Date of Meeting: April 18-19, 1958

Date of Memo: April 9, 1958

Memorandum No. 6

Subject: Study No. 22 - Cut-off date, Motion for New Trial

The 1956 Session of the Legislature authorized the Commission to make a study "to determine whether the law relating to motions for new trial in cases where notice of entry of judgment has not been given should be revised".

Attached is a research study on this subject prepared by Professor Harold G. Pickering of the Hastings College of Law, as revised by the staff. At the date of this memorandum the revision has not been "cleared" with Professor Pickering; moreover, considerable technical work with respect to the form of the footnotes remains to be done. Nevertheless, I believe that the study is substantially in final form and that it is ready to be discussed on the merits by the Commission at the April meeting.

Respectfully submitted,

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Executive Secretary

JRM:ih

#22

April 9, 1958

A STUDY TO DETERMINE WHETHER THE LAW RELATING TO THE TIME WITHIN WHICH A MOTION FOR NEW TRIAL MAY BE MADE WHEN NOTICE OF ENTRY OF JUDGMENT HAS NOT BEEN GIVEN SHOULD BE REVISED.

This study was made at the direction of the Law Revision Commission by Professor Harold G. Pickering of the Hastings College of Law, University of California, San Francisco.

Theoretically the law favors a speedy end to litigation. Actually it all too frequently fails to achieve this goal. One obstacle to its achievement in California is Section 659 of the Code of Civil Procedure which, in effect, leaves without limit the time within which a party may move for a new trial in some cases. That section provides in relevant part:

> §659. The party intending to move for a new trial must, either (1) before the entry of judgment, and where a motion for judgment notwithstanding the verdict is pending, then within five (5) days after the making of said motion, or (2) within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial...

Provision "(1)" may be disregarded because if the notice of intention to move for a new trial is served prior to the entry of judgment no problem of delay is involved. Where, however, the notice is not served prior to judgment provision "(2)" becomes operative and the moving party has ten days "after receiving written notice of the entry of the judgment" in which to file and serve his notice of intention

to move for a new trial. In cases in which notice of entry of judgment is not received the time allowed to move for a new trial is thus made indefinite and indeterminate and may extend long after the right to appeal from the judgment has expired.

Thus, in Smith v. Halstead,[1] the defendant served a notice of intention to move for a new trial three years and seven months after the entry of judgment. There being nothing in the record to show that notice of entry of judgment had been "received" by him the court held the motion timely.[2] In fact, defendant's time to move would have run on indefinitely until he received such notice.[3]

Section 659 is open to the further objection that the issue as to whether a party's motion for a new trial is timely is subject to a possible conflict of extrinsic evidence as to whether the moving party received notice of entry of judgment.[4]

Should Section 659 be revised to preclude the possibility of such long-delayed motions for new trial? Before turning to this question a brief analysis of the legislative history of Section 659 and of the law of other jurisdictions relating to the time for making motions for new trials will be presented for such light as they may shed on the question.

Legislative History

of Section 659 of the Code of Civil Procedure

A review of the legislative history of Section 659 of the Code of Civil Procedure must include consideration also of the legislative history of Section 660.

Beginning with the original 1872 Code of Civil Procedure the underlying legislative intent appears to have been to expedite the making and disposition of motions for new trial. Thus, the 1872 version of Section 659 required that notice of intention to move for new trial be filed and served within 30 days after "decision or verdict" and that it fix a time and place for hearing the motion not less than 10 or more than 20 days after service.[5] Section 660, enacted in the same year, limited adjournment by the court of the hearing of a motion for new trial to 10 days, and required that the motion be decided within 10 days after hearing.[6] Thus events of record were fixed as the events from which the time for making the motion was to be computed and a policy of expeditious disposition of the motion was established.

In 1873-1874 Section 659 was amended to reduce the time for serving a notice of intention to move for new trial from 30 to 10 days and Section 660 was amended to require that the motion "shall be heard at the earliest practicable period."[7] This bespoke a continued desire for speed in handling such motions, but was flexible indeed as

compared with the stringent provisions of the two sections as they stood in 1872. However, a discrimination was introduced between jury and nonjury cases. In jury cases the time for serving the notice was to be computed from the date of the verdict, as before, but in nonjury cases it was made to run from "notice of the decision of the Court or referee." Thus the motion of starting the time to run from the time of notice of an event in the litigation rather than the event itself was introduced in nonjury cases; furthermore, an additional element of uncertainty was introduced in that there was no provision for service of the "notice of the decision" referred to.[8]

While the 1900-1901 revision of the Code of Civil Procedure[9] was abortive, having been declared unconstitutional on technical grounds,[10] it is worth noting that it amended Section 659 to fix the time for serving and filing the notice of intention to move for new trial as "within ten days after receiving notice of the entry of the judgment," in both jury and nonjury cases.[11] While the 1900-1901 revision was the subject of the Report of the Commissioners for the Revision and Reform of the Law, Recommendations Respecting the Code of Civil Procedure, the only comment in the Report respecting this aspect of Section 659 is the following:

> This fixes the notice of the entry of a judgment as the period from which to compute the time for moving for a new trial. . .[12]

No relevant change was made by the 1900-1901 revision in Section 660.[13] Since the requirement that the motion be heard "at the earliest practicable period" was retained it would appear that the possibility of indefinite delay arising out of the provision that the time should run from "receiving notice of the entry of the judgment" was not visualized by the Commissioners or the Legislature.

In 1907 the ill-fated 1901 revision of the Code was re-enacted, with some changes.[14] Section 659 was revised as it had been in 1901; thus was enacted for the first time the provision that in both jury and nonjury cases the time in which to serve notice of intention to move for a new trial begins to run "within ten days after receiving notice of the entry of the judgment".

In 1915 Section 659 was amended to revive the discrimination between jury and nonjury cases, providing for serving and filing the notice of intention "within ten days after verdict" but leaving the requirement in nonjury cases at "ten days after receiving notice of the entry of the judgment."[15] However, expedition in the disposition of motions for new trial received added emphasis in that legislative year in two respects:

(1) Section 659 was amended to provide that the time for filing and serving the notice of intention "shall not be extended by order or stipulation" and that the time for serving affidavits and counter affidavits could not be extended for more than 20 days.[16]

2. Section 660 was revised to introduce new devices for acceleration by providing that the hearing and disposition of a motion for new trial should have precedence over all other matters except criminal cases, probate matters and cases actually on trial, that it should be the duty of the court to determine the same at the earliest possible moment, that the power of the court to pass on the motion should expire three months after the verdict, or "notice of the decision" [the Legislature apparently meant notice of entry of judgment], and that a motion not determined in three months should be deemed denied.

These amendments would appear to indicate that expeditious disposition of motions for new trial was still desired and that it had not yet occurred to anyone that the provision permitting service of the notice of intention in nonjury cases "within ten days after receiving notice of the entry of the judgment" would frustrate this goal in some cases.

In 1923[17] Section 660 was amended to reduce the time within which the court could determine a motion for new trial from three to two months, and to provide that a motion not determined within the two month period should be deemed denied.[18] This again emphasized the Legislature's intention to have motions for new trial disposed of expeditiously.

In 1929 Section 659 was amended to restore jury and nonjury cases to parity, providing that in all cases the notice of intention to move for new trial must be served

"within ten (10) days after receiving notice of the entry of the judgment."[19] Section 660 was rearranged and reworded, but without material change.[20] The provision that the motion "must be heard at the earliest practicable time" was dropped. However, the provision according preference to the motion was retained as was the requirement that the court "determine the same at the earliest possible moment."[21] The provision as to the allowable period for the determination of the motion was changed from two months to 60 days.

There has been no relevant amendment of Section 659 or Section 660 since 1929.[22]

Law of Other Jurisdictions

A study has been made of the Federal Rules of Civil Procedure and of the statutes of 15 representative states to ascertain the time within which a motion for a new trial must be made and the event from which the time runs. The information disclosed is summarized in Table 1.

Table 1 shows that in 12 of the 16 jurisdictions studied the time to move or give notice of intention to move for a new trial begins to run from an event of record -- rendition of verdict, rendition of decision or entry of judgment -- in both jury and nonjury cases.[23] In Idaho and Washington this is true in jury cases, the time running from the rendition of the verdict. In the latter jurisdictions the time

TABLE 1

State	Period within which to move or give notice of motion	Event Starting Time to Run: Entry judgment in all cases	Rendition verdict jury cases	Rendition decision court cases	Service written notice entry judgment: All cases	Service written notice entry judgment: nonjury cases	Filing proof service notice entry judgment all cases	Authority
Federal district courts	10 days	X						F.R.C.P. Rule 59(b)
Arizona	10 days	X						Ariz. R.C.P. Rule 59(d)
Colorado	10 days	X						Colo. R.C.P. Rule 59(b)
Connecticut	3 years	X						Conn. Gen. Stat. (1949) §8322
Idaho	10 days		X			X		Idaho Code §10-604
Illinois	30 days	X						Ill.Civ.Prac.Act §§68.1(2) and (3)
Michigan	20 days						X	Mich.Ct.Rules Ann. Rule 47 §1,p.492
Montana	10 days		X	X				Mont.Rev.Code §93-5605
Nevada	10 days				X			Nev.R.C.P. Rule 59(b)
Oklahoma	3 days		X	X				Okla.Stats 1941 §653
Oregon	10 days	X						Ore.Rev.Stats. §17-615
South Dakota	One Year	X						S.Dak.Code §33.0702; Supp. §33.1606
Texas	10 days	X						Tex.R.C.P. Rule 329-b,#1
Utah	10 days	X						Utah R.C.P. Rule 59(b)
Washington	2 days		X			X		Wash.Rev.Code C.4.76.060
Wisconsin	60 days		X	X				Wis. Stat.§270.49

does not begin to run until service of written notice of entry of judgment in nonjury cases and this is the rule for all cases in Nevada and Michigan.[24]

Thus, Section 659 of the Code of Civil Procedure puts California in the company of a small minority of the jurisdictions studied. In the great majority of these jurisdictions it is an event of record and not notice thereof which starts the time to run within which to make a motion for new trial.

Conclusions and Recommendations

The provision in Section 659 of the Code of Civil Procedure that the time to serve a notice of intention to move for new trial begins to run when notice of entry of judgment is received is undesirable. Since it has been held that any notice of entry of judgment which may be given by the clerk of the court is ineffective to start the time running,[27] the time limitation hinges upon a voluntary and uncontrolled act of a party to the litigation. This creates the possibility that notice will not be given and that a motion for new trial may be made in such a case many years after judgment has been entered and has become final for purposes of appeal. It is not possible for a court to pass intelligently on a motion for new trial at a date so remote from the events upon which the motion is based. Section 659

should, therefore, be revised to eliminate the possibility of its being asked to do so.

Against this conclusion it might be argued that the party against whom the motion is made has no ground to complain inasmuch as it was his neglect in giving notice of entry of judgment to the moving party which makes possible the delayed motion for new trial. The answer to this argument is that the State has a larger interest in this matter than assessing the blame for long-delayed new trial motions as between the parties to the action -- or, more accurately, their counsel. The burden on our courts in hearing and deciding such tardy motions for new trial and the larger interest in a speedy end to litigation, which the Legislature has given special emphasis in the statutes dealing with disposition of motions for new trial justify an amendment to Section 659 to prevent a repetition of cases like Smith v. Halstead.[25]

If the Legislature agrees with this conclusion an adequate remedy may be effected by amending Section 659 to provide that a motion for a new trial must be made, at the latest, within a specified time after the entry of judgment. To that end the following amendment is suggested:

> §659. The party intending to move for a new trial must either ~~(1) before the entry of judgment and, where a motion for judgment notwithstanding the verdict is pending, then within five (5) days after the making of said motion, or (2) within ten (10) days after receiving written notice of the~~

~~entry-of-the-judgment~~, before the entry of judgment or within ten days after the entry thereof file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court or both. Said notice shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The time above specified shall not be extended by order or stipulation.

If Section 659 is to be amended as suggested, the last paragraph of Section 660 of the Code of Civil Procedure should also be amended, as follows:

> Except as otherwise provided in section 12a of this code, the power of the court to pass on motion for a new trial shall expire sixty ~~(60)~~ days from and after the ~~service-on-the-moving-party-of-written notice-of-the~~ entry of judgment, ~~or if such-notice-has-not-therefore-been-served then-sixty-(60)-days~~ after filing of the notice of intention to move for a new trial. If such motion is not determined within said period of sixty ~~(60)~~ days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court.[26]

It may be objected that these proposed amendments would impose a hardship upon the party desiring to move for a new trial in that he would be required to examine the record or to consult the clerk to ascertain if and when judgment was entered. That this would be true in some cases is made clear by the provisions of Section 664 of the Code of Civil Procedure which governs entry of judgment:

> §664. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict within 24 hours after the rendition of the verdict (provided

> that in justice courts such judgment shall be entered in the docket at once), unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. When a motion for judgment notwithstanding the verdict is pending, entry of judgment in conformity to the verdict shall be automatically stayed until the court has rendered its decision upon the motion. If the trial, in a superior or municipal court, has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such a decision; in justice courts, judgment must be entered within 30 days after the submission of the cause. In no case is a judgment effectual for any purpose until entered.

It is apparent that under the provisions of Section 664 the time of entry of judgment will not be known to counsel without inquiry when a case tried to the court without a jury is taken under submission or when in a jury case a motion for judgment notwithstanding the verdict is pending or the court has ordered the case reserved for argument or further consideration or has granted a stay of proceedings.

However, the suggested inconvenience to counsel does not seem to be a persuasive argument against amending Section 659. Moreover, the proposed change introduces nothing novel in requiring counsel to keep himself informed with respect to the date of entry of judgment in order to safeguard his client's rights. For example, under Rule 2(a) of the Rules on Appeal the date of entry of the judgment, not of notice thereof, is the date from which the time to appeal begins to run. Again, under Section 1033 of the Code of Civil Procedure a party is given 10 days after the entry

of judgment to serve and file a memorandum of costs and no notice is required to start that time running. The date of entry of judgment having been found satisfactory as respects these matters, it should serve as well to fix the date from which the time to give notice of intention to move for a new trial begins to run.

If the "hardship" objection is thought to be well taken, however, it could largely be obviated by either of two expedients:

(1) The time period provided in Section 659 could be increased to more than 10 days. For example, it could be made co-extensive with the time within which to appeal, 60 days.

(2) A statute could be enacted requiring the clerk of the court to mail a notice of the entry of the judgment to counsel for all parties. While the time to give notice of intention to move for new trial would not begin to run from the sending or receipt of such notice, the party would in fact be put on warning when the notice was received. There is precedent for such a requirement. Section 667a of the Code of Civil Procedure requires the clerk or judge of a justice court to give notice of "the rendition of judgment" by mail or personally to the parties or their attorneys. And Rule 77(d) of the Federal Rules of Civil Procedure requires the clerks of the District Courts to serve a notice by mail of "the entry of an order or judgment." Provision

for such a notice could be made by enacting a new section of the Code, patterned after the Federal rule, as follows:

> §664.1. Immediately upon the entry of a judgment in superior and municipal courts the clerk shall serve a notice thereof by mail upon every party to the action who is not in default for failure to appear, and shall make a note in the docket of such mailing. Such notice shall be in substantially the form of the abstract of judgment required in section 674 of this code.

Section 663a of the Code of Civil Procedure: A Related Problem

In considering the problem with respect to Section 659 it is to be noted that the same problem exists with respect to Section 663a of the Code of Civil Procedure. Section 663 of the code provides for motions to set aside and vacate judgments or decrees based upon findings made by the court or the special verdict of a jury for specified causes. This is followed by Section 663a which provides in relevant part:

> §663a. The party intending to make the motion mentioned in the last section must, within ten days after notice of the entry of judgment, serve upon the adverse party and file with the clerk of the court a notice of his intention. . .

In the interest of doing a complete job, Section 663a should be amended as follows:

> §663a. The party intending to make the motion mentioned in the last section must, ~~within ten days after notice of the entry of judgment,~~ within ten days after the entry of judgment, serve upon the

adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which~~,-and the-time-at-which~~ the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. ~~The-time designated-for-the-making-of-the-motion must-not-be-more-than-sixty-days-from-the time-of-the-service-of-the-notice.~~ 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 and a bill of exceptions to be used on such appeal may be prepared as provided in section six hundred and forty-nine.

The hearing and disposition of such motion shall have precedence over all other matters except criminal cases, probate matters and cases actually on trial, and it shall be the duty of the court to determine the same at the earliest possible moment.

Except as otherwise provided in section 12a of this code, the power of the court to pass on such motion shall expire sixty (60) days from and after the filing of the notice of intention to move to set aside and vacate a judgment as provided in section 663. If such motion is not determined within said period of sixty (60) days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court.

The amendments suggested go beyond those necessary to conform the proposed amendment of Section 663a to the proposed amendment of Section 659 but appear to be desirable to conform the practice in disposing of motions made under Section 663 to that in disposing of motions for new trial.[27]

FOOTNOTES

1. 88 Cal. App.2d 638, 199 P.2d 379 (1948).
2. It might be noted that, while under Section 659 the time begins to run on the date of receiving written notice of the entry of the judgment, the District Court of Appeal said in Smith v. Halstead that the time does not begin to run until proof of service of notice of entry is filed.
3. Jansson v. National Steamship Co., 34 Cal.App. 483, 168 Pac. 151 (1917); Bates v. Hansome-Crummy Co., 42 Cal. App. 699, 184 Pac. 39 (1919); Steward v. Spano, 82 Cal.App. 306, 255 Pac. 532 (1927); Peoples F.&T. Co. v. Phoenix Assur. Co., 104 Cal.App. 334, 285 Pac. 857 (1930); Cowee v. Marsh, 317 P.2d 125 (1957).
4. /Herein citation and perhaps discussion of cases indicating that entrinsic evidence may be introduced./
5. Civ. Prac. of Cal. Anno. (1872) 575.
6. Id.
7. Stats. Amend. Code, 1873-1874, pp. 315, 317.
8. The 1873-74 amendments also amended Section 659 to provide that a motion for new trial could be made on (1) affidavits served 10 days after the notice, (2) a bill of exceptions settled within 10 days after the notice, (3) a statement of the case served within 10 days after the notice, but with elaborate provisions

for its ultimate settlement, or (4) the minutes of the court. The adverse party had 10 days in each instance in which to serve opposing documents. The time of the moving party could be enlarged by the court.

9. Stats. 1900-1901, Chap CII, p. 117.

10. Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901).

11. Stats. 1900-1901, Chap. CII, Sec. 123, p. 149. Section 659 was also amended to eliminate the "statement of the case" as an alternative record upon which to present the motion, and, of course, the elaborate procedure for its settlement. This was restored in the 1907 Act, but eventually was dropped along with the bill of exceptions.

12. Vol. 1 Appendix to Journals of Senate and Assembly, 34th Session. The Report also said, concerning Section 659:

> "/The Section as revised/ omits subdivision three referring to statements of the case, there being no reason to provide both for statements of the case and for bills of exceptions. See note to last section." (pp. 62-63) The note to last section /658/ said: "There is nothing in the statement of the case that cannot be contained in a bill of exceptions, and this double designation is useless and perplexing. It is therefore omitted." (p. 62)

13. Stats. 1900-1901, Chap. CII, Sec. 124, p. 149.

14. Stats. Code Amend., 1907, Chap. 380, Sec. 3, p. 718. This revision did not eliminate the "statement of

the case" and the cumbersome procedure for its settlement as had been done in 1901. This seems odd in view of the 1901 Commissioners' report, but no explanation has been found.

15. Stats. Code Amend., 1915, Chap. 107, Sec. 2, p. 201.

16. In addition, the statement of the case and the bill of exceptions were eliminated.

17. In 1917 there was no amendment to Section 659. Section 660 was amended to correct the error in the 1915 statute by substituting "notice of the entry of the judgment" for "notice of the decision."

18. Stats. Code Amend., 1923, Chap. 105, p. 233. Section 659 was also amended in a respect which has no bearing on the present inquiry, the only change made being to authorize the making of a motion for a new trial before the entry of judgment, as well as after. Id., Chap. 367, p. 751.

19. Stats. Code Amend., 1929, Chap. 479, Sec. 3, p. 841. The provision as to the service of affidavits and counter affidavits and the extension of time for service were transferred to a new section, 659a and reworded, but there was no change in substance.

20. Stats. Code Amend., 1929, Chap. 479, Sec. 5, p. 842.

21. In lieu of the provision that the motion "must be heard at the earliest practicable time" Section 661 was enacted Stats. Code Amend., 1929, Ch. 479, Sec. 6, p. 842. By this section (1) the clerk was required

"upon the expiration of the time to file counter affidavits" to call the motion to the attention of the judge; (2) the judge was required to designate the time for oral argument, if any,; (3) the clerk was required to give 5 days notice of the argument by mail; and (4) the motion was required to be argued or submitted not later than 10 days "before the expiration of the time within which the court has power to pass on" it.

22. In 1933 Section 12a of the Code which refers to the computation of time was made applicable to Sections 659 and 659a and to the 60 day period for determination of motions for a new trial prescribed in Section 660. Stats. Code Amend., 1933, Chap. 29, Secs. 5 & 7, pp. 305, 306.

In 1951 Section 659 was amended to provide a 5 day notice period for a motion for a new trial made before the entry of judgment and while a motion for judgment notwithstanding the verdict is pending. Stats. Code Amend., 1951, Chap. 801, vol. 1, p. 2288. This change does not enter into the present inquiry.

23. The federal courts, Arizona, Colorado, Connecticut, Illinois, Montana, Oklahoma, Oregon, South Dakota, Texas, Utah and Wisconsin.

Rule 77(d) of the Federal Rules of Civil Procedure requires the clerk of the District Court to serve

notice by mail of the entry of judgment. The time for new trial does not run from the service or receipt of such notice, however, but from entry of judgment.

24. It should be noted, however, that in Michigan the right to make a motion for new trial may be terminated on a date certain by the trial judge on motion of the opposite party. Michigan Court Rules Annotated, Rule 47, §4, p. 492.

25. Cowee v. Marsh, 154 A.C.A. 691; 317 P.2d 125 (1957).

26. 88 Cal. App.2d 638, 199 P.2d 379 (1948).

27. The time for making a motion for judgment notwithstanding the verdict as prescribed in Section 629 is also as indeterminate as that prescribed in Section 659. The relevant provision of that Section 629 is as follows:

> ...if made after the entry of judgment such motion shall be made within the period specified by Section 659 of this code in respect of the filing and serving of notice of intention to move for a new trial.

However, as the time is thus fixed by reference to Section 659 the suggested change in that section would make amendment of Section 629 unnecessary.