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William S. Stinnette

John A. Gose

Vincent L. Gadbow

PRACTICE AND PROCEDURE

Pre-Trial Discovery—Failure to Reveal Information—Remedies. In two cases coming before the Washington court in the past year, problems have arisen as to the appropriate sanctions to be invoked against a litigant who conceals information sought to be obtained on discovery or who refuses to answer questions propounded on discovery. In *Sather v. Lindahl,*[1] the plaintiff denied knowing of any witnesses to the accident in question in response to a question put to him on discovery. At the trial, the plaintiff produced four eyewitnesses. On cross examination it appeared that they had been known to the plaintiff at the time his deposition was taken. The only relief sought by the defendant was by way of a motion for a mistrial made after the plaintiff's closing argument to the jury. The court held that relief should have been sought by a timely objection to the witnesses being allowed to testify, or a motion to strike should the witnesses have been permitted to testify. In the absence of such timely action, relief is not available either by way of a motion for a mistrial or a motion for a new trial.

The instant case is not a holding that the remedy of mistrial is not appropriate. Rather, it is an application of the principle that objections not timely made are deemed waived.[2] The court catalogues the available remedies in this manner: "The trial judge can sustain such an objection and refuse to permit the witness to testify or can order his testimony stricken; or he can grant a continuance to give the surprised party an opportunity to investigate the witness and secure rebuttal testimony; and it is possible that, under circumstances in which no other relief or penalty could remedy the situation created by the deception, he could grant a mistrial."

In *Kagele v. Fredrick,*[3] the court is confronted with the problem of the litigant who fails to respond to interrogatories within the period of time for filing answers. The defendant submitted written interrogatories to the plaintiff. No answers were served until the day before the trial, some forty-one days after the interrogatories were first submitted. The defendant moved to strike the complaint and to dismiss the action. The trial court refused. On appeal, the trial court's action was held not to be an abuse of discretion upon two grounds: (1) this was not a *failure to answer* interrogatories for which a penalty is provided but

[1] 143 Wash. Dec. 428, 261 P.2d 682 (1953).
[2] State v. Shock, 41 Wn.2d 572, 250 P.2d 516 (1952).
[3] 143 Wash. Dec. 378, 261 P.2d. 699 (1953).

a *delay in answering* for which no penalty is provided, and (2) the striking of a complaint for failure to answer interrogatories is such a harsh remedy that it will not be granted except upon a clear showing of prejudice.

The parties and the court alike consider only the procedure for the submission of interrogatories set out in RCW 5.04. RCW 2.04.190 authorizes the court to promulgate rules of pleading, practice and procedure. This the court has done by adopting those rules now contained in 34A Wn.2d, including an excellent set of rules governing discovery proceedings.[4] In addition to giving to the court this rule making power, the legislature has declared that when rules of court shall have been promulgated in accordance with that statute, all laws in conflict therewith shall become of no further force and effect.[5] The procedure prescribed in RCW 5.04.020 and RCW 5.04.030 varies materially from that prescribed in Rules of Pleading, Practice and Procedure 33.[6]

It would be unfortunate were the approach here used by the court applied to cases arising under the discovery sections of the Rules of Pleading, Practice and Procedure. The adoption by the court of the rules contained in 34 A Wn.2d has been described as "a landmark in the history of procedural reform in the state of Washington."[7] One of the fundamental objectives of those rules, particularly the rules dealing with discovery, was the elimination of the sporting theory of litigation which embodies the idea of concealing as much as possible from your adversary in the hope that he can be surprised out of court. This object can be accomplished only by judicial interpretation of the rules which is designed to preserve their integrity and effectiveness. It remains to be seen how well the grounds of decision employed in the instant case meet the standard here suggested.

The court asserts that the plaintiff here did not fail to answer the interrogatories submitted but merely delayed his answer. Judicial countenance of the practice of delaying answer to interrogatories until the last possible minute before the trial is hardly consistent with the suggested objective of the discovery rules, the elimination of surprise as a major factor in the trial of a lawsuit. In addition, if, as the court suggests, a failure to serve answers to interrogatories within the time

[4] RULES OF PLEADING, PRACTICE AND PROCEDURE 26 through 37, 34A Wn.2d 84 et seq.
[5] RCW 2.04.200. *See* Nicktovich v. Olympic Motor Transit Co., 148 Wash. 410, 269 Pac. 337 (1928).
[6] 34A Wn.2d 97.
[7] Green, *Procedural Progress in Washington*, 26 WASH. L. REV. 87 (1951).

limited by the rule (or statute) is not to be considered a failure to answer, then the court has deprived the express time limit contained in the rule of all effect. The federal courts, in applying their discovery rule[8] which is verbatim with the Washington rule, have not had occasion to deal squarely with this question, but a federal court has indicated that when no answer has been submitted within the time limited by the rule, there has been a failure to answer.[9]

The court also relies upon the lack of a clear showing of prejudice to the interrogating party resulting from the adverse party's failure to comply with the discovery procedure. In those cases in which the court had occasion to apply the sanctions for failure to make discovery authorized by RCW 5.04.060, a showing of prejudice was required as a condition precedent to the availability of the remedies therein provided.[10] No Washington cases have been found in which the sanctions made available by Rules of Pleading, Practice and Procedure 37[11] have been granted or denied on the merits. The federal courts, in applying the federal equivalent of this rule,[12] seem to look not to the injury to the complaining party caused by the failure to make discovery, but instead look to the motive or purpose of the adverse party in refusing to make discovery.[13] Such an approach, it is submitted, is better calculated to preserve the vitality of the discovery process.

WILLIAM S. STINNETTE

Denial of New Trial—Duty of Trial Court to Give Reasons. *State v. Arnold*[14] added another step to Rule 16, Rules of the Superior Court.[15] The pertinent portion of the rule provides:

> In all cases wherein the trial court grants or denies a motion for a new trial, it shall, in the order granting or denying the motion, give definite reasons of law and facts for so doing.

In the *Arnold* case, the trial court denied a motion for a new trial but did not enter a written order stating the reasons for denying the motion. The defendant did not complain of this violation of Rule 16 until his appeal. The court held that in order to take advantage of the

[8] FEDERAL RULES OF CIVIL PROCEDURE 33, 28 U.S.C.A. 245.
[9] Dann v. Compagnie Generale Trans-Atlantique, 29 F. Supp. 330 (DCNY 1939).
[10] Gostina v. Whitham, 148 Wash. 72, 268 Pac. 132 (1928).
[11] 34A Wn.2d 101.
[12] FEDERAL RULES OF CIVIL PROCEDURE 37, 28 U.S.C.A. 342.
[13] Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (C.A.Mich. 1949); Dunn v. Pennsylvania Railroad Co., 96 F. Supp. 597 (D.C.Ohio 1951).
[14] 143 Wash. Dec. 57, 259 P.2d 1104 (1953).
[15] 34A Wn.2d 118 (1951).

above quoted section of Rule 16, the trial court's attention must be called to the rule and compliance therewith requested.

Two previous cases touched on the rule.[16] In the case of In Re *Dands Estate,*[17] the court denied a motion for a new trial. The counsel for the appellant approved as to form the order denying the new trial. The court held that counsel could not for the first time on appeal question the form of the order. In the case of *Mulka v. Keyes,*[18] the trial court granted a new trial and in compliance with Rule 16, assigned the reasons therefor. The court reversed this decision and granted judgment for the plaintiff according to the verdict. The court held that the reasons for granting a new trial were not sufficient. In the *Mulka* case, the court made no mention of having to call the trial court's attention to Rule 16.

There is an apparent tendency on the court's part to distinguish (1) orders granting a motion for a new trial and (2) orders denying a motion for a new trial. In cases involving an order granting a new trial, the *Mulka* case holds that Rule 16 operates to require that the reasons in support of it be sufficient and does not suggest that the trial court's attention must be directed to the rule to take advantage of it on appeal. Whereas in cases involving the denying of a motion for a new trial, it is necessary to call the trial court's attention to Rule 16 before the rule can be taken advantage of on appeal.[19] Such an interpretation seems in line with the background of the rule.[20]

The rule was promulgated as a result of the case of *Coppo v. Van Wieringen.*[21] In the *Coppo* case, Justice Hill indicated the Supreme Court would be able to perform the appellate function more effectively if the trial court was required to state reasons of law and fact for the granting of the new trial order.[22] Only passing mention was made of orders denying a new trial in *Coppo* case. As has been pointed out,[23] the *Coppo* case stressed that the rule should be non-adversary in nature. That is, the rule is for the court's benefit so it can rule intelligently and by implication it should not have to be pressed on the trial court.

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[16] Mulka v. Keyes, 41 Wn.2d 427, 249 P.2d 972 (1952) noted in 28 WASH. L. REV. 241 (1953); *In Re* Dand's Estate, 41 Wn.2d 158, 247 P.2d 1016 (1952).

[17] 41 Wn.2d 158, 247 P.2d 1016 (1952).

[18] 41 Wn.2d 427, 249 P.2d 972 (1952).

[19] State v. Arnold, 143 Wash. Dec. 57, 259 P.2d 1104 (1953); *In Re* Dand's Estate, 41 Wn.2d 158, 427 P.2d 1016 (1952).

[20] Coppo v. Van Wieringen, 36 Wn.2d 120, 217 P.2d 294 (1950) note in 26 WASH. L. REV. 87, 109 (1951) and 28 WASH. L. REV. 241 (1953).

[21] Note 20 *supra.*

[22] See Note, 28 WASH. L. REV. 241 (1953).

[23] 26 WASH. L. REV. 87, 109 (1951).

The draftsmen of the rule added the phrase "or denying" which was not the situation to which Justice Hill had reference in the *Coppo* case. Faced with a situation involving the denial part of the rule, the court in the *Dand's* case and the instant case made the denial part of the rule adversary in nature. That is in order to take advantage of Rule 16 when the court has denied a motion for a new trial, one must call the trial court's attention to the rule. Such a rule making the denial part of Rule 16 adversary in nature seems sound. There are two considerations that support this conclusion. In the first place, the court said, "This court does on occasion reverse judgments, set aside verdicts and send cases back for new trials after trial judges have refused to grant them; usually, however, because of the erroneous instructions, error in admitting or refusing to admit evidence or other errors of law.",[24] and secondly, Rule 16(8)[25] which requires that such rulings be excepted to at the time. Thus, it would seem that if the "or denying" phrase had been left out of Rule 16, an appeal from a motion denying a new trial would in effect be an appeal from the judgment of the case and as pointed out above, such an appeal would have to be predicated on adequate foundation, that is, exceptions taken at the time. In other words, an appeal from a denial of a motion for a new trial would be adversary in nature without Rule 16. The court, by adding this other step and making Rule 16 adversary in so far as the "or denying" phrase is concerned, has in effect reached the same result as if it had deleted the "or denying" phrase from the rule.

It is submitted that the rule set out in the instant case does not apply to cases where the court grants a motion for a new trial. In such cases, one should not have to call the court's attention to the rule in order to take advantage of it on appeal. For as has been pointed out,[26] the *Coppo* case stressed that the rule should be for the benefit of the court and if the court made the rule adversary in nature, it would deprive itself of the very thing Justice Hill indicated the court desired in promulgating the rule.[27]

Jury—Failure to Administer Oath Prior to Voir Dire. In *State v. Tharp*,[28] no oath was administered to the prospective jurors prior to the voir dire examination. The defendant discovered this in the early

[24] Note 20 *supra*.
[25] SUPERIOR COURT RULE 16(8), 34A Wn.2d 117.
[26] Note, 26 WASH. L. REV. 87, 109 (1951).
[27] Note 20 *supra*.
[28] 42 Wn.2d 494, 256 P.2d 482 (1953).

stages of the trial but neither objected nor called the court's attention to this omission until after the verdict when a motion for a new trial was made and denied. The Supreme Court ruled that while the trial court should administer an oath prior to the voir dire examination, failure to do so was not reversible error when the defendant having knowledge of this fact did not object until after the verdict. This rule is in line with the authorities in other jurisdictions.[29]

Washington has no statute requiring an oath before the voir dire examination. It is, however, an element of the trial by common law.[30]

The instant case implies that it is error not to administer the oath prior to the voir dire examination. However, in order for the omission of the oath to be *reversible error,* one must show either prejudice arising from the omission *or* that he did not waive the right to object. The defendant did not show either in the instant case.

The first basis the court used for holding the defendant did not come within the rule was that the defendant was not prejudiced by the omission of the oath. In order to show prejudice arising from the omission of the oath, the court held the defendant must first show that he exercised all his peremptory challenges and yet a disqualified person was allowed to serve on the jury by reason of the omission. In the alternative, he must show that he was in some other way prejudiced by the omission.

The second basis the court used was that examination of the jurors is procedural rather than jurisdictional. On this reasoning, omission of the preliminary oath would be an error of the trial court to which an exception would have to be taken at the time in order to assert the error on appeal. By not excepting at the time, the defendant waived his right to object later.

The two lines of reasoning used by the court leave these questions unanswered: If the defendant does not take an exception, and, after he exercises all his peremptory challenges, a disqualified person is allowed to serve on the jury, is such reversible error? On the other hand, if the

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[29] 50 C.J.S. 1057 (Juries, Sec. 276b) (1947). "As a general rule a preliminary oath should be administered before questions of the voir dire examination are prepounded. . . . It has been held however that in the absence of a statute, it may not be improper to conduct the examination without administration of the oath to the proposed juror, especially where no request is made therefore, and, if it is inadvertently omitted, and the attention of the court is not called thereto, it is too late after the verdict to make the objection for the first time."

[30] State v. Lloyd, 138 Wash. 8, 244 Pac. 130 (1926); State v. Harold, 68 Wash. 654, 123 Pac. 1076 (1912).

party does not show prejudice but does object, does he now have error to assert on appeal?

Trial without Jury—Incomplete Findings of Fact—Motion to Vacate Judgment. In the case of *Bowman v. Webster*[31] the question before the supreme court was: where a trial court sits without a jury must it make findings of fact as to the material issues involved? The court answered the question in the affirmative and reversed and remanded the case with instructions to make and enter the necessary findings of fact. The court held that where a trial court sits without a jury, it must make the ultimate findings of fact as to the material issues involved. This holding is based on Rule 17 of the Superior Court[32] which restates a statutory provision which has stood since 1854.[33]

In the *Bowman* case, the court for the first time interprets Rule 15 of the Superior Court as amended March 27, 1952.[34] The pertinent portion thereof provides:

> A judgment entered without findings of fact having been made is subject to a motion to vacate, within the time for the taking of an appeal therefrom and after vacation shall not be re-entered until rule 17 has been complied with.

The court stated that this rule only applies in cases where there is a *complete absence* of findings of fact. The rule does not apply in cases such as the principal case where there are findings of fact but none as to the material issues involved.

Appealable Order—Suspended Sentence. Plea of Guilty as Precluding Appeal. In the case of *State v. Rose*,[35] the defendant was given probation and a suspended jail sentence which were revoked a year and a half later and the defendant was sent to the penitentiary.

The first question raised is can a defendant under such circumstances appeal. The defendant had been convicted a year and a half before the appeal was taken and rule 46(1), Rules on Appeal,[36] provides that an appeal must be taken within 30 days after entry of judgment. The court held that one can only appeal from a final judgment[37] and without a sentence there is no final judgment.[38] The suspended jail term was

[31] 42 Wn.2d 129, 253 P.2d 934 (1953).
[32] 34A Wn.2d 118.
[33] RCW 4.44.050.
[34] 34A Wn.2d (Pocket Part).
[35] 42 Wn.2d 509, 256 P.2d. 493 (1953).
[36] 34A Wn.2d 50.
[37] State v. Farmer, 39 Wn.2d 675, 237 Pac. 792 (1951).
[38] State v. King, 18 Wn.2d 747, 140 P.2d 283 (1943); note 37 *supra*.

not a sentence but merely a condition fixed by court relative to probation. Thus, in the principal case, there was no appealable order until the defendant's probation was revoked and he was sentenced to the penitentiary. The confusion on what is an appealable order and what is not arises from two statutes, RCW 9.92.060 and RCW 9.95.200,210. As the court said in *State v. Farmer*,[39] "There is a distinction under our statutes between a suspension of sentence where it has been pronounced but execution thereof suspended, [RCW 9.92.060] and a situation where the pronouncement of a sentence is suspended or deferred." RCW 9.95.200,210. In the former instance, the court has held that such is a final order and an appeal from a suspended sentence may be had.[40] In the latter instance, which is the situation with which the court is here faced, there is no final judgment and hence no appealable order.

In the second place, the state maintained that the defendant's plea of guilty in Superior Court precluded an appeal to the Supreme Court. The court applied the rule that it had applied to appeals from justice court to superior court:[41] that is, a plea of guilty precludes an appeal unless collateral issues are raised. This is the first time the court has actually stated the above rule but such a rule has been implied before.[42] In the instant case, the court held that collateral issues were raised and the appeal was allowed.

JOHN A. GOSE

Appellate Brief—Assignments of Error—Changes in the Rules. Appeals continued to be dismissed in 1953 for failure to comply with the requirements for setting out the assignments of error in the appellant brief. Those cases coming up under the rules prior to the amendments of January, 1953,[43] can be excused to some extent because of the ambiguity of the old requirements. The appeals dismissed under the amended rules,[44] however, are inexcusable. Carelessness of counsel

[39] Note 37 *supra*.

[40] State v. Liliopoulos, 165 Wash. 197, 5 P.2d 319 (1931).

[41] State v. Eckert, 123 Wash. 403, 212 Pac. 551 (1923); State v. Haddon, 179 Wash. 669, 38 P.2d 227 (1934).

[42] State v. McDowall, 197 Wash. 323, 85 P.2d 660 (1938). Defendant pleaded guilty but later sought to withdraw plea and plead not guilty. The motion was denied. Defendant was allowed to appeal from the judgment of the trial court. The bases of the appeal were abuse of discretion by the tr ial court in denying defendant the right to change his plea and denial of his constitutional rights in that he was not given a trial by jury.

[43] Cugini v. McPhail, 41 Wn.2d 804, 252 P.2d 290 (1953); Gilmartin v. Stevens, 143 Wash. Dec. 267, 261 P.2d 73 (1953).

[44] Paulson v. Higgins, 143 Wash. Dec. 73, 260 P.2d 318 (1953); Kaiser Aluminum and Chemical v. Dept. of Labor and Industries, 143 Wash. Dec. 538, 262 P.2d 536 (1953).

rather than ambiguity in the new rules is the reason for the dismissal of these appeals. Under the old rules, the only guides for the draftsman were the general statement in Rule 42, "Each error relied on shall be clearly pointed out and discussed under appropriately designated headings,"[45] and the more specific, but equivocal phrase in Rule 43, ". . . appellant must point out by number and description the finding of fact upon which he predicates error. . . ."[46]

The objective of the appellate brief, like the objective of all technical writing, is the clear and accurate presentation of ideas. The plan of organization is a formal one, designed to achieve a specific purpose through logically organized and lucidly developed composition. The purpose of the appellant's brief is to expedite apellate procedure by assisting the court and the respondent in determining the exact grounds upon which the appellant relies without recourse to the transcripts of the trial court.[47] To realize this purpose the requirements for setting out the grounds should be specific and unequivocal. Leaving the organizational plan to the whim of the individual draftsman defeats the primary purpose of the brief. Thus briefs on appeal will be improved, not by less stringent rules as a recent dissent suggests,[48] but by (1) a detailed and specific set of rules which admit of but one interpretation, and (2) a demand for strict compliance with the rules.

The new rule requiring a verbatim transcript of the portion of the finding or findings to which error is assigned is a step in this direction. Now the draftsman must (1) refer to the finding of fact by number in the "assignments of error" section of the brief;[49] (2) set out the portion of the finding verbatim somewhere in the brief;[50] and, (3) discuss the error relied on under appropriately designated headings in the brief.[51] The one point where more certainty could be achieved would be in fixing a definite place for the verbatim transcript in the different sections of the brief. Recently, the court suggested that the most logical place for the findings to be described under the old rule was in the "assignments of error" section.[52] To avoid confusion and create uniformity in the briefs, this suggestion might well have been made part

[45] RULE ON APPEAL 42, 34A Wn.2d 45.
[46] RULE ON APPEAL 43, 34A Wn.2d 47.
[47] Cugini v. McPhail, note 43 *supra.*
[48] Paulson v. Higgins, note 44 *supra. Held:* Motion to file amended appellant's brief must be made prior to filing of respondent's brief.
[49] RULE ON APPEAL 42, 34A Wn. 2d (1953 Amend.).
[50] RULES ON APPEAL 42 and 43, 34A Wn.2d (1953 Amend.).
[51] RULE ON APPEAL, note 45 *supra.*
[52] Cugini v. McPhail, note 43 *supra.*

of the new rule. Then this section alone would immediately achieve the objective desired by the court, that of informing the court and the respondent of the exact grounds relied upon by the appellant.

Other Changes in Rules on Appeal. *Rule 22. Bond for Costs.* Serving a copy of the appeal bond or written notice of a money deposit in lieu thereof on the adverse party is a necessary procedural step for perfecting an appeal under Rule 22. The old rule incidentally referred to this requirement with the statement, ". . . an appeal bond to the adverse party . . . be served and filed with the clerk of the superior court. . . ."[53] The new rule drops "served" from this part of the rule, but adds a statement spelling out the requirement. The addition reads, "At the time the appeal bond is filed or deposit in lieu thereof is made, a copy of the appeal bond or written notice of the deposit shall be served on the adverse party."[54]

Rule 32. Jurisdictional Requirements in Civil Causes. Service of a copy of the appeal bond or written notice of a money deposit is not referred to under the 1953 amendment as a jurisdictional step in perfecting an appeal. The old rule in referring to the necessity for filing an appeal bond required the appellant to ". . . give, *serve,* and file an appeal bond. . . ."[55] The amended rule omits the requirement of service by dropping the word "serve" from this phrase. As amended, the rule reads, "In order that the supreme court may secure jurisdiction of an appeal in a civil cause, the appellant must—give notice of appeal: *give and file* an appeal bond. . . ."[56]

Rule 33. Appeals and Cross-appeals in Civil Causes. Under the old rule an appeal bond had to be filed in the office of the clerk of the superior court within *five* days after the day of giving or filing of the notice of appeal.[57] A 1953 amendment to Rule 33 extends this period for filing the appeal bond from five days to *ten* days.[58]

Rule 46. Appeals in Criminal Cases. Subdivision (2) requiring the clerk of the superior court to prepare and transmit to the clerk of the Supreme Court copies of the judgment or order appealed from and a copy of the journal entry showing the giving of oral notice of appeal or a copy of the written notice of appeal has been changed in two ways.

[53] RULE ON APPEAL 22, 34A Wn.2d 26.
[54] RULE ON APPEAL 22, 34A Wn.2d Supp. 1 (1953 Amend.).
[55] RULE ON APPEAL 32, 34A Wn.2d 32.
[56] RULE ON APPEAL 32, 34A Wn.2d Supp. 2 (1953 Amend.).
[57] RULE ON APPEAL 33, 34A Wn.2d 35.
[58] RULE ON APPEAL 33, 34A Wn.2d Supp. 2 (1953 Amend.).

The rule as amended provides that the expense of preparing and transmitting these copies shall be borne by the public prosecution,[59] rather than, as under the old rule, by the appellant.[60] Further, each of these copies must be *certified* under the new rule. Under the old rule there was no express requirement of certification for the various copies sent to the clerk of the Supreme Court.

Rule 50. Petitions for Rehearing. Formerly an attorney receiving a petition for rehearing from the clerk of the court had to file an answer within fifteen days.[61] The rule as amended requires the attorney to serve a copy of the answer on opposing counsel in addition to filing it.[62] A further new requirement calls for a filing of *three* copies each of the petition for rehearing and of the answer with the clerk.

Rule 55. Costs on Appeals and Cost Bills. Under the old rule, if no cost bill is served and filed, cost of the transcript was assessed at ten cents per folio, and no provision was made for the clerk's discretion in assessing any less where the actual cost was less.[63] The amended rule provides that an assessment be made at the statutory rate rather than the flat ten cents a folio.[64] The statutory rate laid down by RCW 4.88.260 is ". . . any sum actually paid or incurred by the prevailing party as stenographer's fees, *not exceeding ten cents a folio,* for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts. . . ." The old rule laid down a single rate of assessment; the amended rule now provides for a maximum only and allows an assessment on the basis of the actual cost if under ten cents a folio.

Rule 57. Other Original Writs. Certain governmental bodies did not have to make a deposit of twenty-six dollars upon application for original writs other than writs of habeas corpus under Rule 57. Those excepted from making such a deposit included the Federal government or any of its agencies, the state, any municipal corporation, or any officer prosecuting on behalf of a municipal corporation. The rule as amended drops the Federal government and its agencies from this list, adds the county, and details the local governmental units favored by the exception. The old rule read, "At the time of filing the application, the petitioner shall deposit with the clerk, except when the petitioner

[59] RULE ON APPEAL 46, 34A Wn.2d Supp. 4 (1953 Amend.).
[60] RULE ON APPEAL 46, 34A Wn.2d 50.
[61] RULE ON APPEAL 50, 34A Wn.2d 55.
[62] RULE ON APPEAL 50, 34A Wn.2d Supp. 5 (1953 Amend.).
[63] RULE ON APPEAL 55, 34A Wn.2d 60.
[64] RULE ON APPEAL 55, 34A Wn.2d Supp. 5 (1953 Amend.).

is the state or any municipal corporation, or any public officer prosecuting on behalf of said municipal corporation, or the Federal government, or any of its agencies, the sum of twenty-six dollars. . . ."[65] The rule as amended reads, ". . . except when the petitioner is the state, or a *county, city, town,* or *school district* thereof, or any public officer prosecuting on behalf of the state or one of such municipal corporations. . . ."[66]

VINCENT L. GADBOW

Appellate Procedure—Appeal Bond—Cash Deposit in Lieu of. In *Salter v. Heiser,* 143 Wash. Dec. 182, 260 P.2d 882 (1953), a certificate was filed with the clerk stating that cash had been deposited with the clerk of the superior court in lieu of a bond on appeal. The cash referred to had been deposited on prior appeals, $1400 of which had not been withdrawn. The court held that even though money was on deposit with the clerk, the money had not been subjected to the conditions of an appeal bond in the instant appeal and thus did not constitute a deposit in lieu of a bond in conformance with Rule on Appeal 22, 34A Wn.2d (1951 amend.).

PROPERTY

Real Property—Mistake as to Boundary Line—Hostile Intent Requirement in Adverse Possession. *Brown v. Hubbard*[1] was an action to quiet title by adverse possession to a strip of land eight and one-half feet wide lying between the property of the plaintiff and that of the defendant, but wholly within the boundaries described by the defendant's deed. The plaintiff's predecessor in interest testified that, without the intention of taking any property belonging to another, she marked off what she thought to be the true boundary by a hedge and placed a rabbit pen and haphazardly piled rocks upon the land in dispute in the belief that this was in fact her property. The plaintiff and defendant testified that certain conversations with reference to the boundary took place at least twelve years following the definition of the boundary by the plaintiff's predecessor. In these conversations the plaintiff pointed out the true boundary as recently indicated to him by a third party and indicated that he would "have" to remove his hedge. Subsequent to this conversation and upon an attempted interference by the defendant this action was brought.

Upon appeal from a judgment for the defendant the court declared that the plaintiff's possession must be actual and uninterrupted, open and notorious, hostile and exclusive, and under a claim of right

[65] RULE ON APPEAL 57, 34A Wn.2d 62.
[66] RULE ON APPEAL 57, 34A Wn.2d Supp. 6 (1953 Amend.).
[1] 42 Wn. 2d 867, 259 P.2d 391 (1953).