.* On its own motion, the Supreme Court may order an opinion depublished, and must notify the rendering court of its action. (C.R.C., Rule 8.1125(c)(2).)

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3. Effect of Order for Depublication.

9 *Witkin Cal. Proc. Appeal § 818*

[§ 818] Effect of Order for Depublication.

(1) *Judicial Expressions Prior to Adoption of Rule.* *People v. Dee* (1990) 222 C.A.3d 760, 272 C.R. 208, involved the issue whether an enhancement of punishment may be imposed if the jury is mistakenly discharged before the enhancement allegation is tried. *People v. Wojahn* (1984) 150 C.A.3d 1024, 198 C.R. 277, had held that no enhancement may be imposed in this situation, and the Supreme Court let stand (review denied) a decision agreeing with *Wojahn* and depublished two opinions disagreeing with it. The court, commenting on the effect of the Supreme Court's denial of review (*supra*, §§501, 502) and on the Supreme Court's order of depublication, made the following observations:

(a) "When, as here, the Supreme Court uses *both* devices to deal with conflicting opinions, letting one remain published and depublishing the others, it is at least 'fairly clear' that the court approves of the opinion that remains published and disagrees with the others." (222 C.A.3d 764.)

(b) "It is hardly unprecedented for the Courts of Appeal to seek implicit guidance from denial of review and depublication; we have just not been very candid about doing so. With the Supreme Court's greatly increased reliance on these procedures as tools for shaping the decisional law, perhaps the time has come for a bit more candor." (222 C.A.3d 764.)

(2) *Rule.* "A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." (C.R.C., Rule 8.1125(d).)

In *People v. Dee*, *supra*, the court concluded that the new rule did not apply to the depublication orders considered in the opinion, because those orders predated the rule. But the court added: "We note, however, that given the manner in which the Supreme Court has dealt with the three post-*Wojahn* cases, to insist that those depublication orders are without significance would be to perpetuate a myth." (222 C.A.3d 765.) (See 45 *Hastings L. J.* 519, 532 [history and analysis of rule]; 26 *Loyola L.A. L. Rev.* 1007 [Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil?]; 26 *Loyola L. Rev.* 1033 [Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court].)

In *Diep v. California Fair Plan Assn.* (1993) 15 C.A.4th 1205, 19 C.R.2d 591, the court said: "We find ourselves in the unusual position of discussing and disagreeing with a case which the state Supreme Court has ordered depublished (*Mitchell v. California Fair Plan Assn.* ... (hereafter *Mitchell*). In *Mitchell*, Division Three of this district ruled on the identical roof/plastic sheeting issue involving the same insurer, ... found the term "roof" in the insurance policy ambiguous, construed it against the insurer and in favor of coverage, and ruled that, under the circumstances, plastic sheeting constituted a roof for purposes of the insurance policy. The case was ordered published. However, the California Supreme Court decertified *Mitchell* consigning it forever, but for this brief reemergence, to limbo. Nevertheless, plaintiff asks us to follow *Mitchell*, applying the principle of collateral estoppel, to prevent defendant from relitigating the same issue it lost in *Mitchell*. We decline to do so and reach the merits of the instant appeal." (15 C.A.4th 1207.)

In *Mangini v. J.G. Durand Int.* (1994) 31 C.A.4th 214, 37 C.R.2d 153, depublishation was given no effect. The court discussed the effect of depublishation of two of its earlier opinions on issues again raised in this case. While these depublishations might arguably be interpreted as meaning that the prior opinions were "wrong in some significant way," recent Supreme Court cases suggest that former rule C.R.C. 979(e) (now C.R.C. 8.1125(d)) "means just what it says." (31 C.A.4th 219.)

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c. Request for Publication.

9 *Witkin Cal. Proc. Appeal* § 819

[§ 819] Request for Publication.

(1) *In General.* Although the Supreme Court may, on its own initiative, order publication of an opinion not certified for publication (see *supra*, §813), C.R.C., Rule 8.1120 provides a procedure for requesting publication of uncertified opinions.

(2) *Request.* "Any person may request that an unpublished opinion be ordered published." (C.R.C., Rule 8.1120(a)(1).) The request must be made by a letter to the court that rendered the opinion, concisely stating the requester's interest and the reason why the opinion meets a standard for publication. (C.R.C., Rule 8.1120(a)(2).) The letter must be delivered to the rendering court within 20 days after the opinion is filed (C.R.C., Rule 8.1120(a)(3)) and must be served on all parties (C.R.C., Rule 8.1120(a)(4)). (See C.E.B., 2 Civil Appellate Practice 3d, §21.13 [although any person may make request, attorneys should weigh advantages and disadvantages to client in seeking publication].)

(3) *Action of Rendering Court.* "If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court." (C.R.C., Rule 8.1120(b)(1).) The rendering court must also send a copy of its recommendation and reasons to all parties and any person requesting publication. (C.R.C., Rule 8.1120(b)(2).)

(4) *Action by Supreme Court.* The Supreme Court may order the opinion published or deny the request, and must send notice of its action to the rendering court, all parties, and any person requesting publication. (C.R.C., Rule 8.1120(c).) However, if the Supreme Court orders publication, this order is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion. (C.R.C., Rule 8.1120(d); see *Wilson v. Blue Cross of Southern Calif.* (1990) 222 C.A.3d 660, 664, 271 C.R. 876.)

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1. General Rule: No Citation or Reliance.

aa. Nature of Problem.

9 Witkin Cal. Proc. Appeal § 820

[§ 820] Nature of Problem.

One of the difficult questions presented by the selective publication system concerns the use that the profession and courts can make of unpublished opinions. The following matters call for consideration:

(1) Is an unpublished opinion of a Court of Appeal a controlling authority in lower courts? It is a binding judgment on appeal, and would, in the absence of a contrary statute or rule, have the usual effect of a precedent. (See Witkin, *Manual on Appellate Court Opinions*, §24.)

(2) Can the use of these opinions be prevented? If copies are obtained and presented to trial or appellate courts without objection, the objectives of the rule are seriously impaired. Unpublished opinions are readily available, and they were occasionally cited or otherwise used in Supreme Court and Court of Appeal opinions. (See, e.g., *Prichard v. Veterans Cab Co.* (1965) 63 C.2d 727, 729, 47 C.R. 904, 408 P.2d 360 [Supreme Court adopted Court of Appeal opinion certified for nonpublication]; *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 127, 52 C.R. 561, 416 P.2d 793 [dissent by justice "for the reasons expressed" in Court of Appeal opinion certified for nonpublication]; *People v. Henry* (1967) 65 C.2d 842, 847, 56 C.R. 485, 423 P.2d 557 [same]; *Brunzell Const. Co. of Nevada v. Wagner* (1970) 2 C.3d 545, 556, 86 C.R. 297, 468 P.2d 553 [same]; *Monica Theater v. Municipal Court* (1970) 9 C.A.3d 1, 10, 88 C.R. 71.)

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1. General Rule: No Citation or Reliance.

bb. Rule Prohibiting Citation or Reliance.

9 *Witkin Cal. Proc. Appeal* § 821

[§ 821] Rule Prohibiting Citation or Reliance.

Continued use of unpublished opinions threatened to undermine the effective operation of the selective publication rule, and both the State Bar and the Judicial Council recommended that citation of these opinions as authority be prohibited. Pursuant to this recommendation, the Supreme Court adopted former C.R.C., Rule 977 (now C.R.C., Rule 8.1115) prohibiting citation except for special purposes (*infra*, §§824, 825).

Except as provided in C.R.C., Rule 8.1115(b), "an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (C.R.C., Rule 8.1115(a).) (See *Watts v. Civil Service Bd.* (1997) 59 C.A.4th 939, 949, 69 C.R.2d 349 [trial court's statement that it was taking judicial notice of unpublished decision did not violate principle of not relying on unpublished opinions, where it could not be presumed that trial court had used unpublished opinion as authority]; C.E.B., 2 Civil Appellate Practice 3d, §21.19; Rutter Group, 2 Civil Appeals and Writs §11:182 et seq.; 35 *Golden Gate U. L. Rev.* 195 [need for uniformity in appellate courts' rules regarding citation of unpublished opinions]; 45 *Hastings L. J.* 519, 548; 55 *Hastings L. J.* 1235 [citation of unpublished opinions as precedent]; 76 *So. Cal. L. Rev.* 755 [nonprecedential opinions]; 105 *A.L.R.5th* 499 [precedential effect of unpublished opinions]; on elaborate discussion of reasons for rule and its validity, see *People v. Valenzuela* (1978) 86 C.A.3d 427, 438, 150 C.R. 314 [dissenting opinion].)

The no-citation rule was a practical solution to the problem, and it made it unnecessary to hold that the unpublished opinion is not a precedent. (See Witkin, *Manual on Appellate Court Opinions*, §24.) Nevertheless, several opinions, emphasizing the effect of the no-citation rule, declare that a nonpublished opinion has no precedential value. (See *Heaton v. Marin County Employees Retirement Bd.* (1976) 63 C.A.3d 421, 431, 133 C.R. 809; *Nelson v. Justice Court* (1978) 86 C.A.3d 64, 66, 150 C.R. 39; *Ramirez v. Moran* (1988) 201 C.A.3d 431, 437, footnote 4, 247 C.R. 117; *Alicia T. v. Los Angeles* (1990) 222 C.A.3d 869, 885, 271 C.R. 513 [attorney for appellant in opening brief relied extensively on depublished opinion; sanctions imposed]; *Barber v. Superior Court* (1991) 234 C.A.3d 1076, 1082, 285 C.R. 668 ["The fact that the *Brodehl* opinion was twice reprinted in the advance pamphlets ... for 'tracking' purposes ... does not

reinvigorate it"]; *People v. Superior Court (Clark)* (1994) 22 C.A.4th 1541, 1548, 28 C.R.2d 46, *infra*, §822.)

Even though a United States District Court decision is not published in the Federal Supplement, it is citable notwithstanding C.R.C., Rule 8.1115, which only bars citation of unpublished California opinions. (*Hawthorne v. H&C Disposal Co.* (2003) 109 C.A.4th 1668, 1678, footnote 5, 1 C.R.3d 312; see 42 U.C.L.A. L. Rev. 1691 [Selective Publication and the Authority of Precedent in the United States Court of Appeals].)

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See *People v. Williams* (2009) 176 C.A.4th 1521, 1529, 98 C.R.3d 770 [although depublished and unpublished decisions are now as readily available as published cases, that does not give counsel excuse to ignore Rules of Court; "persistent use of unpublished authority may be cause for sanctions"].



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1. General Rule: No Citation or Reliance.

cc. Reliance Where Review Is Granted.

9 Witkin Cal. Proc. Appeal § 822

[§ 822] Reliance Where Review Is Granted.

In *People v. Superior Court (Clark)* (1994) 22 C.A.4th 1541, 28 C.R.2d 46, a murder trial, the trial judge dismissed special circumstances allegations on the basis of an earlier Court of Appeal opinion that held that Proposition 115 (see 1 Cal. Crim. Law (3d), Introduction to Crimes, §106 et seq.) never became operative. That opinion, which was certified for publication, became final as to the Court of Appeal on September 4. On September 13, the district attorney filed a petition for review, which was granted on October 24. In the meantime, on October 18, the crime in question in the present case was committed. Subsequently, the Supreme Court, in *Yoshisato v. Superior Court* (1992) 2 C.4th 978, 9 C.R.2d 102, 831 P.2d 327, 1 Cal. Crim. Law (3d), Introduction to Crimes, §106, reversed the Court of Appeal opinion and held that Proposition 115 had become operative. Defendants raised the argument, which the trial judge accepted, that Proposition 115 could not be applied to them because of the uncertainty as to its effectiveness on the date of the crime. This uncertainty was allegedly caused by the fact that the crime occurred during the "window period" between the date when the now superseded Court of Appeal opinion became final as to that court and the date when the Supreme Court granted the petition for review. *Held*, this contention is without merit; the Court of Appeal opinion had no effect.

(a) Although the Court of Appeal opinion was certified for "publication" and was printed in the advance sheets, it was not truly "published." In all cases, the ultimate decision on publication rests with the Supreme Court (see *supra*, §§813, 816). And where, as in this case, the Supreme Court grants review, the Court of Appeal opinion is not published unless the Supreme Court orders otherwise (see *infra*, §951). Because no such order was issued in this case, the Court of Appeal opinion was not published in the sense that it could be relied on by prospective killers. (22 C.A.4th 1547.)

(b) The 7-week gap between the date the opinion became final as to the Court of Appeal and the date the Supreme Court granted review is irrelevant. The Court of Appeal opinion was not final when the crime was committed or when review was granted, and thus never became the law, even though it could be found in the advance sheets. (22 C.A.4th 1548.)

(c) Defendants argued that even if the superseded Court of Appeal opinion could not be relied on, the mere

"publication" of it created a period during which no reasonable person was on notice that Proposition 115 was operative. This position too is without merit. Former C.R.C, Rule 977(a) (now C.R.C., Rule 8.1115(a)) "expressly provides that an unpublished opinion cannot be relied on by a party. To allow defendants to 'rely on' our now-superseded opinion on some theory that it made the law uncertain would be to allow defendants, in a perverse way, to do precisely what the rule prohibits. In any event, our opinion in *Yoshisato* could not have contributed to any uncertainty in the law since it was never final, and never the law." (22 C.A.4th 1548.)

Subsequent to *People v. Superior Court (Clark)*, the rule was amended to state that a published California opinion may be cited or relied on "as soon as it is certified for publication."

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2. Distinction: Citation But Not Reliance.

9 *Witkin Cal. Proc. Appeal* § 823

[§ 823] Distinction: Citation But Not Reliance.

In *Conrad v. Ball Corp.* (1994) 24 C.A.4th 439, 29 C.R.2d 441, the court noted that the Supreme Court's depublishing of one opinion and its nearly contemporaneous refusal to depublish a conflicting opinion was some indication of its disapproval of the former and approval of the latter. In defense of its citation of the depublished opinion (*Romero v. Derdendzhyana*), the court made the following observations:

(a) "We recognize that the Rules of Court state a depublished opinion 'shall not be cited or relied on by a court or a party in any other action or proceeding.' ... However, two recent opinions from the Supreme Court have cited unpublished opinions for reasons other than *reliance* upon them." In *Cynthia D. v. Superior Court* (1993) 5 C.4th 242, 19 C.R.2d 698, 851 P.2d 1307, 10 Summary (10th), *Parent and Child*, §691, the majority cited a depublished concurring Court of Appeal opinion to indicate that the majority's analysis had been adapted from that opinion. (24 C.A.4th 443, footnote 2.) In *People v. Saunders* (1993) 5 C.4th 580, 20 C.R.2d 638, 853 P.2d 1093, 1 Cal. Crim. Law (3d), *Defenses*, §122, a dissenting opinion cited two depublished Court of Appeal opinions to address the effect of orders affecting the publication status of multiple decisions. (24 C.A.4th 443, footnote 2.)

(b) "The message from the Supreme Court seems to be that unpublished opinions may be cited if they are not 'relied on.' ... That is our situation here. We cite *Romero* not to rely on it, but to discuss the effect of the depublishing order vis-a-vis the order denying depublishing of *Espinoza*." (24 C.A.4th 444, footnote 2.) (See *Mangini v. J.G. Durand Int.* (1994) 31 C.A.4th 214, 219, 37 C.R.2d 153 [decertified opinions cited not to be "critical of the high court's depublishing procedure," but "simply to illustrate" that issue presented in these cases was recurring and remained unresolved]; 45 *Hastings L. J.* 519, 548 [erosion of no-citation rule].)

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3. Exceptions.

9 *Witkin Cal. Proc. Appeal* § 824

[§ 824] Exceptions.

C.R.C., Rule 8.1115(b) states the exceptions to the no-citation rule (*supra*, §821), and C.R.C., Rule 8.1115(c) prescribes the procedure to be employed in the proper use of an unpublished opinion.

(1) *Exceptions*. An unpublished opinion may be cited or relied on in either of the following circumstances:

(a) "When the opinion is relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel." (C.R.C., Rule 8.1115(b)(1).)

(b) "When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action." (C.R.C., Rule 8.1115(b)(2).)

(2) *Opinion Used To Establish Law of the Case*. (See *People v. Allen* (1980) 101 C.A.3d 285, 290, 161 C.R. 568 ["Reference to our unpublished opinion is appropriate to establish what matters were therein adjudicated"].)

(3) *Opinion Used To Establish Collateral Estoppel*. (See *Vezina v. Continental Cas. Co.* (1977) 66 C.A.3d 665, 667, 136 C.R. 198 [trial judge took judicial notice of opinion, and appellate court quoted relevant excerpts from it]; *Verdugo Hills Hosp. v. Department of Health* (1979) 88 C.A.3d 957, 962, footnote 6, 152 C.R. 263 [counsel at oral argument produced opinion of another Court of Appeal division].)

In *Valley View Home of Beaumont v. Department of Health Services* (1983) 146 C.A.3d 161, 194 C.R. 56, defendant set forth the unpublished decision in its opening brief, contending that plaintiff was collaterally estopped because it was "in privity" with the parties involved in the other litigation who represented "the same legal right." ... "It is evident that the Department has either profoundly misunderstood the law, confusing the rule of *stare decisis* with the law of privity and collateral estoppel, or has wilfully breached a fundamental Rule of Court. [W]e assume that the former explanation accounts for this otherwise flagrant impropriety. ... In any case the contention of collateral estoppel is wholly without merit, if not specious." (146 C.A.3d 167.)

(4) *Opinion in Closely Connected Proceeding.* In *Los Angeles v. Wilshire Ins. Co.* (1979) 103 C.A.3d Supp. 1, 163 C.R. 123, a concurring justice pointed out that the result reached by the majority was compelled as to appellant by a prior unpublished opinion of the Court of Appeal deciding the identical question. "Under these circumstances, a fair reading of [the rule] surely allows citation to the unpublished opinion. To hold otherwise leaves us in the Orwellian situation where the Court of Appeal opinion binds us, ... but we cannot tell anyone about it." (103 C.A.3d Supp. 5.) Former C.R.C., Rule 977 prohibits citation of an opinion "in any other action or proceeding"; but the present case does not involve another action or proceeding. "Given the history of the ... case, this is the same proceeding. The appeals are technically separate, as were the summary judgments, but all common sense cries out that the rule should not apply here." (103 C.A.3d Supp. 6.)

(5) *Citation Procedure.* A copy of an opinion citable under C.R.C., Rule 8.1115(b) "must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation." (C.R.C., Rule 8.1115(c).) (See *Verdugo Hills Hosp. v. Department of Health*, *supra*, 88 C.A.3d 962.)

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9 Witkin Cal. Proc. Appeal § 825

[§ 825] Citation of Opinion Available Only in Computer-Based Source of Decisional Law.

"A copy ... of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation." (C.R.C., Rule 8.1115(c).)

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f. Partial Publication.

1. Nature and Purpose.

9 Witkin Cal. Proc. Appeal § 826

[§ 826] Nature and Purpose.

Appellate courts occasionally produce opinions that contain some matter meeting the standards for publication but in the main deal with matters that do not. In several California cases, the justices suggested that publication of only part of the opinion would be a feasible method of dealing with the problem. (See *People v. Collins* (1975) 44 C.A.3d 617, 623, 118 C.R. 864; *People v. Mack* (1977) 66 C.A.3d 839, 846, footnote 1, 136 C.R. 283 ["The discussion just concluded furnishes the sole justification for publication of this opinion. The remaining questions with which we must treat in disposing of this appeal are neither new nor novel, but remain an unavoidable appendage to this opinion by the force of the 'all or nothing' character of the rules governing publication of appellate opinions"]; *Golden Gate Bridge & Highway Trans. Dist. v. Muzzi* (1978) 83 C.A.3d 707, 714, 148 C.R. 197; *People v. McNeal* (1979) 90 C.A.3d 830, 840, 153 C.R. 706; 19 *Santa Clara L. Rev.* 53 [critical study recommending that partial publication be authorized].)

The Advisory Council for Appellate Justice (see Witkin, *Manual on Appellate Court Opinions*, §§4, 23) took a strong position in favor of the proposal: "The Committee recognizes that in many cases an opinion prepared mainly for the benefit of the parties may involve several matters that do not meet the standards for publication, and at the same time may involve one or more matters meeting the standards. In such cases, partial publication should be ordered for so much of the opinion as meets the publication standards; the remainder should be left unpublished." (Advisory Council for Appellate Justice, *Standards for Publication of Judicial Opinions* (1973).)

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2. Guidelines.

9 Witkin Cal. Proc. Appeal § 827

[§ 827] Guidelines.

The Judicial Council Committee on Partial Publication developed the following guidelines to assist justices who participated in an initial experiment in partial publication in 1983:

"1. Partial publication will probably be found most useful in cases involving numerous issues, only a few of which meet the criteria for publication."

"2. Format is not prescribed by the rule except that the published part of each partially published opinion must indicate that part is unpublished."

"3. Since the unpublished part is not citable, ... all material, factual or legal, that aids in the application or interpretation of the published part must be in the published part. Issues discussed in one part should not be discussed in the other part."

The Committee pointed out that only the most general guidelines were offered, because it was intended that the court "have maximum discretion as to when to issue and how to prepare a partially published opinion."

The Advisory Council for Appellate Justice (see *supra*, §826) offered this suggestion: "When a tentative decision to publish is made before the opinion is prepared, ... the opinion writer can prepare the opinion with partial publication in mind. Examples of methods that could be used are: separating the part to be published from the unpublished part; including in the published portion, in the interests of assuring it will be understood, sufficient factual information; using a separate appendix to include all of the unpublished parts. Deletions should be clearly indicated in the published opinion so that anyone interested may know what is available in the records of the court. All unpublished opinions and parts of opinions are components of the public records of the court and available to anyone to examine." (Witkin, *Manual on Appellate Court Opinions*, §23.)

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3. California Rule.

9 Witkin Cal. Proc. Appeal § 828

[§ 828] California Rule.

C.R.C., Rule 8.1110 governs partial publication:

(1) "A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under" C.R.C., Rule 8.1105 (supra, §815). (C.R.C., Rule 8.1110(a).) "The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published." (C.R.C., Rule 8.1110(b).)

(2) For purposes of C.R.C., Rules 8.1105 (supra, §813 et seq.), 8.1115 (supra, §§821, 824, 825), and 8.1120 (supra, §819), "the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion." (C.R.C., Rule 8.1110(c).)

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9 *Witkin Cal. Proc. Appeal* § 829

[§ 829] Illustrations.

Some of the earlier opinions identified the case as certified for partial publication by a statement in the text. (See *People v. Humphrey* (1982) 138 C.A.3d 881, 883, 188 C.R. 473 ["The remainder of the issues presented on appeal do not merit publication under *California Rules of Court*, rule 976 [now C.R.C., Rule 8.1105]. ... Accordingly, they are discussed in an unpublished opinion filed by this court on December 9, 1982"]; *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 C.A.3d 491, 495, 193 C.R. 25 ["At this point we have completed the only portion of this opinion that meets the criteria for publication listed in *California Rules of Court*, rule 976(b). Our resolution of the remaining issues is contained in an unpublished appendix"]; *Bowers v. Bernards* (1984) 150 C.A.3d 870, 874, 197 C.R. 925 ["We certify for publication, only the foregoing portion of this opinion, this parenthesized paragraph, and our decisional statement, i.e., the opinion's last paragraph. The remainder does not meet the standards for publication and shall not be published"].)

The uniform practice is now for the Reporter of Decisions to insert this boldface statement following the title of the case: "[Opinion certified for partial publication]" and for the court to add an explanatory footnote at the beginning of the opinion. (See *People v. McGraw* (1983) 141 C.A.3d 618, footnote 1, 190 C.R. 461 ["Part II is not published because it does not meet the standards for publication. ... Since the facts are only relevant to part II, they also are not published"]; *People v. Hurley* (1983) 144 C.A.3d 706, footnote 1, 192 C.R. 805 ["Part I of this opinion is not published because it does not meet the standards for publication contained in *California Rules of Court*, rule 976(b)"]; *Manor Inv. Co. v. F.W. Woolworth Co.* (1984) 159 C.A.3d 586, 589, footnote 1, 206 C.R. 37 [opinion certified for publication, except for portion of facts and part III]; *Swann v. Olivier* (1994) 22 C.A.4th 1324, 28 C.R.2d 23 [opinion certified for publication with exception of part I of discussion].)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Forms of Appellate Judgments.

9 Witkin Cal. Proc. Appeal § 830

[§ 830] Forms of Appellate Judgments.

Although the bare bones "judgment affirmed" or "judgment reversed," or even the slightly more informative "judgment reversed for proceedings not inconsistent with (or in conformity with) this opinion" may be sufficient in some cases, there are others in which a more specific and precise statement will benefit the parties and the trial court, and may avoid a second appeal. The parties and trial court should not be left in doubt whether, on a reversal, all or only part of the issues are open for retrial. If there is a reversal with directions, the directions should be clear and complete; the right to interest, costs, or attorneys' fees may require attention; and the possibility of modification rather than reversal should be considered. (See Witkin, *Manual on Appellate Court Opinions*, §83; C.E.B., 2 *Civil Appellate Practice* 3d, Chap. 17; Rutter Group, 2 *Civil Appeals and Writs* §11:48 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error* §829 et seq.)

The forms of appellate judgments are discussed in detail in subsequent sections under the following topical headings:

- (1) General or Unqualified Affirmance. (See *infra*, §§853, 854.)
- (2) Modification. (See *infra*, §855 et seq.)
- (3) General or Unqualified Reversal. (See *infra*, §869 et seq.)
- (4) Reversal With Directions. (See *infra*, §874 et seq.)
- (5) Partial Reversal. (See *infra*, §888 et seq.)
- (6) Fact-Finding Power of Reviewing Court. (See *supra*, §309 et seq.)
- (7) Costs on Appeal. (See *infra*, §953 et seq.)

West's Key Number Digest, Appeal and Error 1181, 1182; Judgment 5, 24

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2. Rendition: Filing of Opinion.

9 *Witkin Cal. Proc. Appeal* § 831

[§ 831] Rendition: Filing of Opinion.

(1) *Opinion and Judgment.* The clerk of the reviewing court "must promptly file all opinions and orders of the court." (C.R.C., Rules 8.264(a)(1), 8.532(a).)

The filing of the opinion, which concludes with a statement of the judgment, constitutes the "rendition of the judgment on appeal." (17 *So. Cal. L. Rev.* 249; see *Chin Ott Wong v. Title Ins. & Trust Co.* (1949) 91 *C.A.2d* 1, 2, 204 *P.2d* 387; cf. *Odlum v. Duffy* (1950) 35 *C.2d* 562, 567, 219 *P.2d* 785 [dissent]; on rendering judgment nunc pro tunc as of date of submission, where party has died, see *Holman v. Stockton Savings & Loan Bank* (1942) 49 *C.A.2d* 500, 510, 122 *P.2d* 120; on distinction between appellate judgment and order granting rehearing, see *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 *C.2d* 463, 468, 122 *P.2d* 257, *infra*, §950.)

The concluding part of the opinion, usually a single sentence ("The judgment is reversed," or "The order is affirmed"), but sometimes more detailed (e.g., where there is a partial reversal or reversal with directions), is the "appellate judgment." This appears not only in the opinion but in the minutes of the reviewing court, which are published in the advance sheets. (See 17 *So. Cal. L. Rev.* 250.)

(2) *Transmission of Copies by Clerk.* The clerk of the reviewing court must, on the filing of opinions and orders, "promptly" send copies showing the filing date to the parties and, "when relevant," to the lower court or tribunal. (C.R.C., Rules 8.264(a)(1), 8.532(a).)

(3) *Edited Opinions.* The Reporter of Decisions must "edit opinions for publication as directed by the Supreme Court" and "submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports." (C.R.C., Rule 8.1105(e)(2).) (On requirement that opinions be provided to Reporter of Decisions, see C.R.C., Rules 8.707(c), 8.1105(f)(2).)

West's Key Number Digest, Appeal and Error 1183, 1184; Judgment 270 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Edited Opinions.* C.R.C., Rule 8.707(c) was repealed in 2008. The requirement that opinions be filed with the

Reporter of Decisions is now in C.R.C., Rule 8.887(c)(2)(A).



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3. When Judgment Becomes Final.

a. In General.

1. Period Begins on Filing.

9 Witkin Cal. Proc. Appeal § 832

[§ 832] Period Begins on Filing.

Finality of judgments of the Courts of Appeal was formerly covered by a constitutional provision stating the period after pronouncement. Finality of Supreme Court judgments was not covered in the Constitution, and the period was specified by rule. (See *17 So. Cal. L. Rev.* 248, 250.) In 1966, the constitutional provision was eliminated, and finality is now governed solely by C.R.C., Rule 8.264(b). (See *infra*, §834 et seq.) Finality of appellate division judgments has always been governed by rule. (See C.R.C., Rule 8.708(a) [15 days after pronouncement, unless petition for rehearing or application for certification is filed].)

What is the starting date? It would create grave uncertainty to take the time when the signatures of the required number of judges are placed on the opinion. The rule accordingly adopts the fixed, easily ascertainable time that the opinion is filed in the office of the clerk of the reviewing court, i.e., when it is stamped with the filing date that is thereafter noted in the published minutes. (C.R.C., Rule 8.264(a), (b); see *17 So. Cal. L. Rev.* 249.)

West's Key Number Digest, Appeal and Error 1181; Judgment 650

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.708(a) was repealed in 2008. C.R.C., Rule 8.888(a)(1) now provides that an appellate division judgment becomes final 30 days after the decision is filed.



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a. In General.

2. Effect of Modification.

9 Witkin Cal. Proc. Appeal § 833

[§ 833] Effect of Modification.

A reviewing court may modify a decision until it is final in that court. However, if the clerk's office is closed on the date of finality, the court may modify the decision on the next day that the clerk's office is open. (C.R.C., Rule 8.264(c)(1).)

A special problem arises in this connection if, before the judgment becomes final, the reviewing court modifies it. Does a new period start running from the time of filing the modification or modified opinion? Under C.R.C., Rule 8.264(c), following the prior case law, this depends on whether the court merely changes the legal discussion or affects the rights of the parties (e.g., by changing the amount of the recovery). "An order modifying an opinion must state whether it changes the appellate judgment. A modification that does not change the appellate judgment does not extend the finality date of the decision. If a modification changes the appellate judgment, the finality period runs from the filing date of the modification order." (C.R.C., Rule 8.264(c); see *17 So. Cal. L. Rev. 251*.) The appellate division rule is similar. (See C.R.C., Rule 8.708(b)(3).)

The Supreme Court may modify a decision as provided in C.R.C., Rule 8.264(c). (C.R.C., Rule 8.532(c).)

West's Key Number Digest, Appeal and Error 1185; Judgment 294 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.708(b)(3) was repealed in 2008. A comparable provision is now in C.R.C., Rule 8.888(b)(2).



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b. Judgment of Court of Appeal.

1. General Rule: 30 Days After Filing.

9 Witkin Cal. Proc. Appeal § 834

[§ 834] General Rule: 30 Days After Filing.

A decision of the Court of Appeal has two kinds of finality: (a) finality in that court, and (b) finality for all purposes (see *infra*, §838).

Except as otherwise provided (see *infra*, §835), a decision of a Court of Appeal, which includes an order dismissing an appeal involuntarily, "is final in that court 30 days after filing." (C.R.C., Rule 8.264(b)(1); on when 30-day period begins, see *supra*, §§832, 833.) "Decision" includes interlocutory orders of the Court of Appeal. (Advisory Committee Comment to C.R.C., Rule 8.264.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Judgment of Court of Appeal.

2. Exceptions: Immediately After Filing.

9 *Witkin Cal. Proc. Appeal* § 835

[§ 835] Exceptions: Immediately After Filing.

C.R.C., Rule 8.264(b)(2) provides that the following Court of Appeal decisions "are final in that court on filing":

(1) *Denial of writ.* (a) "The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause." (C.R.C., Rule 8.264(b)(2)(A).) (b) "The denial of a petition for writ of supersedeas." (C.R.C., Rule 8.264(b)(2)(B).) (On effect of setting writ matter for oral argument, see *infra*, §836.) This exception permits an immediate petition for review in the Supreme Court after summary denial of a petition for a writ. (See *infra*, §904; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §221.)

(2) *Denial of application for bail or to reduce bail.* "The denial of an application for bail or to reduce bail pending appeal." (C.R.C., Rule 8.264(b)(2)(C); see 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §102 et seq.)

(3) *Denial of transfer.* "The denial of a transfer of a case within the appellate jurisdiction of the superior court." (C.R.C., Rule 8.264(b)(2)(D); see *infra*, §1024.)

(4) *Dismissal of appeal.* "The dismissal of an appeal on request or stipulation." (C.R.C., Rule 8.264(b)(2)(E); see *supra*, §731.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Denial of writ.* C.R.C., Rule 8.264(b)(2)(A) was repealed and C.R.C., Rule 8.264(b)(2)(B) was renumbered C.R.C., Rule 8.264(b)(2)(A) in 2008. (2) *Denial of application for bail or to reduce bail.* C.R.C., Rule 8.264(b)(2)(C) was repealed in 2008.

(3) *Denial of transfer.* C.R.C., Rule 8.264(b)(2)(D) was repealed in 2008.

(4) *Dismissal of appeal.* C.R.C., Rule 8.264(b)(2)(E) was renumbered C.R.C., Rule 8.264(b)(2)(B) in 2008.



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3. Effect of Setting Writ Matter for Oral Argument.

9 Witkin Cal. Proc. Appeal § 836

[§ 836] Effect of Setting Writ Matter for Oral Argument.

In *Bay Dev., Ltd. v. Superior Court* (1990) 50 C.3d 1012, 269 C.R. 720, 791 P.2d 290, 5 Summary (10th), *Torts*, §118, after plaintiffs sought extraordinary writ relief, the Court of Appeal set the matter for oral argument, heard argument, and decided the matter by a full, written opinion denying the writ. Plaintiffs' petition for review was timely filed if the opinion became final 30 days after filing, but not if it became final immediately under the exception in former C.R.C., Rule 24(a) (now C.R.C., Rule 8.264(b)(2)(A)) relating to denial of a petition for a writ *without* issuance of an alternative writ or order to show cause. *Held*, the petition for review was timely filed.

(a) The rule's exception "to the ordinary 30-days-after-filing date of finality was intended to apply only to summary denials of writ petitions by the Court of Appeal, and not to cases--such as this case--in which the Court of Appeal sets a writ matter for oral argument, hears oral argument and resolves the matter by full written opinion." (50 C.3d 1024.)

(b) Here, the Court of Appeal's internal operating practices and procedures suggested that oral argument in an original writ proceeding would be ordered only after an alternative writ or order to show cause was issued. And it was apparent that the court itself assumed that the normal rule of finality was applicable to its decision, because it permitted plaintiffs to file a petition for rehearing and disposed of that petition on the merits, which would not have been permissible had the court's opinion become final immediately. Hence, to fulfill the purposes of the writ-denial exception and to prevent it from becoming an unconscionable trap for the unwary, it is appropriate to treat the order setting this matter for oral argument before the Court of Appeal as the equivalent of an order issuing "an alternative writ or order to show cause" for purposes of the rule. (50 C.3d 1025.)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.264(b)(2)(A) was repealed in 2008.



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4. Effect of Certification for Publication.

9 Witkin Cal. Proc. Appeal § 837

[§ 837] Effect of Certification for Publication.

If a Court of Appeal certifies its opinion for publication or partial publication after filing its decision and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication. (C.R.C., Rule 8.264(b)(5).) Thus, a post-filing decision of the Court of Appeal to publish its opinion in whole or in part restarts the 30-day finality period. This provision is intended to allow parties sufficient time to petition the Court of Appeal for rehearing or the Supreme Court for review--and to allow potential amici curiae sufficient time to express their views--when the Court of Appeal changes the publication status of an opinion. The rule thus recognizes that the publication status of an opinion may affect a party's decision whether to file a petition for rehearing or a petition for review. (Advisory Committee Comment to C.R.C., Rule 8.264.)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.264(b)(5) was renumbered C.R.C., Rule 8.264(b)(3) in 2008.



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5. Finality for All Purposes.

9 Witkin Cal. Proc. Appeal § 838

[§ 838] Finality for All Purposes.

(1) *Time for Review in Supreme Court.* After the decision has become final in the Court of Appeal (30 days after filing; see *supra*, §834), there is an additional period for review in the Supreme Court before the decision becomes final for all purposes.

(a) *Review on Petition of Party.* A party seeking review must file a petition within 10 days after the decision becomes final as to the Court of Appeal. For this purpose, the time that the decision becomes final as to the Court of Appeal is not extended if the last day falls on a day on which the clerk's office is closed. (C.R.C., Rule 8.500(e)(1).) Within 60 days after the filing, the Supreme Court may order review. (C.R.C., Rule 8.512(b)(1).) (See *infra*, §933.)

(b) *Review on Supreme Court's Own Motion.* If no petition is filed, the Supreme Court may order review within 30 days after the decision becomes final as to the Court of Appeal. (C.R.C., Rule 8.512(c)(1).) (See *infra*, §925.) And if a petition for review is filed, the court may deny the petition but order review on its own motion within the periods prescribed in C.R.C., Rule 8.512(b)(1). (C.R.C., Rule 8.512(c)(2).)

(2) *Extension of Time.*

(a) *Review on Petition of Party.* Before the expiration of the 60-day period or any extension within which the Supreme Court may grant review of a petition for review, the court may order one or more extensions to a date not later than 90 days after the last petition is filed. (C.R.C., Rule 8.512(b)(1).) (See *infra*, §933.) The 60-day period begins on the filing date of the last petition for review that either (1) is timely in the sense that it is filed within the rule time for such petitions (i.e., 10 days after finality of the Court of Appeal decision) or (2) is treated as timely in the sense that it is filed with permission of the Chief Justice on a showing of good cause for relief from default. In each circumstance, it is the filing of the petition that triggers the 60-day period. (Advisory Committee Comment to C.R.C., Rule 8.512.)

(b) *Review on Supreme Court's Own Motion.* Within the 30-day period after finality as to the Court of Appeal or any extension of it within which the Supreme Court may order review on its own motion, the court may order one or

more extensions to a date not later than 90 days after the decision is final in the Court of Appeal. If any such period ends on a day when the clerk's office is closed, the court may order review on the next day that the clerk's office is open. (C.R.C., Rule 8.512(c)(1).) (See *infra*, §933.)

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c. Judgment of Supreme Court.

9 *Witkin Cal. Proc. Appeal* § 839

[§ 839] Judgment of Supreme Court.

(1) *In General.* Generally, a Supreme Court decision is final 30 days after filing (see *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 469, 122 P.2d 257; 17 So. Cal. L. Rev. 250), unless either of the following occurs:

(a) The court orders a shorter period. (C.R.C., Rule 8.532(b)(1)(A).)

(b) Before the 30-day period or any extension expires, the court orders one or more extensions, not to exceed a total of 60 additional days. (C.R.C., Rule 8.532(b)(1)(B).)

(2) *Decisions Final on Filing.* The following Supreme Court decisions are final on filing:

(a) The denial of a petition for review of a Court of Appeal decision. (C.R.C., Rule 8.532(b)(2)(A).)

(b) A dismissal of review, transfer without decision, or retransfer without decision under C.R.C., Rule 8.528(b), (d), or (e) (*infra*, §§943, 945). (C.R.C., Rule 8.532(b)(2)(B).)

(c) The denial of a petition for a writ within the court's original jurisdiction without issuance of an alternative writ or order to show cause. (C.R.C., Rule 8.532(b)(2)(C).)

(d) The denial of a petition for writ of supersedeas. (C.R.C., Rule 8.532(b)(2)(D).)

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3. When Judgment Becomes Final.

d. Finality for United States Supreme Court.

9 Witkin Cal. Proc. Appeal § 840

[§ 840] Finality for United States Supreme Court.

The United States Supreme Court may review a final judgment of a state appellate court, but its test of finality for this purpose is the rendition of a final appellate decision on the issues--usually the date of filing of the opinion. Hence, even though the period for rehearing or hearing in the California Supreme Court has not elapsed, the time runs. But the subsequent granting of a rehearing or review in the California Supreme Court will, of course, destroy the previous finality, and a new period will start when the new final decision is rendered.

The rule was explained in *Market Street Ry. Co. v. Railroad Com. of Calif.* (1945) 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, an appeal from the California Supreme Court. The opinion states that finality "is not controlled by the designation applied in state practice," and adds: "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. ... Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired. ... If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing." (65 S.Ct. 773, 89 L.Ed. 1176, 1177.) (See 2A Federal Procedure, L.Ed., §3:38 et seq.; 91 Harv. L. Rev. 1004 [rule and exceptions]; 4 Am.Jur.2d (2007 ed.), Appellate Review §88.)

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E. Remittitur.

1. Nature of Remittitur.

9 Witkin Cal. Proc. Appeal § 841

[§ 841] Nature of Remittitur.

Remittitur "is the term employed to designate the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken or over which its controlling jurisdiction is exercised, and corresponds to the 'mandate' used in the practice of the United States Supreme Court." (*Noel v. Smith* (1905) 2 C.A. 158, 162, 83 P. 167; *Rowland v. Kreyenhagen* (1864) 24 C. 52, 59; *Granger v. Sheriff* (1903) 140 C. 190, 195, 73 P. 816; see *Isenberg v. Sherman* (1932) 214 C. 722, 725, 7 P.2d 1006; *Severns Drilling Co. v. Superior Court* (1936) 16 C.A.2d 435, 437, 60 P.2d 530; *Combs v. Haddock* (1962) 209 C.A.2d 627, 631, 26 C.R. 252 [opinion must be consulted in interpreting remittitur]; C.E.B., 2 Civil Appellate Practice 3d, §18.1; Rutter Group, 2 Civil Appeals and Writs §14:1 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §843 et seq.)

In brief, the remittitur is a document that "remits," i.e., communicates, the final judgment on appeal to the lower court. Certified copies of the judgment or opinion or record, although often remitted or attached to the remittitur, are distinct from the remittitur itself. (*Gallenkamp v. Superior Court* (1990) 221 C.A.3d 1, 10, 270 C.R. 346.)

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E. Remittitur.

2. Procedure.

9 Witkin Cal. Proc. Appeal § 842

[§ 842] Procedure.

(1) *Judgment of Supreme Court or Court of Appeal.* The judgment of the Supreme Court or Court of Appeal "shall be remitted to the court from which the appeal was taken." (C.C.P. 43.)

(2) *Clerk of Reviewing Court and Clerk of Trial Court.* On the final determination of an appeal by the reviewing court, the court clerk must remit to the trial court a certified copy of the judgment or order of the reviewing court and of its opinion, if any. The clerk of the trial court must then (a) file the certified copy of the judgment and opinion of the reviewing court, (b) attach that copy to the judgment roll if the appeal was from a judgment, and (c) enter a note of the judgment of the reviewing court stating whether the judgment or order appealed from has been affirmed, reversed, or modified, in the margin of the original entry of the judgment or order, and also in the register of actions. (C.C.P. 912.) (See C.E.B., 2 Civil Appellate Practice 3d, §18.4.)

(3) *Clerk of Supreme Court.* The clerk of the Supreme Court must issue a remittitur when a decision of the court is final. After review of a Court of Appeal decision, the clerk must address the remittitur to the Court of Appeal and send that court two copies of the remittitur and two file-stamped copies of the Supreme Court opinion or order. (C.R.C., Rule 8.540(b); see *infra*, §941.)

(4) *Where There Is No Supreme Court Review.* If a Court of Appeal decision is not reviewed by the Supreme Court, the Court of Appeal clerk must issue a remittitur immediately after the Supreme Court denies review, the period for granting review expires, or the court dismisses review, and must send the lower court or tribunal the remittitur and a file-stamped copy of the opinion or order. (C.R.C., Rule 8.272(b)(1).) After Supreme Court review of a Court of Appeal decision, the clerk must, on receiving the Supreme Court remittitur, immediately issue a remittitur if there will be no further proceedings in the Court of Appeal, and must send the lower court or tribunal the Court of Appeal remittitur, a copy of the Supreme Court remittitur, and a file-stamped copy of the Supreme Court opinion or order. (C.R.C., Rule 8.272(b)(2).)

(5) *When Remittitur Is Deemed Issued.* The remittitur, whether of the Supreme Court or a Court of Appeal, is deemed issued when the clerk enters it in the record. The clerk must immediately send the parties notice of issuance of the remittitur, showing the date of entry. (C.R.C., Rules 8.272(d)(1), 8.540(b)(1), 8.540(b)(4); see *infra*, §844.)

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XIX. DETERMINATION ON MERITS

E. Remittitur.

3. Proceedings in Which Remittitur Issues.

9 Witkin Cal. Proc. Appeal § 843

[§ 843] Proceedings in Which Remittitur Issues.

C.C.P. 43 and *912* refer only to the judgment on appeal. However, it may be necessary to communicate the judgment to the lower court in any case in which jurisdiction was transferred to the reviewing court and must be retransferred, or after an original proceeding. Thus, the Supreme Court must issue a remittitur not only after a decision in a "review of a Court of Appeal decision," but also after a decision in an "appeal from a judgment of death or in a cause transferred to the court" (see *infra*, §922). (C.R.C., Rule 8.540(a).) Similarly, the Court of Appeal must issue a remittitur after a decision in an appeal. (C.R.C., Rule 8.272(a).) It must also issue a remittitur in a writ proceeding, except when the court denies the petition without issuing an alternative writ or order to show cause. C.R.C., Rule 8.272(b)-(d) (*supra*, §§841, 842) governs issuance of a remittitur in a writ proceedings. (C.R.C., Rule 8.499.)

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4. Effect of Issuance.

9 Witkin Cal. Proc. Appeal § 844

[§ 844] Effect of Issuance.

When the remittitur issues, the jurisdiction of the appellate court ceases, and that of the trial court attaches. Except where the issuance was a result of mistake, inadvertence, or fraud (see *infra*, §847 et seq.), it cannot be recalled for the purpose of modifying the judgment. (See *Martin v. Wagner* (1899) 124 C. 204, 206, 56 P. 1023; *Granger v. Sheriff* (1903) 140 C. 190, 195, 73 P. 816; *Estate of Ross* (1922) 189 C. 317, 318, 207 P. 1014; *Isenberg v. Sherman* (1932) 214 C. 722, 725, 7 P.2d 1006 ["this court has no appellate jurisdiction over its own judgments and it cannot review or modify them after the cause has once passed from its control by the issuance of the remittitur"]; *Nuckolls v. Bank of California* (1937) 10 C.2d 266, 271, 74 P.2d 264; *Fischer v. Lukens* (1919) 41 C.A. 358, 360, 182 P. 967; *Crenshaw Bros. & Saffold v. Southern Pac. Co.* (1919) 42 C.A. 44, 45, 183 P. 208; *Petersen v. Civil Service Bd. of Oakland* (1924) 68 C.A. 752, 754, 230 P. 196; *Chin Ott Wong v. Title Ins. & Trust Co.* (1949) 91 C.A.2d 1, 2, 204 P.2d 387; *Gallenkamp v. Superior Court* (1990) 221 C.A.3d 1, 10, 270 C.R. 346; *Bryan v. Bank of America* (2001) 86 C.A.4th 185, 190, 103 C.R.2d 148, quoting the text.)

There was formerly some uncertainty as to the precise time when jurisdiction left the reviewing court and revested in the lower court. To say that this did not happen until receipt and filing of the remittitur by the lower court clerk would have the undesirable effect of making jurisdiction dependent on extrinsic factors such as delay in transmission, loss of the document, or neglect to file. This is avoided by the practical solution of C.R.C., Rules 8.272(d)(1) and 8.540(b)(1): "The remittitur is deemed issued when the clerk enters it in the record." In other words, the date of the record entry by the reviewing court clerk is the time when jurisdiction is transferred. (See *Wilson v. Nichols* (1942) 55 C.A.2d 678, 681, 131 P.2d 596 [remittitur lost; certified copy ordered filed nunc pro tunc]; *Bellows v. Aliquot Associates* (1994) 25 C.A.4th 426, 432, 30 C.R.2d 723; 17 So. Cal. L. Rev. 255.)

To assist the parties in knowing when jurisdiction is revested, C.R.C., Rules 8.272(d)(1) and 8.540(b)(4) require the clerk of the reviewing court to mail notice of the issuance of the remittitur to the parties "immediately."

West's Key Number Digest, Appeal and Error 1192 et seq.

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5. Issuance Forthwith.

9 Witkin Cal. Proc. Appeal § 845

[§ 845] Issuance Forthwith.

(1) *In General.* The remittitur is normally issued by the clerk as a routine ministerial act only when the judgment becomes final for all purposes. (C.R.C., Rules 8.272(b)(1)(A) and 8.540(b)(1); see *supra*, §§832, 834 et seq., 841, 842.) But the reviewing court may under some circumstances eliminate the time lapse.

(2) *Supreme Court: For Cause.* If a promptly effective decision is of vital importance to the public or the parties, the Supreme Court may direct issuance of the remittitur immediately upon filing of its decision, cutting off the time for rehearing. (C.R.C., Rule 8.540(c)(1) ["on the parties' stipulation or for good cause"]; see *infra*, §941.) The court's power is clear because the finality of its decisions is established only by rule. (See *Corona Unified Hosp. Dist. v. Superior Court* (1964) 61 C.2d 846, 854, 40 C.R. 745, 395 P.2d 817; *Carmel-by-the-Sea v. Young* (1970) 2 C.3d 259, 273, 85 C.R. 1, 466 P.2d 225 [appeal from judgment in action for declaratory judgment on constitutionality of public officer disclosure statute]; *Legislature v. Reinecke* (1972) 6 C.3d 595, 604, 99 C.R. 481, 492 P.2d 385 [mandamus proceeding in Supreme Court challenging validity of legislative reapportionment, and requiring decision in time for impending elections]; *Long Beach v. Bozek* (1983) 33 C.3d 727, 728, 190 C.R. 918, 661 P.2d 1072, *infra*, §851; C.E.B., 2 Civil Appellate Practice 3d, §§18.6, 18.7; Rutter Group, 2 Civil Appeals and Writs §14:25; 17 So. Cal. L. Rev. 254; *supra*, §832 et seq.)

(3) *Court of Appeal: On Stipulation.* The Court of Appeal has no such unlimited power; its decisions are not final until the period for rehearing in that court and for review in the Supreme Court has expired. (See *Moran v. District Court of App.* (1940) 15 C.2d 527, 530, 102 P.2d 1079; *supra*, §838.) Under C.R.C., Rule 8.272(c)(1), a Court of Appeal may direct immediate issuance of a remittitur only on (a) the parties' stipulation or (b) dismissal of the appeal on the appellant's request or a stipulation to dismiss. This rule thus allows the parties to waive the benefit of the rehearing period. (See C.E.B., 2 Civil Appellate Practice 3d, §§18.6, 18.8, 18.9; Rutter Group, 2 Civil Appeals and Writs §§14:23, 14:24; Cal. Civil Practice, 5 Procedure §41:55; cf. *Sanders v. Warden* (1951) 106 C.A.2d 707, 236 P.2d 19 [issuance forthwith without stipulation, after vacating void order purporting to reinstate dismissed appeal]; 17 So. Cal. L. Rev. 254; and see C.R.C., Rule 8.773(b) [limited civil case appeals: issuance on stipulation].)

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6. Stay of Issuance.

9 *Witkin Cal. Proc. Appeal* § 846

[§ 846] Stay of Issuance.

Unusual circumstances may also make it necessary to stay the issuance of the remittitur, i.e., to delay the date when jurisdiction would normally be revested in the lower court for enforcement of the judgment or other purposes. (See *Krug v. Meehan* (1951) 108 C.A.2d 416, 239 P.2d 46 [stay pending determination of application to vacate mistaken order dismissing appeal].) The main reason is to allow an opportunity for further review in the United States Supreme Court. (See *Reynolds v. E. Clemens Horst Co.* (1918) 36 C.A. 529, 172 P. 623 [30-day stay]; *Severns Drilling Co. v. Superior Court* (1936) 16 C.A.2d 435, 60 P.2d 530 [stay until United States Supreme Court passes on petition].)

On the motion of a party or on its own motion, and "for good cause," the Supreme Court may stay a remittitur's issuance for "a reasonable period." (C.R.C., Rule 8.540(c)(2); see C.R.C., 8.773(c) [appellate division]; *San Bernardino Community Hosp. v. Meeks* (1986) 187 C.A.3d 457, 462, 231 C.R. 673 [issuance stayed to allow court to decide whether to impose sanctions for frivolous appeal]; C.E.B., 2 Civil Appellate Practice 3d, §18.10 et seq.; Rutter Group, 2 Civil Appeals and Writs §14:28 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §856; 17 *So. Cal. L. Rev.* 254.) Similarly, the Court of Appeal may stay issuance for a reasonable period on the motion of a party or on its own motion, and "for good cause." (C.R.C., Rule 8.272(c)(2).) The power of the Supreme Court is clear, and, although that of the Court of Appeal is more doubtful, it has not been challenged.

There is some uncertainty whether the stay order may be made *ex parte*, without notice. (See *Goble v. Appellate Dept.* (1933) 130 C.A. 737, 738, 20 P.2d 345 [lack of notice was immaterial because aggrieved party thereafter moved to vacate and had hearing in court]; C.E.B., 2 Civil Appellate Practice 3d, §18.11.)

West's Key Number Digest, Appeal and Error 1188

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7. Recall of Remittitur.

a. Nature of Remedy.

9 Witkin Cal. Proc. Appeal § 847

[§ 847] Nature of Remedy.

If the remittitur issues by inadvertence or mistake, or as a result of fraud or imposition practiced on the appellate court, the court has inherent power to recall it and thereby reassert its jurisdiction over the cause. This remedy, though described in procedural terms, is actually an exercise of an extraordinary substantive power. Correction of the clerk's clerical or other mistakes in the remittitur is a very minor aspect of the proceeding; its significant function is to permit the court to set aside an erroneous judgment on appeal obtained by improper means. In practical effect, therefore, the motion or petition to recall the remittitur may operate as a belated petition for rehearing on special grounds, without any time limitations. (See *Bryan v. Bank of America* (2001) 86 C.A.4th 185, 191, 103 C.R.2d 148, quoting the text; C.E.B., 2 Civil Appellate Practice 3d, §18.14; Rutter Group, 2 Civil Appeals and Writs §14:34 et seq.; 17 So. Cal. L. Rev. 255.)

The power is explained in several leading cases:

(1) "Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this Court will afford relief. ... This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the Court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity." (*Rowland v. Kreyenhagen* (1864) 24 C. 52, 59.)

(2) "The theory upon which this power is exercised is not that the court, in this manner, resumes jurisdiction over a cause, but that the court has never lost jurisdiction, because an order secured by fraud and false suggestion is a nullity and cannot be deemed to be the order of the court." (*Isenberg v. Sherman* (1932) 214 C. 722, 725, 7 P.2d 1006.)

A similar power is exercised by the United States Supreme Court, by allowing the equivalent of a second petition for rehearing (contrary to the governing rule) in the guise of a "motion to recall and amend the judgment." (See *Cahill v. New York, New Haven & Hartford R. Co.* (1956) 351 U.S. 183, 76 S.Ct. 758, 100 L.Ed. 1075; *Gondeck v. Pan Amer. World Airways* (1965) 382 U.S. 25, 86 S.Ct. 153, 15 L.Ed.2d 21.)

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7. Recall of Remittitur.

b. Procedure.

9 *Witkin Cal. Proc. Appeal* § 848

[§ 848] Procedure.

The Supreme Court may order a remittitur's recall on the motion of a party or on its own motion and "for good cause." (C.R.C., Rule 8.540(c)(2); see *infra*, §941.) The Court of Appeal may order a recall on the motion of a party or on its own motion or on stipulation, and "for good cause." (C.R.C., Rule 8.272(c)(2).) (See C.R.C., Rule 8.773(d) [appellate division]; *Estate of Davis* (1936) 8 C.2d 11, 63 P.2d 827 [stipulation]; C.E.B., 2 Civil Appellate Practice 3d, §18.17; 17 *So. Cal. L. Rev.* 255; Rutter Group, 2 Civil Appeals and Writs §14:45 et seq.; Cal. Civil Practice, 5 Procedure §41:59 et seq.; cf. *Ellenberger v. Oakland* (1946) 76 C.A.2d 828, 830, 174 P.2d 461 ["motion to set aside the judgment," filed in pro. per., treated as motion to recall remittitur]; on 30-day time limit for recall to correct clerk's mistake in entry of judgment for costs, see C.R.C., Rule 8.278(b)(2), *infra*, §974; 17 *So. Cal. L. Rev.* 256, 263; on denial of motion for laches or failure to exhaust normal remedies, see *infra*, §852.) An order by either court recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status. (C.R.C., Rules 8.272(c)(3), 8.540(c)(3).)

An improper exercise of the power may be corrected by a second recall. Thus, in *Chin Ott Wong v. Title Ins. & Trust Co.* (1949) 91 C.A.2d 1, 204 P.2d 387, the appellate court recalled its remittitur and corrected the judgment to conform to the views stated in the opinion. Thereafter, on motion of respondents to recall, the court determined that its change in the judgment was not a correction of inadvertent error but an unauthorized modification of the decision for judicial error. Accordingly, the remittitur was again recalled and the clerk was directed to issue a new remittitur in the original form. (91 C.A.2d 3.)

Obviously, the mere order of recall is not a determination that the judgment is subject to correction. In *People v. Randazzo* (1957) 48 C.2d 484, 310 P.2d 413, defendant was charged in count 1 with robbery and in count 2 with kidnaping for purpose of robbery. He was convicted on both, and the conviction was affirmed. Thereafter, defendant's motion to recall the remittitur was granted by the Court of Appeal as to count 2 only, and a hearing in the Supreme Court was denied "because of our unwillingness to interfere" pending decision by the appellate court. The latter court reversed the conviction on count 2 on the ground that the kidnaping statute was erroneously applied. The Supreme Court granted a hearing. *Held*, the remittitur was erroneously recalled, and the merits of the conviction could not be considered.

(a) The main theory of the opinion is that an order of the Court of Appeal recalling its remittitur is interlocutory and does not establish the law of the case for further proceedings. "If the court was bound by its tentative decision that a fraud had been perpetrated upon it or that it had been inadvertent or mistaken, it would be foreclosed from the full review of the case implicit in its order for reconsideration. Given the strong policy in favor of finality of appellate judgments after the going down of the remittitur, and the fact that the court must be free to review the grounds of its decision recalling the remittitur properly to dispose of the merits, we conclude that if it determines on further consideration that the remittitur should not have been recalled, it has the power to and must vacate its order of recall instead of redeciding the case on the merits." (*48 C.2d 487.*)

(b) "Accordingly, implicit in the District Court of Appeal's reversal of the judgment herein was its redetermination of the correctness of its recall of the remittitur, and that issue is now before this court by virtue of our order of transfer." (*48 C.2d 488.*) The Supreme Court's denial of a hearing on the order granting the motion to recall is not conclusive, for denial of hearing constitutes only an exercise of discretionary power to transfer or refuse to transfer. (*48 C.2d 488.*)

On the issue of ground for recall, it was clear that the error was one of law and did not authorize recall. Hence, the Court of Appeal should have vacated its order recalling and not have redecided the case on the merits. The proceeding was therefore transferred back to the Court of Appeal with directions "to file its order vacating its order recalling the remittitur and to reissue the remittitur on its decision affirming the judgment." (*48 C.2d 491.*)

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7. Recall of Remittitur.

c. Grounds.

1. Correction of Remittitur.

9 Witkin Cal. Proc. Appeal § 849

[§ 849] Correction of Remittitur.

The simplest exercise of the power is in the correction of the clerk's ministerial error. If by mistake or inadvertence the clerk makes entries in the remittitur that are contrary to the actual judgment of the court, it may be recalled for correction.

The remittitur is usually a printed form, on which the clerk enters the names of parties, date of judgment, and judgment (the last part of the opinion). Mistakes in these items are rare. But it is the duty of the clerk to insert a judgment for costs (C.R.C., Rule 8.278(b), *infra*, §§954, 974), and nearly all of the cases on recall for the clerk's mistake deal with erroneous entry or failure to enter a proper judgment for costs. (See *Baker v. Southern Calif. Ry. Co.* (1900) 130 C. 113, 62 P. 302; *San Joaquin & Kings River Canal & Irr. Co. v. James J. Stevinson* (1913) 165 C. 540, 132 P. 1021; *Estate of Steehler* (1925) 197 C. 67, 239 P. 718; *Horan v. Varian* (1929) 207 C. 7, 276 P. 1002.)

A remittitur may also be recalled where, by inadvertence, it is issued prematurely. In *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 188 C.R. 104, 655 P.2d 306, the Court of Appeal dismissed an appeal, and the remittitur issued. Then appellants (plaintiffs), who had previously requested attorneys' fees under C.C.P. 1021.5, submitted a motion for fees. The remittitur was recalled and the motion was filed. *Held*, issuance of the remittitur was accidental, and the recall "was the appropriate procedural mechanism to correct the clerical error." (33 C.3d 166.) Defendant's contention that dismissal of the appeal divested the Court of Appeal of jurisdiction to rule on the motion was erroneous; recall of the remittitur reinstated that court's jurisdiction, and it could dispose of the motion separately from its decision on the merits of the appeal. (33 C.3d 166.)

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c. Grounds.

2. Correction of Judgment.

9 Witkin Cal. Proc. Appeal § 850

[§ 850] Correction of Judgment.

Even though the clerk issues the remittitur in strict conformity with the judgment, if the court afterwards decides that the judgment was obtained or rendered by means so improper that it should not stand, the remittitur may be recalled for the purposes of correcting that judgment or rendering a new and different judgment. The situations are as follows:

(1) *Fraud or Imposition on Court.* (See *Trumpler v. Trumpler* (1899) 123 C. 248, 55 P. 1008 [false confession of error for purpose of defeating real party in interest, deception of counsel, and imposition on court].)

(2) *Mistake of Fact or "Improvident Order."* Despite the absence of fraud or imposition, if the judgment was rendered unintentionally and inadvertently by reason of the court's own mistake of fact or lack of knowledge of the circumstances, the remittitur may be recalled.

The leading case on this point is *Municipal Bond Co. v. Riverside* (1934) 138 C.A. 267, 32 P.2d 661. A city treasurer misappropriated money from a bond redemption fund, and plaintiff bondholder sued the treasurer, his surety, and the city. The city, as trustee, cross-complained against the treasurer and surety. The trial judge determined that the city could not recover from the surety or treasurer, and the appellate court held that plaintiff could not recover against the surety or city. Pending the appeal, the city compromised its own claim against the surety, and the appeal was dismissed by stipulation, the remittitur issuing. Thus, the city abandoned its duty as trustee to recover the money for the benefit of bondholders, and plaintiff was left without any remedy. Some 3 months later, on plaintiff's motion, the order dismissing the city's appeal was set aside and the remittitur was recalled.

One justice contended that there was no ground for recall because the stipulation was openly made, in good faith, with authority, with plaintiff's knowledge at least 2 weeks in advance, and without fraud or imposition on any party or the court. The other justices pointed out, however, that the court was only "legally" in possession of the facts (presumed knowledge of its own records); "factually" it was not, because none of the justices actually was informed as to the issues or the effect of dismissal on the rights of bondholders. Conceding that "a mistake of law on the part of counsel, or the members of this court, no matter how honestly made, does not of itself, and standing alone, furnish sufficient ground"

for the motion (138 C.A. 286), nevertheless, because the court actually did not know of the unfortunate result of its order, the order was to that extent "provident"; and the act of procuring the dismissal "was just as void as though actual fraud had been proven." (138 C.A. 288.) (See 23 Cal. L. Rev. 354 [*Municipal Bond Co. v. Riverside*].)

A number of decisions are illustrative. (See *McClearen v. Superior Court* (1955) 45 C.2d 852, 856, 291 P.2d 449 [superior court thought justice court had decided no fact issue]; *People v. Hickok* (1949) 92 C.A.2d 539, 540, 207 P.2d 620 [criminal appeal had been dismissed after notice of default (for late filing of brief) was sent to wrong attorneys]; *People v. Bartges* (1954) 128 C.A.2d 496, 498, 275 P.2d 518 [court mistakenly assumed that jury had found defendant guilty of three prior convictions instead of only one]; cf. *ERA-Trotter Girouard Assn. v. Superior Court* (1996) 50 C.A.4th 1851, 1857, 58 C.R.2d 381, quoting the text [judgments in action tried in absence of appellant and her counsel as result of counsel's mistake were not "improvident orders" warranting judicial correction].)

In re McGee (1951) 37 C.2d 6, 229 P.2d 780, again draws the difficult line between judicial error and inadvertence. In an election contest brought by appellant, respondent's attack on jurisdiction was rejected, but he was given judgment on the merits. On appeal, it was held that the trial court lacked jurisdiction, and the judgment was reversed with directions to dismiss. The appellate court forgot that, by a routine application of former C.R.C., Rule 26(b) (now C.R.C., Rule 8.278(b)), the appellant receives costs on a reversal, and the clerk entered a judgment accordingly. *Held*, the remittitur should be recalled to correct the error resulting from the court's inadvertent failure to make express provision for an award of costs to the true prevailing party (respondent). (37 C.2d 9.) (See *In re Rothrock* (1939) 14 C.2d 34, 38, 92 P.2d 634 [court mistakenly assumed that no motion for new trial had been made].)

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c. Grounds.

3. Response to United States Supreme Court Remand.

9 Witkin Cal. Proc. Appeal § 851

[§ 851] Response to United States Supreme Court Remand.

In *Long Beach v. Bozek* (1983) 33 C.3d 727, 190 C.R. 918, 661 P.2d 1072, the United States Supreme Court, on certiorari, vacated the decision of the California Supreme Court in *Long Beach v. Bozek* (1982) 31 C.3d 527, 18 C.R. 86, 645 P.2d 137, 5 Summary (10th), Torts, §487, and directed the court to consider whether its judgment was based on federal or state constitutional grounds or both. Pursuant to this mandate, the remittitur was recalled, the decision was reexamined, and the court declared that its decision was based on both Constitutions, and accordingly, that the California Constitution furnished an independent ground to support the decision (see 7 Summary (10th), *Constitutional Law*, §111).

The court then observed that it was unnecessary to modify the prior opinion and that "we reiterate that opinion in its entirety." (33 C.3d 728.) The new remittitur was issued forthwith.

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7. Recall of Remittitur.

d. Reasons for Denying Motion.

9 *Witkin Cal. Proc. Appeal* § 852

[§ 852] Reasons for Denying Motion.

(1) *Judicial Error*. It has been seen that a trial court may, regardless of lapse of time, correct clerical error in its judgment, but may not revise it for judicial error after the time for new trial or other direct attack has passed. (See 7 *Cal. Proc.* (5th), *Judgment*, §§65, 67 et seq.) The same distinction is made as a limitation on the power of a reviewing court to recall the remittitur. A mistake of law or faulty conclusion as to the legal effect of the facts, resulting in an erroneous judgment, must be corrected during the period for rehearing and modification. After the appellate judgment is final, the remittitur cannot be recalled merely because the case should have been decided differently. (See *Isenberg v. Sherman* (1932) 214 C. 722, 725, 7 P.2d 1006; *Southwestern Inv. Corp. v. Los Angeles* (1952) 38 C.2d 623, 626, 241 P.2d 985; *People v. Randazzo* (1957) 48 C.2d 484, 491, 310 P.2d 413, supra, §848; *Haydel v. Morton* (1938) 28 C.A.2d 383, 386, 82 P.2d 623; *Chin Ott Wong v. Title Ins. & Trust Co.* (1949) 91 C.A.2d 1, 3, 204 P.2d 387; *People v. Stone* (1949) 93 C.A.2d 858, 861, 210 P.2d 78; *Davis v. Basalt Rock Co.* (1952) 114 C.A.2d 300, 303, 250 P.2d 254; *Kohle v. Sinnett* (1955) 136 C.A.2d 34, 37, 288 P.2d 139; *Bank of America v. Superior Court* (1990) 220 C.A.3d 613, 624, 269 C.R. 596.)

(2) *Mistake Not Prejudicial*. "[W]e are entirely unable to perceive wherein respondent has been harmed by the irregularities complained of, or in what manner her interest will be prejudiced if said *remittitur* is not recalled." (*Muller v. Union Traction Co.* (1924) 68 C.A. 239, 243, 228 P. 731.)

(3) *Petition (or Failure To Petition) for Rehearing or Review*. One reason for denial is that the same grounds were presented to the court in briefs on the appeal or on petition for rehearing, and the motion is simply an attempt to obtain an additional rehearing. (See *Isenberg v. Sherman*, supra, 214 C. 725; *Southwestern Inv. Corp. v. Los Angeles*, supra, 38 C.2d 630.) Another is that the aggrieved party had an opportunity to present his or her contention in this manner and neglected to do so. (See *Heroux v. Atchison, Topeka & Santa Fe Ry. Co.* (1939) 35 C.A.2d 128, 129, 94 P.2d 820; *Chin Ott Wong v. Title Ins. & Trust Co.*, supra, 91 C.A.2d 3; *Davis v. Basalt Rock Co.*, supra, 114 C.A.2d 310.)

(4) *Laches*. Long or unexcused delay in seeking the relief may also be a ground of denial. (*Gutelius v. General Elec. Co.* (1940) 39 C.A.2d 292, 293, 102 P.2d 1108; *Talbot v. Fire & Police Pension Bd. of Pasadena* (1942) 51 C.A.2d 193, 124 P.2d 352 [7 years after facts discovered]; *Ellenberger v. Oakland* (1946) 76 C.A.2d 828, 836, 174 P.2d

461; *Bryan v. Bank of America* (2001) 86 C.A.4th 185, 192, 103 C.R.2d 148.)

(5) *Failure To File Opening Brief*. "Although [counsel] has presented evidence showing that her client was incompetent when the appeal was dismissed, she has completely failed to justify counsel's failure to either file a timely opening brief or explain ... why appellant's mental state interfered with the preparation or filing of the brief. If ... counsel felt unauthorized to continue to proceed on behalf of an incompetent client no longer able or willing to pursue her cause, it was incumbent upon them to so advise this court and seek to defer proceedings until a conservator could be appointed, not to silently allow the appeal to be dismissed." (*Bryan v. Bank of America, supra*, 86 C.A.4th 191.)

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CHAPTER XIII - Appeal

Witkin Summary of California Law

XX. AFFIRMANCE, MODIFICATION, OR REVERSAL OF JUDGMENT

A. General or Unqualified Affirmance.

1. Nature and Effect.

9 Witkin Cal. Proc. Appeal § 853

[§ 853] Nature and Effect.

(1) *In General.* "The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." (C.C.P. 43.) (On reversal, see *infra*, §869 et seq.; on modification, see *infra*, §855 et seq.)

A general or unqualified affirmance ordinarily sustains the judgment and ends the litigation. The respondent can enforce the judgment, the trial court cannot modify it, and further proceedings are improper. (See *Rutter Group*, 2 Civil Appeals and Writs §11:49 et seq.; 85 A.L.R.2d 772 [power of trial court to enjoin enforcement of its judgment as affected by previous affirmance]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §774 et seq.)

The effect of this general principle is illustrated in *Griset v. Fair Political Practices Com.* (2001) 25 C.4th 688, 107 C.R.2d 149, 23 P.3d 43, which considered the constitutionality of the statute (Govt.C. 84305; see 7 *Summary* (10th), *Constitutional Law*, §277) requiring candidates and individuals or groups supporting or opposing a candidate or ballot measure to identify themselves on mass mailings sent to prospective voters. In an earlier proceeding (*Griset I*), plaintiffs raised the constitutionality of this statute in a complaint alleging four causes of action, all of which alleged a violation of free speech. In *Griset I*, the superior court ruled in favor of constitutionality, and this ruling was upheld by the Court of Appeal. This was proper, because the superior court holding disposed of all four causes of action and was thus a final, appealable judgment. (25 C.4th 698.) The California Supreme Court agreed that Govt.C. 84305 was constitutional, but limited its holding to candidates and candidate-controlled committees. Plaintiffs then filed a petition for certiorari with the United States Supreme Court. The petition was denied, but before that time the High Court issued a decision holding unconstitutional the imposition of a fine on an *individual* who had distributed anonymous leaflets opposing a proposed school tax levy. Based on this decision, plaintiffs filed the present action (*Griset II*), again challenging the constitutionality of Govt.C. 84305. The superior court held the statute constitutional, but the Court of Appeal held it unconstitutional in its entirety. *Held*, reversed; the superior court and Court of Appeal lacked jurisdiction to again consider the constitutionality of Govt.C. 84305.

(a) In *Griset I*, the California Supreme Court affirmed without directions the judgment of the Court of Appeal, which in turn had rendered an unqualified affirmance of the superior court judgment. Because an unqualified affirmance "ordinarily sustains the judgment and ends the litigation," once the California Supreme Court decision in *Griset I*

became final, the superior court lacked the authority to reopen the case. (25 C.4th 701.) Thus, its judgment was void, and the Court of Appeal's jurisdiction was limited to reversing the void act (see supra, §93). (25 C.4th 701.)

(b) In an attempt to reexamine *Griset I*, the Court of Appeal relied on "the intervening change in controlling law" exception to the doctrine of law of the case (see supra, §480), and similar exceptions to the doctrines of double jeopardy and collateral estoppel. This reliance was improper. Once it became final, the decision in *Griset I* terminated the litigation as to all causes of action in plaintiffs' complaint. Because plaintiffs did not commence a separate lawsuit, but instead improperly sought to revive this litigation, there was no *pending* proceeding to which the doctrine of law of the case or its exceptions could be applied. The same is true for double jeopardy and collateral estoppel. (25 C.4th 701.)

(2) *Exceptions*. There are three major exceptions to the general principle that an unqualified affirmance ends the litigation:

(a) *Clerical error*. The trial judge has power to correct clerical errors in the judgment. (See 7 Cal. Proc. (5th), *Judgment*, §67.)

(b) *New trial*. Where the appeal is taken from an order granting a new trial (see supra, §192), affirmance sets the case at large for retrial pursuant to the order affirmed.

(c) *Void judgment*. Affirmance of a void judgment imparts no validity to it, and, if the invalidity appears on its face, it is subject to collateral attack. (*Pioneer Land Co. v. Maddux* (1895) 109 C. 633, 642, 42 P. 295; *Sullivan v. Gage* (1905) 145 C. 759, 771, 79 P. 537; *Hager v. Hager* (1962) 199 C.A.2d 259, 261, 18 C.R. 695.)

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A. General or Unqualified Affirmance.

2. Affirmance With Directions.

9 Witkin Cal. Proc. Appeal § 854

[§ 854] Affirmance With Directions.

Appellate directions are often added to judgments of reversal where a new trial or other proceeding is contemplated. (See *infra*, §§858, 874 et seq.) However, an affirmance with directions is extremely rare, but has been recognized as appropriate.

In *Vandenbergh v. Davis* (1961) 190 C.A.2d 694, 12 C.R. 222, respondent was entitled to attorneys' fees by reason of a provision in a lease, and the trial court's judgment awarded them. In affirming the judgment, however, the appellate court held that respondent was also entitled to an additional award of attorneys' fees for defending against the appeal. "The judgment is affirmed, and the trial court is directed to determine a reasonable attorney's fee for services performed on appeal and to add such fee to the principal amount of the judgment." (190 C.A.2d 700.) (See *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 300, 5 C.R. 263 [judgment affirmed; motion for fees on appeal to be filed in trial court within 30 days from filing of remittitur]; *In re Marriage of Melone* (1987) 193 C.A.3d 757, 766, 238 C.R. 510 [judgment affirmed; trial court was directed to examine parties' financial resources to determine whether appellant should pay all or part of respondent's appellate attorneys' fees]; *In re Marriage of Colvin* (1992) 2 C.A.4th 1570, 1582, 4 C.R.2d 323 [judgment affirmed; trial court was directed to refrain from acting on respondent's request for appellate attorneys' fees until remittitur filed in related appeal involving same issue].)

West's Key Number Digest, Appeal and Error 1139, 1140, 1142

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B. Modification.

1. Nature of Power.

9 Witkin Cal. Proc. Appeal § 855

[§ 855] Nature of Power.

The power of an appellate court to modify the judgment, i.e., to affirm it with changes, is recognized in *C.C.P.* 43 (supra, §853). The theory is that, where the appellate court can correct an erroneous judgment, it will do so in order to avoid the additional expense, delay, and hardship of reversal and new trial. "Under its authority to modify any judgment or order appealed from, whenever it is shown, either by the record on appeal, or by the admission or consent of the parties, that their rights can be finally determined here, this court will render its own judgment to that effect, or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense." (*Fox v. Hale & Norcross Silver Mining Co.* (1898) 122 C. 219, 221, 54 P. 731; see *American Enterprise v. Van Winkle* (1952) 39 C.2d 210, 219, 246 P.2d 935 [power should be liberally exercised]; *Wong v. Young* (1947) 80 C.A.2d 391, 394, 181 P.2d 741; *Schmidt v. Callero* (1950) 97 C.A.2d 582, 590, 593, 218 P.2d 80; *Sagadin v. Ripper* (1985) 175 C.A.3d 1141, 1170, 221 C.R. 675; Rutter Group, 2 Civil Appeals and Writs §11:53 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §780 et seq.; on types of errors corrected, see *infra*, §859 et seq.; on types of judgments modified, see *infra*, §863 et seq.)

There are three common methods of accomplishing this object:

- (1) Direct order (see *infra*, §856).
- (2) Condition of affirmance (see *infra*, §857).
- (3) Directions (see *infra*, §858).

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B. Modification.

2. Procedure.

a. Modification by Direct Order.

9 Witkin Cal. Proc. Appeal § 856

[§ 856] Modification by Direct Order.

The simplest method of exercise of the power to modify a judgment is for the reviewing court to modify the judgment by its own order and affirm the judgment as so modified. (See *Allen v. California Water & Tel. Co. (1946) 29 C.2d 466, 491, 176 P.2d 8*; *Schelbauer v. Butler Mfg. Co. (1984) 35 C.3d 442, 458, 198 C.R. 155, 673 P.2d 743* ["The valid order granting a new trial is modified to limit the scope of the new trial to the issue of apportionment of liability among the parties"]; *American-Hawaiian Engineering & Const. Co. v. Butler (1912) 17 C.A. 764, 770, 121 P. 709*; *Manor Inv. Co. v. F.W. Woolworth Co. (1984) 159 C.A.3d 586, 598, 599, 206 C.R. 37* ["The order granting a new trial is modified to require retrial of appellants' second cause of action ... as well as appellants' third cause of action"]; *Sagadin v. Ripper (1985) 175 C.A.3d 1141, 1170, 221 C.R. 675*; *infra*, §859 et seq.)

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B. Modification.

2. Procedure.

b. Modification as Condition of Affirmance.

9 Witkin Cal. Proc. Appeal § 857

[§ 857] Modification as Condition of Affirmance.

The reviewing court may order that the judgment be reversed for a new trial, or that, in the alternative, the judgment be affirmed on condition that the prevailing party consent to a remission of the amount of the judgment, or that the party against whom it was rendered consent to an addition. (See *Lightner Mining Co. v. Lane* (1911) 161 C. 689, 709, 120 P. 771; *Estate of Carroll* (1922) 190 C. 105, 107, 210 P. 817; *Offeman v. Robertson-Cole Studios* (1926) 80 C.A. 1, 15, 251 P. 830; *Oceano Beach Resort Co. v. Clark* (1930) 106 C.A. 582, 587, 289 P. 950; *Burnett v. National Enquirer* (1983) 144 C.A.3d 991, 1018, 193 C.R. 206; 17 So. Cal. L. Rev. 252.)

Although the modification typically involves a change in the monetary amount of the judgment, it need not do so. For example, in *Brooks v. Allard* (1966) 244 C.A.2d 283, 290, 53 C.R. 82, defendant vendor agreed to sell plaintiff purchaser a parcel of timber land, excepting a portion. Plaintiff sued for specific performance and received judgment. The appellate court found the description of the main parcel adequate and the description of the excepted portion fatally uncertain. But defendant vendor, during the trial, had a survey and plat made, and testified that, if 16 acres shown on the plat were excepted, he would transfer the rest in accordance with the agreement. The court observed that it could not compel plaintiff purchaser to accept this agreement, but "we do have the power to give him an opportunity to do so." Accordingly, the judgment was reversed, unless plaintiff agreed to this modification, in which event it would be affirmed as so modified. (244 C.A.2d 291.)

In re Marriage of Ramer (1986) 187 C.A.3d 263, 231 C.R. 647, is another unusual illustration. The case was a second appeal in a marital dissolution case in which the trial judge failed to comply with directions in the prior appellate opinion. The court observed that the normal procedure would be a reversal and remand for a third trial of important and complex issues, but "both parties have requested this court to resolve their dispute itself so as to avoid further trial court proceedings and the possibility of yet another appeal." (187 C.A.3d 278.) The court, obviously lacking authority to fix the amount of spousal support or to decide other matters within the discretion of the trial judge, nevertheless acceded to the request as follows: "[O]n the condition that both parties file their written consent to the modification with the clerk of this court within 20 days of the date this opinion is filed or, alternatively, within said time file with the clerk of this court a stipulation for a different modification executed by the parties and their respective attorneys, the judgment is hereby modified as hereinafter set forth and as so modified is affirmed." (187 C.A.3d 279.)

The opinion then sets forth a detailed list of modifications, to become effective if the consent is filed. (*187 C.A.3d 279, 280, 281.*)

Formerly, there was uncertainty whether consent to a remission or addition should be filed in the trial or appellate court. C.R.C., Rule 8.264(d) now provides that two copies of a consent must be filed in the reviewing court before the decision is final (30 days). The extra copy is transmitted with the remittitur to the lower court, and a new finality period runs from the filing date of the consent. (See C.R.C., Rule 8.709 [in appellant division cases, two copies of written consent to proposed modification must be within 15 days of filing of decision]; *17 So. Cal. L. Rev. 252*; Cal. Civil Practice, 5 Procedure §41:48.)

SUPPLEMENT: [This section is current through the latest supplement]

Former uncertainty: C.R.C., Rule 8.709 was repealed in 2008. Consent in the appellate division is now covered in C.R.C., Rule 8.888. The new rule states that if an appellate division decision conditions the affirmance of a money judgment on a party's consent to an increase or decrease in the amount, the judgment is reversed unless, before the decision is final, the party serves and files two copies of a consent in the appellate division. If a consent is filed, the finality period runs from the filing date of the consent. The clerk must send one file-stamped copy of the consent to the trial court with the remittitur. (C.R.C., Rule 8.888(c).)



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B. Modification.

2. Procedure.

c. Remand With Directions To Modify.

9 *Witkin Cal. Proc. Appeal* § 858

[§ 858] Remand With Directions To Modify.

The reviewing court may avoid the mechanics of drafting by sending the case back to the lower court for the actual modification.

(1) *Modification in Form of Affirmance.* Sometimes the language is of affirmance, and, it would seem, properly so. (See, e.g., *Fox v. Hale & Norcross Silver Mining Co.* (1898) 122 C. 219, 223, 54 P. 731 [remanded with directions to strike out portions of judgment; "[a]s so modified the judgment is affirmed"]; *Tarpey v. Curran* (1924) 67 C.A. 575, 589, 228 P. 62 [similar]; *Elliott v. Agajanian* (1937) 19 C.A.2d 244, 251, 64 P.2d 1159 [similar]; *Larson v. Barnett* (1950) 101 C.A.2d 282, 291, 225 P.2d 297 [judgment "affirmed with the following directions" that amended judgment nunc pro tunc to substitute true name of party sued by fictitious name].)

(2) *Modification in Form of Reversal.* In other cases, the order is, in terms, one of reversal, but, because no new trial is contemplated and judgment is to be entered for the respondent, the effect is a modification. Thus, in *Sutton-Watts v. Sarnow* (1926) 80 C.A. 91, 97, 251 P. 654, plaintiff obtained a decree rescinding a sale of property, but the trial court failed to provide that plaintiff restore the consideration to defendant. The appellate court said that the evidence and findings supported the judgment in favor of plaintiff except in that one respect, and added: "[W]e think it necessary only to reverse the judgment with directions to enter a new judgment" including such a provision, with costs to the defendant-appellant. (80 C.A. 98.) (See *Marston v. Rood* (1944) 62 C.A.2d 435, 440, 144 P.2d 863 ["reversed with instructions" to grant motion to vacate consent judgment and substitute a modified judgment]; *Davis v. Rudolph* (1947) 80 C.A.2d 397, 411, 181 P.2d 765 [order reversed "and the trial court is instructed to correct the judgment in accordance with the views expressed herein"].)

(3) *Effect of Distinction Between Modification and Reversal.* Superficially, it would seem that the effect of a reversal with directions is identical to that of a modification, and that the formal distinction is of no significance. But this is not so; the distinction directly affects interest on the judgment. (See *Stockton Theatres v. Palermo* (1961) 55 C.2d 439, 443, 11 C.R. 580, 360 P.2d 76, 7 Cal. Proc. (5th), Judgment, §333; *Espinoza v. Rossini* (1967) 257 C.A.2d 567, 570, 65 C.R. 110; 4 A.L.R.3d 1221 [date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal].)

In *Snapp v. State Farm Fire & Cas. Co.* (1964) 60 C.2d 816, 36 C.R. 612, 388 P.2d 884, plaintiffs had a property insurance policy with defendant, and suffered a loss due to a faulty fill that damaged their house. In an action for declaratory relief, the trial judge determined that the loss was covered by the policy and was in excess of its \$ 25,000 limit, but that the company was only liable for \$ 8,168.25, the amount of damage occurring up to its termination date. The Court of Appeal held that the company was liable for the full amount of the loss resulting from factors existing before the termination date, hence, that plaintiff was entitled to the policy limit of \$ 25,000. That should have settled the matter, but the Court of Appeal, instead of modifying the existing judgment by increasing the amount, reversed with directions to enter a new judgment for \$ 25,000. Defendant thereafter contended that the new judgment bore interest only from the date of its entry, and the trial judge agreed. *Held*, judgment modified to provide for interest from the time of entry of the original judgment (about 2 years before). Following *Stockton Theatres*, the Supreme Court pointed out that, after the "reversal," no evidence was taken and no issues were determined; i.e., the original judgment had not been found erroneous but merely insufficient. Thus, the Supreme Court, by construction, gave a different effect to the decision of the Court of Appeal, long since final. That court "could and perhaps should have formally modified the first judgment," but its failure to do so was not controlling. "The important question as to when interest commences should not depend on mere formalism, but on the substance of the order." (60 C.2d 821.)

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B. Modification.

3. Types of Errors Corrected.

a. Clerical Error or Inadvertence.

9 *Witkin Cal. Proc. Appeal* § 859

[§ 859] Clerical Error or Inadvertence.

The simplest situation calling for modification instead of reversal is where the judgment contains an obvious clerical error or other defect resulting from inadvertence. (See *Campbell v. Southern Pac. Co.* (1978) 22 C.3d 51, 63, 148 C.R. 596, 583 P.2d 121, citing the text [reduction of judgment in amount that, by clerical error, was not deducted in computing it]; *Singh v. Cross* (1922) 60 C.A. 324, 325, 212 P. 952 [failure to substitute administrator for deceased party]; *Kniese v. Fairfax Incline R. Co.* (1929) 98 C.A. 610, 613, 277 P. 347 [modified to increase judgment by \$ 100]; *Dewees v. Kuntz* (1933) 130 C.A. 620, 624, 20 P.2d 733 [finding of damages in sum of \$ 1,570; judgment for \$ 1,750]; *Mongerson v. Williams* (1934) 136 C.A. 569, 570, 29 P.2d 303 [failure to include figures in addition].)

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B. Modification.

3. Types of Errors Corrected.

b. Error Shown by Record.

9 Witkin Cal. Proc. Appeal § 860

[§ 860] Error Shown by Record.

The judgment may be erroneous under the pleadings, evidence, findings or law; but, though the error may be substantial, if the correct judgment can be determined by the appellate court from its examination of the record, modification is proper. (See *Fox v. Hale & Norcross Silver Mining Co.* (1898) 122 C. 219, 221, 54 P. 731 ["This court does not reverse a judgment or direct a new trial, if it is able from the record to determine the rights of the parties, but will itself make a final determination of these rights by a correction or modification of the judgment"]; *Telegraph Avenue Corp. v. Raentsch* (1928) 205 C. 93, 102, 269 P. 1109 ["We are satisfied from our examination of the record that the judgment should be modified by striking therefrom the sum of \$ 29,150 and that the inclusion of this sum in the judgment, though error of a substantial kind, would not justify a reversal of the judgment"]; *Wong v. Young* (1947) 80 C.A.2d 391, 394, 181 P.2d 741; *Alton v. Rogers* (1954) 127 C.A.2d 667, 675, 274 P.2d 487, *infra*, §867.)

In *Schelbauer v. Butler Mfg. Co.* (1984) 35 C.3d 442, 198 C.R. 155, 673 P.2d 743, the court said: "There is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence. Where, as here, the trial court has reviewed the jury's special verdicts and has properly concluded that the jury's apportionment of damages is erroneous but that the damage award is incorrect only to the extent that it reflects an improper apportionment of liability, the trial court should have limited its new trial order to that issue. Accordingly, the new trial order is modified to limit the new trial to the issue of apportionment of liability." (35 C.3d 457.)

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B. Modification.

3. Types of Errors Corrected.

c. Error Admitted by Respondent.

9 *Witkin Cal. Proc. Appeal* § 861

[§ 861] Error Admitted by Respondent.

The respondent may admit the error or voluntarily request or consent to the modification. (See *Fox v. Hale & Norcross Silver Mining Co.* (1898) 122 C. 219, 221, 54 P. 731; *Campbell v. Canty* (1912) 162 C. 382, 384, 123 P. 266; *Rowe v. McElroy* (1927) 201 C. 105, 107, 255 P. 750; *Browne v. T.J. Lawrence Co.* (1928) 204 C. 424, 427, 268 P. 631 [respondent's disclaimer]; *National Bank of Commerce of Los Angeles v. Blair* (1931) 119 C.A. 129, 130, 6 P.2d 260; *Guay v. American President Lines, Ltd.* (1947) 81 C.A.2d 495, 520, 184 P.2d 539.)

In *Pereira v. Pereira* (1909) 156 C. 1, 103 P. 488, the judgment was partially reversed for a new trial on an issue involving certain property. After the opinion was filed, respondent asked for a modification and filed a written consent. The court then filed a supplemental opinion and order, modifying the judgment and affirming it as modified. (156 C. 11.)

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B. Modification.

3. Types of Errors Corrected.

d. Facts Found on Appeal.

9 *Witkin Cal. Proc. Appeal* § 862

[§ 862] Facts Found on Appeal.

Occasionally a reviewing court will exercise its fact-finding power to affirm a judgment, and, where the new facts call for a change in the judgment, to modify. (See *Kirk v. Culley* (1927) 202 C. 501, 508, 261 P. 994; *Kramer v. Superior Court* (1939) 35 C.A.2d 239, 241, 95 P.2d 158; *Boller v. Signal Oil & Gas Co.* (1964) 230 C.A.2d 648, 656, 41 C.R. 206, 1 Cal. Proc. (5th), Attorneys, §207 [inadequate attorneys' fees increased]; *Newport Beach v. Sasse* (1970) 9 C.A.3d 803, 813, 88 C.R. 476 [mistakenly computed attorneys' fees corrected and reduced]; supra, §314.)

In *Cunningham v. Reynolds* (1933) 135 C.A. 91, 26 P.2d 869, plaintiff sued to recover his sheep, which were held by defendant under a claim for the cost of caring for them as strays. Though the parties stipulated that the cost was actually 3 cents, per day per head, the trial court awarded defendants the statutory limit of 15 cents; and gave judgment accordingly. On the appeal by plaintiff, the court followed the stipulation as to cost, and from other undisputed evidence made findings and conclusions to the effect that defendants were liable for certain damages and that plaintiff was entitled to a money judgment and costs. The judgment "as so modified" was affirmed. (135 C.A. 95.) But the procedure seems clearly erroneous. The judgment below was for defendants; plaintiff appealed, and judgment on appeal was in favor of plaintiff. Although this could have been properly accomplished by a reversal with directions, it is hardly proper to regard it as a modification.

In *Shimpones v. Stickney* (1934) 219 C. 637, 28 P.2d 673, plaintiff obtained judgment quieting title, the court finding that appellant attorney had been guilty of fraud in bringing about a trustee's sale of plaintiff's real property. The attorney unsuccessfully sought to reopen the case before judgment, pointing out that he was not present at the trial and that the pleadings gave no intimation of a charge of fraud. The Supreme Court thought that he should have been given the relief sought below, that the issue of title was moot by reason of other facts, and that the findings of fraud were not supportable. Accordingly, the court, following appellant's request, ordered that the findings and judgment determining the appellant guilty of fraudulent conduct should be expunged and the judgment otherwise affirmed. (219 C. 655.) Again, as the dissenting opinion suggests, it would seem that the effect was more a reversal than a modification.

The situation presented by *Swycaffer v. Swycaffer* (1955) 44 C.2d 689, 285 P.2d 1, was similar. In an annulment action, custody of a child had been awarded to the husband. On the wife's application, the trial judge modified the

decree by striking out the provision. The Supreme Court properly affirmed this order on the ground that the custody issue was not within the pleadings. But the trial judge had recited in the order that he had been wilfully deceived by the husband's attorney in seeking the custody award. *Held*, the pleadings fully advised the court of all the facts, and the attorney was entitled to rely on the assumption that the trial judge was aware of those facts. Therefore, the finding of fraud was not supported and was ordered stricken from the record. (44 C.2d 692.)

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B. Modification.

4. Types of Erroneous Judgments Modified.

a. Judgment Outside Issues or Demand.

9 Witkin Cal. Proc. Appeal § 863

[§ 863] Judgment Outside Issues or Demand.

A judgment, correct except as to a part outside the issues, may appropriately be modified instead of reversed. (See *De Kahn v. Chase* (1918) 177 C. 281, 284, 170 P. 608; *Hannula v. Hacienda Homes* (1949) 34 C.2d 442, 448, 211 P.2d 302; *Hart v. Merchants Trust Co.* (1932) 120 C.A. 231, 234, 8 P.2d 162.)

The same is true of a judgment in excess of the amount demanded. (See *Kerry v. Pacific Marine Co.* (1898) 121 C. 564, 573, 54 P. 89; *Meisner v. McIntosh* (1928) 205 C. 11, 13, 269 P. 612 [complaint pleaded damages of \$ 1,000; trial court relied on evidence to make finding and judgment for \$ 1,525, but no amendment to conform to proof]; *Nitta v. Haslam* (1934) 138 C.A. 736, 747, 33 P.2d 678.)

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4. Types of Erroneous Judgments Modified.

b. Judgment Contrary to Verdict or Statement of Decision.

9 *Witkin Cal. Proc. Appeal* § 864

[§ 864] Judgment Contrary to Verdict or Statement of Decision.

Where the judgment can be modified to correctly reflect the verdict or findings (now statement of decision; see 7 *Cal. Proc.* (5th), *Trial*, §390), this should be done. (See *Gomes v. Bragg* (1927) 201 C. 70, 72, 255 P. 499 [findings]; *Quigley v. Nash* (1934) 1 C.2d 502, 509, 36 P.2d 112 [findings]; *Yeoman v. Sherry* (1935) 10 C.A.2d 567, 573, 52 P.2d 555 [verdict]; *Wong v. Young* (1947) 80 C.A.2d 391, 397, 181 P.2d 741 [judgment that plaintiff was "legitimate" daughter modified to substitute word "illegitimate"].)

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4. Types of Erroneous Judgments Modified.

c. Judgment Contrary to Evidence.

9 *Witkin Cal. Proc. Appeal* § 865

[§ 865] Judgment Contrary to Evidence.

Modifying a judgment to reduce or increase the amount to conform to the evidence is a common practice.

(1) *Excessive Recovery*. Where the recovery includes some improper item ascertainable from the record, it may be deducted. (See *Irrgang v. Ott* (1908) 9 C.A. 440, 445, 99 P.2d 528; *Larson v. Larson* (1913) 22 C.A. 331, 333, 134 P. 342 [replevin; damages were also erroneously awarded without supporting evidence]; *McInerney v. United R. of San Francisco* (1920) 50 C.A. 538, 547, 195 P. 958 [punitive damages award was not supported]; *Latky v. Wolfe* (1927) 85 C.A. 332, 346, 259 P. 470 [special damages award was not supported]; 97 A.L.R.2d 1145 [power to reduce actual damages while sustaining award of punitive damages].)

In personal injury actions involving an unliquidated recovery of general damages, the usual method of modification is a conditional judgment, i.e., ordering a reversal unless the respondent remits the excess, or an affirmance as modified if the excess is remitted. (See *Livesey v. Stock* (1929) 208 C. 315, 322, 281 P. 70 [assault; judgment modified by cutting down both actual and punitive damages]; *Bellman v. San Francisco High School Dist.* (1938) 11 C.2d 576, 588, 81 P.2d 894; *Gackstetter v. Market Street Ry. Co.* (1935) 10 C.A.2d 713, 725, 52 P.2d 998; *Babb v. Murray* (1938) 26 C.A.2d 153, 156, 79 P.2d 159; on procedure, see *supra*, §856 et seq.) Conditional judgments may also be appropriate in other actions. (See *Estate of Carroll* (1922) 190 C. 105, 106, 109, 210 P. 817 [claim for value of services]; *Oceano Beach Resort Co. v. Clark* (1930) 106 C.A. 582, 586, 289 P. 950 [action for accounting].)

(2) *Omitted Item*. Where the evidence supports recovery in a certain amount for some item, the appellate court may include it in the judgment by a modification. (See *Spencer Kennelly, Ltd. v. Bank of America* (1942) 19 C.2d 586, 594, 122 P.2d 552 [specific recovery of ownership certificate for automobile; appellate court made finding on uncontradicted evidence of damage sustained, and modified judgment accordingly]; *American-Hawaiian Engineering & Const. Co. v. Butler* (1912) 17 C.A. 764, 770, 121 P. 709 [quantum meruit; lower court denied recovery of certain elements on erroneous theory of law, judgment was modified to increase recovery]; *Irvine v. California Cotton Credit Corp.* (1937) 18 C.A.2d 761, 762, 64 P.2d 782 [crop lessor's action to recover share of crop; judgment was modified to restore amount improperly deducted by trial court].)

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4. Types of Erroneous Judgments Modified.

d. Judgment Erroneous in Law.

9 *Witkin Cal. Proc. Appeal* § 866

[§ 866] Judgment Erroneous in Law.

Where the judgment is, in part, in violation of statute, or in some other way fails to conform to the law, and the legally erroneous portion can be stricken out, a modification is proper. (See *Dyer v. Minturn* (1920) 47 C.A. 1, 7, 189 P. 1046 [personal judgment against executor was modified to make it payable in course of administration]; *Garrison v. Williams* (1933) 128 C.A. 598, 603, 17 P.2d 1072 [judgment under driving with consent law over statutory limit was reduced]; *Johnson v. Marr* (1935) 8 C.A.2d 312, 314, 47 P.2d 489 [interest allowed where not proper]; *Prescott v. O'Connell* (1938) 27 C.A.2d 220, 224, 80 P.2d 749 [judgment against party not involved was modified by striking name from judgment]; *Foster v. Peters* (1941) 47 C.A.2d 204, 206, 117 P.2d 726 [injunction too broad].)

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4. Types of Erroneous Judgments Modified.

e. Other Defective Judgments.

9 *Witkin Cal. Proc. Appeal* § 867

[§ 867] Other Defective Judgments.

Miscellaneous situations appropriate for exercise of the power to modify include the following:

(1) *Two Purported Final Judgments*. In *Alton v. Rogers* (1954) 127 C.A.2d 667, 274 P.2d 487, the judge departed from the usual practice of trying the equitable issues first, and a jury brought in a verdict on the legal issues. The clerk, following C.C.P. 664, entered judgment on the verdict, and later the judge made findings and entered a second judgment. *Held*, the first so-called judgment was void, and the second valid final judgment was therefore modified to incorporate the provisions of the first. (127 C.A.2d 677.)

(2) *Inadequate Award of Attorneys' Fees*. In *Boller v. Signal Oil & Gas Co.* (1964) 230 C.A.2d 648, 41 C.R. 206, 1 Cal. Proc. (5th), Attorneys, §207, the appellate court, with the "same basic expertise" on the subject of fees, exercised its fact-finding power to make a finding of the reasonable value of services and modified the judgment accordingly. (230 C.A.2d 656.)

(3) *Division of Community Property*. Under *Family C. 2555*, the disposition of the community estate by the trial judge in a proceeding for dissolution of marriage "is subject to revision on appeal in all particulars." The reviewing court may therefore change the disposition if it feels that the apportionment is unjust. (*Hill v. Hill* (1957) 150 C.A.2d 34, 39, 309 P.2d 44 [construing former C.C. 4810]; see 11 *Summary* (10th), *Community Property*, §232.)

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B. Modification.

5. Where Modification Is Improper.

9 Witkin Cal. Proc. Appeal § 868

[§ 868] Where Modification Is Improper.

If the record does not clearly show what the correct judgment should be, modification is inappropriate, and the proper procedure is to reverse the judgment. (*Boyle v. Hawkins* (1969) 71 C.2d 229, 232, footnote 3, 78 C.R. 161, 455 P.2d 97, quoting the text.)

In *Machado v. Machado* (1914) 26 C.A. 16, 145 P. 738, the court observed that a comparison of the findings and judgment "leaves no doubt in our minds that the trial judge in this case either acted inadvertently in the adoption of the findings and determination of the proper judgment to be given thereon; or that he had other facts and circumstances in mind in rendering the judgment than those which the findings contain or the record discloses. In other words, it is impossible to reconcile this judgment with the findings upon the theory either of a miscalculation based upon the facts found or upon a mistake in the terms of the law. This being so, it is clearly the duty of this court to reverse this judgment and remand the case to the trial court for the correction by it upon a new trial of the manifest error in its findings or its judgment or both." (26 C.A. 18.)

In *Milo v. Prior* (1930) 210 C. 569, 292 P. 647, a personal injury action tried on the merits, judgment was given "without prejudice to plaintiff's bringing a new action." Defendant appealed, asking that this unwarranted provision be eliminated. *Held*, modification would be improper, because there was nothing to show why the trial judge gave that judgment, and it did not appear that he intended judgment for defendant on the merits. Accordingly, the judgment was reversed with directions to the trial court to enter judgment on the merits on the record in the cause. (210 C. 571.)

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See *Bullock v. Philip Morris USA* (2008) 159 C.A.4th 655, 695, 71 C.R.3d 775 [on defendant's appeal in fraud and products liability action by smoker in which jury made excessive award of punitive damages, new trial limited to amount of punitive damages was required; remittitur by appellate court was inappropriate, because court could not determine how award was affected by improper refusal to instruct that jury could not impose punishment for harms suffered by persons other than plaintiff].



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C. General or Unqualified Reversal.

1. Vacation of Judgment and Incidental Matters.

9 Witkin Cal. Proc. Appeal § 869

[§ 869] Vacation of Judgment and Incidental Matters.

(1) *Case "At Large."* The effect of an unqualified reversal ("the judgment is reversed") is to vacate the judgment, and to leave the case "at large" for further proceedings as if it had never been tried, and as if no judgment had ever been rendered. (See *Central Savings Bank of Oakland v. Lake* (1927) 201 C. 438, 443, 257 P. 521; *Odum v. Duffy* (1950) 35 C.2d 562, 564, 219 P.2d 785; *Rossi v. Caire* (1919) 39 C.A. 776, 777, 180 P. 58; *Sichterman v. R.M. Hollingshead Co.* (1931) 117 C.A. 504, 506, 4 P.2d 181; *Lewis v. Upton* (1984) 151 C.A.3d 232, 236, 198 C.R. 494; *Regents of Univ. of Calif. v. Public Emp. Relations Bd.* (1990) 220 C.A.3d 346, 356, 269 C.R. 563, quoting the text; Rutter Group, 2 Civil Appeals and Writs §11:64 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §803.)

(2) *Distinction: Reinstatement of Original Judgment.* If the lower court gives a judgment or order, then vacates it, and an appeal is taken from the vacating order, reversal leaves the proceeding as if the order appealed from (the vacating order) had not been made; i.e., the original judgment comes back into full effect. (*Estate of Mitchell* (1899) 126 C. 248, 250, 58 P. 549.) The same is true of an order granting a new trial. Reversal leaves the judgment as if no such order had been made, i.e., as if the motion had been denied. The original judgment is thus restored to full force. (See *Sherwin v. Southern Pac. Co.* (1914) 168 C. 722, 725, 145 P. 92; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C.3d 689, 699, 106 C.R. 1, 505 P.2d 193.)

(3) *Nullification of Incidental Matters.* With the judgment vacated, incidental matters, proceedings, or claims based on the judgment are likewise nullified. The most common illustrations are proceedings by the judgment creditor to enforce or satisfy the judgment, e.g., issuance or levy of execution, execution sale, an order based on supplementary proceedings, or an action to set aside an alleged fraudulent conveyance. (See *Di Nola v. Allison* (1904) 143 C. 106, 109, 76 P. 976 [execution sale]; *Turner v. Markham* (1909) 156 C. 68, 69, 103 P. 319 [order after supplementary proceedings]; *Thomas v. Lavery* (1932) 125 C.A. 666, 669, 14 P.2d 158 [action to set aside fraudulent conveyance]; *First-Trust Joint Stock Land Bank of Chicago v. Meredith* (1937) 19 C.A.2d 103, 105, 64 P.2d 977.)

Reversal has the same effect on a prior claim for costs, which are incident to the judgment. (See *Monson v. Fischer* (1933) 219 C. 290, 291, 26 P.2d 6; *Beard v. Goodrich* (2003) 110 C.A.4th 1031, 1038, 2 C.R.3d 160 [settlement of case and vacation of judgment extinguish attorney's right to court-ordered fees].)

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C. General or Unqualified Reversal.

2. Right to New Trial.

a. General Rule: Automatic Right After Reversal.

9 Witkin Cal. Proc. Appeal § 870

[§ 870] General Rule: Automatic Right After Reversal.

An unqualified reversal ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings. It is unnecessary to add specific directions for this purpose in the judgment. (*Gospel Army v. Los Angeles* (1947) 331 U.S. 543, 67 S.Ct. 1428, 1430, 91 L.Ed. 1662, 1666; *Davis v. Le Mesnager* (1909) 155 C. 519, 520, 101 P. 910; *Estate of Pusey* (1918) 177 C. 367, 371, 170 P. 846; *Central Savings Bank of Oakland v. Lake* (1927) 201 C. 438, 443, 257 P. 521; *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court* (1939) 12 C.2d 549, 554, 86 P.2d 85; *Riedy v. Bidwell* (1928) 93 C.A. 202, 205, 269 P. 682; *Heinfelt v. Arth* (1935) 4 C.A.2d 381, 383, 41 P.2d 191; *Rinaldo v. Superior Court* (1936) 15 C.A.2d 585, 598, 59 P.2d 868; *Bate v. Marsteller* (1965) 232 C.A.2d 605, 619, 43 C.R. 149, citing the text.)

In *Rossi v. Caire* (1919) 39 C.A. 776, 180 P. 58, the Supreme Court on appeal declared that the judgment was "unsupported by the facts and without authority; on the facts found the judgment should have been for the defendants." But its decision concluded with a general order of reversal. When the remittitur went down, the trial court granted defendants' motion for judgment, refusing to permit plaintiff to file amended pleadings. *Held*, this was error. "In reversing the case the supreme court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial; however, it did not do so, and the judgment was merely in general terms. This clearly left the whole case to be tried anew, as if it had not been tried before. ... It was not necessary to give express directions that the cause be remanded for a new trial, since the unqualified reversal had that effect." (39 C.A. 777.)

In *Erlin v. National Union Fire Ins. Co.* (1936) 7 C.2d 547, 61 P.2d 756, plaintiff recovered judgment for an agent's commissions. This was reversed for insufficiency of the evidence and because plaintiff was admittedly unlicensed. The court declared that it was unnecessary to determine whether plaintiff was entitled to sue because, "on the merits, the plaintiff is not entitled to recover." The reversal was, however, in general terms. The trial court refused to hear the matter further and gave judgment for defendant. *Held*, this was improper. The unqualified reversal justified a retrial, and the remarks of the court on the appeal referred only to the evidence then before the court. (7 C.2d 548.)

In *Weightman v. Hadley* (1956) 138 C.A.2d 831, 292 P.2d 909, a general reversal was obtained by defendant. The trial judge, on defendant's motion, denied plaintiff the right to introduce evidence, and rendered judgment of nonsuit

against her on the basis of the former record. *Held*, this was improper. After such a reversal the action must be brought to trial, and a party has a right to present new evidence on that trial. (138 C.A.2d 835.)

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C. General or Unqualified Reversal.

2. Right to New Trial.

b. Distinction: Reversal for Insufficiency of Evidence.

9 Witkin Cal. Proc. Appeal § 871

[§ 871] Distinction: Reversal for Insufficiency of Evidence.

In *Bank of America v. Superior Court* (1990) 220 C.A.3d 613, 269 C.R. 596, the Court of Appeal considered the effect of its previous decision in *Kruse v. Bank of America* (1988) 202 C.A.3d 38, 248 C.R. 217. In *Kruse*, the jury returned a verdict in favor of plaintiffs against Bank of America. The bank's motion for judgment notwithstanding the verdict was denied and judgment was entered for plaintiff Kruse. On appeal, the judgment was reversed for insufficiency of the evidence. After remand, the bank sought entry of judgment in its favor or summary judgment or summary adjudication of the issues, and Kruse sought leave to amend to add a cause of action. The trial court denied the bank's motion and granted Kruse's motion. The bank then sought mandamus to compel the trial court to issue an order granting judgment in favor of the bank. *Held*, writ granted.

(a) In *Kruse*, the appellate court "meticulously reviewed the evidence presented in the first trial and determined that proof of essential elements of each of the causes of action was lacking." (220 C.A.3d 620.) But the opinion in that case concluded: "The judgments, and each of them, are reversed." The trial court in the present case relied on the rule that an unqualified reversal of a judgment, without directions, remands the case for a new trial. (220 C.A.3d 620; see *supra*, §870.)

(b) The bank relied on cases such as *Stromer v. Browning* (1968) 268 C.A.2d 513, 74 C.R. 155, *infra*, §875, holding that, despite an unqualified reversal, a case may be retried only if that was the appellate court's intent. But *Stromer* is distinguishable: (1) In *Stromer*, the facts were undisputed, and there was no need for a reexamination of the issues of fact; here, they are hotly contested. (2) In *Stromer*, the plaintiff was unable to elicit any new evidence on which a judgment in his favor could have been supported; here, such evidence was to be offered. (3) *Kruse* does not reveal an intent to order entry of judgment for the bank; the holding was based "on the record before us." (220 C.A.3d 621.) Thus, the intent expressed in *Kruse* is too ambiguous to come within the *Stromer* exception. (220 C.A.3d 622.) And the *Stromer* exception has been relied on only infrequently: "Perhaps one of the reasons judges do not often invoke the exception is that it depends on textual analysis of a prior opinion that may not even consciously, let alone, unambiguously, address the subject of the present inquiry, and therefore cannot often be employed with confidence." (220 C.A.3d 623.)

(c) In *Kruse*, the appellate court determined that the trial judge should have granted the bank's motion for judgment notwithstanding the verdict; hence, the appellate court should have applied *C.C.P.* 629, and entered judgment in favor of the bank. (220 C.A.3d 624; see *infra*, §873.) But *Kruse* became final without *C.C.P.* 629 having been raised or considered; and once the remittitur issued, the appellate court lost jurisdiction to apply the section directly. (220 C.A.3d 624, 625.)

(d) "Nevertheless, given the existence of section 629 and the statutory policy it reflects, it would be anomalous to follow the unqualified reversal rule in the circumstances of this case." (220 C.A.3d 625.) The failure of the appellate court in *Kruse* to direct entry of judgment "would fortuitously confer" on plaintiffs a second chance to prove their case, which they would not have had if the trial court had acted correctly. (220 C.A.3d 625.)

(e) Although *C.C.P.* 629 can no longer be applied to this case, its reasoning provides a sufficient basis on which to avoid the anomaly that would otherwise result. "*Stromer* created its exception to avoid applying the general rule to defeat the manifest intent of the appellate court to disallow retrial. It would be just as unreasonable to allow retrial under the general rule in a case where, but for the trial court's erroneous denial of the Bank's motion for judgment notwithstanding the verdict and the Court of Appeal's failure to comply with section 629 (which inexplicably was never called to its attention by the Bank), real parties would clearly have lost their right to another day in court. There is no compelling policy reason to restore it to them. ... Accordingly, we hold that the unqualified reversal rule has no application in a case where a motion for judgment notwithstanding the verdict was made and denied by the trial court, and the appellate court reverses the judgment for insufficiency of the evidence." (220 C.A.3d 626.)

The reasoning of *Bank of America v. Superior Court* was applied to reach a similar result in *McCoy v. Hearst Corp.* (1991) 227 C.A.3d 1657, 278 C.R. 596. Plaintiffs, two police officers and an assistant district attorney, sued defendant newspaper and two of its reporters for libel. The complaint was based on articles suggesting that plaintiffs had conspired and engaged in deliberate misconduct to obtain a murder conviction of an innocent person. The jury brought in a verdict for plaintiffs, and defendants' motions for judgment notwithstanding the verdict and for new trial were denied. The Supreme Court reversed, concluding that, at the time the articles were published, defendants "did not possess a subjective awareness of probable falsity," and therefore that "the record does not establish liability" under the *New York Times* rule (5 *Summary* (10th), *Torts*, §601 et seq.). Thus, the judgment was reversed on the grounds of insufficiency of the evidence to support a finding of "actual malice." But the reversal was unqualified, and plaintiffs filed a new at-issue memorandum. Defendants then moved for judgment, contending that the Supreme Court's decision was a final determination precluding retrial. The trial judge granted the motion, and plaintiffs appealed. *Held*, affirmed.

(a) *Erlin v. National Union Fire Ins. Co.* (1936) 7 C.2d 547, 549, 61 P.2d 756, *supra*, §870, states the general rule that a reversal without directions remands the case for a new trial and places the parties in the same position as if the case had never been tried. (227 C.A.3d 1660.) "However, a reversal for insufficiency of the evidence is based on the fact that the plaintiff's evidence does not, as a matter of law, support the plaintiff's cause of action." (227 C.A.3d 1661.)

(b) When trial courts grant nonsuits or judgments notwithstanding the verdict based on insufficiency of the evidence and these are affirmed on appeal, new trials do not follow as a matter of course. And where the plaintiff's evidence is insufficient as a matter of law to support a judgment for the plaintiff, a reversal with directions to enter a judgment for defendant is proper. (227 C.A.3d 1661, citing the text.) "It is anomalous to end the case when the trial court correctly enters a nonsuit or JNOV on the ground that the plaintiff has, as a matter of law, failed to prove a cause of action, but to allow plaintiff another trial when the appellate court makes the same determination, since the standard applied by the respective courts is virtually identical." (227 C.A.3d 1661.) A new trial would be permitted only for newly discovered evidence, and would be governed by the law of the case doctrine; hence, retrying the case on the same evidence would be a needless exercise. (227 C.A.3d 1661.)

(c) *Stromer* created an exception to the rule stated in *Erlin* by holding that a reversal general in terms can be construed as a reversal with directions. (227 C.A.3d 1662.) And *Erlin* has been modified by statute. *C.C.P.* 629 provides that the trial court "shall" render judgment in favor of the aggrieved party notwithstanding the verdict whenever a

motion for a directed verdict should have been granted had that motion been made; and the appellate court "shall," when it appears that the motion for JNOV should have been granted, "order judgment to be so entered on appeal." (227 C.A.3d 1662; see 7 Cal. Proc. (5th), Trial, §§436, 444.) Thus, as pointed out in *Bank of America v. Superior Court*, *supra*, the effect of C.C.P. 629 is that a reversal on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had correctly entered judgment notwithstanding the verdict. (227 C.A.3d 1663.)

(d) In libel actions governed by the *New York Times* standard, all judges have a responsibility to independently examine the record to determine whether it provides clear and convincing evidence of actual malice. (227 C.A.3d 1663, 1664, citing *Bose Corp. v. Consumers Union of United States* (1984) 466 U.S. 485 104 S.Ct. 1949, 80 L.Ed.2d 502, 5 Summary (10th), Torts, §612.) Here, California's Supreme Court has done so. (227 C.A.3d 1665.)

Several other decisions are illustrative. (See *Kelly v. Haag* (2006) 145 C.A.4th 910, 919, 52 C.R.3d 126 [following reversal on appeal of punitive damages award based on plaintiff's failure to provide insufficient evidence of defendant's financial condition, plaintiff was not entitled to retrial; plaintiff had full and fair opportunity at trial to present his case for punitive damages, but failed to do so]; *Frank v. Los Angeles* (2007) 149 C.A.4th 805, 833, 57 C.R.3d 430 [minority police officers had full opportunity to present evidence on claim that higher compensation to caucasian sheriff's deputies constituted employment discrimination; where evidence was insufficient as matter of law, officers were not entitled to new trial, and defendant was entitled to judgment in its favor].)

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C. General or Unqualified Reversal.

3. Right To Amend Pleadings.

9 *Witkin Cal. Proc. Appeal* § 872

[§ 872] Right To Amend Pleadings.

Because a reversal generally sets the case at large for a retrial (see *supra*, §§869, 870), either party normally has the right to file amended pleadings, and express directions to this effect are unnecessary. (*Pillsbury v. Superior Court* (1937) 8 C.2d 469, 472, 66 P.2d 149; *Bank of America v. Superior Court* (1942) 20 C.2d 697, 702, 128 P.2d 357; *Estate of Horman* (1971) 5 C.3d 62, 72, 95 C.R. 433, 485 P.2d 785; *Rossi v. Caire* (1919) 39 C.A. 776, 777, 180 P. 58, *supra*, §870; *Hurley v. Lake* (1933) 133 C.A. 219, 221, 23 P.2d 838; *Rinaldo v. Superior Court* (1936) 15 C.A.2d 585, 590, 59 P.2d 868; *Vallera v. Vallera* (1944) 64 C.A.2d 266, 269, 148 P.2d 694; see 5 *Cal. Proc.* (5th), *Pleading*, §1208.)

In *Ellis v. Witmer* (1906) 148 C. 528, 83 P. 800, plaintiff obtained judgment quieting title. The Supreme Court held his complaint defective for failure to allege an offer to pay such sum as should be found due defendant. "[O]n the case being remanded, the plaintiffs may, if so advised, amend their complaint by offering to pay into the court" such sum, and "[i]f the complaint be not amended, judgment should be entered for the defendants." The actual order was: judgment reversed and "the cause remanded for further proceedings in accordance with this opinion." On the retrial, defendant contended that the court could not allow any other amendment than that expressly authorized in the appellate court opinion. *Held*, further amendments were permissible.

"No express leave to permit such further amendments need be given by the supreme court in order that the superior court shall have power to allow them. It would require, at least, an express decision in the case by the supreme court, to the effect that an amendment which would otherwise be proper should not be made in the court below, to take from that court its ordinary powers to allow such amendments as appear to be in furtherance of justice and necessary or proper to enable the parties to present their whole case on the merits. The opinion in question contains no such declaration. It merely directs the superior court to allow certain designated amendments. This made it obligatory on that court, in the absence of any showing of any new facts which might have justified a refusal to do so, to give leave to the plaintiff to make the amendments mentioned, but did not in any respect affect its power, which exists after the granting of a new trial as well as before issue joined, to allow such amendments as justice demands." (148 C. 531.)

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C. General or Unqualified Reversal.

4. Reversal of Judgment Notwithstanding Verdict.

9 *Witkin Cal. Proc. Appeal* § 873

[§ 873] Reversal of Judgment Notwithstanding Verdict.

(1) *Motion Granted.* If a motion for judgment notwithstanding the verdict was granted, and judgment was accordingly entered, reversal restores the proceeding to its condition before that erroneous judgment was rendered, i.e., there is a verdict without a judgment. In such a case, the successful party, without having to go through another trial, is entitled to have judgment entered in accordance with the verdict. (*Ferran v. Mulcrevy* (1935) 9 C.A.2d 129, 130, 48 P.2d 984; *Davcon v. Roberts & Morgan* (2003) 110 C.A.4th 1355, 1366, 2 C.R.3d 782, quoting the text [judgment should be entered on earlier verdict, even though judgment on that verdict should have been entered under C.C.P. 664].) The appellate court may make this clear by ordering a reversal with directions to enter judgment on the verdict. (See *Devens v. Goldberg* (1948) 33 C.2d 173, 181, 199 P.2d 943; *Lauritsen v. Goldsmith* (1929) 99 C.A. 671, 676, 279 P. 168; *Tomlinson v. Kiramidjian* (1933) 133 C.A. 418, 422, 24 P.2d 559.)

(2) *Motion Denied.* If a motion for judgment notwithstanding the verdict is denied, a reversal is a determination that such a judgment should have been entered. Accordingly, if no new trial was granted, "the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict." (C.C.P. 629; see *Pirkle v. Oakdale Union Grammar School Dist.* (1953) 40 C.2d 207, 213, 253 P.2d 1; *Estate of Llewellyn* (1948) 83 C.A.2d 534, 568, 189 P.2d 822, 191 P.2d 419.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

a. When Directions Are Proper.

1. Nature of Power.

9 *Witkin Cal. Proc. Appeal* § 874

[§ 874] Nature of Power.

The power to reverse with directions to enter judgment for the appellant will not be exercised where there is a conflict in the evidence and a retrial may develop other important facts. (See *Pollitz v. Wickersham* (1907) 150 C. 238, 251, 88 P. 911 ["Unless this court can satisfy itself from the record as to the ultimate rights of the parties, it will not undertake in reversing a judgment to finally settle the same"]; *Alden v. Mayfield* (1912) 164 C. 6, 13, 127 P. 45; *Calpetro Producers Syndicate v. Chas. M. Woods Co.* (1929) 206 C. 246, 254, 274 P. 65; *Alexander v. Shell Co. of Calif.* (1932) 124 C.A. 607, 610, 12 P.2d 973; *Giometti v. Etienne* (1933) 132 C.A. 602, 609, 23 P.2d 52; *Scalf v. Eicher* (1935) 11 C.A.2d 44, 55, 53 P.2d 368; *Rutter Group, 2 Civil Appeals and Writs* §§11:73, 11:73a; 36 *Cal. L. Rev.* 627.)

If, however, the record clearly shows that only one judgment is proper under the law and undisputed facts and that a new trial would be a waste of effort, that direction is proper. (See *England v. Christensen* (1966) 243 C.A.2d 413, 435, 52 C.R. 402; *Bach v. Butte* (1989) 215 C.A.3d 294, 301, 263 C.R. 565; *Mid-Century Ins. Co. v. Gardner* (1992) 9 C.A.4th 1205, 1220, 11 C.R.2d 918.)

In *Avery v. Associated Seed Growers* (1963) 211 C.A.2d 613, 632, 27 C.R. 625, the trial judge, on a motion for a new trial, modified the judgment under C.C.P. 662; but the order was void for lack of notice and hearing. This void modified judgment was, of course, appealable and subject to reversal, but a general reversal would reinstate the original superseded judgment, from which no appeal had been taken and as to which the time for appeal had expired. Accordingly, the court reversed with directions to *reenter* the original judgment, thus making it open to a new motion for new trial or appeal. (See *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 C.2d 452, 459, 72 C.R. 217, 445 P.2d 881, 7 *Cal. Proc.* (5th), *Trial*, §370 [defendant appealed and reviewing court reversed with directions to enter judgment for plaintiff but reduced in amount; nonappealing plaintiff was entitled to move for new trial]; *In re Marriage of Micalizio* (1988) 199 C.A.3d 662, 669, 670, 671, 245 C.R. 673 [following *Avery*].)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

a. When Directions Are Proper.

2. General Reversal Construed as Reversal With Directions.

9 *Witkin Cal. Proc. Appeal* § 875

[§ 875] General Reversal Construed as Reversal With Directions.

In *Stromer v. Browning* (1968) 268 C.A.2d 513, 74 C.R. 155, plaintiff real estate broker sued defendant owner for a commission on a deal that fell through. Judgment was for plaintiff, but, on appeal, the Supreme Court pointed out that there was no evidence of the owner's bad faith; therefore, "[u]nder the circumstances, plaintiff is not entitled to recover his commission." The decision, however, was simply "The judgment is reversed." The trial court signed an ex parte judgment for defendant, and plaintiff moved under C.C.P. 473 to set it aside so that the case might be retried. *Held*, order denying motion affirmed. Although the language of general reversal normally indicates an intent to permit retrial (see *supra*, §870), the Supreme Court's opinion, viewed as a whole, and emphasizing substance rather than form, supported the opposite interpretation: The case had been fully tried and the facts were not in dispute. "It intended, as we read its opinion, that judgment in Browning's favor be entered. We can find nothing left for the trial court to retry. Except for formalities, the litigation has ended." (268 C.A.2d 518.) (See *Barth v. B. F. Goodrich Tire Co.* (1971) 15 C.A.3d 137, 141, 92 C.R. 809 [quoting the text on general reversal and following *Stromer* exception]; *Salaman v. Bolt* (1977) 74 C.A.3d 907, 915, 141 C.R. 841 [following *Stromer*].)

Stromer was followed in *Moore v. Orange* (1985) 174 C.A.3d 31, 219 C.R. 301. Plaintiff was dismissed from her job as a deputy city clerk without a hearing or written explanation, as permitted by *Govt.C. 40813*, providing that deputy city clerks serve at the pleasure of the city clerk. She claimed that a city resolution, enacted after her appointment, gave her property rights in the position and precluded her termination without due process. On appeal from a judgment in plaintiff's favor, the Court of Appeal reversed without directions, holding that the procedure established by *Govt.C. 40813* prevailed. The city then obtained a summary judgment, and plaintiff appealed, claiming that new evidence that she had been appointed by the city manager, rather than the city clerk, raised a triable issue of fact. *Held*, judgment affirmed.

(a) There was no triable issue of fact raised by the pleadings. Plaintiff's only contention was that, notwithstanding *Govt.C. 40813*, she was entitled to due process by virtue of the city resolution. She did not contest the city's assertion that she was appointed by the city clerk; she acknowledged that she had no property rights prior to the passage of the city resolution; and she included in the findings the assertion that her position was created by, and subject to, *Govt.C.*

40813. (174 C.A.3d 35, 37.) Hence, the only issue raised, i.e., whether the resolution entitled plaintiff to due process, was resolved by the Court of *Appeal*. (174 C.A.3d 35.)

(b) Because there was nothing left for the trial court to decide, it is clear that the Court of Appeal, despite its earlier general reversal, intended that a judgment be entered for defendant. (174 C.A.3d 36.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

a. When Directions Are Proper.

3. Error of Law Alone.

9 *Witkin Cal. Proc. Appeal* § 876

[§ 876] Error of Law Alone.

A reversal with directions to enter judgment for the appellant is proper when the sole ground of reversal is the trial judge's error of law.

In *Phillips v. Patterson* (1939) 34 C.A.2d 481, 93 P.2d 807, a personal injury action against an alleged agent and his employer, plaintiffs appealed from a judgment in favor of the employer. The parties stipulated that the sole issue on appeal was agency or independent contract. The appellate court held that the negligent defendant was an agent, and, accordingly, reversed in part with directions to enter judgment against the employer for the amount of damages previously determined. (34 C.A.2d 483.)

In *Bliss v. California Cooperative Producers* (1952) 112 C.A.2d 507, 247 P.2d 85, an action on a note, the first judgment in favor of plaintiff payee was reversed for retrial of the issue of notice. The opinion stated that "judgment may thereafter be entered in accordance with the views expressed herein in the light of the determination of the issue of notice." On the retrial, the lower court found that plaintiff had no notice. *Held*, this finding was erroneous as a matter of law, and plaintiff was not a holder in due course. Because the sole remaining issue was thus determined, the judgment was reversed with directions to enter judgment in favor of appellants (defendants). (112 C.A.2d 514.)

Many other cases apply this rule. (See *Wixom v. Davis* (1926) 198 C. 641, 645, 246 P. 1041 [agreed statement of facts; "As the conclusions to be drawn from the undisputed facts require judgment to be entered for the plaintiff, the cause is remanded to the trial court with directions to enter judgment in favor of the plaintiff and against the defendant for the amount prayed"]; *Boyer v. Murphy* (1927) 202 C. 23, 36, 259 P. 38 [construction of grant; judgment reversed "with direction ... to make and cause to be entered its judgment herein decreeing the plaintiffs herein to be the owners in fee," etc.]; *Fraser v. Carman-Ryles* (1937) 8 C.2d 143, 146, 64 P.2d 397 [decree of distribution misinterpreted; judgment was reversed "with directions to the trial court to amend its conclusion of law and enter a modified judgment in accordance with the views herein expressed"]; *In re Marriage of Fonstein* (1976) 17 C.3d 738, 751, 131 C.R. 873, 552 P.2d 1169 [trial judge, dividing community assets, erroneously considered speculative tax consequences in valuing husband's law partnership interest; because record contained ample evidence on which to base correct valuation,

judgment was reversed with directions to do so, and make new findings of fact, conclusions of law, and judgment]; *McCord Co. v. Martin* (1920) 47 C.A. 717, 727, 191 P. 89; *Stetson v. Sheehan* (1921) 52 C.A. 353, 362, 200 P. 387 [agreed statement of facts, stipulation that if court found certain ultimate fact plaintiff should be entitled to judgment for stated sum]; *Noack v. Zellerbach* (1936) 14 C.A.2d 249, 250, 57 P.2d 1390; *McEwen v. Taylor* (1951) 106 C.A.2d 25, 33, 234 P.2d 754 [trial court erroneously held that plaintiff had elected right against agent and waived right against undisclosed principal]; *Pacific Motor Transport Co. v. State Bd. of Equalization* (1972) 28 C.A.3d 230, 243, 104 C.R. 558 [question of validity of defendant board's tax regulation; superior court was directed to enter judgment declaring it valid]; *Mid-Century Ins. Co. v. Gardner* (1992) 9 C.A.4th 1205, 1220, 11 C.R.2d 918 [under provision excluding uninsured motorist coverage for vehicle owned by insured, but not insured under the policy, defendant insured did not own vehicle that was owned by his corporation.].) (On directions where motion for judgment notwithstanding verdict has been erroneously granted or denied, see *supra*, §873.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

a. When Directions Are Proper.

4. Insufficient Evidence or Pleadings.

9 *Witkin Cal. Proc. Appeal* § 877

[§ 877] Insufficient Evidence or Pleadings.

If the evidence or pleading is clearly insufficient to support the judgment, it will be reversed, usually for a new trial (see *supra*, §870). But in rare cases, where it appears unlikely that new evidence or a proper pleading will be produced, reversal with directions is proper. (See *Mayer v. Beondo* (1948) 83 C.A.2d 665, 671, 189 P.2d 327, 190 P.2d 23, 5 Cal. Proc. (5th), *Pleading*, §1208 [plaintiff's refusal to amend defective complaint though defect was pointed out three times during trial]; *Banchero v. Coffis* (1950) 96 C.A.2d 717, 724, 216 P.2d 151 [deliberate refusal of plaintiff to comply with demand for bill of particulars]; 36 Cal. L. Rev. 622 [criticizing *Mayer* as harsh and unwarranted exercise of power to reverse with directions].)

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D. Reversal With Directions.

1. Directions To Enter Judgment.
 - a. When Directions Are Proper.
5. Where Action Should Be Dismissed.

9 Witkin Cal. Proc. Appeal § 878

[§ 878] Where Action Should Be Dismissed.

A reversal with directions to dismiss the action is of course a reversal with directions to enter judgment for the defendant. This is the proper direction where, e.g., the lower court has no jurisdiction, or the action is moot or collusive, or the plaintiff has no right to sue. (See *McConoughey v. San Diego* (1900) 128 C. 366, 368, 60 P. 925; *In re McGee* (1951) 36 C.2d 592, 599, 226 P.2d 1; *Paul v. Milk Depots* (1964) 62 C.2d 129, 134, 41 C.R. 468, 396 P.2d 924, supra, §756; *Metcalf v. Drew* (1946) 75 C.A.2d 711, 720, 171 P.2d 488 [difference between dismissal of action and dismissal of appeal]; supra, §93; 3 *Cal. Proc.* (5th), *Actions*, §35.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

b. Duty of Trial Court To Follow Directions.

1. Nature of Duty.

9 *Witkin Cal. Proc. Appeal* § 879

[§ 879] Nature of Duty.

The trial judge must follow the directions of the appellate court and enter the judgment accordingly. Thus, the judge cannot permit amended pleadings or retry the case, cannot modify or add any conditions to the judgment as directed, and cannot ordinarily stay its enforcement. (See *Hampton v. Superior Court* (1952) 38 C.2d 652, 655, 242 P.2d 1 ["action which does not conform to those directions is void"]; *Lial v. Superior Court* (1933) 133 C.A. 31, 34, 23 P.2d 795 ["The reversal of a judgment on appeal with directions to the trial court to enter a specific judgment determines the merits of the cause just as effectively as though the judgment were affirmed on appeal"]; *Snoffer v. Los Angeles* (1936) 14 C.A.2d 650, 653, 58 P.2d 961; *Carter v. Superior Court* (1950) 96 C.A.2d 388, 391, 215 P.2d 491; *Kenney v. Kenney* (1954) 128 C.A.2d 128, 133, 274 P.2d 951; *Coffee-Rich v. Fielder* (1975) 48 C.A.3d 990, 998, 122 C.R. 302 [direction to modify findings of fact; new findings making material changes were unauthorized]; *Bach v. Butte* (1989) 215 C.A.3d 294, 301, 263 C.R. 565; *Butler v. Superior Court* (2002) 104 C.A.4th 979, 982, 128 C.R.2d 403 [where remand instructed trial court to enter new default judgment based on evidence presented by plaintiffs at default proveup hearing, it was improper for trial judge to take action leading to further trial court proceedings]; *Bell v. Farmers Ins. Exchange* (2006) 135 C.A.4th 1138, 1143, 38 C.R.3d 306 [on remand, trial court had no jurisdiction to change prejudgment interest rate]; *Karlsen v. Superior Court* (2006) 139 C.A.4th 1526, 1530, 43 C.R.3d 738 [where remittitur directed trial court to complete statement of decision, judge exceeded jurisdiction by granting peremptory challenge motion].)

In *English v. Olympic Auditorium* (1935) 10 C.A.2d 196, 52 P.2d 267, plaintiffs claimed mechanics' liens on a building, and appealed from an adverse judgment. The Supreme Court reversed, with specific directions to enter findings, conclusions of law, and judgment in favor of plaintiffs. The trial judge did so, but added certain provisions to the judgment for sale of the building according to law, including a reasonable period for the purchaser to remove it from the land, the time within which removal should commence, and an injunction against occupancy pending removal. *Held*, he was without authority to add any conditions to the judgment that were not contemplated by the appellate court. If the appellate court inadvertently omits to include in its directions any essential element determined on appeal, the aggrieved party has his or her remedy by petition for rehearing; the trial judge cannot add conditions that the judge assumes the

appellate court should have included. (10 C.A.2d 201.)

In *Phillips v. Patterson* (1939) 34 C.A.2d 481, 93 P.2d 807, the trial court, on direction from the appellate court, entered a directed judgment for appellant, but, on application of respondent, made an order temporarily restraining execution, probably to permit respondent to determine whether to move for new trial or appeal. *Held*, the order was without authority. (34 C.A.2d 484.)

In *Skaggs v. Los Angeles* (1956) 138 C.A.2d 269, 291 P.2d 572, 292 P.2d 572, plaintiff sought mandamus to compel pension commissioners to pay accrued pensions. He received judgment for pensions plus interest. Defendants appealed and the judgment was reversed with directions to recompute past due installments; in other respects, it was affirmed. Nevertheless, the trial judge gave judgment for accrued installments without interest, because the original award of interest against a municipality was then contrary to law. *Held*, reversed with directions to provide for interest on the part covered by the first judgment. The first judgment, though erroneous in this respect, was not void. Hence, on the reversal with directions, the trial court had to follow the remittitur, and award interest in accordance with the Supreme Court affirmance of that part of the judgment. (138 C.A.2d 272.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.
- b. Duty of Trial Court To Follow Directions.
2. Remedies for Noncompliance.

9 *Witkin Cal. Proc. Appeal* § 880

[§ 880] Remedies for Noncompliance.

The jurisdictional duty of the trial judge to comply with the directions may be enforced in several ways:

(1) *Mandamus*. Because the judge has no discretion, but a positive duty, mandamus may issue to compel entry of the judgment as directed. (*Lamb v. Owen* (1929) 98 C.A. 106, 108, 276 P. 628; *Bakkebo v. Municipal Court* (1981) 124 C.A.3d 229, 234, 177 C.R. 239; see *Hampton v. Superior Court* (1952) 38 C.2d 652, 654, 242 P.2d 1 [if clerk has entered judgment in register of actions in conformity with remittitur, mandamus is unnecessary].)

(2) *Reversal of judgment after retrial*. If the trial judge orders a retrial, the resulting judgment is void and will be reversed on appeal for that reason alone. (*Mather v. Mather* (1944) 25 C.2d 582, 583, 154 P.2d 684; *Snoffer v. Los Angeles* (1936) 14 C.A.2d 650, 653, 58 P.2d 961; *Skaggs v. Los Angeles* (1956) 138 C.A.2d 269, 272, 291 P.2d 572, 292 P.2d 572.)

(3) *Prohibition*. The unauthorized order for a retrial is an act in excess of jurisdiction, the remedy by trial and appeal is burdensome and inadequate, and, accordingly, the trial may be restrained by prohibition. (*Hampton v. Superior Court*, *supra*, 38 C.2d 656; *Lial v. Superior Court* (1933) 133 C.A. 31, 33, 23 P.2d 795.)

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D. Reversal With Directions.

1. Directions To Enter Judgment.
- b. Duty of Trial Court To Follow Directions.
3. Directions Requiring Construction.

9 *Witkin Cal. Proc. Appeal* § 881

[§ 881] Directions Requiring Construction.

Because of the policy favoring trial on the merits, and the drastic effect of denial of a retrial, the courts will not construe a decision and opinion as a direction to enter judgment unless this meaning is clearly indicated. (See *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court* (1939) 12 C.2d 549, 555, 556, 86 P.2d 85; *Frankel v. Four Star Int.* (1980) 104 C.A.3d 897, 902, 163 C.R. 902 [case remanded to trial court for clarification of finding of fact supporting amount of damages; trial judge could redetermine amount of award and make findings supporting larger sum].) On the other hand, such a direction may be implied even though language of general reversal is used. (See *Stromer v. Browning* (1968) 268 C.A.2d 513, 518, 74 C.R. 155, supra, §875; *Barth v. B.F. Goodrich Tire Co.* (1971) 15 C.A.3d 137, 141, 92 C.R. 809.)

In *Harris v. Hensley* (1931) 214 C. 420, 6 P.2d 253, defendant obtained a reversal and the court tried the case de novo. Plaintiff, successful on the first trial and unsuccessful on the second, appealed, but the appeal was dismissed for failure to file a transcript. Then he brought the present action to set aside the judgment, on the ground that the trial court had failed to follow directions and that the trial de novo was unauthorized. *Held*, the order of reversal, not entirely clear in its terms, was subject to interpretation. "The trial court had the power to place its construction on the meaning, extent and limitations of the language of the decision and the judgment of the District Court of Appeal, and if its determination in that respect were erroneous the error was in the exercise of its jurisdiction and the plaintiff had a remedy by an appeal from the judgment." (214 C. 422.)

In *Spaulding v. Cameron* (1954) 127 C.A.2d 698, 274 P.2d 177, the action sought an injunction and damages for injury caused by earth washing down on plaintiff's property. The trial judge awarded both damages and a mandatory injunction to remedy the condition. The Supreme Court reversed for inconsistency (see 4 *Cal. Proc.* (5th), *Pleading*, §57 et seq.). Its opinion affirmed the damage award and added: "In all other respects the judgment is reversed and the cause is remanded to the trial court with instructions to determine on the basis of the evidence previously presented and such additional evidence as may be presented by the parties whether or not the nuisance is in fact permanent." (*Spaulding v. Cameron* (1952) 38 C.2d 265, 270, 239 P.2d 625.) In the original action, a jury had been waived. On resetting for trial before the same judge, defendant demanded a jury, plaintiff opposed, and the demand was refused.

Held, judgment for plaintiff affirmed; i.e., the directions, as interpreted, continued the waiver of a jury into the retrial, though there was nothing explicit to this effect in the directions.

The court's theory was that the directions implied that the evidence already introduced would be considered by the trial judge familiar with it, and that a new jury trial with all witnesses repeating testimony or reading it to the jury would not be consistent with these directions. "It may be that when defendant waived trial by jury he did not anticipate that if liability should be established plaintiff might ultimately recover on the basis of diminution of rental value of the property while the injurious condition continued, but we do not regard this as a sufficient reason for relieving him of the waiver. If the trial court on motion for a new trial had discovered its error and had granted a limited retrial for the purpose of adjudicating issues that had not been determined, or if after the evidence was closed the trial had been reopened for evidence as to the permanency of the nuisance, it could scarcely have been contended by the defendant that in the further proceedings he was not bound by his waiver of a jury. We see no substantial difference between the proceedings that were had pursuant to the mandate of the Supreme Court and proceedings that would have been had if the trial court of its own volition had reopened the case or had vacated its findings and judgment in part and had proceeded to determine the questions which it eventually did determine pursuant to the directions of the Supreme Court. It was not error to refuse the request for a jury trial." (127 C.A.2d 703.)

If the intent to direct entry of judgment is established, but the directions are silent or unclear as to the manner in which they are to be carried out, the trial court has discretion to determine the manner. (See *Barnhart v. Edwards* (1900) 128 C. 572, 574, 61 P. 176; *Security Trust & Savings Bank v. Southern Pac. R. Co.* (1937) 19 C.A.2d 420, 423, 65 P.2d 818 [direction to enter judgment that property be conveyed to appellant on payment of certain sum, no time being fixed for payment; trial court could fix reasonable time].)

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D. Reversal With Directions.

1. Directions To Enter Judgment.

c. Review of Judgment in Conformity With Directions.

9 Witkin Cal. Proc. Appeal § 882

[§ 882] Review of Judgment in Conformity With Directions.

The appellate decision directing a particular judgment in favor of the appellant is law of the case (*supra*, §459). Hence, after entry of judgment in conformity with the directions, the respondent cannot, by motion for a new trial, or on appeal, relitigate the same issues. (*Lambert v. Bates* (1905) 148 C. 146, 148, 82 P. 767 [appeal]; *Lierly v. McEwen* (1930) 208 C. 645, 646, 283 P. 943 [entry of judgment compelled by mandamus; subsequent appeal dismissed as frivolous]; *Lial v. Superior Court* (1933) 133 C.A. 31, 34, 23 P.2d 795; *Texas Co. v. Moynier* (1934) 137 C.A. 112, 113, 29 P.2d 873; *Snoffer v. Los Angeles* (1936) 14 C.A.2d 650, 653, 58 P.2d 961 [motion for new trial]; *Phillips v. Patterson* (1939) 34 C.A.2d 481, 484, 93 P.2d 807; *McCulloch v. Superior Court* (1949) 91 C.A.2d 641, 644, 205 P.2d 689 [no power to grant new trial for insufficiency of evidence, where appellate opinion held that evidence compelled judgment as directed]; *Carter v. Superior Court* (1950) 96 C.A.2d 388, 391, 215 P.2d 491 [mandamus or prohibition lies].)

It does not follow, however, that the directed judgment is entirely free from further review. The respondent has the same right to move for a new trial or to appeal as in the case of any other judgment, and he or she may obtain review of issues not conclusively determined by the former appeal. The governing principle was explained in *Klauber v. San Diego Street Car Co.* (1893) 98 C. 105, 32 P. 876, as follows: When the defendant gets judgment below, and the plaintiff appeals, the defendant-respondent, as the nonappealing party, ordinarily cannot have a review of any errors against him or her (*supra*, §329). However, if the judgment is reversed and a directed judgment is entered against the defendant, he or she is for the first time an aggrieved party entitled to appeal and raise these errors. (98 C. 108.)

In *Hudgins v. Standard Oil Co. of Calif.* (1935) 5 C.A.2d 618, 43 P.2d 597, plaintiffs sued for personal injuries. The jury brought in a general verdict for them, but in a special verdict found that they had executed releases. The trial court gave judgment for defendants on the ground that the special verdict was contrary to the general, but on appeal a reversal was ordered with directions to enter judgment on the general verdict. After entry, defendants moved for a new trial, and, upon its denial, took an appeal from the judgment in which they raised the issue of contributory negligence. *Held*, this was proper. In its opinion on the former appeal, the appellate court had expressly omitted consideration of this contention of the nonappealing respondents. (5 C.A.2d 621.)

In *Boyd v. Lancaster* (1942) 53 C.A.2d 479, 128 P.2d 41, an action was brought to set aside a deed from B to L on

grounds of incompetency and inadequate consideration. Judgment was rendered for reconveyance on payment of a specified sum. After the death of B, title was quieted in defendant L for nonpayment. B's administrator, in two successive appeals, obtained reversals on the grounds, respectively, of failure to substitute the administrator and substantial compliance with the condition. The last reversal was with directions to enter judgment for appellant and to turn over the money to respondent. Then respondent, for the first time faced with a judgment against him, moved for a new trial, and, on denial, appealed, raising such questions as the sufficiency of the findings of mental incompetency of B and failure to give proper notice of rescission. *Held*, these steps were proper. (53 C.A.2d 483.)

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D. Reversal With Directions.

2. Other Directions.

a. In General.

9 Witkin Cal. Proc. Appeal § 883

[§ 883] In General.

In addition to stating the power to direct a judgment (*supra*, §874 et seq.), *C.C.P.* 43 provides that the reviewing court may "direct a new trial or further proceedings to be had." (*See supra*, §853.)

There is no definable limit to the directions that the court, within the scope of its appellate jurisdiction, may find convenient to the proper determination of the cause. Nor is there any test of necessity. Some directions may be found that merely describe what would normally follow from an unqualified reversal. They do no harm, but their superfluous nature should be understood to prevent any misconceptions as to the effect of a general reversal without them. (*See supra*, §§869, 870.)

Thus, a direction to retry the case is occasionally found in the formal phrasing of a reversal. (*See, e.g., Alden v. Mayfield* (1912) 164 C. 6, 14, 127 P. 45 ["Wherefore the judgment here appealed from is reversed and the cause remanded for a new trial"].) It is superfluous, for that would be the necessary result of a general reversal. (*Falkner v. Hendy* (1895) 107 C. 49, 54, 40 P. 21; *see supra*, §870.) But a direction to retry a particular issue is a common and important method of partial reversal. (*See infra*, §§890, 891.)

Sometimes the court desires to direct judgment for the plaintiff-appellant, but the record does not furnish the necessary data. An appropriate order may be a reversal with directions to determine damages or other sums due in accordance with the law set forth in the opinion, and thereafter to enter judgment for the appellant. This hybrid direction is just as binding a limitation on the trial judge's power as a flat direction for judgment. (*See Mitau v. Roddan* (1906) 149 C. 1, 17, 84 P. 145 [directions to bring in necessary parties and enter judgment if they elect to be bound by prior findings, otherwise to try such issues as they raise by new pleadings]; *Rice v. Schmid* (1944) 25 C.2d 259, 263, 153 P.2d 313 [trial judge lacked authority to try any other issue than damages, and judgment in violation of directions was reversed]; *Buttram v. Finley* (1946) 73 C.A.2d 536, 541, 166 P.2d 654 [reversal with directions to render judgment for plaintiffs quieting their title to undivided one-half interest in real property, and to try designated issues relating to partition, sale, liens, and charges against shares]; cf. reversal with directions to modify judgment, in substance modification rather than reversal, *supra*, §858.)

C.C.P. 170.1, stating the grounds for disqualification of a judge (see 2 *Cal. Proc.* (5th), *Courts*, §93), authorizes a direction that further proceedings be heard before a trial judge other than the one whose judgment or order was reviewed. (*C.C.P. 170.1(c)*; see 2 *Cal. Proc.* (5th), *Courts*, §119.)

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2. Other Directions.

b. Direction To Permit Amended Pleadings.

9 Witkin Cal. Proc. Appeal § 884

[§ 884] Direction To Permit Amended Pleadings.

On a general reversal, the parties may propose amendments to pleadings (see *supra*, §872), and the direction to permit the appellant to amend "if so advised" is, at first glance, superfluous. But it has a distinct purpose: The ordinary discretion of the trial judge to allow or deny an amendment is eliminated by this mandatory order to permit it. (See *Gamache v. South School Dist.* (1901) 133 C. 145, 149, 65 P. 301; *Ellis v. Witmer* (1906) 148 C. 528, 531, 83 P. 800, *supra*, §872 [obligatory direction to allow certain amendments does not deprive trial judge of discretion to allow others]; *Hurley v. Lake* (1933) 133 C.A. 219, 220, 23 P.2d 838; cf. *Irwin v. Manhattan Beach* (1964) 227 C.A.2d 634, 639, 38 C.R. 875 [directions to vacate order sustaining demurrer and to require plaintiff to bring in indispensable parties].)

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2. Other Directions.

c. Proceedings in Conformity With Opinion.

1. Nature and Purpose of Direction.

9 *Witkin Cal. Proc. Appeal* § 885

[§ 885] Nature and Purpose of Direction.

The appellate judgment may direct that further proceedings be had "in conformity with the views expressed in this opinion," or "not inconsistent with this opinion," or "consistent with the views set forth in this opinion." (See *Pillsbury v. Superior Court* (1937) 8 C.2d 469, 472, 66 P.2d 149 [lower court may allow amended pleading]; *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 608, 146 C.R. 182, 578 P.2d 899 ["proceed in accordance with the views expressed in this opinion"]; *Rollins v. San Francisco* (1974) 37 C.A.3d 145, 150, 112 C.R. 168; *Estate of Hearst* (1977) 67 C.A.3d 777, 786, 136 C.R. 821 ["further proceedings in harmony with this opinion"]; *Puritan Leasing Co. v. Superior Court* (1977) 76 C.A.3d 140, 147, 142 C.R. 676, *infra*, §887 [surplusage or summary method of incorporating by reference directions indicated in body of opinion]; *Eldridge v. Burns* (1982) 136 C.A.3d 907, 918, 186 C.R. 784, *infra*, §887 [quoting *Puritan Leasing*].)

This is no doubt an appropriate summary method of incorporating by reference directions, as to proceedings on a retrial, specifically indicated in the body of the opinion. Sometimes, however, it is a superfluous direction that merely means that on a retrial the appellate opinion will be the law of the case. (See *Clutter v. Superior Court* (1934) 140 C.A. 135, 138, 35 P.2d 152 [quoting early case: "The general direction to the lower court, to proceed in pursuance of the principles announced in the opinion, is a mere formality, which of itself neither gives authority nor limits the power of the inferior tribunal. Without such direction, the principles being adjudged, the same duty would devolve upon that court"].)

In *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court* (1939) 12 C.2d 549, 86 P.2d 85, plaintiff sued for damages for personal injuries. At the trial, he based his case on the Federal Safety Appliance Act (absolute liability), and did not urge any claim for common law negligence (subject to defenses). After recovery in this state, the United States Supreme Court, declaring that he had abandoned the only possible ground of recovery, reversed the judgment "for further proceedings not inconsistent with this opinion." *Held*, the lower court could retry the case on the issue of negligence. Plaintiff was not changing his cause of action, but merely seeking recovery on a proper legal theory, having previously misconceived it. Upon an ordinary reversal, retrial under such circumstances is permissible, and the order of the Supreme Court should not be interpreted to deny the right. "If that court had been of the view that the only

proceeding consistent with its opinion was the entry of a final judgment for defendant without the right of retrial for plaintiff, it would have been a simple matter to state its view clearly and unequivocally in its opinion." (12 C.2d 555.)

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c. Proceedings in Conformity With Opinion.

2. Criticism and Proposal for Reform.

9 *Witkin Cal. Proc. Appeal* § 886

[§ 886] Criticism and Proposal for Reform.

This type of direction (*supra*, §885) can create serious problems for the trial court on remand and the appellate court on a second appeal. In *Coffee-Rich v. Fielder* (1975) 48 C.A.3d 990, 122 C.R. 302, the controversy resulted in complicated findings of fact, and the appellate judgment was a reversal with directions to modify the findings "in terms consistent with this opinion." (48 C.A.3d 997.) The trial court made a new finding, and the second appeal came before a different panel of the Court of Appeal. This panel had difficulty interpreting the directions of the first appellate court opinion, and urged the adoption of procedural changes to avoid this situation in the future: "The case at bench illustrates the need for consideration of: (1) a standard of judicial administration precluding 'remand for proceedings consistent with this opinion' unless the opinion on appeal specifically states what the trial court is to do; and (2) a rule of court requiring that an appeal from a judgment rendered after remand from the Court of Appeal be heard, so far as feasible, by the panel which determined the first appeal and remanded the case. In combination, the standard and rule will permit the already strained resources of this court to be better spent." (48 C.A.3d 1002.)

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3. Illustrations.

9 *Witkin Cal. Proc. Appeal* § 887

[§ 887] Illustrations.

The difficulties of construing this type of direction (see *supra*, §885) and the effect of the doctrine of law of the case (see *supra*, §459) were highlighted in *Puritan Leasing Co. v. Superior Court* (1977) 76 C.A.3d 140, 142 C.R. 676. Plaintiff lessor of personal property sued lessee A and A's guarantors, seeking recovery of rent plus expenses in conducting a public sale. Defendants denied the allegations of breach and set up affirmative defenses. The judge directed a verdict for plaintiff in the amount of unpaid rent, based on the limited issue of interpretation of the default provisions of the lease, and he reserved for future proceedings the issues involved in the affirmative defenses. Plaintiff appealed. The Court of Appeal determined that plaintiff was entitled to post-sale damages, and reversed the judgment with direction to enter judgment for plaintiff "in accordance with this decision." Defendants petitioned for hearing, contending that the direction was improper because the other issues had not been adjudicated. The Supreme Court granted the petition and rendered an opinion holding that: (a) The lease provisions were valid and recovery of damages was proper; (b) the issue of guarantor's liability "was necessarily resolved by the directed verdict against all defendants" in view of the failure of the defendants to appeal or cross-appeal in plaintiff's appeal; (c) any ambiguity in the lease provision, except as it related to the computation of the deficiency owed after resale, was resolved by the holding that plaintiff proceeded properly under its terms; and (d) as to matters touching on the correct deficiency, including compliance with the U.C.C. provisions on conduct of the sale, "[w]e do not foreclose retrial." The opinion concluded with the statement that "The judgment is reversed and the cause remanded for proceedings consistent with the views expressed herein." On remand, plaintiff moved for limitation of the issues to be retried and for summary judgment. The trial judge denied the motion and stated his intention of trying the issues raised by the guarantors' affirmative defenses of lack of consideration, mistake, and fraud. *Held*, mandamus granted to compel the trial judge to limit the issues.

(a) The body of the Supreme Court's opinion states that the damage provision of the lease is legal; that the issue of consideration for the guaranty is not to be retried, and that ambiguity of the lease is no longer in issue except to the extent that it relates to the computation of damages. This direction is clear: these matters were conclusively determined on the prior appeal and cannot be retried. (76 C.A.3d 148, 149.)

(b) The statement that "[w]e do not foreclose retrial of those latter questions" should not be construed as a remand

for trial only of the issues not foreclosed. Under the principle that doubt is resolved in favor of treatment of the phrase ("proceedings consistent") as surplusage, the trial court has jurisdiction to try the issues of mistake and fraud. (76 C.A.3d 148.)

(c) However, those issues were implicitly decided against defendants by the Supreme Court's decision that the lease was valid and enforceable. Thus: "Imposing obstacles face defendants in seeking to avoid the impact of the law of the case as a bar to their assertion of the defenses of mistake or fraud. No relevant change of law has occurred. Any injustice flowing from the inability of defendants to assert the defenses at this late date seems of their own making. They did not include either question in their petition for hearing to the Supreme Court as one of the issue that should be adjudicated on remand." (76 C.A.3d 149.)

(d) The writ was issued directing the trial judge to vacate his order and enter a new order foreclosing defendants from raising the issues conclusively determined, and permitting the other issues to be raised, but to rule on them pursuant to the doctrine of law of the case. (76 C.A.3d 149.)

In *Eldridge v. Burns* (1982) 136 C.A.3d 907, 186 C.R. 784, the case was remanded for further proceedings "consistent with the views set forth in this opinion." Pointing to the discussion of optional equitable remedies in the first opinion, the court held that the direction was for a consideration of remedies, not a direction that evidence be taken. (136 C.A.3d 918.) (See *Bach v. Butte* (1989) 215 C.A.3d 294, 301, 263 C.R. 565 [reversal of judgment denying county injunctive relief against attorney using his home as law office, and remand for further proceedings not inconsistent with opinion, was construed as order to issue injunction, not as authorization for trial judge to conduct evidentiary hearing].)

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E. Partial Reversal.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 888

[§ 888] In General.

The reviewing court may reverse a judgment in part and affirm it in part, with or without directions, where the judgment is severable as to causes of action, issues, or parties, and the erroneous part may be severed from the remainder. The cases fall into three classes:

(1) *Appeal from part of judgment.* The first situation, where the appeal itself is taken from part of the judgment, has already been discussed. (See *supra*, §§57, 58.)

(2) *Appeal by less than all parties.* One of several parties may appeal from the judgment and obtain a reversal insofar as it affects him or her. The judgment becomes final, however, as to those who fail to appeal, and in that sense the reversal is only partial. (See *Nichols v. Dunphy* (1881) 58 C. 605; *Fowden v. Pacific Coast Steamship Co.* (1906) 149 C. 151, 155, 86 P. 178; *Neill v. Five C. Refining Co.* (1947) 79 C.A.2d 191, 194, 179 P.2d 818; *supra*, §56.)

(3) *Appeal from all of severable judgment.* (See *infra*, §889.)

An unqualified partial reversal has the same effect on the part reversed as an unqualified general reversal (*supra*, §869). Thus, in *Hall v. Superior Court* (1955) 45 C.2d 377, 289 P.2d 431, a divorce decree was upheld as to the divorce but reversed as to the amount of the alimony award. *Held*, on the retrial, the case was at large for a retrial of this issue and the wife could present any evidence on her needs. (45 C.2d 381.)

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E. Partial Reversal.

2. Where Appeal Is From Whole Judgment.

9 Witkin Cal. Proc. Appeal § 889

[§ 889] Where Appeal Is From Whole Judgment.

Where the appeal is taken from the judgment as a whole by all parties against whom it was rendered, the reviewing court may reverse it in part or as to some but not all parties.

The test of partial reversal in an appeal from the whole judgment is the same as the test of the right to take a partial appeal, namely, severability. (See *Gray v. Cotton* (1913) 166 C. 130, 139, 134 P. 1145 ["[t]he practice of reversing a judgment in part only is well settled in this court ... and should be followed where the error found to have been committed has affected the determination of but one or more of a greater number of distinct and severable issues or causes of action"]; *Martin v. Burris* (1922) 57 C.A. 739, 748, 208 P. 174; *Watkins v. McCartney* (1924) 70 C.A. 137, 142, 232 P. 982; *Compton v. Northwest Engineering Co.* (1931) 116 C.A. 523, 527, 2 P.2d 1014; *Noack v. Zellerbach* (1936) 14 C.A.2d 249, 251, 57 P.2d 1390 [reversal with directions to enter judgment for one defendant, general reversal as to others]; *supra*, §59; on directions to retry particular issue, see *infra*, §§890, 891.)

However, if the rights and liabilities are interdependent, the judgment should be treated as an entirety, i.e., partial reversal is improper. (See *Sun Oil Co. of Calif. v. Union Drilling & Petroleum Co.* (1929) 208 C. 114, 119, 280 P. 535 [judgment construed to preclude partial reversal]; *Bird v. McGuire* (1963) 216 C.A.2d 702, 718, 31 C.R. 386 [M primarily liable, H liable as principal under respondeat superior doctrine; reversal as to M also requires reversal as to H].)

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E. Partial Reversal.

3. Directions To Retry Particular Issue.

a. In General.

9 Witkin Cal. Proc. Appeal § 890

[§ 890] In General.

Where the appeal is from the whole judgment, the reversal may permit the trial court's determination of certain issues to stand but direct the retrial of a particular issue or issues. (See *Glassell v. Hansen* (1906) 149 C. 511, 516, 87 P. 200 [whether land was formed by accretion]; *Robinson v. Muir* (1907) 151 C. 118, 125, 90 P. 521; *Gray v. Cotton* (1913) 166 C. 130, 139, 134 P. 1145; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 C.2d 489, 579, 583, 45 P.2d 972, 1014; *Lobree v. L.E. White Lumber Co.* (1921) 53 C.A. 85, 92, 199 P. 821 [sufficiency of assignments]; *Gilmore v. Caswell* (1924) 65 C.A. 299, 303, 305, 224 P. 249; *Nelson v. Yonge* (1925) 73 C.A. 704, 712, 239 P. 67 [value of property]; *Richardson v. Michel* (1943) 59 C.A.2d 361, 365, 138 P.2d 774 [whether statute of limitations was bar]; *In re Marriage of Steinberg* (1977) 66 C.A.3d 815, 820, 136 C.R. 299; *Interstate Group Administrators v. Cravens, Dargan & Co.* (1985) 174 C.A.3d 700, 710, 220 C.R. 250, citing the text [validity of claimed setoff, evidence of which was improperly refused at trial].)

The most important application of this power occurs in cases where the judgment on liability is clearly right, but error is found in the verdict or decision on the amount recoverable. It is proper to reverse with directions to retry the single issue of damages and enter judgment for the plaintiff in the amount so determined. (*Pretzer v. California Transit Co.* (1930) 211 C. 202, 209, 294 P. 382 [personal injuries; error in instructions on damages]; *Taylor v. Pole* (1940) 16 C.2d 668, 675, 107 P.2d 614; *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 801, 197 P.2d 713; [libel; error in instructions on exemplary damages]; *Carter v. Turner* (1933) 131 C.A. 296, 297, 21 P.2d 139 [fraud; findings as to value of property were not sustained by evidence]; *Foster v. Keating* (1953) 120 C.A.2d 435, 454, 261 P.2d 529 [issue of damages]; *Spaulding v. Cameron* (1954) 127 C.A.2d 698, 274 P.2d 177, supra, §881; *Austero v. National Cas. Co.* (1978) 84 C.A.3d 1, 36, 148 C.R. 653, citing the text.)

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3. Directions To Retry Particular Issue.

b. Whether Complete Retrial Is Required.

9 Witkin Cal. Proc. Appeal § 891

[§ 891] Whether Complete Retrial Is Required.

Where limited retrial might be prejudicial to either party, retrial should be ordered on all related issues. (*In re Marriage of Martinez* (1984) 156 C.A.3d 20, 34, 202 C.R. 646 [in view of remand for determination of parties' community property rights, injustice would result if division of community property did not give appellant capital required to pay attorneys' fees].) Thus, where the evidence as to liability is in substantial conflict, and the damages awarded are so grossly inadequate as to indicate a compromise on the issues of liability and damages, the case should be remanded for a retrial of both issues. (*Clifford v. Ruocco* (1952) 39 C.2d 327, 329, 246 P.2d 651; see *Wilke v. Crofton* (1949) 34 C.2d 304, 310, 209 P.2d 790.)

In *Torres v. Automobile Club of Southern Calif.* (1997) 15 C.4th 771, 63 C.R.2d 859, 937 P.2d 290, the Court of Appeal set aside as excessive a \$ 1.7 million punitive damages award rendered against defendant insurer for bad faith refusal to pay a \$ 38,000 automobile accident claim. Although defendant did not challenge its liability or the compensatory damages award, the Court of Appeal remanded the entire cause for a complete retrial on the ground that C.C. 3295(d), precluding evidence of financial condition until after the trier of fact awards actual damages and finds that a defendant is guilty of malice, oppression, or fraud (2 *Cal. Evidence* (4th), *Discovery*, §17), does not allow a partial retrial on the amount of punitive damages only. The Supreme Court granted review and directed the parties to address the limited issue of the scope of the remand. *Held*, reversed and remanded for a new trial on punitive damages only.

(a) *General power to limit retrial to particular issue.* "The appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial." (15 C.4th 776, quoting *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 C.2d 791, 197 P.2d 713.) To require a complete retrial when an issue can be separately tried without prejudice to the litigants would unnecessarily add to the burden of already overcrowded court calendars and could be unduly harsh on the parties. (15 C.4th 776.)

(b) *Brewer case.* In *Brewer*, this court held that a retrial limited to punitive damages was proper because that issue is distinct from that of actual damages, for they are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff. Following that decision, appellate courts have not hesitated to remand cases for retrial limited to punitive damages. (15 C.4th 776.)

(c) *Question raised by C.C. 3295(d).* C.C. 3295 was adopted in 1979 to protect against the premature disclosure of a defendant's financial condition when punitive damages are sought. C.C. 3295(d), added in 1987, requires a court, on application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. The question here is whether the last sentence of C.C. 3295(d), i.e., "Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud," overturns the *Brewer* holding and entitles a defendant to a new trial on all issues, including liability and compensatory damages, following reversal of a punitive damages award. In defendant's view, this provision means that the issues of liability, compensatory damages, and punitive damages must always be decided by the same trier of fact, and that therefore these issues may never be decided by different juries. Conversely, plaintiff argues that the "same-trier-of-fact" requirement simply defines and limits a new statutory right of bifurcation by clarifying that defendants are not entitled to have two separate juries resolve the issues when bifurcation is ordered. (15 C.4th 778.)

(d) *Complete retrial is unnecessary to give effect to statutory purpose.* The various restrictions set forth in C.C. 3295 serve to safeguard defendants against the premature disclosure, both in discovery and at trial, of their profits and financial condition. But disclosing these matters threatens no prejudice once a bifurcated trial has been held and the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defense by both the trier of fact and the appellate court. It is therefore unnecessary to construe the same-trier-of-fact restriction to apply to retrials in order to give full effect to the statute's protective purpose. (15 C.4th 778.)

(e) *No legislative intent to afford defendants right to full retrial.* Because C.C. 3295(d) is silent on whether the same-trier-of-fact provision precludes retrials limited to the issue of punitive damages, it is appropriate to review the legislative history for clues as to the Legislature's intent. Significantly, nothing is found from which to infer a legislative intent to afford defendants a right to a complete retrial whenever punitive damages are reversed on appeal. If anything, the legislative history confirms the view that the provision is intended simply as a restriction on a defendant's right to bifurcation of the issues. Moreover, courts may not presume that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention clearly appears either by express declaration or by necessary implication. The statute does not clearly express intent to strip the appellate courts of their authority under *Brewer* to order retrials limited to the issue of punitive damages. (15 C.4th 779.)

(f) *Complete retrial is unnecessary to guard against excessive punitive damages.* This court's reasoning in *Brewer* illustrates why, in the context of retrials, it generally is unnecessary for the same jury to determine liability and punitive damages in order to ensure a reasonable relation between actual and punitive damages: "The rule that exemplary damages must bear a reasonable relation to actual damages ... is designed solely to guard against excessive punitive damages. ... Upon a retrial of the issue of exemplary damages the jury can maintain that reasonable relation between general and exemplary damages without having to determine for itself the amount of general damages. The amount of general damages has been properly determined by the first jury. Upon a retrial of the issue of exemplary damages it is only necessary for the second jury to be advised of the amount of general damages already awarded in order that it may maintain a reasonable relation between such damages and the exemplary damages, if any, that it awards. If it fails to do so and awards excessive exemplary damages, there is an adequate remedy by way of an appropriate motion before the trial court or by appeal." (15 C.4th 781, quoting *Brewer*.) In short, because there are adequate safeguards for ensuring that the jury in a limited retrial can maintain a reasonable relationship between actual and punitive damages, there is no need for a complete retrial to guard against an excessive punitive damages award. (15 C.4th 781.)

(g) *Court's function is to determine legislative intent, not weigh public policy considerations.* Several "policy reasons" are offered to support a complete retrial mandate whenever the punitive damages portion of a judgment is reversed, e.g., that a defendant's right to a fair hearing on punitive damages is jeopardized without a complete retrial of all issues, which avoids any uncertainty concerning the defendant's wrongdoing and its connection to the plaintiff's injury; that a complete retrial requirement is not unfair to the plaintiff, because a retrial of liability and other issues decided in the plaintiff's favor may be avoided if the plaintiff waives the punitive damages claim; and that there are no

significant concerns of judicial economy at stake, because the only significant difference between a complete retrial on all issues and a second retrial limited to punitive damages would be in the verdict form submitted to the second jury. Although the logic and strengths of these perceived "policy reasons" are debatable, this court's sole function here is to determine legislative intent. Hence, its decision may not rest on the weighing and balancing of public policy considerations. (15 C.4th 781.) (See *Baxter v. Peterson* (2007) 150 C.A.4th 673, 677, 681, 58 C.R.3d 686 [reversal and remand on issue of liability did not require retrial of defendant's statute of limitations defense or, where there was no evidence of defendant's wealth, of plaintiff's right to punitive damages; in each instance, interested party had been given fair opportunity to litigate relevant issue].)

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F. Summary Reversal.

9 *Witkin Cal. Proc. Appeal* § 892

[§ 892] Summary Reversal.

Is there a power to reverse a palpably wrong judgment, summarily on motion, without a calendar hearing and normal course of decision, similar to the power to dismiss a frivolous appeal or summarily affirm a palpably correct judgment (*supra*, §747)?

In *Melancon v. Walt Disney Productions* (1954) 127 C.A.2d 213, 273 P.2d 560, the court held that the power exists, and it was accordingly exercised where the issue on appeal from an order had already been determined in favor of the appellant by a Supreme Court ruling in a related proceeding. In summarily reversing the order, the court declared that nothing would be gained by putting the parties to the additional expense and delay of preparing briefs on appeal. (127 C.A.2d 214.)

Melancon was followed in *Estate of Geltman* (1957) 152 C.A.2d 560, 314 P.2d 78, where an executor's account and petition for distribution sought fees properly computed under the statute in force at the time. The probate judge lowered the amount on the erroneous theory that the prior statute in effect at decedent's death governed. The court granted the executor's motion for summary reversal with directions to enter a new order. (152 C.A.2d 561.) (For critical examination of this practice in United States Supreme Court, see 72 *Harv. L. Rev.* 77; for summary reversal on confession of error, see *supra*, §458.)

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G. Stipulation To Reverse.

1. Presumption in Favor of Stipulation.

9 Witkin Cal. Proc. Appeal § 893

[§ 893] Presumption in Favor of Stipulation.

In *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, defendant University and its School of Veterinary Medicine published a report asserting that plaintiff, a cattle rancher, had engaged in deficient ranch management practices that caused illness and death of many of his cattle. Plaintiff, contending that his cattle instead had been poisoned by a pesticide sprayed by governmental agencies, sued for libel, and received a jury verdict of \$ 7 million. Defendants appealed, and plaintiff cross-appealed; but, while the appeals were pending in the Court of Appeal, the parties agreed to the following settlement: Defendants would pay plaintiff \$ 3 million, and in return plaintiff would join in a stipulation that the appeals would be dismissed with prejudice, the Court of Appeal would vacate the trial court's judgment, and the action would be dismissed. Pursuant to this stipulation the parties filed a joint application in the Court of Appeal, which rejected the request. *Held*, judgment of the Court of Appeal (i.e., the order denying the motion for stipulated reversal) reversed, and the cause remanded to the Court of Appeal with directions to issue a new order granting the request and dismissing the appeal.

(a) There is no provision in California's Constitution or statutes that denies appellate courts the authority to reverse a judgment in order to effectuate a settlement and terminate further litigation. And the Constitution gives the courts inherent powers to control judicial proceedings. (3 C.4th 276, citing Cal. Const., Art. VI, §1; see 2 Cal. Proc. (5th), Courts, §162.) C.C.P. 128(a)(8), authorizing every court to amend and control its process and orders "so as to make them conform to law and justice," is to the same effect. These provisions support the authority of the Court of Appeal to grant the request. (3 C.4th 276; see 2 Cal. Proc. (5th), Courts, §173.)

(b) As a general rule, the parties should be entitled to a stipulated reversal to effectuate settlement in the absence of extraordinary circumstances (see *infra*, §894). Such a presumption encourages postjudgment settlements without reducing the frequency of pretrial settlements, thereby increasing judicial efficiency (3 C.4th 277), promotes fairness to the parties by honoring their wishes (3 C.4th 280), and does not trivialize the judicial process (3 C.4th 281).

(c) "We hold that, when the parties to an action agree to settle their dispute and as part of their settlement stipulate to a reversal of the trial court judgment, the Court of Appeal should grant their request for the stipulated reversal absent a showing of extraordinary circumstances that warrant an exception to this general rule. Any determination that such circumstances exist must be made on a case-by-case basis. Because we can only speculate as to the facts of future cases,

we cannot enumerate with any specificity what facts may or may not constitute an extraordinary circumstance that would warrant denying the parties' request. We emphasize, however, that the policies favoring settlement are strong and that the extraordinary-circumstance exception is narrow." (3 C.4th 284.) (See *In re Elise K.* (1982) 33 C.3d 138, 139, 187 C.R. 483, 654 P.2d 253, 10 Summary (10th), *Parent and Child*, §356 [appeal from judgment terminating mother's custody of daughter; acceptance of stipulation requesting that judgment be reversed and cause remanded to trial court for further proceedings in light of subsequent evidence that child was no longer adoptable due to her age]; 85 Cal. L. Rev. 479 [Neary]; 85 Cal. L. Rev. 867 [The Public Right to Precedent: A Theory and Rejection of Vacatur]; 20 Pepperdine L. Rev. 1573 [Neary]; 26 Loyola L.A. L. Rev. 1033 [Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court]; on the similar problem of dismissal sought to avoid precedent, see *supra*, §736.)

West's Key Number Digest, Appeal and Error 167, 1156 et seq.

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G. Stipulation To Reverse.

2. Extraordinary Circumstances Justifying Rejection of Stipulation.

9 *Witkin Cal. Proc. Appeal* § 894

[§ 894] Extraordinary Circumstances Justifying Rejection of Stipulation.

Norman I. Krug Real Estate Inv. v. Praszker (1994) 22 C.A.4th 1814, 28 C.R.2d 498, involved a stipulated reversal of a judgment that was entered after the case was remanded to the trial court for reasons set forth in an earlier opinion (*Norman I. Krug Real Estate Inv. v. Praszker* (1990) 220 C.A.3d 35, 269 C.R. 228). The facts, as set forth in the earlier opinion, are as follows: Plaintiff K possessed a promissory note from a former partner secured by a third deed of trust on an apartment building. In order to facilitate refinancing of the property, plaintiff agreed not to record the deed. When the former partner defaulted on the note, the building was listed with defendant P, who successfully negotiated a sale, but neither informed plaintiff of the impending sale nor the buyer of the unrecorded deed of trust. As a result of the sale, plaintiff lost his security interest in the property. In an action against P and W & P Realtors, judgment was rendered for plaintiff, and defendants appealed. The Court of Appeal held that defendant P had breached his duty to disclose to the buyer the existence of the deed of trust or to inform plaintiff of the impending sale. However, the case was remanded to the trial court to make new findings and an apportionment of plaintiff's damages based on his own comparative negligence. On remand, the trial court issued an amended judgment reducing plaintiff's damages award. Counsel for both parties then requested a settlement conference and thereafter, as part of a settlement agreement, applied for a motion for recall of the remittitur and reversal of the amended judgment. *Held*, motion granted as to defendant W & P Realtors, but, under the "extraordinary circumstances" exception announced in *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, *supra*, §893, motion denied as to defendant P.

(a) *Neary* held that requests for stipulated reversals should be granted in the absence of extraordinary circumstances, e.g., that reversal would adversely affect the public interest. This public interest exception, although not definable by formula, will more likely be present when the judgment in question involves important public rights, unfair, illegal, or corrupt practices, or torts affecting a significant number of persons. For example, judgments against state licensed professionals or tradespersons obtained on grounds of dishonesty, fraud, or gross negligence often provide a basis for license suspension or revocation. Hence, entry of such a judgment carries a salutary effect that goes beyond the dispute between the parties and affects the public interest. In other words, a reversal solely to effectuate settlement between the parties might deprive the state and its regulatory boards of information necessary to protect the public against incompetent or unethical licensees. (22 C.A.4th 1821.)

(b) Stipulated reversal of the judgment against defendant P would interfere with the disciplinary scheme set forth in

California's Real Estate Law (3 *Summary* (10th), *Agency and Employment*, §47 et seq.). *B. & P.C. 10177.5* provides for suspension or revocation when a final judgment is obtained in a civil action against any real estate licensee on grounds of fraud, misrepresentation, or deceit with reference to any transaction for which a license is required. Because "deceit" is defined in C.C. 1710(3) as including the suppression of a fact by one who is bound to disclose it, and because misrepresentation may be intentional or negligent, a licensed broker may be disciplined for failure to disclose even if the broker was not intentionally fraudulent or dishonest and even if he or she received no advantage from the failure to disclose. (22 *C.A.4th* 1821.)

(c) Here, defendant P's breach of duty falls within the type of conduct that could be grounds for disciplinary action. Hence, a reversal of the judgment against him, by stipulation or not, would effectively deprive the commissioner of his ability to act under *B. & P.C. 10177.5*. (22 *C.A.4th* 1822.)

(d) The evidence also indicates that P is of advanced age, no longer licensed as a broker, and in ill health. In other words, it is unlikely that the judgment against him will, in fact, ever be used as a basis for disciplining him. However, this consideration is irrelevant. "In our view, it is enough that the judgment *may* provide the basis for disciplinary action against the defendant and that reversal impinges, or appears to impinge, upon the authority of a state agency to regulate real estate licensees and thereby protect the public." (22 *C.A.4th* 1825.)

(e) Because reversal connotes the affirmative rejection of a judgment, a reversal here could well be interpreted as a judicial nullification of the holding in the earlier decision that P violated his duty of care as a real estate broker. And this danger cannot be obviated by an appellate court statement that the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court's judgment. (22 *C.A.4th* 1823.)

(f) Permitting a licensee to "buy his way out" from under a judgment that might form the basis for disciplinary action by settling at the appellate level would not only reduce incentives for wealthier licensees to conform to the standards imposed by their profession, but would also render it less likely that they will settle cases prior to judgment, i.e., a licensee-defendant is more apt to gamble on going to trial if the disciplinary consequences of an unfavorable judgment may ultimately be avoided by settling at the appellate level. (22 *C.A.4th* 1823.) (See *California v. Superior Court (Lovelace)* (1995) 11 *C.4th* 50, 61, 44 *C.R.2d* 399, 900 *P.2d* 648, *supra*, §736 [distinguishing *Neary* where appellate judgment, instead of trial judgment, was affected]; for pre-*Neary* case rejecting stipulated reversal that would affect third party, i.e., the taxing authorities, see *In re Marriage of Shapiro* (1974) 39 *C.A.3d* 460, 463, 114 *C.R.* 277; on nonapplicability to criminal cases, see *infra*, §898.)

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3. Refusal To Apply Presumption Favoring Stipulation.

9 Witkin Cal. Proc. Appeal § 895

[§ 895] Refusal To Apply Presumption Favoring Stipulation.

In *Morrow v. Hood Communications* (1997) 59 C.A.4th 924, 69 C.R.2d 489, the majority reversed a judgment for plaintiff in accordance with a stipulation for reversal. Noting that the stipulation specified that the case contained none of the reasons for refusing to comply with a stipulation set forth in *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, supra, §893, the majority determined that that decision was controlling. However, the majority urged the Supreme Court to reconsider and repudiate *Neary*. (59 C.A.4th 926.)

A dissenting judge, disagreeing with *Neary*, refused to acquiesce in that decision, because he believed it to be destructive of judicial institutions. In explaining why, unlike the majority, he did not feel bound by stare decisis, the dissenting judge, quoting a 1990 law review article, stated: "I am not the first judge to refuse to apply the doctrine articulated in *Neary*. ... My conscientious refusal to acquiesce is not designed to offend our Supreme Court, for which I have the most profound respect. It is constitutionally justified and, I hope, constructive. As has been stated, '[s]o long as the lower court may still be reversed by the higher court, there is no interference with either the "supremacy" of the Supreme Court or with the idea of the rule of law. While lower courts may be "inferior" in the hierarchy--i.e., their decisions can be *countermanded* by a higher tribunal--they are not constitutionally *subordinate* in terms of either their duties under the Constitution or their relationship to higher courts. ... Neither can it be said that "underruling" actually undermines the rule of law, so long as the superior court is allowed to review and reverse. Indeed, quite to the contrary, such "underruling" may be an essential part of the process of judicial self-correction, and has occurred in the past to force Supreme Court reconsideration of questionable constitutional decisions.' " (59 C.A.4th 929.) The dissenting judge acknowledged that while he would refuse to apply *Neary* when asked to do so by litigants, he would comply with an order of the Supreme Court requiring him to do the purely ministerial act of granting a request for stipulated reversal. (59 C.A.4th 930.)

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4. Abrogation of Presumption Favoring Stipulation.

9 *Witkin Cal. Proc. Appeal* § 896

[§ 896] Abrogation of Presumption Favoring Stipulation.

The judicial rule, set forth in *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, supra, §893, upholding stipulated reversals in the absence of extraordinary circumstances, was superseded by the Legislature in 1999. Accordingly, an appellate court may not reverse or vacate a duly entered judgment on the parties' agreement or stipulation unless the court finds both of the following:

(1) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal. (C.C.P. 128(a)(8)(A).)

(2) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement. (C.C.P. 128(a)(8)(B).)

A number of decisions are illustrative:

In re Rashad H. (2000) 78 C.A.4th 376, 378, 92 C.R.2d 723 [stipulated reversal of order terminating parental rights, where order was invalid due to absence of statutory notice; C.C.P. 128(a)(8) factors were satisfied].

Union Bank of Calif. v. Braille Institute of America (2001) 92 C.A.4th 1324, 1325, 112 C.R.2d 604 [although no reversible error had been shown to have occurred, stipulation for reversal of the orders pertaining to appointment of successor cotrustees and modification of trust was proper where C.C.P. 128(a)(8) factors were satisfied].

Estate of Regli (2004) 121 C.A.4th 878, 880, 17 C.R.3d 514 [stipulated reversal of probate orders approving final accounting and distribution of estate and denying potential beneficiaries' objections to accountings would adversely affect estate administrator (nonparty) by exposing him to potential litigation and, rather than settling dispute, provide potential beneficiaries opportunity to further object to accountings].

Hardisty v. Hinton & Alfert (2004) 124 C.A.4th 999, 1004, 21 C.R.3d 835 [attorneys and law firm failed to demonstrate justification for stipulated reversal of judgment in dispute over attorneys' fees earned in underlying action; parties gave no reason why they requested reversal; finding that firm made misrepresentations created possible exposure

to discipline, thus implicating public trust; and parties failed to show that reversal would reduce incentive for pretrial settlement].

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5. Procedure.

9 *Witkin Cal. Proc. Appeal* § 897

[§ 897] Procedure.

In most cases involving a stipulated reversal, much of the relevant information required for determining whether it should be accepted or rejected will not be available. (See *Norman I. Krug Real Estate Inv. v. Praszker* (1994) 22 C.A.4th 1814, 1820, 1823, 28 C.R.2d 498, supra, §894; *Hardisty v. Hinton & Alfert* (2004) 124 C.A.4th 999, 1007, 21 C.R.3d 835.)

To alleviate this problem, the First District adopted a local rule (Local rule 8) requiring the parties to a stipulated reversal to provide specific information. The Local Rule reads as follows: "A motion filed in this court for stipulated reversal of a judgment of a trial court must include a joint declaration of counsel that (1) describes the parties and the factual and legal issues presented at trial; (2) indicates whether the judgment involves important public rights or unfair, illegal or corrupt practices, or torts affecting a significant number of persons, or otherwise affects the public or a significant number of persons not parties to the litigation (if the judgment is against a state licensee, the declaration must also disclose whether it exposes such person to any possible disciplinary proceeding); and (3) discloses whether the judgment sought to be reversed may have collateral estoppel or other effects in potential future litigation and, if so, whether any third parties who might be prejudiced by stipulated reversal of the judgment have received notice of the motion therefor. A copy of the judgment must accompany the motion. The parties must provide a sufficient showing to support the findings required by *Code of Civil Procedure section 128*, subdivision (a)(8), as amended effective Jan. 1, 2000."

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6. No Stipulated Reversal in Criminal Case.

9 Witkin Cal. Proc. Appeal § 898

[§ 898] No Stipulated Reversal in Criminal Case.

People v. Barraza (1994) 30 C.A.4th 114, 35 C.R.2d 377, involved an unsuccessful effort to apply *Neary v. Regents of Univ. of Calif.* (1992) 3 C.4th 273, 10 C.R.2d 859, 834 P.2d 119, *supra*, §893, in a criminal context. A lawful resident alien who was convicted of the misdemeanor offense of carrying a loaded firearm in public, and who was assertedly subject to deportation under federal law because the offense involved a firearm, made a motion, with the support of the prosecutor, for approval by the Court of Appeal of a "stipulated reversal" vacating his conviction and replacing the judgment with a judgment convicting him of misdemeanor assault. *Held*, motion denied.

(a) The assumption that *Neary* extends to criminal cases is "very questionable." (30 C.A.4th 119.) Although *Neary* is not explicitly limited to the civil sphere, "it is hard to imagine the Supreme Court contemplated that stipulated reversal would be appropriate in criminal cases." The Supreme Court in *Neary* described that case as "an ordinary civil action" and observed: "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant." "This is obviously not true of the judgment in a criminal case. (30 C.A.4th 119, footnote 5.)

(b) Here, defendant did not seek mere reversal or vacation of the judgment, and the relief sought, i.e., vacating his conviction and replacing the judgment with a different judgment, is authorized neither by statute nor case law. (30 C.A.4th 119.) Although P.C. 1203.4(a) permits a trial court to set aside a verdict of guilty and thus dismiss the accusations or information, defendant did not seek relief under that statute, which offers the only available postconviction relief from the consequences of a valid criminal conviction. (30 C.A.4th 120, 121.)

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7. Consent to Vacation of Judgment.

9 *Witkin Cal. Proc. Appeal* § 899

[§ 899] Consent to Vacation of Judgment.

In *Muccianti v. Willow Creek Care Center* (2003) 108 C.A.4th 13, 133 C.R.2d 1, plaintiffs instituted a wrongful death action against defendants (a health care facility and its parent corporations) for failing to diagnose a medical condition that allegedly caused the death of decedent 3 days after she was released from the facility. Plaintiffs obtained judgment, which included a punitive damages award of \$ 4.5 million. One of defendant parent corporations appealed and then filed for bankruptcy relief. Before defendant filed its opening brief, the parties settled. Under the settlement terms, plaintiffs, for a specified sum of money, agreed to consent to vacation of the judgment. Defendant agreed to dismiss the appeal. After the bankruptcy court approved the settlement, defendant, in accordance with the settlement, moved to vacate the judgment. The appellate court deferred ruling on this motion, and defendant filed its opening brief. Plaintiffs subsequently moved to dismiss the appeal in light of the settlement. *Held*, motion to vacate denied; appeal dismissed.

(a) *Motion to vacate: First prong of C.C.P. 128(a)(8).*

(1) *C.C.P. 128(a)(8)* precludes an appellate court from reversing or vacating a judgment on an agreement or stipulation of the parties unless the court finds that there is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal (see *C.C.P. 128(a)(8)(A)*). Here, defendant was a health care facility that treated the elderly, and the jury found that it was guilty of negligence and wilful misconduct. The treatment received by decedent is an issue relevant to the public in deciding future placement of its citizens, and vacation of the judgment may deny the public the ability to discover defendant's bad acts. This conclusion is not altered by the fact that defendant had a change of ownership, because there is no evidence that the change affected the operation or staffing of defendant. (108 C.A.4th 21.)

(2) The judgment here has potential collateral licensing and insurance ramifications. Although the complaint in this case has already been investigated by the Department of Health Services and thus the judgment would appear to have no further effect in the matter, it may nevertheless be relevant in future licensing or disciplinary proceedings. (108 C.A.4th 21.)

(3) Under *Health & Saf.C. 1305(a)*, liability insurers are required to report to the Department of Health Services judgments over \$ 3,000 rendered against insured health care facilities in negligence actions, and under *Health & Saf.C.*

1307, the department must keep a record of these reports. Thus, the judgment clearly affects the availability and cost of insurance for defendant, a matter of interest to insurers providing liability insurance to health care facilities. And the fact that the judgment is also made a part of the department records evidences an interest to the public. In addition, defendant concedes that the judgment may adversely affect its licensing and operations outside California, because some states require disclosure of all malpractice judgments. Finally, by maintaining that the judgment will likely damage the health care center's reputation in the community, defendant admits that the judgment is of undeniable interest to the public. (108 C.A.4th 22.)

(b) *Motion to vacate: Second prong of C.C.P. 128(a)(8).*

(1) Before an appellate court may reverse or vacate a judgment on an agreement or stipulation of the parties, it must also find that the reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment (see C.C.P. 128(a)(8)(B)). It is clear that plaintiffs have an interest in settling with defendant in light of the pending bankruptcy proceeding and this appeal, but this interest is outweighed by the following considerations: The public trust could be undermined if a nursing facility has findings of negligence and wilful misconduct expunged from the public record, and a court-ordered vacation of judgment could well be interpreted as a judicial nullification of these findings. (108 C.A.4th 22.)

(2) The aforementioned interpretation is particularly true where reversible error has not been conclusively shown. Although defendant has filed its opening brief, the plaintiffs' responding brief does not address the underlying merits, because under the terms of the settlement plaintiffs agreed to consent to vacation of the judgment. Thus, the court is in no position to evaluate the merits of the appeal. (108 C.A.4th 22.)

(c) *Dismissal of appeal.* The bankruptcy court approved the settlement agreement, and plaintiffs received the settlement proceeds. The settlement only provides for plaintiffs to consent to vacation of the judgment, but it does not mandate that the judgment actually be vacated. (The settlement provides for its own nullification if the bankruptcy court fails to approve it, but it is silent in the event that the request to vacate the judgment is denied.) "Because the settlement agreement is valid even in the case where we deny the motion to vacate the judgment, we find the appeal moot." (108 C.A.4th 24.)

(d) *Additional points.* The court made the following additional points: (1) The parties apparently believe that the judgment belongs solely to them to use in a manner that is in their best interest. (2) Instead, the judgment now belongs to the public, not the parties, and the public indisputably has an interest in its continuing existence. (108 C.A.4th 15.)

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H. Restitution After Reversal.

1. Nature and Scope of Power.

9 *Witkin Cal. Proc. Appeal* § 900

[§ 900] Nature and Scope of Power.

"When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination." (*C.C.P.* 908.)

This statutory declaration covers the principle, but does not fully describe the power and procedure, of restitution to the appealing party after he or she obtains a reversal of the judgment. Thus, it provides that the appellate court may direct restitution, but this is rarely done. Relief is normally sought in the trial court, which has inherent power to order it, independent of statute. (*Schubert v. Bates* (1947) 30 C.2d 785, 789, 185 P.2d 793; *Bank of America v. McLaughlin* (1940) 37 C.A.2d 415, 417, 99 P.2d 548; see *Rest., Restitution* §74.)

In *Stockton Theatres v. Palermo* (1953) 121 C.A.2d 616, 264 P.2d 74, plaintiff corporation had obtained a lease of a theater from defendant. In actions for declaratory relief and unlawful detainer, defendant received lower court judgments nullifying the lease, and he took possession and operated the theater. The judgments were reversed on appeal, and plaintiff, deeming restitution of the physical property incomplete, brought this action for an accounting of profits from the business. *Held*, it was proper to order the accounting and give judgment for the profits. (121 C.A.2d 620.)

In *Erickson v. Boothe* (1954) 127 C.A.2d 644, 274 P.2d 460, the judgment was in favor of plaintiff for possession of property. After reversal on appeal, she contended that restitution should be confined to restoration of the property and the reasonable value of its use. *Held*, this is not the sole measure of recovery after reversal. Here, the record showed that the property was used profitably in a cattle business, and the trial court did not err in ordering an accounting to defendant for the profits of that business. (127 C.A.2d 648.) (See *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg, Pennsylvania* (2004) 118 C.A.4th 1061, 1085, 13 C.R.3d 586 [insurer paid punitive damages award that was later determined on appeal to be unconstitutionally excessive; insurer was entitled to interest on excessive

amount that it had paid on original judgment[.])

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H. Restitution After Reversal.

2. Summary Proceeding on Motion.

9 Witkin Cal. Proc. Appeal § 901

[§ 901] Summary Proceeding on Motion.

The successful appellant may make a motion in the trial court, and obtain restitution in this summary proceeding. (*Schubert v. Bates* (1947) 30 C.2d 785, 789, 185 P.2d 793 [relief may be had by defendant despite plaintiff's voluntary dismissal]; see 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §880 et seq.) No setoff is available to the adverse party in the summary proceeding. (See *Buckman v. Tucker* (1937) 9 C.2d 403, 406, 71 P.2d 69, 5 Cal. Proc. (5th), Pleading, §1162; cf. *Palpar v. Thayer* (1949) 91 C.A.2d 176, 204 P.2d 654 [in proceeding for restoration of tractor, "collateral issue" of deductible value of use were not appropriate for determination].)

The trial judge has discretion to deny the motion where the claim is inequitable. (*Hansen v. D'Artenay* (1936) 13 C.A.2d 293, 297, 57 P.2d 202; see *Schubert v. Bates*, *supra*, 30 C.2d 791; *Bank of America v. McLaughlin* (1940) 37 C.A.2d 415, 418, 99 P.2d 548 [crops taken by lessor on execution were actually owed by appellant lessee as rental]; *Holmes v. Williams* (1954) 127 C.A.2d 377, 379, 273 P.2d 931 [discretion in denial was abused and reversed]; *Rogers v. Bill & Vince's* (1963) 219 C.A.2d 322, 325, 33 C.R. 129 [discretion in granting was affirmed]; *Rest.*, *Restitution* §74, Comment c; on protection of third party who purchases at execution sale, see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §166.)

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H. Restitution After Reversal.

3. Independent Action.

9 *Witkin Cal. Proc. Appeal* § 902

[§ 902] Independent Action.

The successful appellant may bring an independent action to vacate an execution sale, to recover the proceeds of the sale, or to recover money or damages. (See *Ward v. Sherman* (1909) 155 C. 287, 291, 100 P. 864; *Buckman v. Tucker* (1937) 9 C.2d 403, 406, 71 P.2d 69; *Stockton Theatres v. Palermo* (1953) 121 C.A.2d 616, 617, 264 P.2d 74; *Erickson v. Boothe* (1954) 127 C.A.2d 644, 646, 274 P.2d 460; *Rest., Restitution* §74; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §889.)

Just as in the summary proceeding (*supra*, §901), relief may be denied where the equities are against the plaintiff. (See *Rest., Restitution* §74, Comment c.)

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H. Restitution After Reversal.

4. Restitution Despite Impending New Trial.

9 Witkin Cal. Proc. Appeal § 903

[§ 903] Restitution Despite Impending New Trial.

If the reversal itself finally determines the rights of the parties, restitution should normally follow as a matter of right. But if the reversal calls for a new trial, the successful appellant may lose again, and the new judgment against him or her may be similar to the one that caused the loss of his or her property.

This uncertainty has led to some conflict whether restitution in these cases is a matter of right. "Even where the reversal is not conclusive of the rights of the parties, as where a new trial is ordered or the cause remanded for further proceeding, some courts, speaking of restitution as an absolute right, hold that it must be made without consideration of what the further result of the litigation may be, since otherwise the court might be required to determine, on motion or by an independent action, the final judgment to be made in the litigation. Other courts, noting the equitable character of the right to restitution, hold that it is not a matter of mere right, but is *ex gratia*, resting in the exercise of a sound discretion, and that the court will not order it where the justice of the case does not call for it or where retention is not shown to be contrary to equity and good conscience." (*Rogers v. Bill & Vince's* (1963) 219 C.A.2d 322, 326, 33 C.R. 129.)

In *Rogers*, plaintiff sold a restaurant and liquor license to defendant, who failed to pay. Plaintiff sued, and defendant counterclaimed to rescind for fraud. Judgment was against defendant on his counterclaim on the ground that, although he proved false representations, he did not prove reliance. Plaintiff was given judgment for damages, and collected \$ 8,065.45 by execution. The appellate court affirmed the judgment against defendant but reversed the judgment for plaintiff. Defendant then moved for, and the judge granted, restitution. *Held*, affirmed. Plaintiff no longer had any right to the money collected under the erroneous judgment, and to allow him to keep it would be to speculate on the outcome of the retrial. (219 C.A.2d 326.)

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A. Nature of Power.

9 *Witkin Cal. Proc. Appeal* § 904

[§ 904] Nature of Power.

"On petition of a party or on its own motion, a reviewing court may order rehearing of any decision that is not final in that court on filing." (C.R.C., Rule 8.268(a)(1); see C.R.C., Rule 8.536(a), *infra*, §948 [Supreme Court]; C.R.C., Rule 8.708(c) [appellate division of superior court]; *In re Jessup* (1889) 81 C. 408, 459, 21 P. 976, 22 P. 742, 22 P. 1028; *Granger's Bank v. Superior Court* (1894) 101 C. 198, 199, 35 P. 642; C.E.B., 2 Civil Appellate Practice 3d, Chap. 19; 44 *Cal. L. Rev.* 627 [comprehensive study and appraisal of practice in American appellate courts]; Rutter Group, 2 Civil Appeals and Writs §§12:1 et seq., 13:204 et seq.; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §821 et seq.; 2 *Am.Jur. P.P. Forms* (2000 ed.), *Appeal and Error* §786 et seq.)

There may be more than one rehearing in the same case; i.e., the new decision, rendered after rehearing, is itself subject to rehearing. (See 17 *So. Cal. L. Rev.* 261.)

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SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.708(c) was repealed in 2008. The power to order a rehearing in the appellate division is now in C.R.C., Rule 8.889(a)(1).



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B. Grounds.

9 *Witkin Cal. Proc. Appeal* § 905

[§ 905] Grounds.

There are no grounds for rehearing specified in C.R.C., Rules 8.268 and 8.536. However, *Govt.C. 68081* provides for a mandatory rehearing if the reviewing court's decision is based on a new issue, and the court fails to afford an opportunity to file a supplementary brief. (See *supra*, §693.)

Despite the general lack of specified grounds for rehearing in the statutes and rules, case law has established that the petitioner must do more than reargue the case. Instead, the petitioner should make a strong showing of a substantial error of law or fact, or serious doubt about the correctness of a statement of law. The standard was stated in an early case, *In re Jessup* (1889) 81 C. 408, 21 P. 976, 22 P. 742, 22 P. 1028, as follows: "The losing party avails himself of the opportunity afforded by the rule to petition for a rehearing. If we are satisfied, from the petition, that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing." (81 C. 471.) (See *San Francisco v. Pacific Bank* (1891) 89 C. 23, 25, 26 P. 615, 26 P. 835 ["Petitions for rehearing are permitted by the rules of the court, for the purpose of correcting any error which the court may have made in its opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument, which may have been overlooked in the decision"]; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §832 et seq.)

A rehearing may also be granted, though the opinion is considered satisfactory, if the appellate judgment is defective because of procedural error affecting the parties' appellate rights. (See *Kelliher v. Kelliher* (1950) 101 C.A.2d 226, 227, 225 P.2d 554 [granted on petition of both parties because appeal was heard originally before only two members of court; after reargument, original opinion was adopted with modifications]; *Waite v. Godfrey* (1980) 106 C.A.3d 760, 763, 163 C.R. 881 [plaintiff's counsel had not received notice of calendaring of oral argument, and thus had been denied opportunity to present argument].)

West's Key Number Digest, Appeal and Error 832

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C. New Points Are Not Allowed.

9 *Witkin Cal. Proc. Appeal* § 906

[§ 906] New Points Are Not Allowed.

The courts have, on numerous occasions, declared that they will not grant rehearings on points newly urged in the petition. It is the duty of counsel to see that all points are properly presented in the original briefs or argument, before submission. (*Prince v. Hill* (1915) 170 C. 192, 195, 149 P. 578; *A.F. Estabrook Co. v. Industrial Acc. Com.* (1918) 177 C. 767, 771, 177 P. 848; *Estate of Novotny* (1928) 94 C.A. 782, 790, 271 P. 923, 273 P. 58; *Pacific Finance Corp. v. Lynwood* (1931) 114 C.A. 509, 516, 300 P. 50, 1 P.2d 520 [quoting early case referring to this "most pernicious practice"]; *Mann v. Brison* (1932) 120 C.A. 450, 452, 7 P.2d 1110, 9 P.2d 257; *Estate of Edwards* (1932) 126 C.A. 152, 157, 14 P.2d 318, 15 P.2d 194; *Conner v. East Bay Mun. Util. Dist.* (1935) 8 C.A.2d 613, 619, 47 P.2d 774, 48 P.2d 982; *Ocean Park Pier Amusement Corp. v. Santa Monica* (1940) 40 C.A.2d 76, 87, 104 P.2d 668, 104 P.2d 879; *Epperson v. Rosemond* (1950) 100 C.A.2d 344, 347, 223 P.2d 655, 224 P.2d 480 ["Appellants where they blew very hot in their briefs blow very cold indeed in their petition for rehearing"]; *Smith v. Crocker First Nat. Bank of San Francisco* (1957) 152 C.A.2d 832, 836, 314 P.2d 237; *People v. Mascotti* (1962) 206 C.A.2d 772, 779, 23 C.R. 846; *CAMSI IV v. Hunter Technology Corp.* (1991) 230 C.A.3d 1525, 1542, 282 C.R. 80, citing the text.)

Like other rules devised for the convenience of the court, this one may be relaxed for good cause. (See *Parker v. Swett* (1922) 188 C. 474, 487, 205 P. 1065 ["because of a hope that an explanation of our view as to the effect of the judgment may prevent controversy between the parties"]; *People v. Marine Products Co.* (1947) 77 C.A.2d Supp. 929, 936, 177 P.2d 67 [validity of state statute involved]; *Sime v. Malouf* (1949) 95 C.A.2d 82, 116, 212 P.2d 946, 213 P.2d 788 [jurisdictional question raised]; *Canal-Randolph Anaheim v. Wilkoski* (1978) 78 C.A.3d 477, 495, 144 C.R. 474; *Mounts v. Uyeda* (1991) 227 C.A.3d 111, 121, 277 C.R. 730 [rehearing was granted to consider constitutionality of C.C.P. 351, even though issue was not raised at trial or on initial appeal].) And it is sometimes disregarded without any stated reason. (See *Elizalde v. Elizalde* (1902) 137 C. 634, 635, 66 P. 369, 70 P. 861; *Mott v. Wright* (1919) 43 C.A. 21, 33, 184 P. 517; *Grant v. Grant* (1924) 68 C.A. 23, 31, 228 P. 412; *Traders & General Ins. Co. v. Pacific Employers Ins. Co.* (1955) 130 C.A.2d 158, 159, 278 P.2d 493; *People v. Blevins* (1963) 222 C.A.2d 801, 806, 35 C.R. 438, 36 C.R. 191.)

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D. Procedure.

1. Petition.

9 Witkin Cal. Proc. Appeal § 907

[§ 907] Petition.

(1) *In General.* A party seeking a rehearing must serve and file a petition for rehearing. This petition, in form and method of presentation, and number of copies, is subject to the rules on briefs. (C.R.C., Rules 8.268(b)(1), (b)(3); see C.R.C., Rules 8.536(b), 8.40(b)(1); C.E.B., 2 Civil Appellate Practice 3d, §19.12 et seq.; Rutter Group, 2 Civil Appeals and Writs §§12:52 et seq., 13:204 et seq.; Cal. Civil Practice, 5 Procedure §§42:14 [checklist for party seeking rehearing], 42:16 [form of petition]; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §§797, 798; 44 Cal. L. Rev. 643 [practice in American appellate courts]; see *supra*, §694 et seq.) Amici curiae are occasionally allowed to seek a rehearing. (See, e.g., *New York Life Ins. Co. v. Bank of Italy* (1923) 60 C.A. 602, 607, 214 P. 61.)

(2) *Time for Petition.* Because the petition must be determined before the decision becomes final (see *infra*, §909), the time to seek a rehearing is extremely short. Formerly, the time for filing the petition differed in civil and criminal cases (see 17 So. Cal. L. Rev. 261), but it is now the same. Under C.R.C., Rules 8.268(b)(1), 8.536(b), a party may serve and file a petition for rehearing within 15 days after one of the following:

(a) The filing of the decision.

(b) A publication order restarting the finality period under C.R.C., Rule 8.264(b)(5) (*supra*, §837), if the party has not already filed a petition for rehearing.

(c) A modification order changing the appellate judgment under C.R.C., Rule 8.264(c)(2) (*supra*, §833).

(d) The filing of a consent under C.R.C., Rule 8.264(d) (*supra*, §857).

(3) *Failure To File.* Before the decision is final and for good cause, the presiding justice may relieve a party from failure to file a timely petition. (C.R.C., Rule 8.268(b)(4).)

(4) *Order on Court's Own Motion.* A reviewing court may also order rehearing of any decision that is not final in that court on filing on its own motion. (C.R.C., Rule 8.268(a)(1).) (On rehearing in Supreme Court, see *infra*, §948.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Time for Petition.*

(b) *Publication order restarting finality period:* C.R.C., Rule 8.264(b)(5) was renumbered C.R.C., Rule 8.264(b)(3) in 2008.



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D. Procedure.

2. Answer.

9 *Witkin Cal. Proc. Appeal* § 908

[§ 908] Answer.

(1) *In General.* A party may not file an answer to a petition for rehearing unless the court requests an answer (however, a petition for rehearing normally will not be granted unless the court has requested an answer). The clerk must "promptly" send to the parties copies of any order requesting an answer and "immediately" notify the parties by telephone or another expeditious method. (C.R.C., Rule 8.268(b)(2).)

(2) *Time for Answer.* Unless the court orders otherwise, the answer must then be served and filed within 8 days after the order is filed. (C.R.C., Rule 8.268(b)(2); see C.E.B., 2 Civil Appellate Practice 3d, §19.21 et seq.; Rutter Group, 2 Civil Appeals and Writs §§12:54 et seq., 13:207 et seq.; Cal. Civil Practice, 5 Procedure §42:15; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error, §804.) The form and contents of the answer are subject to the rules on briefs. (C.R.C., Rule 8.268(b)(3).)

(3) *Failure To File.* Before the decision is final and for good cause, the presiding justice may relieve a party from failure to file a timely answer. (C.R.C., Rule 8.268(b)(4).) (On rehearing in Supreme Court, see *infra*, §948.)

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3. Time for Order.

9 *Witkin Cal. Proc. Appeal* § 909

[§ 909] Time for Order.

(1) *In General*. "An order for rehearing must be filed before the decision is final." (C.R.C., Rules 8.268(a)(2) [if clerk's office is closed on date of finality, court may file order on next day that clerk's office is open]; C.R.C., Rule 8.708(c)(1).) The time of finality is fixed by C.R.C., Rule 8.264(b)(1), and is the same in both civil and criminal cases: 30 days after the decision is filed. (See *supra*, §§832, 834, 839.)

(2) *Denial by Operation of Law*. The petition is denied by operation of law if no determination is made before the decision becomes final. (C.R.C., Rule 8.268(c).) (On rehearing in Supreme Court, see *infra*, §948.)

(3) *Time May Not Be Extended*. "The time for granting or denying a petition for rehearing in the Court of Appeal may not be extended." (C.R.C., Rule 8.268(c).)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. C.R.C., Rule 8.708(c)(1) was repealed in 2008. The time for filing an order of rehearing in the appellate division is now in C.R.C., Rule 8.889(a)(2).



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4. Grant of Petition.

9 *Witkin Cal. Proc. Appeal* § 910

[§ 910] Grant of Petition.

In a Court of Appeal, the decision to grant a rehearing requires the concurrence of a majority of the court. (See, e.g., Internal Operating Practices and Procedures, First Appellate District, IOP III(B)(5); on what constitutes majority, see *infra*, §950.)

"An order granting a rehearing vacates the decision and any opinion filed in the case and sets the cause at large in the Court of Appeal." (C.R.C., Rule 8.268(d).) The old opinion, though previously printed in the advance sheets and the California Reporter or the Pacific Reporter, is wholly superseded, and never appears in the final official volumes of California Appellate Reports. (*Miller & Lux v. James* (1919) 180 C. 38, 48, 179 P. 174, 175.) It is not necessary that the case be recalendared for oral argument before the matter is resubmitted. (*Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 466, 468, 122 P.2d 257.)

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D. Procedure.

5. Denial of Petition.

a. In General.

9 Witkin Cal. Proc. Appeal § 911

[§ 911] In General.

A petition will sometimes point out an error not vital to the decision that can be corrected without rewriting or adding to the opinion. In that situation, it is customary to deny the petition for rehearing and to make an order of modification, which is filed and printed in the advance sheets. But in the permanent official volumes, the Reporter of Decisions makes the necessary changes and the modified opinion only is printed, superseding the order of modification. (See, e.g., *Gardner v. Downtown Porsche Audi* (1986) 180 C.A.3d 713, 721, 225 C.R. 757.)

If the petitioner argues that the court has overlooked some point or misstated the law or facts, the court, in denying a rehearing, may issue a supplemental "opinion on denial of rehearing." (See, e.g., *Sutphin v. Speik* (1940) 15 C.2d 195, 204, 99 P.2d 652, 101 P.2d 497; *Estate of Watkins* (1940) 16 C.2d 793, 799, 108 P.2d 417; *National Bank of Calif. v. Los Angeles Iron & Steel Co.* (1906) 2 C.A. 659, 662, 84 P. 466, 468 [prior opinion modified]; *Keyes v. Nims* (1919) 43 C.A. 1, 15, 184 P. 695; *Pacific Finance Corp. v. Lynwood* (1931) 114 C.A. 509, 516, 300 P. 50, 1 P.2d 520; *Estate of Edwards* (1932) 126 C.A. 152, 157, 14 P.2d 318, 15 P.2d 194; *Ocean Park Pier Amusement Corp. v. Santa Monica* (1940) 40 C.A.2d 76, 87, 104 P.2d 668, 104 P.2d 879; *Wyman v. Municipal Court* (1951) 102 C.A.2d 738, 741, 228 P.2d 89; *Estate of Franco* (1975) 50 C.A.3d 374, 386, 122 C.R. 661, 123 C.R. 458; *Canal-Randolph Anaheim v. Wilkoski* (1978) 78 C.A.3d 477, 494, 144 C.R. 474; *People v. Rojas* (1981) 118 C.A.3d 278, 288, 174 C.R. 91, supra, §787.)

In rare cases, a justice may file an opinion dissenting from an order denying rehearing. (See, e.g., *Hunt v. Hammel* (1904) 142 C. 456, 460, 76 P. 378; *Hirschman v. Los Angeles* (1952) 39 C.2d 698, 704, 249 P.2d 287; *People v. Love* (1961) 56 C.2d 720, 748, 756, 16 C.R. 777, 17 C.R. 481, 366 P.2d 33, 366 P.2d 809 [opinion dissenting and response to it].)

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5. Denial of Petition.

b. Summary Denial Final Forthwith.

9 Witkin Cal. Proc. Appeal § 912

[§ 912] Summary Denial Final Forthwith.

In *Brown v. Superior Court* (1982) 33 C.3d 242, 188 C.R. 425, 655 P.2d 1260, on petition of the Governor, a divided court upheld the constitutional power of the Legislature, by a 1982 statute, to create new districts and divisions of the Court of Appeal. The majority opinion was signed by two Supreme Court justices (N and R) and two Court of Appeal justices assigned; the dissenting opinion was signed by one Supreme Court justice and two Court of Appeal justices assigned. T, one of two real parties in interest who had brought a taxpayer's action in the lower court to enjoin implementation of the 1982 statute, petitioned for a rehearing. The attorneys of record for the petitioners and real parties in interest filed a stipulation that "the decision may become final forthwith." T and amici curiae objected, but the Attorney General, as counsel for the Governor, urged that the decision be made final forthwith, notwithstanding the objections.

(a) *Main Opinion and Order Denying Rehearing Final Forthwith.* In a brief order signed by R, Acting Chief Justice, the court said: "After due consideration, the petition for rehearing is denied. The court deems that this lawsuit has long enough delayed the implementation of responsibilities that our Constitution entrusts to the Legislature. Accordingly, for good cause, the decision herein is made final forthwith." (33 C.3d 258.)

(b) *Dissenting Opinion From Order Denying Rehearing.* The three justices who dissented from the opinion in the main case joined in a dissent which made the following points:

(1) "No valid special considerations, peculiar to this case, justify the majority's deviation from our usual practice of awaiting expiration of the full 30-day period." (33 C.3d 258.)

(2) There are good reasons for the traditional rule. During the 30-day period, constructive and useful criticism is frequently received from the bench, the Bar, legal scholars, amici curiae, and other interested persons. (33 C.3d 258.)

(3) T (one of the real parties in interest) asserted that he never authorized his attorney to sign the stipulation, and through new counsel, made two constitutional arguments not considered by the court in its opinion; these were not given appropriate consideration in the summary denial of the petition for rehearing. (33 C.3d 258.) And amici curiae

indicate an intent to file additional authorities and argument which might induce the court to order a rehearing on its own motion. "It is most unfortunate that the majority, in its rush, denies amici opportunity, during our rule time, of presenting their additional contentions." (33 C.3d 259.)

(4) "While the majority recites that its order is issued for 'good cause,' no one has suggested what that 'good cause' is. ... What possible emergency exists to justify any deviation from our usual procedures?" (33 C.3d 259.)

(5) The power to make decisions "final forthwith" has been exercised rarely and under exigent circumstances where a promptly effective decision is of vital importance to the public or to the parties. (33 C.3d 259, quoting the text.) In *Carmel-By-the-Sea v. Young* (1970) 2 C.3d 259, 272, 85 C.R. 1, 466 P.2d 225, an extensive financial disclosure law was invalidated, and immediate relief necessary for candidates and government officials made subject to the law. In *Assembly of Calif. v. Deukmejian* (1982) 30 C.3d 638, 679, 180 C.R. 297, 639 P.2d 939, a reapportionment case, it was necessary that election officials know precise boundary lines in time for the orderly conduct of the primary election. "No similar urgency or 'good cause' justifies immediate finality in the present case." (33 C.3d 260.)

(c) *Response to Dissenting Opinion.* Justice R filed a response, defending the procedure used in denying rehearing and making the denial final:

(1) Justices have from time to time dissented to orders denying rehearing to express their views on the merits of the petition for rehearing or to argue that a modification did not adequately cure defects of the original opinion; but here, the dissent is not directed at the merits: it "mistakenly suggests" that, contrary to the "usual practice," the petition was denied summarily without due consideration of the merits. (33 C.3d 261.)

(2) This case was not a normal appeal. The appealable judgment was treated as an extraordinary writ proceeding, bypassing Court of Appeal review in order to determine important questions requiring prompt resolution by the Supreme Court, and a special calendar for oral argument was scheduled. "In short, this court made a determination early on that the issues raised in the present case were of public importance and warranted expedited review; thus, this case began with a need for prompt resolution, and ended as it began." (33 C.3d 261.)

(3) As in many other cases where the urgency was self-evident, the determination to make the decision final forthwith was made without explanation. (33 C.3d 261.)

(4) The assertion that the finality order precluded consideration of "useful criticism" is not persuasive. Amici curiae expressed the intent to present additional contentions, but they made no such contentions and did not file additional authorities. (33 C.3d 263.) And the petition for rehearing was disposed of in accordance with the usual internal practice of the court; i.e., it was assigned to a justice's staff for preparation of a memorandum, the memorandum concluded that the real party's contentions were meritless, and a majority of the court, in its scheduled conference, after consideration of the briefs and the memorandum, decided that rehearing should be denied. "No one has suggested that the petition would have received more careful consideration had it been considered at a later conference, or that two days was insufficient time to review the merits." (33 C.3d 265.)

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Witkin Summary of California Law XXII. REVIEW IN SUPREME COURT A. In General.

1. Constitutional Authority.

9 Witkin Cal. Proc. Appeal § 913

[§ 913] Constitutional Authority.

Cal. Const. Art. VI, §12, adopted in 1966 as a restatement of former constitutional provisions, authorized the Supreme Court, before a decision became final, to transfer to itself a cause in a Court of Appeal. It could also, before decision, transfer a cause from itself to a Court of Appeal or from one Court of Appeal or division to another.

As provided by this authority, the Supreme Court adopted rules under which it could grant a hearing after a decision by a Court of Appeal, "on its own motion or on petition." (See 72 *Cal. L. Rev.* 720; 17 *So. Cal. L. Rev.* 262; 3 *Stanf. L. Rev.* 243; 4 *Stanf. L. Rev.* 392.) The grounds for hearing in the Supreme Court, unlike the grounds for rehearing (*supra*, §905), were specified in the Rules of Court. In granting the hearing, the Supreme Court vacated the decision and opinion of the Court of Appeal, and the case was then "at large" for decision on all of the issues by an opinion of the Supreme Court (unless the Supreme Court retransferred the case to the Court of Appeal with directions). (See *Knouse v. Nimocks* (1937) 8 *C.2d* 482, 483, 66 *P.2d* 438.)

Cal. Const., Art. VI, §12, as amended at the November 1984 election by Proposition 32, authorizes the Supreme Court to review, instead of to vacate, a decision of the Court of Appeal. (For argument favoring "selective review," see 72 *Cal. L. Rev.* 720.) The revised constitutional section provides as follows:

(1) "The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction." (Cal. Const., Art. VI, §12(a).) (See *infra*, §922 et seq.)

(2) "The Supreme Court may review the decision of a court of appeal in any cause." (Cal. Const., Art. VI, §12(b).)

(3) "The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted." (Cal. Const., Art. VI, §12(c).)

(4) "This section shall not apply to an appeal involving a judgment of death." (Cal. Const., Art. VI, §12(d).)

The amendment took effect 6 months after the date of approval by the electorate; i.e., the effective date was

therefore May 6, 1985.

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A. In General.

2. Judicial Council Advisory Committee Report.

9 Witkin Cal. Proc. Appeal § 914

[§ 914] Judicial Council Advisory Committee Report.

To meet the short deadline for adoption of implementing rules (6 months), the Chief Justice appointed a Judicial Council Advisory Committee composed of judges, attorneys, the Director of the Administrative Office of the Courts, and the Reporter of Decisions. This Committee, with the assistance of the Judicial Council staff, prepared a draft of proposed rules, which was sent to members of the bench and State Bar and interested organizations for comment.

The final Report of the Committee, in its "Summary and Overview," observed that there was "a high degree of consensus" on the following issues:

"1. Although it would be possible to conform the rules to the language of Proposition 32 by making more limited changes, the committee was of the view that, in light of the basic change effected by the constitutional amendment, broader modifications of practice and procedure before the Supreme Court would be appropriate to allow the court and litigants to gain the maximum benefit from the adoption of Proposition 32."

"2. Key aspects of practice before the United States Supreme Court should be adapted for use in California. The most important appear to be:"

"a. Petitions invoking the Supreme Court's discretionary jurisdiction should be kept shorter and more precisely directed to the question why the case warrants Supreme Court review, to conserve the court's time."

"b. Issues should be identified in the petition; all subsequent proceedings will normally be limited to the issues identified by the petitioner."

"c. The parties should be expected to file new briefs in the Supreme Court if review is granted, because: (1) new briefs on the merits will help make it feasible to keep petitions short and focused on the reasons why review is appropriate; (2) counsel are likely to want to reorganize their arguments in light of the limited issues before the Supreme Court; and (3) both the parties and the court will be helped if the briefs address the issues in terms of the Court of Appeal decision."

The Rules were adopted, effective May 6, 1985. (See *infra*, §915 et seq.) Explanatory comments by the Advisory

Committee deal with all material changes, and these were approved by the Judicial Council for publication with the Rules. (For general comments and detailed coverage of procedure under the Rules, see C.E.B., 2 Civil Appellate Practice 3d, Chap. 22.)

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B. Grounds for Review.

1. Uniformity of Decision and Important Question.

9 Witkin Cal. Proc. Appeal § 915

[§ 915] Uniformity of Decision and Important Question.

The first and basic ground of review is: "When necessary to secure uniformity of decision or to settle an important question of law." (C.R.C., Rule 8.500(b)(1).)

In the early leading case of *People v. Davis* (1905) 147 C. 346, 81 P. 718, the court made it clear that there was no right to appeal to the Supreme Court on the merits of the decision alone, but there was instead a discretionary "hearing" (now "review") for the general purpose of supervising the declaration of legal principles by the intermediate appellate courts. (See 72 Cal. L. Rev. 720; 17 So. Cal. L. Rev. 262; 3 Stanf. L. Rev. 244; 4 Stanf. L. Rev. 392.)

The language of this celebrated case is noteworthy. The object of the former constitutional provision under discussion was "to enable this court, in its discretion, to supervise and control the opinions of the several district courts of appeal, each of which is acting concurrently and independently of the others, and by such supervision to endeavor to secure harmony and uniformity in the decisions, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the state, a correct and uniform construction of the constitution, statutes, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed question of law." (147 C. 348.)

In *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, 11 Summary (10th), *Community Property*, §275, the court said: "During the past 15 years there has been substantial increase in the number of couples living together without marrying. Such nonmarital relationships lead to legal controversy when one partner dies or the couple separates. Courts of Appeal, faced with the task of determining property rights in such cases, have arrived at conflicting positions. ... We take this opportunity to resolve that controversy and to declare the principles that should govern distribution of property acquired in a nonmarital relationship." (18 C.3d 665.)

West's Key Number Digest, Appeal and Error 18, 33, 35, 42

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B. Grounds for Review.

2. Appellate Court Without Jurisdiction.

9 Witkin Cal. Proc. Appeal § 916

[§ 916] Appellate Court Without Jurisdiction.

Irrespective of the legal question involved or the correctness of the decision, a review will be granted "[w]hen the Court of Appeal lacked jurisdiction." (C.R.C., Rule 8.500(b)(2).)

The reason for this provision has ceased to exist, and it has little significance today. Formerly, the constitutional distribution of appellate jurisdiction based on the nature of the action or proceeding (e.g., equity or legality of tax) could result in the mistaken filing of an appeal in the Court of Appeal instead of in the Supreme Court. The clerk usually caught the mistake in time to make the transfer without decision. If he or she did not, the decision by the wrong reviewing court was void for lack of appellate jurisdiction; but, on petition, the Supreme Court could grant a hearing and salvage the case in one of two ways: (a) retransfer it to the Court of Appeal, which would then have appellate jurisdiction by the transfer, and could decide the case by refiling its original opinion; (b) retain the case and set it on the calendar for a new hearing and new decision, or adopt the Court of Appeal opinion as the opinion of the Supreme Court. (See *Franks v. Cesena* (1923) 192 C. 1, 2, 218 P. 437 [rendition of new opinion]; *Burns v. Peters* (1936) 5 C.2d 619, 620, 55 P.2d 1182 [adoption of Court of Appeal opinion]; 17 So. Cal. L. Rev. 262.)

Today, only criminal appeals involving the death penalty are directly appealable to the Supreme Court (see 2 *Cal. Proc.* (5th), *Courts*, §329), and it is difficult to conceive of a situation in which the rule would now apply.

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B. Grounds for Review.

3. No Qualified Majority.

9 *Witkin Cal. Proc. Appeal* § 917

[§ 917] No Qualified Majority.

A review may be granted "[w]hen the Court of Appeal decision lacked the concurrence of sufficient qualified justices." (C.R.C., Rule 8.500(b)(3).)

Obviously, such a purported decision is void and the Supreme Court may take the cause over. Once it is transferred, the Supreme Court may decide it in any manner it wishes, and if it finds the opinion satisfactory, may adopt it as its own opinion. (See *Knouse v. Nimocks* (1937) 8 C.2d 482, 66 P.2d 438; *Scott v. Kenyon* (1940) 16 C.2d 197, 105 P.2d 291.)

However, an opinion does not lack "concurrence of sufficient qualified justices," where the first justice authors the opinion announcing the court's judgment, the second justice "concurs in the result" without opinion, and the third justice writes a dissenting opinion. In that case, two justices (a majority) concur in the judgment. (See *Amwest Surety Ins. Co. v. Wilson* (1995) 11 C.4th 1243, 48 C.R.2d 12, 906 P.2d 1112, *supra*, §779.)

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B. Grounds for Review.

4. Transfer to Court of Appeal for Further Proceedings.

9 Witkin Cal. Proc. Appeal § 918

[§ 918] Transfer to Court of Appeal for Further Proceedings.

The Supreme Court may order review of a Court of Appeal decision "[f]or the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order." (C.R.C., Rule 8.500(b)(4).)

This provision recognizes the Supreme Court's long-standing practice of ordering review not to decide the case itself but for the purpose of transferring the case to the Court of Appeal with instructions to conduct certain further proceedings (e.g., to issue an alternative writ or order to show cause returnable before the Court of Appeal or the superior court).

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B. Grounds for Review.

5. Other Grounds Formerly Recognized.

9 Witkin Cal. Proc. Appeal § 919

[§ 919] Other Grounds Formerly Recognized.

In several unusual cases arising under the former authorization of hearing in the Supreme Court (see *supra*, §913), the court granted hearings on grounds not listed in C.R.C., Rule 8.500(b):

(1) Where the Court of Appeal failed to file a written opinion as required by the Constitution (*supra*, §779). (See *Oliver v. Superior Court* (1924) 193 C. 61, 62, 223 P. 558 [petition granted and case ordered retransferred to Court of Appeal, apparently for purpose of having that court write opinion].)

(2) Where the Supreme Court agreed with the result, but disagreed with statements in the Court of Appeal opinion. "This cause was taken over ... not because of any dissatisfaction with the conclusion there announced, but for the sole purpose of deleting certain language from the opinion. Upon further examination of the record, we adopt the opinion ... with such omissions and additions as hereinafter appear, as and for the decision of this court." (*Commercial Discount Co. v. Cowen* (1941) 18 C.2d 610, 612, 116 P.2d 599.)

(3) Where two Court of Appeal decisions reached inconsistent conclusions in cases involving the same controversy. (See *Southern Pac. Co. v. Los Angeles* (1936) 5 C.2d 545, 55 P.2d 847, *supra*, §388.)

Under the broader and more flexible review procedure, these and other peculiar problems can be readily solved without taking over the cause.

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C. Examination of Record.

1. General Rule: No Examination.

9 Witkin Cal. Proc. Appeal § 920

[§ 920] General Rule: No Examination.

In *People v. Davis* (1905) 147 C. 346, 81 P. 718, the Court of Appeal decided that the record showed that certain evidence had been first introduced by the defendant, thus rendering him unable to complain of it. The petition for hearing attacked this determination of fact as erroneous. The Supreme Court undertook to define the theory and scope of its revisory power, stating the question as follows: "Shall this court devote itself to the correction of alleged errors of fact by the district courts of appeal which are important only to the decision of the particular case in which they are made and to the rights of the particular parties there concerned?" The answer was no, for two reasons:

(a) The constitutional provision for hearing (now review) did not give a right of appeal, but conferred a discretionary power on the Supreme Court to supervise the Courts of Appeal for the general purpose of securing uniformity of decision. (See *supra*, §915.) If the Supreme Court were to inquire into the facts of each case, to ascertain whether they were accurately stated and considered, the object of relieving the court of its excessive burdens by the distribution of cases among the Courts of Appeal would be largely defeated. Hence, the exercise of the power should be strictly limited. (147 C. 349.)

(b) The Courts of Appeal "must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments." (147 C. 349.)

The rule of *Davis* was reaffirmed in later decisions. (See, e.g., *People v. Groves* (1935) 9 C.A.2d 317, 321, 49 P.2d 888, 50 P.2d 813.) It is also incorporated in C.R.C., Rule 8.500(c)(2). (See 17 So. Cal. L. Rev. 263; *infra*, §921.)

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C. Examination of Record.
2. When Record Will Be Reexamined.

9 *Witkin Cal. Proc. Appeal* § 921

[§ 921] When Record Will Be Reexamined.

(1) *Former Case Law Exceptions.* Two exceptions to the theory of *People v. Davis* (1905) 147 C. 346, 81 P. 718, supra, §920, were formerly recognized by decisions:

(a) Where the case was within the appellate jurisdiction of the Supreme Court and came to the Court of Appeal by transfer. (*Burke v. Maze* (1909) 10 C.A. 206, 211, 101 P. 438.)

(b) Where the case was an original proceeding, e.g., an application for certiorari, prohibition, or mandamus. (*Rockridge Place Co. v. City Council of Oakland* (1918) 178 C. 58, 60, 172 P. 1110.)

These exceptions were reexamined when the new rules were adopted, and were rejected as unsound in principle and discriminatory in operation. (See 17 *So. Cal. L. Rev.* 263.)

(2) *Former Rule Exceptions.* After the case-developed exceptions were abrogated, it was, nevertheless, believed that the rule of *People v. Davis* was too broad in rendering Court of Appeal opinions relatively immune from challenge on the facts. As the draftsman of the Judicial Council rules observed: "It is possible for any appellate court to fall into error in its attempt to summarize the ultimate facts appearing from the record, and its judgment as to what facts are material and should be recited is sometimes fallible. Similarly, the court occasionally rests its decision on one or more issues, and omits any discussion of others. Moreover, the materiality of facts is sometimes dependent upon what issues are deemed controlling, and thus the court may leave out of the opinion facts which relate to excluded issues. In all of these situations the right to petition for a hearing may be an empty one if the petitioner is precluded from calling attention to the true state of the record." (17 *So. Cal. L. Rev.* 264.)

The solution was the statement in former C.R.C., Rule 29(b) of two new exceptions. As originally stated they were:

(a) "That material facts were omitted from or incorrectly stated in the opinion of the District Court of Appeal and that the alleged omission or other inaccuracy was set forth in a petition for rehearing and not corrected by the District Court of Appeal."

(b) "That substantial legal issues raised in the briefs were not considered in the opinion, and that the failure to

consider them was set forth in a petition for rehearing."

These exceptions preserved the benefits of the *Davis* rule without its injustices, and gave the losing party freedom to expose error not apparent on the face of the Court of Appeal opinion. (See 17 *So. Cal. L. Rev.* 264.)

The original version of former C.R.C., Rule 29(b) called for examination of the record when "material facts were omitted" from the Court of Appeal opinion. When the policy of dealing with obviously nonmeritorious appeals by memorandum opinions was instituted (see *supra*, §790), this language was thought to be inappropriate, because material facts are always omitted from a memorandum decision. Accordingly, former C.R.C., Rule 29(b) was rewritten in 1970 to provide that the court would not examine the record unless the petition shows that "substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal."

The prerequisite of a prior petition for rehearing in the Court of Appeal has been criticized as a burdensome and futile step. But it was thought both expedient and fair to allow that court an opportunity to correct its own omissions or misstatements before asking the Supreme Court to examine the record. (See 17 *So. Cal. L. Rev.* 264.) And, where the appeal was decided by a memorandum opinion, the requirement gives the Supreme Court assurance that the issues raised in the petition for review were presented to the Court of Appeal.

(3) *Current Limitations.* C.R.C., Rule 8.500(c) now reads as follows:

(a) "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (C.R.C., Rule 8.500(c)(1).)

(b) "A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." (C.R.C., Rule 8.500(c)(2).)

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D. Transfer of Cause Before Decision.

1. Power of Supreme Court.

a. Nature and Grounds.

9 Witkin Cal. Proc. Appeal § 922

[§ 922] Nature and Grounds.

(1) *Scope of Authority.* C.R.C., Rule 8.552 implements a power established by Cal. Const., Art. VI, §12. (See C.R.C., Rule 10.1000(a)(1); supra, §913.) "On a party's petition or its own motion, the Supreme Court may transfer to itself, for decision, a cause pending in a Court of Appeal." (C.R.C., Rule 8.552(a).) C.R.C., Rule 8.552 applies only to causes that the Supreme Court transfers to itself for the purpose of reaching a decision on the merits. "Cause" is broadly construed to include all cases, matters, and proceedings of every description adjudicated by the Courts of Appeal and the Supreme Court. (Advisory Committee Comment to C.R.C., Rule 8.552; see *In re Rose (2000) 22 C.4th 430, 540, 93 C.R.2d 298, 993 P.2d 956*; on Internal Operating Practices and Procedures of Supreme Court regarding transfer of cases, see IOP II.)

(2) *When Cause Is Pending in Court of Appeal.* For purposes of C.R.C., Rule 8.552, a cause within the appellate jurisdiction of the superior court is not pending in the Court of Appeal until that court orders it transferred under C.R.C., Rule 8.1002, infra, §1025. Any cause pending in the Court of Appeal remains pending until the decision of the Court of Appeal is final in that court under C.R.C., Rule 8.264 (supra, §832 et seq.). (C.R.C., Rule 8.552(b).)

(3) *Grounds for Transfer.* "The Supreme Court will not order transfer under this rule unless the cause presents an issue of great public importance that the Supreme Court must promptly resolve." (C.R.C., Rule 8.552(c).)

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(2) *When Cause Is Pending in Court of Appeal.* C.R.C., Rule 8.552(b) was amended in 2008 to delete the reference to C.R.C., Rule 8.264.



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D. Transfer of Cause Before Decision.

1. Power of Supreme Court.
 - b. Procedure.

9 Witkin Cal. Proc. Appeal § 923

[§ 923] Procedure.

(1) *Petition.* A party seeking transfer must promptly serve and file in the Supreme Court a petition explaining how the cause satisfies the requirements of C.R.C., Rule 8.552(c) (*supra*, §922). (C.R.C., Rule 8.552(d); see Cal Civil Practice, 5 Procedure, §43:6.)

(2) *Answer.* An answer to the petition may be served and filed within 20 days after the petition is filed. (C.R.C., Rule 8.552(d).)

(3) *Form of Petition and Answer.* The petition and any answer must conform to the relevant provisions of C.R.C., Rule 8.504 (*infra*, §929). (C.R.C., Rule 8.552(d).)

(4) *Determination of Petition.* An order granting transfer must be signed by at least four justices; an order denying transfer may be signed by the Chief Justice alone. (C.R.C., Rule 8.552(e).)

(5) *Notice.* The clerk of the court to which the cause is transferred must "promptly" send each party a copy of the transfer order showing the new case number, if any. (C.R.C., Rule 10.1000(a)(2).)

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D. Transfer of Cause Before Decision.
2. Power of Court of Appeal.

9 Witkin Cal. Proc. Appeal § 924

[§ 924] Power of Court of Appeal.

A Court of Appeal administrative presiding justice may transfer causes between divisions of that court as follows:

(1) "If multiple appeals or writ petitions arise from the same trial court action or proceeding, the presiding justice may transfer the later appeals or petitions to the division assigned the first appeal or petition." (C.R.C., Rule 10.1000(b)(1)(A).)

(2) "If, because of recusals, a division does not have three justices qualified to decide a cause, the presiding justice may transfer it to a division randomly selected by the clerk." (C.R.C., Rule 10.1000(b)(1)(B).)

The clerk must "promptly" notify the parties of the division to which the cause is transferred. (C.R.C., Rule 10.1000(b)(2).)

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E. Procedure.

1. Review on Court's Own Motion.
 - a. Time and Extension.

9 Witkin Cal. Proc. Appeal § 925

[§ 925] Time and Extension.

(1) *Normal Time Within Which Court May Order Review.* If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court may order review of the Court of Appeal decision on its own motion. (C.R.C., Rule 8.512(c)(1); see C.R.C., Rule 8.68 [shorting of time].)

If a petition for review is filed, the court may deny the petition but nevertheless order review on its own motion within the periods prescribed in C.R.C., Rule 8.512(b)(1) (60 days after petition is filed, with extension not later than 90 days after petition is filed). (C.R.C., Rule 8.512(c)(2).)

The 60-day period within which the Supreme Court may grant review begins on the filing date of the last petition for review that is either timely filed or treated as timely in the sense that it is filed with permission of the Chief Justice on a showing of good cause for relief from default. (Advisory Committee Comment to C.R.C., Rule 8.512.)

(2) *Extension of Time.* "Before the 30-day period or any extension expires, the Supreme Court may order one or more extensions to a date not later than 90 days after the decision is final in the Court of Appeal." (C.R.C., Rule 8.512(c)(1).)

If the period ends on a day on which the clerk's office is closed, the Supreme Court may on its own motion order review of the Court of Appeal decision on the next day that the clerk's office is open. (C.R.C., Rule 8.512(c)(1).) (See C.R.C., Rule 8.60(b).)

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1. Review on Court's Own Motion.
 - b. Reasons for Granting Review.

9 *Witkin Cal. Proc. Appeal* § 926

[§ 926] Reasons for Granting Review.

The power to order review on the court's own motion is rarely exercised. Under the former hearing procedure, the power was chiefly invoked to allow consideration of an unauthorized or belated petition, or an issue of significant importance. (See, e.g., *Rockridge Place Co. v. City Council of Oakland* (1918) 178 C. 58, 60, 172 P. 1110 [petition was filed by one technically not a party, court observed that it had power on its own motion]; *Hygienic Health Food Co. v. Grant* (1922) 188 C. 131, 132, 204 P. 389 [hearing was granted even though petition was filed too late under rules]; *In re O'Connell* (1926) 199 C. 538, 540, 250 P. 390; *Ponce v. Marr* (1956) 47 C.2d 159, 160, 301 P.2d 837; *Skaff v. Small Claims Court* (1968) 68 C.2d 76, 77, 65 C.R. 65, 435 P.2d 825, 2 Cal. Proc. (5th), Courts, §311 ["we granted a hearing on our own motion ... to decide a novel and important question in the day-to-day operations of small claims courts"]; *Ferguson v. Keays* (1971) 4 C.3d 649, 652, 94 C.R. 398, 484 P.2d 70 [hearing granted because of conflicting Court of Appeal decisions on power to permit filing of transcript by indigent without fee]; *American Motorcycle Assn. v. Superior Court* (1978) 20 C.3d 578, 586, 146 C.R. 182, 578 P.2d 899 ["In view of the obvious statewide importance of the questions at issue, we ordered a hearing in this case on our own motion"]; *Arnel Dev. Co. v. Costa Mesa* (1980) 28 C.3d 511, 514, 525, 169 C.R. 904, 620 P.2d 565; 41 So. Cal. L. Rev. 749.)

In *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 C.3d 341, 256 C.R. 543, 769 P.2d 399, the issue was whether agricultural laborers working under a "sharefarmer" agreement were independent contractors exempt from workers' compensation coverage. The Supreme Court opinion states: "There was no petition for review of the Court of Appeal decision in this case. Because we considered the issue presented to be of substantial importance, we ordered review on our own motion." (48 C.3d 345, footnote 1.) Two justices, dissenting, felt that review was improvidently granted, pointing out that, at oral argument, the parties "rather frankly indicated their mutual recognition that the record in this case was entirely insufficient to furnish the basis for a decision of major significance." (48 C.3d 360.)

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2. Review on Petition of Party.

a. Petition.

9 Witkin Cal. Proc. Appeal § 927

[§ 927] Petition.

(1) *Service and Filing.* "A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order." (C.R.C., Rule 8.500(a)(1).) The petition must be served and filed within 10 days after the Court of Appeal decision is final in that court. The date of finality is not extended "if it falls on a day on which the clerk's office is closed." (C.R.C., Rule 8.500(e)(1).) (See C.E.B., 2 Civil Appellate Practice 3d, §§22.14, 22.18 et seq.; Rutter Group, 2 Civil Appeals and Writs §§13:20 et seq., 13:35 et seq.; Cal. Civil Practice, 5 Procedure §§43:27, 43:30 et seq.; for discussion of factors in determining whether to petition, see C.E.B., 2 Civil Appellate Practice 3d, §22.3 et seq.)

The petition "must also be served on the superior court clerk and the Court of Appeal clerk." (C.R.C., Rule 8.500(f)(1).)

(2) *Effect of Premature Service.* If a petition is presented for filing before the Court of Appeal decision is final in that court, "the Supreme Court clerk must accept it and file it on the day after finality." (C.R.C., Rule 8.500(e)(3).)

(3) *Interlocutory Orders.* Interlocutory orders that may be the subject of a petition for review are not final on filing. This fact is confirmed by current practice in which parties may be allowed to apply for, and the Courts of Appeal may grant, reconsideration of interlocutory orders; reconsideration, of course, would be impermissible if the orders were in fact final on filing. (Advisory Committee Comment to C.R.C., Rule 8.500.) (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §221.)

(4) *Defective Proof of Service.* "The Supreme Court clerk must file the petition even if its proof of service is defective, but if the petitioner fails to file a corrected proof of service within 5 days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction." (C.R.C., Rule 8.500(f)(3).)

(5) *Exception to Right To Petition.* A party may not file a petition for review of the "denial of a transfer of a case within the appellate jurisdiction of the superior court." (C.R.C., Rule 8.500(a)(1).)

(6) *No Extension of Time To Petition.* "The time to file a petition for review may not be extended, but the Chief Justice may relieve a party from a failure to file a timely petition for review if the time for the court to order review on its own motion has not expired." (C.R.C., Rule 8.500(e)(2).)

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b. Answer and Reply.

9 Witkin Cal. Proc. Appeal § 928

[§ 928] Answer and Reply.

(1) *Answer*. A party may file an answer responding to the issues raised in the petition and, in the answer, may ask the court to address additional issues if it grants review. (C.R.C., Rule 8.500(a)(2).) The answer must be served and filed within 20 days after the petition is filed. (C.R.C., Rule 8.500(e)(4).) (See C.E.B., 2 Civil Appellate Practice 3d, §22.40 et seq.; Rutter Group, 2 Civil Appeals and Writs §13:85 et seq.)

(2) *Reply*. If the petitioner replies to the answer, the reply must be served and filed within 10 days after the answer is filed. (C.R.C., Rule 8.500(e)(5).) (See C.E.B., 2 Civil Appellate Practice 3d, §§22.45, 22.46.)

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2. Review on Petition of Party.
- c. Form and Length Limitations.

9 *Witkin Cal. Proc. Appeal* § 929

[§ 929] Form and Length Limitations.

(1) *In General.* Except as provided in C.R.C., Rule 8.504, the petition for review, the answer, and the reply must comply with C.R.C., Rule 8.204, governing the form and content of briefs (see *supra*, §692 et seq.). (C.R.C., Rule 8.504(a).) (See C.E.B., 2 Civil Appellate Practice 3d, §§22.28 et seq., 22.41, 22.56; Rutter Group, 2 Civil Appeals and Writs §13:85 et seq.)

"If the petition seeks review of a Court of Appeal opinion, a copy of the opinion showing its filing date and a copy of any order modifying the opinion or directing its publication must be bound at the back of the original petition and each copy filed in the Supreme Court." (C.R.C., Rule 8.504(b)(4).)

"If a petition for rehearing could have been filed in the Court of Appeal, the petition for review must state whether it was filed and, if so, how the court ruled." (C.R.C., Rule 8.504(b)(3).)

(2) *Length Limitations.* "If produced on a computer, a petition or answer must not exceed 8,400 words, including footnotes, and a reply must not exceed 4,200 words, including footnotes. Each petition, answer, or reply must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document." (C.R.C., Rule 8.504(d)(1).) "If typewritten, a petition or answer must not exceed 30 pages and a reply must not exceed 15 pages." (C.R.C., Rule 8.504(d)(2).) The tables, the Court of Appeal opinion, a certificate stating the number of words, and any attachment are excluded from the limits. (C.R.C., Rule 8.504(d)(3).) "On application and for good cause, the Chief Justice may permit a longer petition, answer, reply, or attachment." (C.R.C., Rule 8.504(d)(4).)

(3) *Court of Appeal Opinion.* "The title of the case and designation of the parties on the cover of the petition must be identical to the title and designation in the Court of Appeal opinion or order that is the subject of the petition." (C.R.C., Rule 8.504(b)(5).)

(4) *Incorporation by Reference.* "No incorporation by reference is permitted except a reference to a petition, an answer, or a reply filed by another party in the same case or filed in a case that raises the same or similar issues and in

which a petition for review is pending or has been granted." (C.R.C., Rule 8.504(e)(3).)

(5) *Annexed Material*. Attachments are not permitted except (a) an opinion or order from which the party seeks relief (C.R.C., Rule 8.504(e)(1)(A)); (b) exhibits or orders of a trial court or Court of Appeal that the party considers unusually significant (C.R.C., Rule 8.504(e)(1)(B)); (c) copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible (C.R.C., Rule 8.504(e)(1)(C)); and (d) an opinion required to be attached under C.R.C., Rule 8.1115(c) (C.R.C., Rule 8.504(e)(1)(D); see supra, §§824, 825). The attachments, except those under C.R.C., Rule 8.504(e)(1)(D), must not exceed a combined total of 10 pages. (C.R.C., Rule 8.504(e)(2).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

(*New*) *Court of Appeal order*: If the petition seeks review of a Court of Appeal order, a copy of the order showing the date it was entered must be bound at the back of the original petition and each copy filed in the Supreme Court. (C.R.C., Rule 8.504(b)(5), added in 2008.) (3) *Court of Appeal Opinion*. C.R.C., Rule 8.504(b)(5) was renumbered C.R.C., Rule 8.504(b)(6) in 2008.

(5) *Annexed Material*. C.R.C., Rule 8.504(e)(1)(A) was amended in 2008 to provide that attachments are not permitted except an order or opinion "required to be attached under C.R.C., Rule 8.504(b)(4) or (b)(5)."



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2. Review on Petition of Party.

d. Statement of Issues.

9 *Witkin Cal. Proc. Appeal* § 930

[§ 930] Statement of Issues.

(1) *Statement in Petition.* "The body of the petition must begin with a concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail." (C.R.C., Rule 8.504(b)(1).) (See C.E.B., 2 Civil Appellate Practice 3d, §22.35; Rutter Group, 2 Civil Appeals and Writs §13:55 et seq.) The petition must also explain how the case presents a ground for review under C.R.C., Rule 8.500(b) (see *supra*, §915 et seq.). (C.R.C., Rule 8.504(b)(2).)

(2) *Answer Requesting Consideration of Additional Issues.* "An answer that raises additional issues for review must contain a concise, nonargumentative statement of those issues, framing them in terms of the facts of the case but without unnecessary detail." (C.R.C., Rule 8.504(c).) (See C.E.B., 2 Civil Appellate Practice 3d, §22.43.)

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9 Witkin Cal. Proc. Appeal § 931

[§ 931] Transmission of Record.

"On receiving a copy of a petition for review or on request of the Supreme Court, whichever is earlier, the Court of Appeal clerk must promptly send the record to the Supreme Court. If the petition is denied, the Supreme Court clerk must promptly return the record to the Court of Appeal." (C.R.C., Rule 8.512(a).)

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3. Determination of Petition.

a. Court Conference and Orders.

9 *Witkin Cal. Proc. Appeal* § 932

[§ 932] Court Conference and Orders.

(1) *Court Conference*. The established practice of consideration of petitions for hearing in Supreme Court conferences without appearance by counsel has not been changed by the review procedure. The conference was described in *Cothran v. San Jose Water Works* (1962) 58 C.2d 608, 25 C.R. 569, 375 P.2d 449, as follows: "It is the uniform and long-established practice of this court to meet in conference at least once each week to discuss and consider whether to grant or deny petitions for hearing after decision in the District Courts of Appeal, petitions for rehearing, and petitions in original proceedings." (58 C.2d 610.) (See 62 Cal. L. Rev. 309 [internal workings and current concerns of court]; 72 Cal. L. Rev. 514, 517 [description by associate justice of conference memorandum, A-List of significant matters, procedure in conference]; C.E.B., 2 Civil Appellate Practice 3d, §22.4 [likelihood of grant]; Rutter Group, 2 Civil Appeals and Writs §13:196; on Internal Operating Practices and Procedures of Supreme Court regarding conferences and conference memoranda, see IOP III, IV.)

(2) *Order Granting Review Must Be Signed by Four Justices*. Supreme Court review of a decision of a Court of Appeal is granted by an order signed by at least four justices. (C.R.C., Rule 8.512(d)(1).) (See 63 Cal. L. Rev. 2 [The Rule of Four in California].)

Cothran dealt with two unusual aspects of signatures:

(a) *Advance or belated signature*. "[I]f one of the justices for any reason cannot attend a particular conference, such justice not infrequently affixes his signature to orders granting such petitions as he may determine should be granted, either in advance of or following the conference which he is unable to attend." (58 C.2d 610.) If the absent justice signs while in the state, and is still here at the time the other justices sign, the order is unquestionably valid. (58 C.2d 612.)

(b) *Advance signature by judge who leaves state*. The problem in *Cothran* was that Judge S signed, left the state, and remained outside when the three other justices signed. In *People v. Ruef* (1910) 14 C.A. 576, 114 P. 48, an order signed under these circumstances was held void on the theory that the signing by the four justices was a single judicial act and that the signing by the absent justice, though done while he was within the state, did not continue while he was beyond the state boundaries, and thus could not be counted with the other signings to make the required four. (14 C.A.

621.) In the present case, the court thought this theory artificial and unrealistic, and overruled *People v. Ruef* on the point. The only requisite, the court held, is that the justice be in the state when he or she signs. "The individual justice's judicial action is the signing of the order and when he takes that action if he is within the limits of the state he has the power to perform that judicial act." (58 C.2d 612.)

(3) *Grant and Hold*. "On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court." (C.R.C., Rule 8.512(d)(2).) (See 72 Cal. L. Rev. 518 [describing practice].)

(4) *Order Denying Review Must Be Signed by Chief Justice*. "[A]n order denying review may be signed by the Chief Justice alone." (C.R.C., Rule 8.512(d)(1).) If no order is made within the time specified in C.R.C., Rule 8.512(b)(1), the petition is deemed denied. (C.R.C., Rule 8.512(b)(2).)

(5) *Effect of Denial*. The order of denial is not an expression of the Supreme Court on the correctness of the Court of Appeal opinion. (See *supra*, §502.)

(6) *Dissenting Opinion*. Occasionally, under the former hearing procedure, a justice who voted for a hearing filed an opinion dissenting from the denial. (See *Estate of Campbell* (1910) 12 C.A. 707, 724, 108 P. 669, 676; *Cavanagh v. Shaver* (1922) 56 C.A. 758, 765, 207 P. 275; *Mathews v. Albany* (1939) 36 C.A.2d 147, 149, 97 P.2d 266, 98 P.2d 1025; *People v. Rochin* (1950) 101 C.A.2d 140, 143, 225 P.2d 1; *Ortzman v. Van Der Waal* (1952) 114 C.A.2d 167, 173, 249 P.2d 846; *Keiper v. Northwestern Pac. R. Co.* (1955) 134 C.A.2d 702, 712, 286 P.2d 47, 288 P.2d 262; *Estate of Bould* (1955) 135 C.A.2d 260, 277, 287 P.2d 8, 289 P.2d 15; *Estate of Keeney* (1956) 140 C.A.2d 688, 694, 295 P.2d 479, 297 P.2d 636; *Estate of Bullock* (1956) 140 C.A.2d 944, 950, 295 P.2d 954, 297 P.2d 633; *People v. Schiers* (1958) 160 C.A.2d 364, 379, 324 P.2d 981, 329 P.2d 1.)

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3. Determination of Petition.

b. Time and Extension.

9 *Witkin Cal. Proc. Appeal* § 933

[§ 933] Time and Extension.

(1) *Time Within Which Supreme Court Must Act.* Within 60 days after filing of the last petition for review, the Supreme Court may order review of a Court of Appeal decision. (C.R.C., Rule 8.512(b)(1).) Thus, the time within which the Supreme Court has jurisdiction to order review is measured from the date of filing of the petition for review, and not from the date of finality of the Court of Appeal decision. (See C.E.B., 2 Civil Appellate Practice 3d, §22.47; Rutter Group, 2 Civil Appeals and Writs §13:111 et seq.)

(2) *Extension of Time.* "Before the 60-day period or any extension expires, the court may order one or more extensions to a date not later than 90 days after the last petition is filed." (C.R.C., Rule 8.512(b)(1).)

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4. Issues on Review.

9 Witkin Cal. Proc. Appeal § 934

[§ 934] Issues on Review.

(1) *Authority.* Cal. Const. Art. VI, §12, directs the Judicial Council to provide rules "for review of all or part of a decision" (see *supra*, §913), and C.R.C., Rule 8.516 carries out that directive. The Supreme Court may decide the following:

(a) Any issues that are raised or fairly included in the petition or answer. (C.R.C., Rule 8.516(b)(1).)

(b) An issue that is neither raised nor fairly included in the petition or answer if the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it. (C.R.C., Rule 8.516(b)(2).)

The court is not required to decide every issue that the parties raise or that the court specifies. (C.R.C., Rule 8.516(b)(3); see *Preston v. Goldman* (1986) 42 C.3d 108, 127, 227 C.R. 817, 720 P.2d 476, *infra*, §942; *People v. Alfaro* (1986) 42 C.3d 627, 629, 630, 230 C.R. 129, 724 P.2d 1154, *infra*, §942.)

(2) *Specification of Issues.* On or after ordering review, the Supreme Court may specify the issues to be briefed and argued, and, generally, the parties must limit their briefs and arguments to those issues and any issues fairly included in them. (C.R.C., Rule 8.516(a)(1).)

(3) *Effect of Specification of Issues.* Notwithstanding an order specifying issues, "the court may, on reasonable notice, order oral argument on fewer or additional issues or on the entire cause." (C.R.C., Rule 8.516(a)(2).) (See C.E.B., 2 Civil Appellate Practice 3d, §22.49; Rutter Group, 2 Civil Appeals and Writs §13:121 *et seq.*)

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5. Oral Argument.

9 *Witkin Cal. Proc. Appeal* § 935

[§ 935] Oral Argument.

(1) *In General.* Oral argument in the Supreme Court is governed by C.R.C., Rule 8.524, unless the court provides otherwise by order or in its Internal Operating Practices and Procedures. (C.R.C., Rule 8.524(a); see C.E.B., 2 Civil Appellate Practice 3d, §22.61; Rutter Group, 2 Civil Appeals and Writs §13:170 et seq.; on Internal Operating Practices and Procedures of Supreme Court, see 2 *Cal. Proc.* (5th), *Courts*, §328.)

(2) *Order.* The petitioner has the right to open and close. If there are two or more petitioners, or none, the court must set the sequence of argument. (C.R.C., Rule 8.524(d).) When the court grants review on its own motion or transfers a cause to itself on its own motion, the number of petitioners is "none." (Advisory Committee Comment to C.R.C., Rule 8.524.)

(3) *Time of Argument.* Each side is allotted 30 minutes for argument. (C.R.C., Rule 8.524(e).)

(4) *Place of Argument.* The Supreme Court holds regular sessions in San Francisco, Los Angeles, and Sacramento on a schedule fixed by the court. Special sessions may be held elsewhere. (C.R.C., Rule 8.524(b).)

(5) *Notice of Argument.* At least 20 days before the argument date, the Supreme Court clerk must send notice of the time and place of oral argument to all parties. For good cause, the Chief Justice may shorten the notice period, in which event the clerk must "immediately" notify the parties by telephone or other expeditious method. (C.R.C., Rule 8.524(c).)

(6) *Number of Counsel.* Only one counsel on each side may argue (regardless of the number of parties on the side), unless the court orders otherwise on request. Requests to divide oral argument among multiple counsel must be filed within 10 days after the date of the order setting the case for argument. Multiple counsel must not divide their argument into segments of less than 10 minutes per person, except that one counsel for the opening side (or more, if authorized by the Chief Justice on request) may reserve any portion of that counsel's time for rebuttal. (C.R.C., Rule 8.524(f).)

(7) *Argument by Amicus Curiae.* An amicus curiae is not entitled to argument time but may ask a party for permission to use a portion or all of the party's time, subject to the 10-minute minimum prescribed in C.R.C., Rule 8.524(f). If permission is granted, counsel must file a request under that provision. (C.R.C., Rule 8.524(g).)

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E. Procedure.

6. Brief on Merits.

a. In General.

9 Witkin Cal. Proc. Appeal § 936

[§ 936] In General.

(1) *As Matter of Right*. "The court may designate which party is deemed the petitioner or otherwise direct the sequence in which the parties must file their briefs." (C.R.C., Rule 8.520(a)(6).) (See C.E.B., 2 Civil Appellate Practice 3d, §22.55 et seq.; Rutter Group, 2 Civil Appeals and Writs §13:130 et seq.)

(2) *Petitioner's Brief*. "Within 30 days after the Supreme Court files the order of review, the petitioner must serve and file in that court either an opening brief on the merits or the brief it filed in the Court of Appeal." (C.R.C., Rule 8.520(a)(1).)

(3) *Opposing Party's Brief*. "Within 30 days after the petitioner files its brief or the time to do so expires, the opposing party must serve and file either an answer brief on the merits or the brief it filed in the Court of Appeal." (C.R.C., Rule 8.520(a)(2).)

(4) *Petitioner's Reply Brief*. "The petitioner may file a reply brief on the merits or the reply brief it filed in the Court of Appeal. A reply brief must be served and filed within 20 days after the opposing party files its brief." (C.R.C., Rule 8.520(a)(3).)

(5) *Intent To Rely on Court of Appeal Brief*. "A party filing a brief it filed in the Court of Appeal must attach to the cover a notice of its intent to rely on the brief in the Supreme Court." (C.R.C., Rule 8.520(a)(4); see Cal. Civil Practice, 5 Procedure §43:33 [notice of intent to rely on Court of Appeal brief].)

(6) *Supplemental Brief*. "A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." (C.R.C., Rule 8.520(d)(1).) "A supplemental brief must not exceed 2,800 words, including footnotes, if produced on a computer or 10 pages if typewritten, and must be served and filed no later than 10 days before oral argument." (C.R.C., Rule 8.520(d)(2).)

(7) *Extension of Time*. "The time to serve and file a brief may not be extended by stipulation but only by order of the Chief Justice" under C.R.C., Rule 8.60 (see supra, §632). (C.R.C., Rule 8.520(a)(5).)

(8) *Additional Briefs on Request of Court.* "The court may request additional briefs on any or all issues, whether or not the parties have filed briefs on the merits." (C.R.C., Rule 8.520(e).) (On amici curiae briefs in the Supreme Court on the merits of the action, see *supra*, §726 and *infra*, §938.)

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6. Brief on Merits.

b. Form and Content.

9 *Witkin Cal. Proc. Appeal* § 937

[§ 937] Form and Content.

(1) *In General.* Briefs must comply with C.R.C., Rule 8.204 (see *supra*, §692 et seq.). (C.R.C., Rule 8.520(b)(1).)

(2) *Length.* "If produced on a computer, a brief on the merits must not exceed 14,000 words, including footnotes, and a reply brief on the merits must not exceed 4,200 words, including footnotes. Each brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief." (C.R.C., Rule 8.520(c)(1).) "If typewritten, a brief on the merits must not exceed 50 pages and a reply brief must not exceed 15 pages." (C.R.C., Rule 8.520(c)(2).)

The tables, a certificate of the word count, any attachment, and any quotation of issues required are excluded from the page limits. (C.R.C., Rule 8.520(c)(3).)

Attachments (relevant local, state, or federal rules and regulations, out-of-state statutes) must not exceed a combined total of 10 pages. (C.R.C., Rule 8.520(h).)

On application and for good cause, the Chief Justice may permit a longer brief. (C.R.C., Rule 8.520(c)(4).)

(3) *Contents.* The body of the petitioner's brief on the merits must begin by quoting "[a]ny order specifying the issues to be briefed" or, if none, "[t]he statement of issues in the petition for review and, if any, in the answer." (C.R.C., Rule 8.520(b)(2).) Unless the court orders otherwise, briefs on the merits must be limited to these issues and any issues fairly included in them. (C.R.C., Rule 8.520(b)(3).)

West's Key Number Digest, Appeal and Error 756 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Length.* C.R.C., Rule 8.520(c)(1) was amended in 2008 to make the 14,000-word limitation for briefs produced on a computer applicable to an "opening or answering" brief, and to increase the word limitation for reply briefs to 8400 words. C.R.C., Rule 8.520(c)(2) was amended in 2008 to make the 50-page limitation for typewritten briefs applicable

to an "opening or answering" brief, and to increase the page limitation for reply briefs "on the merits" to 30 pages.



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6. Brief on Merits.

c. Amicus Briefs on Merits.

9 Witkin Cal. Proc. Appeal § 938

[§ 938] Amicus Briefs on Merits.

After the court orders review, any person or entity may serve and file an application for permission of the Chief Justice to file an amicus curiae brief. (C.R.C., Rule 8.520(f)(1).) The application must be filed no later than 30 days after all briefs that the parties may file other than supplemental briefs have been filed or are required to be filed. However, for good cause, the Chief Justice may allow later filing. (C.R.C., Rule 8.520(f)(2).) The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter. (C.R.C., Rule 8.520(f)(3).)

The proposed brief must be served. It must accompany the application and may be combined with it. (C.R.C., Rule 8.520(f)(4).) The covers of the application and proposed brief must identify the party that the applicant supports, if any. (C.R.C., Rule 8.520(f)(5).)

If the court grants the application, any party may file an answer within 20 days after the amicus curiae brief is filed. The answer must be served on all parties and the amicus curiae. (C.R.C., Rule 8.520(f)(6).)

The Attorney General may file an amicus curiae brief without the Chief Justice's permission, unless the brief is submitted on behalf of another state officer or agency. The Attorney General must serve and file the brief within the time generally required for filing an application for permission to file an amicus curiae brief, must provide the information required in that application, and must comply with the general requirements for covers. An answer must comply with the general requirements for answers to amicus curiae briefs. (C.R.C., Rule 8.520(f)(7); see C.E.B., 2 Civil Appellate Practice 3d, §14.59; Rutter Group, 2 Civil Appeals and Writs §9:204 et seq.; 17 *So. Cal. L. Rev.* 140; 4 *Am.Jur.2d* (2007 ed.), *Amicus Curiae* §8; 1C *Am.Jur.* P.P. Forms (2003 ed.), *Amicus Curiae*, §3 et seq.; 2 *Am.Jur.* P.P. Forms (2000 ed.), *Appeal and Error*, §§709, 710, 715; cf. C.R.C., Rule 8.706(b) [filing on permission of presiding judge]; on similar requirements for Attorney General's amicus curiae briefs in writ proceedings in reviewing courts (8 *Cal. Proc.* (5th), *Extraordinary Writs*, §162 et seq.), see C.R.C., Rule 8.490(j).)

SUPPLEMENT: [This section is current through the latest supplement]

In 2008, C.R.C., Rule 8.520(f)(4), (f)(5), (f)(6), and (f)(7), were renumbered C.R.C., Rule 8.520(f)(5), (f)(6), (f)(7), and

(f)(8), respectively.

An application to file an amicus brief must also identify any party or counsel who authored the proposed brief in whole or in part or made a monetary contribution to its preparation or submission and every person or entity (other than the amicus curiae, its members, or its counsel in the pending appeal) who made a monetary contribution. (C.R.C., Rule 8.520(f)(4), added in 2008.) *Attorney General*: C.R.C., Rule 8.706(b) was repealed in 2008. Amicus briefs by the Attorney General in the appellate division are now covered in C.R.C., Rule 8.882(d)(5).



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7. Letter in Lieu of Brief.

9 *Witkin Cal. Proc. Appeal* § 939

[§ 939] Letter in Lieu of Brief.

"Any person or entity wanting to support or oppose a petition for review or for an original writ must serve on all parties and send to the Supreme Court an amicus curiae letter rather than a brief." (C.R.C., Rule 8.500(g)(1).) The letter "must describe the interest of the amicus curiae." Any matter attached to the letter or incorporated by reference must comply with C.R.C., Rule 8.504(e) (*infra*, §929). (C.R.C., Rule 8.500(g)(2).) Receipt of the letter does not constitute leave to file an amicus curiae brief on the merits under C.R.C., Rule 8.520(f) (*supra*, §§726, 938). (C.R.C., Rule 8.500(g)(3).)

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8. Submission and Deposition of Causes.
a. Submission.

9 Witkin Cal. Proc. Appeal § 940

[§ 940] Submission.

A cause is submitted when the Supreme Court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including supplemental briefs permitted by the court. The only approved method for vacating submission is an order stating the court's reasons and setting a timetable for resubmission. (C.R.C., Rule 8.524(h).) The court may provide otherwise by order or in its Internal Operating Practices and Procedures. (C.R.C., Rule 8.524(a); see *supra*, §773; on Internal Operating Practices and Procedures of Supreme Court regarding submission of cases, see IOP VII.)

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- b. Affirmance, Modification, or Reversal.

9 *Witkin Cal. Proc. Appeal* § 941

[§ 941] Affirmance, Modification, or Reversal.

(1) *Nature of Power*. "After review, the Supreme Court normally will affirm, reverse, or modify the judgment of the Court of Appeal, but may order another disposition." (C.R.C., Rule 8.528(a); see *Building Industry Assn. of Southern Calif. v. Camarillo* (1986) 41 C.3d 810, 816, 817, 824, 226 C.R. 81, 718 P.2d 68 [Court of Appeal opinion discussed, reversed in part, and balance affirmed]; *Shamblin v. Brattain* (1988) 44 C.3d 474, 479, 243 C.R. 902, 749 P.2d 339 [judgment of Court of Appeal reversed].)

"[T]he judgment of the Court of Appeal" includes a decision of that court denying a petition for original writ without issuing an alternative writ or order to show cause. On review, the current Supreme Court practice is to affirm or reverse the judgment of the Court of Appeal summarily denying the writ petition. Thus, if the Supreme Court affirms the judgment, it will normally discharge any alternative writ or order to show cause that it issued when granting review. However, if the court reverses the judgment, it will normally include a direction to the Court of Appeal, e.g., to issue the requested writ or to reconsider the petition. (Advisory Committee Comment to C.R.C., Rule 8.528.)

(2) *Reversal With Directions*. In *Sheldon Appel Co. v. Albert & Olier* (1989) 47 C.3d 863, 254 C.R. 336, 765 P.2d 498, a malicious prosecution action, the trial court improperly left the determination of probable cause to the jury under an erroneous standard. The Court of Appeal affirmed, the Supreme Court granted review, and reached a decision contrary to that of the Court of Appeal. Normally, after reversal, the cause would be remanded to the trial court, but the Supreme Court chose a more direct method of disposition: "We need not return the case to the trial court, however, for we are in as good a position as that court to make the required legal determination, and we conclude, in light of the underlying facts and relevant legal precedents, that the prior action in question here was objectively tenable and thus was not brought without probable cause. Accordingly, we shall reverse the decision of the Court of Appeal with directions to order the entry of judgment in favor of" defendant. (47 C.3d 868.)

(3) *Remittitur*. The Supreme Court must issue a remittitur after a decision in (a) a review of a Court of Appeal decision; or (b) an appeal from a judgment of death or in a cause transferred to the court under C.R.C., Rule 8.552 (supra, §922). (C.R.C., Rule 8.540(a).)

The clerk must issue a remittitur, i.e., enter it in the record, when a decision of the court is final. After review of a Court of Appeal decision, the Supreme Court clerk must address the remittitur to the Court of Appeal and send that court two copies of the remittitur and two file-stamped copies of the Supreme Court opinion or order. After a decision in an appeal from a judgment of death or in a cause transferred to the court, the clerk must send the remittitur and a file-stamped copy of the Supreme Court opinion or order to the lower court or tribunal. The clerk must comply with the notice requirements of C.R.C., Rule 8.272(d) (*supra*, §§841, 842). (C.R.C., Rule 8.540(b).)

The Supreme Court may direct immediate issuance of a remittitur on the parties' stipulation or for good cause. On a party's motion or its own motion and for good cause, the court may stay a remittitur's issuance for a reasonable period or order its recall. An order recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status. (C.R.C., Rule 8.540(c).)

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c. Decision on Limited Issues.

9 Witkin Cal. Proc. Appeal § 942

[§ 942] Decision on Limited Issues.

C.R.C., Rule 8.516 authorizes the Supreme Court to limit its review to specific issues. (See *supra*, §934.) "If it decides fewer than all the issues presented by the case, the Supreme Court may remand the cause to a Court of Appeal for decision on any remaining issues." (C.R.C., Rule 8.528(c).)

In *Preston v. Goldman* (1986) 42 C.3d 108, 227 C.R. 817, 720 P.2d 476, the Court of Appeal reversed the trial court's judgment. After granting review, the Supreme Court in its opinion addressed only those issues that formed the basis for the appellate court's reversal of the trial court's judgment, and, after reaching a different conclusion, reversed the appellate court's judgment. In so doing, the court added the following comment on the scope of its decision: "Our review has been limited to those issues relating to the liability of the predecessor landowners, the determination of which formed the basis for the Court of Appeal's decision reversing the trial court's judgment in favor of defendants. We decline to reach the remaining issues dealt with by the Court of Appeal, none of which formed the basis for the court's reversal of the trial court judgment." (42 C.3d 127.)

In *People v. Alfaro* (1986) 42 C.3d 627, 230 C.R. 129, 724 P.2d 1154, the Supreme Court granted review of a Court of Appeal decision affirming a conviction, specifying in its order that the issues to be argued "shall be limited to what evidence may be considered in determining whether a prior felony conviction involved burglary of a residence." (42 C.3d 629.) The court explained the effect of the specification as follows: "Thus questions relating to the use of prior convictions for impeachment remain in this case, but were not briefed or argued here. Such questions have since been resolved in *People v. Collins*, ... which was pending before this court when we granted review in the present case. Therefore, after resolving the issue argued here--the proof of a prior conviction for residential burglary--we will retransfer the case to the Court of Appeal for further proceedings in light of *Collins*." (42 C.3d 630.) (On retransfer generally, see *infra*, §944.)

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d. Dismissal.

9 Witkin Cal. Proc. Appeal § 943

[§ 943] Dismissal.

(1) *In General.* The Supreme Court may dismiss review, and, if it does so, the Supreme Court clerk must "promptly" send the dismissal order to all parties and the Court of Appeal. (C.R.C., Rule 8.528(b)(1).) The former reference requiring that the grant of review be "improvident" has been deleted. The court may dismiss review for a variety of other reasons, such as where the decision in a lead case makes decision in a companion case unnecessary or when a supervening event renders a case moot. (Advisory Committee Comment to C.R.C., Rule 8.528.)

(2) *Proceedings in Court of Appeal.* When the Court of Appeal receives an order dismissing review, the decision of that court is final, and the Court of Appeal clerk must "promptly" issue a remittitur or take other appropriate action. (C.R.C., Rule 8.528(b)(2).) The Court of Appeal has no discretion to exercise after the Supreme Court dismisses review. The Supreme Court clerk must promptly send the dismissal order to the Court of Appeal, and, when the Court of Appeal clerk files that order, the Court of Appeal decision immediately becomes final. (Advisory Committee Comment to C.R.C., Rule 8.528.)

(3) *Status of Court of Appeal Opinion.* After review is dismissed, the Court of Appeal opinion remains unpublished unless the Supreme Court orders otherwise. (C.R.C., Rule 8.528(b)(3).)

(4) *Retransfer to Court of Appeal.* "After transferring to itself, before decision, a cause pending in the Court of Appeal, the Supreme Court may retransfer the cause to a Court of Appeal without decision." (C.R.C., Rule 8.528(e).) Retransfers can be with or without instructions. (Advisory Committee Comment to C.R.C., Rule 8.528.) (See *supra*, §§922, 923 and *infra*, §945 et seq.)

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e. Transfer Where Justices of Supreme Court Are Recused.

9 Witkin Cal. Proc. Appeal § 944

[§ 944] Transfer Where Justices of Supreme Court Are Recused.

Carma Developers (Calif.) v. Marathon Dev. Calif. (1992) 2 C.4th 342, 6 C.R.2d 467, 826 P.2d 710, deals with the situation where review was granted and the justices of the Supreme Court then recused themselves. The Court of Appeal justices who were selected to hear and decide the case were picked according to the following order:

"The members of the court, each having recused themselves from acting upon the petition for review in this matter, the court hereby transfers the matter to the Court of Appeal, Third Appellate District, with directions to the clerk of that court to forthwith select, by lot, from the complement of justices assigned to that District, a panel of seven justices to act in the stead of this court, and to determine the petition. If Presiding Justice Puglia is among those selected by lot, he shall act as Acting Chief Justice, otherwise the justice selected by lot shall choose an Acting Chief Justice." (2 C.4th 350, footnote 1.)

"Pursuant to this order, the Clerk of the Court of Appeal, Third Appellate District, forthwith selected by lot seven justices of that court to constitute the panel. On October 31, 1989, this panel granted defendant and appellant's petition for review. Subsequently, the clerk selected by lot two more justices from the remaining members of the court to replace on the original panel of seven, one justice who retired and another who died." (2 C.4th 350, footnote 1.)

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f. Retransfer With Directions.
1. In General.

9 *Witkin Cal. Proc. Appeal* § 945

[§ 945] In General.

(1) *Retransfer Authorized*. "After ordering review, the Supreme Court may transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders." (C.R.C., Rule 8.528(d).) A number of cases in this and the following sections illustrate the practice under the former hearing procedure.

An unusual assertion of appellate jurisdiction by the Supreme Court appeared in several cases. The Reporter's Note in *Doud Lumber Co. v. Guaranty Savings & Loan Assn.* (1967) 254 C.A.2d 585, 60 C.R. 94, recites the following: The Supreme Court granted a hearing on September 21, 1967, then retransferred the cause to the Court of Appeal with directions to adopt its original opinion. On September 22, 1967, the Court of Appeal did adopt and file its original opinion. (254 C.A.2d 586.) Thus, by granting a hearing and later directing adoption of the same opinion, the Supreme Court in effect rendered a delayed order denying hearing.

An even more peculiar order was made in *People v. Sesser* (1969) 269 C.A.2d 707, 75 C.R. 297. Defendant was found guilty of robbery while armed with a gun, and the judgment was affirmed by the Court of Appeal. The Supreme Court granted a hearing, then retransferred the case to the same Court of Appeal, directing it to recall the remittitur, and, with appropriate changes in the opinion, to refile it "with the following dispositive order." The order modified the judgment by striking the finding that defendant was armed. (269 C.A.2d 712.) The Court of Appeal refiled the opinion with the observation that it could not change its correct recital of the facts, and therefore, could not make "appropriate modifications" in the opinion. (269 C.A.2d 712.) Then it carried out the other directions by modifying the judgment to add the order striking the finding. (269 C.A.2d 713.) The result was that the opinion as filed sets forth "positive and conclusive evidence" (269 C.A.2d 713) that the victims were robbed at gunpoint, but, for undisclosed reasons, the appellate judgment reached exactly the opposite conclusion.

Ferguson v. Keays (1971) 4 C.3d 649, 94 C.R. 398, 484 P.2d 70, illustrates the exercise of this power in a manner that left intact the jurisdiction and independent judgment of the Court of Appeal on matters not properly subject to direction. Several appellants, claiming indigence, sought relief from payment of the fee for filing the record on appeal,

and several Courts of Appeal rendered different decisions on their power to give that relief. The Supreme Court, after granting hearings on its own motion, rendered an opinion (a) upholding the power to grant relief, (b) laying down guidelines for the showing of indigence and meritorious case, and (c) emphasizing the power of appellate courts to prevent abuses of the right. (See *supra*, §558.) But the showing made by each of the appellants was distinct, and the determinations and the conflicting decisions of the Courts of Appeal had been made without the benefit of the guidelines laid down in the Supreme Court opinion. It was therefore inappropriate for that court to decide either the right of each appellant to relief or the possible imposition of penalties in the event an appeal turned out to be frivolous. Accordingly, each matter was transferred to the Court of Appeal from which it came, "for further proceedings consistent with the views expressed herein."

(2) *Supplemental Briefs on Retransfer*. Within 15 days after finality of a Supreme Court decision remanding or order transferring a cause to a Court of Appeal for further proceedings, any party may serve and file a supplemental opening brief in the Court of Appeal. Within 15 days after this brief is filed, any opposing party may serve and file a supplemental responding brief. (C.R.C., Rule 8.200(b)(1).)

The first 15-day briefing period begins on the day of finality of the Supreme Court decision remanding or order transferring the cause to the Court of Appeal. The decision or order of transfer to the Court of Appeal triggers, first, a 15-day period in which any or all parties may file supplemental opening briefs and second, if any party files such a brief, an additional 15-day period in which any opposing party may file a supplemental responding brief. (Advisory Committee Comment to C.R.C., Rule 8.200.)

Supplemental briefs must be limited to matters arising after the previous Court of Appeal decision, unless the presiding justice allows briefing on other matters. (C.R.C., Rule 8.200(b)(2).)

Supplemental briefs may not be filed if the previous Court of Appeal decision was a denial of a petition for a writ within that court's original jurisdiction without issuance of an alternative writ or order to show cause. (C.R.C., Rule 8.200(b)(3).)

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 - f. Retransfer With Directions.
2. Power To Exercise Discretion After Retransfer.

9 Witkin Cal. Proc. Appeal § 946

[§ 946] Power To Exercise Discretion After Retransfer.

Where a hearing was granted and the case was then retransferred to the Court of Appeal with directions to grant certain relief, but the theory on which that relief was to be granted was not stated in the order of retransfer, what could the Court of Appeal set forth in its opinion as the "reasons" for its decision? *Atlantic Richfield Co. v. Superior Court* (1975) 51 C.A.3d 168, 124 C.R. 63, attempted to answer this question.

Plaintiffs were nine heirs-at-law of the Andersons, Texas residents who leased oil land to defendants. Plaintiffs, three of whom were California residents and the rest Texas residents, sued for an accounting of royalties, making various allegations of fraud and coercion in assignments of the royalty rights to others. Defendants moved to dismiss on the ground of inconvenient forum, setting forth two theories: Texas judgments in actions brought by the Andersons were res judicata on their lack of title to the land, and other claimants of royalty interests were indispensable parties. The trial court denied the motion to dismiss, and the Court of Appeal refused to review the matter on mandamus for the reason that defendants were attempting improperly to use the inconvenient forum motion instead of a motion to dismiss for lack of subject matter jurisdiction or a motion for summary judgment based on res judicata; in other words, that defendants had other adequate remedies and were consequently not entitled to mandamus. The Supreme Court granted a hearing and retransferred the cause to the same Court of Appeal with directions to issue an alternative writ, but with no accompanying opinion. Accordingly, the Court of Appeal, forced to construe and apply the order of retransfer, reasoned as follows:

(a) The Supreme Court order conclusively established the facts necessary to the issuance of an alternative writ of mandamus, including (1) inadequacy of other remedies, (2) issues properly raised in the trial court, and (3) a legal theory that would support the relief sought. (51 C.A.3d 170, 172, citing the text.)

(b) To determine what undisclosed theory the Supreme Court thought sufficient, possible theories must be examined. (1) Res judicata cannot be an acceptable theory, for the complaint raised triable issues of extrinsic fraud in the rendition of the Texas judgment. (2) Lack of jurisdiction to affect title to property in another state is likewise unacceptable, for the complaint, though ambiguous, seeks an accounting of royalties fraudulently paid, and does not

necessarily involve title to the property. (3) The third theory--indispensable parties--is acceptable: 57 nonresidents, not subject to California process, are claimants of the royalties, and under *C.C.P. 389* are indispensable parties (see 4 *Cal. Proc.* (5th), *Pleading*, §175). (51 *C.A.3d* 173.)

(c) "Forced by the Supreme Court order to choose one of petitioner's theories, we select this as the most likely candidate for that silently considered by our high court to have such merit as to require that we issue an alternative writ." (51 *C.A.3d* 174.)

In *Krueger v. Superior Court* (1979) 89 *C.A.3d* 934, 152 *C.R.* 870, the Court of Appeal of the same district took a different view of a fatally defective petition for mandamus. The petition was improperly verified, unreasonably delayed, and lacking in allegations and record essential to the granting of relief. The Court of Appeal thus denied relief, but the Supreme Court, on petition for hearing, ordered that an alternative writ be issued and the matter be placed on the calendar for oral argument. This was done, and thereafter, the Court of Appeal discharged the alternative writ and denied a peremptory writ, with the following explanation:

(a) "It is thus our conclusion, right or wrong, that petitioners are not entitled to the extraordinary writ they seek because they have not carried their pleading burden." (89 *C.A.3d* 939.)

(b) The Supreme Court's order (with no indication of the content of the conference memorandum on which it was presumably based) "does not preclude us from exercising our judgment based upon the record and the law as we construe it to be." It does not require exercise of discretion in a particular way, or require that patent deficiencies in the petition be ignored. (89 *C.A.3d* 939.)

The point dealing with whether the Supreme Court could direct how the Court of Appeal was to exercise its discretion was directly raised and decided in *Gillaizeau v. Bank of America* (1986) 179 *C.A.3d* 836, 224 *C.R.* 914. In that case, the Court of Appeal affirmed the judgment in an unpublished opinion, and imposed sanctions against plaintiff's attorney for prosecuting a frivolous appeal. The Supreme Court granted a hearing, then retransferred the case to the Court of Appeal "with directions to refile its unpublished opinion without sanctions." (179 *C.A.3d* 838.) The Court of Appeal instead set the matter on the calendar for briefs and oral argument on the issue of the Supreme Court's authority to direct the Court of Appeal to resolve a particular issue in a specific way. The parties, however, filed a stipulation stating that they did not wish to incur further legal expenses in litigating the sanctions issue, and requesting that the court refile the unpublished opinion without sanctions. The Court of Appeal then filed a published opinion setting forth its position on the law and its practical disposition of the appeal.

(a) "We have no doubt the Supreme Court could have itself issued a written opinion resolving the sanctions issue and then retransferred the case to this court for disposition of the remaining issues." (179 *C.A.3d* 838, citing *Taylor v. Union Pac. R. Corp.* (1976) 16 *C.3d* 893, 130 *C.R.* 23, 549 *P.2d* 855, *infra*, §947.)

(b) "However, with all due respect, we are unaware of any authority authorizing the California Supreme Court to direct a Court of Appeal to dispose of in a specific manner an issue requiring the exercise of judicial discretion. Indeed, we are confident that authority and the sound administration of justice dictate the contrary." (179 *C.A.3d* 838, citing the text.)

(c) "Accordingly, we should have had respectfully to decline to comply with the directions of the California Supreme Court even though in view of a subsequent decision by this court relating to the same controversy ... we have no real disagreement with the California Supreme Court's apparent but unarticulated determination that sanctions should not have been imposed." (179 *C.A.3d* 838.)

(d) The problem was solved, however, by the stipulation. When the hearing was granted the earlier opinion became a nullity. "Ignoring the inappropriate directions in the order transferring the case to us, the matter is now before us again on all issues as if it had never been decided." But the stipulation of the parties "constitutes an abandonment of the request for sanctions, which we accept and honor." (179 *C.A.3d* 839.)

A number of additional decisions are of note. (See *Charlton v. Superior Court* (1979) 93 C.A.3d 858, 939, 156 C.R. 107 [Supreme Court cannot direct Court of Appeal to exercise discretion in particular way]; *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 C.A.3d 496, 500, 165 C.R. 748 ["we join the *Charlton* court ... in concluding that the Supreme Court's action means only that this court must decide the issues presented"]; *Pedlow v. Superior Court* (1980) 112 C.A.3d 368, 370, 169 C.R. 326 [following *Krueger, Popelka, and Charlton*, and discharging alternative writ where petitioner failed to meet pleading burden of furnishing adequate record]; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 C.A.3d 272, 284, 245 C.R. 873 [grant and transfer order directing issuance of alternative writ does not cure procedural defects in the petition for the writ].)

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3. Partial Decision and Retransfer.

9 Witkin Cal. Proc. Appeal § 947

[§ 947] Partial Decision and Retransfer.

In *Taylor v. Union Pac. R. Corp.* (1976) 16 C.3d 893, 130 C.R. 23, 549 P.2d 855, the trial judge, after ruling that plaintiffs had waived a jury during trial by failure to deposit fees, made findings and judgment against plaintiffs. They appealed, asserting error in that ruling, many other errors, and insufficiency of the evidence to support the findings. The Court of Appeal held that they were improperly denied a jury trial and reversed the judgment without considering the other issues. The Supreme Court granted a hearing for the sole purpose of considering the jury trial waiver issue, and concluded that there had been a waiver, hence, reversal could not be based on this ground of appeal. But, instead of deciding the other issues, the Supreme Court ordered a retransfer to the Court of Appeal for that purpose. "We consider such a procedure appropriate to assure that complex and substantial issues raised on appeal are initially considered by the Court of Appeal before their presentation to us, thereby providing the parties a more complete form of appellate review." (16 C.3d 895.)

In *Gonzales v. Nork* (1978) 20 C.3d 500, 506, 143 C.R. 240, 573 P.2d 458, a malpractice action, the trial judge refused to grant relief from a jury waiver, and judgment for compensatory and punitive damages was rendered by the trial judge. Defendant appealed, raising numerous issues. The Court of Appeal reversed, holding that the denial of relief was an abuse of discretion, and did not reach the other issues. The Supreme Court granted a hearing, held that the denial of relief was not an abuse of discretion, and retransferred the cause to the Court of Appeal for determination of the other issues. (20 C.3d 511.) (See *Vella v. Hudgins* (1977) 20 C.3d 251, 254, 142 C.R. 414, 572 P.2d 28; *Arnel Dev. Co. v. Costa Mesa* (1980) 28 C.3d 511, 514, 525, 169 C.R. 904, 620 P.2d 565 [main issue decided, and cause retransferred to Court of Appeal for resolution of minor issues not fully argued].)

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E. Procedure.

9. Rehearing.

a. In General.

9 Witkin Cal. Proc. Appeal § 948

[§ 948] In General.

(1) *Power To Order Rehearing.* The Supreme Court may order rehearing as provided in C.R.C., Rule 8.268(a) (supra, §904) with respect to Courts of Appeal. (C.R.C., Rule 8.536(a).)

(2) *Petition and Answer.* A petition for rehearing and any answer must comply with C.R.C., Rule 8.268(b)(1) and (b)(3) (supra, §§907, 908). Any answer to the petition must be served and filed within 8 days after the petition is filed. However, before the Supreme Court decision is final and for good cause, the Chief Justice may relieve a party from a failure to file a timely petition or answer. (C.R.C., Rule 8.536(b).)

(3) *Determination of Petition.* The time for granting or denying the petition may be extended under C.R.C., Rule 8.532(b)(1)(B) (supra, §839). If the court does not rule on the petition before the decision is final, the petition is deemed denied. (C.R.C., Rule 8.536(c).)

(4) *Order.* An order granting a rehearing must be signed by at least four justices; an order denying rehearing may be signed by the Chief Justice alone. (C.R.C., Rule 8.536(d).) (On what constitutes majority, see *infra*, §950; on similar practice on petition for review in Supreme Court, see *supra*, §932.)

(5) *Effect of Granting Rehearing.* An order granting a rehearing vacates the decision and any opinion filed in the case and sets the cause at large in the Supreme Court. (C.R.C., Rule 8.536(e).) The old opinion, though previously printed in the advance sheets and California Reporter or Pacific Reporter, is wholly superseded, and never appears in the final official volumes of California Reports or California Appellate Reports. (*Miller & Lux v. James* (1919) 180 C. 38, 48, 179 P. 174, 175.)

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9. Rehearing.

b. Court Conference.

9 Witkin Cal. Proc. Appeal § 949

[§ 949] Court Conference.

Petitions are considered in court conference, without appearance of counsel or oral argument. The Supreme Court practice was thus described some time ago in *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 122 P.2d 257, *infra*, §950: "But from the constitutional provision concerning argument it does not follow that the parties are entitled to oral argument in all matters passed upon by the court in bank. When not conducting an open session, the court is convened in executive sessions at least two times each week. At these sessions numerous matters are ruled upon, such as applications for writs, petitions for transfer from the District Courts of Appeal, and petitions for rehearing of our own decisions. These matters are disposed of by order of at least four members of the court, but no oral argument thereon is provided for by the Constitution or otherwise permitted, and no grounds for the rulings are stated in writing, except in very rare cases in the discretion of the court. The petition for a rehearing in the present case was one of those matters. The action thereon was not to 'pronounce a judgment' as contemplated by the constitutional provision above quoted, but was a ruling on the question whether there should be a re-consideration of a judgment theretofore pronounced to the end that further argument be had, if desired, and a judgment thereafter pronounced in all respects as required by the Constitution." (19 C.2d 468.) (See generally 44 Cal. L. Rev. 649 [practice in American appellate courts]; on summary denial final forthwith, see *Brown v. Superior Court* (1982) 33 C.3d 242, 188 C.R. 425, 655 P.2d 1260, *supra*, §912; on conferences where petition for review is filed in Supreme Court, see *supra*, §932.)

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9. Rehearing.

c. What Constitutes Majority of Court.

9 Witkin Cal. Proc. Appeal § 950

[§ 950] What Constitutes Majority of Court.

In *Metropolitan Water Dist., of Southern Calif. v. Adams* (1942) 19 C.2d 463, 122 P.2d 257, the court carefully examined the problem of what constitutes a qualified majority of four justices necessary to grant a rehearing. An appeal was argued before six Supreme Court justices and Justice P, a Court of Appeal justice duly assigned pro tem. in place of Justice H, who was absent. The judgment was affirmed by a bare majority, three Supreme Court justices and Justice P, pro. tem. A petition for rehearing was filed and considered by the Supreme Court, the pro tem. justice not being present. An order granting rehearing was signed by four Supreme Court justices, including Justice H. Respondents moved to set aside the order as void on the theory that the absent justice was not qualified to sign it, i.e., that a majority of the justices constituting the court at the oral argument of the appeal must concur in an order granting a rehearing. *Held*, the order was valid.

(a) "The justices entitled to act on matters considered at executive sessions are the regular members of the court except such as may be disqualified or unable to act thereon; and if a full complement of the qualified members be not available, then such justice or justices as may be duly assigned to the court, provided that in no event shall there be more than seven justices acting on a particular matter." (19 C.2d 469.)

(b) It was immaterial that Justice P was assigned to act on "all matters submitted" to him during a specified period; the appeal had been so submitted, but not the petition for rehearing. "[T]he question whether the judgment should be set aside and further consideration be given to the appeal in accordance with the showing made by the plaintiff district in its petition for a rehearing was a question separate from and independent of the question of the prior pronouncement of judgment. The question whether a rehearing should be granted was, as above stated, presented to the court with its regular membership participating, and Justice [H] had the power to act on the matter unless disqualified. ... The assignment, always temporary, of a justice of the District Court of Appeal to the Supreme Court, does not and can not deprive a regularly constituted member of the Supreme Court of his constitutional functions, when he is able, ready and willing to act and no disqualification exists." (19 C.2d 470.)

(c) No vested rights are infringed nor any prejudice suffered by this practice, for the court is merely exercising its control over litigation pending, before final decision (19 C.2d 475.) "The parties, of course, have the constitutional right

to a judgment herein by a duly constituted court, but they have no right, constitutional or otherwise, to a decision by any particular judge or group of judges." (19 C.2d 474.)

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10. Court of Appeal Opinion After Grant of Review.

a. Publication or Nonpublication.

9 Witkin Cal. Proc. Appeal § 951

[§ 951] Publication or Nonpublication.

The former practice on granting of a hearing was to preclude publication of the Court of Appeal opinion in the official reports and thereby to prevent citation of the opinion. (See *supra*, §821.) As the court observed in *Knouse v. Nimocks* (1937) 8 C.2d 482, 66 P.2d 438: "The opinion and decision ... , by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed." (8 C.2d 483.) (See *Estate of Kent* (1936) 6 C.2d 154, 156, 57 P.2d 901 ["It serves no further purpose than that it may be regarded as a brief on the questions therein discussed, and, if found satisfactory when taken over by this court on petition for hearing it may be, and many times is, adopted as the opinion of the Supreme Court"]; *Menchaca v. Helms Bakeries* (1968) 68 C.2d 535, 541, footnote 1, 67 C.R. 775, 439 P.2d 903 [plaintiffs did not raise issue in their petition for hearing, but had briefed it in Court of Appeal; issue decided by Supreme Court]; 72 Cal. L. Rev. 730.)

This practice was modified for grant of review. The Supreme Court may order publication as follows:

(1) *No Publication Unless Publication Ordered.* The Supreme Court may order publication of an opinion, in whole or in part, at any time after granting review. (C.R.C., Rule 8.1105(f)(2).) However, unless so ordered, "an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing." (C.R.C., Rule 8.1105(d)(1).)

(2) *Citation of Opinion Ordered Published.* "A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." (C.R.C., Rule 8.1115(d).) (See *Jonathon M. v. Superior Court* (2006) 141 C.A.4th 1093, 1098, 46 C.R.3d 798 [juvenile court judge was obligated by court rule to follow published Court of Appeal opinion holding that, in absence of court order, assignment of judge in delinquency proceeding by deputy court clerk was insufficient to trigger 10-day period for filing motion for disqualification, where no petition for review had been filed and there were no extraordinary circumstances excusing that obligation]; cf. *White v. Davis* (2003) 30 C.4th 528, 563, footnote 14, 133 C.R.2d 648, 68 P.3d 74 [citable Court of Appeal opinion, which contained issues not addressed by Supreme Court on review, constituted citable authority of Court of Appeal, not of Supreme Court].)

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10. Court of Appeal Opinion After Grant of Review.

b. Distinction Between Practice of Granting Hearing and Review.

9 Witkin Cal. Proc. Appeal § 952

[§ 952] Distinction Between Practice of Granting Hearing and Review.

In *Agricultural Lab. Rel. Bd. v. Tex-Cal Land Management* (1987) 43 C.3d 696, 238 C.R. 780, 739 P.2d 140, the Supreme Court, after deciding the issues of appealability and stay pending appeal (see supra, §150) affirmed the judgments of the Court of Appeal, and said: "Without ruling on the remaining issues addressed in the Court of Appeal opinion, we order that it be published in the Official Reports." The court explained this procedure as follows (43 C.3d 709, footnote 12):

(a) "Under former rules, our grant of 'hearing' after decision by the Court of Appeal resulted in 'transfer' of the 'cause' to this court for 'decision.' The Court of Appeal's opinion was thus entirely vacated, and our subsequent opinion, which addressed anew all issues raised by the appeal, became the only appellate opinion governing the case. ... Under Proposition 32 and its supporting rules, ... we may merely 'review' the Court of Appeal's decision. We need not address portions of the opinion as to which the parties did not seek review, and the court of appeal's opinion remains determinative on those matters."

(b) "Federal procedure provides for similar limited review by the United States Supreme Court of decisions of the federal courts of appeals. No federal rule provides for 'depublication' of a Court of Appeals' decision once the Supreme Court grants certiorari or notes appellate jurisdiction. The lower court opinion thus remains available as citable precedent on issues not reached by the Supreme Court. By contrast, a grant of review by this court determines that the Court of Appeal's opinion shall not be published unless we order otherwise."

(c) "If, before ordering postreview publication, we were required to formally decide the correctness of the Court of Appeal's opinion on issues beyond the scope of our grant of review, our authority to order publication of the lower court opinion would be pointless, since the relevant analysis and precedent would then appear in *our* opinion, as under the old procedure. The efficient use of our new 'review' jurisdiction suggests that, as in the federal system, significant Court of Appeal opinions should be available as citable precedent with respect to issues not reached by us on subsequent review."

(d) "We deem the lower court's opinion here to be beneficial and worthy of publication in that regard, but our order

for publication does not necessarily imply agreement with the Court of Appeal's analysis on issues not addressed in our opinion."

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A. Costs on Appeal.

1. Right To Recover.

a. In General.

9 Witkin Cal. Proc. Appeal § 953

[§ 953] In General.

Costs on appeal to the appellate division of the superior court (*infra*, §1018), to the Court of Appeal (*infra*, §954 et seq.), and to the Supreme Court (*infra*, §954), formerly provided for by statute, are now entirely governed by rule. (See C.R.C., Rule 8.276 [Court of Appeal]; C.R.C., Rule 8.544 [Supreme Court]; C.R.C., Rule 8.764 [appellate division]; *Lavine v. Jessup* (1959) 175 C.A.2d 136, 138, 345 P.2d 505, citing the text; C.E.B., 2 Civil Appellate Practice 3d, §20.1; Rutter Group, 2 Civil Appeals and Writs §14:55 et seq.; 17 So. Cal. L. Rev. 256; 5 Am.Jur.2d (2007 ed.), Appellate Review §849 et seq.) The Rules do not apply in criminal cases.

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C.R.C., Rule 8.764 was repealed in 2008. Costs in the appellate division are now covered in C.R.C., Rule 8.891.



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A. Costs on Appeal.

1. Right To Recover.

b. Right of Prevailing Party.

1. General Rule.

9 Witkin Cal. Proc. Appeal § 954

[§ 954] General Rule.

The party prevailing in the Court of Appeal in a civil case is entitled to costs on appeal, subject to specified exceptions (see *infra*, §958 et seq.). (C.R.C., Rule 8.278(a)(1).)

This is a restatement of the general rule that the prevailing party is normally entitled to his or her costs as a matter of right. The award requires no statement in the court's judgment; the clerk inserts the necessary provision in the remittitur. (See *Paine v. Bank of Ceres* (1943) 60 C.A.2d 621, 622, 141 P.2d 219; *Delorey v. Board of Public Works of Los Angeles* (1931) 114 C.A. 20, 22, 299 P. 758; *Harmon v. Pacific Tel. & Tel. Co.* (1962) 201 C.A.2d 453, 455, 20 C.R. 118; 17 So. Cal. L. Rev. 256; *infra*, §974; on prevailing party's right to costs in probate proceedings, see *infra*, §967.)

In a civil case, the Supreme Court may (1) direct the Court of Appeal to award costs; (2) order the parties to bear their own costs; or (3) make any other award of costs that the Supreme Court deems proper. (C.R.C., Rule 8.544.) When the Supreme Court makes an award of costs, the party claiming the costs must proceed under C.R.C., Rule 8.278(c), *infra*, §975. (Advisory Committee Comment to C.R.C., Rule 8.544.)

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1. Right To Recover.

b. Right of Prevailing Party.

2. Who Is Prevailing Party.

9 Witkin Cal. Proc. Appeal § 955

[§ 955] Who Is Prevailing Party.

If the Court of Appeal affirms the judgment without modification or dismisses the appeal, the prevailing party is the respondent. If the court reverses the judgment in its entirety, the prevailing party is the appellant. (C.R.C., Rule 8.278(a)(2); see *Passow & Sons v. United States Fidelity & Guaranty Co.* (1922) 56 C.A. 72, 79, 20 P. 545; *Scott v. Donahue* (1928) 94 C.A. 795, 796, 271 P. 1100; *Broy v. Calaveras Cen. Gold Mining Co.* (1937) 22 C.A.2d 232, 233, 70 P.2d 689 [reversal with directions to enter judgment for appellant]; *Combs v. Haddock* (1962) 209 C.A.2d 627, 631, 26 C.R. 252 [modification, for appellant].)

In *O'Hare v. Peacock Dairies* (1938) 28 C.A.2d 562, 82 P.2d 1112, plaintiffs obtained judgment for damages. Defendant appealed from the entire judgment, and plaintiffs appealed from that part fixing the amount of damages. Judgment was reversed in both appeals, with directions to retry the issue of damages and render judgment for plaintiffs in the amount found. The clerk entered an award of costs for each party in his particular appeal. Plaintiffs contended that they were really victors in both appeals and should not pay costs. *Held*, however, the clerk's action was proper. Each appeal was separate and distinct, each resulted in a reversal, and each appellant was, as to his appeal, the prevailing party. (28 C.A.2d 564.)

On the other hand, *In re McGee* (1951) 37 C.2d 6, 229 P.2d 780, interpreted the language of the rule less strictly in order to carry out its general object. Respondent had judgment on the merits below, and, on appeal, the judgment was reversed with directions to dismiss appellant's action for lack of jurisdiction. The rule as normally applied would give costs to appellant, but respondent prevailed in both courts in all respects. *Held*, he was entitled to costs, and a remittitur inadvertently issued with costs to appellant was recalled and corrected (*supra*, §850). (37 C.2d 8.)

Where the appellate judgment is severable, one part may carry costs and the other not. (See *Combs v. Haddock*, *supra*, 209 C.A.2d 632.)

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b. Right of Prevailing Party.

3. Unsuccessful Owner-Appellant in Condemnation.

9 Witkin Cal. Proc. Appeal § 956

[§ 956] Unsuccessful Owner-Appellant in Condemnation.

An unusual point of first impression was decided in *People v. International Tel. & Tel. Corp.* (1972) 26 C.A.3d 549, 103 C.R. 63. Plaintiff brought a condemnation proceeding and was awarded judgment. Defendant property owner appealed, raising the issue of error in the trial judge's ruling that its land and adjacent land did not constitute a single "larger parcel" for severance damages. The judgment was affirmed with no direction as to costs, but the clerk included an award to defendant. *Held*, this was proper.

(a) Where the property owner is successful in his or her appeal, the property owner, as the prevailing party, is entitled to costs under the *Rules of Court*. (26 C.A.3d 550.)

(b) Where the property owner appeals solely on the issue of damages, and is unsuccessful, he or she is not entitled to costs. (26 C.A.3d 551, citing *Oakland v. Pacific Coast Lumber & Mill Co.* (1916) 172 C. 332, 335, 156 P. 468.)

(c) Where the property owner appeals on the issue of the public entity's right to take the property for a public use, he or she is, even if unsuccessful, entitled to costs. (26 C.A.3d 552, citing *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B* (1964) 61 C.2d 21, 37 C.R. 74, 389 P.2d 538.)

(d) The present case involved an unsuccessful appeal challenging the correctness of the trial judge's application of legal principles that assertedly prevented the jury from fairly assessing the damages, and neither of the cited decisions was controlling. However, in the light of the reasoning of these cases and implications from others, it "appears" to be the rule that costs on appeal will be allowed the unsuccessful appellant property owner where the amount of damages is not an issue. (26 C.A.3d 553.) (See concurring opinion, 26 C.A.3d 554, suggesting that the Supreme Court clarify the law by a definitive opinion.)

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1. Right To Recover.

b. Right of Prevailing Party.

4. Award Against Government or Officer.

9 Witkin Cal. Proc. Appeal § 957

[§ 957] Award Against Government or Officer.

(1) *In General.* Costs are awarded against the state "on the same basis as against any other party." (*C.C.P. 1028*; see 7 *Cal. Proc.* (5th), *Judgment*, §84.) "When any county, city, district, or other public agency or entity, or any officer thereof in his official capacity, is a party, costs shall be awarded against it on the same basis as against any other party." (*C.C.P. 1029.*)

(2) *Mandamus Proceeding.* *C.C.P. 1095*, which applies to mandamus proceedings, provides that when the respondent "is an officer of a public entity," costs "shall be recovered and awarded against the public entity represented by the officer" and not against the officer; "but in all such cases, the court shall first determine that the officer appeared and made defense in the proceeding in good faith." (See 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §211.) In *Mitchell v. County Sanitation Dist. Number One of Los Angeles County* (1958) 164 *C.A.2d* 133, 330 *P.2d* 411, the trial court granted a writ of mandamus to compel county auditor L to issue warrants to pay a judgment against the district for interest on bond coupons. Although the district board and its counsel were satisfied with the decision and directed L to pay, the latter, pursuant to his belief that a fiscal officer is a taxpayers' "watchdog," took an appeal. On affirmance of the judgment with costs to the respondent, appellant L sought to be relieved of personal liability for costs. *Held*, both the plaintiff and the nonappealing district were entitled to costs against L. The good faith test of *C.C.P. 1095* was not met; L "took personal issue with the board, its counsel and the courts, and expected the taxpayers to pay costs expended in asserting his position on appeal." (164 *C.A.2d* 144.)

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1. Right To Recover.

c. Discretion of Reviewing Court.

1. In General.

9 Witkin Cal. Proc. Appeal § 958

[§ 958] In General.

The right of the prevailing party to recover costs on appeal (see *supra*, §954) is qualified by an appellate court's inherent discretionary power to grant or withhold costs. This power is expressly stated in C.R.C., Rule 8.278(a)(5) by the proviso that "[i]f the interests of justice require it, the court may award or deny costs as it deems proper." The court's discretion is further recognized by the provision that "[i]f the court reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs." (C.R.C., Rule 8.278(a)(3).) Hence, in the exercise of this discretion, the courts often make awards that depart from the prevailing party rule. (See *infra*, §958 et seq.)

In *Ramirez v. St. Paul Fire & Marine Ins. Co.* (1995) 35 C.A.4th 473, 41 C.R.2d 416, the trial judge held that the insured was covered by appellant insurer's policy, entered judgment against appellant insurer on the insured's claim, and dismissed appellant insurer's cross-complaint for indemnity against another insurer. The Court of Appeal reversed the judgment for the insured as to coverage, and provided that appellant insurer was "entitled to its costs." However, the trial court, on remittitur, ordered that appellant insurer recover its costs on appeal only from the insured and not from the other insurer. *Held*, reversed.

(a) Under former C.R.C., Rule 26(a) (now C.R.C., Rule 8.278(a)(1)), the prevailing party is ordinarily entitled to recover its costs on appeal, and only the reviewing court is empowered to depart from the usual rule for awarding costs when "the interests of justice require it," as by apportioning costs. A losing party seeking an allocation of costs on appeal must direct its request to the appellate court. Further, the request should normally be made before the appellate court loses jurisdiction over the matter by issuance of the remittitur. (35 C.A.4th 478.)

(b) In the absence of any direction in the appellate court's opinion to the contrary, the usual rule applied, entitling appellant insurer to recover its costs from both the insured and the other insurer. The trial court lacked the authority, in the absence of any ambiguity in the opinion or remittitur, to interpret the opinion to apportion costs. (35 C.A.4th 479.)

In *Small v. Hall's Furniture Defined Benefit Pension Plan* (2000) 79 C.A.4th 648, 94 C.R.2d 313, defendants

dismissed their appeal, but the trial judge ordered that each party should bear its own costs. In upholding this apportionment and applying the "interests of justice" language of former C.R.C., Rule 26(a)(1) (now C.R.C., Rule 8.278(a)(5)), the court emphasized that plaintiffs, rather than defendants, had identified most of the documents to be included in the lengthy clerk's transcript, and then offered the following advice: "In the present case, defendants have hired experienced and competent appellate counsel in an effort to ensure that it was appropriate to proceed with the appeal. After consultation with their appellate counsel, defendants have determined that no purpose will be served by pursuing the present appeal. Such a course of conduct is to be highly commended. One of the functions of a lawyer is to limit or even end litigation in an appropriate case." (79 C.A.4th 650.)

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1. Right To Recover.

c. Discretion of Reviewing Court.

2. Request for Exercise of Discretion.

9 *Witkin Cal. Proc. Appeal* § 959

[§ 959] Request for Exercise of Discretion.

A party who seeks the exercise of the appellate court's discretion regarding costs should make the request to the reviewing court during the pendency of the appeal. (*Paine v. Bank of Ceres* (1943) 60 C.A.2d 621, 623, 141 P.2d 219; *Weck v. Los Angeles County Flood Control Dist.* (1948) 89 C.A.2d 278, 283, 200 P.2d 806; *Lavine v. Jessup* (1959) 175 C.A.2d 136, 138, 345 P.2d 505 [reviewing court cannot exercise this discretion unless it first recalls remittitur and reestablishes its jurisdiction]; *Wilson v. Sharp* (1959) 175 C.A.2d 691, 694, 346 P.2d 910 [challenge to award cannot be made in trial court by motion to tax costs]; *Ramirez v. St. Paul Fire & Marine Ins. Co.* (1995) 35 C.A.4th 473, 41 C.R.2d 416, *supra*, §958.)

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1. Right To Recover.

c. Discretion of Reviewing Court.

3. No Costs Award.

9 Witkin Cal. Proc. Appeal § 960

[§ 960] No Costs Award.

In the exercise of its discretionary power regarding the award of costs (see *supra*, §958), the reviewing court may determine that no costs are to be recovered, i.e., that each party is to bear his or her own costs. (See *Menghetti v. Dillon* (1938) 10 C.2d 470, 473, 75 P.2d 596; *Naify v. Pacific Indem. Co.* (1938) 11 C.2d 5, 13, 76 P.2d 663; *Stromerson v. Averill* (1943) 22 C.2d 808, 817, 141 P.2d 732; *Finley v. Wyatt* (1931) 113 C.A. 233, 237, 298 P. 80; *Epstein v. Frank* (1981) 125 C.A.3d 111, 126, 177 C.R. 831.)

In *Van de Kamp v. Bank of America* (1988) 204 C.A.3d 819, 251 C.R. 530, a class action in which plaintiffs challenged various practices of defendant bank, and lost at trial and on appeal, the court noted that although plaintiffs had lost the battle, they had won the war, i.e., defendant, at least in part due to this lawsuit, had changed its practices to afford plaintiffs the benefits sought by this action. Declaring that it would thus be inequitable to impose further costs on plaintiffs, the court ordered each party to bear its own costs. (204 C.A.3d 869.)

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4. Costs Apportioned.

9 Witkin Cal. Proc. Appeal § 961

[§ 961] Costs Apportioned.

Regardless of which side prevails, the courts often order that the costs be divided or apportioned between the parties.

In *Parker v. Parker* (1955) 135 C.A.2d 782, 288 P.2d 29, an appeal was taken from a custody order. After filing of the transcript and opening brief, respondent stipulated that the order be set aside, and the appeal was dismissed as moot. Because appellant was, in effect, the prevailing party, she would normally have received costs. But, because respondent saved the expense of further litigating the appeal, costs were assessed one-third against appellant and two-thirds against respondent. (135 C.A.2d 783.)

In *People v. Mitchell Bros.' Santa Ana Theater* (1985) 165 C.A.3d 378, 211 C.R. 501, plaintiff brought an action to enjoin allegedly obscene films as a public nuisance. Both parties appealed from portions of the judgment adverse to them. Defendant obtained a partial reversal on the ground that the relief afforded by the trial judge was too broad. Plaintiff's claim that a too strict standard of proof of obscenity had been used was initially rejected, but was ultimately accepted by the United States Supreme Court on certiorari and the Court of Appeal on remand. The case was then remanded to allow plaintiff to seek other injunctions based on the correct standard of proof. The clerk's remittitur awarded costs to "Respondents," and the trial judge gave costs to plaintiff in both appeals. *Held*, this was error. Because each party had succeeded in obtaining a partial reversal, each was entitled to receive the costs of appeal, "to be apportioned on the basis of the portions of the transcripts and briefs devoted to each appeal." (165 C.A.3d 385.)

Apportionment has been recognized in a number of other decisions. (See *Wilson v. Chesley* (1913) 23 C.A. 630, 633, 138 P. 958; *Zahos v. Loescher* (1926) 78 C.A. 145, 151, 248 P. 283; *Baldie v. Bank of America* (1950) 97 C.A.2d 614, 615, 217 P.2d 1011; *Golf West of Kentucky v. Life Investors* (1986) 178 C.A.3d 313, 317, 318, 223 C.R. 539 [after reversal, apportionment of costs between two plaintiffs was proper, where, despite consolidation of cases, neither plaintiff had any interest in recovery of other, defendant showed no basis for joint and several liability, and imposition of liability would penalize parties for promoting judicial economy through consolidation].)

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5. Award to Respondent on Modification.

9 Witkin Cal. Proc. Appeal § 962

[§ 962] Award to Respondent on Modification.

Where the judgment could easily have been corrected in the trial court, the reviewing court, in the exercise of its discretion, may order that the respondent recover costs even though the appellant has procured a modification. (See *Brenner v. Redlick Furniture Co. (1931) 113 C.A. 343, 347, 298 P. 62* [costs were awarded to respondent who admitted liability in sum finally awarded by modification, whereas appellant continually insisted on much larger sum]; *McPheeters v. Bateman (1936) 11 C.A.2d 106, 109, 53 P.2d 195* ["If these points had been presented to the trial court this appeal might have been obviated"]; *Bank of America v. Oil Well Supply Co. of Calif. (1936) 12 C.A.2d 265, 271, 55 P.2d 885* ["appellant has accomplished nothing by this appeal that could not have been accomplished without appeal, as a result of which respondent is entitled to costs and it is so ordered"].)

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6. Award to Respondent on Reversal.

9 Witkin Cal. Proc. Appeal § 963

[§ 963] Award to Respondent on Reversal.

In *Campbell v. Veith* (1953) 121 C.A.2d 729, 264 P.2d 141, an unusual situation led to an award in favor of the losing party. Plaintiff, acting in pro. per., filed a confused complaint entitled "libel." It was completely defective as such, but sufficient to justify leave to amend to state a cause of action for interference with contractual relations. Accordingly, the judgment on demurrer was reversed, but the court added: "In the interests of justice and in view of the negligence of plaintiff in the preparation of his pleadings and his failure to appear and properly present his contentions to the trial court in the first instance, it is directed that plaintiff be allowed no costs on appeal and that defendants be awarded and allowed to recover from plaintiff their costs on appeal." (121 C.A.2d 735.) This seems to be a reasonable limitation on the policy of extreme leniency in cases handled without counsel, where the blunders of the legally untrained litigant work a hardship on the adverse party. (See 7 Cal. Proc. (5th), Trial, §254.)

In *B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 C.A.2d 491, 41 C.R. 98, plaintiff-appellants injected a false issue that they maintained through their closing brief, and "accomplished nothing by this appeal except to get it back on track." Hence, though entitled to recovery against defendant-respondent, their appeal delayed the proper determination of the action, and costs were accordingly awarded to defendant-respondent. (230 C.A.2d 507.)

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7. Award to Appellant on Affirmance.

9 Witkin Cal. Proc. Appeal § 964

[§ 964] Award to Appellant on Affirmance.

In *Stuckey v. Stuckey* (1964) 231 C.A.2d 382, 41 C.R. 792, plaintiff wife was awarded a divorce with a property division and \$ 200 a month alimony. She appealed from the alimony award. The appellate court, pointing to the property award to the wife (\$ 40,000 value) and her teacher's salary, decided that the award was at the present time not an abuse of discretion; but the court added that, if the wife should be unable to continue teaching or the husband's salary should increase, the award should be reexamined. Having thus laid the groundwork for a new attempt to gain relief in the future, the court concluded: "The judgment appealed from is affirmed. It would be inequitable to require that the wife's meager estate be depleted further. In the interests of justice it is ordered that the costs of appeal shall be borne by the husband; also that the trial court shall fix and order payment by the husband of a reasonable fee to the wife's attorney for his services on appeal." (231 C.A.2d 387.)

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8. Award to Appellant on Reversal With Directions To Dismiss.

9 *Witkin Cal. Proc. Appeal* § 965

[§ 965] Award to Appellant on Reversal With Directions To Dismiss.

In *Bell v. Board of Supervisors of San Joaquin* (1976) 55 C.A.3d 629, 127 C.R. 757, intervening legislation rendered the action moot, and the judgment was reversed with directions to the trial court to dismiss the action (see *supra*, §761). Such a procedure is the equivalent of dismissal of the appeal, and would ordinarily entitle respondent, as the prevailing party, to recover costs. But the appellate court, citing the text, ordered that the costs be recovered by plaintiff-appellant. "Although plaintiff has lost this appeal and with it the case, he achieved an ephemeral success in this court which precipitated the very legislative changes which turned his victory from palliative to Pyrrhic. ... Under the circumstances, we believe it would be inequitable to require plaintiff to bear the costs of this appeal." (55 C.A.3d 637.)

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9. Award to Appellant on Affirmance of Order Denying Mandamus.

9 Witkin Cal. Proc. Appeal § 966

[§ 966] Award to Appellant on Affirmance of Order Denying Mandamus.

In *Unnamed Physician v. Board of Trustees of St. Agnes Med. Center* (2001) 93 C.A.4th 607, 113 C.R.2d 309, plaintiff physician's performance was found to be substandard by defendant hospital. He requested a hearing as allowed by defendant's bylaws, but prior to the hearing, the hearing officer made several adverse rulings. Plaintiff then sought mandamus, and appealed the order of denial. On appeal, plaintiff was unable to establish harm that the appellate court could address, because after the trial judge denied mandamus, defendant amended its bylaws to conform to *B. & P.C. 809.1*, which provides minimum procedural rights to physicians. The Court of Appeal thus affirmed the order denying mandamus, but awarded costs to plaintiff even though, technically speaking, he was the losing party. *Held*, this was proper. Subsequent to the trial judge's denial of the petition for mandamus, defendant rendered the major issues raised by plaintiff moot. "Thus, although an affirmance, the termination of the appeal reflects on the merits of the appeal and establishes that the prevailing party in this action is actually the losing party on appeal." (93 C.A.4th 632, relying on *Bell v. Board of Supervisors of San Joaquin* (1976) 55 C.A.3d 629, 127 C.R. 757, *supra*, §965.)

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1. Right To Recover.

d. Discretion of Probate Judge.

9 Witkin Cal. Proc. Appeal § 967

[§ 967] Discretion of Probate Judge.

Early cases developed the rule that costs in probate were awarded by the probate court, and no reference to costs appeared in the remittitur. The result was that the prevailing party might be denied appellate costs, not in the discretion of the reviewing court (*supra*, §958), but in the discretion of the probate court. As the draftsman of the Rules remarked: "The rule was unsound in principle, and seems to have been based upon a misconception of the problem, which was not who was *entitled* to costs, but rather who should be *liable* therefor--the estate, the representative, or the distributee." (17 *So. Cal. L. Rev.* 257.)

C.R.C., Rule 8.278(a)(4) corrects this mistaken theory by making the general rule apply. The prevailing party in a probate case "must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award." (See *Estate of Powers* (1950) 97 C.A.2d 888, 889, 218 P.2d 1007; *Estate of Williams* (1952) 110 C.A.2d 50, 52, 242 P.2d 26.)

In *Estate of Miller* (1968) 259 C.A.2d 554, 66 C.R. 768, appellant, the beneficiary of a testamentary trust, obtained a reversal in a probate appeal, with an order that she recover her costs. The executor, an attorney, and his law firm, induced the probate judge to cut down the amount of her cost bill (without any item being challenged), and also to order them paid out of the estate and trust, which resulted in her paying her own costs. She appealed from this order. *Held*, reversed, again with costs on appeal. The reviewing court condemned the order as "void"; the power of the probate court to determine against whom costs are to be awarded does not extend to circumvention of the order giving them to the prevailing party. Payment must come from the other parties. (259 C.A.2d 560.) The opinion concluded with a direction to the lower court to hold a prompt hearing to determine which parties should pay the costs. If the executor should be one of the persons required to pay, he should not be entitled to recover any part from appellant "through the estate or trust or otherwise." (259 C.A.2d 561.)

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2. Items Recoverable.

a. In General.

9 *Witkin Cal. Proc. Appeal* § 968

[§ 968] In General.

A trial court can award only those items of costs that fall within the scope of the governing statute. (See *C.C.P. 1021* et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §§83, 117.) The reviewing court is similarly limited; recoverable costs on appeal are limited to the narrow list of items set forth in the governing rule, subject to the condition that they be "reasonable." (C.R.C., Rule 8.278(d)(1); see C.R.C., Rule 8.764(c) [limited civil case appeals; listing recoverable items]; *Sime v. Hunter* (1921) 55 C.A. 157, 159, 202 P. 967 [travel or other personal expenses of attorney are not recoverable]; *Arrow Garage Co. v. Kikugawa* (1924) 69 C.A. 509, 510, 231 P. 571 [cost of storing attached automobile pending appeal is not recoverable]; *Southern Calif. Tel. Co. v. Damenstein* (1947) 81 C.A.2d 216, 229, 183 P.2d 675 [attorneys' fees for preparation of brief is not recoverable]; *Muller v. Reagh* (1959) 170 C.A.2d 151, 152, 338 P.2d 601; *Visini v. Visini* (1963) 212 C.A.2d 183, 190, 27 C.R. 782 [attorneys' fees in divorce are not allowable as costs on appeal; proper procedure is application in trial court and appeal from order of denial]; 17 *So. Cal. L. Rev.* 258; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §859 et seq.)

Unless the court orders otherwise, an award of costs neither includes attorneys' fees on appeal nor precludes a party from seeking them under C.R.C., Rule 3.1702 (see *infra*, §982). (C.R.C., Rule 8.278(d)(2).)

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C.R.C., Rule 8.764(c) was repealed in 2008. Recoverable costs in limited civil case appeals are now listed in C.R.C., Rule 8.891(d).



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b. Record.

9 *Witkin Cal. Proc. Appeal* § 969

[§ 969] Record.

(1) *Cost of Preparation.* A party may recover, if reasonable, the amount paid for any portion of the record, whether an original or a copy or both. However, the cost to copy parts of a prior record is not recoverable unless the Court of Appeal ordered the copying. (C.R.C., Rule 8.278(d)(1)(B).) This provision refers not only to a normal record prepared by the clerk and the reporter, but also, for example, to an appendix prepared by a party and to a superior court file to which the parties stipulate. (Advisory Committee Comment to C.R.C., Rule 8.276.)

In *Acree v. General Motors Acceptance Corp.* (2001) 92 C.A.4th 385, 112 C.R.2d 99, defendant appealed from the appointment of a referee and prepared a transcript. However, it lost that appeal and thus recovered no costs. Later, defendant appealed from an injunction, incorporated the prior transcript by reference, and was successful on appeal. Defendant was awarded costs, but was not entitled to the costs of preparing a transcript. Under former C.R.C., Rule 26(c) (now C.R.C., Rule 8.276(d)), defendant could not recover costs for preparing a transcript that could be incorporated by reference. In the present appeal, defendant again attempted to recover the costs previously incurred in preparing the transcript for the initial appeal. *Held*, defendant was not entitled to recover. Under the rule, a prevailing party may only recover costs actually incurred, and the costs of preparing the transcript were actually incurred during the initial appeal. Because that appeal was unsuccessful, no costs were recoverable, and because the transcript was incorporated by reference during the later appeal, no transcript costs were incurred at that time. (92 C.A.4th 405.)

(2) *Cost of Augmentation.* In addition to the cost of preparation, the cost of augmentation of the record (see *supra*, §683) is also properly awarded. (*Muller v. Muller* (1959) 174 C.A.2d 517, 519, 345 P.2d 29 [construing former rule].)

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c. Briefs.

9 *Witkin Cal. Proc. Appeal* § 970

[§ 970] Briefs.

The reasonable cost to print and reproduce a brief, including any petition for rehearing or review, answer, or reply, is recoverable. (C.R.C., Rule 8.278(d)(1)(E).) (See *Lubetzky v. Friedman* (1988) 199 C.A.3d 1350, 1357, 245 C.R. 589 [cost of reproduction includes cost of typing final draft of brief from which copies are then made by photocopying, as well as preparing brief on word processor].) (On original rule limiting recovery for costs of this item to \$ 100, see *Lane v. Pacific Greyhound Lines* (1947) 30 C.2d 914, 918, 187 P.2d 9; 17 So. Cal. L. Rev. 258.)

In *Wilson v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1959) 176 C.A.2d 320, 1 C.R. 373, respondent county claimed the reasonable cost of its briefs. Appellant challenged the award on the ground that no costs were actually incurred because the briefs were mimeographed by salaried clerical personnel of the County Counsel's office. *Held*, the award was proper. The county incurred the expense in paying its employees the part of their salaries allocable to the work, just as it did in paying for the paper and other materials. (176 C.A.2d 323.)

If an incurred cost is "reasonable," it is recoverable even though the brief could have been printed by some other printer, or reproduced by some other process, at a lesser cost. (*Johnson v. Work. Comp. App. Bd.* (1984) 37 C.3d 235, 243, 207 C.R. 857, 689 P.2d 1127; see *Harmon v. Pacific Tel. & Tel. Co.* (1962) 201 C.A.2d 453, 454, 20 C.R. 118 [standard price for printing is allowable even though cheaper methods of preparation might have been used].)

The costs of printing briefs in the United States Supreme Court are expressly disallowed by a rule of that court; hence, no award may be made for those costs. (See *Citizens Against Rent Control v. Berkeley* (1986) 181 C.A.3d 213, 223, 224, 226 C.R. 265.)

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d. Expenses on Surety Bond.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 971

[§ 971] In General.

(1) *Statutory Development.* It was formerly held that a premium on a surety bond to stay execution, not being a listed item, was not recoverable. (See *Christenson v. Cudahy Packing Co.* (1927) 84 C.A. 237, 239, 257 P. 906.) Former C.C.P. 1035 (now C.C.P. 995.250; see 6 Cal. Proc. (5th), *Provisional Remedies*, §15) made the necessary premium on a surety bond an allowable item. This statute was construed as applicable generally to proceedings at trial and on appeal, and consequently, it was held to have enlarged the scope of former C.R.C., Rule 26(c) (now C.R.C., Rule 8.278(d)). (*Stockton Theatres v. Palermo* (1956) 47 C.2d 469, 476, 304 P.2d 7 [\$ 6,980.49 premium on bond to preserve attachment on appeal].)

(2) *Scope of Recovery.* Courts construed former C.R.C., Rule 26(c) narrowly to authorize recovery of only the premium on a bond, and not fees for letters of credit that allegedly were, in effect, a prerequisite to obtaining the bond. The unfairness of this construction was noted. (See *Geldermann v. Bruner* (1992) 10 C.A.4th 640, 642, 12 C.R.2d 654.) The reasonable cost to procure a surety bond now includes the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary. (C.R.C., Rule 8.278(d)(1)(F).) (On what constitutes "necessity," see *infra*, §972.)

(3) *Deposit in Lieu of Bond.* Because C.C.P. 995.730 (6 Cal. Proc. (5th), *Provisional Remedies*, §44) requires a deposit given in lieu of a bond to be treated the same as a bond, costs associated with making a deposit are treated the same as those associated with posting of a bond. (*Cooper v. Westbrook Torrey Hills, LP* (2000) 81 C.A.4th 1294, 1298, 97 C.R.2d 742.)

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d. Expenses on Surety Bond.

2. Test of Necessity.

9 *Witkin Cal. Proc. Appeal* § 972

[§ 972] Test of Necessity.

The test for determining whether a bond is necessary was considered in *Stockton Theatres v. Palermo* (1958) 51 C.2d 346, 333 P.2d 10. In the previous appeal, the trial judge was directed to determine the issue, and he determined that the bond was unnecessary. Inasmuch as the appeal did not then continue an attachment in force without sureties in double the amount claimed, the trial judge's order was construed as meaning that it was unnecessary because of defendant's financial standing. But the evidence on the hearing revealed that defendant removed money from his California bank accounts, opened accounts in a mentally incompetent brother's name, made unsupported valuations of his other property, and admittedly was trying to protect himself from attachments. *Held*, "it appears to us as a matter of law that the bond procured by plaintiff was necessary within the meaning of" former C.C.P. 1035 (now C.C.P. 995.250). (51 C.2d 351.) (See *Crag Lumber Co. v. Crofoot* (1958) 156 C.A.2d 568, 569, 319 P.2d 668 [affirming trial judge's determination that bond was necessary]; *Combs v. Haddock* (1962) 209 C.A.2d 627, 633, 26 C.R. 252 [reversing trial judge's determination that bond not necessary].)

In *Jewell v. Bank of America* (1990) 220 C.A.3d 934, 269 C.R. 671, after a judgment against it had been reversed, defendant bank sought to recover as costs the premiums paid on its appeal bonds. Plaintiffs opposed recovery on the ground that the bonds were unnecessary within the meaning of C.C.P. 995.250(b), because an alternative method of staying execution was available under 12 U.S.C., §91, precluding execution against national banking associations prior to final judgment. Defendant argued that the bonds were the only expedient means of removing abstracts of judgment that plaintiffs had filed throughout the state and that interfered with defendant's attempt to sell its San Francisco headquarters. Defendants pointed out that it was not until two years after the bonds had been posted that federal decisions established that the prohibition against execution contained in 12 U.S.C., §91 extended to the recording of abstracts of judgment. *Held*, the appeal bond premiums were necessary and hence chargeable to plaintiffs.

(a) Plaintiffs' reasoning implies that a judgment debtor may not recover premiums expended for a bond if, prior to filing the bond, he or she failed to pursue an available or arguably available alternative method of staying enforcement. However, the presence or absence of such an alternative method is not the only factor the trial judge may consider in determining whether appeal bond premiums were "unnecessary" under C.C.P. 995.250(b). (220 C.A.3d 940.)

(b) Here, the trial judge could also consider "the expediency or in expediency to the Bank, as judgment debtor, of the alternative procedure to stay enforcement of judgment; the delay, if any, in obtaining relief from the lien of the judgment, which use of the alternative procedure was reasonably likely to engender; the risk and danger of reasonably foreseeable monetary loss, if any, to the Bank by reason of the use, or attempted use, of the alternative procedure, pending which the recorded abstracts of judgment would continue to interfere with the Bank's ongoing lending operations and remain a cloud on the title to its real property; and other additional expense and interference with its business operations, if any, the Bank would incur by utilization of the alternative procedure." (220 C.A.3d 941.)

(c) There is no authority to support plaintiffs' contention that defendant was required to ask them to voluntarily release the abstracts of judgment before posting the bonds. Once a judgment creditor takes a positive step towards enforcing his judgment, such as recording judgment abstracts, the judgment debtor may pursue his or her remedies to stay enforcement pending appeal without requesting the creditor to undo his or her action. (220 C.A.3d 942.)

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e. Other Expenses.

9 *Witkin Cal. Proc. Appeal* § 973

[§ 973] Other Expenses.

The narrow list of C.R.C., Rule 8.267(c)(1) contains only three additional items (if reasonable):

(1) *Costs of filing*: Filing fees. (C.R.C., Rule 8.278(d)(1)(A).)

(2) *New evidence on appeal*: The cost to produce additional evidence on appeal. (C.R.C., Rule 8.278(d)(1)(C).)

(3) *Service, filing, and transmission*: The costs to notarize, serve, mail, and file the record, briefs, and other papers. (C.R.C., Rule 8.278(d)(1)(D).)

In *Lubetzky v. Friedman* (1988) 199 C.A.3d 1350, 245 C.R. 589, defendants sought recovery of the expense of transmitting two briefs from their attorney's San Francisco office to the office of the Los Angeles Court of Appeal. *Held*, the item was properly allowed. The attorney had personally transmitted the briefs instead of utilizing a less expensive alternative such as express mail; but this did not preclude the award. "The focus is on the necessity of transmission itself, not on the means used, although as noted above the means used were reasonable." (199 C.A.3d 1358.)

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3. Procedure.

a. Award and Entry.

9 Witkin Cal. Proc. Appeal § 974

[§ 974] Award and Entry.

(1) *Entry by Clerk.* In the normal case, the reviewing court's judgment will not mention costs. In that event, if the judgment is unqualifiedly affirmed or if the appeal is dismissed, the clerk must enter on the record and insert in the remittitur a judgment for costs for the respondent. However, if the reviewing court, under its inherent power, renders a judgment that directs the manner in which costs are to be awarded or denied, the clerk must follow those directions in making his or her entries. (C.R.C., Rule 8.278(b)(1).) "If the clerk fails to enter judgment for costs, the court may recall the remittitur for correction on its own motion, or on a party's motion made not later than 30 days after the remittitur issues." (C.R.C., Rule 8.278(b)(2); see *supra*, §847 et seq.)

In *Schwartz v. Schwartz* (1969) 268 C.A.2d 685, 74 C.R. 192, the court stressed the importance of an unambiguous order by the clerk. Two brothers, M and F, were involved in actions involving the dissolution of their partnership. Specifically, M brought an action against F for dissolution of the partnership and for an accounting, and F initiated an action to impose a constructive trust on a certain parcel of real property. The actions were consolidated, but were tried separately, with separate appellate judgments against M. On M's appeal, with F conceding the error in the accounting that had resulted in its being remanded for further proceedings, the judgment for an accounting was reversed with directions to take a new accounting. The judgment in the constructive trust action in favor of F was affirmed. Thus, while F was in a broad sense the victor in both actions, M obtained one reversal and was entitled to costs on it. But the appellate court clerk's order simply read "[p]revailing party to recover costs." In an appeal with multiple parties and more than one prevailing, this is ambiguous, and improperly delegates discretion to the trial judge. The correct procedure is for the clerk to seek clarification from the appellate court, so that a clear direction can be placed in the opinion or remittitur. (268 C.A.2d 690.)

In *Schwartz*, the trial judge reached the correct result; consulting the opinion for interpretation, he properly determined that costs should go to F on his affirmance, but not on his reversal. This apportionment was necessary, even though the transcripts and briefs dealt with both cases. (268 C.A.2d 690.)

(2) *Nature of Award.* The award is a general judgment for "costs." It merely determines that the party is entitled to recover his or her costs, if the party makes proper application and proof of the items thereof in the lower court, after the

remittitur goes down. The appellate court ordinarily does not itself determine or allow any items. "[T]his court has nothing to do with the particular items of costs to which a party may be entitled under a judgment rendered therefor by this court. The effect of our judgment is simply that a party is entitled to costs. What they are, the specific amount which he would be entitled to have fixed or allowed therefor, are matters to be determined by the trial court to which the cause is remanded, or to which the *remittitur* runs. The determination of that court on the subject necessarily constitutes the definite and specific judgment concerning which the general right to recover was declared by this court. There is no provision of law authorizing this court to tax or retax the costs it allows on appeal from a judgment or order of the superior court, either reversed or affirmed. That is a matter solely for consideration in the lower court." (*Bell v. Superior Court* (1906) 150 C. 31, 33, 87 P. 1031.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Procedure.

b. Cost Bill in Trial Court.

1. Requirements.

9 Witkin Cal. Proc. Appeal § 975

[§ 975] Requirements.

A verified memorandum of costs must be served and filed within 40 days after the reviewing court clerk mails notice of the issuance of the remittitur to the party claiming costs. (C.R.C., Rule 8.267(d)(1); see *People v. Hawley* (1932) 119 C.A. 548, 550, 6 P.2d 976 [no requirement that filing precede service]; C.E.B., 2 Civil Appellate Practice 3d, §20.6 et seq.; Rutter Group, 2 Civil Appeals and Writs §14:97 et seq.; 2 Am.Jur. P.P. Forms (2000 ed.), Appeal and Error §868; Judicial Council Form No. MC-013 [Memorandum of Costs on Appeal]; cf. C.R.C., Rule 8.764(d) [appeals in limited civil cases; memorandum must be filed within 30 days after remittitur is filed with trial court].)

The verified memorandum is essential, and the time provision is mandatory, so that failure to follow the procedure results in loss of the right to costs. (*Johnson v. Schimpf* (1928) 91 C.A. 26, 36, 266 P. 597 [memorandum too late, stricken from files]; *Snodgrass v. Snodgrass* (1930) 103 C.A. 412, 414, 284 P. 696 [unverified memorandum should be stricken from files]; see 7 Cal. Proc. (5th), *Judgment*, §139 et seq.; on service by mail and sufficiency of verification, see *Miller v. Cortese* (1955) 136 C.A.2d 47, 48, 288 P.2d 297.)

The court, however, has the usual power under C.C.P. 473 to relieve from delay caused by mistake, inadvertence, or excusable neglect. (See *Ferry v. O'Brien* (1923) 63 C.A. 620, 626, 219 P. 467; *Soda v. Marriott* (1933) 130 C.A. 589, 591, 20 P.2d 758; cf. *Snodgrass v. Snodgrass*, *supra*, 103 C.A. 414 [inadvertence of clerk in filing bill before notarizing was insufficient showing]; 7 Cal. Proc. (5th), *Judgment*, §§140, 141.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.764(d) was repealed in 2008. The filing requirements for limited civil cases are now specified in C.R.C., Rule 8.891(c)(1).



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2. Abandonment of Appeal.

9 Witkin Cal. Proc. Appeal § 976

[§ 976] Abandonment of Appeal.

A special problem regarding the timely filing of a memorandum of costs arises on abandonment of an appeal. This operates as a dismissal, and entitles the respondent to costs incurred up to the time of abandonment. (C.R.C., Rules 8.244(b)(1), 8.278(a)(2), *supra*, §§731, 954.) But, because there is no remittitur after an abandonment, the 40-day period of C.R.C., Rule 8.276(c)(1) (see *supra*, §975) does not apply, and no other statute or rule prescribes the time for filing a memorandum of costs.

In *Wilson v. Harley Davidson Motor Co.* (1977) 67 C.A.3d 678, 136 C.R. 793, defendant served plaintiff with notice of abandonment of his appeal on September 19, and the clerk served a similar notice, under former C.R.C., Rule 19(c), on December 12. Plaintiff filed his memorandum on December 31, more than 3 months after defendant's notice, but within 20 days after the clerk's notice. *Held*, the filing was timely.

(a) In the absence of statute or rule specifying the time, the memorandum may be filed within a reasonable time after notification by the clerk; and 20 days was reasonable under the circumstances. (67 C.A.3d 681.)

(b) Under former C.R.C., Rule 19(c), the clerk must "immediately" notify the adverse party of the filing of the abandonment, but the failure to perform this mandatory duty does not make the memorandum untimely where no prejudice is shown. (67 C.A.3d 681.) (C.R.C., Rule 8.244(b)(2) now requires the clerk to act "promptly.")

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3. Procedure.

c. Motion To Tax.

9 *Witkin Cal. Proc. Appeal* § 977

[§ 977] Motion To Tax.

The adverse party, if dissatisfied, may make the usual motion to tax costs, where the items are considered improper; or he or she may move to strike the memorandum from the files, where the entire claim is invalid because of late filing, improper form, etc. In either case, the motion must be filed within 15 days after service of the cost memorandum. (C.R.C., Rules 8.278(c), 8.764(d), 3.1700(b); see 7 *Cal. Proc.* (5th), *Judgment*, §144; on proof of actual expenditures, and discretion of trial court in determination of necessity, see *Muller v. Reagh* (1959) 170 *C.A.2d* 151, 152, 338 *P.2d* 601.) The resulting orders are appealable as orders after final judgment. (*Monson v. Fischer* (1933) 219 *C.* 290, 291, 26 *P.2d* 6; *Markart v. Zeimer* (1925) 74 *C.A.* 152, 155, 239 *P.* 856; *Citizens Against Rent Control v. Berkeley* (1986) 181 *C.A.3d* 213, 223, 226 *C.R.* 265; see *supra*, §§186, 187.)

Relief from default in making the motion may be granted under *C.C.P.* 473, under the same theory that allows relief from late filing of the memorandum. (*Lane v. Pacific Greyhound Lines* (1947) 30 *C.2d* 914, 916, 187 *P.2d* 9 [4 days late, mistake in calendaring].)

Ramirez v. St. Paul Fire & Marine Ins. Co. (1995) 35 *C.A.4th* 473, 41 *C.R.2d* 416, *supra*, §958, held that the trial court could not, on a motion to tax costs, apportion those costs among the losing parties where the appellate court has simply awarded costs to the prevailing party without further direction. "It has long been settled that an appellate court by its judgment determines the final award of costs on appeal (who shall recover the same), and the trial court determines the specific judgment (what items of costs the entitled party may recover under the general award)." (35 *C.A.4th* 478.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.764(d) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.891(c)(2).

See *Alan S. v. Superior Court* (2009) 172 *C.A.4th* 238, 259, 91 *C.R.3d* 241 [in child custody action, mother's late-filed motion to tax costs in opposition to father's memorandum of costs on appeal was not mere "amendment" of earlier timely motion; thus trial court could not consider late-filed motion when considering whether to reduce father's costs; timely motion objected solely on basis of lack of documentation, but late-filed motion cited trial court rule

regarding allowable costs].



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3. Procedure.

d. Enforcement of Award.

9 *Witkin Cal. Proc. Appeal* § 978

[§ 978] Enforcement of Award.

An award of costs is enforceable as a money judgment. (C.R.C., Rule 8.278(c)(3); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §53 et seq.)

In other words, trial court costs are a mere incident of the main judgment, and not separately enforceable (see 7 *Cal. Proc.* (5th), *Judgment*, §147), but after appeal, there may be a new trial with even a further appeal, and the proceedings may cover a long period of time. Accordingly, the award of costs on appeal, when properly allowed in the trial court, represents an independent judgment, enforceable by any available means. "It is a complete judgment in itself that finds its origin in the order of an appellate or the Supreme Court affirming or reversing a judgment of a lower court. The right to such judgment comes into being when the order of the reviewing court becomes final. The judgment itself is created when the successful party files his cost bill and his costs are taxed." (*Supera v. Moreland Sales Corp.* (1938) 28 C.A. 2d 517, 521, 82 P.2d 963; see *First Nat. Bank of San Pedro v. Stansbury* (1931) 214 C. 190, 192, 5 P.2d 11 ["There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case"]; *Dalzell v. Kelly* (1952) 115 C.A.2d 60, 61, 251 P.2d 343 [cost judgment bears interest from time when amount is fixed by order on motion to tax or lapse of time for such motion].) Indeed, to avoid oppression, the trial court may stay the retrial of a case reversed on appeal until costs are paid. (See *Weile v. Sturtevant* (1917) 176 C. 767, 768, 169 P. 685.)

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B. Attorneys' Fees on Appeal.

1. Right To Recover.

9 Witkin Cal. Proc. Appeal § 979

[§ 979] Right To Recover.

Although *C.C.P. 1033.5* includes attorneys' fees as one of the items allowable as costs under *C.C.P. 1032*, C.R.C., Rule 8.278(d), which defines and limits recoverable costs on appeal (see *supra*, §968 et seq.), states that, unless the court orders otherwise, an award of costs does not include attorneys' fees on appeal. (C.R.C., Rule 8.278(d)(2).) Nevertheless, as in the trial court, attorneys' fees on appeal are recoverable when authorized by statute, contract, or law. (See 7 *Cal. Proc.* (5th), *Judgment*, §149; 5 *Am.Jur.2d* (2007 ed.), *Appellate Review* §860.) And it is not necessary that either a contractual provision or a statute specifically refer to appellate attorneys' fees. In other words, contractual or statutory authorization for the recovery of attorneys' fees includes authorization for recovery of attorneys' fees incurred on appeal. (See *Morcos v. Board of Retirement* (1990) 51 *C.3d* 924, 927, 275 *C.R.* 187, 800 *P.2d* 543 [statutory]; *Security Pacific National Bank v. Adamo* (1983) 142 *C.A.3d* 492, 498, 191 *C.R.* 134 [contractual].)

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B. Attorneys' Fees on Appeal.

2. Jurisdiction of Reviewing Court.

9 *Witkin Cal. Proc. Appeal* § 980

[§ 980] Jurisdiction of Reviewing Court.

The reviewing court has jurisdiction to determine both entitlement to attorneys' fees on appeal and the amount. Hence, it may do any of the following:

(1) Make both determinations. (See *Roberts v. Brian* (1973) 30 C.A.3d 427, 431, 106 C.R. 360.)

(2) Determine entitlement, but remand the cause to the trial court to fix the amount. (See *Security Pacific National Bank v. Adamo* (1983) 142 C.A.3d 492, 498, 191 C.R. 134 [deemed the better practice]; *Milman v. Shukhat* (1994) 22 C.A.4th 538, 546, 27 C.R.2d 526 [same].)

(3) Direct the trial court to make both determinations. (See *People v. Mitchell Bros.' Santa Ana Theater* (1985) 165 C.A.3d 378, 388, 211 C.R. 501; *Citizens Assn. for Sensible Dev. of Bishop Area v. Inyo* (1985) 172 C.A.3d 151, 176, 217 C.R. 893.)

(4) Expressly direct the trial court not to award attorneys' fees. (See *Encinitas Plaza Real v. Knight* (1989) 209 C.A.3d 996, 1003, 257 C.R. 646.)

In addition, any determination of the reviewing court regarding entitlement to attorneys' fees on appeal is the law of the case, and, as such, is binding on the trial court. In *Benson v. Greitzer* (1990) 220 C.A.3d 11, 269 C.R. 201, the appellate court's finding that the appeal was not frivolous under *In re Marriage of Flaherty* (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, *infra*, §989, precluded the trial court from awarding appellate attorneys' fees under 42 U.S.C., §1988, which allows recovery by the defendant only if the plaintiff's action was frivolous or vexatious. In this context, "frivolous appeal" has the same meaning under *Flaherty* and the federal statute. (220 C.A.3d 15.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Amount fixed by trial court on remand:* See *Premier Med. Management Systems v. California Ins. Guarantee Assn.* (2008) 163 C.A.4th 550, 556, 77 C.R.3d 695 [fees for appeal from order on anti-SLAPP motion to strike].



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3. Jurisdiction of Trial Court.

9 *Witkin Cal. Proc. Appeal* § 981

[§ 981] Jurisdiction of Trial Court.

American City Bank v. Zetlen (1969) 272 C.A.2d 65, 67, 76 C.R. 898, held that, without an order of the appellate court directing the trial court to hear an application for fees, the trial court has no jurisdiction to entertain the motion. The *Zetlen* holding was confined to its facts, i.e., attorneys' fees authorized solely by contract, in *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 C.A.3d 59, 65, 112 C.R. 910. Where the right is statutory, the trial judge may award attorneys' fees notwithstanding a lack of direction in the remittitur. (See *MST Farms v. C.G.* 1464 (1988) 204 C.A.3d 304, 308, 251 C.R. 72 [under C.C. 1717, attorneys' fees are statutorily recoverable as costs; hence, trial court has jurisdiction to award, as element of costs, attorneys' fees incurred by prevailing party in successfully defending or prosecuting appeal]; *M. C. & D. Capital Corp. v. Gilmaker* (1988) 204 C.A.3d 671, 677, 251 C.R. 178; C.E.B., 2 Civil Appellate Practice 3d, §§20.16, 20.18; C.E.B., Attorney Fee Awards 2d, Chap. 15; Rutter Group, 2 Civil Appeals and Writs §§14:114, 14:114a.)

In 1990, *C.C.P.* 1033.5 was amended to provide that attorneys' fees, whether authorized by contract, statute, or law, are statutory costs. (See 7 *Cal. Proc.* (5th), *Judgment*, §150.) Hence, under the reasoning of the preceding cases, it appears that the trial court now has jurisdiction to award attorneys' fees on appeal in the absence of a direction by the appellate court in all situations, i.e., regardless of whether the fees are authorized by statute or contract. (See *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 C.A.4th 260, 263, 55 C.R.2d 640.)

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B. Attorneys' Fees on Appeal.

4. Procedure for Request.

9 *Witkin Cal. Proc. Appeal* § 982

[§ 982] Procedure for Request.

(1) *Scope.* C.R.C., Rule 3.1702 establishes the procedure for claiming attorneys' fees on appeal. Except as otherwise provided by statute, it applies both to claims for statutory attorneys' fees and claims for contractual attorneys' fees. Furthermore, it applies when the court determines entitlement to the fees, the amount of the fees, or both, regardless of whether the court makes that determination because the statute or contract refers to reasonable fees, because it requires a determination of the prevailing party, or for other reasons. (C.R.C., Rule 3.1702(a).)

(2) *Attorneys' Fees on Appeal.* A notice of motion requesting attorneys' fees on appeal, other than attorneys' fees on an appeal before the rendition of judgment in the trial court (see *infra*, this section), must be served and filed within the time for serving and filing the memorandum of costs under C.R.C., Rule 8.278(c)(1), i.e., within 40 days after the clerk has mailed the party notice of the remittitur (see *supra*, §975). (C.R.C., Rule 3.1702(c)(1).) (See *In re Marriage of Freeman* (2005) 132 C.A.4th 1, 5, 33 C.R.3d 237 [40-day period of former rule governed postjudgment application for imposition of sanction under *Family C. 271* (11 *Summary* (10th), *Husband and Wife*, §10), permitting fee sanction when party's conduct frustrated policy of settlement and reduction of litigation costs].)

The parties may, by stipulation filed before expiration of the time allowed for filing the notice of motion, extend the allowable time up to an additional 60 days. (C.R.C., Rule 3.1702(c)(2).) Moreover, in the absence of a stipulation or for a longer period than allowed by stipulation, the trial judge may, for good cause, extend the time for filing a motion for attorneys' fees. (C.R.C., Rule 3.1702(d).)

(3) *Attorneys' Fees Before Trial Court Judgment.* A notice of motion requesting attorneys' fees on an appeal before the rendition of judgment in the trial court must be served and filed within the time for filing a notice of appeal under C.R.C., Rules 8.104 and 8.108 (see *supra*, §575 et seq.). (C.R.C., Rule 3.1702(b)(1).)

The parties may, by stipulation filed before the time allowed expires, extend the time for filing the motion (a) until 60 days after the expiration of the time for filing a notice of appeal, or (b) if a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under C.R.C., Rule 8.278(c). (C.R.C., Rule 3.1702(b)(2).) Moreover, in the absence of a stipulation or for a longer period than allowed by stipulation, the trial judge may, for good cause, extend the time for filing a motion for attorneys' fees. (C.R.C., Rule 3.1702(d).)

In *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 C.A.4th 1077, 120 C.R.2d 273, plaintiff lost in the trial court, but prevailed on appeal. On remand, plaintiff moved in the trial court for an award of the attorneys' fees incurred in the previous appeal, but the trial judge denied the request as untimely. *Held*, reversed. The trial judge based his ruling on former C.R.C., Rule 870.2(c)(1) (now C.R.C., Rule 3.1702(c)(1)), but that rule does not apply to fees requested under former C.R.C., Rule 870.2(b) (now C.R.C., Rule 3.1702(b)), which applies to fees incurred on appeal before rendition of judgment in the trial court. Here, plaintiff's motion was actually premature, but because no one was misled or prejudiced by the premature filing, the trial judge should have found the motion to be timely. (98 C.A.4th 1083.)

(4) *Effect of Award of Costs*. Unless the court orders otherwise, an award of costs does not include attorneys' fees on appeal, but neither does the award preclude a party from seeking them under C.R.C., Rule 3.1702. (C.R.C., Rule 8.278(d)(2).) (See *Butler-Rupp v. Lourdeaux* (2007) 154 C.A.4th 918, 922, 65 C.R.3d 242 [appellate court rejected claim that, because appellate court had not awarded appellate costs to respondents in prior appeal, trial court had no jurisdiction to award appellate attorneys' fees to respondents; language in rule that award of costs on appeal does not include attorneys' fees on appeal was not intended to make award of attorneys' fees dependent on award of costs].)

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XXIV. SANCTIONS FOR FRIVOLOUS OR DILATORY APPEAL

A. In General.

1. Nature of Power.

9 *Witkin Cal. Proc. Appeal* § 983

[§ 983] Nature of Power.

(1) *In General*. "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (C.C.P. 907.) This is the approved practice, and, except for the expanded use of memorandum opinions (see *supra*, §788 et seq.), is the least burdensome on the reviewing court. The court is not called on to engage in any extra preliminary labor, but, after its decision is made, it may properly determine that the appeal should never have been taken and add a penalty to the costs. (See *Rutter Group*, 2 Civil Appeals and Writs §11:95 et seq.; 54 *Cal. L. Rev* 1793; 43 *Harv. L. Rev* 113; 20 *U.S.F. L. Rev* 13 [Sanctions on Appeal: A Survey and a Proposal for Computation Guidelines]; on the rarely used power to dismiss frivolous appeals, see *supra*, §§747, 748.)

In *Winter v. Rice* (1986) 176 C.A.3d 679, 222 C.R. 340, an appeal from a nonappealable order was dismissed (see *supra*, §572), and respondent requested that a penalty be imposed. The court, rejecting the request, pointed out that in dismissing the appeal, it did not reach the issues whether the appeal was (a) prosecuted for an improper motive, or (b) totally lacking in merit. There was, therefore, no basis for the imposition of sanctions. (176 C.A.3d 683.) (See *In re Marriage of Mason* (1996) 46 C.A.4th 1025, 1028, 54 C.R.2d 263 [defendant's request for sanctions for frivolous appeal was treated as request for attorneys' fees; this is proper where party engages in conduct that frustrates settlement (see *supra*, §979)]; *Evans v. Centerstone Dev. Co.* (2005) 134 C.A.4th 151, 165, 35 C.R.3d 745 [in appeal from confirmation of arbitration award, plaintiffs' unreasonable violations of rules of appellate procedure warranted sanctions]; cf. *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited* (2005) 134 C.A.4th 1477, 1482, 36 C.R.3d 754 [where appeal was untimely partially due to trial court's failure to realize that entry of judgment rendered extension provisions of former C.R.C., Rule 3(d) (now C.R.C., Rule 8.108(e); see *supra*, §§600, 603) ineffective, sanctions were inappropriate].)

C.R.C., Rules 8.276(a) and 8.764(e) authorize the imposition of penalties on attorneys as well as parties. (See *infra*, §987; on power of reviewing court to impose costs in extraordinary proceedings, see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §213.) Under C.R.C., Rule 8.276, the Supreme Court may impose sanctions on a party or an attorney for committing an unreasonable violation of the Appellate Rules. (C.R.C., Rule 8.544.)

Although the reviewing court usually both imposes the sanction and sets the amount, it may instead affirm the

judgment and impose the sanction, but direct the trial judge on remittitur to set the amount. (See *Otworth v. Southern Pac. Trans. Co.* (1985) 166 C.A.3d 452, 462, 212 C.R. 743.)

(2) *Two Grounds for Imposing Sanctions.* Although the term "frivolous" is typically used to describe any appeal for which a sanction is imposed, the statute and rules actually describe two separate grounds justifying the imposition of sanctions: "frivolousness," and "delay." The "frivolousness" ground refers to the merits of the appeal, while the "delay" ground refers to the appellant's motive in taking the appeal. (*In re Marriage of Flaherty* (1982) 31 C.3d 637, 639, 183 C.R. 508, 646 P.2d 179, *infra*, §989; see *Westphal v. Wal-Mart Stores* (1998) 68 C.A.4th 1071, 1081, 81 C.R.2d 46 [slip-and-fall case; appeal was indisputably without merit where there were no unique issues, no facts not amenable to easy analysis in terms of existing law, and no reasoned analysis by defendant for extension of existing law]; *Oriola v. Thaler* (2000) 84 C.A.4th 397, 413, 100 C.R.2d 822 [where appeal asked appellate court to resolve novel legal question, i.e., meaning of "dating relationship," and not just to evaluate sufficiency of evidence, appeal was not "frivolous" even though it was found to have no merit]; *DeRose v. Heurlin* (2002) 100 C.A.4th 158, 179, 122 C.R.2d 630 [appeal in attorneys' fees dispute was frivolous where it was taken for wrong motive, i.e., to delay effect of adverse judgment and to cover up both mishandling of former client's trust funds and dishonesty before trial court; question whether appeal had no merit was not reached].)

(3) *Amount of Sanctions.* When deciding the amount of sanctions, courts may consider (a) the amount of respondent's appellate attorneys' fees; (b) the amount of the judgment against appellant; (c) the degree of objective frivolousness and delay; (d) the need for discouragement of like conduct in the future. (*Keitel v. Heubel* (2002) 103 C.A.4th 324, 342, 126 C.R.2d 763; see *Harris v. Sandro* (2002) 96 C.A.4th 1310, 1315, 117 C.R.2d 910 [amount of attorneys' fees incurred in opposing appeal, together with recovery of costs on appeal, is appropriate measure of amount of sanction].)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.764(e) was repealed in 2008. Sanctions in the appellate division are now discussed in C.R.C., Rule 8.891(e).



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A. In General.

2. Partially Frivolous Appeal.

9 *Witkin Cal. Proc. Appeal* § 984

[§ 984] Partially Frivolous Appeal.

In *Maple Properties v. Harris* (1984) 158 C.A.3d 997, 205 C.R. 532, the trial judge concluded that a number of libel counts in the complaint were wholly without merit, in light of *Okun v. Superior Court* (1981) 29 C.3d 442, 175 C.R. 157, 629 P.2d 1369, in which the Supreme Court had issued a writ of mandamus ordering a demurrer sustained without leave to amend. But because the Supreme Court writ had permitted amendment of a cause of action for slander, plaintiff filed an amended complaint alleging only causes of action for slander and conspiracy to commit slander. The trial judge sustained defendants' demurrer to the amended complaint, denied further leave to amend, and dismissed the entire action. Plaintiff appealed, contending that the existence of a viable cause of action precluded a finding that the appeal was frivolous. *Held*, judgment for defendants affirmed, with penalties of \$ 20,000 imposed on plaintiff's counsel.

(a) The appeal of the libel claims was frivolous under the objective standard of *In re Marriage of Flaherty* (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, *infra*, §989, i.e., no reasonable person would conclude that the appeal had any merit after the Supreme Court decision was rendered. (158 C.A.3d 1008.) It was therefore unnecessary to determine whether it was "subjectively" frivolous. (158 C.A.3d 1009.)

(b) The appeal was not entirely frivolous because it challenged the trial judge's dismissal of the slander and other causes, but it was partially frivolous in its attempt to support the libel claims. Sanctions are, however, appropriate "if the frivolous claims are a *significant* and *material* part of the appeal." And here, the libel claims were not only significant and material but were severable and distinct from the other causes of action. (158 C.A.3d 1010.)

(c) "In determining the amount of sanctions, we have considered the following factors: the nature and extent of the libel claims on appeal and the conclusive holding in *Okun* ... ; the protracted length of this litigation and the delay in the resolution of the appeal ... ; the chilling effect that appellant's actions have had on the respondents' first amendment rights and the electoral process, the relative costs of legal counsel for respondents in addressing the frivolous claims on appeal ... ; the undue burden on the legal system and consumption of this court's time ... ; and the need to deter this type of conduct in the future." (158 C.A.3d 1011.) (See *People v. Outdoor Media Group* (1993) 13 C.A.4th 1067, 1080, 17 C.R.2d 19, *infra*, §999 [sanctions were properly imposed for frivolous appeal from injunction compelling removal of billboards, even though appellant raised appealable issue whether permit to erect billboards was wrongfully denied].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

3. Frivolous Continuation of Appeal.

9 Witkin Cal. Proc. Appeal § 985

[§ 985] Frivolous Continuation of Appeal.

In *Hale v. Laden* (1986) 178 C.A.3d 668, 224 C.R. 182, a malpractice action against defendant physician and his associate, defendant filed a cross-complaint against the associate for equitable indemnification. On determining that the associate had made a good faith settlement with plaintiff and thus, under C.C.P. 877.6(c), could not be held liable for indemnification, the trial judge dismissed the cross-complaint. Defendant appealed from both the determination of good faith and the dismissal of his cross-complaint, but abandoned the former appeal, which was then dismissed. However, defendant continued to pursue the appeal from the order dismissing his cross-complaint. *Held*, a penalty of \$ 5,000 on defendant's attorneys was properly imposed.

(a) Although it was arguable that the appeal from the dismissal of the cross-complaint was properly begun, it became totally without merit when the related appeal on the good faith determination was dismissed. At that point, the pending appeal became frivolous and should have been promptly dismissed. (178 C.A.3d 675.)

(b) Defendant's attorneys "should have been particularly sensitive to the subject of frivolous appeals," because in a previous case "the same two counsel were subjected to sanctions for prosecuting an appeal long after the underlying issue became moot." (178 C.A.3d 675.) (See *Wax v. Infante* (1983) 145 C.A.3d 1029, 1031, 194 C.R. 14 [failure to dismiss appeal that had become moot]; *Cohen v. General Motors Corp.* (1992) 2 C.A.4th 893, 896, 3 C.R.2d 619 [following *Hale*].)

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A. In General.

4. Bankruptcy Is No Bar to Sanctions.

9 Witkin Cal. Proc. Appeal § 986

[§ 986] Bankruptcy Is No Bar to Sanctions.

In *Papadakis v. Zelis* (1991) 230 C.A.3d 1385, 282 C.R. 18, defendant Z, an attorney litigant appearing pro se, entered into a settlement agreement, culminating in a stipulated judgment in favor of plaintiffs, which called for payment by defendant of \$ 120,000. Defendant failed to pay, and the trial judge entered judgment against him as provided by the stipulation. Defendant appealed. The Court of Appeal dismissed the appeal from this judgment by consent (see supra, §43), and issued an order to show cause stating that it was considering sanctions and would allow defendant to file pleadings and present argument on this issue (see infra, §994). Defendant replied with a letter stating that he had filed a bankruptcy petition and that this precluded imposition of sanctions. *Held*, sanctions imposed.

(a) The Bankruptcy Act allows for an exception to the automatic stay for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The imposition of sanctions on an attorney comes within this exception. "It was never intended that the automatic stay provision would become an 'escape mechanism' ... from the enforcement by the courts of their inherent regulatory power over attorneys' abuses of the court system." (230 C.A.3d 1389.)

(b) Sanctions are proper, and are imposed (1) in the sum of \$ 5,498.03 as compensation for respondents' attorneys' fees and costs; and (2) in the sum of \$ 4,000, payable to the clerk of the court, for the cost to the taxpayers of processing the frivolous appeal. "We will also request that the Office of the Attorney General take whatever further actions may be necessary to defend the taxpayers' interests in any bankruptcy proceedings." (230 C.A.3d 1390.) (See *Keitel v. Heubel* (2002) 103 C.A.4th 324, 332, 126 C.R.2d 763 [court's regulatory power, which is expressly excepted from reach of automatic stay arising in bankruptcy cases, includes authority to impose sanctions to deter abuses; relying on *Papadakis*].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Detriment and Benefit.

1. Persons Sanctioned.

9 *Witkin Cal. Proc. Appeal* § 987

[§ 987] Persons Sanctioned.

The sanctions, including the award or denial of costs, may be imposed "on a party or an attorney." (C.R.C., Rule 8.276(a).) Thus, a sanction may be imposed on a party alone (see, e.g., *Otworth v. Southern Pac. Trans. Co.* (1985) 166 C.A.3d 452, 461, 212 C.R. 743); on the attorney alone (see, e.g., *Cohen v. General Motors Corp.* (1992) 2 C.A.4th 893, 897, 3 C.R.2d 619); or on both party and attorney (see, e.g., *Portola Hills Community Assn. v. James* (1992) 4 C.A.4th 289, 294, 5 C.R.2d 580; *Pierotti v. Torian* (2000) 81 C.A.4th 17, 28, 96 C.R.2d 553).

For the purpose of imposing sanctions, a county is treated the same as any other party. (*Bell Gardens v. Los Angeles* (1991) 231 C.A.3d 1563, 1572, 283 C.R. 91, *infra*, §988.) And where a corporate alter ego is formed to protect the individual from the consequences of litigation and is used to circumvent statutes generally applicable to litigants, sanctions may be imposed on both the individual and the corporation. (See *Say & Say v. Castellano* (1994) 22 C.A.4th 88, 94, 27 C.R.2d 270.)

In the first decade following the adoption of the rules, sanctions were rarely imposed on attorneys, and the following remarks in *Vickter v. Pan Pac. Sales Corp.* (1952) 108 C.A.2d 601, 239 P.2d 463, may explain why: "While a penalty may be imposed either upon the party or his attorney, it will usually be unknown to the court whether the appeal was inspired by insincere or negligent advice given by the attorney or the insistence of a stubborn client. Therefore, the penalty should usually be imposed upon the party, and the matter of responsibility be left to private adjustment." (108 C.A.2d 604.)

In later years, the appellate courts, emphasizing professional responsibility, have been less inclined to give the attorney the benefit of the doubt. This attitude is reflected by the following statement in *Cosenza v. Kramer* (1984) 152 C.A.3d 1100, 200 C.R. 18: "An attorney in a civil case is not a hired gun required to carry out every direction given by the client. ... As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. ... Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client." (152 C.A.3d 1103.)

In re Marriage of Schnabel (1994) 30 C.A.4th 747, 36 C.R.2d 682, involved a protracted marital dissolution proceeding in which appellate courts had already written several opinions. The trial court ordered increased pendente lite spousal support and attorneys' fees for the wife. The husband appealed, and sanctions were imposed on both the husband and his attorney for filing a frivolous appeal.

(a) *Frivolousness of appeal*. An appeal is frivolous either when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit. Under either standard, the present appeal is frivolous. The support order appealed from increased the husband's payment only about \$ 150 a month from an amount to which he had previously stipulated, and this increase did not warrant the expenditure necessary to appeal. As for the attorney's fee order, the husband rehashed evidentiary findings and cited little, if any, support for his arguments. Given the past history of the matter and a review of the record, it must be concluded that the appeal is devoid of merit and is brought to harass and delay. (30 C.A.4th 754.)

(b) *Who may be sanctioned*. Sanctions may be imposed against the litigant and the lawyer. Here, the conduct of both merits sanctions. (30 C.A.4th 755.) Under *B. & P.C. 6068(c)*, it is an attorney's duty "[t]o counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just." Indeed, sanctions may be assessed solely against a lawyer who, because the appeal is so totally lacking in merit, has a professional obligation not to pursue it. Here, however, the appellant, having initiated the appeal and pursued it, cannot put all of the blame on his counsel. Moreover, the record amply supports a finding that the appellant benefited from the delay. (30 C.A.4th 756.)

As seen from the foregoing cases, it is now commonplace for sanctions to be imposed on attorneys, either individually or in conjunction with their clients. (See, e.g., *Stafford v. Russell* (1954) 128 C.A.2d 794, 797, 276 P.2d 41; *Clewett v. Clewett* (1955) 136 C.A.2d 913, 915, 289 P.2d 512; *Howard v. Howard* (1956) 141 C.A.2d 233, 242, 296 P.2d 592, *infra*, §996; *Ames v. Ames* (1959) 168 C.A.2d 39, 41, 335 P.2d 135; *Babb v. Weemer* (1964) 225 C.A.2d 546, 553, 37 C.R. 533; *Schulz v. Wulfing* (1967) 251 C.A.2d 776, 779, 60 C.R. 53; *In re Marriage of Millet* (1974) 41 C.A.3d 729, 732, 116 C.R. 390; *In re Marriage of Milch* (1975) 47 C.A.3d 666, 671, 120 C.R. 901; *Moore v. El Camino Hosp. Dist.* (1978) 78 C.A.3d 661, 664, 144 C.R. 314; *Conservatorship of Gollock* (1982) 130 C.A.3d 271, 274, 181 C.R. 547; *Hummel v. First Nat. Bank* (1987) 191 C.A.3d 489, 496, 236 C.R. 449; *Finnie v. Tiburon* (1988) 199 C.A.3d 1, 16, 244 C.R. 581, *infra*, §988; *Kurokawa v. Blum* (1988) 199 C.A.3d 976, 993, 996, 245 C.R. 463; *Young v. Rosenthal* (1989) 212 C.A.3d 96, 133, 260 C.R. 369, *infra*, §988; *Summers v. Cathedral City* (1990) 225 C.A.3d 1047, 1080, 275 C.R. 594; *Collisson & Kaplan v. Hartunian* (1994) 21 C.A.4th 1611, 1621, 26 C.R.2d 786; *Say & Say v. Castellano* (1994) 22 C.A.4th 88, 93, 95, 27 C.R.2d 270; *Simonian v. Patterson* (1994) 27 C.A.4th 773, 785, 32 C.R.2d 722.)

The term "party" does not include a plaintiff who files an allegedly frivolous reply brief. (See *CPI Builders v. Impco Technologies* (2001) 94 C.A.4th 1167, 1174, 114 C.R.2d 851 [appellant could not obtain sanctions against respondent for filing respondent brief allegedly devoid of supporting authority or argument; that appellant viewed respondent's brief as flimsy meant that its burden should be easier].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Campagnone v. Enjoyable Pools & Spas Service & Repairs* (2008) 163 C.A.4th 566, 570, 77 C.R.3d 551 [for purposes of local court rule permitting monetary sanctions for failure to comply with local rules regarding appellate mediation, insurer is considered party to mediation and thus may be ordered to pay sanctions for its unauthorized failure to have representative attend mediation].



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B. Detriment and Benefit.

2. Persons Compensated.

9 *Witkin Cal. Proc. Appeal* § 988

[§ 988] Persons Compensated.

A trend reflected in the more recent cases is the recognition that the respondent is not the only party harmed by a frivolous appeal. In *Finnie v. Tiburon* (1988) 199 C.A.3d 1, 244 C.R. 581, the trial court imposed sanctions on plaintiffs and their counsel for a frivolous action, and the appellate court found plaintiffs' appeal equally without merit: "This is clearly a case in which from its commencement any reasonable lawyer would have said, and this lawyer should have said, 'No.' " (199 C.A.3d 17.) The court then imposed two sanctions on the plaintiffs' attorney:

(a) For defendant's costs and attorneys' fees in defending against the appeal, \$ 14,000, to be paid to defendant. (199 C.A.3d 17.)

(b) For the cost to the taxpayers in processing the appeal, the cost of an average civil appeal, \$ 2,324, to be paid to the clerk of the court. The court explains this item by pointing out that the respondent is not the only person damaged when an appellant pursues a frivolous claim. "Other appellate parties, many of whom wait years for a resolution of bona fide disputes, are prejudiced by the useless diversion of this court's attention. ... In the same vein, the appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources." (199 C.A.3d 17.)

Young v. Rosenthal (1989) 212 C.A.3d 96, 260 C.R. 369, followed the example of *Finnie v. Tiburon* in imposing sanctions to compensate the state for its expenses in processing five frivolous appeals. In *Finnie*, the court estimated that the cost of processing an average civil appeal in its district was \$ 2,324, while the *Young* court determined that the cost of an average appeal was \$ 3,995. But this appeal, with a voluminous record and multiple issues to be resolved, imposed a substantially greater burden. The court determined that the total cost of the appeal was \$ 25,000, of which \$ 20,000 was assignable to defendant's appeals. Accordingly, he was directed to pay \$ 20,000 to the clerk of the court. (212 C.A.3d 136, 137.)

In *Bell Gardens v. Los Angeles* (1991) 231 C.A.3d 1563, 283 C.R. 91, defendant county instituted new litigation raising the same issue that had been conclusively determined against it in previous litigation. The trial judge granted plaintiff's motion for summary judgment and defendant appealed. *Held*, judgment affirmed, with sanctions against the county.

(a) The county's appeal was brought in bad faith in order to collaterally attack the prior determination of another division of the Court of Appeal, and "any reasonable attorney would agree that the county's appeal is totally without merit." (231 C.A.3d 1571.) "We also conclude this appeal was brought for the improper purposes of harassment and delay. ... Repeated litigation of matters previously determined by final judgment constitutes harassment and should be penalized." (231 C.A.3d 1572, quoting *Weber v. Willard* (1989) 207 C.A.3d 1006, 255 C.R. 165, *infra*, §997.)

(b) The appropriate measure of sanctions should be based in part on the respondents' costs and attorneys' fees paid to several law firms, amounting to \$ 34,164.62, \$ 45,049.12, and \$ 56,051.62. (231 C.A.3d 1573.)

(c) "Because the facts of this case are particularly egregious, we further determine that an award of additional sanctions is proper." (231 C.A.3d 1573.) These are required to reimburse the taxpayers victimized by the litigation, and to deter future frivolous litigation by the county. The cost to the taxpayers to process an average civil appeal has been estimated at \$ 3,995; but the appellate court is not limited to reimbursing costs. "We believe that the outrageous nature of this case warrants the imposition of a far greater penalty than \$ 3,995 in order to deter future conduct of this nature. We are particularly troubled by the county's unbridled abuse of its police power to circumvent the authority of the judicial system, and thus feel compelled to impose a substantial amount. On the other hand, we also feel compelled by the county's current budgetary constraints to impose far less than we otherwise would deem appropriate. After weighing these factors, we have decided to order the county to pay the sum of \$ 25,000 to the clerk of this court as additional sanctions." (231 C.A.3d 1574.)

A number of other cases are illustrative. (See *Bach v. Butte* (1989) 215 C.A.3d 294, 312, 263 C.R. 565; *Bank of California v. Varakin* (1990) 216 C.A.3d 1630, 1638, 1639, 1640, 265 C.R. 666; *Summers v. Cathedral City* (1990) 225 C.A.3d 1047, 1079, 275 C.R. 594; *Cohen v. General Motors Corp.* (1992) 2 C.A.4th 893, 897, 3 C.R.2d 619 [sanctions payable to both respondent and court clerk]; *Papadakis v. Zelis* (1992) 8 C.A.4th 1146, 1150, 11 C.R.2d 411, *supra*, §986; *People v. Outdoor Media Group* (1993) 13 C.A.4th 1067, 1081, 17 C.R.2d 19, *infra*, §999; *Collisson & Kaplan v. Hartunian* (1994) 21 C.A.4th 1611, 1621, 26 C.R.2d 786 [\$ 10,000 sanction payable to general fund]; *Say & Say v. Castellano* (1994) 22 C.A.4th 88, 95, 27 C.R.2d 270 [\$ 150,000 total sanction; \$ 144,000 payable to general fund]; *Simonian v. Patterson* (1994) 27 C.A.4th 773, 785, 32 C.R.2d 722 [\$ 50,000 total sanction, \$ 4,000 payable to clerk of appellate court]; *Estate of Gilkison* (1998) 65 C.A.4th 1443, 1450, 77 C.R.2d 463; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1431, 6 C.R.3d 122.)

On due process grounds, a dissenting justice in the case of *In re Marriage of Schnabel* (1994) 30 C.A.4th 747, 36 C.R.2d 682, *supra*, §987, criticized the practice of ordering sanctions payable to the court. "Due process entails adjudication by a neutral decisionmaker who, by definition, does not benefit from the decision. Obviously the court benefits at least incrementally from the determination that sanctions are warranted. That does not seem very neutral to me. Since we are the appellate court, there is also no right of appeal. How is this for due process: we announce to the parties that we are thinking that sanctions are appropriate, and then, after we decide they are, award them to ourselves! While ... plenty of opinions impliedly countenance the payment of sanctions to a court, ... the Supreme Court has [never] squarely confronted the issue. It may wish to do so sometime in the future." (30 C.A.4th 756.) (On due process generally in imposing sanctions, see *infra*, §993.)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Gong & Kwong* (2008) 163 C.A.4th 510, 520, 77 C.R.3d 540 [sanctions were payable to court clerk to compensate government for its expense in processing, reviewing, and deciding frivolous appeal].



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C. Standards for Determining Frivolousness.

1. Objective and Subjective Standards.

9 Witkin Cal. Proc. Appeal § 989

[§ 989] Objective and Subjective Standards.

In re Marriage of Flaherty (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, involved an appeal by a husband from a judgment in a dissolution proceeding, in which he challenged (a) the order that gave him child custody but denied his request for child support from the wife, and (b) the order dividing the transportation costs incurred by the child during visits with the wife. The Court of Appeal termed the appeal "utterly hopeless," imposed a \$ 500 penalty on the husband's attorney, and certified the opinion for publication. In a petition for hearing in the Supreme Court, the attorney pointed out that (a) he had participated in an appellate settlement conference and had received no warning of such a possible sanction; and (b) he had agreed to accept the result of the settlement conference and had waived oral argument, but respondent rejected the result. The Supreme Court granted a hearing noting that, "for future guidance, this opinion will examine the superseded penalty and the procedure by which it was imposed, as well as the merits of the appeal." (*31 C.3d 642.*)

(a) Appellate courts have imposed sanctions on attorneys for prosecution of frivolous appeals, but the statute (*C.C.P. 907*), the rule (former C.R.C., Rule 26(a); now C.R.C., Rule 8.276(a)), and the published opinions have not provided any clear definition of the concept of "frivolous." (*31 C.3d 646, 647*, quoting the text.) This lack of definition presents a problem both for attorneys and the administration of justice. Counsel face the danger of being trapped between their obligation to clients to diligently pursue any possibly meritorious claim, and their obligation to the judicial system to refrain from prosecuting frivolous claims. (*31 C.3d 647.*) But the practice of penalizing frivolous appeals reflects a fear that irresponsible litigants may abuse their right of access to the judicial system. (*31 C.3d 648.*)

(b) "The difficulty is in striking a balance that will ensure both that indefensible conduct does not occur and that attorneys are not deterred from the vigorous assertion of clients' rights." (*31 C.3d 648.*) California courts have not attempted to implement a uniform standard, but if such a standard "is surrounded by procedural protections ... , it can serve the important purpose of penalizing the most egregious conduct without deterring valid appellate claims." (*31 C.3d 649.*)

(c) The cases applying standards fall into two general categories: (1) The subjective standard looks to the motives of the appellant and his or her counsel; e.g., penalizing appellants where the only purpose of the appeal was delay. (2) The objective standard looks at the merits of the appeal from a reasonable person's perspective; e.g., finding an appeal

frivolous where no reasonable person would anticipate success. The two standards are often used together, with one providing evidence of the other; e.g., the total lack of merit of an appeal is viewed as evidence that the appellant must have intended it only for delay. (31 C.3d 649.)

(d) Both standards are relevant to the determination. "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive--to harass the respondent or delay the effect of an adverse judgment--or when it indisputably has no merit--when any reasonable attorney would agree that the appeal is totally and completely without merit." (31 C.3d 650.) But any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel may present issues that are arguably correct, even if it is extremely unlikely that they will win. "An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (31 C.3d 650.) Hence, the penalty should be used against attorneys "most sparingly to deter only the most egregious conduct." (31 C.3d 651; on due process requirements for the imposition of penalties, see *infra*, §993.)

Flaherty specifically involved sanctions imposed against an attorney. However, its analysis has been applied in all cases involving sanctions for frivolous appeals, regardless of the person sanctioned. (See *infra*, §996 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Airlines Reporting Corp. v. Renda* (2009) 177 C.A.4th 14, 22, 99 C.R.3d 66 [judgment creditor's appeal of vacation of registration of Virginia judgment was not frivolous; it was arguable that 30-day time limit under Sister State Money-Judgments Act for challenge to judgment in excess of jurisdiction applied to motion to vacate registration of judgment on ground that judgment was void for lack of personal jurisdiction].



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C. Standards for Determining Frivolousness.

2. Standards Applicable to Pro. Per. Appellants.

9 *Witkin Cal. Proc. Appeal* § 990

[§ 990] Standards Applicable to Pro. Per. Appellants.

In determining whether an appeal is frivolous, should the reviewing court apply the same standards to pro. per. appellants as it does to represented appellants? *Kabbe v. Miller* (1990) 226 C.A.3d 93, 275 C.R. 893, answered this question in the negative. Although the appeal was obviously lacking in merit, the court denied respondent's request for sanctions. The majority opinion (two justices) explained the reasons: "We recognize a litigant appearing in propria persona is generally held to the same restrictive rules and procedures as an attorney. ... However, we have found no case imposing sanctions on a propria persona appellant solely on the ground the appeal lacked merit. In each case the court has found some impropriety in addition to lack of merit to support the imposition of sanctions. In some cases the court found the appeal was brought for the purpose of delay. ... Because Ms. Kabbe is the plaintiff in this action, delay is not a factor here." (226 C.A.3d 98.) "We do not believe it is appropriate to hold a propria persona appellant to the standard of what a 'reasonable attorney' should know is frivolous unless and until that appellant becomes a persistent litigant." (226 C.A.3d 98.)

In *Leslie v. Board of Med. Quality Assur.* (1991) 234 C.A.3d 117, 285 C.R. 501, plaintiff, a physician appealing in pro. per., challenged a Medical Board's disciplinary order based on his criminal narcotics convictions. Although the court, without mentioning *Kabbe v. Miller*, stated that pro. per. appellants are held to the same restrictive procedural rules as attorneys, the facts indicated that the appeal, in addition to being without merit, was based on improper motives: Because the trial judge had clearly explained to him the conclusive effect of the judgments of conviction, appellant could not argue that he believed that his position had merit. And yet: "Appellant continues to challenge his convictions in inappropriate forums harassing respondent and forcing respondent to expend resources in responding. His actions result in needless delay. Appellant must accept responsibility for his actions and stop abusing respondent and the system." A sanction of \$ 10,000 was imposed. (234 C.A.3d 121.) (See *Ferguson v. Keys* (1971) 4 C.3d 649, 658, 94 C.R. 398, 484 P.2d 70 [stating as general rule "[i]t should go without saying that these sanctions must be evenly applied and equally imposed upon indigent and nonindigent alike," but not deciding whether sanctions should be imposed]; *Bistawros v. Greenberg* (1987) 189 C.A.3d 189, 193, 234 C.R. 377 [sanction imposed against pro. per. appellant solely on ground that appeal lacked merit, but appellant, who had filed more appeals than "most attorneys file in a lifetime," was extremely familiar with appellate practice].)

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D. Where Delay Is Sole Ground for Sanction.

1. In General.

9 *Witkin Cal. Proc. Appeal* § 991

[§ 991] In General.

C.C.P. 907 and *C.R.C.*, Rule 8.276(a)(1) authorize sanctions when the appeal is frivolous or taken solely for delay, and *C.R.C.*, Rule 8.276(a)(3) authorizes sanctions for filing a frivolous motion. Although sanctions are often imposed on both grounds (see *In re Marriage of Flaherty* (1982) 31 *C.3d* 637, 649, 183 *C.R.* 508, 646 *P.2d* 179, *supra*, §989), it is also proper to impose them on the single ground that the appeal is taken solely for delay. In other words, if the reviewing court finds that the appeal is taken solely for an improper motive, it is not necessary that it also find that the appeal lacks merit, as measured by an objective standard. (*Hersch v. Citizens Savings & Loan Assn.* (1983) 146 *C.A.3d* 1002, 1012, 194 *C.R.* 628 [rejecting argument that, because appeal was based on valid and arguable legal grounds, it could not be held frivolous]; *Maple Properties v. Harris* (1984) 158 *C.A.3d* 997, 1009, 205 *C.R.* 532, *supra*, §984; *In re Marriage of Stich* (1985) 169 *C.A.3d* 64, 77, 214 *C.R.* 919.) Indeed, even if an appeal can be justified on arguably legal grounds, it can yet be the basis for the imposition of sanctions if it is undertaken solely for purposes of delay. (*San Bernardino Community Hosp. v. Meeks* (1986) 187 *C.A.3d* 457, 470, 231 *C.R.* 673, *infra*, §§992, 994, 995; on standard of proof for establishing intent to delay, see *infra*, §992.)

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D. Where Delay Is Sole Ground for Sanction.

2. Standard of Proof.

9 *Witkin Cal. Proc. Appeal* § 992

[§ 992] Standard of Proof.

In *San Bernardino Community Hosp. v. Meeks* (1986) 187 C.A.3d 457, 231 C.R. 673, the court, denying a request for sanctions, held that sanctions cannot be based on the ground that the appeal is taken solely for delay unless the intent to delay is established by clear and convincing evidence.

(a) "Although we cannot point to any precise authority for the proposition ... , as a matter of informal policy, in this division, we have uniformly declined to impose sanctions unless the panel were unanimous in favoring them. Such policy is susceptible of articulation into a rule stated in terms of the burden of proof." (187 C.A.3d 470.)

(b) "In other words, because of the disciplinary flavor of the proceedings and the punitive nature of any decision to award sanctions, we view it as well advised to require proof of an intent to delay by *clear and convincing evidence*, well beyond a mere preponderance and approaching the criminal standard of *beyond a reasonable doubt*." (187 C.A.3d 470.)

(c) "[W]e must at once concede that such subjective standard defies precise definition. However, it is true nevertheless that it affords one of those situations where it can be said 'I cannot describe it, but I will know it when I see it.' " (187 C.A.3d 471.)

(d) "The facts here present a case where we cannot see 'it.' The three members of the panel have three different reactions to the facts. One member is absolutely convinced that the appeal was taken solely for delay. One member of the panel is equally convinced that the appeal was not taken solely for delay. The third member remains uncertain. Thus, if the foregoing rule is to be applied, the mere circumstance of this diversity of views among the panel necessarily demonstrates that the evidence on the side of 'solely for delay' is *not* clear and convincing." (187 C.A.3d 471.)

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E. Procedure.

1. Due Process Requirements.

9 *Witkin Cal. Proc. Appeal* § 993

[§ 993] Due Process Requirements.

In re Marriage of Flaherty (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, supra, §989, made the following observations concerning the due process protections that must be afforded to attorneys before the State may impose sanctions on them for frivolous or dilatory appeals.

(a) "Constitutional due process principles are offended by the summary imposition of sanctions by the appellate courts. It is true that the public criticism and fine at issue when a Court of Appeal reprimands an attorney for filing a frivolous appeal are lesser sanctions than the complete exclusion from the profession. ... Nonetheless, they are sanctions that potentially could have a devastating impact on an attorney's ability to practice law." (31 C.3d 652.)

(b) There is also the danger that any disciplinary process without procedural controls may be abused. (31 C.3d 653, quoting *Bauguess v. Paine* (1978) 22 C.3d 626, 150 C.R. 461, 586 P.2d 942, 7 Cal. Proc. (5th), Trial, §226.) "The appellate courts should exercise their statutory power to impose sanctions only after scrupulously observing the due process mandates set forth herein. Penalties for prosecuting frivolous appeals should not be imposed without giving fair warning, affording the attorney an opportunity to respond to the charge, and holding a hearing. Further, when imposing sanctions, the court should provide the attorney with a written statement of the reasons for the penalty." (31 C.3d 654.)

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E. Procedure.

2. Noticed Motion Procedure.

9 *Witkin Cal. Proc. Appeal* § 994

[§ 994] Noticed Motion Procedure.

San Bernardino Community Hosp. v. Meeks (1986) 187 C.A.3d 457, 231 C.R. 673, held that a motion for sanctions may be made after the final disposition of the merits of an appeal, either before the remittitur has issued or after recall of the remittitur to restore the court's appellate jurisdiction. (187 C.A.3d 463.) However, C.R.C., Rule 8.276(a) establishes the following procedure requiring submission of the matter prior to disposition on the merits:

(1) *Time of Filing.* A party's motion for sanctions must be served and filed under C.R.C., Rule 8.705 (infra, §1017) before any order dismissing the appeal, but no later than 10 days after the appellant's reply brief is due (see supra, §722). If a party files a motion for sanctions with a motion to dismiss the appeal and this motion is not granted, the party may file a new motion for sanctions within 10 days after the appellant's reply brief is due. (C.R.C., Rule 8.276(b)(2); on form of motion, see Cal. Civil Practice, 5 Procedure §41:69.)

(2) *Content.* A party's motion for sanctions must include a declaration supporting the amount of any monetary sanction sought. (C.R.C., Rule 8.276(b)(1).)

(3) *Notification.* The court must give written notice if it is considering imposing sanctions. (C.R.C., Rule 8.276(c).)

(4) *Opposition.* Within 10 days after the court sends notice that it is considering imposing sanctions, a party or attorney may serve and file an opposition, but failure to do so will not be deemed consent. Unless the court sends notice, an opposition may not be filed. (C.R.C., Rule 8.276(d).)

(5) *Hearing.* Unless otherwise ordered, oral argument on the issue of sanctions must be combined with oral argument on the merits. (C.R.C., Rule 8.276(e).)

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(1) *Time of Filing.* C.R.C., Rule 8.705 was repealed in 2008. Motions in the appellate division are now covered in C.R.C., Rule 8.808.



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E. Procedure.

3. Use of Referee.

9 *Witkin Cal. Proc. Appeal* § 995

[§ 995] Use of Referee.

In *San Bernardino Community Hosp. v. Meeks* (1986) 187 C.A.3d 457, 231 C.R. 673, the court followed the procedure of issuing an order to show cause why sanctions should not be imposed. However, on reflection, it suggested that the following modification of the procedure would have been preferable: "With the benefit of hindsight, we can see now that it would have greatly facilitated the court's factfinding process if, in connection with issuance of the order to show cause, we had also appointed a referee to take evidence on the 'solely-for-delay' issue and then to make a finding on that issue. Reviewing a record developed before such a referee would have enabled the panel to proceed with a greater sense of confidence of where the truth lay. In other words, such a procedure would have been better than our having to resolve the factual issue only from declarations where credibility and other so-called testimonial qualifications of the declarants were crucial." (187 C.A.3d 472.) (See *People v. Outdoor Media Group* (1993) 13 C.A.4th 1067, 1082, 17 C.R.2d 19, *infra*, §998 [appointing superior court judge as referee to determine appellant's profits from illegal operation of billboards during pendency of appeal].)

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F. Illustrations.

1. Sanction Under \$ 1,000.

9 *Witkin Cal. Proc. Appeal* § 996

[§ 996] Sanction Under \$ 1,000.

In *Seidell v. Tuxedo Land Co.* (1932) 216 C. 165, 13 P.2d 686, the court, in imposing a penalty of \$ 150, made the following observation concerning the nature of the appeal: "It is entirely barren of merit and frivolous in the extreme. Appeals of this character should be discouraged, both in the interest of litigants directly interested in the particular case, and of those who have meritorious causes awaiting the consideration of the courts. ... The only reasonable conclusion at which the court can arrive in determining an appeal which is so destitute of merit as is the present one, is that it was taken for delay merely." (216 C. 171.)

In *Howard v. Howard* (1956) 141 C.A.2d 233, 296 P.2d 592, plaintiff wife won an interlocutory decree of divorce, with \$ 1,750 monthly alimony. Defendant husband appealed and gave a bond to stay execution. Being without funds to prosecute her own appeal or to defend against his, plaintiff obtained an order for temporary alimony and attorneys' fees pending appeal. But defendant appealed from this order, posting another bond to stay execution. Plaintiff made several new motions for alimony and fees, pending appeal, and from each order (six in all) defendant appealed and stayed execution. The trial judge said in a memorandum: "Plaintiff maintains defendant is pursuing his present tactics for the purpose of starving her into submission. It is difficult to ascertain whether that is his motive, or whether he is congenitally litigious, immaturely mischievous, seeking contention out of sheer boredom with his rather unproductive existence, or whether he is the victim of unsound and costly advice by his counsel." (141 C.A.2d 242.) "[I]t does seem demonstrably clear that defendant is bringing a continuing series of frivolous appeals that result in rendering the judicial process ineffectual. Query, is there any judicial remedy?" (141 C.A.2d 243.) "[N]one of the proposals suggested herein get to the root of the evil, and this multimillionaire defendant is able to continue posting bonds and filing new appeals, making a mockery of Court orders." (141 C.A.2d 243.) The appellate court, approving these remarks, affirmed the orders and, as to three of them, fined appellant's attorney \$ 100.

In *Clark v. Universal Underwriters Ins. Co.* (1965) 233 C.A.2d 746, 43 C.R. 822, defendant insurer appealed from a judgment that was governed by recent Supreme Court decisions in point, challenging the correctness of those decisions. The court, noting that the same insurer had made the same contention in another recent case, said: "We can see no reason for this repeated litigation of rules long settled other than an intent to delay the ultimate recovery by injured persons." (233 C.A.2d 749.) Hence, in affirming, a \$ 500 penalty was imposed, to be paid by defendant to plaintiff. (233 C.A.2d 749.)

Reber v. Beckloff (1970) 6 C.A.3d 341, 85 C.R. 807, focuses attention on a particularly obnoxious class of frivolous appeals: the attempts by litigants in pro. per. to review the same point in successive proceedings. It also casts doubt on the deterrent effect of the penalties. "It is one of a long series of appellate and extraordinary writ proceedings taken by appellant. ... In greater part, if not in their entirety, they relate to issues long since finally adjudicated. Our records indicate 64 such appeals; of these 5 are now pending, 32 have been dismissed, and in 25 the decisions appealed from have been affirmed. The remaining 2 have resulted in reversals; neither concerned substantive merits, one related to a decision on demurrer and the other to a jurisdiction question. Throughout the same period [appellant] has 19 times applied to this court for relief relating to the same parties by way of extraordinary writs. Without exception these applications were found to be without merit and denied." A sanction of \$ 500 was imposed. (6 C.A.3d 342.)

In imposing sanctions, hindsight occasionally gives the reviewing court a dimmer view of the appellant's motives than one would have at the time the appeal was taken. For example, in *Niyya v. Goto* (1960) 181 C.A.2d 682, 5 C.R. 642, the court declared that "[t]he appeal is without merit and appears to have been taken as a means of harassing plaintiff," and affirmed the judgment with a \$ 300 penalty. (181 C.A.2d 690.) But the trial judge had first given judgment for defendant-appellant, and then had granted a new trial for insufficiency of the evidence; the appeal was from the order granting a new trial. It seems odd to penalize a party who relies on the determination by the trial judge in his original judgment, where no extrinsic fraud or mistake is involved, but only a dispute over the facts and the law. (181 C.A.2d 690.)

Numerous other cases, most of them decided before 1980, illustrate facts and circumstances that caused the courts to impose sanctions not exceeding \$ 1,000. (See *Crane v. State Savings & Commercial Bank* (1916) 173 C. 110, 115, 159 P. 585 [\$ 250]; *Holcomb v. Breikreutz* (1919) 180 C. 17, 18, 179 P. 162 [\$ 100]; *Huber v. Shedoudy* (1919) 180 C. 311, 315, 181 P. 63 [discussion of policy and practice; penalty of 7-8% of judgment: \$ 720]; *Blackmore Inv. Co. v. Johnson* (1931) 213 C. 148, 149, 1 P.2d 978 [purpose of appeal appeared to be to cloud title to valuable property; \$ 500]; *Parra v. Traeger* (1931) 214 C. 535, 539, 6 P.2d 941 [\$ 250]; *Slappey v. Schiller* (1931) 116 C.A. 274, 277, 2 P.2d 577 [sole ground for appeal was asserted preponderance of evidence, findings amply supported by testimony; appeal delayed plaintiff's recovery for injuries for over 3 years; \$ 50 penalty]; *Hendricks v. Pappas* (1947) 82 C.A.2d 774, 779, 187 P.2d 436 [\$ 100]; *Estate of Walters* (1950) 99 C.A.2d 552, 558, 222 P.2d 100 [\$ 100]; *Sipe v. McKenna* (1951) 105 C.A.2d 373, 375, 233 P.2d 615 [reargument of point conclusively determined in former appeal; \$ 300]; *Vicker v. Pan Pac. Sales Corp.* (1952) 108 C.A.2d 601, 604, 239 P.2d 463 [\$ 100]; *Kruckow v. Lesser* (1952) 111 C.A.2d 198, 200, 244 P.2d 19 [\$ 100]; *Estate of King* (1953) 121 C.A.2d 765, 776, 264 P.2d 586 [\$ 250]; *McCosker v. McCosker* (1954) 122 C.A.2d 498, 502, 265 P.2d 21 [\$ 150]; *Stahl v. Fahrman* (1954) 126 C.A.2d 755, 758, 272 P.2d 927 [\$ 100]; *Stafford v. Russell* (1954) 128 C.A.2d 794, 797, 276 P.2d 41 [\$ 100]; *Clewett v. Clewett* (1955) 136 C.A.2d 913, 915, 289 P.2d 512 [\$ 100]; *Gordon v. Gordon* (1956) 145 C.A.2d 231, 235, 302 P.2d 355 [\$ 100]; *Howarth v. Howarth* (1956) 146 C.A.2d 694, 697, 304 P.2d 147 [\$ 300]; *Ames v. Ames* (1959) 168 C.A.2d 39, 41, 335 P.2d 135 [\$ 100]; *Muller v. Muller* (1959) 174 C.A.2d 517, 519, 345 P.2d 29 [appellant in pro. per. repeatedly litigating same controversy, and "the instant appeal represents the acme of frivolity"; \$ 50]; *Taliaferro v. Taliaferro* (1960) 178 C.A.2d 140, 144, 145, 2 C.R. 716 [similar conduct; \$ 150]; *Taliaferro v. Davis* (1962) 211 C.A.2d 229, 230, 27 C.R. 152 [\$ 200]; *Babb v. Weemer* (1964) 225 C.A.2d 546, 553, 37 C.R. 533 ["particularly since plaintiff ... is a practicing attorney" appearing in pro. per.; \$ 500]; *Scott v. Texaco* (1966) 239 C.A.2d 431, 437, 48 C.R. 785 [\$ 100]; *Schulz v. Wulfing* (1967) 251 C.A.2d 776, 777, 60 C.R. 53 [\$ 100]; *Perego v. Seltzer* (1968) 260 C.A.2d 825, 830, 67 C.R. 636, citing the text [\$ 500]; *Towle v. Lewis* (1969) 274 C.A.2d 376, 377, 79 C.R. 124 [\$ 200]; *In re Marriage of Millet* (1974) 41 C.A.3d 729, 732, 116 C.R. 390 [meritless appeal, inadequate record; extended delay obtained to file wholly inadequate brief; \$ 250]; *Parker v. Parker* (1974) 43 C.A.3d 610, 614, 117 C.R. 707 [\$ 250]; *In re Marriage of Milch* (1975) 47 C.A.3d 666, 671, 120 C.R. 901 [commenting on expense of marriage dissolution proceedings; "Counsel for the parties are obligated to employ a firm hand to avoid procedures which needlessly increase those expenses. Here that firm hand was clearly not employed and a frivolous appeal was prosecuted by counsel for Wife"; \$ 250]; *Moore v. El Camino Hosp. Dist.* (1978) 78 C.A.3d 661, 664, 144 C.R. 314 [attorney wholly at fault, \$ 500 penalty on attorney alone]; *Conservatorship of Gollock* (1982) 130 C.A.3d 271, 274, 181 C.R. 547 [regardless of intent or motive of counsel, appeal had no chance of success; \$ 500].)

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F. Illustrations.

2. Sanction of \$ 1,000 to \$ 5,000.

9 Witkin Cal. Proc. Appeal § 997

[§ 997] Sanction of \$ 1,000 to \$ 5,000.

In *Moses v. DeVersecy* (1984) 157 C.A.3d 1071, 203 C.R. 906, the court, after concluding that the appeal was taken by defendants solely to delay satisfaction of a relatively small money judgment, imposed a joint and several penalty of \$ 3,000 on defendants and their counsel. "We not only find defendants to be culpable for prosecuting this frivolous appeal, but we conclude that their counsel also acted irresponsibly in pursuing this appeal in disregard of the interests of the administration of justice." (157 C.A.3d 1075.)

A particularly obnoxious performance by a pro. per. plaintiff was condemned in *Weber v. Willard* (1989) 207 C.A.3d 1006, 255 C.R. 165. His action alleging violation of his civil rights was brought in the federal district court, that court ruled against him, the federal Court of Appeals did likewise, and the Supreme Court denied certiorari. He then brought an identical action in the superior court that resulted in a finding of res judicata and a judgment on demurrer. He took this appeal, contending that the state court, which had concurrent jurisdiction over federal civil rights actions, was not bound by the federal judgment. In imposing sanctions of \$ 2,516, payable to respondent, and \$ 1,075, payable to the county, the court pointed out that (a) his view of res judicata was "nonsensical," and (b) both the federal district court and the federal Court of Appeals had informed him that the underlying allegations of his action were frivolous. (207 C.A.3d 1010.)

In *Monex Int., Ltd. v. Peinado* (1990) 224 C.A.3d 1619, 274 C.R. 667, the trial judge awarded sanctions against defendants for making a frivolous summary judgment motion. Contending that the motion was not frivolous, defendants appealed, and plaintiff requested sanctions on appeal. *Held*, sanctions of \$ 3,750 imposed. Appellants proceeded below with a totally frivolous motion after being informed several times of the risks involved. They have now compounded that affront with an equally frivolous appeal, requiring respondent to again expend time and energy defending a meritless action. There can be no doubt that any reasonable attorney would agree that this appeal is totally and completely without merit. Furthermore, it is difficult to find that the appeal is anything but a calculated effort to harass respondent. (224 C.A.3d 1627.)

In *Portola Hills Community Assn. v. James* (1992) 4 C.A.4th 289, 5 C.R.2d 580, the court imposed penalties on appellant and his counsel, consisting of \$ 3,000 payable to defendants; and the opinion adds a denunciation of the conduct involved: "Bluntly speaking, the judicial system does not have the resources to indulge petulant litigants. The

association served up stipulated facts and gambled on a legal position. It lost. Then, without a legal or logical foundation, it contrived to revive the fatally wounded action. But more than distaste for the verdict is necessary to justify the consumption of scarce and overburdened judicial resources." (4 C.A.4th 294.)

Other cases illustrate the variety of evil motives or meritless arguments that call for the penalty, as well as the absence of any consistency in the amount. (See *Lapique v. Walsh* (1923) 191 C. 22, 27, 214 P. 876 [\$ 1,000]; *Taliaferro v. Taliaferro* (1962) 203 C.A.2d 652, 653, 21 C.R. 870 [five appeals, either from nonappealable orders or on moot points, taken by experienced vexatious litigant; \$ 200 penalty assessed in each appeal--\$ 1,000 total]; *Davis v. Calaway* (1975) 48 C.A.3d 309, 312, 121 C.R. 570 [\$ 1,000]; *Nelson v. Crocker Nat. Bank* (1975) 51 C.A.3d 536, 541, 124 C.R. 229 [several spurious proceedings by plaintiff seeking to assert cause of action merged by prior judgment against him; order granting summary judgment to defendant affirmed, with \$ 1,000 penalty added to costs]; *In re Marriage of Schwander* (1978) 79 C.A.3d 1013, 1022, 145 C.R. 325 [\$ 1,500]; *117 Sales Corp. v. Olsen* (1978) 80 C.A.3d 645, 652, 145 C.R. 778 [\$ 1,000]; *Kunza v. Gaskell* (1979) 91 C.A.3d 201, 212, 154 C.R. 101 [\$ 1,500]; *Carazo v. Lopez* (1980) 112 C.A.3d 319, 322, 169 C.R. 182 [\$ 1,000]; *Beckstead v. International Industries* (1982) 127 C.A.3d 927, 935, 179 C.R. 767 [\$ 3,000 penalty plus \$ 3,000 in attorneys' fees]; *People v. Beverly Bail Bonds* (1982) 134 C.A.3d 906, 915, 185 C.R. 36 [\$ 2,000]; *Kapelus v. Newport Equity Funds* (1983) 147 C.A.3d 1, 9, 194 C.R. 893 [\$ 5,000]; *Cosenza v. Kramer* (1984) 152 C.A.3d 1100, 1101, 200 C.R. 18 [\$ 3,000]; *Menasco v. Snyder* (1984) 157 C.A.3d 729, 734, 735, 203 C.R. 748 [\$ 1,000]; *Corona v. Lundigan* (1984) 158 C.A.3d 764, 768, 204 C.R. 846 [defendant real estate broker defrauded elderly man, allowed judgment to be taken by default and made no attempt to set aside judgment; appeal so devoid of merit that it was obviously taken for delay; penalty of \$ 2,000 payable to plaintiff and \$ 2,000 payable to plaintiff's attorney]; *Sui v. Landi* (1985) 163 C.A.3d 383, 385, 209 C.R. 449 [experienced litigant appealing in pro. per. deliberately requested that reporter's transcript not be designated, thereby preventing appellate court from evaluating her arguments; \$ 5,000]; *Bank of America v. Henkin* (1986) 185 C.A.3d 919, 922, 230 C.R. 113 ["entire brief is based upon an error in performing the simplest, most rudimentary function--counting the days on a calendar," a repetition of same error that led to sanctions in trial court; penalty of \$ 1,500 imposed]; *Bistawros v. Greenberg* (1987) 189 C.A.3d 189, 192, 234 C.R. 377 [pro. per. appellant familiar with appellate practice was entitled to no greater consideration than other litigants; \$ 2,500]; *People v. Dependable Ins. Co.* (1988) 204 C.A.3d 871, 874, 251 C.R. 527 [appeal "indisputably having no merit, is frivolous by any standard"; \$ 5,000]; *Kim v. Walker* (1989) 208 C.A.3d 375, 386, 256 C.R. 223 [appeal was but one episode of plaintiff's litigious history of using court system to harass and intimidate; \$ 1,684]; *Los Angeles County Dept. of Children & Family Services v. Superior Court* (1995) 37 C.A.4th 439, 455, 43 C.R.2d 757 [sanctions totaling \$ 1,500 imposed against two deputy county counsel and against social worker for county department of children and family services for disregard of juvenile court and Court of Appeal orders]; *Johnson v. Lewis* (2004) 120 C.A.4th 443, 457, 15 C.R.3d 507 [whether warrantless arrest by off-duty arson investigator was legal; sanction against attorney of \$ 2,500]; *Millennium Corporate Solutions v. Peckinpugh* (2005) 126 C.A.4th 352, 359, 23 C.R.3d 500 [law firm's appeal from order granting preliminary injunction was frivolous where no reasonable attorney would have agreed that appeal had merit; \$ 24,045].)

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F. Illustrations.

3. Sanction Over \$ 5,000, But Less Than \$ 100,000.

9 Witkin Cal. Proc. Appeal § 998

[§ 998] Sanction Over \$ 5,000, But Less Than \$ 100,000.

In *Miller v. R. K. A. Management Corp.* (1979) 99 C.A.3d 460, 160 C.R. 164, the court described the conduct of appellants (plaintiffs) as follows: "These nonmeritorious frenetic legal maneuvers had a patently improper purpose--to cloud the buyer's title to property for which it had paid over \$ 6 million--to effectively deny that buyer the benefit of the bankruptcy court's order, circumvent, evade the bankruptcy court's plenary powers over this sale." Defendants had suggested a penalty in the nature of compensatory damages for loss of the use of the \$ 6 million for nearly 2 years. The court observed that *C.C.P. 907* is not a substitute for an appropriate malicious prosecution action in which the issue of damages could be tried. (99 C.A.3d 469.) However, a nominal sanction would not be a deterrent to such sham appeals, and a substantial penalty--\$ 15,000--was imposed. (99 C.A.3d 470.)

In *Papadakis v. Zelis* (1992) 8 C.A.4th 1146, 11 C.R.2d 411, supra, §988, the court emphasized the repeated frivolous appeals in the same litigation: "We need not fully recapitulate the very long and sordid story of this litigation, and the manner in which determined lawyers with dubious ethics have unconscionably delayed the imposition of effective remedies for their misdeeds." (8 C.A.4th 1148.) The court explained its decision to impose "significant sanctions" as follows: "We would normally assess sanctions of approximately \$ 10,000: \$ 5,000 payable to the opposing parties and \$ 5,000 payable to the court, as in the previous appeal. Since the previous imposition of sanctions in approximately this amount has not had any discernible effect, we will impose sanctions here, jointly and severally against appellants ... in the total amount of \$ 20,000: \$ 10,000 payable to respondents, and \$ 10,000 payable to the clerk of this court. We impose these sanctions by way of compensation for the costs of dealing with this appeal, and for purposes of specific and general deterrence." (8 C.A.4th 1150.)

In *Banks v. Dominican College* (1995) 35 C.A.4th 1545, 42 C.R.2d 110, plaintiff challenged an academic decision regarding her qualifications for a degree, the trial judge entered summary judgment against her, and she appealed. The Court of Appeal determined that the appeal was frivolous and imposed sanctions against plaintiff of \$ 15,000 payable to defendants and \$ 2,000 payable to the court clerk. Plaintiff's arguments were totally without merit and frivolous; no reasonable attorney after proper investigation could have concluded otherwise, or that summary judgment was improperly granted; and she could not and did not present any contrary evidence in the trial court raising a contested issue of material fact. (35 C.A.4th 1558.) Although plaintiff prosecuted the appeal in pro. per., she had an extensive legal background, having graduated from a legal studies program, and the papers she filed were technically proficient,

demonstrating considerable legal knowledge. The record also revealed that plaintiff was no indigent litigant; she appeared in pro. per. only because successive retained counsel withdrew from her representation, citing ethical considerations and her unreasonable demands and actions. (35 C.A.4th 1559.)

In *Henry v. Clifford* (1995) 32 C.A.4th 315, 38 C.R.2d 116, 3 Cal. Proc. (5th), Actions, §580, the second of two medical malpractice actions, sanctions were imposed by both the trial and appellate courts. Plaintiffs' first complaint had resulted in summary judgment for defendant. In the second action, the trial judge sustained defendant's demurrer without leave to amend and dismissed the case, ruling that the statute of limitations had run and that the action was barred by the doctrine of res judicata. In addition, the trial judge imposed sanctions, finding that the complaint "was clearly frivolous and brought in bad faith, and appears to be brought for the primary, if not, sole purpose of harassing the defendant." The sanctions were based on evidence that counsel for plaintiffs had threatened to file the present action against defendant if he did not testify against the other defendants in the first action. Plaintiffs did not deny the charge or appeal from the sanctions order. *Held*, judgment affirmed, and plaintiffs' counsel ordered to pay further sanction of \$ 7,800 to defendant for filing a frivolous appeal. The appeal "was prosecuted for an improper motive and any reasonable attorney would agree that the appeal is completely without merit as a matter of law." (32 C.A.4th 324.)

In numerous other cases, the courts imposed sanctions of over \$ 5,000, but less than \$ 100,000. (See *Hummel v. First Nat. Bank* (1987) 191 C.A.3d 489, 495, 236 C.R. 449 [brief rearguing issues decided in prior appeal, appeal from nonappealable order, relevant evidence ignored; \$ 50,000]; *Dwyer v. Crocker Nat. Bank* (1987) 194 C.A.3d 1418, 1439, 1440, 240 C.R. 297 [appeal "completely without merit"; \$ 10,000]; *Finnie v. Tiburon* (1988) 199 C.A.3d 1, 17, 244 C.R. 581, *supra*, §988 [\$ 16,324]; *Kurokawa v. Blum* (1988) 199 C.A.3d 976, 995, 245 C.R. 463 [\$ 15,000]; *Zimmerman v. Drexel Burnham Lambert* (1988) 205 C.A.3d 153, 165, 252 C.R. 115 [\$ 9,000]; *Woodside v. Gava* (1989) 213 C.A.3d 488, 494, 495, 261 C.R. 730 [\$ 7,694]; *Bach v. Butte* (1989) 215 C.A.3d 294, 295, 263 C.R. 565 [\$ 17,500]; *Bank of California v. Varakin* (1990) 216 C.A.3d 1630, 1638, 1639, 1640, 265 C.R. 666 [\$ 25,000]; *Summers v. Cathedral City* (1990) 225 C.A.3d 1047, 1050, 275 C.R. 594 [\$ 10,240]; *Computer Prepared Accounts v. Katz* (1991) 235 C.A.3d 428, 433, 286 C.R. 556 [\$ 25,000]; *Cohen v. General Motors Corp.* (1992) 2 C.A.4th 893, 897, 3 C.R.2d 619 [\$ 6,401]; *Collisson & Kaplan v. Hartunian* (1994) 21 C.A.4th 1611, 1621, 26 C.R.2d 786 [\$ 10,000]; *Simonian v. Patterson* (1994) 27 C.A.4th 773, 785, 32 C.R.2d 722 [\$ 50,000]; *Caro v. Smith* (1997) 59 C.A.4th 725, 738, 69 C.R.2d 306, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §575 [\$ 12,500]; *Guardianship of Melissa W.* (2002) 96 C.A.4th 1293, 1300, 118 C.R.2d 42 [sanction of \$ 13,004 for filing moot appeal]; *DeRose v. Heurlin* (2002) 100 C.A.4th 158, 182, 122 C.R.2d 630 [sanction of \$ 6,000 plus \$ 123 (cost of reporter's transcript); court hinted that higher amount might now be proper because of rising cost of appeal]; *People v. Ranger Ins. Co.* (2002) 101 C.A.4th 605, 609, 124 C.R.2d 359 [\$ 13,467]; *Keitel v. Heubel* (2002) 103 C.A.4th 324, 342, 126 C.R.2d 763 [appellants--\$ 9,700; their attorney--\$ 3,700]; *Barnard v. Langer* (2003) 109 C.A.4th 1453, 1463, 1 C.R.3d 175 [in legal malpractice action, appeal was brought for improper purpose of inducing law firm to reduce its legal fees; \$ 20,000]; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1431, 6 C.R.3d 122 [\$ 17,000, \$ 14,000 to be paid jointly and severally by appellant and attorney and \$ 3,000 to be paid by attorney alone]; *Millennium Corporate Solutions v. Peckinpugh* (2005) 126 C.A.4th 352, 359, 23 C.R.3d 500 [\$ 24,045]; *Olsen v. Harbison* (2005) 134 C.A.4th 278, 287, 35 C.R.3d 909 [sanction was justified for filing untimely anti-SLAPP motion, but imposition of further fines was not warranted, because appeal was not prosecuted to harass respondent or for purpose of delay; \$ 18,727].)

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Gong & Kwong* (2008) 163 C.A.4th 510, 519, 77 C.R.3d 540 [\$ 15,000 for frivolous appeal of trial court's denial of husband's motion to stop further payment of child support under marital settlement agreement].



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F. Illustrations.

4. Sanction Over \$ 100,000.

9 *Witkin Cal. Proc. Appeal* § 999

[§ 999] Sanction Over \$ 100,000.

In *Hersch v. Citizens Savings & Loan Assn.* (1983) 146 C.A.3d 1002, 194 C.R. 628, the court pointed out that delay as a motive "is specifically addressed and made sanctionable by the statute."

(a) "Defendants' motive in this case is as easy to understand as it is difficult to hide. For nearly five years defendants have had the use of approximately \$ 1 million legally owed by them to plaintiffs. It is common knowledge that a conservative investment during the same period would have earned annual interest greatly in excess of the 7 percent, and later 10 percent, payable upon civil judgments. In this type of market good investment counsel could not ignore the fact that postponement of payment of this judgment was a profitable venture. Given the legal education and investment sophistication of defendants in this case, and their indisposition ever to post the collateral called for in their agreement with plaintiffs, we are compelled to the conclusion that material gain through delay was and is their motive." (146 C.A.3d 1012.)

(b) The assessment of damages to be added to the costs on appeal presented a special problem in the *Hersch* case: The actual damages sustained in the form of lost interest could have been determined, but no inquiry was made into the subject at the hearing, and counsel were not placed on notice that any such inquiry might be made. Hence, the court, without any basis for direct measurement of damages, was left to assess a "just" amount which "will bear some rational relationship to the circumstances of the parties and to the purpose" of the statute. The award was \$ 125,000. (146 C.A.3d 1013.)

In *McConnell v. Merrill Lynch, Pierce, Fenner & Smith* (1985) 176 C.A.3d 480, 222 C.R. 228, defendant in a class action entered into a settlement agreement, approved by the trial judge and entered as a judgment, for payment of \$ 10 million to class members in amounts determined by the judge. The parties to the agreement waived the right of appeal and no appeal was taken from the judgment. But later, when the trial judge under his reserved jurisdiction made an order increasing payments to class members, defendant appealed from the order, arguing that the condition of waiver of the right of appeal was void, and that the increase in payments was an abuse of discretion. The Court of Appeal held that the waiver was valid and that sanctions should be imposed for the present appeal.

(a) The appeal was totally lacking in merit. "After taking advantage of all the benefits of the settlement agreement,

Merrill Lynch now asks this court to find that it was coerced into one portion of the settlement agreement, a portion which it only found objectionable after it was applied to Merrill Lynch's detriment." (176 C.A.3d 491.) The case has been litigated for 12 years, has produced two California Supreme Court opinions as well as unreported writ proceedings, and was settled only after substantial negotiations. "Merrill Lynch at this late date is using this appeal to attempt to renege on the express terms of a settlement agreement it freely entered into." (176 C.A.3d 491.)

(b) "In a case involving a \$ 10 million settlement fund, a nominal sanction would do nothing to discourage such appeals in the future. Moreover, as a consequence of the frivolous appeal, payments to Class claimants have been delayed approximately one year. Therefore, we assess Merrill Lynch and its counsel Rogers & Wells as sanctions for prosecuting this frivolous appeal an amount equal to the actual interest earned by the settlement fund from the date the notice of appeal was filed to the date this opinion is filed." (176 C.A.3d 491.)

Another strong condemnation of frivolous appeals appears in *Young v. Rosenthal* (1989) 212 C.A.3d 96, 260 C.R. 369, supra, §988. The opinion commences as follows: "In this case, involving five separate appeals, we are presented with an incredibly obscene example of the defiance, subversion and abuse of the judicial system in general and the procedures for pretrial discovery in particular. In affirming a summary judgment and two trial court sanction orders, we write what should be the final chapter of the unsuccessful efforts of a disbarred lawyer to avoid paying fees for valuable legal services rendered to him. As two of the five appeals were frivolous and were clearly motivated by an intent to delay and harass the respondent and, in the process, imposed a significant burden on this court, we impose substantial sanctions." The sanctions imposed were \$ 113,909, payable by appellant to respondent, and \$ 5,000, payable by appellant's attorney to respondent. (212 C.A.3d 102; on sanctions payable to the court, see supra, §988.)

In *People v. Outdoor Media Group* (1993) 13 C.A.4th 1067, 17 C.R.2d 19, OMG erected certain billboards even though its application for a permit to do so had been denied by Caltrans. When Caltrans obtained an injunction requiring the removal of the billboards, OMG appealed. The court, after reviewing recent cases and concluding that the appeal was frivolous, made the following comments concerning how the amount of the sanction should be determined:

(a) "The damages for which we may order compensation include the costs and attorney fees incurred by the respondent in defending against the appeal and the expense incurred by the appellate court in processing, reviewing, and deciding the appeal. These damages are compensatory." (13 C.A.4th 1081.)

(b) "[W]e are not limited to compensatory considerations; rather, we may also require the payment of sums sufficient to discourage future frivolous litigation." (13 C.A.4th 1082.) These sums must be sufficient to remove any financial incentive to flout the law. (13 C.A.4th 1082.)

(c) In view of these principles, sanctions were imposed as follows: \$ 1,607, payable to Caltrans to cover its costs and attorneys' fees; \$ 5,908, payable to the clerk of the court and representing the cost of processing an average civil appeal in this court; and \$ 165,565, payable to the state general fund and representing OMG's gross revenues from the billboards during pendency of the appeal. (13 C.A.4th 1082.) With respect to the last item, it should be noted that cases prohibiting a governmental entity from recovering the costs of law enforcement do not restrict the right of appellate courts to exercise control over abuse of the court system by imposing sanctions for frivolous appeals. (13 C.A.4th 1083, footnote 16.) (See *Say & Say v. Castellano* (1994) 22 C.A.4th 88, 95, 27 C.R.2d 270 [\$ 150,000].)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Illustrations.

5. Sanction Denied.

9 *Witkin Cal. Proc. Appeal* § 1000

[§ 1000] Sanction Denied.

In re Marriage of Flaherty (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, involved a husband's appeal from a judgment in a dissolution proceeding, in which he challenged (a) the order that gave him child custody but denied his request for child support from the wife, and (b) the order dividing the transportation costs incurred by the child during visits with the wife. *Held*, no sanction imposed; as measured by either the subjective or objective standard (see *supra*, §989), the appeal was not frivolous.

(a) There is no evidence of subjective bad faith. In contrast to most of the cases where sanctions have been imposed, appellant has nothing to gain from delay. The trial judge's ruling denied him support payments from the wife, and the appeal merely kept open the possibility that he might receive those payments. It did not postpone his obligation to do anything except pay his share of the child's transportation costs. (31 C.3d 651.)

(b) On the merits, the appeal raised the issue whether the trial judge had applied a sex-biased standard in determining that the wife should not pay child support. And although this decision affirms the trial judge's ruling, it was not unreasonable for appellant's counsel to believe that the issue was arguable. Hence, it cannot be said that any reasonable person would agree that appellant's argument is totally and completely devoid of merit. (31 C.3d 651.)

In *California War Veterans for Justice v. Hayden* (1986) 176 C.A.3d 982, 222 C.R. 512, plaintiffs sought to disqualify defendant member of the State Assembly for alleged support of North Vietnam during recent hostilities, and appealed from a judgment for defendant on demurrer. Although the lack of jurisdiction of a court to disqualify a legislator was established law for 100 years, and the appeal "might well be viewed by this court as patently frivolous," defendant's request for sanctions was denied on the ground that "the chilling effect of sanctions should be avoided wherever possible, especially in a suit involving great controversy over political office." (176 C.A.3d 990.)

A number of other decisions have denied sanctions. (See *Winick Corp. v. County Sanitation Dist. No. 2* (1986) 185 C.A.3d 1170, 1181, 1183, 230 C.R. 289 [although appeal from trial court order imposing sanctions under C.C.P. 128.5 was meritless, it was taken for proper purpose, i.e., to minimize harm that attorney's negligence had caused his client; hence, sanctions on appeal were not justified]; *San Bernardino Community Hosp. v. Meeks* (1986) 187 C.A.3d 457, 231 C.R. 673, *supra*, §§992, 994, 995; *Fredrics v. Paige* (1994) 29 C.A.4th 1642, 1650, 35 C.R.2d 246 [declining to impose

sanctions on appeal from denial of motion for new trial based on allegation of quotient verdict]; *Barkley v. Blue Lake* (1996) 47 C.A.4th 309, 318, 54 C.R.2d 679 [defendant city was justified in appealing summary judgment granted to plaintiff in action on judgment, where appeal was necessary to prevent incorrect ruling on city's defenses from being given res judicata effect in future enforcement proceedings]; *Haskett v. Villas at Desert Falls* (2001) 90 C.A.4th 864, 885, 108 C.R.2d 888; *Lombardo v. Huysentruyt* (2001) 91 C.A.4th 656, 671, 110 C.R.2d 691 [plaintiffs were not entitled to sanctions for defendant's failure to timely file reply brief on appeal where plaintiffs' claims of prejudice were speculative; fact that conduct of defendant's counsel was not exemplary did not change result]; *Forthmann v. Boyer* (2002) 97 C.A.4th 977, 985, 118 C.R.2d 715 [income beneficiary's argument on appeal that, although not objecting to accounting, he was entitled to continuance to conduct discovery was unmeritorious, but it presented novel, arguable question; as such, it was not basis for sanction].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Applied Business Software v. Pacific Mortg. Exchange* (2008) 164 C.A.4th 1108, 1119, 79 C.R.3d 849 [defendant's appeal from denial of anti-SLAPP motion was not frivolous, even though allegations in complaint were not related to defendant's rights of petition or free speech; plaintiff filed action after defendant's president filed declaration in earlier lawsuit to which plaintiff was party, and plaintiff quoted nondisparagement clause of settlement agreement in complaint, suggesting that complaint had some connection to protected rights]; *Avila v. Continental Airlines* (2008) 165 C.A.4th 1237, 1261, 82 C.R.3d 440 [no sanction where plaintiff's claim under Fair Employment and Housing Act, although without merit, addressed uncertain area of law]; *Friends of Riverside's Hills v. Riverside* (2008) 168 C.A.4th 743, 756, 85 C.R.3d 695 [appeal from dismissal of petition for mandamus challenging city's approval of subdivision maps under California Environmental Quality Act (CEQA) was not so frivolous as to merit sanctions, even though dismissal was proper because of failure to comply with Subdivision Map Act service requirement; applicability of service requirement to CEQA causes of action was issue of first impression].



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G. Distinction: No Tort Action for Malicious Appeal.

9 Witkin Cal. Proc. Appeal § 1001

[§ 1001] Distinction: No Tort Action for Malicious Appeal.

In *Coleman v. Gulf Ins. Group* (1986) 41 C.3d 782, 226 C.R. 90, 718 P.2d 77, plaintiffs brought a wrongful death action against the city of Monrovia, based on the drowning of William Coleman in August 1975. They received judgment on a jury award of \$ 350,000. The city appealed, and Gulf Insurance Group, its insurer, offered to settle for an amount less than half the judgment. Plaintiffs rejected the offer; but later, in January 1982, Gulf tendered and plaintiffs accepted \$ 300,000 in full settlement, and the appeal was dismissed. Six months afterwards plaintiffs filed the present action against Gulf, seeking compensatory and punitive damages on the basis of Gulf's conduct in the appeal from the wrongful death judgment.

The complaint alleged that Gulf controlled the proceedings, and that it filed the appeal with no reasonable belief in a reversal but simply to postpone payment of the judgment; that Gulf knew plaintiffs had lost their principal source of financial support with Coleman's death, and hoped to settle for a fraction of the judgment; that in addition Gulf, not required to post an appeal bond because of the city's status as a public entity, could invest the \$ 350,000 at over 15% while having to pay plaintiffs only 7% during pendency of the appeal, thereby depriving plaintiffs of the higher return; and that in adopting this course of conduct Gulf acted with "malicious" and "oppressive" intent.

Four causes of action were set forth: (1) bad faith refusal to pay insurance benefits; (2) violation of the *Ins.C.* 790.03(h)(5) duty to attempt good faith settlement; (3) malicious prosecution of an appeal; and (4) abuse of process. The trial court sustained Gulf's demurrer as to all causes of action, and entered judgment of dismissal. *Held*, affirmed.

(a) *Sanctions for filing frivolous appeal distinguished.* The conduct of Gulf as alleged in the complaint was clearly improper and subject to sanctions under *C.C.P.* 907 and former C.R.C., Rule 26(a) (now C.R.C., Rule 8.276(a)). But *In re Marriage of Flaherty* (1982) 31 C.3d 637, 183 C.R. 508, 646 P.2d 179, *supra*, §989 stressed the difficulty of distinguishing frivolous appeals from those simply without merit. *Flaherty* established a general standard for determining frivolousness, and a number of cases have imposed sanctions as provided by its standard. (41 C.3d 790, 791, and footnote 7.) *Flaherty* did not address the issue of this case: whether, after settlement of an appeal, a plaintiff may bring an independent action to recover compensatory and punitive damages on the basis of the defendant's alleged bad faith prosecution of that appeal. But the reasoning of *Flaherty* "appears substantially at odds with the recognition of such a cause of action." Under *C.C.P.* 907, the determination of frivolousness is made by an appellate court; here plaintiffs seek to have the determination made by a lay jury. "And the potential 'chilling effect' on appeals--an effect that

Flaherty struggled to minimize--would be greatly exacerbated if every appellant faced the prospect that a jury might impose additional damages--compensatory and punitive--in a subsequent action based on its assessment of his or her motive in prosecuting the appeal." (41 C.3d 791.)

(b) *No action for abuse of process.* Plaintiff satisfied the first element of ulterior motive, but not the second--improper use of the process. *Tellefsen v. Key System Transit Lines* (1961) 198 C.A.2d 611, 613, 17 C.R. 919, is in point: There is no allegation that defendant took an appeal for other than its proper purpose. (41 C.3d 792.) The supposed "threat" that plaintiffs can be said to have alleged is implicit in every appeal; i.e., that it will be pursued to finality unless settlement is reached. To hold that making an offer to settle is itself sufficient to supply the missing element would have a devastating effect on the settlement process: "[N]o appellate counsel could properly advise his client to propose a settlement on appeal if that very proposal would itself provide the essential ingredient to subject the client to a second lawsuit for abuse of process." (41 C.3d 793.)

(c) *No action for malicious prosecution of appeal.* *Bertero v. National General Corp.* (1974) 13 C.3d 43, 118 C.R. 184, 529 P.2d 608, holding that a malicious cross-complaint could be the prior action, was based on the view that cross-pleadings are treated as distinct and independent actions. An appeal, however, is not a separate proceeding, but merely the continuation of an action. (41 C.3d 794, citing the text.)

(d) *No action for breach of covenant of good faith and fair dealing.* Even if it were assumed that Gulf's alleged conduct would constitute a breach of the covenant if it occurred in the context of litigation brought by an insured, *Murphy v. Allstate Ins. Co.* (1976) 17 C.3d 937, 132 C.R. 424, 553 P.2d 584, 2 Summary (10th), *Insurance*, §307, held that an alleged breach of the covenant does not give rise to a cause of action by third-party claimants. And *Royal Globe Ins. Co. v. Superior Court* (1979) 23 C.3d 880, 153 C.R. 842, 592 P.2d 329, 2 Summary (10th), *Insurance*, §253, distinguishing *Murphy*, merely held that a third-party claimant may sue an insurer under the statutory good faith requirements of *Ins.C. 790.03(h)*; nothing in that decision suggests expansion of the common law cause of action. (41 C.3d 795.)

(e) *No action for violation of Ins.C. 790.03.* *Ins.C. 790.03(h)(5)* speaks of "claims" and "claimants," and was not intended to apply to judgments. Moreover, the standard provided for sanctions against an insurer who does not attempt to effectuate settlement refers to claims "in which liability has become reasonably clear." This standard affords no meaningful guidance once a judgment is entered; and, in light of the fundamental nature of the right to appeal, "it appears quite unlikely that the Legislature intended to subject an insurer to the risk of a subsequent suit every time it exercised its right to appeal from an adverse judgment." (41 C.3d 796.) The more plausible interpretation is that the provision was intended to apply only to prejudgment conduct. (41 C.3d 797.)

(f) *Conclusion.* "The abuse of the litigation process for the purpose of delay is unquestionably a serious problem. Although, from a defendant's personal perspective, justice delayed may not be justice denied but a consummation devoutly to be wished, our legal system has long struggled--not always successfully--to eliminate such dilatory tactics. Recent legislation has expanded the judicial tools for dealing with the matter by explicitly authorizing the imposition of sanctions for frivolous and delaying conduct in the course of pretrial and trial proceedings (§ 128.5) and by increasing the judgment rate of interest to reduce a defendant's incentive to delay payment. (§ 685.010.)" (41 C.3d 797.) And *C.C.P. 907* affords a remedy for frivolous or delaying actions in the appeal process. "Given the complex and specialized nature of the task of distinguishing frivolous and nonfrivolous appeals, we conclude that--in the absence of an explicit legislative authorization of an independent cause of action for 'malicious appeal'--an aggrieved party's remedy properly lies in the provisions of section 907." (41 C.3d 797.)

One justice dissented at length, arguing that, although plaintiffs failed to meet the requirements of their other three causes of action, their complaint sufficiently alleged abuse of process. (41 C.3d 797, 808.) (See 14 *Pepperdine L. Rev.* 226 [Coleman].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

9 Witkin Cal. Proc. Appeal § 1002

[§ 1002] In General.

(1) *Trial Court Unification.* Trial court unification, which began in 1998, has been completed in all counties. Cases traditionally within the jurisdiction of the former municipal court are termed "limited civil cases," and, although these cases are now within the jurisdiction of the superior court, they continue to be governed by the procedural rules, including the appellate rules, formerly applicable to the municipal court. (See 2 *Cal. Proc.* (5th), *Courts*, §241; Rutter Group, 2 Civil Appeals and Writs, Chap. 16.)

(2) *Appeal to Superior Court Appellate Division.* "An appeal of a ruling by a superior court or other judicial officer in a limited civil case is to the appellate division of the superior court." (*C.C.P.* 904.2; see *C.C.P.* 77(e); 8 *Pacific L. J.* 242; 2 *Cal. Proc.* (5th), *Courts*, §339.)

(3) *Judicial Council Rules.* The rules that formerly applied to municipal court appeals now apply to appeals in limited civil cases. "Rules that apply to an appeal taken from a municipal court judgment to the appellate division of the superior court apply to an appeal taken from a unified superior court (trial court) judgment to the appellate division of the unified superior court (reviewing court)." (*C.R.C.*, Rule 8.700.) The following rules apply in the appellate division:

(a) *C.R.C.*, Rule 8.700 et seq. govern proceedings in the appellate division. (See *infra*, §1015 et seq.)

(b) *C.R.C.*, Rule 8.750 et seq. govern appeals to the appellate division in limited civil case appeals that do not require a retrial in the superior court. (See *infra*, §1006 et seq.)

(c) *C.R.C.*, Rule 8.780 et seq. govern appeals to the appellate division in criminal cases. (See 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §1 et seq.)

(4) *Statutes.* Substantive matters relating to appeals in limited civil cases are governed by statute. These include:

(a) Appealable judgments and orders. (*C.C.P.* 904.2; *infra*, §§1004, 1005.)

(b) Undertaking and stay on appeal. (*C.C.P.* 917.1; *supra*, §231 et seq.)

(c) Hearing in Court of Appeal. (*C.C.P.* 911; *infra*, §1020 et seq.)

(d) Scope of review. (*C.C.P.* 906; *supra*, §§89, 90.)

(e) Fact-finding power of reviewing court. (*C.C.P.* 909; *supra*, §309 et seq.)

(f) Costs imposed on frivolous appeals. (*C.C.P.* 907; *supra*, §983 et seq.)

West's Key Number Digest, Appeal and Error 44, 65, 373(2)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Judicial Council Rules.* C.R.C., Rule 8.700 was repealed in 2008.

(a) C.R.C., Rule 8.700 et seq. were repealed in 2008. C.R.C., Rule 8.800 et seq. now govern proceedings in the appellate division. (For definitions, see C.R.C., Rule 8.804; on construction and terminology, see C.R.C., Rule 8.802.)

(b) C.R.C., Rule 8.750 et seq. were repealed in 2008. C.R.C., Rule 8.820 et seq. now govern appeals to the appellate division in limited civil cases.

(c) C.R.C., Rule 8.780 et seq. were repealed in 2008. C.R.C., Rule 8.850 et seq. now govern appeals to the appellate division in criminal cases.



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B. Distinction: Appeal From Small Claims Court.

9 Witkin Cal. Proc. Appeal § 1003

[§ 1003] Distinction: Appeal From Small Claims Court.

Although it is often referred to as the "small claims court," the court is but a division of the superior court. (*C.C.P. 116.210*; see *2 Cal. Proc. (5th), Courts*, §267.) However, it is governed by separate rules of appeal. (See *C.R.C.*, Rule 8.900 et seq.)

The defendant, with respect to the plaintiff's claim, and the plaintiff, with respect to a claim of the defendant, may appeal a judgment of the small claims court to the superior court of the county in which the matter was heard, for a trial de novo, under Judicial Council Rules. (*C.C.P. 116.710, 116.770*; see *C.J.E.R.*, Judges Benchbook, Small Claims Court and Consumer Law (17th ed.), §9.1 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Trial, §17.2 et seq.; *2 Cal. Proc. (5th), Courts*, §312 et seq.) The plaintiff may not appeal the judgment on his or her own claim. (*C.C.P. 116.710(a)*; see *2 Cal. Proc. (5th), Courts*, §309.) Substantive matters are governed by statute. And this includes the nature and scope of review. (See *Burnett v. Reyes (1953) 118 C.A.2d Supp. 878, 880, 256 P.2d 91.*)

The right to appeal, the procedure in taking an appeal, and the trial de novo in the superior court, are fully covered in an earlier chapter of this work. (See *2 Cal. Proc. (5th), Courts*, §312 et seq.)

West's Key Number Digest, Appeal and Error 44, 65, 373(2)

SUPPLEMENT: [This section is current through the latest supplement]
C.R.C., Rule 8.900 et seq. were renumbered *C.R.C.*, Rule 8.950 et seq. in 2008.



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C. Appealability.

1. Appealable Judgments and Orders.

9 Witkin Cal. Proc. Appeal § 1004

[§ 1004] Appealable Judgments and Orders.

The statute specifying appealable judgments and orders in a limited civil case differs slightly from that dealing with superior court appeals (*supra*, §85 et seq.). The following judgments and orders in a limited civil case are appealable:

(1) A judgment, except an interlocutory judgment, or a contempt judgment made final and conclusive by *C.C.P.* 1222. (*C.C.P.* 904.2(a).)

(2) An order after a judgment made appealable by *C.C.P.* 904.2(a). (*C.C.P.* 904.2(b).)

(3) An order changing or refusing to change the place of trial. (*C.C.P.* 904.2(c).)

(4) An order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum. (*C.C.P.* 904.2(d).)

(5) An order granting a new trial or denying a motion for judgment notwithstanding the verdict. (*C.C.P.* 904.2(e).)

(6) An order discharging or refusing to discharge an attachment or granting a right to attach order. (*C.C.P.* 904.2(f).)

(7) An order granting or dissolving an injunction, or refusing to grant or dissolve an injunction. (*C.C.P.* 904.2(g).)

(8) An order appointing a receiver. (*C.C.P.* 904.2(h).)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Appealability.

2. Nonappealable Judgments and Orders.

9 Witkin Cal. Proc. Appeal § 1005

[§ 1005] Nonappealable Judgments and Orders.

(1) *Appeal to Appellate Division.* In *Smith v. Los Angeles Dept. of Trans.* (1997) 59 C.A.4th Supp. 7, 73 C.R.2d 838, defendant received two parking citations for parking a commercial vehicle in a residential area. A hearing examiner found defendant liable. After this determination was upheld on appeal to the municipal court, defendant attempted to appeal to the appellate department (now division) of the superior court under C.C.P. 904.2(a). *Held*, appeal dismissed. The appellate jurisdiction of the superior court is entirely statutory, and there is no specific provision for an appeal from the municipal court's determination of liability for a parking violation. Instead, the matter is extensively regulated by Veh.C. 40200 et seq., which do not provide for appeal to the superior court and establish an administrative procedure under which the courts have limited involvement in this area. In view of this extensive regulation, it is clear that the Legislature did not intend for a municipal court's decision regarding parking citations to constitute an appealable judgment under C.C.P. 904.2(a). (59 C.A.4th Supp. 9.)

In *Lim v. Silverton* (1997) 61 C.A.4th Supp. 1, 72 C.R.2d 408, defendant attempted to appeal from an interlocutory judgment imposing a monetary sanction. *Held*, the judgment was not appealable. C.C.P. 904.2 makes all interlocutory judgments nonappealable, and, unlike C.C.P. 904.1, contains no exceptions for sanction orders over a certain amount. Construing the statutes together, it is clear "that the Legislature did not intend any prejudgment municipal court orders or interlocutory judgments imposing sanctions to be directly appealable." (61 C.A.4th Supp. 4.)

In *Drum v. Superior Court* (2006) 139 C.A.4th 845, 43 C.R.3d 279, the court disapproved *Lim*. Monetary sanctions were imposed on plaintiff's attorney in a limited civil case. If the sanction orders were immediately appealable, his appeal was untimely. *Held*, the appeal was untimely. Under the common law "collateral order" exception to the "one final judgment" rule, monetary sanctions orders are directly appealable. Amendments to C.C.P. 904.1, governing appeals in unlimited civil cases, limited the "collateral order" exception. However, those amendments made no change to C.C.P. 904.2, governing appeals in limited civil case appeals. Thus, the "collateral order" exception continues to apply to limited civil cases. (139 C.A.4th 849.) (See *General Elec. Capital Auto Financial Services v. Appellate Div.* (2001) 88 C.A.4th 136, 144, 105 C.R.2d 552 [small claims judgments are appealable only to superior court, not to appellate division; in small claims cases, appellate division's appellate jurisdiction extends only to *postjudgment* enforcement orders].)

(2) *Appeal From Appellate Division.* An appeal may not be taken from a judgment of the appellate division of a superior court granting or denying a petition for mandamus or prohibition directed to the superior court or a judge of that court in limited civil case. An appellate court may review the judgment, in its discretion, on a petition for an extraordinary writ. (*C.C.P.* 904.3; on nonappealable orders and judgments generally, see *supra*, §85 et seq.)

West's Key Number Digest, Appeal and Error 24 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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D. Procedure.

1. Notice of Appeal.

a. Form and Filing.

9 *Witkin Cal. Proc. Appeal § 1006*

[§ 1006] Form and Filing.

(1) *In General.* An appeal in a limited civil case, except a small claims case (see *supra*, §1003), from the judgment or from a particular part of it is taken by filing a notice of appeal with the clerk of the trial court. "The notice shall be signed by the appellant or by his attorney and shall be sufficient if it states in substance that the appellant appeals from a specified judgment or a particular part thereof. A notice of appeal shall be liberally construed in favor of its sufficiency." (C.R.C., Rule 8.750(a); see C.R.C., Rule 8.100(a) [unlimited civil case appeal], *supra*, §560; C.E.B., 1 Civil Appellate Practice 3d, §10.7 et seq.; Rutter Group, 1 Civil Appeals and Writs §3:130 et seq.; Cal. Civil Practice, 4 Procedure, §34:29.)

(2) *Filing Fee.* Within 10 days of the filing of the notice of appeal, appellants and cross-appellants must pay to the clerk of the superior court a nonrefundable filing fee in the statutorily prescribed amount. (C.R.C., Rule 8.750(c), (e).) The fee for filing a notice of appeal or petition for a writ is \$ 300. (*Govt.C. 70621(a).*) However, if the amount demanded, excluding attorneys' fees and costs, is \$ 10,000 or less, the fee for filing the notice or petition is \$ 180. (*Govt.C. 70621(b).*)

Payment of the fee for filing a notice of appeal may be excused for an indigent appellant or cross-appellant on the same basis as payment of such a fee is excused in the trial court (see 3 *Cal. Proc.* (5th), *Actions*, §§418, 419). (C.R.C., Rule 8.750(d), (e).)

West's Key Number Digest, Appeal and Error 396 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.750 was repealed in 2008. The form and filing of the notice of appeal are now governed by C.R.C., Rule 8.821, which provides as follows:

(a) To appeal from a judgment or appealable order in a limited civil case, except a small claims case, an appellant must serve and file a notice of appeal in the superior court that issued the judgment or order being appealed. The appellant or the appellant's attorney must sign the notice. (C.R.C., Rule 8.821(a)(1).) The notice of appeal must be

liberally construed and is sufficient if it identifies the particular judgment or order being appealed. (C.R.C., Rule 8.821(a)(2).)

(b) Failure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure. (C.R.C., Rule 8.821(a)(3).)

See Judicial Council Form No. APP-101-INFO [Information on Appeal Procedures for Limited Civil Cases]; Judicial Council Form No. APP-102 [Notice of Appeal/Cross-Appeal (Limited Civil Case)].

(2) *Filing Fee.* C.R.C., Rule 8.750 was repealed in 2008. The form and filing of the notice of appeal are now governed by in C.R.C., Rule 8.821, which provides as follows:

(a) Unless otherwise provided by law, the notice of appeal must be accompanied by the filing fee required under *Govt.C. 70621*, an application for a waiver under C.R.C., Rule 8.818, or an order granting a waiver. The filing fee is nonrefundable. (C.R.C., Rule 8.821(b)(1), as amended in 2009.) The clerk must file the notice of appeal even if the appellant does not comply with these requirements. (C.R.C., Rule 8.821(b)(2).)

(b) The clerk must promptly notify the appellant in writing if (1) one of more of the aforementioned requirements is not met; (2) a check for the filing fee is dishonored; or (3) an application for a waiver is denied. (C.R.C., Rule 8.821(c)(1).) The notice must state that the court may dismiss the appeal unless, within 15 days after the notice is sent, the appellant either pays the fee or files an application for a waiver (if the appellant has not previously filed such an application). (C.R.C., Rule 8.821(c)(2).) If the appellant fails to take the action specified in the notice, the appellate division may dismiss the appeal, but may vacate the dismissal for good cause. (C.R.C., Rule 8.821(c)(3).)

The fee for filing a notice of appeal or a petition for a writ where the amount demanded, excluding attorneys' and costs, is more than \$ 10,000 is now \$ 330. (*Govt.C. 70621(a)*, as amended in 2009.) The fee for filing a notice of appeal or a petition for a writ where the amount demanded, excluding attorneys' fees and costs, is \$ 10,000 or less is now \$ 205. (*Govt.C. 70621(b)*, as amended in 2009.)

(3) *(New) Service and Filing of Documents.* Before filing any document, a party must serve, by any method permitted by the Code of Civil Procedure, one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule. (C.R.C., Rule 8.817(a)(1), adopted in 2008; on attachment of proof of service to document to be filed, see C.R.C., Rule 8.817(a)(2), adopted in 2008.)

The Judicial Council has approved the following forms related to service:

Form No. APP-109 [Proof of Service (Appellate Division)].

Form No. APP-109-INFO [What Is Proof of Service?].

A document is deemed filed on the date the clerk receives it. (C.R.C., Rule 8.817(b)(1), adopted in 2008.) Unless otherwise provided, a filing is not timely unless the clerk receives the document before the time to file it expires. (C.R.C., Rule 8.817(b)(2), adopted in 2008; on special provisions regarding filing of briefs, petitions for rehearing, and answers to petitions for rehearing, see C.R.C., Rule 8.817(b)(3), (b)(4), adopted in 2008.)



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1. Notice of Appeal.
- b. Notification by Clerk.

9 Witkin Cal. Proc. Appeal § 1007

[§ 1007] Notification by Clerk.

Former C.C.P. 974 required service of the notice on the adverse party. (See *MacDonald v. Superior Court* (1929) 101 C.A. 423, 281 P. 672; *Marr v. Superior Court* (1938) 27 C.A.2d 393, 80 P.2d 1005; *Fraser v. Superior Court* (1953) 115 C.A.2d 693, 252 P.2d 365.) This requirement was eliminated in 1964. "The clerk of the trial court shall forthwith mail a notification of the filing of the notice of appeal to the attorney of record of each party other than the appellant, or if the party is not represented by an attorney, then to the party at his last known address. The notification shall state the number and title of the action or proceeding and the date the notice of appeal was filed. Such mailing is a sufficient performance of the clerk's duty notwithstanding the death of the party or the death, discharge, suspension, disbarment or disqualification of his attorney prior to the giving of the notification. The failure of the clerk to give such notification shall not affect the validity of the appeal." (C.R.C., Rule 8.750(b).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.13; Rutter Group, 1 Civil Appeals and Writs §3:139 et seq.; on C.R.C., Rule 8.100(e) [unlimited civil case appeal], see supra, §559.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.750(b) was repealed in 2008. C.R.C., Rule 8.821(d) now provides as follows:

(1) When the notice of appeal is filed, the trial court clerk must promptly mail a notification of the filing to the attorney of record for each party and to any unrepresented party. The clerk must also mail or deliver this notification to the appellate division clerk. (C.R.C., Rule 8.821(d)(1).) The notification must show the date that it was mailed and must state the number and title of the case and the date the notice of appeal was filed. (C.R.C., Rule 8.821(d)(2).)

(2) A copy of the notice of appeal is sufficient notification if the required information is on the copy or is added by the trial court clerk. (C.R.C., Rule 8.821(d)(3).) Mailing the notification is sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney. (C.R.C., Rule 8.821(d)(4).)

(3) Failure to comply with any of these provisions does not affect the validity of the notice of appeal. (C.R.C., Rule 8.821(d)(5).)



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D. Procedure.

1. Notice of Appeal.

c. Time.

9 Witkin Cal. Proc. Appeal § 1008

[§ 1008] Time.

Except as otherwise provided by statute or C.R.C., Rule 8.752 (extension by new trial motion or motion to vacate), the notice of appeal must be filed on or before the earliest of the following dates:

(1) Thirty days after the date of mailing by the clerk of a document entitled "notice of entry" of judgment or appealable order (or a file-stamped copy of the judgment or appealable order). (C.R.C., Rule 8.751(a)(1).)

(2) Thirty days after the date of service of a document entitled "notice of entry" of judgment or appealable order (or a file-stamped copy of the judgment or appealable order) either by the party filing the notice of appeal or by any party on the party filing the notice of appeal. (C.R.C., Rule 8.751(a)(2).)

(3) Ninety days after the date of entry of the judgment. (C.R.C., Rule 8.751(a)(3).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.7 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:3 et seq.; on C.R.C., Rule 8.104(a) [providing for 60- and 180-day periods for filing notice of appeal in unlimited civil case], see supra, §574 et seq.)

The time is jurisdictional, and a late appeal is ineffective. (See *Reber v. Superior Court* (1961) 189 C.A.2d 622, 625, 11 C.R. 534, supra, §614.) But C.R.C., Rule 8.751(c) provides protection for a premature appeal. (See C.R.C., Rule 8.104(e) [unlimited civil case appeal], supra, §620 et seq.)

In *Triumph Precision Products v. Insurance Co. of North America* (1979) 91 C.A.3d 362, 154 C.R. 120, the clerk's notice of entry of judgment was wrongly addressed and was returned as undeliverable. The clerk immediately mailed a second notice. *Held*, the notice of appeal, although filed more than 30 days after the first clerk's notice, was timely; the first notice was a nullity, and the 30-day period did not begin to run until the date the second notice was mailed. (91 C.A.3d 364.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Adaimy v. Ruhl* (2008) 160 C.A.4th 583, 586, 72 C.R.3d 926 [court clerk's service by mail of notice of entry of judgment on one of plaintiff's attorneys, but not on law firm also representing plaintiff, was sufficient to start period for

filing notice of appeal, even though plaintiff filed association of counsel and requested that all documents be served on all counsel; distinguishing *Triumph Precision Products v. Insurance Co. of North America* (1979) 91 C.A.3d 362, 154 C.R. 120, text, p. 1064, where notice was improperly addressed].

C.R.C., Rule 8.752 was repealed in 2008. Extension of time is now governed by C.R.C., Rule 8.823. C.R.C., Rule 8.751 was repealed in 2008. C.R.C., Rule 8.822 now provides that a notice of appeal must be filed on or before the earliest of the following:

(1) Thirty days after the trial court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed. (C.R.C., Rule 8.822(a)(1).)

(2) Thirty days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service. (C.R.C., Rule 8.822(a)(2).)

(3) Ninety days after the entry of judgment. (C.R.C., Rule 8.822(a)(3).)

Protection for a premature filing is now provided in C.R.C., Rule 8.822(c).



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1. Notice of Appeal.
d. Extension After Denial of Motion.

9 Witkin Cal. Proc. Appeal § 1009

[§ 1009] Extension After Denial of Motion.

(1) *In General.* C.R.C., Rule 8.752(a) allows an extension where a valid notice of intention to move for new trial is served and filed within the time for filing notice of appeal. The time is extended until 15 days after denial of the motion, but in no event may the notice of appeal be filed later than 90 days after the date of entry of the judgment. (See C.E.B., 1 Civil Appellate Practice 3d, §10.10; Rutter Group, 2 Civil Appeals and Writs §16:6 et seq.; on C.R.C., Rule 8.108(a) [unlimited civil case appeal], see *supra*, §587 et seq.)

C.R.C., Rule 8.752(b) allows a similar extension where a motion to vacate is made within the time for appeal and the motion is denied or not decided by the trial court within 75 days after entry of the judgment. (On C.R.C., Rule 8.108(c) [unlimited civil case appeal], see *supra*, §595.) The time is extended until 15 days after entry of the order denying the motion, or until 90 days after entry of the judgment, whichever is earlier. (See *Knudson v. Superior Court* (1968) 267 C.A.2d 876, 879, 73 C.R. 513 [judgments May 14, 16; motion to vacate under C.C.P. 473 made June 11, denied June 27; notice of appeal, filed July 1, was timely]; C.E.B., 1 Civil Appellate Practice 3d, §10.11.)

(2) *Withdrawal of Motion as Constructive Denial.* In *O'Donnell v. Municipal Court* (1989) 207 C.A.3d 714, 255 C.R. 31, defendant O made motions for a new trial and to vacate the judgment. At the hearing, the judge warned her that if the motions were pursued, the result might be a judgment more favorable to plaintiff W than the original judgment. She then withdrew both motions and filed a notice of appeal. *Held*, the appeal was timely under the extension rule; withdrawal was equivalent to denial, because it had the same effect.

"[A]s a policy matter, we feel it is unwise to penalize [O] for dropping a hopeless motion and proceeding with the appeal, an action which saved time for everyone. It would have been inefficient to have required her to wait until the hearing and denial of the motions, a waste of everyone's time. [W] rejoins that if in general we treat the withdrawal of such motions as giving an extension of time to appeal, then parties could file such motions though they were groundless, with no intention of doing anything other than obtaining an extension of time to notice the appeal. But we feel as a practical matter this is a relatively unlikely possibility." (207 C.A.3d 717.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.752 was repealed in 2008. C.R.C., Rule 8.823 now applies to (a) motions for a new trial; (b) motions to vacate judgment; (c) motions for judgment notwithstanding the verdict; and (d) motions to reconsider an appealable order.

C.R.C., Rule 8.823 operates only to increase the time to appeal; it does not shorten the time to appeal. Thus, if the normal time to appeal stated in C.R.C., Rule 8.822(a) (Supp., supra, §1008) would be longer than the time provided in C.R.C., Rule 8.823, the time to appeal stated in C.R.C., Rule 8.822(a) governs. (C.R.C., Rule 8.823(a).)

(a) *Motion for new trial.* If any party serves and files a valid notice of intention to move for a new trial, and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) Fifteen days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.823(b)(1)(A).)

(2) Fifteen days after denial of the motion by operation of law. (C.R.C., Rule 8.823(b)(1)(B).)

(3) Ninety days after entry of judgment. (C.R.C., Rule 8.823(b)(1)(C).)

If any party serves and files a valid notice of intention to move for a new trial, and any party then serves an acceptance of a conditionally ordered additur or remittitur of damages under a trial court finding of excessive or inadequate damages, the time to appeal from the judgment is extended for all parties until 15 days after the date that the party serves the acceptance. (C.R.C., Rule 8.823(b)(2).)

(b) *Motion to vacate.* If, within the time prescribed by C.R.C., Rule 8.822 to appeal from the judgment, any party serves and files a valid notice of intention to move to vacate the judgment or a valid motion to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) Fifteen days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.823(c)(1).)

(2) Forty five days after the first notice of intention to move or motion is filed. (C.R.C., Rule 8.823(c)(2).)

(3) Ninety days after entry of judgment. (C.R.C., Rule 8.823(c)(3).)

(c) *Motion for judgment notwithstanding verdict.* If any party serves and files a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of the following:

(1) Fifteen days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.823(d)(1)(A).)

(2) Fifteen days after denial of the motion by operation of law. (C.R.C., Rule 8.823(d)(1)(B).)

(3) Ninety days after entry of judgment. (C.R.C., Rule 8.823(d)(1)(C).)

(d) *Motion to reconsider appealable order.* If any party serves and files a valid motion to reconsider an appealable order under C.C.P. 1008(a), the time to appeal from that order is extended for all parties until the earliest of the following:

(1) Fifteen days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order. (C.R.C., Rule 8.823(e)(1).)

(2) Forty-five days after the first motion to reconsider is filed. (C.R.C., Rule 8.823(d)(2).)

(3) Ninety days after entry of the appealable order. (C.R.C., Rule 8.823(d)(3).)



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1. Notice of Appeal.

e. Cross-Appeal.

9 Witkin Cal. Proc. Appeal § 1010

[§ 1010] Cross-Appeal.

C.R.C., Rule 8.752 permits the losing party, as a precautionary measure following an order granting a new trial, to take a cross-appeal from the judgment or an order denying a motion for judgment notwithstanding the verdict, along with the adverse party's appeal from the order. "If a timely notice of appeal is filed from an order granting a motion for a new trial or granting, within 75 days after entry of judgment, a motion to vacate the judgment or to vacate judgment and enter another and different judgment, any party other than the appellant, within 10 days after mailing of notification by the trial court clerk of such appeal, may file a notice of appeal from the judgment or from an order denying a motion for judgment notwithstanding the verdict, and on that appeal may present any question which he might have presented on an appeal from the judgment as originally entered or from the order denying a motion for judgment notwithstanding the verdict." (C.R.C., Rule 8.752(c).) (On C.R.C., Rule 8.108(f) [unlimited civil case appeal: same except time for filing notice], see *supra*, §592.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.752(c) was repealed in 2008. Cross-appeal is now governed by C.R.C., Rule 8.823(f). The following provisions apply:

(1) If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 10 days after the trial court clerk mails notification of the first appeal. (C.R.C., Rule 8.823(f)(1).)

(2) If an appellant timely appeals from (a) an order granting a motion for a new trial, (b) an order granting--within 75 days after entry of judgment--a motion to vacate the judgment, or (c) a judgment notwithstanding the verdict, the time for any other party to appeal from the original judgment or from an order denying a motion for judgment notwithstanding the verdict is extended until 10 days after the clerk mails notification of the first appeal. (C.R.C., Rule 8.823(f)(2).)

See Judicial Council Form No. APP-102 [Notice of Appeal/Cross-Appeal (Limited Civil Case)].



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D. Procedure.

2. Record on Appeal.

a. In General.

9 Witkin Cal. Proc. Appeal § 1011

[§ 1011] In General.

The Rules of Court authorize the same choice of records in limited civil case appeals as in unlimited civil case appeals (see *supra*, §626 et seq.). (C.R.C., Rule 8.753 et seq.) They also contain similar provisions on preparation and filing (see *supra*, §§642, 649), except for shorter time limits (see *supra*, §632). (C.R.C., Rule 8.750 et seq.; see C.E.B., 1 Civil Appellate Practice 3d, §10.28 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:11 et seq.) C.R.C., Rule 8.771 states a presumption of sufficiency where less than a complete record is brought up. (On C.R.C., Rule 8.163 [unlimited civil case appeal], see *supra*, §357.)

The reporter's transcript is prepared as provided in C.R.C. 8.144(b). All papers copied by the clerk for the record are prepared as provided in C.R.C., Rule 8.144(a). (C.R.C., Rule 8.758(a).) This rule adopts the requirements of form of typewritten and printed records for appeals in unlimited civil cases. (See *supra*, §631.)

C.R.C., Rule 8.760 follows C.R.C., Rule 8.147(a) in requiring the preparation of a single record where several parties appeal from the same judgment or where there is a cross-appeal. (See *supra*, §671.) However, the provision for use of a prior record on subsequent appeals in the same case (C.R.C., Rule 8.147(b); see *supra*, §672) is omitted from C.R.C., Rule 8.760.

The use of recycled paper is required for the original record on appeal from a limited civil case and copies filed with the court or served on other parties. (C.R.C., Rule 8.706(g).)

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SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.753 et seq. were repealed in 2008. The types of record are now specified in C.R.C., Rule 8.830 et seq.

C.R.C., Rule 8.750 et seq. were repealed in 2008. Filing requirements are now stated in C.R.C., Rule 8.821 et seq.

C.R.C., Rule 8.771 was repealed in 2008. C.R.C., Rule 8.830(b) now provides that the appellate division will

presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record.

C.R.C., Rule 8.758(a) was repealed in 2008. The form of the record is now specified in C.R.C., Rule 8.838.

C.R.C., Rule 8.760 was repealed in 2008. C.R.C., Rule 8.839(a) now requires a single record. (On sharing cost of preparing record, see C.R.C., Rule 8.839(b).)

C.R.C., Rule 8.706(g) was repealed in 2008. The mandatory use of recycled paper is now in C.R.C., Rule 8.883(c)(1). Service of copies of the brief is now in C.R.C., Rule 8.882(e).

Within 10 days after filing the notice of appeal, an appellant must serve and file a notice in the trial court designating the record on appeal. The appellant may combine its notice designating the record with its notice of appeal. (C.R.C., Rule 8.831(a); on contents of notice, see C.R.C., Rule 8.831(b))



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b. Transcripts.

9 Witkin Cal. Proc. Appeal § 1012

[§ 1012] Transcripts.

(1) *Reporter's Transcript.* When the appellant desires to present a point requiring consideration of the oral proceedings (including oral instructions given or refused, and portions of depositions received in evidence or offered and rejected), he or she usually obtains a reporter's transcript. (C.R.C., Rule 8.753; see C.E.B., 1 Civil Appellate Practice 3d, §10.37 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:11.1 et seq.; on C.R.C., Rule 8.130 [unlimited civil case appeal], see supra, §635 et seq.)

The first step is a written notice to prepare the transcript, served on the respondent and filed with the clerk. (C.R.C., Rule 8.753(a).) The clerk must transmit the notice to the reporter "without delay," and the reporter must within 10 days thereafter file an estimate of charges or notify the clerk of the date that he or she notified the appellant of that estimate. (C.R.C., Rule 8.753(a).) The appellant's notice to prepare the transcript is ineffective unless, within 10 days after receiving notice of the estimated cost, he or she deposits the estimated cost or files a waiver signed by the reporter. (C.R.C., Rule 8.753(c).)

Unless time is extended, the reporter must complete and file with the clerk the original reporter's transcript within 20 days after direction from the clerk or the receipt of the fees from the appellant. However, in multi-reporter cases, the clerk must accept completed portions of the transcript for 1 week after the filing deadline, even if the total transcript has not been completed. (C.R.C., Rule 8.753(d); on C.R.C., Rule 8.130(f)(1) [unlimited civil case appeal: 30-day limit, and original and one copy required], see supra, §642.)

As in appeals in unlimited civil cases, the parties, by stipulation or by designation, may bring up a partial transcript. (C.R.C., Rule 8.753(b); on C.R.C., Rule 8.130(a)(2) and (e)(2) [unlimited civil case appeal], see supra, §635.)

(2) *Clerk's Transcript and Original Papers.* The "papers or records on file or lodged with the clerk" are brought up by a clerk's transcript or as original papers. (C.R.C., Rule 8.754(a); on similar C.R.C., Rule 8.122 [unlimited civil case appeal], see supra, §646 et seq.) However, in unlimited civil case appeals, the only original papers allowed are exhibits; in limited civil case appeals, virtually the entire clerk's file comes up without copying, and the only papers copied are those that cannot be transmitted.

To avoid unnecessary expense and duplication of records, the captions and formal parts of papers, and the verifications and proofs of service, are to be omitted unless a party expressly requests inclusion. But the clerk must state in his or her transcript "the nature of such omitted matters." (C.R.C., Rule 8.754(e); see C.E.B., 1 Civil Appellate Practice 3d, §10.30 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:15 et seq.; on C.R.C., Rule 8.130(a)(1) [unlimited civil case appeal], see *supra*, §635.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reporter's Transcript.* C.R.C., Rule 8.753 was repealed in 2008. C.R.C., Rule 8.834 now provides as follows:

(a) The notice designating a reporter's transcript must specify the date of each proceeding to be included in the transcript and may specify portions of the designated proceedings that are not to be included. (C.R.C., Rule 8.834(a)(1).) Within 10 days after service of the notice, the respondent may file a notice in the trial court designating any additional proceedings to be included. (C.R.C., Rule 8.834(a)(3).) The clerk must then promptly mail a copy of each notice to the reporter. (C.R.C., Rule 8.834(a)(4).) (See Judicial Council Form Nos. APP-103 [Notice Designating Record on Appeal (Limited Civil Case)]; APP-110 [Respondent's Notice Designating Record on Appeal (Limited Civil Case)].)

(b) Within 10 days after being notified by the clerk of the estimated cost of preparing the reporter's transcript, the appellant must deposit with the clerk an amount equal to the estimated cost or file with the clerk a waiver of the deposit. The clerk must then promptly notify the reporter to prepare the transcript. (C.R.C., Rule 8.834(b)(2).) Within 20 days after being so notified, the reporter must prepare and certify an original of the transcript and file it in the trial court. The reporter must also file one copy of the original or more than one copy if multiple appellants equally share the cost of preparing the record. (C.R.C., Rule 8.834(d)(1).) When the transcript is completed, the reporter must bill each designating party at the statutory rate and send a copy of the bill to the clerk. The clerk then pays the reporter from that party's deposited funds. (C.R.C., Rule 8.834(d)(2).)

(c) The reporter must transcribe all designated proceedings and must note in the transcript where any proceedings were omitted and the nature of those proceedings. The reporter must also note where any exhibit was marked for identification and where it was admitted or refused, identifying exhibits by number or letter. (C.R.C., Rule 8.834(c)(1).) The reporter may not transcribe the voir dire examination of jurors, any opening statement, or the proceedings on a motion for a new trial, unless they are designated. (C.R.C., Rule 8.834(c)(2).) If a party designates a portion of a witness's testimony to be transcribed, the reporter must transcribe the witness's entire testimony, unless the parties stipulate otherwise. (C.R.C., Rule 8.834(c)(3).)

(d) If any portion of the designated proceedings were not reported or cannot be transcribed, the trial court clerk must so notify the designating party by mail. (C.R.C., Rule 8.834(e)(1).) Within 10 days after the notice is mailed, the designating party must notify the court whether the party elects to proceed with or without a record of the oral proceedings that were not reported or cannot be transcribed. If the party elects to proceed with a record of these oral proceedings, the notice must specify which form of the record the party elects to use. (C.R.C., Rule 8.834(e)(2).)(2) *Clerk's Transcript and Original Papers.* C.R.C., Rule 8.754 was repealed in 2008. C.R.C., Rule 8.832, as amended in 2009, now provides as follows:

(a) The matters to be included automatically in the clerk's transcript, as well as those that must be included if designated, are set forth in C.R.C., Rule 8.832(a)(2). These are substantively the same as those mentioned in C.R.C., Rule 8.122(b) (see text, §§646, 647) for unlimited civil cases. (On procedure for allowing respondent to designate documents to be included and portions to be omitted, see C.R.C., Rule 8.832(b).) (See Judicial Council Form No. APP-103 [Notice Designating Record on Appeal (Limited Civil Case)].)

(b) The clerk sends a notice of the estimated cost of preparing the clerk's transcript. (C.R.C., Rule 8.832(c)(1).) Within 10 days after the clerk sends a notice of the estimated cost, the appellant and any party wanting to purchase a copy of the clerk's transcript must deposit the estimated cost with the clerk, unless the party submits an application for a

waiver of the cost or an order granting a waiver. (C.R.C., Rule 8.832(c)(3).) Within 30 days after the appellant deposits the estimated cost of the transcript, the clerk must prepare an original and one copy of the clerk's transcript and certify the original, and prepare any additional copies for which the parties have made deposits. (C.R.C., Rule 8.832(d)(1).) (On refund of deposit where appeal is abandoned or dismissed, see C.R.C., Rule 8.832(a)(2).)

(3) *(New) Trial Court File Instead of Clerk's Transcript.* By local rule for the appellate division, the original trial court file may be used instead of a clerk's transcript. (C.R.C., Rule 8.833, adopted in 2008.) The following provisions apply:

(a) Within 10 days after the appellant serves a notice indicating that the appellant elects to use a clerk's transcript, the trial court clerk may mail the appellant a notice indicating that the appellate division for that court has elected by local court rule to use the original trial court file instead of a clerk's transcript and providing the appellant with an estimate of the cost to prepare the file. (C.R.C., Rule 8.833(b)(1).) Within 10 days after the clerk mails the estimate, the appellant must deposit the estimated cost otherwise provided by law or submit an application for a waiver under C.R.C., Rule 8.818, or an order granting a waiver. (C.R.C., Rule 8.833(b)(2), as amended in 2009.)

(b) Within 10 days after the appellant deposits the estimated cost or the court files an order waiving that cost, the trial court clerk must put the trial court file in chronological order, number the pages, and attach a chronological index and a list of all attorneys of record, the parties they represent, and any unrepresented parties. (C.R.C., Rule 8.833(b)(3).) The clerk sends copies of the index to the attorneys of record and to unrepresented parties to use in paginating their own copies of the record. (C.R.C., Rule 8.833(b)(4).) The clerk sends the file to the appellate division. (C.R.C., Rule 8.833(b)(5).)

(4) *(New) Form.* Except as otherwise provided in C.R.C., Rule 8.838, the clerk's and reporter's transcripts (see text, §635 et seq.) must comply with the paper and format requirements of C.R.C., Rule 8.144. (C.R.C., Rule 8.838(a), adopted in 2008.)



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9 Witkin Cal. Proc. Appeal § 1013

[§ 1013] Agreed or Settled Statement.

(1) *Agreed Statement.* An agreed statement, i.e., one showing the nature of the controversy, the basis of the reviewing court's jurisdiction, and how the questions arose and were decided, may be used as the whole or part of the record. (C.R.C., Rule 8.755(a).) The notice of a preliminary stipulation stating that the parties are attempting to prepare an agreed statement must be given within 10 days after filing the notice of appeal. (C.R.C., Rule 8.755(b).)

The time limits are generally different from those in unlimited civil case appeals (see C.R.C., Rule 8.134, *supra*, §664 et seq.). For example, under C.R.C., Rule 8.755(a), the agreed statement must be filed within 30 days, rather than 40 days, after filing of the notice of appeal, and under C.R.C., Rule 8.755(b), the stipulation extends time for 40 days, instead of 50 days. (See C.E.B., 1 Civil Appellate Practice 3d, §10.51 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:23 et seq.; on C.R.C., Rule 8.134(b) [unlimited civil case appeal], see *supra*, §666.) Only the original is filed. (C.R.C., Rule 8.755(a).)

(2) *Settled Statement.* A settled statement, i.e., a condensed statement in narrative form of those portions of the oral proceedings deemed material to the determination of the points on appeal, may also be used in lieu of a reporter's transcript. (C.R.C., Rule 8.756; on C.R.C., Rule 8.137 [unlimited civil case appeal], see *supra*, §657 et seq.) The procedure is similar, except that the appellant, within 10 days after filing the notice of appeal, must file a notice of intent to use a settled statement, and within 20 days thereafter must serve and file the statement itself. (C.R.C., Rule 8.756(a).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.42 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:19 et seq.; Cal. Civil Practice, 4 Procedure, §34:39 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Agreed Statement.* C.R.C., Rule 8.755 was repealed in 2008. C.R.C., Rule 8.836 now provides as follows:

(a) An agreed statement is a summary of the trial court proceedings that is agreed to by the parties. If the parties have prepared an agreed statement or stipulated to prepare one, the appellant can elect to use an agreed statement as the record of the documents filed in the trial court, replacing the clerk's transcript, and, as the record of the oral proceedings in the trial court, replacing the reporter's transcript. (C.R.C., Rule 8.836(a).)

(b) The agreed statement must explain the nature of the action, the basis of the appellate division's jurisdiction, and the rulings of the trial court relating to the points to be raised on appeal. The statement should recite only those facts that a party considers relevant to decide the appeal, and must be signed by the parties. (C.R.C., Rule 8.836(b)(1).) If the agreed statement replaces a clerk's transcript, the statement must be accompanied by copies of all items automatically included in that transcript (see text, §646). (C.R.C., Rule 8.836(b)(2).) The statement may be accompanied by copies of any document includable in the clerk's transcript (see text, §647). (C.R.C., Rule 8.836(b)(3).)

(c) If an appellant indicates in its notice designating the record that it elects to use an agreed statement, the appellant must file with the notice designating the record either the agreed statement or a stipulation that the parties are attempting to agree on a statement. (C.R.C., Rule 8.836(c)(1).) If the appellant files a stipulation, within 30 days after filing the notice of designation, the appellant must either file the statement (if the parties were able to agree on the statement), or file both a notice stating that the parties were not able to agree on the statement and a new notice designating the record. (C.R.C., Rule 8.836(c)(2).)(2) *Settled Statement*. C.R.C., Rule 8.756 was repealed in 2008. The agreed statement, now named the "statement on appeal," is governed by C.R.C., Rule 8.837, which provides as follows:

(a) A statement on appeal is a summary of the trial court proceedings that is approved by the trial court. An appellant can elect to use a statement on appeal as the record of the oral proceedings in the trial court, replacing the reporter's transcript. (C.R.C., Rule 8.837(a).)

(b) The appellant must serve and file a proposed statement of appeal within 20 days after filing the notice designating the choice of record. (C.R.C., Rule 8.837(b)(1).) The statement must contain a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal and a summary of the trial court's holding and judgment (C.R.C., Rule 8.837(c)(1)), as well as a statement of the points that the appellant is raising on appeal (C.R.C., Rule 8.837(c)(2)). (See Judicial Council Form No. APP-104 [Proposed Statement on Appeal (Limited Civil Case)].)

(c) Within 10 days after the appellant files the proposed statement, the respondent may serve and file proposed amendments. (C.R.C., Rule 8.837(d)(1).) No later than 10 days thereafter, a party may request a hearing before the trial court judge to review and correct the proposed statement. The judge will not ordinarily order a hearing unless there is a factual dispute about a material aspect of the trial court proceedings. (C.R.C., Rule 8.837(d)(2).)

(d) If a hearing is ordered, the judge must make any changes to the statement within 10 days after the hearing. If no hearing is ordered, no later than 10 days after the time for requesting a hearing expires, the judge must review the proposed statement and any proposed amendments and make any changes necessary to ensure that it is an accurate summary of the trial court proceedings. (C.R.C., Rule 8.837(d)(4).) Instead of correcting a proposed statement on appeal, the judge may order the use of an electronic recording or a transcript. (C.R.C., Rule 8.837(d)(6).) (See Judicial Council Form No. APP-105 [Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case)].)

(e) If the judge makes corrections or modifications to the proposed statement, the clerk must send copies of the corrected or modified statement to the parties, who may then serve and file proposed modifications or objections. (C.R.C., Rule 8.837(e).) If the judge has changed an appellant's proposed statement, the judge must review any proposed modifications or objections filed by the parties, make any changes necessary, and certify the statement. (C.R.C., Rule 8.837(f)(2).) If the judge has not made changes to the proposed statement, the judge must promptly certify the statement. (C.R.C., Rule 8.837(f)(1).)



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9 Witkin Cal. Proc. Appeal § 1014

[§ 1014] Filing, Correction, and Augmentation.

On completion of the record and payment of the filing fee by the appellant or excuse from paying the fee, the trial court clerk transmits the record to the county clerk for filing. The trial court clerk may be compelled to transmit the record by order of the reviewing court, made on motion. (C.R.C., Rule 8.759; see C.E.B., 1 Civil Appellate Practice 3d, §10.62; on C.R.C., Rule 8.150(a) [transmission to reviewing court], see *supra*, §679.)

C.R.C., Rule 8.761 provides for augmentation of the record by adding papers or transcribing oral proceedings or bringing up an agreed or settled statement of portions of the oral proceedings. It also provides for correction of omissions or errors in the record. (On C.R.C., Rule 8.155 [unlimited civil case appeal], see *supra*, §681 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.759 was repealed in 2008. C.R.C., Rule 8.840 now provides that, when the record is complete, the trial court clerk must promptly send the original to the appellate division and send to the appellant and respondent copies of any certified statement on appeal (see *Supp.*, *supra*, §1013) and any copies of transcripts or official electronic recordings they have purchased. The appellate division clerk must promptly file the original and mail notice of the filing date to the parties. (C.R.C., Rule 8.840.)

C.R.C., Rule 8.761 was repealed in 2008. Augmentation and correction are now covered by C.R.C., Rule 8.841, which provides as follows:

(1) At any time, on motion of a party or its own motion, the appellate division may order the record augmented to include (a) any document filed or lodged in the case in the trial court, or (b) a certified transcript (or agreed statement or a statement on appeal) of oral proceedings that have not been designated to be included in the record. (C.R.C., Rule 8.841(a)(1).) A party must attach to the motion a copy, if available, of any document or transcript to be added to the record. (C.R.C., Rule 8.841(a)(2).)

(2) On agreement of the parties, motion of a party, or on its own motion, the appellate division may order the correction or certification of any part of the record. (C.R.C., Rule 8.841(b)(1).)

(3) The appellate division may also order the trial court to settle disputes about omissions or errors in the record or to make corrections pursuant to stipulations filed by the parties in that court. (C.R.C., Rule 8.841(b)(2).)

(4) If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in the trial court specifying the omitted portion and requesting that it be prepared, certified, and sent to the appellate division. The party must serve a copy of the notice on the appellate division. (C.R.C., Rule 8.841(c)(1).)

(5) The clerk or reporter must comply with the notice within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment (see text, §683), attaching a copy of the notice. (C.R.C., Rule 8.841(c)(2).)

(6) The appellate division clerk must send all parties notice of the receipt and filing of any matter concerning augmentation or correction. (C.R.C., Rule 8.841(d).)



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e. (New) Record Where Trial Proceedings Are Electronically Recorded.

9 Witkin Cal. Proc. Appeal § 1014A

[§ 1014A] (New) Record Where Trial Proceedings Are Electronically Recorded.

C.R.C., Rule 8.835(b), adopted in 2008, governs preparation of the record where the trial proceedings are electronically recorded.

If the trial court proceedings were officially recorded electronically, a written transcript of the recording may be prepared under C.R.C., Rule 2.952. A transcript so prepared and certified is prima facie a true and complete record of the oral proceedings it purports to cover, and satisfies any requirement for a reporter's transcript of oral proceedings. (C.R.C., Rule 8.835(b).) If a local court rule permits, on stipulation of the parties or on order of the trial court, the original or a copy of the recording may be transmitted as the record of the oral proceedings without being transcribed. (C.R.C., Rule 8.835(c).)

If the appellant elects to use a transcript prepared from an official electronic recording or the recording itself, the trial court clerk must notify the appellant by mail if any portion of the designated proceedings was not officially electronically recorded or cannot be transcribed. (C.R.C., Rule 8.835(d)(1).) Within 10 days after the notice is mailed, the appellant must notify the court whether the appellant elects to proceed with or without a record of the oral proceedings that were not recorded or cannot be transcribed. If the party elects to proceed with a record of these oral proceedings, the notice must specify which form of the record other than an electronic recording the appellant elects to use. (C.R.C., Rule 8.835(d)(2).)

SUPPLEMENT: [This section is current through the latest supplement]



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f. (New) Transmitting Exhibits.

9 *Witkin Cal. Proc. Appeal § 1014B*

[§ 1014B] (New) Transmitting Exhibits.

C.R.C., Rule 8.843, adopted in 2008, governs the transmission of exhibits to and from the appellate division.

(1) *Notice of Designation.* If a party wants the appellate division to consider any original exhibits that were admitted in evidence, refused, or lodged but that were not copied in the clerk's transcript or included in the original file, within 10 days after the last respondent's brief is filed or could have been filed, the party must serve and file a notice in the trial court designating the exhibits. (C.R.C., Rule 8.843(a)(1).) Within 10 days after this notice is served, any other party wanting the appellate division to consider additional exhibits must serve and file a notice in the trial court designating the exhibits. (C.R.C., Rule 8.843(a)(2).) Any party filing a notice of designation must serve a copy on the appellate division. (C.R.C., Rule 8.843(a)(3).)

(2) *Application for Later Transmittal.* After the time periods in C.R.C., Rule 8.843(a) have expired, a party may apply to the appellate division for permission to send an exhibit to that court. (C.R.C., Rule 8.843(b).)

(3) *Request by Appellate Division.* At any time, the appellate division may direct the trial court or a party to send it an exhibit. (C.R.C., Rule 8.843(c).)

(4) *Transmittal.* Unless the appellate division orders otherwise, within 20 days after notice of designation is filed or after the appellate division directs that an exhibit be sent, the trial court clerk must put designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the appellate division with two copies of a list of the exhibits sent. If the appellate division clerk finds the list correct, he or she must sign and return one copy to the trial court clerk. (C.R.C., Rule 8.843(d)(1).)

Within the same period, any party in possession of designated exhibits returned by the trial court must put them into numerical or alphabetical order and send them to the appellate division with two copies of a list of the exhibits sent. If the appellate division clerk finds the list correct, he or she must sign and return one copy to the party. (C.R.C., Rule 8.843(d)(2).)

(5) *Return by Appellate Division.* On request, the appellate division may return an exhibit to the trial court or to the party that sent it. When the remittitur issues, return is mandatory. (C.R.C., Rule 8.843(e).)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Briefs.

9 Witkin Cal. Proc. Appeal § 1015

[§ 1015] Briefs.

C.R.C., Rule 8.706(a) follows C.R.C., Rule 8.200(a) in requiring an appellant's opening brief and a respondent's brief, and permitting an appellant's reply brief. (See *supra*, §§716, 719, 722.) And the requirements of content, such as concise and separate statement of the points of law, references to the record, and citations of authority, are similar. (C.R.C., Rule 8.706(c); see C.E.B., 1 Civil Appellate Practice 3d, §10.63 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:27 et seq.; on C.R.C., Rule 8.204(a) [unlimited civil case appeal], see *supra*, §694 et seq.) But there are several important differences in the requirements:

(1) *Time for Filing.* The opening brief must be filed within 20 days after the record is filed; the respondent's brief within 20 days after the appellant's opening brief is filed; and an appellant's reply brief, if any, within 10 days after the respondent's brief is filed, but not later than the time of the hearing. (C.R.C., Rule 8.706(a); on C.R.C., Rule 8.212(a) [unlimited civil case appeal], see *supra*, §717.)

(2) *Format.* C.R.C., Rule 8.706(b) requires all briefs to be prepared as provided in C.R.C., Rule 8.204(b) (*supra*, §697), except that briefs must be bound at the top.

(3) *Length Limitations.* C.R.C., Rule 8.204(c) limits a brief produced on a computer to no more than 14,000 words and a typewritten brief to 50 pages, unless the presiding justice permits a longer brief for good cause. (See *supra*, §707.) C.R.C., Rule 8.706(c), however, states that (a) quotations or extracts from the record or from any legal authority may not exceed 15 full lines of typewriting, and (b) no brief may exceed 15 pages except by permission of the presiding judge.

(4) *Original and Copy.* C.R.C., Rule 8.44(b) requires a number of copies of every brief. (See *supra*, §698.) C.R.C., Rule 8.706(e) requires filing of the original, after serving a copy on each adverse party who appeared separately. C.R.C., Rule 8.706(f) requires proof of the deposit of one copy of each brief with the clerk of the trial court, who must then deliver the brief to the trial judge, but who is not required to maintain a copy in the court file.

(5) *Recycled Paper.* The use of recycled paper is required for any brief filed with the court in a matter to be heard in the appellate division and for all copies filed with the court or served on other parties. (C.R.C., Rule 8.706(g).)

West's Key Number Digest, Appeal and Error 755 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.706(c) was repealed in 2008. The contents of briefs are now set forth in C.R.C., Rule 8.883(a).(1) *Time for Filing*. C.R.C., Rule 8.706(a) was repealed in 2008. C.R.C., Rule 8.882(a) now states that the appellant's opening brief must be served and filed within 30 days after the record is filed; the respondent's brief must be served and filed within 30 days after the appellant's opening brief is filed; and the appellant's reply brief must be served and filed within 20 days after the respondent's brief is filed. When the record is filed, the clerk of the appellate division must promptly mail a notice to each appellate counsel or unrepresented party giving the dates the briefs are due. (C.R.C., Rule 8.881; see Judicial Council Form No. APP-106 [Application for Extension of Time to File Brief (Limited Civil Case)].)

(1a) *(New) Extension of Time by Stipulation*. The parties may extend the time for filing a brief by up to 30 days by filing one or more stipulations in the appellate division before the brief is due. Stipulations must be signed by and served on all parties. The original signature of at least one party must appear on the stipulation; the signatures of the other parties may be in the form of fax copies of the signed signature page of the stipulation. (C.R.C., Rule 8.882(b)(1).) A stipulation is effective on filing. The appellate division may not shorten a stipulated extension. (C.R.C., Rule 8.882(b)(2).)

(1b) *(New) Extension of Time by Application*. Before the brief is due, a party may apply to the presiding judge of the appellate division for an extension. The application must show that there is good cause to grant the extension, and must also show either that the applicant is unable to obtain the extension by stipulation or that the applicant seeks a further extension after the parties have stipulated to the maximum extension. (C.R.C., Rule 8.882(b)(3), added in 2009.)

A party need not apply for an extension if it can file its brief within the time permitted for filing late briefs (see C.R.C., Rule 8.882(c)). (C.R.C., Rule 8.882(b)(4), added in 2009.)

(2) *Format*. C.R.C., Rule 8.706(b) was repealed in 2008. Format requirements are now set forth in C.R.C., Rule 8.883(c), which generally follows the requirements of C.R.C., Rule 8.204(c). Briefs must be bound on the left margin, unless a local rule of the appellate division requires binding at the top. (C.R.C., Rule 8.883(c)(8).)

(3) *Length Limitations*. C.R.C., Rule 8.706(c) was repealed in 2008. Length limitations are now specified in C.R.C., Rule 8.883(b). A brief produced on a computer may not exceed 6,800 words, including footnotes, and a brief produced on a typewriter may not exceed 20 pages. However, on application, the presiding judge may permit a longer brief for good cause.

(4) *Original and Copy*. C.R.C., Rule 8.706(e) and (f) were repealed in 2008. The requirements for originals and copies are now specified in C.R.C., Rule 8.882(e). Copies of each brief must be served as required by C.R.C., Rule 8.25. (C.R.C., Rule 8.882(e)(1).) Unless the court provides otherwise by local rule or order in the specific case, only the original brief, with proof of service, must be filed in the appellate division. (C.R.C., Rule 8.882(e)(2).) A copy of each brief must be served on the trial court clerk for delivery to the judge who tried the case. (C.R.C., Rule 8.882(e)(3).) A copy of each brief must be served on a public officer or agency when required by C.R.C., Rule 8.29. (C.R.C., Rule 8.882(e)(4).)

(5) *Recycled Paper*. C.R.C., Rule 8.706(g) was repealed in 2008. The use of recycled paper is now required by C.R.C., Rule 8.883(c)(1).

(6) *(New) Oral Argument*. C.R.C., Rule 8.885, as amended in 2009, provides for oral argument as follows:

(a) As soon as all parties' briefs are filed or the time for filing has expired, the appellate division clerk must send a notice of the time and place of oral argument to all parties. The notice must be sent at least 20 days before the date for oral argument, but the presiding judge may shorten the notice period for good cause. (C.R.C., Rule 8.885(c).) The appellant, petitioner, or moving party has the right to open and close (C.R.C., Rule 8.885(e)(1)), and each side is

allowed 10 minutes for argument (C.R.C., Rule 8.885(e)(2)). Parties may waive oral argument. (C.R.C., Rule 8.885(d).)

(b) Oral argument may be conducted by videoconference if ordered by the presiding judge of the appellate division (or the presiding judge's designee) on application of any party or on the court's own motion. The application must be filed within 10 days after the court sends notice of oral argument. Oral argument may also be conducted by videoconference if permitted by a local rule that is consistent with the Rules of Court. (C.R.C., Rule 8.885(b)(1); on procedure, see C.R.C., Rule 8.885(b)(2) added in 2009.)

(7) *(New) Appeals in Which Party Is Both Appellant and Respondent.* In an appeal in which any party is both an appellant and a respondent, the parties must jointly (or separately if unable to agree) submit a proposed briefing sequence to the appellate division within 20 days after the second notice of appeal is filed. (C.R.C., Rule 8.884(a)(1), adopted in 2008.) A party that is both an appellant and a respondent must combine its respondent's brief with its appellant's opening brief or its reply brief, if any, whichever is appropriate under the briefing sequence that the appellate division orders. (C.R.C., Rule 8.884(b)(1), adopted in 2008.) A party must confine a reply brief to points raised in its own appeal. (C.R.C., Rule 8.884(b)(2), adopted in 2008.) A combined brief must address the points raised in each appeal separately, but may include a single summary of the significant facts. (C.R.C., Rule 8.884(b)(3), adopted in 2008.)



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4. Abandonment and Dismissal.

9 Witkin Cal. Proc. Appeal § 1016

[§ 1016] Abandonment and Dismissal.

(1) *Voluntary Abandonment or Dismissal.* An appeal in a limited civil case may be voluntarily abandoned or dismissed in the same manner as an appeal in an unlimited civil cases:

(a) Before the record is filed, the abandonment is accomplished by (1) the appellant filing a written abandonment of the appeal with the trial court clerk, or (2) the parties filing a stipulation for abandonment. The filing of either document operates to dismiss the appeal and to restore the trial court's jurisdiction. (C.R.C., Rule 8.762(a).)

(b) After the record is filed, the appeal may be dismissed by the reviewing court on written request of the appellant or stipulation of the parties filed with the clerk of the reviewing court. (C.R.C., Rule 8.762(b); see C.E.B., 1 Civil Appellate Practice 3d, §10.79; on C.R.C., Rule 8.244 [unlimited civil case appeal], see *supra*, §731 et seq.; on notification by clerk, see C.R.C., Rule 8.762(d); on reviewing court's discretion to deny dismissal, see *supra*, §§735, 736.)

C.R.C., Rule 8.762(e) provides for approval of a compromise of the case of a minor or an insane or incompetent person. (See C.R.C., Rule 8.244(d) [unlimited civil case appeal], *supra*, §737.)

(2) *Involuntary Dismissal.* A limited civil case appeal may be dismissed by the reviewing court, on motion of the respondent or on its own motion, "[i]f the appellant shall fail to perform any act necessary to procure the preparation or filing of the record on appeal or shall otherwise fail to prosecute his appeal with diligence, and such failure is the fault of the appellant and not of any court officer or any other party." (C.R.C., Rule 8.762(c); see C.E.B., 1 Civil Appellate Practice 3d, §10.80; on grounds and procedure for involuntary dismissal of unlimited civil case appeals, see *supra*, §739 et seq.)

West's Key Number Digest, Appeal and Error 775 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Voluntary Abandonment or Dismissal.* C.R.C., Rule 8.762 was repealed in 2008. Voluntary abandonment and dismissal are now governed by C.R.C., Rule 8.825, which provides as follows:

(a) The appellant may serve and file an abandonment of the appeal or a stipulation to abandon the appeal in the appellate division. (C.R.C., Rule 8.825(b)(1).) If the record has not been filed in the appellate division, filing an abandonment effects a dismissal of the appeal and restores the trial court's jurisdiction. (C.R.C., Rule 8.825(b)(2).) If the record has been filed in the appellate division, the appellate division may dismiss the appeal and direct immediate issuance of the remittitur. (C.R.C., Rule 8.825(b)(2).) (See Judicial Council Form No. APP-107 [Abandonment of Appeal (Limited Civil Case)]; on notice by clerk, see C.R.C., Rule 8.825(b)(3); on preparation of transcript and refund of deposit, see C.R.C., Rule 8.825(b)(4), (b)(5).)

(b) If a civil case settles after a notice of appeal has been filed, either as a whole or as to any party, the appellant who has settled must immediately serve and file a notice of settlement in the appellate division. (C.R.C., Rule 8.825(a)(1).) Within 45 days after filing a notice of settlement (unless the court has ordered a longer time period on a showing of good cause), the appellant who filed the notice of settlement must file an abandonment. (C.R.C., Rule 8.825(a)(3).) If the appellant does not file an abandonment (or a letter stating good cause why the appeal should not be dismissed), the court may dismiss the appeal as to that appellant and order each side to bear its own costs on appeal. (C.R.C., Rule 8.825(a)(4).)

(c) If a guardian or conservator seeks approval of a proposed compromise of a pending appeal, the appellate division may, before ruling on the compromise, direct the trial court to determine whether the compromise is in the minor's or the conservatee's best interest and to report its findings. (C.R.C., Rule 8.825(c).)(2) *Involuntary Dismissal*. C.R.C., Rule 8.762(a) was repealed in 2008. Involuntary dismissal is now governed by C.R.C., Rule 8.842.

If a party, within the 15 days allotted, fails to do any act required to procure the record, the trial court clerk must promptly notify the appellate division of the default. If the defaulting party is the appellant, the appellate division may dismiss the appeal but may vacate the dismissal for good cause. (C.R.C., Rule 8.842(b)(1).) If the defaulting party is the respondent, the appellate division may order the appeal to proceed on the record designated by the appellant, but the respondent may obtain relief from default under C.R.C., Rule 8.60(d). (C.R.C., Rule 8.842(b)(2).)



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5. Hearing and Determination.
a. Sessions and Calendar.

9 Witkin Cal. Proc. Appeal § 1017

[§ 1017] Sessions and Calendar.

(1) *Sessions.* The appellate division "shall hold one or more regular sessions each month at a time or times and at a place to be determined by the judges," and "may hold sessions at any other time and place found necessary or convenient." (C.R.C., Rule 8.702; see 2 *Cal. Proc. (5th), Courts*, §340.)

(2) *Calendars and Hearing.* Unless ordered otherwise, the clerk must place on the calendar for hearing at each regular session all appeals of which the division has jurisdiction, if the appellate records were filed not less than 50 days prior to the date of the session. However, the presiding judge or the division may order an appeal placed on the calendar for hearing at any session of the division. (C.R.C., Rule 8.704(a).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.82; Rutter Group, 2 Civil Appeals and Writs §16:34.) The clerk must give notice to the attorneys (or the party if not represented) as soon as the record is filed; the notice must state the time set for hearing and the time to file briefs. However, failure to give notice does not affect the division's jurisdiction. (C.R.C., Rule 8.704(b).)

(3) *Motions.* Motions may be decided without oral argument, i.e., by filing a typewritten motion and accompanying papers. Opposition papers must be "served and filed within 7 days after the filing of the motion." (C.R.C., Rule 8.705(a).) The court may, however, order a motion calendared for hearing, in which event the clerk gives the parties notice of the date and time of the hearing. (C.R.C., Rule 8.705(b); on form of motion, see *Cal. Civil Practice*, 5 Procedure, Chap. 41; on C.R.C., Rule 8.54 [unlimited civil case appeal], see *supra*, §730 et seq.)

West's Key Number Digest, Appeal and Error 815 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Sessions.* C.R.C., Rule 8.702 was repealed in 2008. Sessions are now governed by C.R.C., Rule 10.1108, which reads as follows: "The appellate division of each superior court must hold a session at least once each quarter unless there are no matters set for oral argument that quarter. The time and place of any session is determined by the presiding judge of the appellate division."

(2) *Calendars and Hearing.* C.R.C., Rule 8.704(a) was repealed in 2008. The material covered in the text is now set

forth in C.R.C., Rule 8.885(a). The time has been shortened to 45 days.

C.R.C., Rule 8.704(b) was repealed in 2008. The notice of hearing is now governed by C.R.C., Rule 8.885(c). The jurisdictional provision was omitted.(3) *Motions*. C.R.C., Rule 8.705 was repealed in 2008. C.R.C., Rule 8.808 now provides as follows:

(a) To make a motion in the appellate division, a party must serve and file a written motion, stating the grounds and the relief requested and identifying any documents on which the motion is based. A motion must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence. Any opposition to the motion must be served and filed within 15 days after the motion is filed. (C.R.C., Rule 8.808(a).)

(b) The court may rule on a motion at any time after an opposition or other response is filed or the time to oppose has expired. On a party's request or its own motion, the appellate division may place a motion on calendar for a hearing. The clerk must promptly send each party a notice of the date and time of the hearing. (C.R.C., Rule 8.808(b).)



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5. Hearing and Determination.

b. Decision and Opinion.

9 *Witkin Cal. Proc. Appeal § 1018*

[§ 1018] Decision and Opinion.

(1) *In General.* The appeal must be heard and determined or taken under submission at the session at which it was set for hearing, unless, for good cause entered in the minutes, it is continued or ordered submitted on the briefs. (C.R.C., Rule 8.707(a); see C.E.B., 1 Civil Appellate Practice 3d, §§10.82, 10.85; Rutter Group, 2 Civil Appeals and Writs §16:35 et seq.)

Appellate division judges are not required to prepare written opinions, but may do so "when they deem it advisable or in the public interest." Opinions certified for publication must comply to the extent practicable with the *California Style Manual*. (C.R.C., Rule 8.707(b); see *supra*, §781.) Only a small number of the written opinions of the appellate division satisfy the standards for publication. (See C.R.C., Rule 8.1105(b), (c), *supra*, §815.)

(2) *Transmission of Opinions.* When the judgment is final as to the appellate division in a case in which the opinion is certified for publication, the clerk must immediately send the Reporter of Decisions two paper copies and one electronic copy in a format approved by the Reporter. The clerk must also send the Court of Appeal for the district another copy bearing the notation "To be published in the Official Reports." The Court of Appeal clerk must promptly file that copy or make a docket entry showing its receipt. (C.R.C., Rule 8.707(c).)

(3) *Remittitur.* The procedure of remittitur, or communication of the judgment on appeal to the lower court, is governed by C.R.C., Rule 8.773. Upon the expiration of the period during which a transfer may be ordered, the clerk must remit to the court from which the appeal was taken a certified copy of the judgment and opinion, if any, and also all the original exhibits, orders, affidavits, papers, and documents that were sent up for the appeal (except the statement or transcript on appeal and the notice of appeal). (C.R.C., Rule 8.773(a); on C.R.C., Rule 8.272 [unlimited civil case appeal], see *supra*, §841 et seq.)

(4) *Costs and Sanctions.* For the following topics, the rules governing limited civil case appeals are comparable to the rules governing unlimited civil case appeals:

(a) Right to costs and recoverable items. (C.R.C., Rule 8.764(a), (c); on unlimited civil case appeals, see C.R.C.,

Rule 8.278(a), (c), *supra*, §954.)

(b) Entry of judgment for costs. (C.R.C., Rule 8.764(b); on unlimited civil case appeals, see C.R.C., Rule 8.278(b), *supra*, §974.)

(c) Sanctions for frivolous appeals. (C.R.C., Rule 8.764(e); on unlimited civil case appeals, see C.R.C., Rule 8.276(a), *supra*, §989.) (See C.E.B., 1 Civil Appellate Practice 3d, §§10.101, 10.102; Rutter Group, 2 Civil Appeals and Writs §16:39.1.)

West's Key Number Digest, Appeal and Error 1100 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 8.707(a) was repealed in 2008. C.R.C., Rule 8.886(a) now provides: "A cause is submitted when the court has heard oral argument or approved its waiver and the time has expired to file all briefs and papers, including any supplemental brief permitted by the court. The appellate division may order the cause submitted at an earlier time if the parties so stipulate."

Written opinion and style: C.R.C., Rule 8.707(b) was repealed in 2008. The provision that the opinion need not be in writing is now in C.R.C., Rule 8.887(a). The provision on compliance with the *California Style Manual* is now in C.R.C., Rule 8.887(c)(1).

(2) *Transmission of Opinions.* C.R.C., Rule 8.707(a) was repealed in 2008. Comparable provisions are now in C.R.C., Rule 8.887(c)(2).

(3) *Remittitur.* C.R.C., Rule 8.773 was repealed in 2008. Remittitur is now governed by C.R.C., Rule 8.890, which provides as follows:

(a) Immediately after the Court of Appeal denies transfer, or the period for granting transfer expires, the appellate division clerk must issue a remittitur (C.R.C., Rule 8.890(b)(1)(A)); send the remittitur to the trial court with a file-stamped copy of the opinion or order (C.R.C., Rule 8.890(b)(1)(B)); and, with specified exceptions, return to the trial court with the remittitur all original records, exhibits, and documents sent to the appellate division (C.R.C., Rule 8.890(b)(1)(C)).

(b) If an appellate division case is transferred to a Court of Appeal, the appellate division clerk, on receiving the Court of Appeal remittitur, must issue a remittitur and return documents to the trial court as provided in C.R.C., Rule 8.1018. (C.R.C., Rule 8.890(b)(2).)(4) *Costs and Sanctions.*

(a) C.R.C., Rule 8.764 was repealed in 2008. The right to costs and recoverable items are now specified in C.R.C., Rule 8.891(a) and (d).

(b) C.R.C., Rule 8.764 was repealed in 2008. Judgment for costs is now governed by C.R.C., Rule 8.891(b).

(c) C.R.C., Rule 8.764(e) was repealed in 2008. Sanctions are now set forth in C.R.C., Rule 8.891(e).



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6. Rehearing.

9 *Witkin Cal. Proc. Appeal* § 1019

[§ 1019] Rehearing.

(1) *Finality of Judgment on Appeal.* "[T]he appellate division may order rehearing at any time before its judgment is final." (C.R.C., Rule 8.708(c)(1).)

The judgment becomes final (a) 15 days after pronouncement, or (b) if a timely petition for rehearing is filed, 30 days after pronouncement or on denial of the petition, whichever is earlier. (C.R.C., Rule 8.708(a).) Modification of the judgment before finality starts the time running anew. (C.R.C., Rule 8.708(b).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.90; Rutter Group, 2 Civil Appeals and Writs §16:38; on finality in unlimited civil case appeals, see *supra*, §832 et seq.)

The time for rehearing is jurisdictional; a purported rehearing granted on a petition filed after expiration of the period is void, and certiorari will lie to annul the new judgment on appeal and reinstate the original judgment. (*Sparrow's Real Estate Service v. Appellate Dept. of Superior Court of Kern County* (1965) 236 C.A.2d 739, 743, 46 C.R. 332; *Weighand v. Appellate Dept.* (1980) 108 C.A.3d 629, 631, 166 C.R. 670.)

(2) *Procedure on Rehearing.* A rehearing may be ordered on the petition of a party or on the court's own motion. (C.R.C., Rule 8.708(c)(1).) (See C.E.B., 1 Civil Appellate Practice 3d, §10.87 et seq.; Rutter Group, 2 Civil Appeals and Writs §16:38; on procedure in unlimited civil case appeals, see C.R.C., Rule 8.268, *supra*, §907 et seq.)

A party may serve and file a petition for rehearing "within 15 days after judgment is pronounced or a modification order changing the appellate judgment is filed." (C.R.C., Rule 8.708(c)(2).) An answer to the petition must be served and filed "within 8 days after the petition is filed." (C.R.C., Rule 8.708(c)(3).) The petition and answer must comply as nearly as possible with C.R.C., Rules 8.500 and 8.504 (see *supra*, §692 et seq.). (C.R.C., Rule 8.708(c)(4).) "If the appellate division orders rehearing, it may place the case on calendar for further argument or submit it for decision." (C.R.C., Rule 8.708(c)(5).)

(3) *Extensions of Time.* The periods specified in C.R.C., Rule 8.708 may not be extended except as provided in C.C.P. 12a, concerning holidays (see 2 *Cal. Proc. (5th), Courts*, §§50, 51). (C.R.C., Rule 8.708(d).)

(4) *Rehearing Is Required When Decision on Point Is Not Briefed.* In *California Cas. Ins. Co. v. Appellate Dept.* (1996) 46 C.A.4th 1145, 54 C.R.2d 118, plaintiff insurer brought a subrogation action in municipal court against two defendants, one of whom defended by calling, over plaintiff's objection, a police officer as an expert witness to testify that this defendant's actions did not violate the law. Judgment was rendered for the defendant. On appeal in the appellate department, plaintiff argued that the police officer was not a proper expert witness. In affirming the judgment, the appellate department (now division) agreed that the police officer was not a proper expert witness, but held that plaintiff's mere objection to the testimony was not sufficient to preserve the issue on appeal, because it was not made on a specific ground as required by *Ev.C.* 353. It thus denied plaintiff's petition for a rehearing. *Held*, mandamus granted directing that a rehearing be held.

(a) *Govt.C.* 68081 provides that no appellate court may render a decision on any issue that has not been briefed by at least one of the parties without affording the parties the opportunity of supplemental briefing of the point. By deciding the matter on the ground of an unbriefed issue, i.e., the *Ev.C.* 353 point, the court violated *Govt.C.* 68081 when it denied rehearing without allowing briefing. (46 C.A.4th 1149.)

(b) Defendant argued that any deficiency in the record was the fault of plaintiff for not having specified adequate documentation. However, that point was relevant to the correctness of the appellate court's decision on the merits, not to the *Government Code* point. (46 C.A.4th 1150.)

West's Key Number Digest, Appeal and Error 829 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

C.R.C., Rule 8.708 was repealed in 2008. Rehearing is now covered in C.R.C., Rule 8.889, which provides as follows:

(1) *Finality of Judgment on Appeal.* "[T]he appellate division may order rehearing of any decision that is not final in that court on filing." (C.R.C., Rule 8.889(a)(1).)

The judgment becomes final 30 days after the decision is filed. (C.R.C., Rule 8.888(a)(1).) If the appellate division certifies a written opinion for publication or partial publication after its decision is filed and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication. (C.R.C., Rule 8.888(a)(2).) Modification of the judgment before finality starts the time running anew if the modification changes the judgment. (C.R.C., Rule 8.888(b)(2).)

(2) *Procedure on Rehearing.* An order for rehearing may be ordered on the petition of a party or on the court's own motion. (C.R.C., Rule 8.889(a)(1).)

A party may serve and file a petition for rehearing within 15 days after (a) the decision is filed (C.R.C., Rule 8.889(b)(1)(A)); (b) a publication order is issued restarting the finality period if the party has not already filed a petition for rehearing (C.R.C., Rule 8.889(b)(1)(B)); (c) a modification order is issued changing the appellate judgment (C.R.C., Rule 8.889(b)(1)(C)); or (d) a consent is filed under C.R.C., Rule 8.888(c) to increase or decrease the amount of judgment (C.R.C., Rule 8.889(b)(1)(D)).

A party may not file an answer to a petition for rehearing unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer. Any answer must be served and filed within 20 days after the order is filed, unless the court orders otherwise. A petition for rehearing normally will not be granted unless the court has requested an answer. (C.R.C., Rule 8.889(b)(2).)

The petition and answer must comply with the relevant provisions of C.R.C., Rule 8.883. (C.R.C., Rule 8.889(b)(3).) (3) *Extensions of Time.* The time for granting or denying a petition for rehearing in the appellate division may not be extended. If the court does not rule on the petition before the decision is final, the petition is deemed denied. (C.R.C., Rule 8.889(c).) However, before the decision is final and for good cause, the presiding judge may relieve a party from failure to file a timely petition or answer. (C.R.C., Rule 8.889(b)(4).)

(3a) *(New) Effect of Granting Rehearing.* An order granting a rehearing vacates the decision and any opinion filed in the case. If the appellate division orders rehearing, it may place the case on calendar for further argument or submit it for decision. (C.R.C., Rule 8.889(d).)



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E. Hearing in Court of Appeal.

1. Nature and Scope of Power.

9 Witkin Cal. Proc. Appeal § 1020

[§ 1020] Nature and Scope of Power.

(1) *In General.* To meet the need for further review of appellate decisions of the superior court (see 2 *Cal. Proc.* (5th), *Courts*, §336), a procedure of hearing in the Court of Appeal was established in 1960 by a constitutional amendment, an implementing statute, and Judicial Council Rules. (See 15 *Hastings L. J.* 11, 27.) The original constitutional provision adopted in 1960 contained an express grant of jurisdiction. It was superseded by Cal. Const., Art. VI, §11, which simply states, in this connection, that Courts of Appeal have appellate jurisdiction "in other causes prescribed by statute." Thus, the source of the power is now statutory. (See Rutter Group, 2 Civil Appeals and Writs §16:40 et seq.) C.R.C., Rule 8.1000 et seq. govern "proceedings for transferring cases within the appellate jurisdiction of the superior court--other than appeals in small claims cases--to the Court of Appeal for review." (C.R.C., Rule 8.1000.)

(2) *Cases That May Be Transferred.* A Court of Appeal may order any case on appeal to a superior court in its district transferred to it for hearing as provided by Judicial Council rules. (*C.C.P.* 911; C.R.C., Rules 8.1002, 8.1005(b)(2).) (See *infra*, §1021 et seq.)

(3) *Conditions of Transfer.* The order may be made when the superior court certifies, or the Court of Appeal determines, that the transfer "appears necessary to secure uniformity of decision or to settle important questions of law." (*C.C.P.* 911.)

(4) *Scope of Review.* A court to which any case is transferred has "similar power to review any matter and make orders and judgments as the appellate division of the superior court would have in the case," except where the case was tried anew in the superior court. (*C.C.P.* 911.)

(5) *Special Rules Governing Trial De Novo.* No case in which there is a right on appeal to a trial de novo in the superior court may be transferred "before a decision in the case becomes final therein." And if the case is tried anew in the superior court, the Court of Appeal has similar power to review any matter and make orders and judgments as it has in a case appealed under *C.C.P.* 904.1 (*supra*, §85 et seq.). (*C.C.P.* 911.) (On trial de novo in small claims court appeal, see 2 *Cal. Proc.* (5th), *Courts*, §312 et seq.)

(6) *Transfer Versus Appeal.* Although a Court of Appeal may order cases within the appellate jurisdiction of the

superior court, other than appeals in small claims cases, transferred to it for review, no statute authorizes the Court of Appeal to hear appeals from the appellate division of superior court. (*Anchor Marine Repair Co. v. Magnan* (2001) 93 C.A.4th 525, 528, 113 C.R.2d 284 [C.C.P. 904.1(a) expressly excludes these appeals].)

West's Key Number Digest, Appeal and Error 32, 64

SUPPLEMENT: [This section is current through the latest supplement]



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E. Hearing in Court of Appeal.

2. Certification and Transfer.

a. In General.

9 Witkin Cal. Proc. Appeal § 1021

[§ 1021] In General.

There are two methods of obtaining a hearing in the Court of Appeal:

(1) Certification by the superior court, which can be accomplished by application of a party or on the court's own motion. (See *infra*, §1022 et seq.)

(2) Transfer by the Court of Appeal on the court's own motion or on a party's petition to transfer. (See *infra*, §1025.)

The time in which either procedure must be completed depends on when the appellate division judgment becomes final. The appellate division's judgment is final 15 days after it is pronounced, unless a petition for rehearing is filed. (C.R.C., Rule 8.708(a)(1).)

West's Key Number Digest, Appeal and Error 337 et seq., 396 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

When judgment becomes final: C.R.C., Rule 8.708(a)(1) was repealed in 2008. C.R.C., Rule 8.888(a)(1) now provides that an appellate division judgment is final 30 days after it is filed.



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b. Certification by Superior Court.

1. Application, Opposition, and Determination.

9 Witkin Cal. Proc. Appeal § 1022

[§ 1022] Application, Opposition, and Determination.

(1) *Authority.* "The appellate division may certify a case for transfer to the Court of Appeal on its own motion or on a party's application." (C.R.C., Rule 8.1005(a)(1).)

(2) *Application.* A party may serve and file an application for certification at any time after the record on appeal is filed in the appellate division and within 15 days after judgment is pronounced or the filing of a modification order changing the appellate judgment. "The party may include the application in a petition for rehearing." (C.R.C., Rule 8.1005(b)(1).)

(3) *Opposition.* Any party other than the applicant may serve and file an opposition within 5 days after the application is filed. (C.R.C., Rule 8.1005(b)(3).)

(4) *Determination.* No hearing is held, and failure to certify is a denial of the application. (C.R.C., Rule 8.1005(b)(4).) Certification is made by a majority of the appellate division judges to whom the case has been assigned or who decided the appeal. If the case has not yet been assigned, certification is made by any two appellate division judges. If an assigned or deciding judge is unable to act on the certification, a judge designated or assigned to the appellate division by the chair of the Judicial Council may act in that judge's place. (C.R.C., Rule 8.1005(a)(2).)

West's Key Number Digest, Appeal and Error 358 et seq.

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 2. Certification and Transmission of Record.

9 Witkin Cal. Proc. Appeal § 1023

[§ 1023] Certification and Transmission of Record.

(1) *Time To Certify.* Certification may occur at any time after the record on appeal is filed in the appellate division and before the appellate division judgment is final in that court. (C.R.C., Rule 8.1005(d); on finality, see *supra*, §1019.)

(2) *Form of Certification.* The certification must: (a) "[b]riefly describe any conflict of decision--citing the decisions creating the conflict--or important question of law to be settled;" and (b) "[s]tate whether there was a judgment on appeal and, if so, its date and disposition." (C.R.C., Rule 8.1005(e).) (See *People v. Moreno* (1977) 67 C.A.3d 962, 965, 134 C.R. 322.)

(3) *Order of Certification.* If the appellate division orders certification, the superior court clerk must "promptly" send a copy of the order to the clerk of the Court of Appeal and the parties. (C.R.C., Rule 8.1005(f)(1).) If the appellate division denies by order the application for certification, the superior court clerk must "promptly" send a copy to the parties. (C.R.C., Rule 8.1005(f)(2).)

In *Corcoran v. Universal Guardian Corp.* (1977) 72 C.A.3d 904, 140 C.R. 421, plaintiffs recovered judgments in the small claims court, defendant appealed, and on March 30, 1976, plaintiffs again received judgments. On July 2, 1976, defendant moved to certify, and on July 26, the superior court ordered that the cases be transferred to the Court of Appeal to settle an important question of law. Defendant had a record prepared and filed it with the Court of Appeal on February 8, 1977. Plaintiffs moved to dismiss the proceedings. *Held*, motion granted.

(a) The superior court's order was not filed with the clerk, as required by former C.R.C., Rule 63(f) (now C.R.C., Rule 8.1005(f)) and, although this order was sufficient in form to serve as a certification, it was made nearly 4 months after the judgments, and the superior court had no jurisdiction to reopen cases that had become final. (72 C.A.3d 910.)

(b) The purpose of the certification procedure is not to correct errors for the benefit of the losing party below, but instead to settle important questions of law. "In the present case what has been lost by the lack of a timely certification is an opportunity for higher courts to examine what the superior court regarded as an important question of law. That

worthy object must await another occasion. As between the parties, the judgment of the superior court constitutes justice under the law. They have had the trial and the retrial which the Constitution and the statutes allow them for cases arising in the small claims court. Plaintiffs are now entitled to the benefits of their judgments without the burden of further litigation." (72 C.A.3d 910.)

(4) *Transmission of Record and Stay of Proceedings.* When the case is certified, the superior court clerk must "promptly" send the record on transfer to the Court of Appeal. (C.R.C., Rule 8.1010(b)(1); see *infra*, §1030.) Thereafter, further action by the superior court is stayed. (C.R.C., Rule 8.1014; see *infra*, §1029.)

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 - 3. Denial or Grant of Transfer.

9 Witkin Cal. Proc. Appeal § 1024

[§ 1024] Denial or Grant of Transfer.

(1) *Denial of Transfer*. Despite certification, the Court of Appeal may refuse to transfer the case. (*Schweiger v. Superior Court* (1970) 3 C.3d 507, 517, footnote 5, 90 C.R. 729, 476 P.2d 97 [Courts of Appeal have "uncontrolled discretion" in deciding whether to transfer cases under C.C.P. 911].) Accordingly, if the Court of Appeal does not timely order transfer, transfer is deemed denied. (C.R.C., Rule 8.1008(c)(3).)

(2) *Grant of Transfer*. The Court of Appeal may order transfer after certification "within 20 days after the record on transfer is filed in the Court of Appeal." (C.R.C., Rule 8.1008(c)(1)(A).) The Court of Appeal may order an extension not exceeding 20 days. (C.R.C., Rule 8.1008(c)(2).)

(3) *Partial Transfer*. The Court of Appeal's discretion in deciding whether to transfer a case "necessarily includes the discretion to determine that only certain, *limited* aspects of a case will be heard and decided after the transfer." (*People v. Dupuis* (1992) 7 C.A.4th 696, 700, 8 C.R.2d 923.) "The Court of Appeal may decide fewer than all the issues raised and may retransfer the case to the appellate division for decision on any remaining issues." (C.R.C., Rule 8.1016(a).)

(4) *Letters Supporting or Opposing Transfer*. A party may send the Court of Appeal a letter supporting or opposing transfer of a certified case within 10 days after a record on transfer is filed in that court. The letter must be served on all other parties. (C.R.C., Rule 8.1008(d)(1); on form of letter, see C.R.C., Rule 8.1008(d)(2).)

(5) *Vacation of Transfer*. If transfer was ordered, the Court of Appeal may vacate the order without decision and retransfer the case to the appellate division with or without directions to conduct further proceedings. (C.R.C., Rule 8.1016(b)(1).) If judgment was pronounced before transfer and the Court of Appeal directs no further proceedings, the judgment is final when the appellate division receives the order vacating transfer, and its clerk must "promptly" issue a remittitur. (C.R.C., Rule 8.1016(b)(2).)

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c. Transfer by Court of Appeal on Own Motion.

9 Witkin Cal. Proc. Appeal § 1025

[§ 1025] Transfer by Court of Appeal on Own Motion.

The Court of Appeal may order transfer of a case on the court's own motion. (C.R.C., Rule 8.1008(a).) Transfer may be ordered within 20 days after the record on transfer is filed in the Court of Appeal. (C.R.C., Rule 8.1008(c)(1)(A).) Within that period, the court may order an extension not exceeding 20 days. (C.R.C., Rule 8.1008(c)(2).)

A party may send the Court of Appeal a letter supporting or opposing transfer on the court's own motion within 10 days after a record on transfer is filed in that court. The letter must be served on all other parties. (C.R.C., Rule 8.1008(d)(1); on form of letter, see C.R.C., Rule 8.1008(d)(2).)

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2. Certification and Transfer.

d. Transfer by Court of Appeal on Party's Petition.

9 Witkin Cal. Proc. Appeal § 1026

[§ 1026] Transfer by Court of Appeal on Party's Petition.

(1) *Authority.* The Court of Appeal may order transfer on a party's petition. (C.R.C., Rule 8.1008(a).)

(2) *Petition and Answer.* If an application for certification is denied by the appellate division and if the division does not certify its opinion for publication, a party may serve and file in the Court of Appeal a petition to transfer the case to that court. (C.R.C., Rule 8.1008(b)(1).) The petition must (a) be served and filed within 15 days after the appellate division judgment is final in that court (C.R.C., Rule 8.1008(b)(2)); (b) show delivery of a copy to the appellate division (C.R.C., Rule 8.1008(b)(2)); and (c) explain why transfer is necessary to secure uniformity of opinion or to settle an important question of law (C.R.C., Rule 8.1008(b)(3)).

A party may not file an answer to a petition for transfer unless the court requests an answer. The clerk must "promptly" send to the parties copies of any order requesting an answer and "immediately" notify the parties by telephone or another expeditious method. Unless the court orders otherwise, an answer must be served and filed within 10 days after the order is filed. Normally, a petition for transfer will not be granted unless the court has requested an answer. (C.R.C., Rule 8.1008(b)(4).)

The petition and answer must comply as nearly as possible with C.R.C., Rule 8.504, stating form and length limitations for pleadings in the Supreme Court (*supra*, §929). (C.R.C., Rule 8.1008(b)(5).)

(3) *Time To Transfer.* Within 20 days after the petition is filed, the Court of Appeal may order transfer. (C.R.C., Rule 8.1008(c)(1)(B).) Within that period, the court may order an extension not exceeding 20 days. (C.R.C., Rule 8.1008(c)(2).) If the court does not timely order transfer, transfer is deemed denied. (C.R.C., Rule 8.1008(c)(3).)

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e. Remedies When Certification or Transfer Is Refused.

9 Witkin Cal. Proc. Appeal § 1027

[§ 1027] Remedies When Certification or Transfer Is Refused.

(1) *Criminal Cases*. The refusal of certification in a criminal case is not necessarily final; the defendant still has several postconviction remedies in the California and federal courts. *In re Zerbe* (1964) 60 C.2d 666, 36 C.R. 286, 388 P.2d 182, is an illustration. Petitioner, a labor picket, was convicted of criminal trespass. The appellate department (now division) affirmed without opinion and certified the case, but the Court of Appeal denied transfer. Petitioner then brought this habeas corpus proceeding in which the question of law--inapplicability of the statute to lawful picketing in a labor dispute--was decided in his favor. (60 C.2d 667.)

(2) *Civil Cases*. In theory, refusal of the superior court or appellate division to certify or of the Court of Appeal to accept certification leaves the aggrieved party in a civil appeal without further remedy. But there are two significant exceptions to this apparent bar:

(a) If the superior court or appellate division decision disregards a binding precedent, the decision is in excess of jurisdiction, and the Supreme Court may review the case on certiorari. (See *Dvorin v. Appellate Dept.* (1975) 15 C.3d 648, 650, 125 C.R. 771, 542 P.2d 1363.)

(b) If the decision of the superior court or appellate division denies a fair hearing on the merits of the cause, e.g., by refusing to consider a valid defense, and the issue is one of general interest that requires a definitive pronouncement on the law, the Supreme Court may review the case on mandamus. (See *Schweiger v. Superior Court* (1970) 3 C.3d 507, 517, 90 C.R. 729, 476 P.2d 97, 8 Cal. Proc. (5th), *Extraordinary Writs*, §111 [tenant's retaliatory defense to landlord's eviction; mandamus issued to compel superior court to hear defense].)

In *Green v. Superior Court* (1974) 10 C.3d 616, 111 C.R. 704, 517 P.2d 1168, landlord S brought an unlawful detainer proceeding in the small claims court against tenant G, demanding possession and \$ 300 in back rent. G admitted nonpayment, but set up the defense of breach of warranty of habitability. Despite uncontradicted evidence establishing the defense, the small claims court gave judgment for the landlord, and the superior court on trial de novo did likewise. G sought certification, which the superior court refused, and mandamus from the Court of Appeal, which it denied; finally, G filed a petition for hearing in the Supreme Court. The Supreme Court, instead of granting a hearing,

exercised its original jurisdiction to issue a writ of mandamus, as in *Schweiger v. Superior Court*, in order to consider the issue of "statewide importance," i.e., whether breach of the warranty of habitability could be raised as a defense in unlawful detainer. (10 C.3d 621.)

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3. Proceedings in Court of Appeal.

a. Notice of Order Granting or Denying Transfer.

9 Witkin Cal. Proc. Appeal § 1028

[§ 1028] Notice of Order Granting or Denying Transfer.

When a transfer order is filed, the Court of Appeal clerk must "promptly" send a copy to the superior court clerk and the parties. (C.R.C., Rule 8.1008(f)(1).) With the copy of the transfer order, the clerk "must send notice of the time to serve and file any briefs ordered" under C.R.C., Rule 8.1012 (infra, §1031) and, "if specified by the Court of Appeal, the issues to be briefed and argued." (C.R.C., Rule 8.1008(f)(2).) If the Court of Appeal denies transfer after certification or petition, the clerk must (a) return the record on transfer and any exhibits to the superior court clerk, and (b) "promptly" send notice of the denial to the parties. (C.R.C., Rule 8.1008(f)(3).) However, failure to send any order or notice under this rule does not affect the Court of Appeal's jurisdiction. (C.R.C., Rule 8.1008(f)(4).)

West's Key Number Digest, Appeal and Error 365 et seq.

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3. Proceedings in Court of Appeal.

b. Stay of Proceedings Below.

9 *Witkin Cal. Proc. Appeal* § 1029

[§ 1029] Stay of Proceedings Below.

Where the appellate division certifies a case (see *supra*, §1023) or the Court of Appeal orders a transfer on its own motion (see *supra*, §1025, 1026), "further action by the appellate division is limited to preparing and sending the record until termination of the proceedings in the Court of Appeal." (C.R.C., Rule 8.1014; on *C.C.P.* 916 [stay of proceedings on perfection of appeal], see *supra*, §17.)

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c. Record.

9 Witkin Cal. Proc. Appeal § 1030

[§ 1030] Record.

(1) *Contents.* Whether there was or was not a trial in the superior court, the record on transfer must consist of:

(a) The original record on appeal prepared under C.R.C., Rule 8.753 et seq. (supra, §635). (C.R.C., Rule 8.1010(a)(1); see supra, §626 et seq.)

(b) Any briefs filed in the appellate division. (C.R.C., Rule 8.1010(a)(2).)

(c) Any order or opinion of the appellate division. (C.R.C., Rule 8.1010(a)(3).)

(2) *Transmission.* The superior court clerk must "promptly" send the record on transfer (together with exhibits designated in accordance with C.R.C., Rule 8.224, supra, §680) to the Court of Appeal and notify the parties that the record was sent in each of the following circumstances:

(a) The appellate division certifies a case. (C.R.C., Rule 8.1010(b)(1)(A).)

(b) The superior court clerk sends a copy of an appellate division opinion certified for publication to the Court of Appeal under C.R.C., Rule 8.707 (see supra, §1018). (C.R.C., Rule 8.1010(b)(1)(B).)

(c) The superior court clerk receives a copy of a petition to transfer. (C.R.C., Rule 8.1010(b)(1)(C).)

(d) The superior court receives a request from the Court of Appeal for the record on transfer. (C.R.C., Rule 8.1010(b)(1)(D).)

When the record on transfer is filed, the Court of Appeal clerk must "promptly" notify the parties. (C.R.C., Rule 8.1010(b)(2).)

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(1) *Contents.*

(a) C.R.C., Rule 8.1010(a)(1) was amended in 2009 to refer to a record prepared under C.R.C., Rules 8.830-8.843, 8.860-8.873, or 8.910-8.923.

(2) *Transmission.*

(b) C.R.C., Rule 8.707 was repealed in 2008. Transmission of opinions to the Court of Appeal is now governed by C.R.C., Rule 8.887(c)(2)(B). C.R.C., Rule 8.1010(b)(1)(B) was amended in 2009 to reflect this change.



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d. Briefs and Oral Argument.

9 Witkin Cal. Proc. Appeal § 1031

[§ 1031] Briefs and Oral Argument.

(1) *In General.* Whether there was or was not a trial in the superior court, the following procedure governs the filing of briefs in the Court of Appeal:

(a) After transfer, the parties may file briefs in the Court of Appeal only if ordered on a party's application or the court's own motion. The court must prescribe the briefing sequence, which may be in any briefing order. (C.R.C., Rule 8.1012(a)(1).) Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related case. (C.R.C., Rule 8.1012(a)(2).)

(b) The opening brief must be served and filed within 20 days after entry of the briefing order. (C.R.C., Rule 8.1012(b)(1).) The responding brief must be served and filed within 20 days after the opening brief is filed. (C.R.C., Rule 8.1012(b)(2).) Any reply brief must be served and filed within 10 days after the responding brief is filed. (C.R.C., Rule 8.1012(b)(3).)

(2) *Form.* No brief may exceed 5,600 words if produced on a computer or 20 pages if typewritten; in all other respects briefs must comply with C.R.C., Rule 8.204, governing appellate briefs generally (see *supra*, §692 et seq.). (C.R.C., Rule 8.1012(d).)

(3) *Copies.* "Every brief must show delivery of a copy to the appellate division from which the case was transferred." (C.R.C., Rule 8.1012(c)(2).)

(4) *Limitation of Issues.* On or after ordering transfer, the Court of Appeal may specify the issues to be briefed and argued. Unless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them. (C.R.C., Rule 8.1008(e)(1).) Notwithstanding an order specifying issues, however, the court may, on reasonable notice, order oral argument on fewer or additional issues or on the entire case. (C.R.C., Rule 8.1008(e)(2).)

(5) *Oral Argument.* "If the appellate division orders rehearing, it may place the case on calendar for further

argument or submit it for decision." (C.R.C., Rule 8.708(c)(5).)

West's Key Number Digest, Appeal and Error 755 et seq., 822 et seq.

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e. Decision and Remittitur.

9 *Witkin Cal. Proc. Appeal § 1032*

[§ 1032] Decision and Remittitur.

(1) *Illustrations of Decision After Transfer.* The reports contain a number of examples of the useful operation of the procedure.

In *People v. Grier* (1964) 226 C.A.2d 360, 38 C.R. 11, a municipal court conviction for a Vehicle Code violation was affirmed by the appellate department, then certified by that court because the question was of first impression. The Court of Appeal accepted the transfer and affirmed the judgment, partly by quoting the appellate department opinion and concurring in its reasoning. (See *Bennett v. Hayes* (1975) 53 C.A.3d 700, 702, 125 C.R. 825 [adopting opinion of appellate department (now division)].)

In *People v. Cole* (1964) 226 C.A.2d 125, 37 C.R. 798, the Los Angeles municipal court dismissed a criminal complaint for possession of the record of a lottery, on the ground that the state had preempted the field of lottery regulation. The appellate department affirmed, but certified the case because of the important question of law. The Court of Appeal ordered the transfer, "not because of doubts that the decision was correct, but because of the importance of settling the question. ... [T]he Supreme Court would have no opportunity to express its views on the issue unless the case were first transferred." (226 C.A.2d 126.)

In *Alta Bldg. Material Co. v. Cameron* (1962) 202 C.A.2d 299, 20 C.R. 713, an action was brought to foreclose a mechanic's lien without the required statutory pre-lien notice. The municipal court in Alameda County followed two prior appellate department decisions from Los Angeles and San Diego holding the law unconstitutional, and gave judgment for plaintiff. On appeal, the appellate department of Alameda County refused to follow these decisions, holding the statute valid. This court then certified the matter to the Court of Appeal, which accepted the transfer, and upheld the validity of the statute. Accordingly, the municipal court judgment was reversed with directions to enter judgment for defendants. (202 C.A.2d 301.)

In *Babcock v. Antis* (1979) 94 C.A.3d 823, 156 C.R. 673, the appellate department had reversed municipal court judgments, the reversals being based on the ground that the amount claimed exceeded the jurisdictional limits of the trial court. The Court of Appeal ordered a transfer, directed its clerk to correct a technical mistake in the prayers by

amendment to bring the cases within the jurisdictional limits, and remanded them to the appellate department for determination of the appeal on the merits. (94 C.A.3d 831, 834.)

(2) *Remittitur*. The Court of Appeal clerk must "promptly" issue a remittitur when a decision of that court is final. The clerk must address the remittitur to the appellate division and send that court two copies of the remittitur and two file-stamped copies of the Court of Appeal opinion or order. (C.R.C., Rule 8.1018(a).)

On receiving this remittitur, the appellate division clerk must "promptly" issue a remittitur if there are to be no further proceedings in that court. (C.R.C., Rule 8.1018(b).)

Each reviewing court clerk "must return all original records, documents, and exhibits with the remittitur but need not return any certification, transcripts on appeal, briefs, or notice of appeal." (C.R.C., Rule 8.1018(c).) (On nature and purpose of remittitur, see *supra*, §841 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Remittitur*. In 2008, C.R.C., Rule 8.1018(a), (b), and (c), were renumbered C.R.C., Rule (b), (c), and (d), respectively.

The denial of a motion to transfer of a case from the appellate division of the superior court is final immediately. (C.R.C., Rule 8.1018(a), added in 2008.)



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I. INTRODUCTION

F. (New) Waiver of Fees and Costs.

9 *Witkin Cal. Proc. Appeal* § 16A

[§ 16A] (New) Waiver of Fees and Costs.

C.R.C., Rule 8.26, added in 2009, sets forth the following procedure for obtaining a waiver of fees and costs:

(1) *Application Form.* An application for the initial waiver of court fees and costs in the Supreme Court or Court of Appeal must be made on Judicial Council Form No. FW-001 [Request to Waive Court Fees]. The clerk must provide this form and the relevant information sheet without charge to any person who requests a fee waiver application or states that he or she is unable to pay any court fee or cost. (C.R.C., Rule 8.26(a).)

(2) *Submission.* The appellant should submit an application for an initial waiver of appellate fees and costs with the notice of appeal in the superior court that issued the judgment or order being appealed. The respondent should submit an application for an initial waiver at the time the fees are to be paid to the court. (C.R.C., Rule 8.26(b)(1).) An application for waiver of the court fees and costs for a writ proceeding should be submitted with the writ petition. (C.R.C., Rule 8.26(b)(2).) An application for waiver of the court fees and costs for a petition for review in the Supreme Court should be submitted with the petition. (C.R.C., Rule 8.26(b)(3).)

(3) *Determination.* The application must be considered and determined as required by *Govt.C. 68634.5* (see 3 *Cal. Proc.* (5th), *Actions*, Supp., §429-I). An order from the Supreme Court or Court of Appeal determining the application or setting a hearing on the application in the Supreme Court or Court of Appeal may be made on Judicial Council Form No. APP-016 [Order on Court Fee Waiver (Court of Appeal or Supreme Court)]. (C.R.C., Rule 8.26(c).) The application is deemed granted unless the court gives notice of action on the application within 5 court days after the application is filed. (C.R.C., Rule 8.26(d).) If the application is denied, the applicant must pay the court fees and costs or submit a new application or additional information requested by the court within 10 days after the clerk gives notice of the denial. (C.R.C., Rule 8.26(f).)

(4) *Fees Waived.* Fees and costs that must be waived on the granting of a waiver application include (a) the fee for filing the notice of appeal required by *Govt.C. 68926*, (b) the fee for filing an original proceeding required by *Govt.C. 68926*, (c) the fee for filing a petition for review required by *Govt.C. 68927*, and (d) any court fee for telephonic oral argument. (C.R.C., Rule 8.26(e).)

(5) *Confidentiality.* No person may have access to a waiver application except the court and authorized court

personnel, persons authorized by the applicant, and persons authorized by order of the court. No person may reveal any information contained in an application except as authorized by law or order of the court. An order granting access to an application or financial information may include limitations on who may access the information and on the use of the information after it has been released. (C.R.C., Rule 8.26(g)(1).) A person seeking access to an application or financial information must make the request by motion, supported by a declaration showing good cause as to why the confidential information should be released. (C.R.C., Rule 8.26(g)(2).)

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D. Procedure.

2. Record on Appeal.

e. (New) Record Where Trial Proceedings Are Electronically Recorded.

9 Witkin Cal. Proc. Appeal § 1014A

[§ 1014A] (New) Record Where Trial Proceedings Are Electronically Recorded.

C.R.C., Rule 8.835(b), adopted in 2008, governs preparation of the record where the trial proceedings are electronically recorded.

If the trial court proceedings were officially recorded electronically, a written transcript of the recording may be prepared under C.R.C., Rule 2.952. A transcript so prepared and certified is prima facie a true and complete record of the oral proceedings it purports to cover, and satisfies any requirement for a reporter's transcript of oral proceedings. (C.R.C., Rule 8.835(b).) If a local court rule permits, on stipulation of the parties or on order of the trial court, the original or a copy of the recording may be transmitted as the record of the oral proceedings without being transcribed. (C.R.C., Rule 8.835(c).)

If the appellant elects to use a transcript prepared from an official electronic recording or the recording itself, the trial court clerk must notify the appellant by mail if any portion of the designated proceedings was not officially electronically recorded or cannot be transcribed. (C.R.C., Rule 8.835(d)(1).) Within 10 days after the notice is mailed, the appellant must notify the court whether the appellant elects to proceed with or without a record of the oral proceedings that were not recorded or cannot be transcribed. If the party elects to proceed with a record of these oral proceedings, the notice must specify which form of the record other than an electronic recording the appellant elects to use. (C.R.C., Rule 8.835(d)(2).)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin California Procedure, Fifth Edition

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CHAPTER XIII - Appeal

Witkin Summary of California Law
XXV. APPEAL IN LIMITED CIVIL CASE

D. Procedure.

2. Record on Appeal.

f. (New) Transmitting Exhibits.

9 *Witkin Cal. Proc. Appeal § 1014B*

[§ 1014B] (New) Transmitting Exhibits.

C.R.C., Rule 8.843, adopted in 2008, governs the transmission of exhibits to and from the appellate division.

(1) *Notice of Designation*. If a party wants the appellate division to consider any original exhibits that were admitted in evidence, refused, or lodged but that were not copied in the clerk's transcript or included in the original file, within 10 days after the last respondent's brief is filed or could have been filed, the party must serve and file a notice in the trial court designating the exhibits. (C.R.C., Rule 8.843(a)(1).) Within 10 days after this notice is served, any other party wanting the appellate division to consider additional exhibits must serve and file a notice in the trial court designating the exhibits. (C.R.C., Rule 8.843(a)(2).) Any party filing a notice of designation must serve a copy on the appellate division. (C.R.C., Rule 8.843(a)(3).)

(2) *Application for Later Transmittal*. After the time periods in C.R.C., Rule 8.843(a) have expired, a party may apply to the appellate division for permission to send an exhibit to that court. (C.R.C., Rule 8.843(b).)

(3) *Request by Appellate Division*. At any time, the appellate division may direct the trial court or a party to send it an exhibit. (C.R.C., Rule 8.843(c).)

(4) *Transmittal*. Unless the appellate division orders otherwise, within 20 days after notice of designation is filed or after the appellate division directs that an exhibit be sent, the trial court clerk must put designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the appellate division with two copies of a list of the exhibits sent. If the appellate division clerk finds the list correct, he or she must sign and return one copy to the trial court clerk. (C.R.C., Rule 8.843(d)(1).)

Within the same period, any party in possession of designated exhibits returned by the trial court must put them into numerical or alphabetical order and send them to the appellate division with two copies of a list of the exhibits sent. If the appellate division clerk finds the list correct, he or she must sign and return one copy to the party. (C.R.C., Rule 8.843(d)(2).)

(5) *Return by Appellate Division.* On request, the appellate division may return an exhibit to the trial court or to the party that sent it. When the remittitur issues, return is mandatory. (C.R.C., Rule 8.843(e).)

SUPPLEMENT: [This section is current through the latest supplement]