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Procedural Progress in Washington

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PROCEDURAL PROGRESS IN WASHINGTON

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TWO great accomplishments mark the course of procedural reform in the United States. One is the David Dudley Field Code of Civil Procedure of 1848. It eliminated the distinction between law and equity, abolished the common law forms of action, and simplified pleading. This code, first enacted in New York, served as a model for similar legislation in a majority of the states.[1] Washington enacted its version of the Field Code in 1854.

The Federal Rules of Civil Procedure may be regarded as the second great landmark. These rules were drafted by a committee of experts, headed by the Honorable William D. Mitchell, and were promulgated by the Supreme Court in 1938. They standardized procedure in the federal district courts, incorporated the fundamental reforms of the Field Code, further simplified procedure by remedying the defects which had become apparent after ninety years' experience under the code, and provided for the most comprehensive pre-trial discovery yet devised. As in the case of the code, these rules have served as a model for procedural reform in a number of the states.[2]

In January of this year the Washington Supreme Court authorized the publication of volume 34-A (second series) of the Washington Reports. This is the first hyphenated volume of the reports; it is the first volume which contains *no* cases; it is the first volume which brings together, in one convenient book, all of the rules of the Supreme Court

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[1] CLARK, CODE PLEADING 23 *et seq.* (2d ed. 1947).

[2] Some states such as Colorado have discarded their codes and substituted therefor rules of civil procedure patterned after the new federal rules. Other states have adopted portions of the rules without attempting a full scale reform.

regulating procedure in and out of the Supreme Court, unencumbered by extraneous material. It is not the format, however, but the contents of the volume which tend to make it a landmark in the history of procedural reform in the state of Washington.

In this new set of rules the Supreme Court did not make a full scale adoption of the federal rules, but it did borrow generously from them, and it also made significant innovations "on its own." Washington lawyers will be faced with the problem of relearning a substantial portion of the adjective law of the state. This will not be an entirely new experience. Lawyers have become inured to the biennial task of integrating the results of new legislation with their previous store of legal knowledge. They have also become accustomed to rather frequent changes in the rules of court. The first rules of our Supreme Court were adopted July 15, 1901;[3] since then they have been revised or amended twenty-two times.[4] In 1925 the legislature delegated to the Supreme Court plenary power to prescribe rules of procedure.[5] Pursuant thereto, on January 14, 1927, the Supreme Court promulgated its Rules of Pleading, Practice and Procedure;[6] since then they have been revised or amended seven times.[7] Pursuant to the same legislative authority, on August 1, 1938, the Supreme Court adopted another set of rules denominated the General Rules of the Superior Courts;[8] since then they have been revised or amended twice.[9]

In writing the present article the author has in mind no more ambitious purpose than to indicate exactly what changes have been made by the new rules in the hope that by so doing he may save the members of the bar some time, energy, and temper.[10]

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[3] 25 Wash. xxvii (1901).

[4] Apr. 17, 1909, 51 Wash. xxxiii; Dec. 9, 1911, 63 Wash. xxxi; June 8, 1913, 71 Wash. xxxix; Dec. 30, 1914, 81 Wash. xxxii; Feb. 18, 1915, 82 Wash. xxxvii; Nov. 5, 1923, 124 Wash. xxxvii; Oct. 11, 1927, 143 Wash. xxxii; Mar. 15, 1929, 150 Wash. xxxvii; Apr. 1, 1931, 159 Wash. xxxiii; Jan. 1, 1933, 169 Wash. xxx; Mar. 1, 1935, 178 Wash. xxxv; Jan. 1, 1937, 186 Wash. xxxiii; Aug. 1, 1938, 193 Wash. xxxi; June 3, 1941, 6 Wn.(2d) xv; July 1, 1942, 11 Wn.(2d) xv; July 19, 1943, 15 Wn.(2d) xvii; July 30, 1943, 16 Wn.(2d) xv; Nov. 23, 1943, 17 Wn.(2d) xv; Mar. 2, 1944, 18 Wn.(2d) 3-a; Oct. 22, 1945, 23 Wn.(2d) xvii; Sept. 27, 1949, 32 Wn.(2d) xvii; Jan. 2, 1951, Vol. 34-A Wn.(2d).

[5] Wash. Laws Extraordinary Session 1925, c. 118.

[6] 140 Wash. xxxv (1926).

[7] Oct. 17, 1930, 157 Wash. xxxi; Mar. 1, 1935, 178 Wash. xxxvii; Aug. 1, 1938, 193 Wash. 39-a; July 1, 1942, 11 Wn.(2d) xviii; Dec. 11, 1943, 17 Wn.(2d) xvii; Mar. 2, 1944, 18 Wn.(2d) 31-a; Jan. 2, 1951, 34-A Wn.(2d).

[8] 193 Wash. 55-a (1938).

[9] Mar. 2, 1944, 18 Wn.(2d) 51-a; Jan. 2, 1951, 34-A Wn.(2d).

[10] The present article deals only with the rules on appeal; the rules of pleading, practice, and procedure; and the general rules of the Superior Courts. Vol. 34-A Wn.(2d) also includes rules peculiar to the business of the Supreme Court, a code of professional ethics, a code of judicial ethics, rules for admission to practice, and rules for the discipline of attorneys.

Rules on Appeal

Before the present revision it was necessary, as every attorney knows, to refer not only to the rules of the Supreme Court, but also to the statutes, in appealing a case. The primary purpose of the revision, according to the preface to the volume, was to bring together in one place all of the material dealing with appellate practice. In so doing the Supreme Court also undertook a certain amount of streamlining and simplification. A bird's-eye view of the degree of change effected by the new rules on appeal may be obtained by referring to the following table:[11]

Rule	*Source*	*Degree of change, if any*
1	Remington 1754	Substantially same
2	New	
3	Old rule 28	Substantially same
4	Remington 1730-7	Substantially same
5	Remington 1748	Same, except it deletes last sentence
6	Old rule 24	No change
7	New	
8	New	
9	New	Similar to Remington 150
10	Old rule 17	No change
11	Old rule 18	Substantially same
12	Old rule 19	No change
13	Old rule 25	No change
14	Remington 1716 and 2183-1	Substantially same
15	Remington 1731	Slight change in terminology
16	Remington 1737	Last sentence added
17	Remington 1736	Rule embodies only first sentence of statute
18	Remington 1717	No change
19	Old rule 7	No change
20	Remington 1735	No change
21	Remington 1743	Substantially same
22	Remington 1721	Substantially same, except it changes time from five to ten days
23	Old rule 6	No change

[11] The comparison in this and other tables is with the 1944 edition, found in 18 Wn.(2d), and also published by the Bar Association in pamphlet form.

Rule	*Source*	*Degree of change, if any*
24	Remington 1723	No change
25	Remington 1722	No change
26	Remington 1725	No change
27	Remington 1726	Substantially same
28	Remington 1730-9	No change
29	Remington 1728	Same, except for last sentence of rule
30	Remington 1727	No change
31	Remington 1739	No change
32	New	
33	Old rule 5	Substantial change
34	Old rules 9 and 10	Slight changes
35	Remington 388	Substantially same
36	Remington 389	Substantially same
37	Remington 391	Substantially same
38	Remington 392	Substantially same
39	Remington 396	Substantially same
40	Remington 394	Substantially same
41	Old rule 11	Material changes
42	Old rule 16	Material changes
43	Old rule 21	Slight change
44	Old rule 8	No change, except a clarifying cross-reference
45	Old rule 13	No change
46	Old rule 12	Material changes
47	New	
48	Remington 1749	No change
49	Old rule 20	Same, except one sentence has been added
50	Old rule 22	Slight change
51	Remington 1733	Substantially same
52	Remington 1734	Substantially same
53	Old rule 26	Minor changes
54	Old Rule 27	No change
55	Remington 1744 and old rule 23	Substantially same
56	Old rule 29	Slight addition
57	Old rule 30	Minor changes
58	New	

Rule	*Source*	*Degree of change, if any*
59	Remington 1751	No change
60	Remington 1741	Substantially same
61	Remington 1742	No change
62	Remington 1738	Minor change
63	Remington 1752	Substantially same
64	Remington 1724	No change

By and large there has been little significant change in the appellate process. Of the sixty-four rules, fifty-two merely reenact pre-existing law verbatim, or with minor modifications. Seven of the sixty-four rules are new, and five contain major changes.

The rules which I have listed as "new" are not necessarily significant innovations, but are "new" in the sense that they have never before appeared in the rules or statutes governing appeals. They may be disposed of in a few words. Rule 2 consists of a list of definitions. Rule 7 advises the bar that sanctions may be imposed for violations. Rule 8 advises the bar that any civil or criminal case will be dismissed for noncompliance with jurisdictional requirements. This is merely declaratory of present practice. Rule 9 is similar to Remington 150 and deals merely with computation of time where Saturdays, Sundays, or holidays are involved. Rule 32 lists the jurisdictional steps which an appellant must take in order to perfect an appeal. It is pehaps well to have these emphasized in a specific rule. However, the rule is merely declaratory of former practice. Rule 47 permits the Chief Justice to authorize an appeal *in forma pauperis* in criminal cases. Rule 58 concerns itself with the title of all cases under review, with particular reference to formal paper requirements in cases of writs of certiorari, mandamus, and prohibition.

We turn now to the rules which embody changes, additions, or deletions, which are more than mere changes in form. Rule 5, which states that "personal appearance of any party in the Supreme Court shall not be necessary on appeal in either civil or criminal actions," is exactly the same as Remington 1748 except that the last sentence of said statute is deleted. That sentence reads "In criminal actions the defendant shall be entitled to close the argument." The writer is unable to determine whether this deletion (1) was inadvertent, (2) was intended to leave the last sentence of Remington 1748 in force, (3) was intended to change pre-existing practice, or (4) was intended to leave the matter to be governed by unwritten law.

Rule 16 defines the powers of the Supreme Court and is identical with Remington 1737. However, it goes further and adds one more sentence: "Respondent may present and urge claimed errors by the trial court in instructions and rulings which, if repeated on a new trial, would constitute prejudicial error." If this new sentence means that a respondent need not prosecute a cross appeal as prescribed by Rule 33 in order to review alleged errors of the trial court, it is significant. Otherwise it is merely declaratory of previous practice by which the Supreme Court exercised authority to review cross errors properly alleged on cross appeal.

Rule 17 states, "Upon an appeal from a judgment, the Supreme Court will review any intermediate order or determination of the superior court which involves the merits and materially affects the judgment, appearing on the record sent from the superior court." This is the first sentence of Remington 1736. However, Remington 1736 goes on to provide that where the appeal is from a trial to the court, or by a referee in either legal or equitable cases, the Supreme Court may review the law and the facts *de novo*. It is difficult to understand why the Supreme Court did not incorporate in Rule 17 the provisions of Remington 1736, giving the court the power to review *de novo* cases tried to the court without a jury, a power which the court has felt no hesitation in exercising. Perhaps the court felt that it was unnecessary to spell out this power of the court, which it may have deemed inherent. Perhaps by not modifying or mentioning that portion of Remington 1736 the Supreme Court intended for it to remain in force as a statute. However, this would be contrary to the avowed purpose of the rules as stated in the preface or introduction. If, on the other hand, the Supreme Court intended to abdicate its power to review *de novo* cases tried to the court (which seems inconceivable), this would be indeed a significant change.

Rule 22, concerning appeal bonds, is the same as Remington 1721 except that time within which the bond may be filed is extended from five to ten days from the notice of appeal.

Rule 29, concerning an application for a new bond where the respondent believes the old one has become insufficient, departs slightly from Remington 1728 which permitted evidence to be adduced before the Supreme Court. The new rule provides that upon the hearing of the motion the court may require the trial court to examine into the merits of the motion and the adequacy of the bond, and certify the facts and conclusions to the Supreme Court.

Rule 33, dealing with appeals and cross appeals in civil causes, differs materially from old Rule 5. The maximum time for serving notice of appeal from a final judgment remains the same at thirty days, and from an interlocutory appealable order at fifteen days. However, under old Rule 5 service of the notice could be upon the party or his attorney, whereas under Rule 33 service must be upon "opposing counsel." In regard to cross appeals, old Rule 5 provided that if the notice of appeal is from a final judgment and is served on the last three days of the time permitted, any respondent has five days thereafter for his cross appeal. Under Rule 33 it is provided that each respondent and co-party, who did not join in the original notice, may within ten days after the giving of the original notice, if made orally, or the service thereof, if in writing, file and serve on *each party or his attorney* a notice of cross appeal. Under old Rule 5 there was an alternative method of giving notice of appeal, to wit, notice given in open court or at chambers when the judgment was rendered or within three days thereafter by filing with the clerk written notice of appeal. Under Rule 33 the alternative method of giving oral notice in open court is retained, but the time is changed from three to five days after entry of the judgment within which notice may be given to the clerk with the same effect as if it was given orally. Under old Rule 5, if this method was pursued, the appeal bond must have been filed at the time of giving the notice or within two days thereafter. Under Rule 33 the appeal bond must be filed at the time the notice is given or within five days thereafter. Rule 33 also contains a provision that in appeals from orders denying writs of habeas corpus no appeal bond shall be required.

Rule 34, dealing with the settlement of the statement of facts, makes several changes. At common law the usual way of getting the facts and proceedings at the trial into the appellate record was by means of a bill of exceptions properly certified by the trial judge.[12] From early days in Washington up to the advent of the present new rules the statutes, rules and decisions referred to a bill of exceptions or statement of facts, using the two terms more or less interchangeably. The new rules abandon the bill of exceptions and confine themselves to a statement of facts. From now on out it seems that the term "bill of exceptions" will be passé in Washington. This makes for clarity because there was no clean-cut distinction between the two terms.[13] The second

[12] See HOLDSWORTH, A HISTORY OF ENGLISH LAW 222 *et seq.* (3rd ed. 1922); RAYMOND, BILL OF EXCEPTIONS (T. and J. W. Johnson, Philadelphia, 1848).

[13] See SMILEY, A TREATISE ON BILLS OF EXCEPTIONS AND STATEMENTS OF FACTS (Bancroft-Whitney Co., 1912).

change which Rule 34 makes is quite significant. Under the old rule the appellant had ninety days from the date of the entry of the final judgment to tender and file his proposed bill of exceptions or statement of facts. In a long line of decisions the Supreme Court held that this time limitation was absolutely jurisdictional and could not be extended by the court or by stipulation of the parties.[14] The one exception was in cases where the death penalty had been imposed.[15] Under the new rules, the filing of the proposed statement of facts with the clerk of the superior court within ninety days from the entry of the final judgment is still regarded as jurisdictional, but there is a proviso that the superior court or the Chief Justice of the Supreme Court may extend the time not to exceed thirty days for good cause.

This increased flexibility under Rule 34 is a desirable change and will undoubtedly take care of most of the hardship cases. It may not be sufficient to prevent an occasional miscarriage of justice. There may be future cases like *Wheeler v. S. Burch & Sons,*[16] where immediately after the judgment became final counsel for the plaintiff (who was nonsuited) ordered the transcript of testimony from the reporter, paid him $250 down, and kept hounding him for it daily. However, due to a court reporters' strike, it was not completed for filing within time. In that case twenty-five Seattle lawyers appeared for the plaintiff and fourteen more as amici curiae, asking the court not to strike the bill of exceptions because the fault was solely due to the machinery of the court, the reporter being an officer of the court. In that case the Supreme Court assumed *arguendo* that the plaintiff's excuse was perfect, but said the rule was jurisdictional, admitting of no exceptions save where the death penalty had been pronounced. The appeal was dismissed. It is submitted that this type of situation should not be permitted to occur.

Rule 41, dealing with the serving and filing of briefs on appeal, makes significant changes from old Rule 11. Under the old rule the appellant had ninety days "after an appeal shall have been taken by notice" within which to serve and file his briefs. Note that the time

[14] For recent representative cases, see Woodard v. Kuhn, 32 Wn.(2d) 96, 200 P.(2d) 739 (1948); Black v. Porter, 31 Wn.(2d) 664, 198 P.(2d) 670 (1948); Smith v. John Hancock Mutual Life Insurance Co., 30 Wn.(2d) 901, 193 P.(2d) 856 (1948); Falk v. Steinback, 30 Wn.(2d) 62, 190 P.(2d) 747 (1948); State *ex rel.* Grange v. Riddell, 27 Wn.(2d) 134, 177 P.(2d) 78 (1947); Colasurdo v. Colasurdo, 27 Wn.(2d) 860, 181 P.(2d) 172 (1947); Martell v. Raymond, 11 Wn.(2d) 165, 118 P.(2d) 950 (1941); Bennett v. McKellips, 8 Wn.(2d) 176, 111 P.(2d) 558 (1941); McKasson v. Huntworth, 5 Wn.(2d) 661, 105 P.(2d) 44 (1940).

[15] State v. Brown, 26 Wn.(2d) 857, 176 P.(2d) 293 (1947).

[16] 27 Wn.(2d) 325, 178 P.(2d) 331 (1947).

was ninety days and ran from the notice of appeal. Under the new rule it is provided that "within thirty days after the statement of facts shall have been filed . . . or in those cases in which a statement of facts is not necessary in order to review a cause, within thirty days after the giving or service of notice of appeal, the appellant shall" serve and file his briefs. This is a significant time change which, if not carefully noted, may be a trap for the unwary. Under the new rule the time is only thirty days and runs from the filing of the statement of facts, if one has been filed. If no statement of facts is necessary and the appeal is on the common law record, then the time is only thirty days and runs from the service of the notice of appeal. In this latter situation the new rule cuts down on the time for filing briefs from ninety to thirty days. Under the new rule time for filing the reply brief is extended from ten to twelve days.

Rule 42, dealing with the contents and style of briefs, makes several changes. Subsection 1(c) is new. It specifies the format of typewritten briefs. Subsection 1(e) is the same as the old rule except it requires filing of ten copies instead of six. Subsection 3, dealing with the contents of briefs, no longer requires that appellant's brief contain "a statement of questions involved" nor that respondent's brief contain "any counter-statement of questions involved, including restatement and additional statement." The old rule, which required the statement of questions involved, provided "The questions and answers in their entirety should not ordinarily exceed one page and must never exceed two pages." In the recent case of *Trowbridge v. Clark*,[17] the respondents complained of a violation of this rule. In discussing this contention the Supreme Court stated that the rule has not been as helpful to the court as it was hoped as the questions are always phrased so that there is only one possible answer to them, and the rule is often violated as to length. Apparently this thought prompted the entire deletion of the requirement in the new rules.

Having deleted one requirement under the old rules as of doubtful utility, Rule 42 proceeds immediately to impose a new one. Subsection 5 of Rule 42 is new. It provides that under the heading "statement of the case" the appellant's brief shall set forth (1) a brief statement of the nature of the action, (2) a short resume of the pleadings and proceedings, (3) the nature of the judgment and, when necessary for a review thereof, the rulings and orders of the court, and (4) a clear and

[17] 137 Wash. Dec. 61, 219 P.(2d) 980 (1950).

concise statement of the facts in the case in narrative form and any other matters necessary to an understanding of the nature of the controversy on the appeal, with page references to the record. Under 5(b) the respondent in his brief is required to accept the statement of the case in the appellant's brief or file a counter-statement of the case.

Subsection 6 of Rule 42, also new, provides that where the brief refers to any portion of the record on appeal specific page references must be given, that exhibits shall be referred to by letter or number, and that if attention is drawn to opposing counsel's brief, page reference must be made.

Rule 43, dealing with the errors which the Supreme Court will consider, contains the following which is new: "In appeals from all actions at law or in equity tried to the court without a jury, appellant must point out by number and description the findings of fact upon which he predicates error, otherwise the findings will be accepted as the established facts in the case."

Rule 46, dealing with appeals in criminal cases, embodies substantial changes. The opening paragraph is a clearer statement of the jurisdictional steps. Subsection 1 is clarified and enlarges the time of appeal in a criminal case from five days to thirty days from the entry of the judgment.

Subsection 2 makes two new additions, one providing that expense of the appeal shall be borne by the county when it is prosecuted *in forma pauperis*, and the other providing that either party may have transmitted to the Supreme Court any additional portions of the records and files believed to have a bearing on the case. Subsection 4 contains an added proviso that the superior court or the Chief Justice of the Supreme Court may extend for good cause the time for filing of the proposed statement of facts not to exceed thirty days. This brings the criminal procedure in line with the civil procedure on this point. This subsection also contains a new provision to the effect that the certification of the statement of facts shall be completed within twenty days of its filing, but further providing that this time may be extended by the Chief Justice of the Supreme Court or in his absence by any judge of that court.

Subsection 5 of the rule is new but probably merely declares the existing condition of affairs, to wit, that the certifying of the statement of facts, the filing and service of the proposed statement of facts, and all steps and proceedings leading up to it, shall be deemed proceedings

in the cause itself resting upon the jurisdiction originally acquired by the court in the cause.

Subsection 7, dealing with the filing of appellant's briefs, is materially different from the old rule. Under the old rule the briefs were to be filed with the clerk of the Supreme Court within ninety days after giving the notice of appeal. Under the new rule briefs are to be filed with the clerk of the *superior court* within *thirty days* after the date of the certifying of the statement of facts. On this point the new rule differs not only from the old practice but also from the civil practice and will undoubtedly cause some confusion to attorneys until they are familiar with it.

Subsection 11 of the rule also makes material changes from the old rule which provided in substance that if upon the expiration of ninety days after the giving of notice of appeal the record is not made or the fee not paid as required by rule, the case could be dismissed. The new rule provides that if upon the expiration of 170 days from the entry of judgment, unless the time for certification of the statement of facts or serving and filing of appellant's brief has been extended, the record is not made, etc., the case may be dismissed. This 170 days apparently contemplates the sum of the times given for the performance of all of the jurisdictional steps by the appellant.

Subsection 12 of the rule is new. It provides, "In cases in which the death penalty has been imposed this court will make such exceptions to this rule as it determines will be just."

Rule 47 is new. It provides for appeals in criminal cases *in forma pauperis*.

Rule 49 is the same as old Rule 20 except that it adds the following sentence, "The time allowed for argument in cases wherein the death penalty has been imposed is not limited."

Rule 50, dealing with petitions for rehearing, differs from old Rule 22 by deleting the requirement that "Twenty-five printed copies of the petition shall be filed with the clerk," and providing in substitution thereof, "Petitions for rehearing and answers thereto may be printed, mimeographed, or typewritten. If a petition for rehearing be granted, the court may require additional copies of the petition, answer and briefs to be supplied in the manner indicated by the court."

Rule 56, dealing with habeas corpus, contains a new provision to the effect that where the application is made by any person who by reason of poverty is unable to pay the cost of such proceeding, the Chief

Justice may order that it be prosecuted without the payment of costs.

Rule 62, which among other things provides that where the appeal is taken merely for the purposes of delay the Supreme Court may award damages, is the same as old Remington 1738 except that it deletes the 15 per cent ceiling on the damages.

One of the avowed purposes of the new rules, as stated in the foreword, was to incorporate in the rules all of the provisions of law dealing with appellate practice so that "in taking the necessary steps to perfect an appeal, attorneys will not have to refer to other than this volume." Pursuant to this plan, as the table of changes, *supra* will indicate, the Supreme Court has put into the rules certain provisions which formerly appeared in the statutes. However, there are some omissions. In the foregoing discussion mention has been made of the fact that Rule 5 embraces only a portion of Remington 1748 and that Rule 17 embraces only a portion of Remington 1736. What the legal status of the remaining fragments of these statutes is, we do no know. In addition to these partial omissions the Supreme Court failed to incorporate in the new rules or otherwise dispose of several whole sections of the statutes bearing upon the subject of appellate practice: Remington 1720, dealing with who may join in a notice of appeal; Remington 1740, dealing with rehearings and remittitur; Remington 1745, dealing with the effect of an appeal in a criminal action; Remington 1746, dealing with the effective date of the commencement of a sentence in a felony action where no appeal is taken; Remington 1747, dealing with the question of bail during the pendency of appeal; and Remington 1750, dealing with the imprisonment of a defendant pending appeal. Nor do the new rules contain anything covering the substance of Remington 390 to the effect that depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so directs, shall be attached to the bill or statement and shall thereupon become a part thereof. Likewise the new rules are silent on the subject matter of Remington 395 which covers what matters shall be included in the common law record without the necessity of having the same included in the bill of exceptions or statement of facts.

Rules of Pleading, Practice and Procedure

In 1925 the legislature granted to the Supreme Court the power to promulgate rules of practice and procedure for the superior courts.[18]

[18] Wash. Laws Extraordinary Session 1925, c. 118.

This action was in line with the growing conviction that legislatures are poorly equipped to prescribe rules of procedure for the courts and that the job can better be done by the courts themselves.[19] Pursuant to this authority, in January, 1927, the Supreme Court promulgated the first set of such rules.[20] There have been several amendments since then.[21] The present set, which became effective in January of this year, probably constitutes the most significant exercise of the Supreme Court's rule-making power.

The following table will give a bird's-eye picture of the changes effected by the new rules:

Rule	*Source*	*Degree of change, if any*
1	Old rule 1	No change
2	Old rule 2	No change
3	Old rule 3	No change
4	Old rule 4	No change
5	Old rule 5	Slight change
6	Old rule 6	Slight change
7	Old rule 6	This is merely last part of old rule 6
8	Old rule 8	No change
9	Old rule 9	No change
10	Old rule 10	No change
11	Old rule 11	No change
12	Old rule 12	No change
13	Old rule 13	No change
14	Old rule 14	No change
15	Old rule 15	No change
16	Old rule 18	No change
17	Old rule 16	No change
18	Old rule 19	No change
19	Old rule 17	No change
20	Old rule 23	No change
21	Old rule 24	Minor changes
22	Old rule 20	No change
23	Old rule 25	No change

[19] See article by William D. Mitchell in DAVID DUDLEY FIELD CENTENARY ESSAYS 73 *et seq.* (New York University School of Law, 1949).
[20] 140 Wash. xxxv (1926).
[21] See note 7 *supra.*

Rule	*Source*	*Degree of change, if any*
24	Old rule 26	No change
25	Old rule 27	Minor change
26	Federal rule 26	Major change
27	Federal rule 27	Major change (of Remington 1249 *et seq.*)
28	Federal rule 28	Major change
29	Federal rule 29	Major change
30	Federal rule 30	Major change
31	Federal rule 31	Major change
32	Federal rule 32	Major change
33	Federal rule 33	Major change
34	Federal rule 34	Major change
35	Federal rule 35	Major change
36	Federal rule 36	Minor change
37	Federal rule 37	Major change
38	Old rule 22	No change
39	New	
40	New	
41	New	
42	New	
43	Federal rule 49	Major change

You will note that, aside from renumbering (which may cause some confusion) there are no significant changes until we get to Rule 26.

The New Discovery Procedure. In Rules 26 to 37 the Supreme Court has adopted practically verbatim the federal rules governing the discovery process. Our new rules carry the same numbers as the federal rules, which will be a great convenience to lawyers, since federal cases interpreting the federal rules will be presumptively controlling the interpretation of our own rules under standard principles of construction. Thus, although our discovery rules are new, they come to us with a gloss of interpretative cases after more than twelve years' use in the federal courts.

One of the features of the new federal rules which made them a landmark in procedural reform in this country was the discovery process. It has been referred to as the heart of the new federal rules.[22]

For centuries under our Anglo-American system of jurisprudence we have been operating under what might be termed the adversary system

[22] Van Cise, *The Federal Discovery Practice Should be Adopted by All States*, 24 WASH. L. REV. 21 (1949).

of justice. The theory is that in litigation each party is represented by counsel who battle for their respective clients in the judicial arena and that if they strive mightily on the trial, when the dust of the combat settles justice will emerge triumphant. The lawsuit was regarded as a contest, a battle, a game between adversaries. No matter what the theory was, as a matter of actual practice the adversaries were the lawyers and not the clients. Hence the actual decision of the case too frequently was based upon the skill and prowess of counsel and not upon the true merits of the case. If counsel were equally matched, it was a fairly safe bet to assume that the true merits of the controversy would be decided. However, if counsel for one party was an experienced and wily practitioner, thoroughly familiar with all of the technicalities of litigation, and his opponent was a fledgling fresh out of law school, it not infrequently happened that the fledgling was counted out without knowing what had happened to him. The element of surprise was a strategic and tactical weapon recognized as part of the armament of the lawyer in the trial of a lawsuit. Each lawyer attempted to keep his opponent as much in the dark as possible, and if he could spring a surprise on him at the trial and catch him unaware, so much the better. True, the pleadings were supposed to apprise the parties of the issues and the nature of the contest, but every experienced lawyer knows that the pleadings do no such thing and that the real controversy may be masked behind general and ambiguous allegations.

The federal rules undertook to eliminate as far as possible this element of surprise in litigation. The objective was not, as in the past, to award the decision as a prize to the cleverest lawyer but to arrive at a just determination of the merits of the controversy. The process by which this miracle was to be accomplished was the discovery procedure. Under it each party could find out in advance of trial practically everything about his opponent's case so that he could come into court adequately prepared on the real issues and, if he had been diligent in using the discovery process, he would not be taken by surprise. In this way all of the pertinent facts concerning the case would be brought out in the open and called to the attention of the court or jury, and the real merits could be determined. By adopting the federal discovery procedure our Supreme Court has taken this philosophy to its bosom. Let us now make a quick survey of our new rules relating to discovery.

Rule 26. Pre-trial depositions were not unknown in Washington prior to the advent of present Rule 26. This state had the usual procedure

for taking the depositions of witnesses where the evidence was to be introduced at the trial and where the witness was apt to be unavailable. These were not discovery depositions. Washington also had in old Rule 7 a procedure for oral examination of an adverse party before trial. This was indeed a discovery process, since the purpose of taking the oral examination of the adverse party was to find out what his case was about. Old Rule 7 was comparatively narrow in compass when compared with new Rule 26. Under old Rule 7 only the adverse party was subject to pre-trial examination, and the rule was silent as to the scope of examination. Under new Rule 26 a pre-trial deposition may be taken not only of the adverse party but of any witness. Concerning the scope of the examination, the new rule provides that "The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[23] This is the key rule to the scope of pre-trial discovery. To one unfamiliar or out of sympathy with the federal discovery procedure the implications of this rule are surprising, if not shocking.

Under it a lawyer can take a pre-trial deposition of the adverse party and ask him everything he knows about the case, including the names and addresses of all of his witnesses, and all about any real or documentary evidence which the adverse party has in his possession or intends to introduce at the trial. On this examination the lawyer is not bound by the usual rules of evidence, and it is no ground of objection that questions asked call for hearsay or answers which would not be admissible under the normal rules of evidence. It is sufficient if they call for information which might reasonably lead to the discovery of admissible evidence. In other words, the rule consti-

[23] The Washington Supreme Court added the following to its Rule 26 which is not found in the federal rule: "The court need not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial. The court shall not order the production or inspection of any writing that reflects an attorney's mental impressions, conclusions or legal theories, or, except as provided in Rule 35, the conclusions of an expert." The Supreme Court was apparently unwilling to rely upon judicial interpretation to take care of this situation, but see Hickman v. Taylor, 329 U.S. 495 (1947).

tutes a very frank invitation for a full-scale fishing expedition. After the adverse party has been thoroughly processed and has told everything he knows about his own case, then the lawyer can proceed methodically to take the pre-trial depositions of all the adverse party's witnesses and find out everything they know about the case. Further, he can employ other discovery machinery to look at the books, documents and real evidence, and then secure copies or photographs of it. If a lawyer is diligent in the use of the machinery now at his disposal, there is no excuse for his going into the actual trial in ignorance of any material issue which may develop.

Of course the rule works both ways, since both parties are entitled to employ the machinery. An interesting by-product of the use of the discovery machinery has developed under the federal system. A great number of cases are never tried at all. They are settled or dismissed because, when the full facts are developed and made available to both sides, actual litigation becomes fruitless.

Subsection (d) of Rule 26 specifies the uses to which the deposition may be put. Where the deposition is taken solely for the purpose of discovering facts about the opponent's case, the function is fulfilled by the mere taking of the deposition. Of course copies may be procured under Rule 30. However, the rule spells out other uses of the deposition. It may be used at the trial to contradict or impeach the witness; it may be used at the trial for any purpose if it is the deposition of the adverse party. If it is merely that of a witness it may be introduced in evidence at the trial if the witness is dead; absent from the county and more than twenty miles away; unable to attend because of illness, age, infirmity, or imprisonment; not under subpoena through no fault of the party calling him; or if exceptional circumstances warrant it. Thus any deposition taken under the rules may be used for the two-fold purpose of discovery and use on the trial for testimony.

Rule 27. This rule adopts the federal rule dealing with perpetuation of testimony. Washington procedure for this purpose had previously existed.[24] This rule, strictly speaking, does not deal with discovery, and the change effected by the adoption of the federal rule is not a seismic one. However, the new rule is more comprehensive and does constitute an improvement over the old statute.

Rules 28, 29, 30, and 32. Rule 28 specifies the persons before whom a deposition may be taken. Rule 29 provides that by stipulation the parties may take a deposition before any person, at any time or place,

[24] REM. REV. STAT. § 1249 *et seq.* [P. P. C. § 43-1 *et seq.*].

upon any notice, and in any manner. Rule 30 deals with the mechanics of taking an oral deposition and provides safeguards against abuses; it also makes provisions for motions to terminate or limit the examination. Rule 32 deals with objections, errors, irregularities, and waiver.

Rule 31. Before the adoption of new Rule 31 there was no procedure in the state of Washington authorizing the taking of a pre-trial discovery deposition upon written interrogatories. Old Rule 7 provided for oral examination before trial but restricted it to parties. Under Rule 31 a pre-trial discovery deposition may be taken of any witness upon written interrogatories.

Rule 33. Prior to the adoption of Rule 33 there was a procedure in this state known as "interrogatories to parties."[25] Under it the plaintiff at the time of filing his complaint, or afterwards, and the defendant at the time of filing his answer, or afterwards, could file interrogatories with the clerk "for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party."

This statute looks very much like a tool for discovery before trial. However, its looks are deceiving. It was passed in its present form by the territorial legislature in 1854. It is merely a codification of the old equity practice, a method by which a pleader obtained admissions in support of his own case, not a tool for discovering what his opponent's case might be about. In an unbroken line of authority, beginning with *Cully v. Northern Pacific Railroad,*[26] and perhaps ending with *State* ex rel. *Bronson v. Superior Court,*[27] the Supreme Court gives the statute a very narrow interpretation, holding that interrogatories must be limited to eliciting information in support of the case of the person propounding them and cannot be used for a fishing expedition.

This history makes it clear that Rule 33 regarding interrogatories to parties is indeed an innovation. It follows verbatim the federal rule to the effect that any party may serve upon any adverse party written interrogatories to be answered under oath. The scope of the interrogatories is specifically made as broad as the scope of depositions under Rule 26.

Rule 34. Prior to the new rule we had a statute[28] dealing with inspection of books and documents. It provided that the court may order a party to permit the inspection and copying of "any book, document

[25] REM. REV. STAT. § 1226 *et seq.* [P. P. C. § 42-3 *et seq.*].
[26] 35 Wash. 241, 77 Pac. 202 (1904).
[27] 194 Wash. 339, 77 P.(2d) 997 (1938).
[28] REM. REV. STAT. § 1262 [P. P. C. § 42-1].

or paper in his possession, or under his control containing evidence relating to the merits of the action or defense therein." This, too, looks like a discovery procedure. However, it also was passed by the territorial legislature in 1854 and is subject to the restrictions mentioned in relation to Remington 1226. In other words, it is not a device for discovering what your opponent's case is about but is only an aid to you in obtaining evidence which is necessary for the proof of your own case.

The new rule, taken verbatim from the federal rule, authorizes the court to order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, and in addition authorizes the court to order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated object or operation thereon. The rule specifically states that the scope of the examination permitted is the same as that permitted by Rule 26.

Rule 35. Prior to the promulgation of this rule we had a statute[29] passed by the legislature in 1915, concerning physical examination of parties. It was limited to actions for damages for personal injuries.

The present new rule is more comprehensive. It provides that in any action in which the mental or physical condition of a party is in controversy the court may order a physical or mental examination. It has some interesting provisions calculated to elicit full discovery of the facts. Of course the party who is examined by the physician is curious as to what the physician will say. He is entitled upon request to a copy of the physician's report. However, if he exercises this privilege, the rule obliges him upon request to deliver to the other party a like report of any examination previously or thereafter made of the same mental or physical condition by other doctors. If he refuses to deliver such report, the court on motion may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such report the court may exclude his testimony. The rule further provides that by requesting and obtaining a report of the examination the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

[29] REM. REV. STAT. § 1230-1 [P. P. C. § 42-13].

Rule 36. This rule, dealing with the admission of facts and genuineness of documents, is one of the few that our court had previously adopted. It was old Rule 21. The present rule does nothing more than to bring it up to date by including the 1946 amendment of the federal rule.

Rule 37. This rule provides an arsenal of sanctions. Among other things, refusal to make discovery may result in an order requiring payment of expenses and attorneys' fees, an order adjudging one in contempt of court, or an order for arrest. It may also result in an order that the facts claimed by the proponent are deemed to be true, an order restricting defenses or evidence, or orders striking pleadings, staying proceedings, dismissing the action or rendering a default judgment.

The adoption of the federal discovery procedure by the new rules is a great advance. It is regrettable that our court did not go one step further and adopt federal Rule 56 dealing with summary judgments, which provides in substance that either party to a suit may move with or without affidavits for a summary judgment in his favor, and that, if the court examines the complete files and finds there is no real issue in the case, although an issue is made by the pleadings, he may enter a summary judgment. The theory behind this procedure is that although formal issues are made by the pleadings, there may be no real issue about the facts of the case. A general denial may be interposed to a complaint, and then on the trial the defendant may not be able to controvert any of the facts of the plaintiff's cause of action. This often happens where an answer is put in merely to stall the case along. Even where valid issues are made by the pleadings, it very often happens that as a result of a diligent exercise of the discovery procedure it develops from the admissions and depositions in the file that there is no real issue to be submitted to the jury. In such circumstances, upon motion for a summary judgment, the case should end right there. The federal rule gives the court the power to end the case there. Unfortunately we have not adopted federal Rule 56, so our courts continue to lack this authority.[30] Our Rule 19, dealing with a motion for judgment on the pleadings, is not a sufficient substitute. That rule was probably adopted to overcome the result of the decision in *State v. Vinther*.[31] As I interpret the rule, one is entitled to judgment on the

[30] See the excellent comment on summary judgments by JoAnn R. Locke in 25 WASH. L. REV. 71 (1950).

[31] 183 Wash. 350, 48 P.(2d) 915 (1935), *aff'd on rehearing,* 186 Wash. 691, 58 P.(2d) 357 (1936).

pleadings only when there is no material issue made by the pleadings. Here we are contemplating a situation where there is an issue made by the pleadings, but where as a result of the discovery process the material in the files, including admissions and depositions, makes it abundantly clear that the issue in the pleadings is a pure sham. Under our present procedure the judge may not give a summary judgment.

Other Changes. When one has discussed the discovery process, he has practically exhausted the significant changes in the rules of pleading, practice and procedure. A few minor changes are made here and there aiming at simplification or clarification, and there are a few new rules. Rule 39 deals with receivers. It does not purport to cover this subject completely and must be construed with the other statutory material regarding receivers and receiverships.[32]

Rule 40 deals with jury fees. It, too, must be construed with other statutory material regarding juries and jury fees.

Rule 41 provides that whenever a final report and petition for distribution, or either, shall have been filed in the estate of a decedent, and a day fixed for the hearing of the same, the personal representative shall cause to be mailed a copy of the notice of the time and place fixed for the hearing to each heir or distributee whose name and address is known to him and file proof of such mailing. This is a correction of one of the supposed deficiencies in the probate code.

Rule 42, concerning the testimony of an adverse witness, apparently covers Remington 1228 to 1230 and incorporates in the rule part of the statutory material concerning evidence.

Rule 43 is new and adopts verbatim federal rule 49 concerning special verdicts and interrogatories. This is distinctly an improvement over previous practice in this state. Formerly, although the trial court had the discretionary power to submit special interrogatories to the jury to be answered in connection with its general verdict, he did not have the power to determine whether or not a special verdict should be returned.[33] Our code made it discretionary with the jury, which, of course, never chose to exercise it. Hence special verdicts have been practically unknown. The new rule places the discretion where it belongs—with the trial court. In many types of cases special verdicts are far superior to general ones, and under the new rule we may expect to see them used more frequently. Judge Driver's recent articles on the subject will be most helpful to the bar.[34]

[32] It merely supplements REM. REV. STAT. § 740 *et seq.* [P. P. C. § 91-1 *et seq.*].
[33] REM. REV. STAT. § 364 [P. P. C. § 100-5].
[34] Driver, *A Consideration of the More Extended Use of the Special Verdict,* 25

General Rules of the Superior Courts

Volume 34-A Washington Second also revises the General Rules of the Superior Courts. The following table indicates the changes made:

Rule	*Source*	*Degree of change, if any*
1	Old rule 1	No change
2	Old rule 2	No change
3	Old rule 3	No change
4	Old rule 4	No change
5	Old rule 5	Substantial change
6	Old rule 6	Slight change
7	Old rule 7	No change
8	Old rule 8	Slight change
9	Old rule 9	No change
10	Old rule 10	No change
11	Old rule 11	No change
12	Old rule 12	No change
13	Old rule 13	Substantial change
14	Old rule 14	No change
15	Old rule 15	No change
16	Remington 399	Minor change
17	New	Major change
18	Old rule 17	No change
19	Old rule 18	No change
20	Old rule 19	No change
21	Old rule 20	No change
22	Old rule 21	No change
23	Old rule 22	No change
24	Old rule 23	No change
25	Old rule 24	No change
26	Old rule 25	No change
27	Old rule 26	No change
28	Old rule 27	No change
29	Old rule 28	No change
30	New	
31	New	

WASH. L. REV. 43 (1950); Driver, *The Special Verdict—Theory and Practice*, 26 WASH. L. REV. 21 (1951).

No change whatever has been made in twenty-three of the rules, minor changes have been made in two, substantial changes have been made in two, and four new rules have been added.

Rule 5. New Rule 5, dealing with divorce actions, differs from old Rule 5 in that two matters are deleted. This is merely to make the rule conform to the new divorce act.

Rule 13. This rule, dealing with proposed instructions to juries, makes some minor changes in phraseology and then adds the following: "Upon request of the trial judge, made not less than ten days before the date of trial, counsel shall prepare and deliver to the trial judge and to opposing counsel, not less than three days before the day on which the case is set for trial, the required number of copies of proposed instructions insofar as counsel may then be able to determine them."

Rule 16. There was nothing in the old rules comparable to new Rule 16 which deals with new trials. All that Rule 16 does is to copy verbatim Remington 399 as amended which sets forth the grounds for new trial, and then the rule proceeds to add one additional ground, No. 9, as follows: "that substantial justice has not been done." It follows this by requiring the trial judge, upon granting or denying a motion for a new trial, to give definite reasons of law and fact for so doing.

Additional ground No. 9 was apparently added merely to declare existing law and practice, since the Supreme Court for many years has been committed to the proposition that the trial court may grant a new trial on the ground that substantial justice has not been done, even though this was not one of the grounds specified in the statute.

The provision in the new rule requiring the trial court to give definite reasons of law and fact for either granting or denying a motion for a new trial was apparently inserted to correct the situation which was so eloquently discussed by Justice Hill in the case of *Coppo v. Van Wieringen.*[35] Justice Hill pointed out in that opinion that during the course of the years the Supreme Court has taken the position that if the trial court grants a new trial without assigning a reason or merely on the ground that substantial justice has not been done, the Supreme Court is powerless to review his action because of the intangible elements which may have influenced his judgment. This Justice Hill deplores. Apparently it was thought that if the new rule required a trial court to give definite reasons of law and fact for his action the

[35] 136 Wash. Dec. 110, 217 P.(2d) 294 (1950).

appellate court would be in a better position to review the ruling and determine whether or not it constituted an abuse of discretion.

Rule 17. This rule succinctly provides, "The trial court shall make findings of fact in all equity cases, and in all law cases tried before the court without a jury."

This changes the law insofar as equity cases are concerned. In a long line of cases the Supreme Court has held that although the trial court is not obliged to make findings of fact in equity cases yet, if it does so they will be given great weight in the Supreme Court.[36] This rule now makes it obligatory upon the part of the trial court to make findings of fact in equity cases.

Rule 30. This rule provides that when more than one year has elapsed after the service of summons in a civil action the court shall not default the defendant or enter judgment against him until a written notice of the time and place of the application for such order is given to the defendant and proof of such notice by affidavit duly made and filed. This seems to be a salutary rule, and there are good reasons for it. The courts are often used as collection agencies. After a suit has been filed and summons served upon the defendant, in many cases the defendant will make arrangements to pay the indebtedness perhaps in instalments. He may be lulled into a sense of security in the belief that as long as he keeps up his payments no judgment will be entered against him. This rule is calculated to make it impossible for one to take an unconscionable advantage of a defendant in such a situation.

Rule 31. This rule enlarges the powers of a visiting judge to consider arguments, sign findings of fact, conclusions of law, judgments and post-trial orders anywhere within the state. Whatever inconvenience this rule may cause counsel is probably more than compensated for by the convenience which it affords the visiting judge.

General Comments

The late Justice Cardozo has said that "the considerations of policy that dictate adherence to existing rules where substantive rights are involved, apply with diminished force when it is a question of the law of remedies."[37] Inadequate or defective rules of procedure should be revised whenever their deficiencies become manifest. Procedural rules are not an end in themselves. They are servitors of justice. If the ends

[36] For recent representative cases, see Carey v. Powell, 32 Wn.(2d) 761, 204 P.(2d) 193 (1949); Osawa v. Onishi, 33 Wn.(2d) 546, 206 P.(2d) 498 (1949).

[37] The Nature of the Judicial Process 156 (Oxford University Press, 1925).

of justice may be better served by further amendments and additions, they should be made without question. No system of procedure was ever devised which did not need further modification and improvement. One of the most thorough studies of procedure in this country was made by the committee apointed by the U. S. Supreme Court, which drafted the new rules of procedure for the federal courts. These were adopted in 1938. Less than ten years later it became necessary to make substantial amendments to these rules. It will undoubtedly be necessary to make further amendments in the future.

This all adds up to one thing: notwithstanding the really notable accomplishments effected by our new rules, our task is not done. Procedural reform is a continuing process, and we must be alert, constantly seeking a better way, if we are not to stagnate as did the common law under the restrictive writ system. I do not suggest that procedural rules should be kept in a constant state of flux, but sometime in the future further revision of our rules is inevitable. I should like to point out a few of the matters which I hope will receive consideration when that time comes.

First, in regard to the rules on appeal, there is a modern tendency to eliminate multiple jurisdictional requirements.[38] One of the maxims of our Anglo-American tradition is that every man is entitled to his day in court. In the past this has been interpreted as meaning his day in the trial court. In the absence of constitutional guarantee, appeal is not a matter of right and can be granted or withheld at the whim of the lawmaking body.[39] Until comparatively recently statutes and rules regulating appeals set up numerous hurdles in the way of jurisdictional steps. It was only the skillful practitioner who could successfully negotiate all of these hurdles and get his case heard on the merits in the appellate court. Innumerable cases were thrown out upon technical grounds for failure to comply with jurisdictional requirements. This used to be true in the federal courts. The new federal rules adopted a different attitude toward appeal. They made only one step jurisdictional, to wit, the giving of the notice of appeal. Rule 73(a) provides, "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." Illinois[40] and Michigan[41] have similar provisions. In the

[38] SUNDERLAND, CASES AND MATERIALS ON TRIAL AND APPELLATE PRACTICE 631 (2d ed., 1941).
[39] Bishop v. Illman, 9 Wn.(2d) 360, 115 P.(2d) 151 (1941).
[40] ILL. ANN. STAT., 1936, c. 110, § 76 (2).
[41] 1939 Michigan Court Rules, Rule 56.

present rules the Washington Supreme Court has softened the jurisdictional steps for appeal but has not cut them down to the desired minimum. Especially is this true in regard to the jurisdictional necessity of the statement of facts. So much for the rules on appeal.

If it is desirable to have handily in one volume all of the rules relating to appeal, I submit that it is equally desirable to have handily in one volume all of the rules relating to practice in the superior courts. The present rules do not make any attempt to so consolidate the material. A reading of the rules of practice and procedure gives one the impression that like Topsy they just grew. Their coverage is extremely heterogeneous. They deal mostly with civil actions in the superior court. However, Rules 12 and 15 deal with criminal procedure. Rule 5 deals with justice court procedure as well as with garnishment. Rules 24 and 41 deal with probate, and Rule 39 deals with receivers. Nor is there any attempt to cover any of these subjects completely. Counsel must also consult the general rules of the superior courts and the statutes, either Remington or Pierce, which do not always agree. The general rules of the superior courts are also of a heterogeneous nature. They cover mostly civil practice in the superior courts, but Rules 11 and 27 deal with criminal practice, Rules 19 and 21 deal with probate practice, and Rules 18 and 19 deal with receivers.

The coverage of the rules of practice and procedure and the general rules of the superior courts is overlapping. The following subjects are touched upon by both sets of rules: service of papers; amendments; charge to the jury; findings and conclusions; criminal procedure; motions; probate; evidence and witnesses; and receivers.

Why it is necessary to have two sets of rules, both dealing with the same subject matter and both purporting to regulate procedure in the superior courts, I am at a complete loss to understand. I can find no logical reason why certain matters are governed by the rules of practice and procedure, some by the general rules of the superior courts, others are left to regulation by statute, and some are governed by all three.

We adopted our code of civil procedure in 1854, patterning it after the New York code. Subsequent legislatures modified it from time to time, making a change here and an amendment there. After the legislature delegated to the Supreme Court the rule-making power, it did not entirely wash its hands of the whole subject of procedure in the courts. In 1943 it enacted Chapter 206 which is solely and simply a repealing statute. Perhaps the legislature felt that, since the Supreme

Court had occupied the field, it would be a good idea to repeal some of the outmoded sections of the code. This, of course, was unnecessary since a rule which is in conflict with or supersedes a provision of the code takes precedence over it. However, in Chapter 206 the legislature repealed many pre-existing sections of the code, among which were Remington 189, which defined necessary parties and contained the usual code provision that one who would normally be a plaintiff but who was unwilling to join might be made a defendant. This repeal left us without such a provision, or for that matter any definition of who are necessary parties. Chapter 206 also repealed Remington 339 which outlined the manner and mode of conducting jury trials, the right to open and close, opening statements, sequence of evidence and the manner of instructing the jury. This repeal left us with a gap which is only partially closed by Rule 8 of the rules of practice and procedure, which is confined to the manner of instructing the jury and the closing arguments of counsel.

Piecemeal reform is better than none, but it has its disadvantages. Where a legislature or a court modifies a particular section of the code or a rule and attempts to modernize it, strange results may be produced because modifications in other areas of procedure which may be affected thereby are not considered. I would like to illustrate this point by showing what has happened in Washington as a result of an attempt to liberalize our procedure in regard to permissive joinder of parties.

Under the common law which grew up in a nonindustrialized, noncommercial society under the stringent restrictions of the writ system, there was no such thing as mere permissive joinder of plaintiffs or defendants. Unless multiple parties were asserting or defending joint rights they were not permitted to join or be joined. Today, in a highly mechanized society where court dockets are crowded and time is at a premium, we feel that it is desirable to shorten litigation. Where several plaintiffs or several defendants, for that matter, are involved in a transaction which results in litigation and where there are common questions of law and fact which affect all of the parties, we feel it is socially desirable to dispose of the whole matter in one suit rather than in several, if that can be done without prejudice to the rights of the parties. Hence the modern tendency is toward a very liberal policy of permissive joinder of parties, plaintiffs, or defendants. To accomplish this result, England liberalized its procedure in 1896 by adopting a

rule[42] to the effect that all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise. The rule contains a proviso that if such joinder would embarrass or delay the trial the court may order separate trials. The rule further provides a like permissive joinder of parties defendant where there are common questions of law or fact. Many American states followed the lead of England and revised their codes or adopted rules to accomplish the same result. When the Washington Supreme Court promulgated its first set of rules of practice and procedure in January of 1927, it purported to carry out this reform by Rule 2. Curiously, the Court copied the English rule verbatim as to permissive joinder of plaintiffs but did not adopt the corresponding portion of the rule regarding permissive joinder of defendants. I am unable to perceive any logical reason why it would be socially desirable to provide for the one and not the other.

While embracing the modern philosophy regarding permissive joinder of plaintiffs, the Supreme Court did nothing toward liberalizing Remington 296 dealing with joinder of causes of action. This code section is the old-fashoned type which says the plaintiff may unite several causes of action in the same complaint when they all arise out of contract, etc., etc., giving eight different categories. It concludes with a clause, "but the causes of action so united must affect all the parties to the action. . . ." This type of provision was common in the early codes before the present philosophy regarding liberal joinder of parties emerged. One can see at a glance that if this code section remains in force it will tend to emasculate the liberal provision of Rule 2 regarding permissive joinder of plaintiffs because almost by hypothesis the several plaintiffs who unite for convenience are not similarly affected by the causes of action which are joined. For instance, where two plaintiffs who were injured in the same automobile accident join in suing one defendant for personal injuries, each plaintiff is interested in his own recovery and is not affected by nor interested in the recovery of his co-plaintiff. As a matter of fact, our Supreme Court held, in *Koboski v. Cobb*,[43] that such a joinder is permissible. However in the

[42] Rules of the Sup. Ct., Order xvi, Rule 1 *et seq.*
[43] 161 Wash. 574, 297 Pac. 771 (1931).

later case of *Lamb v. Mason*[44] there is dictum in the opinion which casts doubt upon the validity of this type of joinder.

Even assuming that Rule 2 has *pro tanto* repealed Remington 296 as far as plaintiffs are concerned, since Rule 2 does not contain anything about permissive joinder of defendants, it cannot logically be argued that Remington 296 is repealed as far as defendants are concerned. This presents an anomalous situation.

The same considerations of public policy which dictate that several parties may join in the same suit where convenience can be served, and where there are common questions of law or fact to be tried, also dictate that all claims which one party has against another should be united in the same complaint so that the sum total of the controversies can be disposed of in one action. This is the position taken by the new federal rules. If we are going to liberalize our rules regarding joinder of parties, we should also liberalize our rules regarding joinder of causes of action. The federal rule which permits unlimited joinder of causes of action is federal Rule 18, subsection (a). Subsection (b) of federal Rule 18 concerns a specialized type of situation where two causes of action can be joined. Perhaps the framers of the rules thought this was necessary because it constituted a departure from the former separation of law and equity in the federal courts. We have done a very curious thing. By Rule 18 of our rules of practice and procedure we have adopted the last half of federal Rule 18, which probably was unnecessary in view of our code, and we have failed to adopt the first half of federal Rule 18 which would have liberalized our law in regard to joinder of causes of action.

These are matters for the future. In the meantime Washington lawyers will be operating under improved and simplified rules relating to appeals and they will be enjoying the benefits of the discovery procedure.

[44] 26 Wn.(2d) 879, 176 P.(2d) 342 (1947). *Cf.* Parrish v. Ash, 32 Wn.(2d) 637, 203 P.(2d) 330 (1949), noted in 25 WASH. L. REV. 92 (1950).