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Comment

APPEAL AND ERROR:

PROCEDURE TO PERFECT CIVIL APPEALS IN CALIFORNIA¹

Appellate procedure has as its object the review of judgments on their merits. The reviewing court should not have to concern itself

¹ This article deals only with appeals from superior courts. Appeals from justices' courts are covered by section 974 of the Code of Civil Procedure, appeals from municipal courts by section 983.

By section 1233 of the Probate Code the procedure to perfect appeals as prescribed by the Code of Civil Procedure is applicable to probate proceedings except as otherwise provided in the code.

Much of the material of this note is suggested by the work of the draftsman for the Judicial Council in preparation of revised rules for practice and procedure on appeal. *Infra* note 9.

with the application of a complicated body of law to determine whether or not the appeal is properly before it. Complicated rules increase the chances for a party to escape a review on the merits because of his ability to find loopholes in the manner in which an appeal has been taken. On the other hand, the rules should require diligence and exactness on the part of the appellant since he has had his day in court in the first instance and since the respondent is entitled to have the matter finally determined as soon as possible. The present tendency is to accomplish these objectives by simplifying and making more definite the procedure to perfect appeals.

Under the common-law system there were two main methods of review. In actions at law the litigant obtained a review through the writ of error, which was sued out of the reviewing tribunal. This had the effect of bringing up the record of the trial court for examination, but only for the purpose of reviewing errors of law made by the trial judge.² These proceedings constituted a new action wherein original process issued and was served on the adverse party to bring him before the appellate court. The assignment of errors was the declaration. In equity actions review was obtained by an appeal, which was generally regarded as a new suit and which resulted in a trial *de novo* of the facts and issues of law presented to the trial court.³ A distinction between the methods of review at law and equity is still retained in a few states, and until fairly recently was followed in the federal courts.⁴

In by far the majority of jurisdictions today the procedure as well as the right to appeal is prescribed by statutes which, it is said, have combined the characteristics of the writ of error and appeal⁵ at

² 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1922) 371; 8 BANCROFT, *CODE PRACTICE AND REMEDIES* (1928) 8229; 3 C. J. 300.

³ 8 BANCROFT, *op. cit. supra* note 2, at 8226; 4 C. J. S. 79.

⁴ ARK. DIG. STAT. (Pope, 1937) §2736 (appeals to supreme court); FLA. GEN. LAWS (Skillman, 1927) §4618; MASS. LAWS (Michie, 1932) c. 250, §1; ME. REV. STAT. (1930) c. 116, §1, and c. 91, §53; PA. STAT. (Purdon, Compact ed., 1936) tit. 12, §§1091, 1092.

In 1928 the writ of error was abolished in the federal courts. 45 STAT. (1928) 54. Fearful that the courts would be flooded with appeals because of the change as originally enacted, the Supreme Court induced Congress to pass an amendment retaining the old procedure of petitioning for appeal and assignment of errors, so the only effect of the change was nominal. 45 STAT. (1928) 466, 28 U. S. C. (1940) §225; Payne, *The Abolition of Writs of Error in the Federal Courts* (1929) 15 VA. L. REV. 305, 318, 319. See notes 6 and 23, *infra*, for the effect of the new Federal Rules.

⁵ *Sharon v. Hill* (C. C. D. Cal. 1885) 26 Fed. 337, 345; 8 BANCROFT, *op. cit. supra* note 2, 8227; 2 AM. JUR. 111; 4 C. J. S. 81.

Some confusion is caused by the use of terms describing the characteristics of the writ of error and the equitable appeal without defining them. Some writers have called the equitable appeal a continuing suit, but this is so only in the sense that the same cause is before the appellate tribunal as was before the lower court; actually it is a new

common law. In California the statutory method is exclusive,⁶ but in a few jurisdictions the writ of error exists as an alternative method of appeal.⁷ These statutes have attempted to do for the litigant in perfecting his appeal that which other provisions in the code scheme did for him with respect to the presentation of his case in the trial court, namely, to abolish strict and formal requirements and at the same time to secure his substantial rights.⁸ A defect common to the plans set forth in these statutes is that they are too sketchy, with the result that the courts have had to fill in the gaps by decisions allegedly based upon the judicial concept of the policies underlying the statutes and by resort to analogies at common law. In 1941, the California legislature authorized the Judicial Council to formulate new rules of appellate procedure, superseding existing statutes and rules.⁹ The purpose of this comment is to set forth and examine the existing California law in the light of how well it meets the requirements suggested above in comparison to other existing systems, and to point out some of the problems that confront the Judicial Council in its revision of the rules on the subject of the procedure to perfect appeals.

trial since new evidence is permitted, different law may be applied, and the judgment below does not operate as an estoppel. *Sharon v. Hill, supra*. On the other hand, a writ of error has been called a new suit by some and a continuing suit by others. 4 C. J. S. 72. It is a new suit only in that the procedure used is similar to that in the lower court when the case is first brought to trial, the assignment of errors acting as a declaration, and the defendant in error being permitted to answer or demur; but the appellate court is limited to errors appearing on the face of the record and the judgment below does operate as an estoppel or bar. *Sharon v. Hill, supra*. The statutory appeal involves the removal of the suit to an appellate court, which is in effect a continuance of the suit, for the purpose of reviewing errors of law and fact based upon the record below. Thus, it is like neither the writ of error nor the equitable appeal. Yet it has been said on the one hand that it is "more like the writ of error than the appeal", and on the other hand that statutory appeals were adopted from equity. *Ibid.* at 345; Sunderland, *The Problem of Appellate Review* (1926) 5 TEX. L. REV. 126, 131. California has apparently adopted the continuing suit concept, but there are cases confusing this with the procedural consequences of a writ of error and as a result calling the statutory appeal a new suit. 2 CAL. JUR. 111, n. 18.

⁶ CAL. CODE CIV. PROC. §936 provides, "A judgment or order, in a civil action . . . may be reviewed as prescribed in this title, and not otherwise . . ." In *Haight v. Gay* (1857) 8 Cal. 297, 300, the supreme court said ". . . in all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued, and that a writ of error will only lie in cases where no appeal is given by the act." Rules 72 and 73 of the Federal Rules of Civil Procedure prescribe the method of appeal in federal courts. That Rule 73 prescribes an exclusive method of taking an appeal to a circuit court, see 3 MOORE, FEDERAL PRACTICE (1938) 3391.

⁷ RULES OF PRACTICE AND PROCEDURE IN CIVIL ACTIONS—PROMULGATED BY THE SUPREME COURT OF TEXAS (1940, amend. 1941) Rule 467, (1941) 4 TEX BAR J. 489, 559. See C. J. S. 69.

⁸ Sunderland, *op. cit. supra* note 5, at 126, 129; 3 AM. JUR. §414.

⁹ CAL. CODE CIV. PROC. §961, "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal . . ." See also CAL. PEN. CODE §1247k.

I

Filing The Notice of Appeal. Section 940 of the California Code of Civil Procedure provides that "An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof." The mere filing of this notice perfects the appeal; thereafter the appellate court has jurisdiction to take action which will affect the judgment or order of the trial court, and the latter is substantially deprived of power to proceed with the cause.¹⁰ This is the only jurisdictional step required.¹¹ If the appellant should fail to take further steps, such as the preparation and filing of his record in the time prescribed, he may be unable to secure a review by the appellate court of the judgment or order appealed from; nevertheless he has still taken a valid appeal.¹² In contrast to the California code, the new Federal Rules and the statutes of a few states incorporate this concept by express words.¹³ There has to be some way for the prospective appellant to announce his appeal, and this procedure adopted in California and the jurisdictions noted above is simple enough to prevent any missteps in conferring jurisdiction on the appellate tribunal.

While the modern tendency is unquestionably in this direction, the majority of states do not, and California in its early history did not favor this simple and decisive procedure. The original procedure to perfect an appeal in California, dating from the Practice Act of 1851 to 1921, embraced three distinct steps—filing of notice of

¹⁰ Estate of Waters (1919) 181 Cal. 584, 588, 185 Pac. 951, 953. However, it was there held ". . . that in no case does the fact that an appeal has been taken from a judgment operate to divest the trial court of power to entertain and determine a motion for a new trial . . ." By virtue of section 954a the jurisdiction of the trial court is completely restored when the appellant files an abandonment of his appeal in that court.

¹¹ Cf. Crump v. Hill (C. C. A. 5th, 1939) 104 F. (2d) 36, as to the filing of notice of appeal as a jurisdictional requirement under Federal Rules.

¹² Section 954 of the Code of Civil Procedure provides that if appellant fails to furnish the requisite papers the appeal may be dismissed. Sections 950, 951 and 952 prescribe the requisite papers. See also RULES FOR THE SUPREME COURT AND DISTRICT COURTS OF APPEAL (1928) 213 Cal. xxxv, Rule 1, §1; Tasker v. Warmer (1927) 202 Cal. 445, 261 Pac. 474; Green v. Ellis (1940) 42 Cal. App. (2d) 208, 108 P. (2d) 732; Fink v. Weisman (1941) 43 Cal. App. (2d) 153, 110 P. (2d) 484.

¹³ "Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal . . ." Fed. Rule 73(a). To like effect is ARIZ. CODE (1939) §21-1801; OHIO CODE (Throckmorton, 1940) §12223-4, but see §12223-6 as to appeal bond, and the proposed Mo. CODE CIV. PROC. art. 13, §5. The Illinois Practice Act of 1933, §76(2) was also to like effect, but ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §259.29, now governs. Michigan accomplishes the same thing by providing that filing a claim of appeal and paying the fees perfects the appeal, MICH. CT. RULES (Rev. 1933, amend. 1938) Rule 56, §1(a).

Texas, on the other hand, in its new rules (Rule 363) expressly provides that appeal is not perfected until notice of appeal is given and the appeal bond has been filed.

appeal, service of notice on the adverse party, and filing of an undertaking on appeal to secure the costs.¹⁴ Failure to comply with any one of the three requirements resulted in a dismissal.¹⁵ It has been said that the frequent dismissals which resulted from technicalities under this procedure were the cause of the enactment in 1907 of an alternative method of appeal,¹⁶ whereby an appeal was perfected merely by filing a notice of appeal.¹⁷ These two methods existed side by side until 1921 when the alternative method was abolished in form,¹⁸ and the present method introduced. The Code of Civil Procedure was amended to dispense with the requirements of service of notice of appeal on the adverse party and the filing of an undertaking.

As intimated above, the majority of states in prescribing the method to perfect an appeal require in addition to the filing of a notice of appeal the service of a notice on the adverse parties,¹⁹ or the filing of an undertaking,²⁰ or both.²¹ In some jurisdictions petition to the court must be made for leave to appeal although the appeal is generally granted as a matter of right.²² The Federal Rules

¹⁴ Practice Act of 1851, sections 337 and 348, which were incorporated into the Code of Civil Procedure as section 940.

¹⁵ 2 CAL. JUR. 326 (filing), 327 (service), 356 (bond).

¹⁶ Southern Pac. Co. v. Superior Court (1914) 167 Cal. 250, 254, 139 Pac. 69, 71; 2 CAL. JUR. 308.

¹⁷ Cal. Stats. 1907, p. 753, incorporated into the Code of Civil Procedure as sections 941a, 941b, 941c.

¹⁸ Although sections 941a, 941b and 941c were repealed, the substance of the alternative method of appeal was retained by the amendment of section 940.

¹⁹ WYO. REV. STAT. (1931) §89-4902.

²⁰ ARIZ. CODE (1939) §21-1804; OHIO CODE (Throckmorton, 1940) §12223-6; OKLA. STAT. (Harlow, 1931) §1401; TEX. RULES CIV. PROC. Rule 354. At least 25 states require a bond or undertaking by express statutory provision. Cf. FED. RULES CIV. PROC. Rule 73(c). The requirement of a bond under the federal rule is not a condition to the perfecting of an appeal.

²¹ IDAHO CODE (1932) §11-202; ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §§259.34, 259.29; IND. STAT. (Burns, 1926) §§ 698, 700; IOWA CODE (1939) §§12839, 12868; KAN. GEN. STAT. (Corrick, 1935) §§60-3306, 60-3309; MICH. CT. RULES (1939) Rule 58; MINN. STAT. (Mason, 1927) §9492; MONT. REV. CODES (Anderson & McFarland, 1935) §9733; NEV. COMP. LAWS (Hillyer, 1929) §8886; N. Y. CIV. PRAC. ACT (1939) §§562, 567; N. C. CODE (Michie, 1935) §§642, 646; N. D. COMP. LAWS (1913) §7821; ORE. CODE (1940) §10-803; S. C. CODE (1932) §775; S. D. CODE (1939) §33-0703; UTAH REV. STAT. (1933) §104-41-6; WASH. REV. STAT. (Remington, 1932) §1719; WIS. STAT. (1937) §274.11.

²² OHIO ANN. CODE (Throckmorton, 1940) §12223-29; N. Y. CIV. PRAC. ACT (1939) §539, states that there can be no appeal to the court of appeals unless the appellate division of the supreme court allows the appeal and certifies that a question of law is involved; ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §259.29, requires in certain instances a petition for leave to appeal which must show probable grounds for reversal and that the appellant was not culpably negligent; Rules 47, §3 and 60, §2 of the Supreme Court of Michigan. These appeals are perfected by the act or order of the court allowing appeal rather than by filing notice.

abolished this formality with respect to appeals from the district courts to the circuit courts of appeal, but it is still in effect as to appeals from the district courts to the Supreme Court of the United States.²³ A few jurisdictions provide as an alternative that the party may take an appeal by motion before the trial judge at the time the judgment is rendered.²⁴ Such procedure relieves the appellant of the responsibility of serving notice of appeal on respondents; it also has the advantage of encouraging quick appeals. Where, however, there is no duty of service, as in California, there is no need for such an alternative since there is no advantage offered appellant to offset the relinquishing of the statutory time in which to appeal.

California follows the customary method of filing the notice of appeal in the trial court. Because the act of filing divests the trial court of jurisdiction,²⁵ it is imperative that it be notified of the appeal at once since almost any subsequent action it might take in the proceedings would be void. And since the trial court is more likely to take further action in the cause than the appellate court, which generally waits until the record is sent up, it seems proper to have the notice filed there. In fact, the appellate court in California has no notice of the appeal until the record is prepared and forwarded. Convenience suggests, however, that the appellate tribunal should also be notified of the appeal at once.²⁶

Filing means actual delivery to the clerk at his place of business

²³ FED. RULES CIV. PROC. Rule 72. It was abolished as to appeals from the district courts to the circuit courts of appeal for the reason stated by William D. Mitchell: "The formality of an order of allowance when the statute says you have the right to appeal seems useless. In most of the Code states the mere filing of a notice is sufficient, no leave is necessary." FED. RULES CIV. PROC., PROC. OF INSTITUTES (Am. Bar Ass'n, Wash. & N. Y. 1939) 316. The procedure was still retained as to appeals from the district courts to the Supreme Court because the Supreme Court rules required this and the rules committee did not wish to offend the Court, which did not take the suggestion hinted at by the rules committee and reform its own procedure. *Ibid.* at 317.

²⁴ N. C. CODE (Michie, 1935) §642; OKLA. STAT. (1937) §954; ORE. CODE (1940) §10-803; WASH. REV. STAT. (Remington, 1932) §1719. Kentucky permits an appeal on motion made during the term judgment was rendered. KY. CODES (Carroll, 1932) Civ. Code §734. That appeals in open court were permitted under the Federal Rules prior to 1938 seems clear. See *Brown v. McConnell* (1887) 124 U. S. 489, 491; *Williams v. City Bank & Trust Co.* (C. C. A. 5th, 1911) 186 Fed. 419; 6 Cyc. FED. PROC. (1929) 2729, 2735. 3 MOORE, *op. cit. supra* note 6, at 3390, n. 5, states that the practice of petitioning for appeals in open court at the time the case was decided was practically obsolete before 1938. Since the Federal Rules now make no provision for a separate method of procedure where the appeal is taken in open court, he concludes that appeals so taken are subject to the same requirements as appeals taken out of court. The appeal taken in open court, if it exists, is consequently no longer an alternative method of appeal. This fact would find support in the contention that Rule 73 prescribes an exclusive method of taking an appeal to a circuit court. *Ibid.* at 3391.

²⁵ *Supra* note 11.

²⁶ Cf. KAN. GEN. STAT. (Corrick, 1935) §60-3307.

during office hours.²⁷ Depositing the notice in the mail is not a filing, and it has been expressly held that section 1013 of the Code of Civil Procedure, providing that in case of service by mail the service is complete at the time of deposit, has no application to a notice of appeal.²⁸

Form and Content of Notice. One of the first problems facing the prospective appellant is that of the form and content of the notice of appeal. The code merely requires that the notice state the appeal from the judgment or some specific part thereof. While the statement that a party "appeals" would appear to be the clearest statement of the appeal, no particular language is required and the following expressions have been approved: ". . . desires, intends to appeal, and has appealed . . .",²⁹ ". . . desires and intends to appeal . . .",³⁰ ". . . desires or intends to appeal . . .",³¹ and ". . . intend to appeal . . ."³² Under the alternative method it was required that the notice "shall state that the person giving the same does thereby appeal",³³ and words of present intention were necessary to state the appeal.³⁴ The problem of necessary wording could be eliminated by the use of standard forms for the notice of appeal, and these have been adopted in a few jurisdictions.³⁵ However, in California the clear import of the code and the liberal attitude of the courts in placing emphasis on substance rather than form render the use of standard forms unnecessary in this respect.

The notice must, of course, contain a description of the judgment or order appealed from. This is the mandate of the code. A liberal rule of construction prevails as to what is an adequate description, and the problem of misdescription is accorded similar

²⁷ *W. J. White Co. v. Winton* (1919) 41 Cal. App. 693, 183 Pac. 277; *People v. Englehardt* (1938) 28 Cal. App. (2d) 315, 82 P. (2d) 489 (notice not filed when left with relative of clerk at his home after office hours). This was an appeal in a criminal case under section 1239 of the Penal Code.

²⁸ *McDonald v. Lee* (1901) 132 Cal. 252, 64 Pac. 25; *Estes v. Chines* (1940) 40 Cal. App. (2d) 41, 104 P. (2d) 74.

²⁹ *Wright & Hogan, Inc. v. Heide* (1925) 72 Cal. App. 16, 236 Pac. 219.

³⁰ *Purity Springs W. Co. v. Redwood Ice Divy.* (1928) 203 Cal. 286, 263 Pac. 810.

³¹ *In re Forthmann* (1931) 118 Cal. App. 332, 5 P. (2d) 472.

³² *Mamer v. Superior Court* (1940) 15 Cal. (2d) 569, 103 P. (2d) 961, (1941) 29 CALIF. L. REV. 219. Although this case, and those cited in notes 30 and 31, *supra*, involved notices and requests for transcripts filed under section 953a, the holding in each case was that the phrases used satisfied the requirement of a "notice stating the appeal" set forth in section 940.

³³ CAL. CODE CIV. PROC. (1919) §941b.

³⁴ *Wall v. Hunter* (1921) 186 Cal. 473, 199 Pac. 775 (notice ineffective where it stated the party "has appealed"); *Eddy v. Hunter* (1920) 46 Cal. App. 370, 189 Pac. 291.

³⁵ 2 CONN. JUD. COUNCIL REP. (1930) 122; ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §259.33; MICH. CT. RULES (Rev. 1933, amend. 1938) Rule 59; Form 703 suggests a notice of appeal which may be used under Federal Rule 73b.

treatment.³⁶ Substantial compliance and its corollary—absence of prejudice or misleading of respondent—has become the rule of statutory interpretation in this instance.³⁷ As stated in a recent case, "While it is true that the filing of a notice of appeal is a jurisdictional requirement and cannot be waived, the absence of prejudice, and the efficacy of the things done to give notice to the other party that the appeal has been taken may be considered in determining whether there has been a sufficient compliance. . . ."³⁸

With the single exception of the requirement of signing, to be discussed below, the California courts have adopted the view that "The expression of certain things to be stated in the notice implies that other things are not regarded as essential."³⁹ Thus, specific designation in the notice of the court to which the appeal is taken is not necessary,⁴⁰ the parties need not be designated,⁴¹ nor need the notice be addressed to the adverse parties.⁴² These requirements are in some jurisdictions specifically enumerated in the codes or set forth in official or standard forms.⁴³

³⁶ Cases dealing with adequacy of description center around the generality that "the judgment or order must be identified with reasonable certainty". A notice of appeal from "all orders made and entered in an action either before or after judgment" is obviously too general. *Gates v. Walker* (1868) 35 Cal. 289. See 2 CAL. JUR. 316-317. An appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal. *Glassco v. El Sereno Country Club, Inc.* (1932) 217 Cal. 90, 17 P. (2d) 703.

Error as to date of entry of the judgment or order appealed from is the most common form of misdescription. It has no effect where there is but one judgment or order in the action, *Wilson v. Union Iron Works Drydock Co.* (1914) 167 Cal. 539, 140 Pac. 250, or where the judgment or order is otherwise sufficiently described. A reference to a motion for new trial as an order denying "rehearing" did not effect the appeal in *Kimple v. Conway* (1886) 69 Cal. 71, 10 Pac. 189. See 2 CAL. JUR. 318-319. See *Estate of Nelson* (1900) 128 Cal. 242, 245, 60 Pac. 772, 773, suggesting the correction of misdescription under section 473 of the Code of Civil Procedure.

³⁷ See *Estate of Smead* (1932) 215 Cal. 439, 441, 10 P. (2d) 462, 463; *Title Guarantee & Trust Co. v. Lester* (1932) 216 Cal. 372, 374, 14 P. (2d) 297, 298; 2 CAL. JUR. 315.

³⁸ *Kellett v. Marvel* (1936) 6 Cal. (2d) 464, 472, 58 P. (2d) 649, 653.

³⁹ *Southern Pac. Co. v. Superior Court*, *supra* note 16, at 255, 139 Pac. at 71, dealing with notice under alternative method.

⁴⁰ *Rabe v. Lloyd* (1921) 187 Cal. 282, 201 Pac. 598; *Hersh v. Garau* (1930) 110 Cal. App. 198, 293 Pac. 860.

⁴¹ *Poggetto v. Bowen* (1936) 18 Cal. App. (2d) 173, 63 P. (2d) 857.

⁴² *Estate of Nelson*, *supra* note 36; *Guardianship of Copsy* (1936) 7 Cal. (2d) 199, 60 P. (2d) 121; *cf.* *Estate of Pendergast* (1904) 143 Cal. 135, 138, 76 Pac. 962, 963, stating the rule that while the notice of appeal did not require an address, if an address were given, it served as a limitation thereof under the procedure authorized by section 940 before the 1921 amendment.

⁴³ Most of the states require that the judgment or part thereof that is appealed from be designated, statutes cited in note 21, *supra*. ALA. CODE (Michie, 1928) §6101, requires in addition that the parties and court be set out, that the notice be signed by appellant or his attorney of record. Oregon requires that the title of the cause be set out, the names of the parties, and the court to which the appeal is taken. ORE. CODE (1940) §10-803; Texas Rule 360 requires the names and residences of the parties adversely

Specific designation of the court to which the appeal is taken seems unnecessary in California under the present system under which the appellate court need not be notified of the filing of a notice of appeal. Under the alternative method of appeal existing before 1921, designation of the court was expressly required by the statute,⁴⁴ and yet it was held that noncompliance with this requirement did not affect the validity of the appeal.⁴⁵ Designation of the parties also seems unnecessary in California where there is no duty to serve notice on the adverse party. That the notice of appeal filed in the trial court need not be addressed to the opposite party seems reasonable since the notice is primarily given to vest jurisdiction in the appellate court. It is apparent that in general the question of both the form and content of the notice of appeal could be somewhat simplified by the use of an official prescribed form. But since surplusage in the notice in California will not vitiate,⁴⁶ and since so many phrases have been held acceptable as statements of an appeal, the adoption of such a form seems unnecessary. Furthermore, the main problem is that of the adequacy and accuracy of the description of the judgment or order appealed from, and the adoption of an official or standard form could in no manner aid in the solution of this problem.

Where the party is represented by an attorney in court, the notice of appeal in California must be signed by the attorney of record, although the code is, and always has been, silent in this regard.⁴⁷ While the reasonableness of requiring a signing is unquestioned, judicial legislation was necessary to fill the gap left in the statute. Failure to comply results in a dismissal, unless a waiver by the opposite party is found by the court.⁴⁸ But as slight a circumstance as failure of the respondent to object seasonably may be deemed a waiver.⁴⁹ The express requirement of a signature is not

interested and a statement of the desire to appeal. For the forms see note 35, *supra*. Federal Rule 73 requires specification of the parties taking the appeal, designation of the judgment appealed from and naming of the court to which the appeal is taken.

⁴⁴ CAL. CODE CIV. PROC. §941b, "... said notice shall state that the person giving the same does thereby appeal to the supreme court or district court as the case may be ..."

⁴⁵ *Rabe v. Lloyd*, *supra* note 40.

⁴⁶ *Sharon v. Sharon* (1885) 68 Cal. 326, 9 Pac. 187; *Williams v. Dennison* (1890) 86 Cal. 430, 25 Pac. 244; *Harrelson v. Miller & Lux Inc.* (1920) 182 Cal. 408, 188 Pac. 800.

⁴⁷ *Prescott v. Salthouse* (1878) 53 Cal. 221; *Anglo-California T. Co. v. Oakland Ry.* (1923) 191 Cal. 387, 216 Pac. 578. But see *McDonald v. McConkey* (1880) 54 Cal. 143, 144.

⁴⁸ *Starkweather v. Eddy* (1925) 196 Cal. 73, 235 Pac. 734 (admission of service by respondent upon appellant's opening brief and stipulation to extend time within which briefs were to be filed obtained from respondent's attorney as a waiver); *Smith v. Smith* (1904) 145 Cal. 615, 79 Pac. 275 (admission of service of papers by respondent's attorney as a waiver).

⁴⁹ See *Starkweather v. Eddy*, *supra* note 48, at 75, 235 Pac. at 735.

found in many statutes, but a few permit either appellant or his attorney to sign.⁵⁰ Oregon amended its statute to provide for this alternative signing because of a decision which, like the California decisions, limited signing to the attorney of record.⁵¹ California would do well to follow this change. This is an instance where the appellate court should have discretionary power to permit an appeal despite noncompliance—that is, waive the requirement itself rather than be compelled to find a waiver by the adverse party in order to reach the same result. It must be obvious that where the appeal is taken in *pro per*, the appellant himself may sign the notice. Even in the California decisions nothing suggests otherwise.

Separate and distinct appeals may be united in one notice: where an appeal is taken from a final judgment and any number of appealable orders rendered by the trial judge;⁵² or where cases have been consolidated for purposes of trial and are to be considered together on appeal because the evidence taken applies to all.⁵³ A notice of appeal and a notice and request for transcript under section 953a of the Code of Civil Procedure may also be united in one document.⁵⁴ This section, although dealing exclusively with the alternative method of preparing the record, provides that a notice thereunder must state that the party "desires or intends to appeal, or has appealed". Evidently confused by the suggestiveness of this phrase, the California Supreme Court has held that a notice and request under this section is in itself a notice of appeal as required by section 940 where the prescribing words, or any combination thereof, are used.⁵⁵ It seems clear that a notice and request for transcript should not in itself operate as a notice of appeal.

⁵⁰ ALA. CODE (Michie, 1928) §6101; N. D. COMP. LAWS (1913) §7821; ORE. CODE (1940) §10-803; S. D. CODE (1939) §33:0703; WIS. STAT. (1937) §274.11; WYO. REV. STAT. (1931) §89-4902. It is interesting to note that many of the states requiring service of notice of appeal have relaxed the requirement to permit service on either the appellee or his attorney.

⁵¹ The old Oregon statute read like the Washington statute. WASH. REV. STAT. (Remington, 1932) §1719. See *Robinson v. Phegley* (1919) 93 Ore. 299, 302, 177 Pac. 942, 943, for a discussion of the reason for the amendment. The new Federal Rules have no express requirement of a signature, but see *Ilsen and Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure* (1939) 24 MINN. L. REV. 1, 38.

⁵² *Winter v. McMillan* (1890) 87 Cal. 256, 25 Pac. 407; *Colburn v. Parrett* (1914) 25 Cal. App. 749, 145 Pac. 540.

⁵³ *Kellett v. Marvel*, *supra* note 38.

⁵⁴ *Mamer v. Superior Court*, *supra* note 32; *Purity Springs W. Co. v. Redwood Ice Dlv.*, *supra* note 30; *Magruder v. City of Redwood* (1928) 203 Cal. 665, 265 Pac. 806; cases cited in (1941) 29 CALIF. L. REV. 219, 220, nn. 9, 10.

⁵⁵ *Ibid.* The extent of this confusion is illustrated by the fact that in POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 343, California is indicated as a state where the notice of appeal merely states "that the party desires or intends to appeal or has appealed", and section 953a of the Code of Civil Procedure is cited as authority on the subject of the notice of appeal. The author also erroneously lists California as a state requiring a bond for costs as a preliminary of appeal. *Ibid.* at 346.

Legislative history gives no sanction to such a practice.⁵⁶ Furthermore, the recent amendment to section 953a, providing that a notice and request for transcript must be filed within ten days *after* the filing of the notice of appeal, further supports this conclusion. There is no objection to combining these two required notices in one writing where the party clearly shows that he is giving both notices. For the sake of clarity, however, section 953a should be amended to provide that a mere notice and request for transcript thereunder should not serve as a notice of appeal. But the right of a party to state his appeal in the language suggested by section 953a should be retained where it is clear that he is giving both a notice of appeal and a notice and request for transcript. Such a purpose on the part of the appellant could be made clear by designating the document "Notice of Appeal and Notice and Request for Transcript". Most, if not all the confusion in the law since 1921 pertaining to the words necessary to state an appeal has resulted from the fact that the courts have not been considering the propriety of expression required by the statute, but rather the propriety of a notice and request for transcript acting as a notice of appeal. It is in the solution of this problem that the use of a standard or prescribed form for the notice of appeal seems the most justified since it obviously precludes the integration of the notice of appeal in any other document.

Notifying Parties of the Appeal. California procedure makes no provision for a notification to any party that a notice of appeal has been filed. A statute which merely provides for the filing of notice in the trial court, and no more, is incomplete. The common law had a procedure to inform the respondent of the appeal⁵⁷ and the majority of states today require some notification to the respondent.⁵⁸ The defect in most such systems is that they generally require too much; while the statutes have not expressly provided that notification by the appellant is a condition precedent to the perfecting of his appeal, the courts have imposed a penalty of dismissal for failure of appellant to discharge this duty.⁵⁹

Until 1921, unless an appeal was taken under the alternative method, California procedure required the notice of appeal to be

⁵⁶ (1941) 29 CALIF. L. REV. 219.

⁵⁷ Statutes cited in notes 19 and 21, *supra*.

⁵⁸ At common law the appellant sued out a writ of error and the appellate court issued a writ of *scire facias* to bring the respondent before it. 1 HOLDSWORTH, *op. cit. supra* note 2, at 371. The writ of *scire facias* was generally served by the sheriff of the county in which the respondent resided. 56 C. J. 874. This procedure was prescribed by statute in Colorado before its new rules were adopted. COLO. STAT. (1935) §434.

⁵⁹ 8 BANCROFT, *op. cit. supra* note 2, §6513; 2 CAL. JUR. 327.

served on the adverse party or his attorney.⁶⁰ The court early entertained the notion that such service served the dual purpose of giving the appellate court jurisdiction over the person of the respondent, and giving it jurisdiction over the subject matter.⁶¹ Both of these concepts have since been overthrown.⁶² It was then conceded that the purpose of the service requirement was to notify the adverse parties of the appeal,⁶³ although the concept that the requirement was jurisdictional was retained by the courts.⁶⁴ In 1921 the legislature abolished the service requirement and substituted the theory of constructive notice. This complete swing away from the old system can scarcely be justified. In California today the respondent has no choice but to search the files of the trial court periodically after the entry of the judgment or order in his favor until the statutory period has expired. Even then it is not certain that one can safely rely on the record.⁶⁵

That there is an intermediate method is shown by Rule 73b of the new Federal Rules of Civil Procedure. Under this Rule, the clerk of the court in which judgment is rendered is required to mail copies of the notice of appeal to the attorneys of record of all parties to the judgment other than the party or parties taking the appeal, or to the respondents themselves if there are no attorneys of record.⁶⁶

⁶⁰ CAL. CODE CIV. PROC. §940 (prior to 1921) Service on the adverse party of a copy of the notice of appeal is required today in appeals from police or justice courts. CAL. CODE CIV. PROC. §974.

⁶¹ *Bell v. San Francisco Savings Union* (1908) 153 Cal. 64, 94 Pac. 225; 2 CAL. JUR. 329. That the courts viewed the acquisition of jurisdiction over the person of respondent as a function of service is apparent from the holding that service was waived by a voluntary appearance of the party to be notified. *Estate of Pendergast*, *supra* note 42; *Burnett v. Piercy* (1906) 149 Cal. 178, 86 Pac. 603.

That service was essential to jurisdiction over the subject matter is shown by cases holding that where service had been made on some parties, the court had no jurisdiction of the appeal even as to those parties, where other adverse parties had not been served. *Bell v. San Francisco Savings Union*, *supra*; *Southern Pac. Co. v. Superior Court*, *supra* note 16; 2 CAL. JUR. 331.

⁶² In sustaining the alternative method of appeal, which expressly provided that service of notice was unnecessary, the supreme court in *Estate of McPhee* (1908) 154 Cal. 385, 391, 97 Pac. 878, 881, stated that service was not necessary to acquire jurisdiction over the parties since "Before any appeal is taken the court has already acquired jurisdiction . . . over the parties by original process, and the appeal is but a proceeding in the cause after that jurisdiction has attached." See *Estate of Nelson*, *supra* note 36, at 244, 60 Pac. at 773.

The view that the requirement of service of notice was waived by a voluntary appearance, and that a stipulation reciting the perfection of an appeal was an admission of service (*Burnett v. Piercy*, *supra* note 61) was inconsistent with the proposition that service was necessary to acquire jurisdiction over the subject matter. Jurisdiction, in this regard, cannot be conferred by the consent of the parties.

⁶³ *Estate of Nelson*, *supra* note 36; *Estate of McPhee*, *supra* note 62.

⁶⁴ *Southern Pac. Co. v. Superior Court*, *supra* note 16, at 254, 139 Pac. at 71.

⁶⁵ *Lane v. Pellissier* (1929) 208 Cal. 590, 283 Pac. 810, is instructive in this regard.

⁶⁶ Rule 73(b) further provides that the notice is sufficient notwithstanding the death of either attorney of record or the respondent prior to the giving of notification. Arizona

Failure on the part of the clerk to do this does not affect the validity of the appeal, which rests entirely upon the filing of notice of appeal in the district court. The clerk keeps a complete record by noting in the docket the names of the parties to whom notice was sent as well as the date of mailing.

Placing the responsibility of notification on the clerk is not entirely an innovation in statutory schemes,⁶⁷ and indeed is reminiscent of review at common law.⁶⁸ At the same time it is in complete accord with the modern concept that the appellant's duty in perfecting his appeal ceases with the filing of notice. The power of the trial court over its clerk affords ample protection to respondent's right to receive notice. If the duty is once again placed on appellant, new sanctions must be devised to insure his compliance, with the possibility that there will be a tendency to return to the old notions.

There is no need that the clerk mail an actual copy of the notice of appeal as required by the Federal Rules, however. The same purpose can be accomplished by the use of a postcard on which the clerk fills in the title of the cause and the date of the filing in spaces provided. The respondent would still have to resort to the files to see the actual notice, but not to determine whether or not an appeal has been taken.

II

Time for Appeal. In California, today, the appellant has only sixty days from the entry of the judgment or order in which to appeal.⁶⁹ In sharp contrast, the Practice Act and the original code provided a one year period⁷⁰ for appeals from judgments, and from 1897-1915 the code provided a six month period.⁷¹ Moreover, there were always specifically enumerated orders from which an appeal had to be taken within sixty days,⁷² and it was not until 1915 that

has adopted this. ARIZ. CODE (1939) §21-1803. Texas has substantially adopted it in Rule 362, and it has been suggested for adoption in the proposed Missouri Rules of Civil Procedure article 13, section 6.

⁶⁷ Indiana provided an alternative method of appeal by filing the transcript with the appellate court, in which case it then became the duty of the clerk of that court to notify the respondent. IND. ANN. STAT. (Burns, 1926) 700.

⁶⁸ Statutes cited in notes 19 and 21, *supra*.

⁶⁹ CAL. CODE CIV. PROC. §939. Section 12 provides that time is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

⁷⁰ Note, however, that under the California Practice Act of 1851, section 336, time ran from the rendition of final judgment, while under the Code of Civil Procedure of 1872, section 939, time ran from entry of judgment.

⁷¹ Cal. Stats. 1897, p. 55.

⁷² California Practice Act of 1851, §336; CAL. CODE CIV. PROC. §939, and 1880 amendments; Cal. Stats. 1897, p. 55; *ibid.* 1899, p. 7; *ibid.* 1907, p. 60.

all orders and judgments were treated alike.⁷³ Other jurisdictions, as a whole, have been guided by no consistent principle in dealing with the problem of a maximum time limit for the taking of appeals. Statutory periods have ranged from ten days to six years.⁷⁴

Service of notice of entry of judgment is not necessary to start the running of the statutory period in California.⁷⁵ Although the code has always clearly indicated that mere entry of judgment would suffice in this regard,⁷⁶ it was repeatedly contended that service of such notice was necessary.⁷⁷ This contention was based on the presence of such a requirement in the code sections dealing with new trial proceedings, proceedings for the preparation of the bill of exceptions and transcript to be used on appeal.⁷⁸ In the inferior California courts,⁷⁹ however, and in a few states, notice of entry of judg-

⁷³ In several states, notably Iowa, Minnesota, Montana, Nevada, North Dakota, South Dakota, and Wisconsin, a shorter period is set for appeals from orders than for those from judgments.

⁷⁴ Ten days (North Carolina, Wyoming, proposed Rhode Island and Missouri rules); twenty days (Michigan); sixty days (Arizona, Maryland, New York, Federal Rules); ninety days (Illinois, Indiana); six months (Alabama, Florida, Arkansas, Kansas, Minnesota, Montana, Nevada, New Mexico, North Dakota, Virginia, Wisconsin); one year (New Jersey, South Dakota, Tennessee); six years (Maine, Massachusetts).

⁷⁵ *Schainman v. Kierce* (1926) 199 Cal. 249, 248 Pac. 905; *Cook v. Cook* (1929) 208 Cal. 501, 282 Pac. 385; *Lawson v. Guild* (1932) 215 Cal. 378, 10 P. (2d) 459; *Kocher v. Fidelity & Deposit Co.* (1934) 137 Cal. App. 474, 30 P. (2d) 535; *Kraft v. Briggs* (1936) 15 Cal. App. (2d) 667, 59 P. (2d) 1044; *Irving v. Sheetz* (1938) 26 Cal. App. (2d) 751, 80 P. (2d) 502; *Nagleman v. McIntyre* (1938) 27 Cal. App. (2d) 621, 81 P. (2d) 466.

⁷⁶ In the following states the statutory periods run from entry of judgment. ARIZ. CODE (1939) §21-1801; IDAHO CODE (1932) §11-201; ILL. REV. STAT. (Smith-Hurd, 1939) c. 110, §259.29; IOWA CODE (1939) §12832; ME. REV. STAT. (1930) c. 116, §10; MASS. LAWS (Michie, 1933) §250.5; MINN. STAT. (Mason, 1927) §9497; MONT. REV. CODES (Anderson and McFarland, 1935) §9732; NEV. COMP. LAWS (Hillyer, 1929) §8885; N. M. STAT. (Courtright, 1929) §105.2501; WIS. STAT. (1937) §274.01; WYO. REV. STAT. (1931) §89.4904. See also Federal Rule 58.

⁷⁷ *Cook v. Cook*, *supra* note 75; *Bates v. Ransome-Crummey Co.* (1919) 42 Cal. App. 699, 184 Pac. 39; *Fruit Supply Co. v. Title G. & T. Co.* (1932) 127 Cal. App. 91, 15 P. (2d) 194.

⁷⁸ CAL. CODE CIV. PROC. §659 (new trial proceedings), §650 (bill of exceptions), §953d (preparation of transcript). Under section 953a, prior to 1941, notice of request for transcript had to be filed within 10 days after notice of entry of judgment. Under cases such as *Mamer v. Superior Court*, *supra* note 32, which in effect held that a notice under section 953a was a notice of appeal, it was arguable that the time limit set forth in that section should control the time within which an appeal might be taken. See (1941) 29 CALIF. L. REV. 219. In 1941, section 953a was amended to provide for the filing of a notice and request for transcript within ten days after the filing of the notice of appeal.

⁷⁹ CAL. CODE CIV. PROC. §974 (appeals from justice's or police courts); §983a (appeals from municipal courts). This latter section does not provide for the running of time from notice of entry of judgment, but merely allows the respondent to shorten the time within which an appeal may be taken to thirty days by serving notice of entry of judgment.

ment is necessary to start the time running.⁸⁰ Under such a scheme it is possible for the respondent, by his laxity, to extend indefinitely the time for appeal. Furthermore, it is difficult to see why a burden of notification should be placed on the party who has already won his lawsuit in order to ensure the finality of his judgment.⁸¹

In some states, as in California under the original Practice Act, time runs from the rendition of the judgment.⁸² And the date of rendition is still important in California, for by express statutory provision, "No appeal . . . shall be dismissed on the ground that it was taken after rendition of such judgment or order and before formal entry."⁸³ This curative provision was added because the uncertainty as to when a judgment was "entered" led to frequent dismissals of appeals as premature.⁸⁴ Under the present law an appeal taken before the rendition of the judgment or order is premature and must be dismissed.⁸⁵ And so the problem today involves a determination of when a judgment is "rendered". When findings of fact and conclusions of law are required, there can be no rendition of the judgment until they are made, signed and filed with the clerk, even though there has been a previous oral pronouncement.⁸⁶ When findings are waived or are not required, judgment is rendered when entered in the minutes of the trial court.⁸⁷ When findings are not required the result is not altered even though findings are made.⁸⁸

A strict application of the premature appeal doctrine in *Spencer*

⁸⁰ N. C. CODE (Michie, 1935) §641 (judgment rendered out of term); N. D. COMP. LAWS (1913) §7820 (orders and judgments other than default judgments); MINN. STAT. (Mason, 1927) §9497 (orders); S. D. CODE (1939) §33.0702 (orders); WIS. STAT. (1937) §274.04 (orders).

⁸¹ Under provisions such as in section 983a of the California Code of Civil Procedure, where notice of entry of judgment merely shortens the ordinary time for taking an appeal, these objections are not applicable.

⁸² ALA. CODE (Michie, 1928) §6127; ARK. DIG. STAT. (Pope, 1937) §2913; IND. STAT. (Burns, 1926) §696; KAN. GEN. STAT. (Corrick, 1935) §60-3309; 2 N. J. REV. STAT. (1937) c. 27 §356; N. C. CODE (Michie, 1935) §641.

⁸³ CAL. CODE CIV. PROC. §939.

⁸⁴ The uncertainty is illustrated in the following cases: *Estate of Pearsons* (1897), 119 Cal. 27, 50 Pac. 929; *Estate of More* (1904) 143 Cal. 493, 77 Pac. 407; *Wood, Curtis & Co. v. Missouri Etc. Ry.* (1907) 152 Cal. 344, 92 Pac. 868.

⁸⁵ *First Nat. Bank of Fresno v. Dusy* (1895) 110 Cal. 69, 42 Pac. 476; *Painter v. Painter* (1896) 113 Cal. 371, 45 Pac. 689; *Brownell v. Superior Court* (1910) 157 Cal. 703, 109 Pac. 91; *Aspegren & Co. Inc. v. Sherman, Swan & Co.* (1926) 199 Cal. 532, 250 Pac. 400; *Supple v. Luckenbach* (1938) 12 Cal. (2d) 319, 84 P. (2d) 52 (findings inadvertently filed by clerk without signature of judge); *Estate of Lopus* (1939) 12 Cal. (2d) 651, 86 P. (2d) 818; *San Diego v. Cuyamaca Water Co.* (1927) 80 Cal. App. 599, 251 Pac. 341.

⁸⁶ Cases cited note 85, *supra*.

⁸⁷ *Crim v. Kessing* (1891) 89 Cal. 478, 26 Pac. 1074; *Aspegren & Co. Inc. v. Sherman, Swan & Co.*, *supra* note 85.

⁸⁸ *Wixom v. Davis* (1926) 198 Cal. 641, 246 Pac. 1041.

*v. Troutt*⁸⁹ enabled the unsuccessful litigant to obtain successive appeals because of a mere clerical error. Plaintiff had appealed from a judgment entered in an action brought against him and others as defendants. After the appeal was decided adversely, and rehearing denied, he discovered that the judgment as originally entered omitted his name. Although a *nunc pro tunc* order amended the entry of judgment, judgment was rendered against plaintiff for the first time at the date of the amendment. The former appeal, then, was premature and void. Consequently, plaintiff was entitled to a second appeal.

Just as dismissal has been the penalty for the taking of a premature appeal, so dismissal will follow the tardy filing of a notice of appeal. The California courts invariably set this forth by the statement that time is jurisdictional.⁹⁰ In the absence of statutory authorization neither the trial nor appellate court may extend or shorten the time for appeal.⁹¹ A court cannot permit a tardy appeal even to relieve against mistake, inadvertence, accident, or misfortune.⁹² Nor can jurisdiction be conferred on the court by the consent or stipulation of the parties, estoppel, or waiver.⁹³ In *Williams v. Long*⁹⁴ the unsuccessful litigant died after rendition of judgment, but before the time for taking an appeal had expired. A representative of the estate was not appointed until after the time for appeal had elapsed; yet an attempted appeal by the administratrix was dismissed even though the hardship was apparent in that no one

⁸⁹ (1901) 133 Cal. 605, 65 Pac. 1083.

⁹⁰ Estate of Brewer (1909) 156 Cal. 89, 103 Pac. 486; Lancel v. Postlethwaite (1916) 172 Cal. 326, 156 Pac. 486; Lane v. Pellissier, *supra* note 65; Lawson v. Guild, *supra* note 75; Estate of Smead (1938) 12 Cal. (2d) 20, 82 P. (2d) 182; Bates v. Ransome-Crummey Co., *supra* note 77; Estate of Vizelech (1932) 123 Cal. App. 651, 11 P. (2d) 870; Le Cyr v. Dow (1938) 26 Cal. App. (2d) 459, 79 P. (2d) 777; Irving v. Sheets, *supra* note 75; Estate of Murphy (1940) 36 Cal. App. (2d) 653, 98 P. (2d) 523.

⁹¹ Bryant v. Superior Court (1936) 16 Cal. App. (2d) 556, 61 P. (2d) 483.

⁹² Williams v. Long (1900) 130 Cal. 58, 62 Pac. 264; People v. Lewis (1933) 219 Cal. 410, 27 P. (2d) 73 (mistake—criminal appeal); Winchester v. General Cab Co. (1935) 8 Cal. App. (2d) 360, 47 P. (2d) 1116 (inadvertence); Estes v. Chimes, *supra* note 28.

⁹³ The court has no discretion but must dismiss the appeal on its own motion. Smith v. Questa (1922) 58 Cal. App. 1, 207 Pac. 1036; Dimity v. Dickson (Cal. App. 1925) 238 Pac. 1058. Stipulation: Langan v. Langan (1891) 89 Cal. 186, 26 Pac. 764; Land v. Johnston (1909) 156 Cal. 253, 104 Pac. 449. Estoppel: Estate of Pearsons (1897) 119 Cal. 27, 50 Pac. 929 (premature appeal). But *cf.* Moyle v. Landers (1889) 78 Cal. 99, 20 Pac. 241, dealing with service of notice of appeal on respondent under the old California law. Waiver: Estate of Brewer, *supra* note 90 (indorsing admission of service of notice of appeal); Aspegren & Co. Inc. v. Sherman, Swan & Co., *supra* note 85 (participation in settlement of transcript); Estate of Murphy, *supra* note 90 (failure of respondent to raise the issue in motion to dismiss). The Federal Rule is in accord. United States v. Florian (1941) 312 U.S. 656.

⁹⁴ *Supra* note 92.

could have appealed from the date of litigant's death to the date of the appointment of the representative.⁹⁵

So mechanical has been the application of the jurisdictional concept that an attorney may not rely absolutely on the record in determining the time for taking an appeal. In *Lane v. Pellissier*⁹⁶ the fate of an attempted appeal rested on the date on which judgment was entered. Judgment had been entered in the judgment book on September 6th, and that fact noted in the register of actions. The clerk on his own account, in order to make the entry correspond with the date of the judgment roll and docket entries, reentered the judgment on September 12th, and cancelled the first entry. An appeal, taken after the statutory period had elapsed when that period was computed from the date of original entry, but within the time limit when computed on the basis of the second entry, on which, in fact, the appellant relied, was held tardy. A contrary, but certainly desirable, result could have been reached had the court refused to inquire beyond the face of the record.⁹⁷

The case of *Spencer v. Troutt* suggested that the trial court, by amending the entry of a judgment by a *nunc pro tunc* order adding the name of a party, could not cut off that party's right to appeal.⁹⁸ Neither may the court by antedating the original order or its entry shorten the time or cut off the right of appeal.⁹⁹ Similarly, a trial court cannot generally permit in any indirect manner an extension of the time for the taking of an appeal. In California, a party who fails to file a timely notice of appeal cannot have a co-party's timely appeal amended or altered by a *nunc pro tunc* order which adds his name.¹⁰⁰ Time cannot be enlarged by the device of moving to vacate or set aside a judgment and then appealing from the order on the motion,¹⁰¹ nor by a subsequent order vacating and then re-

⁹⁵ CAL. CODE CIV. PROC. §941, now provides, "In the event of the death of any person having at his death a right of appeal the attorney of record representing the decedent in the court in which the judgment was rendered may appeal therefrom at any time before the appointment of an executor or an administrator of the estate of the decedent."

⁹⁶ *Supra* note 65. *Cf. Supple v. Luckenbach, supra* note 85; *Bryant v. Superior Court, supra* note 91.

⁹⁷ Justice Shenk in his dissent, *Lane v. Pellissier, supra* note 65, at 593, 283 Pac. at 812, suggests that the face of the record, aided by the presumption of regularity in the performance of the clerk's duties [CAL. CODE CIV. PROC. §1963(15)] should provide the test of the jurisdiction of the appellate court.

⁹⁸ *Supra* note 89.

⁹⁹ *Bryant v. Superior Court, supra* note 91.

¹⁰⁰ *People v. Lewis, supra* note 92.

¹⁰¹ See *De La Montanya v. De La Montanya* (1896) 112 Cal. 101, 118, 44 Pac. 345, 349. *Cf. Kittredge v. Stevens* (1863) 23 Cal. 283 (statutory time for appeal from order on motion cannot be extended by subsequent renewal of the motion even if it be varied in its terms); *Waggenheim v. Hook* (1868) 35 Cal. 216; *Coombs v. Hibberd* (1872) 45 Cal. 174.

instating the order appealed from.¹⁰² Indirect methods resorted to in other jurisdictions to extend the time include the vacation and subsequent affirmance of an order, an order suspending the entry of judgment, the setting aside of a judgment and reëntering it as of a later date, and a petition for rehearing made after the time for appeal has expired.¹⁰³

While amending an order or judgment does not extend the time for appeal, the judgment rendered in the proceedings to amend is in effect a new decree and the only appealable one.¹⁰⁴ On the other hand, a mere correction of the judgment does not so operate. It also does not extend the time for appeal.¹⁰⁵ Where a judgment is vacated and another substituted, the latter judgment, again, is the only appealable one.¹⁰⁶

Attempts to extend the time for the taking of an appeal by more direct methods, but which methods were also unauthorized by the code, have been notably unsuccessful. We have already seen that this object could not be accomplished by stipulation.¹⁰⁷ And *Williams v. Long* held that, in California, the disability of a party would not extend the time for appeal.¹⁰⁸ Statutes in some jurisdictions provide for the tolling of the limit on the time for appeal where a disability in the form of death, insanity, infancy, or even absence from the jurisdiction is shown.¹⁰⁹ It has also already been indicated that the mere mailing of a notice of appeal is not a "filing" within section 940 of the California Code of Civil Procedure.¹¹⁰ Accordingly, section 1013 of the Code does not authorize any extension of the time within which a notice of appeal may be filed.¹¹¹

¹⁰² Estate of Murphy, *supra* note 90, suggests a possible extension where an appeal is taken from several decrees, one of which was entered more than sixty days previous, but is so connected and interwoven with the others, which were entered less than sixty days before appeal, that an injustice would occur from its determination as separate from and without reference to the others.

¹⁰³ *Humphrey v. Chamberlain* (1854) 11 N. Y. 274; *Hogensen v. Prah* (1926) 190 Wis. 214, 208 N. W. 867 (vacation and subsequent affirmance of order); *Northwestern Ry. v. Drainage Dist.* (1922) 29 Wyo. 50, 208 Pac. 872 (unsuccessful attempts to set aside judgment or order and reenter it as of later date); *Snow v. Dyer* (1901) 178 Mass. 393, 59 N. E. 1023; *Renouil v. Harris* (N. Y. 1849) 2 Sandf. 641 (postponement of formal entry); cases collected in (1934) 89 A. L. R. 941; 2 R. C. L. 104.

¹⁰⁴ *Mann v. Haley* (1872) 45 Cal. 63; *Bixby v. Bent* (1881) 59 Cal. 522; *Hayes v. Silver Creek etc. Co.* (1902) 136 Cal. 238, 68 Pac. 704.

¹⁰⁵ *Savings & L. Soc. v. Horton* (1883) 63 Cal. 310; *Fallon v. Brittan* (1890) 84 Cal. 511, 24 Pac. 381; *Combination Land Co. v. Morgan* (1892) 95 Cal. 548, 30 Pac. 1102.

¹⁰⁶ *Amell v. Amell* (1937) 10 Cal. (2d) 153, 73 P. (2d) 888.

¹⁰⁷ *Supra* note 93, and text thereto.

¹⁰⁸ *Supra* note 92.

¹⁰⁹ Florida (infant, *non compos mentis*); Indiana (disability); Maine (minor, insane, imprisoned, absentee); New Jersey (infancy, insanity); Ohio (death, insanity); Tennessee (insane, infant, imprisoned); Wisconsin (minor, insane, imprisoned).

¹¹⁰ Cases cited note 28, *supra*.

¹¹¹ *Ibid.*

Extension of Time. We come now to a consideration of extensions expressly authorized by the code. Section 939 contemplates an extension of time "... in the manner, for the period and under the circumstances prescribed in section 12a [which deals with holidays]"¹¹² And further, "... If proceedings on motion for a 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"

Prior to the addition of this provision to the code in 1915, the pendency of new trial proceedings did not extend the time for appeal.¹¹³ In a few jurisdictions extension resulted although there was no express statutory authorization;¹¹⁴ statutes in a number of states assured the same result.¹¹⁵ By an amendment in 1915, the California legislature abolished the right of appeal from orders denying a motion for new trial. And the provision for an extension of time for appeal from a judgment by the pendency of new trial proceedings was added to insure a review of matters which formerly were considered on direct appeal from the order denying the motion for new trial.¹¹⁶

"Proceedings" on motion for new trial referred to in section 939, consist of the mere filing and service of a notice of intention to move for a new trial under section 659.¹¹⁷ However, not every proceeding on motion for new trial operates to extend the time for appeal. For example, an attempt to obtain a review of the issues of law by a motion for new trial will not extend the time, since a new trial contemplates the reëxamination of an issue of fact.¹¹⁸ Moreover, neither

¹¹² That section provides that when the last day is a holiday, it is excluded in computing time, and if a holiday appointed by the President or governor occurs during the period, time is extended by such number of days as equals the number of holidays. Holidays prescribed by the legislature which occur during the period, do not extend the time. *Adolph Ramish, Inc. v. Belur* (1940) 40 Cal. App. (2d) 54, 104 P. (2d) 410 (Washington's birthday). Federal Rule 6(a) similarly provides for extension of time.

¹¹³ *Bornheimer v. Baldwin* (1871) 42 Cal. 27. *Accord: Buzbee v. Morstorf* (1919) 105 Kan. 270, 182 Pac. 644; *McCartney v. Shipherd* (1911) 60 Ore. 133, 117 Pac. 814.

¹¹⁴ *Florence Cotton & Iron Co. v. Field* (1894) 104 Ala. 471, 16 So. 538; *State v. Cox* (1924) 194 Ind. 380, 142 N. E. 862; *Walter v. Scofield* (1902) 167 Mo. 537, 67 S. W. 276; *Pearce v. Strickler* (1897) 9 N. M. 46, 49 Pac. 727; *Insurance Agency v. Investment Co.* (1909) 35 Utah 542, 101 Pac. 699; *Reeves v. Wilson* (1919) 105 Wash. 318, 177 Pac. 825; *Morse v. United States* (1926) 270 U. S. 151, *semble*.

¹¹⁵ IND. CT. RULE (1937, rev. 1940) Rule 22; OHIO CODE (Baldwin, 1940) §12223.7.

¹¹⁶ *Lancel v. Postlethwaite*, *supra* note 90; *Wilcox v. Hardisty* (1918) 177 Cal. 752, 171 Pac. 947; *Soules v. Glafkidas* (1926) 198 Cal. 750, 247 Pac. 910.

¹¹⁷ *Estate of Bergland* (1918) 177 Cal. 227, 170 Pac. 400; *Gross v. Hazeltine* (1928) 206 Cal. 130, 273 Pac. 550; *Mathews v. Davison* (1930) 103 Cal. App. 346, 284 Pac. 672.

Since 1929 section 659 of the Code of Civil Procedure has provided that the notice shall be deemed to be a motion for new trial.

¹¹⁸ *Pasadena v. Superior Court* (1931) 212 Cal. 309, 298 Pac. 968; *Confar v. Whelan* (1935) 8 Cal. App. (2d) 101, 46 P. (2d) 991. *Hotel Park Cent. v. Security-First Bk.*

a premature¹¹⁹ nor tardy¹²⁰ filing of notice of intention will constitute the initiation of new trial proceedings.¹²¹ Yet, it cannot be stated categorically that defective new trial proceedings are ineffective for this purpose, since mere defects in the form of the notice will not preclude an extension of time.¹²²

It has been repeatedly pointed out by the courts that proceedings to vacate a judgment and enter a different judgment under sections 663 and 663a are not "proceedings on motion for new trial" within the meaning of section 939.¹²³

The filing and serving of notice of intention to move for a new trial or "proceedings on motion for new trial" initiated by any one party extends the time for appeal for all parties. *Meda v. Lawton*¹²⁴ was an action to foreclose a mechanic's lien brought against the owner, contractor, and the latter's bondsman. After judgment was entered for plaintiff, the contractor and his surety instituted new trial proceedings. More than sixty days after the entry of judgment, but less than thirty days after the denial of the motion for new trial, the owner, who made no motion for new trial and did not join in the motion of his codefendants, appealed. Inasmuch as the statute was silent as to whose new trial proceedings extended the time for appeal, the court sustained as timely the appeal made by one who did not participate in the new trial proceedings. The court assumed that a party who does not join in a motion for a new trial could not complain of alleged error in the denial of that motion;¹²⁵ it also ac-

(1936) 15 Cal. App. (2d) 293, 59 P. (2d) 609, *semble*; Estate of O'Neill (1920) 183 Cal. 585, 191 Pac. 1106, *semble*.

¹¹⁹ Barnes v. Foley (1922) 189 Cal. 226, 207 Pac. 885; Root v. Daugherty (1927) 201 Cal. 12, 255 Pac. 181; Estate of Barker (1929) 207 Cal. 112, 276 Pac. 992 (notice filed before signing and filing of facts and conclusions of law).

¹²⁰ Whiting-Mead Com. Co. v. Bayside Land Co. (1918) 178 Cal. 93, 172 Pac. 598.

¹²¹ Winchester v. General Cab Co., *supra* note 92, involved another type of defect in new trial proceedings which precluded an extension of time. Through inadvertence, the wrong defendant was named as the moving party. *Cf.* Estate of Nutt (1919) 180 Cal. 419, 181 Pac. 661, where notice of intention to move for new trial was not addressed to or served on one adverse party, and a different result obtained.

¹²² Bellev v. Bellev (1929) 206 Cal. 769, 276 Pac. 573; Melvin v. Carl (1929) 206 Cal. 772, 276 Pac. 574 (notice did not state whether the motion would be made on affidavits or minutes of the court or both as required by CAL. CODE CIV. PROC. §659).

¹²³ Spotton v. Superior Court (1918) 177 Cal. 719, 171 Pac. 801; Alvarado v. Stanton (1928) 204 Cal. 173, 267 Pac. 313; Bates v. Ransome-Crummey Co., *supra* note 77; Karsh v. Superior Court (1932) 124 Cal. App. 373, 12 P. (2d) 658. In view of the object of the original extension these cases are sound, since orders on motions under sections 663 and 663a of the California Code of Civil Procedure are appealable. Delta Farms v. Chinese-American Farms (1927) 201 Cal. 201, 255 Pac. 1097.

In Kraft v. Briggs, *supra* note 75, the pendency of proceedings testing void orders granting a motion for new trial was held not to extend the time for appeal.

¹²⁴ (1932) 214 Cal. 588, 7 P. (2d) 180.

¹²⁵ *Ibid.* at 590, 7 P. (2d) at 181, citing Calderwood v. Brooks (1865) 28 Cal. 451.

knowledge that the intent of the legislature in providing an extension for the time for appeal in the case of new trial proceedings pending was to provide for a review of all matters that might theretofore have been considered on appeal from the order denying the motion for new trial.¹²⁶ A consideration of these two doctrines, it would seem, should have led the court to a contrary conclusion.

Failure of the code to set a limit on the time during which the proceedings on motion for a new trial must be pending in order to extend the time for appeal gave rise to the contention that there was no such time limit. This meant that if the successful party failed to serve notice of entry of judgment, thereby limiting his adversary's time to move for a new trial under section 659, the latter would have an indefinite period in which to initiate such proceedings and thereby extend his time for appeal.¹²⁷ The courts have uniformly held that the motion for new trial must be filed within sixty days after entry of judgment to be effective as proceedings "pending" within section 939; the legislature could not have intended to leave the finality of a judgment open to question for such an indefinite period.¹²⁸

The phrase "pending" does not mean that the proceedings must be pending at the end of the sixty-day period in which an appeal must ordinarily be taken. The fact that the motion for new trial has been denied less than sixty days after the date of entry of judgment, does not deprive appellant of the thirty days allowed for the filing of his notice of appeal after entry of the order denying his motion for new trial.¹²⁹

The thirty-day extension granted in section 939 begins to run

¹²⁶ 214 Cal. at 590, 7 P. (2d) at 181.

¹²⁷ Section 660 of the Code of Civil Procedure provides that a court may act on a motion for new trial within and from sixty days after service on the moving party of written notice of the entry of the judgment, or if such notice has not been served, then sixty days after the filing of the notice of intention to move for a new trial. Either service of notice of entry of judgment by the successful party or an actual filing of notice of intention to move for new trial is necessary to limit the time within which motion for new trial may be considered by the court.

The *Report of the Committee on Administration of Justice* (Aug. 1941) 2 CAL. ST. BAR J. 1, 13-16, recommended an amendment requiring notice of intention to move for new trial to be filed ten days after notice of entry of judgment, or if no such notice be received, then within sixty days from the entry of judgment.

¹²⁸ *Lawson v. Guild*, *supra* note 75, at 380, 10 P. (2d) at 459. ". . . if at the expiration of the sixty-day period within which an appeal might be taken, no notice of intention to move for a new trial has been given, the time to appeal from the judgment elapses, and the privilege of appealing from the judgment or of having an order denying a new trial reviewed on appeal terminates." *Accord*: *Ransome-Cruminey Co. v. Beggs* (1921) 185 Cal. 279, 196 Pac. 487; *Pacific Light Etc. Corp. v. Kauffman* (1919) 39 Cal. App. 499, 179 Pac. 452; *Smith v. Quaesta*, *supra* note 93; *Steward v. Spano* (1927) 82 Cal. App. 306, 255 Pac. 532.

¹²⁹ *Rainey v. Crowder* (1933) 131 Cal. App. 562, 21 P. (2d) 593.

from the ". . . entry in the trial court of the order determining such motion . . . or other termination in the trial court of the proceedings upon such motion."¹³⁰ The first portion of this phrase obviously includes an order denying the motion for new trial.¹³¹ Where the motion is denied, the moving party would normally appeal from the judgment in order to have the appellate court pass on the order of denial or consider other errors urged. But whether an order granting the motion comes within the phrase is not entirely clear, although the broad language of the statute would indicate that it does. However, where the new trial is granted, the moving party would not ordinarily appeal. He would seek relief from the adverse judgment in the new trial. But since there is always the possibility that an order granting a new trial will be reversed, a cautious attorney may be compelled to appeal from the judgment, although successful in his motion for new trial, as a result of the decision in *Jackson v. Dolan*.¹³²

In the *Jackson* case the unsuccessful defendant obtained an order granting his motion for new trial. More than thirty days after the granting of this order, the appellate court reversed it. Within thirty days, defendant appealed from the judgment, contending that the reversal of the order granting a new trial was "other termination" of proceeding on motion for new trial within section 939. The court concluded that the appeal was untimely; an extension of time was unwarranted since the code speaks of termination of the proceedings in the *trial court*. As a reason for its literal interpretation the court quoted approvingly from an earlier case: "It would subject the adverse party to unjust and unwarranted delay if, as here, after prevailing upon his appeal from the order granting him a new trial, he was still to be confronted with a postponed appeal from the judgment which had been left slumbering to abide the termination of the appeal from the order."¹³³ No mention is made of prejudice

¹³⁰ *Pflug v. Brown* (1922) 57 Cal. App. 312, 207 Pac. 39 (time runs from entry in minutes of trial court regardless of time of entry in register of action); *Berman v. Blankenship Motors* (1934) 140 Cal. App. 134, 34 P. (2d) 1035 (entry of order denying motion in clerk's rough minutes and subsequent entry in regular minutes).

¹³¹ *Wilcox v. Hardisty*, *supra* note 116; *Franceschini v. Solis* (1933) 132 Cal. App. 601, 23 P. (2d) 50; and cases cited note 130, *supra*.

¹³² (1927) 202 Cal. 468, 261 Pac. 706, (1927) 1 So. CALIF. L. REV. 187-188. It is perhaps more accurate to say that the cautious attorney will be compelled to appeal at the time he moves for a new trial since he will not know at that time whether or not the motion will be granted. And if the party desires to avail himself of the alternative method of preparing a record to be used on appeal, he must file his request for transcript under section 953a of the Code within ten days after filing a notice of appeal. The unnecessary expense involved in preparing a record is apparent.

¹³³ *Ibid.* at 472, 261 Pac. at 707, citing *Puckhaber v. Henry* (1905) 147 Cal. 424, 81 Pac. 1105. The *Report of the Committee on Administration of Justice*, *op. cit. supra* note 127, at 11, suggests that section 939 of the Code of Civil Procedure be amended to

to the would-be appellant from the loss of his opportunity to appeal.

The court also pointed out that in line with many other cases, the words "other termination" in section 939 referred to the automatic denial of a motion for new trial by the failure of the court to act on such motion.¹³⁴

Modern statutory revisions in a few states have included as a means of extending the time for appeal the proceedings on motions for directed verdict, judgment notwithstanding verdict, in arrest of judgment, rehearing, and motions to amend findings and judgments.¹³⁵ Placing these motions on a par with the motion for new trial in California is commendable as a method to encourage a party to correct judgments in the trial court by any of the motions permitted by law. However, the reason for the extension of time in California in the case of new trial proceedings is not present in the case of these other motions. In Michigan and Illinois the court has been endowed with discretion to allow an appeal even after the statutory period has elapsed upon showing that appellant's claim for an appeal has merit and that the delay was not occasioned by his negligence.¹³⁶

The preliminary draft of the new rules of California appellate procedure to be presented to the Judicial Council indicates that the basic concept that an appeal is taken and perfected by the filing of a notice in the court in which the judgment or order is entered is to be retained. Inasmuch as the rule that an appeal may be taken after rendition of judgment but before entry is also retained, it might be well to provide that the notice is to be filed in the court in which the judgment or order is rendered rather than entered. The form of the notice of appeal appears to be the subject of a contemplated

provide that ". . . if an appeal is taken from an order granting a new trial, and such order is reversed on such appeal, an appeal may be taken from the judgment within ten days from the filing of the remittitur in the trial court."

¹³⁴ *Jackson v. Dolan*, *supra* note 132, at 473, 261 Pac. at 708. *Accord*: *Iske v. Stockwell-Kling Corp.* (1932) 128 Cal. App. 192, 17 P. (2d) 203; *Kocher v. Fidelity & Deposit Co.*, *supra* note 75; see *Lancel v. Postlethwaite*, *supra* note 90, at 329, 156 Pac. at 487. But *cf.* *Melvin v. Carl*, *supra* note 122, suggesting that a denial of motion for new trial or dismissal of new trial proceedings on the ground of defects in the notice of intention constitutes "other termination of proceedings on such motion" within section 939.

Section 660 of the California Code of Civil Procedure provides that if motion for new trial is not determined within sixty days after service on the moving party of notice of entry of judgment or within sixty days after filing notice of intention to move for new trial where notice of entry of judgment has not theretofore been served, the effect shall be a denial of the motion without further order of the court.

¹³⁵ MICH. CT. RULES (Rev. 1933, amend. 1938) Rule 57 (rehearing); PROPOSED R. I. RULES Rule 73 (directed verdict, amend findings and judgment).

¹³⁶ ILL. CIV. PRAC. ACT (1933) §76 (supreme court Rule 29 limited petitions for an order granting leave to appeal to a period of within one year after entry of judgment); MICH. CT. RULES (Rev. 1933, amend. 1938) Rule 57.

change. The draft speaks of a notice in the form specified, and sets forth such a form. Unless the use of the statutory form is made mandatory, little purpose is served by the proposed rule. And another portion of the rule states that the notice shall be sufficient where it states in substance that the party appeals. If the use of the official form is to be mandatory, this latter provision is superfluous, and its presence casts doubt on the intent of the draftsman in this regard. The rule providing for a liberal construction of the notice in favor of the right to appeal is also expressly incorporated, and its incorporation suggests a doubt as to the purpose to be accomplished by the codification of such generality.

The proposed revision also fills in the gaps left by our present statutes. The requirement of signing the notice of appeal, so consistently adhered to by the courts,¹³⁷ finally finds its place in the code. Further, a method of notifying both the adverse parties and the appellate court of the taking of an appeal is contemplated. It is to be hoped that the final draft finds the duty of notification placed on the clerk of the trial court rather than on the appellant, and that the use of technical words such as "service", which has definite legal consequences, is avoided.

The rules concerning the ordinary time to appeal remain unchanged. The provision for the extension of time by the pendency of new trial proceedings is, however, adeptly restated to codify the decisions in cases such as *Lawson v. Guild*,¹³⁸ *Rainey v. Crowder*,¹³⁹ *Meda v. Lawton*,¹⁴⁰ *Gross v. Hazeltine*,¹⁴¹ *Barnes v. Foley*,¹⁴² *Whiting-Mead Commercial Co. v. Bayside Land Co.*,¹⁴³ and to reject the holding in *Estate of Nutt*.¹⁴⁴ The wisdom of accepting the decision in *Meda v. Lawton* that the initiation of new trial proceedings by any party extends the time for all parties is questionable. The time to appeal is extended until thirty days after denial of the motion, and in another portion of the rule it is expressly provided that time is not extended by the granting of such motion. While the rule nominally changes the existing law in this respect, it is a recognition of the fact that, practically speaking, the party who has been granted a new trial does not desire to appeal. The proposed rule does not in itself adopt the decision of *Jackson v. Dolan*,¹⁴⁵ nor preclude a solution of the problem suggested by that case.

¹³⁷ *Supra* note 47, and text thereto.

¹³⁸ *Supra* note 75.

¹³⁹ *Supra* note 129, and text thereto.

¹⁴⁰ *Supra* note 124, and text thereto.

¹⁴¹ *Supra* note 117.

¹⁴² *Supra* note 119.

¹⁴³ *Supra* note 120.

¹⁴⁴ *Supra* note 121.

¹⁴⁵ *Supra* note 132, and text thereto.