STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

The Effective Date of an Order Ruling on a Motion for New Trial

February 1, 1957

LETTER OF TRANSMITTAL

To His Excellency Goodwin J. Knight
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether Section 660 of the Code of Civil Procedure should specify the effective date, for the purposes thereof, of orders granting motions for new trials. The commission herewith submits its recommendation relating to this subject and the study prepared by its research consultant, Professor Edward L. Barrett, Jr., of the School of Law, University of California, Berkeley.

February 1, 1957

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to the Effective Date of an Order Ruling on a Motion for New Trial

Section 660 of the Code of Civil Procedure (hereinafter referred to as "Section 660") is applicable in superior and municipal court actions. It provides that a motion for a new trial is denied by operation of law upon the expiration of 60 days from the date of certain events specified therein unless the motion has theretofore been "determined" by the court. The question frequently arises of precisely what must be done within this 60-day period to "determine" the motion. The matter is of particular importance when the question is whether a court which intended and attempted to *grant* a motion for a new trial within the period actually did so, thus precluding its denial by operation of law.

Several earlier cases indicate that a motion for a new trial is "determined" within the meaning of Section 660 if (1) the judge pronounces the order orally in open court in the county of trial within the 60 days, whether or not the order is entered in the permanent minutes within the period; (2) the judge signs a written order within the 60 days outside the county of trial, whether or not the order is filed within the period; or (3) the judge pronounces an order orally in chambers in the county of trial and the order is entered in the permanent minutes within the period. While there are no cases so holding, it would seem to follow from these earlier cases that a motion for new trial would also be "determined" if (4) the judge signs a written order in the county of trial within the 60 days, whether or not it is filed within the period; or (5) the judge pronounces the order orally in chambers outside the county of trial and the order is entered in the permanent minutes within the 60-day period.

However, as is shown in the research consultant's report, three recent cases have thrown considerable doubt on the earlier cases referred to and have indicated that a motion for a new trial is denied as a matter of law under Section 660 unless one of two things is done within the 60-day period: (1) an order ruling on the motion is made and is entered in the permanent minutes or (2) a written order is signed by the judge and filed with the clerk.

The commission believes that the uncertainty created by this inconsistency between the earlier and later cases is undesirable and recommends that a statute be enacted specifying precisely what must be done within the 60-day period prescribed by Section 660 to have an effective ruling on a motion for a new trial and to prevent denial of the motion by operation of law. It is important for parties, judges, counsel, and court clerks that the law on this matter be perfectly clear.

The commission recommends that Section 660 be revised to provide that a motion for a new trial is determined within the meaning of the

section when, within the 60-day period specified therein, (1) an oral order ruling on the motion is first entered in the minutes or (2) a written order ruling on the motion is signed by the judge. This recommendation is based on the commission's conclusion that an event must be selected as critical which can be proved by a writing rather than by resort to the recollection of the judge as to when he ruled on the motion. In the case of an oral order this is supplied by the clerk's entry in either his temporary or "rough" minutes or the permanent or "smooth" minutes of the court. In the case of a written order it is provided by the signing of the order which is routinely dated as of the day upon which it is signed.

The commission also recommends that Section 660 provide that an order ruling on a motion for a new trial is effective when entered in the minutes or signed even though it directs that a written order be prepared, signed, and filed. The commission recognizes that under Rule 3(a) of the Rules on Appeal the time for appeal does not start to run in such a case until the signed order is filed. However, this proposed difference in the rules is justified because of the different purposes which they serve. It is desirable to make as early an event in the process of decision as possible a "determination" within the meaning of Section 660 to avoid an unintended denial of the motion by operation of law when later events relating to the order occur after the 60-day period has elapsed. On the other hand, it is desirable to make a relatively late event relating to the order critical for the purpose of starting the time for appeal to run in order to give maximum opportunity to file an appeal.

The commission's recommendation would be effectuated by the enactment of the following measure: *

An act to amend Section 660 of the Code of Civil Procedure, relating to orders ruling on motions for new trials.

The people of the State of California do enact as follows:

SECTION 1. Section 660 of the Code of Civil Procedure is amended to read:

660. On the hearing of such motion, reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified transcript of such report or if there be no such report or certified transcript, to such proceedings occurring at the trial as are within the recollection of the judge; when the proceedings at the trial

* Matter in italics would be added to the present law.

have been phonographically reported, but the reporter's notes have not been transcribed, the reporter must upon request of the court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the court, or either party, may require.

The hearing and disposition of the motion for a new trial 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 *a* motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore 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. *A motion for a new trial is determined within the meaning of this section when (1) an order ruling on the motion is first entered in the minutes or (2) a written order ruling on the motion is signed by the judge. Such determination shall be effective even though the order directs that a written order be prepared, signed, and filed.*

A STUDY RELATING TO THE EFFECTIVE DATE OF NEW TRIAL ORDERS IN RELATION TO SECTION 660 OF THE CODE OF CIVIL PROCEDURE *

THE PROBLEM

California Code of Civil Procedure Section 660 (hereinafter referred to as "Section 660") provides in part:

> 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 service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore 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.

The purpose of this study is to determine the point in time at which an order of a court granting a new trial becomes effective within the meaning of Section 660—*i.e.*, what must be done by the end of the sixtieth day to prevent denial of the motion by operation of law—and to determine whether clarifying legislation is necessary. The discussion is limited to the problem as it arises in the superior courts and the municipal courts.[1]

THE PRACTICE

The Making of New Trial Orders

Judges frequently rule on motions for new trial at the conclusion of the argument and in the presence of counsel. In such a situation the order may take the form of an oral announcement from the bench, a formal written order, or an oral announcement followed by a written order.

In many cases, however, the judge will take the motion under submission and rule on it later. Some judges may call counsel into court to hear the ruling on new trial. More often the court will rule in chambers by oral directions to the clerk or by a written order handed to the clerk for filing. In this situation counsel may often know of the ruling only upon the receipt of postal notice from the clerk.

Where a judge from another county has been hearing a case while on assignment, he may rule on the motion for a new trial after returning to his home county either after oral argument in the county of trial or after submission of written argument to him in his home county.

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* This study was made at the direction of the Law Revision Commission by Professor Edward L. Barrett, Jr. of the School of Law, University of California, Berkeley.

[1] CAL. CODE CIV. PROC. § 660 applies to superior and municipal courts but not to justice courts. CAL. CODE CIV. PROC. § 655.

In such a situation the court may sign a formal written order and mail it to the clerk in the county of trial, he may mail a letter to the clerk of the county of trial containing informal directions for entry of a new trial order, or he may convey such directions to the clerk by telephone or telegraph.

Practices of Clerks' Offices in Filing and Entering New Trial Orders

Code of Civil Procedure Section 668 requires clerks of superior courts to keep a judgment book in which judgments must be entered. Code of Civil Procedure Section 664 prescribes the time in which judgments must be entered in the judgment book. There is, however, no statute directly requiring the keeping of a minute book or describing the method of doing so. Several statutes, by providing for the entry of orders in the minutes, imply that some form of a minute book shall be kept [2] but no statute prescribes the time in which such entries shall be made.[3] As a result, practices in handling the entry of orders vary widely among clerks' offices in this State. A questionnaire was sent to the clerks of the superior and municipal courts by the Law Revision Commission asking how new trial orders are handled. A brief summary of the results is presented in the following paragraphs. A fuller description will be found below.[4]

When the judge makes an oral order in open court or gives oral directions to his clerk in chambers, an immediate notation will normally be made in the rough minutes of the courtroom clerk. In nearly all of the municipal court clerks' offices and in about two-thirds of the county

[2] *E.g.*, CAL. CODE CIV. PROC. §§ 581d, 668, 1003; CAL. PROB. CODE § 1221.

[3] See generally 2 WITKIN, CALIFORNIA PROCEDURE 1648 (1954); 3 *id.* at 1890-91.

[4] Questionnaires were sent to the county clerks and to the clerks of the municipal courts seeking information regarding the way in which new trial orders are handled. Responses were received from almost all of the clerks. The following information was disclosed:

A. Nearly all the municipal court clerks and about two-thirds of the superior court clerks stated that an oral or written order granting or denying a new trial is normally entered in the permanent minutes on the same date on which it is made, though occasionally an order made at the end of the day may not be entered until the beginning of the next court day. Some clerks stated, however, that delays between the making of a new trial order and its entry were customary; the delays reported for particular counties were as follows:

Superior courts: Alpine (1 day); Contra Costa (2 weeks); Del Norte (1 to 3 days); El Dorado (1 or 2 days); Fresno (2 or 3 days); Humboldt (1 day to 4 months); Kern (1 to 7 days); Kings (1 day); Los Angeles (2 court days); Madera (1 to 2 weeks); Mariposa (1 to 2 days); Mendocino (3 or 4 days); Santa Barbara (2 weeks); San Benito (1 to 14 days); San Bernardino (2 to 6 days); Sonoma (1 day); Trinity (2 days); Tuolumne (1 week); Ventura (2 or 3 days).

Municipal courts: Burbank (1 day); Fresno (1 to several days); Long Beach (1 to 3 days); Los Angeles (1 to 3 days); San Francisco (1 to 3 days); South Bay (1 day).

B. About one-third of the superior court clerks and nearly all of the municipal court clerks stated that both the date of rendition of an order granting or denying a new trial and the date of its entry in the permanent minutes are shown in the minutes in cases where such dates are not the same. About one-third of the superior court clerks reported that only the date on which the order was made would be shown on the face of the minutes. Nearly one-third of the superior court clerks reported that since the minute entries were made the same day the order was made they had no occasion to show different dates. It was not clear what practice these clerks would follow in the occasional instance where entry was later than the making of the order.

C. When a new trial order is signed by a judge outside the county and mailed in to the clerk's office, a few clerks make a minute entry which shows only the date on which the judge signs the order. About one-third of the superior court clerks and a few municipal court clerks make a minute entry which shows only the date on which the clerk receives the order. About one-third of the superior court clerks and most of the municipal court clerks make a minute entry which shows both the date on which the judge signed the order and the date on which the clerk received it. A few superior court clerks merely file such orders and make no minute entries. Many of the municipal courts have not yet had any occasion for using judges on assignment and hence have no established practice for such orders.

clerks' offices the order will be entered in the "smooth" or permanent minutes on the same day in which it is made or occasionally, if the order is made at the end of the day, at the beginning of the next court day. In the rest of the clerks' offices there will be delays ranging from a customary one to two court days up to as much as three weeks between the oral order and its entry in the permanent minutes. Where there has been a period of delay between the announcement of the order and its entry, most clerks' offices will show in the permanent minutes both the date of its entry therein and the date the court made the order. In a substantial number of clerks' offices, however, such orders are entered as of the date the court made them without showing in the permanent minute book the date of actual entry.

Where the judge signs a formal written order and hands it to his clerk, it will normally be filed immediately. In some clerks' offices such formal, written new trial orders are never entered in the minutes. In the others they are, and the delay between filing the order and its entry in the minutes is the same as with oral orders.

Where the judge acts on the new trial motion outside the county, clerks' practices are even more varied. Telephoned directions to enter an order will normally be treated the same as an oral order made within the county. Probably the same would be true with mailed or telegraphed directions to the clerk to enter an order—the clerks would regard as crucial the date of receipt of the directions and disregard the date the judge acted. Where, however, the judge signs a formal written order and mails it to the county of trial, there is no consistency of treatment. A few clerks will make a minute entry which shows only the date the judge signed the order regardless of the date of receipt. A few will just file the order and make no minute entry. The rest of the clerks' offices appear about equally divided between those which make a minute entry as of the date of receipt of the order and those which make a minute entry showing both date of signing and date of receipt.

What Must Be Done Before a Motion for a New Trial Is "Determined" Within the Meaning of Code of Civil Procedure Section 660?

In order to make an effective order granting a new trial the court must "pass on" or "determine" the motion prior to the expiration of the 60-day period prescribed in Section 660. The crucial question is what acts must be performed within the 60-day period.

Is it sufficient if the court makes an oral order in open court prior to the expiration of the 60 days even though no entry is made in the permanent minutes until after the 60 days? Is the answer different if the court acts in chambers by oral directions to his clerk?

Is it sufficient if the court signs a written order within the period even though it is not filed or entered in the permanent minutes until after the 60 days? What if it is signed and filed within the period but the minute entry comes after?

Is the problem different when the judge is acting outside the county of trial? If he signs and mails an order within the period is it effective even though not received by the clerk until after?

It makes little practical difference whether the order granting a new trial becomes effective when made or when entered in those counties

where such orders are either filed or are entered in the smooth minutes in normal course the same day that they are made. But in those counties where there is a delay between the making of the order and its filing or entry and in all counties where a judge who heard the case on assignment is acting in his home county it is essential to know precisely what must be done within the 60 days in order effectively to grant a new trial.

In the next section of this study the current state of the law on the questions posed above will be discussed. The concluding section will suggest possibilities for clarifying legislation.

THE LAW

The general problem of the point in time at which orders become effective arises not only with respect to new trial orders under Section 660 but also with respect to other orders and in a variety of situations. The most common question is when the time for appeal commences to run. Frequently, however, the question will be whether the rights of the parties were fixed as of the date of an oral order or only when the minute entry was made. Or it may be whether the judge was free to reconsider his ruling at any time before the formal minute entry was made. In any particular situation the problem may be controlled by the language of a special statute. Yet the cases contain much general language and are often cited indiscriminately without reference to the statutory language which controlled the results. Hence it appears necessary to examine briefly the law as it has developed with respect to judgments and to orders of various kinds before proceeding to a detailed study of the situation with respect to new trial orders under Section 660. The problem as it arises in connection with the time for appeal will be considered first since it has from the beginning been governed by special statutes.

Time for Appeal

From 1872 to 1915 Code of Civil Procedure Section 939 provided that the time for appeal should run from the time of "entry" of a *judgment* [5] and from the time that an *order* "is made and entered in the minutes of the court or filed with the clerk." In 1915 Code of Civil Procedure Section 939 was amended to provide that appeals from judgments and orders should be filed "within sixty days from the entry of said judgment or order." [6] The 1915 amendment also provided that if proceedings on a motion for new trial are pending "the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion." [7] Decisions under these statutes made it clear that with respect to orders the time for appeal did not commence to run until they were entered in the permanent minutes or filed with the clerk. Thus, it was held that where a new trial was denied and

[5] With the exception of a period from 1872 to 1907 when appeals based on an insufficiency of the evidence had to be filed within 60 days of "rendition" of the judgment.

[6] Cal. Stat. 1915, c. 111, § 1, p. 205.

[7] *Ibid.*

entry made in the rough minutes on one day and entry in the permanent minutes was not made until the following day, the 30-day extension of time within which to appeal started only from the entry in the permanent minutes.[8] Confusion, however, existed as to when the time for appeal started to run when an oral order was entered in the permanent minutes and then later a formal written order was signed and filed.[9]

Code of Civil Procedure Section 939 was superseded by the Rules on Appeal which became effective in 1943. Rule 2(a) provides that notice of appeal shall be filed within 60 days from the date of entry of the judgment unless the time is extended by proceedings on a motion for new trial or a motion to vacate. Rule 2(b), as amended in 1951, provides:

> (b) For the purposes of this rule: (1) The date of entry of a judgment shall be the date of its entry in the judgment book. (2) The date of entry of an appealable order which is entered in the minutes shall be the date of its entry in the permanent minutes, unless such minute order as entered 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. (3) The date of entry of an appealable order which is not entered in the minutes shall be the date of filing of the order signed by the court. (4) The date of entry of a decree of distribution in a probate proceeding shall be the date of its entry at length in the minutes.

Rule 3(a), as amended in 1951, provides in part that when a valid notice of intention to move for a new trial is served and filed within 60 days after entry of judgment "if the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after either entry of the order denying the motion or denial thereof by operation of law * * *."

Under the Rules on Appeal, it is settled that the time for appeal from a judgment runs from the date of its actual entry in the judgment book.[10] When the court must act by a signed order and an oral order is not sufficient, the time for appeal runs from the date of filing of the order.[11] When an oral order is made, the time for appeal runs from the date of actual entry in the permanent minutes.[12] When the oral order is followed by the filing of a signed written order, time for appeal runs from the entry in the permanent minutes and not from the date of filing[13] unless the court specifies in the minute order that a formal order will be signed and filed, in which case the time runs

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[8] Berman v. Blankenship Motors, 140 Cal. App. 134, 34 P.2d 1035 (1934). See Grande v. Donovan, 55 Cal. App.2d 694, 695, 131 P.2d 855 (1942) ("The time for filing a notice of appeal runs from the actual entry of the order from which an appeal is taken in the *regular minutes* of the court and not from the entry in the 'rough minutes' of the clerk.")

[9] See discussion in Pessarra v. Pessarra, 80 Cal. App.2d 965, 183 P.2d 279 (1947); Witkin, *New California Rules on Appeal,* 17 So. Calif. L. Rev. 79, 86 (1944).

[10] Verdier v. Verdier, 118 Cal. App.2d 279, 257 P.2d 723 (1953) (date of actual entry and not date shown on face of judgment book is the controlling date).

[11] Hirschberg v. Oser, 82 Cal. App.2d 282, 186 P.2d 53 (1947) (order confirming sale under Cal. Code Civ. Proc. § 785).

[12] Beresford v. Pacific Gas & Elec. Co., 113 Cal. App.2d 622, 248 P.2d 773 (1952) (permitting affidavits from clerk to show date of actual entry).

[13] Gwinn v. Ryan, 33 Cal. 2d 436, 202 P.2d 51 (1949); Pessarra v. Pessarra, 80 Cal. App. 2d 965, 183 P.2d 279 (1947).

from the date of filing.[14] And an oral order denying a motion for a new trial does not serve to start running the 30-day extension of time for appeal under Rule 3(a) until it is entered in the permanent minutes.[15] If it is not entered in the minutes within the 60-day period prescribed by Section 660, the order will be treated as automatically denied at the end of the 60 days and the appeal time will run from then rather than from a later minute entry of the oral denial.[16]

Judgments and Decrees

As enacted in 1872, Code of Civil Procedure Section 668 provided: "The clerk must keep, with the records of the court, a book to be called the 'judgment book,' in which judgments must be entered." A number of early cases, which are frequently cited now in cases dealing with the effective date of orders, held that a judgment or decree became effective when "rendered" without regard to the date upon which the clerk preformed the ministerial duty of entering the judgment in the judgment book. Thus in *In re Newman*[17] the court held that a decree of divorce became effective when signed and filed with the clerk even though not entered in the judgment book until later. "The clerk could not, by his failure to perform a ministerial duty, abridge the rights of any party interested."[18] In another divorce case, *In re Cook*,[19] the court held a decree of divorce effective when announced orally in open court and entered in the minutes even though no entry was made in the judgment book until years later:

> But when, after the trial and final submission of the case, the court pronounces a judgment in apt language, which finally determines the rights of the parties to the action, and leaves nothing more to be done except the ministerial act of the clerk in entering it, and especially when what the court has pronounced has been entered in the minutes, then the judgment has been rendered, and the rights of the parties established.[20]

In 1907, Code of Civil Procedure Section 664 was amended to include the following sentence: "In no case is a judgment effectual for any purpose until so entered."[21] In 1933, Code of Civil Procedure Section 668 was amended to provide that in municipal courts instead of keeping a judgment book the clerk

> shall enter all civil judgments of such court in the minute book of such court, and shall certify to a copy thereof, and file said copy in the files of the action, and shall subscribe a condensed

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[14] Herrscher v. Herrscher, 41 Cal.2d 300, 259 P.2d 901 (1953).

[15] Jablon v. Henneberger, 33 Cal.2d 773, 205 P.2d 1 (1949).

[16] Millsap v. Hooper, 34 Cal.2d 192, 208 P.2d 982 (1949). For a detailed discussion of the cases on the time for appeal, see 3 WITKIN, CALIFORNIA PROCEDURE 2292-2302 (1954).

[17] 75 Cal. 213, 16 Pac. 887 (1888).

[18] *Id.* at 221, 16 Pac. at 889.

[19] 77 Cal. 220, 17 Pac. 923, 19 Pac. 431 (1888).

[20] *Id.* at 227, 19 Pac. at 434-35. See also Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074 (1891) (indicating that when findings are required there can be no effective judgment until they are filed with the clerk; when findings are not required, there must be entry in the minutes); *In re* Clarke, 125 Cal. 388, 58 Pac. 22 (1899); Estate of Wood, 137 Cal. 129, 69 Pac. 900 (1902).

[21] Cal. Stat. 1907, c. 381, § 1, p. 719.

> statement of the judgment, with the date of entry thereof, on the appropriate page in the register of actions.[22]

The result of these amendments is that judgments and decrees are now not effective for any purpose until formal entry has been made in the judgment book in superior court actions and as prescribed in Section 668 in municipal court actions. One recent case will suffice to illustrate the rule. In *Phillips* v. *Phillips*,[23] a divorce case, the court filed a memorandum containing findings of fact and conclusions of law and an order that each party be denied a divorce. The memorandum was filed and entered in the minutes in 1949 but was not entered in the judgment book. In 1952, after appellate proceedings in which attention was called to the fact that no judgment had been entered, the court signed new findings of fact and conclusions of law and the judgment was entered in the judgment book. The husband took an appeal from this latter judgment and the wife moved to dismiss the appeal contending that the only judgment was the one in 1949 and that the clerk's dereliction in entering it could not impair the finality of the judgment to her prejudice. The court refused to dismiss. It stated that the filing of the 1949 memorandum "met the requirements for rendition of a judgment" but said:

> It does not follow, however, that the memorandum is the judgment. Until a judgment is entered, it is not effectual for any purpose (Code Civ. Proc., § 664), and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. * * * Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his findings of fact. * * *
>
> Since the 1949 memorandum was not entered as a judgment, the trial judge had the power to substitute new findings of fact and conclusions of law, and to enter a new judgment. The only judgment in this case is the judgment entered on October 14, 1952, and all issues in this case must be resolved on the basis of that judgment.[24]

A judge who has heard a case on assignment has no jurisdiction to render a judgment while outside the county of trial. However, he can sign the findings and judgment and mail them to the clerk where the case was heard and on entry they will be vaild. In this situation even the cases arising prior to the 1907 amendment recognized that the judgment was not effective for any purpose until the papers were received and filed by the clerk.[25]

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[22] Cal. Stat. 1933, c. 744, § 124, p. 1883.

[23] 41 Cal.2d 869, 264 P.2d 926 (1953).

[24] *Id.* at 874-75, 264 P.2d at 929-30.

[25] Estudillo v. Security Loan etc. Co., 158 Cal. 66, 109 Pac. 884 (1910); Walter v. Merced Academy Assn., 126 Cal. 582, 59 Pac. 136 (1899); Comstock Quicksilver Min. Co. v. Superior Court, 57 Cal. 625 (1881); Weinstock-Nichols Co. v. Courtney, 26 Cal. App. 445, 147 Pac. 218 (1915); *see* United Railroads v. Superior Court, 197 Cal. 687. 242 Pac. 701 (1925). See generally 3 WITKIN, CALIFORNIA PROCEDURE 1887 *et seq.* (1954); Note, 29 CALIF. L. REV. 635 (1941).

Probate Orders and Decrees

Prior to 1921, Code of Civil Procedure Section 1704 provided that in probate proceedings all "orders and decrees of the Court or Judge must be entered at length in the minute book of the Court." [26] Since 1921, the statute has contained the language now found in Probate Code Section 1221: "All orders and decrees of the court or judge must be entered at length in the minute book of the court, or else signed by the judge and filed; but decrees of distribution must always be so entered at length." [27]

Under this statutory provision it is settled that probate orders and decrees need not be entered in the judgment book. Orders and decrees other than decrees of distribution become effective either when signed and filed or when entered in the permanent minutes. Thus in *Carroll* v. *Carroll* [28] it was held that the signing and filing of an order restoring the plaintiff to competency was effective to validate a note and deed of trust executed by the plaintiff prior to entry of the order in the judgment book. Decrees of distribution must be entered at length in the minutes [29] and presumably are not effective until that is done.[30]

There is considerable confusion in the probate cases, however, as to whether orders and decrees may become effective for some purposes when signed but prior to filing or when made orally and prior to entry in the minutes. Two early cases suggested that under these circumstances probate orders might be effective for purposes other than appeal. In *Estate of Hughston* [31] an order refusing to revoke the probate of a will was made. The opinion does not state whether it was oral or written. After the making of the order but prior to its entry in the minutes a statute making such orders appealable became effective. The court held that the statute applied only to orders made after its effective date and that this order, having been made before, was not appealable:

> It is the judgment or order that the statute says may be appealed from. The entry of that judgment or order only serves the purpose of fixing the time from which the appeal may be taken. * * * [Probate orders] are perfect and complete, and have full force and effect before they are entered.[32]

In *Otto* v. *Long* [33] the court relied on the pre-1907 judgment cases to hold that a written probate order setting aside certain property to a widow as a homestead became effective and enabled the widow to execute a valid mortgage after the signing of the order but prior to its filing and entry. "The entry of the order was not necessary to make it valid or effectual to pass the title." [34]

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[26] Code Am. 1880, c. 85, § 122, p. 105.

[27] Cal. Stat. 1921, c. 112, § 1, p. 105; Cal. Stat. 1931, c. 281, § 1221, p. 668.

[28] 16 Cal.2d 761, 108 P.2d 420 (1940).

[29] Estate of Lair, 65 Cal. App.2d 245, 150 P.2d 560 (1944).

[30] Mears v. Jeffry, 80 Cal. App.2d 610, 182 P.2d 294 (1947) (refusing to decide whether a decree of distribution becomes effective for any purpose when signed and filed and prior to entry in the minutes).

[31] 133 Cal. 321, 65 Pac. 742 (1901).

[32] *Id.* at 323, 65 Pac. at 743.

[33] 144 Cal. 144, 77 Pac. 885 (1904).

[34] *Id.* at 146, 77 Pac. at 886.

The often cited case of *Brownell* v. *Superior Court*,[35] however, appeared to hold that an oral order was not effective until entered in the minutes. The judge orally announced that a petition for partial distribution of an estate was granted and a notation was made in the rough minutes of the clerk. A few days later a formal order was signed and filed. A motion to set aside the order under Code of Civil Procedure Section 473 was made more than six months after the oral order, less than six months after the formal order. The court held that the order was "taken" within the meaning of Section 473 when the formal order was filed, saying that entry of the order in the smooth minutes would have been sufficient but until that time "the matter granted still remained a mere oral announcement."[36] The *Brownell* case was distinguished as being controlled by the language of Section 473 in *Fresno Estate Co.* v. *Fiske*,[37] where the court held that an order accepting the resignation of a guardian was effective when signed even though not filed until later:

> The validity of such an order does not depend upon the day of its entry. An order or decree of court takes effect from the time it is pronounced, and the failure of the clerk to file the papers or enter the judgment does not delay or defeat the operation of the court's pronouncement.[38]

In *Van Tiger* v. *Superior Court*,[39] the most recent case to raise the point, an oral order was involved and held ineffective until entered in the permanent minutes. An oral order calling for distribution of the estate to the heirs *per capita* was entered in the rough minutes of the clerk. The entry in the permanent minutes indicated that the distribution was to be made *per stirpes*. Held that the trial judge had no discretion to correct the final minute order to conform with his oral announcement, that the entry in the permanent minute book constituted the rendition by the court of its judgment.

Orders of Dismissal and Nonsuit

Code of Civil Procedure Section 581d provides in part:

> All dismissals ordered by the court shall be entered upon the minutes thereof or in the docket in the justice court, as the case may be, and such orders when so entered shall constitute judgments and be effective for all purposes, and the clerk in superior and municipal courts shall note such judgments in his register of actions in the case.[40]

Under this section it has been held in numerous cases that no entry need be made in the judgment book and that the effective judgment is the entry in the permanent minutes.[41]

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[35] 157 Cal. 703, 109 Pac. 91 (1910).
[36] *Id.* at 708, 109 Pac. at 93.
[37] 172 Cal. 583, 157 Pac. 1127 (1916).
[38] *Id.* at 597-98, 157 Pac. at 1133.
[39] 7 Cal.2d 377, 60 P.2d 851 (1936).
[40] Another sentence of Section 581d provides that voluntary dismissals by the plaintiff shall be entered in the clerk's register.
[41] Gwinn v. Ryan, 33 Cal.2d 436, 202 P.2d 51 (1949) (appeal); Beresford v. Pacific Gas & Elec. Co., 113 Cal. App.2d 622, 248 P.2d 773 (1952) (appeal); Costa v. Regents of University of Cal., 103 Cal. App.2d 491, 229 P.2d 867 (1951) (appeal). *But cf.* Herrscher v. Herrscher, 41 Cal.2d 300, 259 P.2d 901 (1953) (holding that when the trial court expressly states that a formal order is to be signed, appeal time runs from the filing of that order rather than the minute entry).

Two cases have dealt with the question of effectiveness of an oral order of dismissal prior to its entry in the minutes and have reached seemingly opposite conclusions. In *Sarkisian* v. *Superior Court* [42] the court made in open court an oral order to dismiss. Later the same day and prior to any entry in the permanent minutes, he made an order setting aside the first order without notice to the defendant. On appeal it was held that the court had no jurisdiction to set aside the first order without noticed proceedings under Code of Civil Procedure Sections 473 or 663. "The first order was not ineffective because not entered in the minutes." [43] In *Jackson* v. *Thompson* [44] the court made in open court an oral order of dismissal of the action which was not entered in the permanent minutes until a week later. The day after the oral ruling counsel for the defendant served on the plaintiff a notice of entry of the order. On appeal it was held that this notice being prior to actual entry was a nullity and did not start the time running for the plaintiff to file a request for a transcript for his appeal:

> Commencing with the case of *Brownell* v. *Superior Court,* * * * it has been uniformly held that the entry of the court's oral order in the clerk's "rough minutes" is not an official record of any character, and until such official entry has been made in the minutes of the court the order granted remains but a mere oral announcement.[45]

Miscellaneous Orders

California Jurisprudence states generally that "except where some statute expressly or by implication provides otherwise, an order is effective from the time it is signed, or from the time it is signed and filed, notwithstanding the fact that it is not entered in the minutes." [46]

There is ample authority, old and modern, for the proposition that, unless otherwise provided by statute, an order becomes effective when signed and filed regardless of the date of entry in the permanent minutes. In the leading case of *Von Schmidt* v. *Widber* [47] the judge signed an order dispensing with an undertaking upon an appeal. The order was filed but never entered in the permanent minutes. The respondent moved to dismiss the appeal for want of an undertaking. The motion was denied:

> There is no provision, either in the constitution or by statute, which requires the presence of any other officer than the judge to constitute a court or to authorize the transaction of judicial business; nor is there any provision of law which requires all the orders of a court to be entered at length in its minutes, in order that they may be effective, and by section 1003 of the Code of Civil Procedure, every direction of a court or judge is an order, whether it be merely made in writing or entered in the minutes. If it is not entered it should, however, be filed, in order that it may form a part of the records in the case. * * * [It is customary to enter orders in the minutes] but if the order is formally pre-

[42] 129 Cal. App. 342, 18 P.2d 739 (1933).
[43] *Id.* at 345, 18 P.2d at 740.
[44] 43 Cal. App.2d 150, 110 P.2d 470 (1941).
[45] *Id.* at 152, 110 P.2d at 472.
[46] *Motions and Orders,* 18 CAL. JUR. 663-64 (1924).
[47] 99 Cal. 511, 34 Pac. 109 (1893).

pared and signed by the judge, and made a matter of record by filing with the clerk, the same end is attained as if it were spread at length upon the minutes of its daily transactions.[48]

In *Maxwell* v. *Perkins*[49] the judge signed and filed a written order granting a motion for change of venue. Before the order was entered in the minutes the judge made another order vacating and setting aside the first order and denying the motion for change of venue. On appeal it was held that the first order was effective and the trial judge had no power to set it aside. "Unless otherwise required by statute, an order becomes legally effective at the time it is signed and filed, regardless of whether it is entered in the minutes by the clerk."[50]

In *Badella* v. *Miller*[51] the trial judge signed and filed an order for change of venue when counsel for the plaintiff failed to appear at the hearing. Later the same day plaintiff's counsel arrived with an adequate excuse. The judge then made an oral order "on its own motion" setting aside the first order granting the change of venue. Thereafter apparently, a permanent minute entry was made showing in consecutive sentences the first order and the second one setting it aside. Held, the second order was invalid. The first order was an effective order granting a change of venue and could be set aside only after a noticed motion made under Code of Civil Procedure Section 473. In response to the argument "that the formal order was not entered by the clerk until at the same time the order vacating it was made * * *; that a judgment is not effective until entered and the order was nullified by the same minute order by which it was made and entered",[52] the court relied on and quoted from *Maxwell* v. *Perkins* to hold that a signed and filed order for change of venue need not be entered in the minutes to be effective. "The formal order was, therefore, an effective final order, granting the motion to change venue and transferring the action. The order vacating it was a separate and subsequent order."[53]

No case not dealt with under other headings has been found which holds an order to be effective when signed even though filed later or when made orally even though entered later.[54]

New Trial Orders

Prior to 1929 judges did not have power to rule on motions for new trial in chambers. At this time the courts said that the order of a court ruling on such a motion "may be rendered in either one of two ways: (1) By the pronouncement thereof in open court * * * [by the judge]; or (2) by the filing with the clerk in the action of a written order of court signed by the judge."[55] Hence, it was held that when a judge

[48] *Id.* at 514, 515, 34 Pac. at 110. See also Phelan v. All Persons, 202 Cal. 175, 259 Pac. 725 (1927) (order for publication of summons under special statute); Rose v. Superior Court, 140 Cal. App. 418, 35 P.2d 605 (1934) (order of contempt).

[49] 116 Cal. App.2d 752, 255 P.2d 10 (1953).

[50] *Id.* at 756, 255 P.2d at 13.

[51] 44 Cal.2d 81, 279 P.2d 729 (1955).

[52] *Id.* at 84, 279 P.2d at 731.

[53] *Id.* at 85. 279 P.2d at 731.

[54] *But cf.* People v. Ruef, 14 Cal. App. 576, 114 Pac. 48 (1910) where the California Supreme Court held that its decisions and orders become effective when signed: "We are entirely satisfied that the filing of the order in the clerk's office within the prescribed time was not essential to its validity, if it was otherwise regularly made by a majority of the court." (*Id.* at 626, 114 Pac. at 51.) See *accord* Estate of McNamara, 181 Cal. 82, 85, 183 Pac. 552, 553 (1919).

[55] United Railroads v. Superior Court, 197 Cal. 687, 692, 242 Pac. 701, 703 (1925).

on Saturday afternoon (the 59th day) telephoned an order granting a new trial to his clerk it was invalid because the order had to be a judicial act made in court and could not be performed on a holiday.[56] And when a judge who had heard a case on assignment signed a written order granting a new trial in his home county on the 60th day and mailed it to the clerk of the county where the case was tried who received and entered it on the 62nd day, it was held that the new trial was not granted because the judge had no power to make the ruling in chambers.[57] By dictum, the court suggested, however, that if the judge had had power to rule in chambers, the order would have been effective when signed without regard to the date of filing. However, in *United Railroads* v. *Superior Court*,[58] where the judge signed the order granting a new trial outside the county and mailed it to the clerk in time for filing within the 60 days, it was held that a valid order had been made. The court said that

> the signing of the order by the judge does not constitute its rendition, neither does the act of sending it or mailing it to the clerk. It is the filing of the written order authenticated by the signature of the judge which constitutes the rendition thereof.[59]

Even prior to 1929 when an oral order granting a new trial was made in open court, it was held to be effective to grant a new trial even though not entered in the minutes until after the 60th day. In *Finkle* v. *Superior Court* the court said by way of dictum:

> Or if the order had been rendered * * * in open court, a failure of the clerk to enter it in his minutes before the expiration of May 5th, would not have defeated its operation as a court order, since the validity of an order made by the court does not depend upon the date of its entry.[60]

In *Barbee* v. *Young* [61] the court made an oral order granting a new trial in open court on the 60th day. The clerk made an entry in his rough minutes. Thereafter the clerk asked counsel to prepare a written order which was signed and filed and entered in the permanent minutes on the 63rd day. The oral order was never entered in the permanent minutes. On appeal it was held that a new trial had been effectively granted:

> We are dealing with an order of court made in open court which required nothing further on the part of the trial judge. His order became effective immediately on its being pronounced and any action thereafter taken by the court by way of written memoranda, formal statement or memorial, constituted only evidence of the order of the court already made.[62]

Shortly after the 1929 amendment to Code of Civil Procedure Section 166 permitting judges to rule on motions for new trial in cham-

[56] Shepherd v. Superior Court, 54 Cal. App. 673, 202 Pac. 466 (1921).
[57] Finkle v. Superior Court, 71 Cal. App. 97, 234 Pac. 432 (1925).
[58] 197 Cal. 687, 242 Pac. 701 (1925).
[59] *Id.* at 692, 242 Pac. at 703.
[60] 71 Cal. App. 97, 101, 234 Pac. 432, 433 (1925).
[61] 79 Cal. App. 119, 249 Pac. 15 (1926).
[62] *Id.* at 126, 249 Pac. at 17.

bers,[63] the Supreme Court was asked in *Willis* v. *Superior Court* [64] to rule on the following situation: A trial judge on assignment heard a motion for new trial and then returned to his home county. Prior to expiration of 60 days he signed an order granting a new trial in his chambers in his home county and placed it in the mail. It was received by the clerk and entered in the records of the county of trial after the expiration of 60 days. The court held that a new trial was effectively granted. It referred to the *United Railroads* and *Finkle* cases and to the 1929 amendments which it said were intended to confer additional power upon judges:

> To say that such an order is still ineffective until entered in the records is to say that the legislature has done a futile thing, and that in spite of this sweeping enactment has left the law unchanged. We cannot reach this conclusion without ignoring the language of the new sections as well as the theory of the prior decisions. Besides, it is well settled that an order of a court, where made in the manner required by law, does not depend for its effectiveness upon the ministerial act of entry in the records by the clerk.[65]

The *Willis* case was approved by dictum in *Ertman* v. *Municipal Court,*[66] the court saying that "it is ordinarily true that an order granting a new trial is effective when signed by the trial judge without regard to the date of its filing or entry." [67]

Barbee v. *Young,* discussed above, appears to stand for the proposition that an oral order made in open court is effective when made even though the permanent minute entry is delayed. No subsequent case involving the same situation has been found. Two cases have held that since 1929 an order granting a new trial may be made by oral directions in chambers to the clerk or by an informal memorandum of decision filed with the clerk.[68] In both of these cases, however, the entry in the permanent minutes was made within the 60 days. One case, *Kraft* v. *Lampton,*[69] suggests that such an oral order not made in open court would not be effective until the permanent minute entry. There, a judge who had heard a case on assignment wrote a letter to the clerk dated after the 60 days had expired stating that the motion for new trial "is hereby granted" and ordered the making of a minute entry. Later, the judge filed another order stating that he had in fact granted the order within the 60 days (inferentially orally) but had failed to indicate the date in his letter to the clerk and hence he was ordering a *nunc pro tunc* correction of the records. On appeal it was held that no effective order granting a new trial was made. The court relied on pre-1929 cases for the proposition that the motion could be granted only by an oral order in open court or by the filing of a signed

[63] Cal. Stat. 1929, c. 487, § 1, p. 849-50.
[64] 214 Cal. 603, 7 P.2d 303 (1932).
[65] *Id.* at 605, 7 P.2d at 304.
[66] 68 Cal. App.2d 143, 156 P.2d 940 (1945).
[67] *Id.* at 150, 156 P.2d at 940.
[68] Hackel v. Los Angeles Ry. Corp., 31 Cal. App.2d 228, 88 P.2d 178 (1939) (oral direction to clerk in chambers); Long v. Standard Oil Co., 92 Cal. App.2d 455, 207 P.2d 837 (1949) (memorandum filed with clerk).
[69] 13 Cal. App.2d 596, 57 P.2d 171 (1936).

written order. The court was not clear as to whether it would have upheld the order if it had in fact been signed prior to 60 days but not filed until after. Impliedly to the contrary, however, is *Keller* v. *Cleaver*.[70] Within the 60 days the judge signed and filed an opinion in which he said he was ordering the granting of a new trial, but no formal order granting a new trial was entered by the clerk. After the 60 days the court signed an order saying that through inadvertence a formal order was not signed and directing *nunc pro tunc* correction of records. It was held a new trial had been validly granted. The court said that if the oral order had been made in open court it would have been effective even though the clerk had erred in not making an entry and that the written opinion here was itself a similar direction to the clerk to make an entry.

The cases discussed to this point appear to support the following conclusions regarding the effectiveness of new trial orders for purposes other than appeal: (1) An oral order made in open court before the 60 days expire is sufficient to grant a new trial even though the entry in the permanent minutes is not made until after the 60 days or is never made. (2) A written order signed by a judge outside of the county of trial and mailed within the 60 days is valid even though it is not received and filed by the clerk until after the 60 days. (3) An oral direction to the clerk in chambers in the county of trial to enter the order is valid when the entry in the permanent minutes is in fact made within the 60 days. The effectiveness of orders granting new trials has not been adjudicated in the following situations: (1) When an oral direction is given to the clerk either in chambers in the county of trial or by telephone from outside the county and the permanent minute entry is not made until after the 60 days. (2) When an order granting a new trial is signed in the county of trial within the 60 days but is not filed until after the 60 days.

Three comparatively recent cases involving orders *denying* motions for new trial, however, cast doubt on the current validity of the conclusions expresed in the preceding paragraph. In *Jablon* v. *Henneberger* [71] the court made an oral order in open court denying a motion for a new trial. This order was noted in the rough minutes when made on October 10 but was not entered in the permanent minutes until October 23. The court held that a notice of appeal from the judgment filed more than 30 days after October 10 but less than 30 days after October 23 was valid, even though at this time Rule 3(a) of the Rules on Appeal provided for extension of time "until 30 days after denial of the motion by order of court or by operation of law" and did not specifically use the word "entry." The court said, citing Code of Civil Procedure Section 1003:

> It is the general rule that an order is ineffective unless filed with the clerk or entered in the minutes. * * * There may be exceptions to the general rule but this motion does not involve one of them and the general rule should be applied.[72]

[70] 20 Cal. App.2d 764, 67 P.2d 131 (1937).
[71] 33 Cal.2d 773, 205 P.2d 1 (1949).
[72] *Id.* at 775, 205 P.2d at 2.

In *Millsap* v. *Hooper*[73] the court made an oral order denying a motion for new trial on March 9. The 60-day period under Section 660 expired on March 10. The order of denial was entered in the minutes on March 17. Notice of appeal from the judgment was filed more than 30 days after March 10, but less than 30 days after March 17. The court held the appeal should be dismised as not taken in time:

> The effective date of an order of denial of a motion for new trial is the date of the minute entry, and the 30-day extension within which notice of appeal from the judgment may be filed under rule 3(a) does not begin to run until such entry. * * * The date of the order of denial was therefore March 17th. That order was ineffective, however, because the motion had been denied by operation of law under section 660 of the Code of Civil Procedure before the date of the minute entry.[74]

It should be noted that while the *Jablon* case dealt wholly with the question of time for appeal and contained only a general dictum on the effective date of orders, the *Millsap* case was a holding that an oral order denying a new trial was not effective because the minute entry was not made within the 60 days and hence the motion was denied by operation of law.[75] If the same reasoning were applied to orders *granting* new trails cases such as *Barbee* v. *Young*, discussed above, would no longer be law.

The most recent case is *Pacific Home* v. *County of Los Angeles.*[76] A judgment for plaintiff was entered on February 18. On April 1, at the conclusion of the hearing on motions for new trial, the court said: "I will deny all motions." The clerk made a memorandum but no entry in the minutes. On April 2 the court instructed the clerk that the matter would stand submitted. Thereupon the clerk made a permanent minute entry dated April 1 stating that the motion was submitted. On April 15, the court signed and filed a written order vacating the findings and judgment, ordering judgment for defendants, directing the preparation of new findings and judgment, and denying the motion for new trial. Judgment was entered for defendants on April 17. Defendant appealed from the February 18 judgment; plaintiff, from the April 17 judgment. Plaintiff contended that the court's oral announcement on April 1 was effective to deny the motion for new trial and that the court did not have jurisdiction to vacate the findings and enter a new judgment. The Supreme Court held that the only effective judgment was that of April 17 and dismised the appeal from the February 18 judgment. It said:

> The court's oral pronouncement was in the future tense and was never entered in the minutes. The formal written order which the court later signed was the only order entered in the minutes. An order ruling on a motion for a new trial is ineffective unless filed with the clerk or entered in the minutes. * * * The effective date of an order denying a motion for a new trial is the date of the minute entry. * * * The minute entry here was made while the

[73] 34 Cal.2d 192, 208 P.2d 982 (1949).
[74] *Id.* at 193, 208 P.2d at 982-83.
[75] In 1951 Rule 3(a) of the Rules on Appeal was amended to reflect the holding in the *Jablon* and *Millsap* cases, making the 30-day extension of time for appeal run from "entry of the order denying the motion or denial thereof by operation of law * * *."
[76] 41 Cal.2d 855, 264 P.2d 544 (1953).

> court still retained jurisdiction. Upon denying the motion for a new trial, the court was authorized to vacate the prior findings, conclusions and judgment, and to make new findings and conclusions, and to render a new judgment.[77]

The court could have reached its conclusion on the ground that the statement "I will deny all motions" was not an order (even oral) but a prediction of a future order. It will be noted from the court's language, however, that it placed the result primarily on the general proposition that oral orders are not effective until entered in the permanent minutes.

The *Jablon, Millsap,* and *Pacific Home* cases involved orders denying motions for new trial rather than orders granting such motions. The attention of the court was not focused on the problem of what acts must be taken within the 60 days effectively to grant a new trial and prevent denial of the motion by operation of law under Section 660. Yet the dicta in all three cases and the holdings in the latter two appear to establish the general proposition that orders ruling on motions for new trial are not effective until filed with the clerk or entered in the minutes. The *Millsap* case would be particularly difficult to distinguish in a situation where an oral order granting a new trial was made within the 60 days but the permanent minute entry was made after. Code of Civil Procedure Section 660 states generally that motions for new trial are automatically denied at the end of the 60 days unless "determined" within the period. If an oral order denying a motion for new trial is not a sufficient determination to avoid the automatic denial, as was held in the *Millsap* case, it appears difficult to argue that an oral order granting a new trial should have greater effect.

POSSIBLE CHANGES IN THE LAW

It is obviously important that judges be informed of just what steps must be taken within the 60-day period prescribed by Section 660 in order effectively to grant a motion for a new trial. The matter cannot be left wholly to the ingenuity of counsel since frequently they will not be informed of new trial rulings until after the expiration of the 60 days. The discussion of the cases above demonstrates the presence of marked confusion and uncertainty as to the applicable rules. Hence, legislative clarification appears to be desirable. Two proposals for legislation will be presented with brief discussion of the pros and cons of each.

Entry in Permanent Minutes or Filing

A new Section 660a could be added to the Code of Civil Procedure (or the same statement could be added as an additional paragraph to Section 660) requiring the entry or filing of new trial orders before new trial motions are determined within the meaning of Code of Civil Procedure Section 660. Such a section might read as follows:

> A motion for a new trial is not determined within the meaning of Section 660 of this code until an order ruling on the motion (1) is entered in the permanent minutes of the court or (2) is signed by the judge and filed with the clerk. The entry of a new trial

[77] *Id.* at 857, 264 P.2d at 546.

> order in the permanent minutes of the court shall constitute a determination of the motion within the meaning of Section 660 even though such minute order as entered expressly directs that a written order be prepared, signed, and filed. The minute entry shall in all cases show the date on which the order actually is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

This statute would require for the granting of a new trial that one or the other of two easily identified actions take place within the 60-day period: actual entry of an order in the permanent minutes or the signing and filing of a written order. In this respect it is consistent with the general current of authority regarding the effective date of other types of orders. It is consistent with the approach taken by the California Supreme Court in the recent *Jablon, Millsap* and *Pacific Home* cases discussed above. It is also consistent with the effective date of such orders for purposes of appeal as prescribed in the Rules on Appeal with one minor exception: the proposed statute would make an oral order ruling on a motion for new trial effective when entered in the permanent minutes (so long as it actually was an order and not merely an indication of a future order) even though the order directed the signing and filing of a written order. In such a situation the time for appeal would not commence to run under Rule 2(b) of the Rules on Appeal until the signed order is filed. This difference in treatment appears to be justified by the differing situations involved. In a Section 660 situation all that should be required to make the judge's order effective to grant a new trial is a definitive, recorded act within the 60-day period. In an appeal situation, however, the purpose appears to be to protect the appellant by giving him the longest time in which to appeal where the judge indicates his intention to act both by minute order and written order.

In counties where orders are normally entered in the permanent minutes on the same day they are made the proposed statute would not disturb present practices insofar as judges in such counties who rule orally on new trial motions are concerned. In counties where there is a significant delay between the making of an oral order and its entry in the minutes, however, it would require a judge desiring to make an effective order granting a new trial either to make his oral order far enough ahead of the end of the 60 days to cover any possible delays in entry or to go to the trouble of preparing (or having prepared), signing, and filing a formal written order. But it would seem that any substantial hardship on the judge could be eliminated by making available printed forms and that once the requirements were understood little difficulty would be experienced.

The proposed statute would change the result in such cases as *Willis* v. *Superior Court,* discussed above, and make substantially more difficult the problem of the judge who is ruling on a motion for new trial while outside the county of trial. He would be required to give directions to the clerk (by telephone or in writing) in time to insure entry in the minutes within the 60 days or else mail a signed order in time to insure its receipt and filing within the period. Balanced against this difficulty, however, would be a substantial gain in certainty. How does

one know when a judge outside the county actually rules on the motion unless he has signed and mailed an order which is postmarked prior to the end of the 60-day period? It would be possible to make it easier for a judge to rule effectively when outside the county without any substantial loss of certainty by adding a sentence somewhat like the following to the statute suggested above: "When a written order ruling on a motion for a new trial is mailed to the clerk from outside the county of trial, the motion is determined within the meaning of Section 660 as of the date on which the order is deposited in the mails."

Oral Announcement or Signed Order

A new Section 660a could be added to the Code of Civil Procedure (or a new paragraph added to Section 660) providing that new trial motions are determined within the meaning of Code of Civil Procedure Section 660 by oral announcement in open court or by the signing of a written order. Such a section might read as follows:

> A motion for a new trial is not determined within the meaning of Section 660 of this code until an order ruling on the motion (1) is announced by the judge in open court, (2) is entered in the permanent minutes of the court or (3) is written and signed by the judge. The announcement of the order by the judge in open court or the entry of the order in the permanent minutes shall constitute a determination of the motion within the meaning of Section 660 even though it directs that a written order be prepared, signed, and filed. The minute entry shall in all cases show the date on which the order actually is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

This statute would conform substantially to the practice established in the earlier cases dealing with the granting of new trials. The judge could make an effective ruling even on the last day of the 60-day period by oral announcement in open court, if it were a court day, or by signing a written order. (It would be possible, of course, to go even further in this direction by making the oral order effective even when made in chambers.) The judge acting outside the county could always make an effective order even on the last day of the period by signing a formal written order.

Against the gains made in the direction of insuring the effectiveness of orders granting new trials, however, must be balanced the following: This solution leaves one substantial area of uncertainty in that often only the judge would know the date on which he actually signs a new trial order. It would provide a special rule for determining the effective date of a new trial order for purposes of Section 660 which would be substantially different from the rules governing its effective date for other purposes. It would appear to involve legislative overruling of *Millsap* v. *Hooper,* discussed above, and would be inconsistent with the apparent intent of the 1951 amendment to Rule 3(a) of the Rules on Appeal.

RECOMMENDATIONS

I think that on balance the virtues of certainty and of uniformity in the handling of new trial orders outweigh the extra burdens which would be imposed upon judges by requiring entry in the permanent minutes or filing of a signed order in order to rule on a motion for new trial within the 60-day period prescribed by Section 660. Some difficulties are created for the judge who is acting outside the county, but I think that once he is informed of what he must do it will be a most unusual case where he cannot make an effective ruling. Hence, I would suggest that the Law Revision Commission recommend to the Legislature the enactment of a statute along the lines of the first statute proposed above.

The replies to the questionnaire which was sent to the clerks revealed widely varying practices by clerks in the handling of new trial orders and, presumably, other orders. I recommend as a topic for future study the possibility of drafting a statute which would prescribe the types of books which must be kept by the clerks and the times within which entries must be made. Such a study would necessitate personal investigation of the practices of a representative sample of clerks' offices in this State and could perhaps best be made by someone who had had actual experience with the mechanical and other problems of such offices.

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