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Continuances in Washington

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COMMENTS

CONTINUANCES IN WASHINGTON

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IN GENERAL

The granting or denying of a continuance is a matter within the sound discretion of the trial court,[1] to be reversed only for a manifest abuse of discretion. This does not mean, of course, that the trial judge can decide by the toss of a coin whether to grant or deny a motion for continuance. He is under a positive duty to exercise his discretion wisely, keeping in mind the relative considerations of speedy justice as against the right to present all of the evidence available in support of one's case. A study of the cases will disclose some of the factors

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[1] Thompson v. Washington Territory, 1 Wash. Terr. 548 (1877); Mattson v. Eureka Cedar Lumber and Shingle Co., 79 Wash. 266, 140 Pac. 377 (1914); Jones v. Jones, 96 Wash. 172, 164 Pac. 757 (1917); State v. Miles, 168 Wash. 654, 13 P.(2d) 48 (1932); DeHaven v. Tomer, 170 Wash. 524, 17 P.(2d) 21 (1932); State v. Pierce, 175 Wash. 523, 27 P.(2d) 1087 (1933); Jerkovich v. Pac. First Fed. S. & L. Ass'n, 23 Wn.(2d) 130, 160 P.(2d) 512 (1945); State v. Rosencrans, 24 Wn.(2d) 775, 167 P.(2d) 170 (1946); State v. Gillingham, 36 Wn. (2d) 655, 220 P.(2d) 333 (1950).

which guide his judgment; consideration of ordinary principles of fair play will bring others to mind.

Grounds for Reversal on Appeal

No case can be found where the court was said to have abused its discretion in granting a continuance. The cases finding reversible error in the denial of the motion are so few as to offer little hope to the litigant who gets an adverse ruling in the trial court. The cases finding grounds for reversal can be roughly divided into two groups. The first group consists of cases in which the motion for continuance was made necessary by some act of the adverse party. Thus in *Eldridge v. Young America and Cliff Consolidated Mining Co.*[2] and in *Wright v. Northern Pacific Railroad Co.*[3] it was held an abuse of discretion to grant an amendment introducing new issues without at the same time granting a continuance to allow appellant to prepare to meet those issues. *State v. McCaskey*[4] and *State v. Willis*[5] found abuse in refusal of a continuance where the defendant in a criminal case was not informed of the witnesses who would appear against him in time to investigate their character. In cases which fall within the above patterns it seems clear that the continuance should be granted. Any other result would enable a litigant to increase his chances of winning the case through his own lack of diligence.

A somewhat different problem is raised by the second group of cases. When the motion for continuance is based on factors not within the control of the adverse party, the court is faced with the difficult task of balancing the damage that the moving party will suffer by denial of the motion against that which the adverse party will suffer if the motion is granted. In some cases this problem will be solved by granting the continuance, with conditions attached. This will be discussed in more detail later.

If the interest of the moving party is felt to be an important one, the court will reverse for refusal to grant a continuance even though the adverse party was in no way to blame for the situation. The principle is appealingly stated in the following language from *State v. Harras*:[6]

> No duty which the courts owe society can rise above that of preserving inviolate those principles which make effective the constitutional guarantee

[2] 27 Wash. 297, 67 Pac. 703 (1902).
[3] 38 Wash. 64, 80 Pac. 197 (1905).
[4] 97 Wash. 401, 166 Pac. 1163 (1917).
[5] 137 Wash. Dec. 260, 223 P.(2d) 453 (1950).
[6] 22 Wash. 57, 60 Pac. 58 (1900).

of a fair trial. Better, far better, that the course of justice be slow, than that in making haste we should break down those safeguards which experience has shown to be necessary for the welfare and protection of the rights of the citizen.[7]

In that case, a certain witness whose testimony was desired on behalf of a defendant being tried for larcency had been convicted of perjury, and was for that reason disqualified from testifying. Defendant asked for a continuance until the appeal had been heard in the perjury case. Denial of the continuance was held an abuse of discretion on the ground that the defendant was thereby deprived of a constitutional right to have witnesses examined in his own behalf. The same result was reached in the later case of *State v. Musselman.*[8] In that case the defendant in a murder trial had pleaded insanity. The only witnesses on the issue of insanity were residents of another state, and hence not subject to subpoena. Several of the witness had indicated a willingness to appear and testify in defendant's behalf, if the trial were postponed until after harvest. In view of the importance of the issue and the impossibility of obtaining witnesses in time for the trial, it was held an abuse of discretion to deny the motion.

In the case of *Hill v. Hill,*[9] a divorce case, it was held to be an abuse of discretion to deny a continuance for a period of time sufficient to allow the taking of the deposition of the defendant, who was a resident of Manila. (The court was influenced partly by the apparent bad faith of the wife, who wrote to her husband that she would join him in Manila, concealing her intention to file for divorce.)

In *Robertson v. Woolery*[10] it was held to be an abuse of discretion to deny a continuance where the principal witness was out of the state necessarily but temporarily, when the continuance was requested before the trial date was set and no reason was given for denying the motion.

The cases discussed above are in line with the rules governing reversal for abuse which have been set forth in the cases finding no grounds for reversal. However, *Strom v. Toklas,*[11] decided in 1914, and *State v. Hartwig,*[12] a 1950 decision, seem to apply a more liberal rule. In *Strom v. Toklas* the court held that it was reversible error to

[7] *Id.*, at 61, 60 Pac. at 60.
[8] 101 Wash. 330, 172 Pac. 346 (1918).
[9] 42 Wash. 250, 84 Pac. 829 (1906).
[10] 6 Wash. 156, 32 Pac. 1060 (1893)
[11] 78 Wash. 223, 138 Pac. 880 (1914).
[12] 36 Wn.(2d) 598, 219 P.(2d) 564 (1950).

deny a motion for continuance where the two parties defendant, who were the only witnesses, were obliged to go to California on the advice of the wife's physician. There had been no attempt to take depositions, but the court held this was not sufficient to defeat appellants' right to a continuance. Inasmuch as this case is more favorable to the appellant than the great bulk of cases on the subject, it is unlikely that it will be followed except upon a recurrence of its own unusual facts. *State v. Hartwig* is more troublesome. It would appear to hold a party to no duty of diligence where counsel is scheduled to appear in the supreme court of the state on the date set for the trial. Appellant knew of the conflict in the dates in ample time to obtain other counsel but did nothing, relying on the hope that a continuance would be granted. Denial of the continuance was held to be an abuse of discretion, the reason given being that the supreme court docket should be given priority over the trial court docket. Is this a reversal of the court's former position that a person is not entitled to be represented by any particular counsel?[13]

Continuance Before Trial

As has been seen, it requires an unusual set of facts to secure a reversal where the trial court has exercised its discretion to deny the motion for continuance. But even if it were easy to obtain reversal, counsel should be primarily concerned with convincing the trial court that the continuance ought to be granted in the first place, saving both time and money. To accomplish this objective, a study of the cases upholding denial of a continuance will prove more fruitful than will any analysis of those reversing for such denial.

The first point to remember, where the necessity for asking a continuance is known before the trial (that is, where the ground is one other than surprise), is that an oral motion, unsupported by an affidavit, cannot be the basis of a successful appeal.[14] This principle is set forth in the statute as follows:

> A motion to continue a trial on the ground of absence of evidence shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it,

[13] *See* Catlin v. Harris, 7 Wash. 542, 35 Pac. 385 (1893); Steenstrup v. Toledo Foundry & Machinery Co., 66 Wash. 101, 119 Pac. 16 (1911); State v. Pico, 116 Wash. 279, 199 Pac. 289 (1921); Peterson v. Crockett, 158 Wash. 631, 291 Pac. 721 (1930).

[14] State v. Newton, 29 Wash. 373, 70 Pac. 31 (1902); Gauthier v. Wood & Iverson, 49 Wash. 8, 94 Pac. 654 (1908); State v. Wallace, 114 Wash. 586, 195 Pac. 993 (1921); Lincoln v. Kuskokwim Fishing & Transp. Co., 118 Wash. 137, 203 Pac. 62 (1921); Conner v. Zanuzoski, 36 Wn.(2d) 458, 218 P.(2d) 879 (1950).

and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain. . . .[15]

Several cases have been decided on this point alone,[16] while others give the absence of affidavit as one of several reasons for refusing to find that the trial court abused its discretion. In spite of the seemingly mandatory language of the statute, however, the court held in *Firestone Tire and Rubber Co. v. Bordeaux*[17] that it was not improper to grant a continuance in the absence of an affidavit, where that point was not argued when the motion was presented in the trial court. Caution: this case should not be read as encouraging the practice of asking a continuance without presenting an affidavit, since the cases have uniformly held that the absence of an affidavit will justify denial of the motion.

Just as the court refuses to find abuse of discretion where no affidavit has been presented, so will it usually hold that there is no abuse where any of the elements required by the statute to be stated in the affidavit have not been properly stated or proved. In the case of *Drumheller v. Bird*[18] the court went so far as to say that it would have been an abuse of discretion to grant a continuance where the witnesses were not named and the nature of their testimony was not given, as required by the statute.

It must be shown that the evidence to be produced will be admissible and will not be merely cumulative. Numerous decisions have upheld denial where it was not shown that material evidence could be produced if the continuance were allowed. In the early case of *State v. Murphy*[19] the supreme court upheld the trial court's denial of a motion for continuance where the moving party failed to show that he could not have obtained the same evidence from the testimony of other witnesses. The testimony to be obtained must be stated clearly enough in the affidavit to allow the court to rule intelligently, and to allow the opposing party to admit that such testimony would be given if the witness were present,[20] in order to defeat the motion as provided by the statute.[21]

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[15] REM. REV. STAT. § 322 [P. P. C. § 21-1], and see REM. REV. STAT. § 2135 [P. P. C. § 140-1] for similar provision concerning criminal trials.

[16] State v. Newton, 29 Wash. 373, 70 Pac. 31 (1902); Gauthier v. Wood & Iverson, 49 Wash. 8, 94 Pac. 654 (1908); Lincoln v. Kuskokwim Fishing & Transp. Co., 118 Wash. 137, 203 Pac. 62 (1921).

[17] 176 Wash. 592, 30 P.(2d) 385 (1934).

[18] 170 Wash. 14, 15 P.(2d) 260 (1932).

[19] 9 Wash. 204, 37 Pac. 420 (1894).

[20] State v. Smythe, 148 Wash. 65, 268 Pac. 133 (1928).

The statute also requires that the moving party show that he exercised due diligence to procure the missing evidence.[22] Probably more continuances are denied for lack of diligence than for any other single ground. What constitutes due diligence will, of course, vary with the facts of the individual case, and so the measure of diligence necessary is largely a matter for the trial judge to decide, he being in the best position to observe the efforts of the moving party in any given factual situation. Of course the moving counsel himself is in a better position even than the trial judge to know what he must do to entitle his client to a continuance. If he has done everything reasonably possible to avoid the necessity of asking for a continuance, he should have little trouble convincing the court that the case should be continued.

The cases afford some insight into what is *not* due diligence. Some cases hold that due diligence is lacking where there has been no attempt to take the deposition of witnesses whose attendance at the trial is doubtful. One such case is *Eberhardt v. Murphy*.[23] In that case a continuance was asked to allow appellant to procure the testimony of a material witness who had gone to Italy before the trial. The news of the expected departure of the witness had been publicized in the newspapers, and appellant had made no attempt to take his deposition. This was held to be such lack of diligence as would justify denial of the continuance. It has also been held to constitute lack of diligence to fail to appoint new counsel promptly when present counsel withdraws from the case,[24] or when it becomes apparent that he will be unable to attend the trial.[25] Cases where appellant left the jurisdiction without informing his counsel,[26] or where he failed to serve written interrogatories on the respondent until six months after the commencement of the action[27] are also evidence of lack of diligence.

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[21] REM. REV. STAT. § 322 [P. P. C. § 21-1]; see also REM. REV. STAT. § 2135 [P. P. C. § 140-1]; see note 31 *infra*.

[22] Juch v. Hanna, 11 Wash. 676 (1895); Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188 (1903); Howland v. Day, 125 Wash. 480, 216 Pac. 864 (1923); State v. Wilson, 139 Wash. 191, 246 Pac. 289 (1926); Thornthwaite v. Greater Seattle Realty & Improvement Co., 160 Wash. 651, 295 Pac. 933 (1931); Conner v. Zanuzoski, 36 Wn.(2d) 458, 218 P.(2d) 879 (1950).

[23] 110 Wash. 158, 188 Pac. 17 (1920).

[24] State v. Lasswell, 133 Wash. 428, 233 Pac. 928 (1925); Peterson v. Crockett, 158 Wash. 631, 291 Pac. 721 (1930).

[25] Catlin v. Harris, 7 Wash. 542, 35 Pac. 385 (1893); State v. Pico, 116 Wash. 279, 199 Pac. 289 (1921). *But cf.* State v. Hartwig, 36 Wn.(2d) 598, 219 P.(2d) 564 (1950).

[26] Humphrey v. Mutual Life Ins. Co., 86 Wash. 672, 151 Pac. 100 (1915).

[27] Steenstrup v. Toledo Foundry & Machinery Co., 66 Wash. 101, 119 Pac. 16 (1911).

Appellant must not only state the name and residence of the witness who will supply the missing evidence, but must also give some assurance that he will be present if the case is postponed,[28] and that his testimony will probably make a difference in the outcome of the case.[29] This follows the general rule of appeals that there must be prejudicial error, and not mere error without harm, in order to obtain a reversal.[30]

Even though the moving party presents his motion in writing, supported by affidavit setting forth the evidence to be obtained, the witnesses by which it will be given, that the same is material, and that due diligence was shown in attempting to procure the same, and even though he is able to prove that his allegations are true, he still may be defeated in his argument for a continuance. The statute[31] provides that if the adverse party "admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued."[32] There is some doubt as to whether the trial court may not allow the continuance even where the admission is made according to the statute, where unusual circumstances exist.[33] The affidavit, when admitted into evidence, is entitled to the same weight (and no more) as if the witness were on the stand.[34]

The motion can also be defeated by a showing that the granting of it will impose a hardship on the adverse party which could not be removed by imposing a condition on the granting, as where respondent had come up from California for the trial and could only be here a certain number of days.[35] The fact that prior continuances have been granted in the same action is another element to be considered in determining whether the denial was proper. Also of importance is the

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[28] Shannon v. Consolidated, etc. Mining Co., 24 Wash. 119, 64 Pac. 169 (1901); Howland v. Day, 125 Wash. 480, 216 Pac. 864 (1923); DeHaven v. Tomer, 170 Wash. 524, 17 P.(2d) 21 (1932).

[29] Ward v. Moorey, 1 Wash. Terr. 104 (1860); Creech v. Aberdeen, 44 Wash. 72, 87 Pac. 44 (1906); Jackson v. Mercantile Mutual Fire Ins. Co., 45 Wash. 244, 88 Pac. 127 (1907); Maloney v. Stetson & Post Mill Co., 46 Wash. 645, 90 Pac. 1046 (1907); Hill v. Arthur, 103 Wash. 187, 173 Pac. 1092 (1918).

[30] 3 Am. Jur. 555; 5 C. J. S. 802.

[31] REM. REV. STAT. § 322 [P. P. C. § 21-1]; see also REM. REV. STAT. § 2135 [P. P. C. § 140-1].

[32] Benson v. Town of Hamilton, 34 Wash. 201, 75 Pac. 805 (1904); Sorenson v. Danaher Lumber Co., 71 Wash. 38, 127 Pac. 586 (1912); Wenatchee Dist. Co-op Ass'n v. Thompson, 135 Wash. 91, 237 Pac. 19 (1925).

[33] *See* Traynor v. White, 44 Wash. 560, 87 Pac. 823 (1906).

[34] Waldron v. Home Mutual Ins., 16 Wash. 193, 47 Pac. 425 (1896).

[35] Humphrey v. Mutual Life Ins. Co., 86 Wash. 672, 151 Pac. 100 (1915). *Cf.* Nye v. Manley, 69 Wash. 631, 125 Pac. 1009 (1912).

court's feelings as to the good or bad faith of the moving party.[36] If it appears that the motion was filed in bad faith, and for the sole purpose of delaying the trial, the court will be justified in denying the motion.

CONTINUANCE ON GROUND OF SURPRISE

Where the ground urged for the continuance is one arising during the trial (surprise), the tests are more simple. The court has only to ask itself: (1) Was the moving party in fact surprised? (2) Was his surprise reasonable? (3) Are the circumstances such that only an allowance of time will cure his injury? If the answer is yes to all three questions, it would be error to refuse a continuance. This is clear on ordinary principles of fair play. Thus it has been held improper to deny a continuance where respondent was allowed to amend the pleadings during the trial to introduce a new cause of action.[37] On the same reasoning, the court upheld the action of the trial court in *Roberts v. Tacoma R. & P. Co.*[38] in granting a trial amendment only on the condition that a continuance be had, and in refusing the amendment when appellant opposed the continuance, insisting on his right to amend without condition.

The cases indicate that there is a fairly widespread misapprehension among some members of the bar that a continuance should follow as a matter of right any time a trial amendment is permitted.[39] This is clearly not true. Many times amendment is permitted merely to state in more detail what is already contained in the complaint,[40] or to include some element which was understood by both parties to be implied in the original pleadings.[41] The test is not whether or not there has been an amendment, but rather whether or not the moving party has been surprised, to his detriment. Where the state introduces a surprise witness in a criminal trial, the defendant is entitled to a continuance for a sufficient time to enable him to investigate the character of the witness.[42] In *Straw-Ellsworth Mfg. Co. v. Cain,*[43]

[36] State v. Miles, 168 Wash. 654, 13 P.(2d) 48 (1932).
[37] Eldridge v. Young Am. & Cliff Consol. Mining Co., 27 Wash. 297, 67 Pac. 703 (1902); Wright v. Northern Pac. R. R., 38 Wash. 64, 80 Pac. 197 (1905).
[38] 59 Wash. 226, 109 Pac. 605 (1910).
[39] Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 654 (1907); Townsend v. Three Lakes Lumber Co., 67 Wash. 654, 122 Pac. 29 (1912); Hood v. Gerrick, 69 Wash. 607, 125 Pac. 956 (1912); Burger v. Covert, 75 Wash. 528, 135 Pac. 30 (1913); Potts v. Potts, 81 Wash. 27, 142 Pac. 448 (1914); Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774 (1915); Ideal Investment Co. v. Neely, 147 Wash. 667, 267 Pac. 46 (1928).
[40] Hood v. Gerrick, 69 Wash. 607, 125 Pac. 956 (1912).
[41] Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774 (1915).
[42] State v. Willis, 137 Wash. Dec. 260, 223 P.(2d) 453 (1950).
[43] 20 Wash. 351, 55 Pac. 321 (1898).

while stating that it would not reverse on that ground alone, the court expressed the opinion that a continuance should have been granted in a civil case where a witness who had stated before the trial that he would testify that certain instruments were bona fide changed his story on the trial. The first requirement, then, is that appellant must in fact be surprised.

Even though appellant was in fact surprised, he will not be entitled to a continuance if the matter was one which he should have anticipated.[44] So it has been held proper to deny the continuance where requested on the ground that respondent introduced evidence not contained in the original complaint, where the issue was one which appellant should have anticipated from the nature of the action.[45] It seems too clear for comment that the refusal of a nonsuit when appellant had anticipated that it would be granted will not entitle him to a continuance on the ground of surprise, yet that was the contention of the appellant in the case of *Vulcan Iron Works v. Burrell Constr. Co.*[46] The surprise, then, must not only be real, but must not be a result of counsel's lack of diligence or understanding.

Even though appellant was genuinely surprised, through no fault of his own, he is not entitled to a continuance if the court feels that a recess for a shorter length of time will enable him to recover from his surprise.[47]

Continuances with Conditions Attached

As was mentioned earlier, the court may grant the motion and impose a condition thereon. There is statutory authority for this procedure: "The court, upon its allowance of the motion, may impose terms or conditions upon the moving party."[48] Rem. Rev. Stat. § 484 provides for ". . . the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses" as a proper condition to be imposed. This has been held to preclude the condition of paying jury fees (amounting to $93),[49] or an order to pay $25 where

[44] Vulcan Iron Works v. Burrell Constr. Co., 39 Wash. 319, 81 Pac. 836 (1905); Merrill v. O'Bryan, 48 Wash. 415, 93 Pac. 917 (1908); Pearson v. Gullans, 81 Wash. 57, 142 Pac. 456 (1914); Potts v. Potts, 81 Wash. 27, 142 Pac. 448 (1914).

[45] Merrill v. O'Bryan, 48 Wash. 415, 93 Pac. 917 (1908).

[46] 39 Wash. 319, 81 Pac. 836 (1905).

[47] Sterios v. Southern Surety, 122 Wash. 36, 209 Pac. 1107 (1922); State v. Gaines, 144 Wash. 446, 258 Pac. 508 (1927); State v. Cooper, 26 Wn.(2d) 405, 174 P.(2d) 545 (1946).

[48] Rem. Rev. Stat. § 322 [P. P. C. § 21-1], last sentence. (There is no similar provision in the criminal statute.)

[49] Johnson v. Dalquist, 124 Wash. 267, 214 Pac. 157 (1923).

it did not appear that the sum was meant to include witness fees.[50] On the other hand, it was held proper to attach as a condition the payment of the sum of $30, where it was found that the sum was meant to include witness fees,[51] no itemization being necessary. It has also been held proper to require appellant to pay respondent's costs,[52] or to pay damages if respondent should win the case[53] (in an action for a way of necessity to haul timber vital to the war effort). The statute is silent as to the possibility of granting a continuance and imposing costs on the adverse party, but such action was upheld in *Van Zonneveld Bros. & Phillipo v. Watson,*[54] decided in 1930.

[50] Tacoma Nat. Bk. v. Peet, 9 Wash. 222, 37 Pac. 426 (1894).
[51] Casady v. Anderson, 90 Wash. 296, 155 Pac. 1067 (1916).
[52] Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747 (1908); American Cotton Oil v. Davis, 129 Wash. 24, 224 Pac. 23 (1924).
[53] State *ex rel.* Walton v. Superior Court, 18 Wn.(2d) 810, 140 P.(2d) 554 (1943).
[54] 159 Wash. 182, 292 Pac. 429 (1930).