Washington Law Review

Volume 28 | Number 1

2-1-1953

Rules on Appeal—Time for Filing Statement of Facts Where Motion for New Trial Pending After Entry of Judgment

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held that cross-examination as to the unchastity of a witness exists as a matter of right in the *Coella* case, but later in *State v. Linton,* 36 Wn. 2d 67, 216 P. 2d 761 (1950), a decision that impliedly overruled the *Coella* case, held that there is no right to cross-examine or to admit extrinsic evidence of specific instances of unchastity, but that the trial court has *discretion* whether or not to admit the evidence. In view of the declaration in the principal case that there is no room for judicial discretion in allowing evidence of unchastity to affect credibility, it would seem logically necessary for the court in the future to hold that specific instances of unchastity are also inadmissible for the purpose of affecting credibility.

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Rules on Appeal—Time for Filing Statement of Facts Where Motion for New Trial Pending After Entry of Judgment. In a civil action tried to the court, judgment was entered immediately after the findings of fact were filed, and *D* moved for a new trial. Before the motion was ruled upon, he perfected an appeal. The motion was later denied, after which *D* gave a second notice of appeal. His statement of facts was served 125 days after the entry of judgment and forty-six days after the denial of the motion. *P* moved to strike the statement of facts, contending that the time for filing and serving the statement had expired ninety days after the date of entry of judgment. *Held:* Motion denied. A statement of facts must be served and filed within ninety days after the date of entry of judgment, or, if a motion for a new trial has been timely filed, within ninety days from the date of entry of the order denying the motion for a new trial. *Dunseath v. Hallauer,* 40 Wn. 2d 708, 246 P. 2d 496 (1952).

By this holding, the Supreme Court has, in effect, changed the wording of Rule on Appeal 34, 34A Wn. 2d 36, which requires a statement of facts to be served and filed within ninety days after the date of entry of final judgment or appealable order. The ruling was necessary to dispel an apparent inconsistency among the rules and statutes relating to procedure on appeal.

RCW 4.64.010 [RRS § 431] provides that judgment may be entered by the court "at any time after two days from the return" of the verdict. (Where a case is tried to the court, the signing of the findings of fact is comparable to the return of the verdict in a jury trial.) During the two-day period before the entry of judgment, a motion for a new trial may be served and filed. See RCW 4.76.060 [RRS § 402]. In spite of the statute, courts continue to enter judgments simultaneously with the return of the verdict or the signing of the findings of fact. Where the statute is followed, a motion for a new trial is not entertained after judgment is entered, and the question before the court in the *Dunseath* case does not arise. The motion is determined before entry of judgment, and the time for taking an appeal *and for filing the statement of facts* begins to run from the date of the judgment. It has not been suggested that the failure of the trial court to observe the statuory procedure should deprive a party of his privilege of moving for a new trial.

Although Rule 34 provides that the statement of facts must be filed within ninety days after the entry of judgment or appealable order, Rule 33(5) allows an *appeal to be taken* upon the denial of a motion for a new trial when the motion is made after entry of judgment. An order denying a motion for a new trial is not appealable. *Wilson v. Katzer,* 37 Wn. 2d 944, 226 P. 2d 910 (1951). See RCW 4.88.010 [RRS § 1716] and Rule on Appeal 14, 34A Wn. 2d 20. The appeal taken after denial of the motion for a new trial is nevertheless an appeal from the judgment; and under a literal reading of Rule 34, the time for filing the statement of facts begins to run from the date of the judgment, not from the date of the order. Thus a strict application of Rule

34 would require that the statement of facts be filed within ninety days after the entry of judgment even though a motion for a new trial was pending and was not determined until after the expiration of the ninety days. Should the motion be denied, unless the appellant has filed his statement of facts before the ruling, he would find himself with a right of appeal, given under Rule 33(5), but with no right to present his statement of facts. Consequently, he would have little hope of a favorable decision, since in the absence of a statement of facts, the Supreme Court refuses to rule on assignments of errors which do not appear on the face of the record. *Lilly Co. v. Parrino,* 18 Wn. 2d 128, 138 P. 2d 206 (1943); *Wheatley v. Washington Jockey Club,* 39 Wn. 2d 163, 234 P. 2d 878 (1951). On the other hand, if, fearing such an eventuality, he had proceeded to file his statement and later the motion for a new trial was granted, he would have been put to useless trouble and expense.

In view of these possibilities, the holding of the instant case, insofar as it dates the time for taking an appeal and the time for filing the statement of facts from the same event, seems only reasonable. Its apparent conflict with the wording of Rule 34 is mitigated if the reasoning of the court in *Reeves v. Wilson,* 105 Wash. 318, 177 Pac. 825 (1919) is applied: "The motion for a new trial suspends the effect of the judgment until after the determination of the motion and filing of the order denying the motion." In other words, the judgment does not become *final* until the motion is determined.

While consistent with dicta in cases decided under the rule in effect from 1938 until the present rules were adopted in 1951, the decision in the *Dunseath* case embodies the first direct holding reconciling the present rules. Since the time for filing had expired, statements in the earlier cases to the effect that the time should be computed from the denial of the motion for a new trial were not decisive of any issue presented therein. See *Lilly Co. v. Parrino, supra; State* ex rel *Grange Store v. Riddell,* 27 Wn. 2d 134, 177 P. 2d 78 (1947); *Wheeler v. Birch & Sons Const. Co., supra.*

The language of the present holding may raise a question as to the status of a party whose motion for a new trial has been denied, but against whom judgment has not been entered. However, since an order denying a motion for a new trial is not appealable, it is unlikely that the court would interpret its ruling in the *Dunseath* case to mean that the appellant must file his statement of facts within ninety days after the denial of such a motion when there exists no judgment or order from which he can take an appeal.

In view of the holding, is an appeal premature if it is taken after entry of final judgment but before the denial of the motion for a new trial? Conceivably a respondent could be harmed if he had expended the effort necessary to prepare his brief, and the new trial was subsequently granted. However, if the appellant is allowed to wait until after the determination of his motion before taking his appeal, the probability of such an occurrence is not as great as it would be if he were required to carry it through from the date of entry of judgment. The question is not discussed in the main case; rather *D*'s earlier appeal is "treated as abandoned." Presumably an appeal taken before denial of a motion for a new trial is not untimely.

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Income Tax—Deductibility of Legal Expenses. *P* made a gift of 1,000 shares of stock to members of his family and paid the federal gift tax thereon. Thereafter *P* was notified by the Commissioner of Internal Revenue of a gift tax deficiency of $145,276.50. Through his attorney, *P* secured a settlement of the deficiency for $15,612.75. He did not deduct the legal expenses of the gift tax controversy from his gross income but later claimed an income tax refund on the ground that the legal fee should have been deducted under INT. REV. CODE § 23(a)(2). The District Court held for *P*. The Court