

# Washington Law Review

---

Volume 30  
Number 2 *Washington Case Law-1954*

---

5-1-1955

## Practice and Procedure

William G. Viert

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Civil Procedure Commons](#)

---

### Recommended Citation

William G. Viert, *Washington Case Law, Practice and Procedure*, 30 Wash. L. Rev. & St. B.J. 157 (1955).  
Available at: <https://digitalcommons.law.uw.edu/wlr/vol30/iss2/13>

This Washington Case Law is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

and doctor bills from the fund, and defendant denied the application. The statute provides: "Whenever any member of the police department . . . is confined to any hospital or to his home . . . the board shall pay the necessary hospital, care and nursing expenses. . . ." *Held*: the defendant acted illegally in ruling that the benefits to which plaintiff was entitled were limited as a matter of law to those provided under the contract between the defendant and the local hospital.

**Municipal Departments and Officers—Examination and Promotion.** *Stoor v. City of Seattle*, 44 Wn.2d 405, 267 P.2d 902 (1954), was an action to annul an oral examination given to plaintiffs by the civil service commission. The city charter required written competitive examination except where tests of manual or professional skill are necessary. Defendant contended the oral examination was necessary to and did test the professional skill of plaintiffs. The majority of the court ruled a captaincy in the fire department is a profession and thus the city charter permits oral testing. As a problem of first instance, the majority decided competitive tests need not be strictly objective as long as all candidates take the same tests and are in competition with one another. Following the prevailing practice in problems of this sort, the court allowed the civil service commission wide discretion in the examination and promotion of candidates.

**Schools and School Districts—Teachers' Reappointment.** In *State ex rel. Welch v. Seattle School District No. 1*, 145 Wash. Dec. 6, 272 P.2d 617 (1954), the school district sent relator a registered letter advising her that her existing contract to teach would not be renewed. The letter was never delivered. Relator demanded issuance of her contract under RCW 28.67.070. Upon refusal, she appealed to the State Superintendent of Public Instruction who ruled she was entitled to the contract. Relator in this action secured a writ of mandate to compel reinstatement. *Held*: the contract was conclusively presumed to have been renewed pursuant to RCW 28.67.070. The school district could have appealed the State Superintendent's decision, but since no appeal was taken, "the decision became final under the purview of RCW 28.88.040."

**Zoning.** *State ex rel. Ogden v. City of Bellevue*, 145 Wash. Dec. 460, 275 P.2d 899 (1954). Relator made a formal application to the city for a permit to construct business buildings on a part of his land zoned for business. Defendant denied the application, asserting relator had made no provision for off street parking as provided by city ordinance. Relator leased a tract of land which complied with all the standards of the ordinance applicable to parking facilities, and made reapplication for a building permit. Defendant asserted the leased tract was not being put to its best use and denied the permit in the exercise of its administrative discretion, whereupon relator sought a writ of mandate to compel issuance of the permit. *Held*: a building permit must issue as a matter of right upon full compliance with the applicable ordinance. The court said the only discretion which is permissible in zoning matters is that exercised in adopting the zoning classifications which must be of general applicability. The administration of a zoning ordinance can only be concerned with questions of compliance with the standards of the ordinance and not with the wisdom of the policy set forth in the ordinance.

## PRACTICE AND PROCEDURE

**Judgment N.O.V.—Inconsistent Testimony by the Same Witness May Be Considered.** In *Halder v. Department of Labor and Industries*,<sup>1</sup> the court qualified the rule that a judgment notwithstanding

<sup>1</sup> 44 Wn.2d 537, 268 P.2d 1020 (1954).

the verdict cannot be granted unless it can be said as a matter of law that there is neither evidence, nor reasonable inference from evidence to sustain the verdict.<sup>2</sup> The court said that if "indispensable testimony is, in effect, retracted or completely negated as a result of inconsistencies and contradictions in the other testimony of the same witness, that fact is to be considered in passing upon the motion."<sup>3</sup>

A judgment n.o.v. cannot be resorted to where there is any element of discretion involved. If there is an element of discretion, the remedy is by a motion for a new trial.<sup>4</sup> Furthermore, the court cannot weigh the evidence in considering a motion for a judgment n.o.v.<sup>5</sup> In *Walling v. Elbert*,<sup>6</sup> the court said that if the trial court found the witness's testimony so conflicting as to make it unworthy of belief, the judge may grant a new trial after the verdict, but he can not grant a judgment n.o.v. without invading the province of the jury. Yet, it appears that the qualification stated in the *Halder* case does allow the court to exercise a limited discretion and to weigh the evidence to the extent indicated above in passing on a motion for a judgment n.o.v.

The effect of such qualification would be to limit the general proposition that, even though a party's evidence is in some respects unfavorable to him, he is not bound by the unfavorable part when the court passes on a motion for a judgment n.o.v.<sup>7</sup> The Washington court was apparently taking the sensible position that the rule excluding contradictory evidence from consideration in passing on a motion for a judgment n.o.v. does not mean, where a witness contradicts himself on a material point, the court must consider only the part of his testimony on that point which favors the party for whom he testifies.<sup>8</sup>

**Rule of Pleading, Practice and Procedure 3—Noting Action for Trial or Hearing.** In reversing a dismissal of an action for want of prosecution, the court, in *Friese v. Adams*,<sup>9</sup> held that Rule of Pleading, Practice and Procedure 3<sup>10</sup> does not require a case to be tried within one year from the date that issues are joined, nor does it require that the action be set for trial when the year ends. The rule requires only that,

<sup>2</sup> *Rettinger v. Bresnahan*, 42 Wn.2d 631, 257 P.2d 633 (1953).

<sup>3</sup> After stating the qualification, the court held that the asserted inconsistencies did not amount to a negation or retraction of the witness's testimony. As the rule was found inapplicable to the facts, it might be regarded as dictum.

<sup>4</sup> *Mattson v. Griffin Transfer Co.*, 90 Wash. 1, 155 Pac. 392 (1916).

<sup>5</sup> *Chess v. Reynolds*, 189 Wash. 547, 66 P.2d 297 (1937).

<sup>6</sup> 87 Wash. 489, 151 Pac. 1081 (1915).

<sup>7</sup> *Moen v. Chesnut*, 9 Wn.2d 93, 113 P.2d 1030 (1941).

<sup>8</sup> *Fitch v. Thompson*, 322 Ill. App. 703, 54 N.E.2d 623 (1944).

<sup>9</sup> 44 Wn.2d 305, 267 P.2d 107 (1954).

<sup>10</sup> 34A Wn.2d 69.

within one year after issues are joined, the moving party must "*note the action* for trial or hearing" in order to avoid dismissal for want of prosecution.

The court clarified the method of *noting* an action, by stating that it consists of giving to the opposing party the statutory notice provided for by RCW 4.44.020. This statute provides that at least three days before setting day the moving party must serve the statutory notice upon the opposite party and file the notice with the county clerk. When this is completed, the running of the one year period is tolled.

This holding has the effect of nullifying some rather loose language by the court concerning Rule 3. In *State ex rel. Lyle v. Superior Court*,<sup>11</sup> it was said that the duty of granting a motion for dismissal without prejudice for want of prosecution "is imposed by the express mandatory conditions of the rule which provides for dismissal of action *if not brought to trial or hearing* within one year . . ." It is probable that such confusion is the result of that portion of Rule 3 which declares that an action not noted in time will not be dismissed if "the failure to *bring the same on for trial or hearing* was caused by the party who makes the motion to dismiss." It is apparent that to "bring the same on for trial or hearing" is not synonymous with "note the action for trial or hearing." The *Friese* case clearly indicates the latter is the only requirement to avoid dismissal for want of prosecution under Rule 3.

**Granting a Continuance of Trial When Party Absent—Effect of Stipulating Absent Party Will Testify as Alleged.** In *Chamberlin v. Chamberlin*,<sup>12</sup> a divorce proceeding by the husband, the defendant's motion for a continuance because of the wife's illness and inability to travel to the place of trial was denied. This denial was held to be an abuse of the trial court's discretion. The plaintiff-husband urged that the court had authority to deny the continuance under RCW 4.44.040. This statute provides, in part, that in a motion to continue a trial because of absence of certain evidence, "if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial . . ., the trial *shall not* be continued." The plaintiff complied with the statutory requisites, yet the court held that, notwithstanding the statutory language, a motion for a continuance is always addressed to the sound discretion of the trial court; such a stipulation

---

<sup>11</sup> 3 Wn.2d 702, 102 P.2d 246 (1940).

<sup>12</sup> 44Wn.2d 689, 270 P.2d 464 (1954).

by the plaintiff does not relieve the court from exercising its discretion in passing on the motion.

The court said that it has never held that the statute *compels* a trial court to deny a continuance where the opposing party stipulates that the absent party, if present, would testify to certain facts. However the court has never held that the quoted portion of RCW 4.44.040 was not mandatory, as the language "shall not be continued" seems to declare.

Prior to the *Chamberlin* case, the court inferentially indicated that the denial of a continuance by the trial court where the adverse party agrees that the absent witness will testify as alleged, might, under unusual circumstances, be considered an abuse of discretion,<sup>13</sup> but it had never expressly so held. This holding clearly indicates that the trial court does not have an absolute authority to deny a continuance upon compliance with the statutory requirements. The grant or denial of a continuance is always a discretionary matter and open to abuse of discretion. The above portion of RCW 4.44.040 is to be used merely as a guide to what is sound discretion for a specified situation, to be followed unless circumstances appear that call for a converse ruling.

The court rejected the rule stated in *Thornthwaite v. Greater Seattle Realty and Improvement Co.*<sup>14</sup> In the *Thornthwaite* case the court held that a stronger case for a continuance must be made if the absent witness is a party to the action than if he were a third person; it is the duty of a party to be present at his trial, and such party's absence will generally be considered at his own peril. In the instant case the court felt such statement was in conflict with other Washington decisions, but the court did not expressly repudiate the statement. The court limited the application of the *Thornthwaite* rule to cases where the party has, without sufficient cause, absented himself from the place of trial.<sup>15</sup> The rule is not to be extended to cases where the party has absented himself with sufficient cause, as when the party's absence is caused by a bona fide illness.

The court, in the *Chamberlin* case, committed itself to the general rule that whether the trial court was within the proper use of its discretion in ruling on a motion for a continuance is dependent upon the

<sup>13</sup> Traynor v. White, 44 Wash. 560, 87 Pac. 823 (1906).

<sup>14</sup> 160 Wash. 651, 295 Pac. 933 (1931).

<sup>15</sup> The court limits the same statement in *Nye v. Manley*, 69 Wash. 631, 125 Pac. 1009 (1912), from which the *Thornthwaite* rule is taken, though it is somewhat qualified in the *Nye* case. This restriction is also upon a similar rule stated in *Donaldson v. Green*, 40 Wn.2d 238, 242 P.2d 1038 (1952).

circumstances of each case, the test being whether the grant or denial of such motion operates in the furtherance of justice.<sup>16</sup> The court has recognized, as a factor for consideration, that rarely can a case be tried in the absence of a party to the action.<sup>17</sup> A voluntary absence by a party to an action would undoubtedly be a circumstance warranting a denial of a motion for a continuance under the general rule. In view of these considerations, it is submitted that the broad *Thornthwaite* rule has been rendered a nullity by the effect of the court's severe limitation upon it.

**A Party May Use His Own Deposition—No Right to Examine Adverse Party at Trial Who Resides Outside Prescribed Area.** In *Aircraft Radio Industries, Inc. v. Palmer, Inc.*,<sup>18</sup> a Connecticut corporation brought an action for the purchase price of electronic equipment. The plaintiff corporation took the deposition of its manager in Connecticut to be used at the trial. The defendant filed no cross-interrogatories when notified that the deposition was to be taken. The defendant contended that it was error to admit the deposition and to proceed with the trial without the manager, as the defendant was deprived of his right to examine the adverse party at the trial guaranteed by Rule of Pleading, Practice and Procedure 42.<sup>19</sup>

The court said that whether or not the trial court erred in refusing to suppress the deposition is answered by Rule of Pleading, Practice and Procedure 26,<sup>20</sup> not Rule 42 as contended. Rule 26 is broad enough to permit a party to take his own deposition, to be used as evidence at the trial, if any of certain enumerated conditions are present.<sup>21</sup> The applicable condition, making the deposition admissible in this case, is Rule 26(d)(3)2, which authorizes its use if the court finds: "that the witness resides out of the county and more than 20 miles from the place of trial, *unless* it appears that the *absence* of the witness was procured by the party offering the deposition . . . ."

As the manager (for purposes of this action the court assumes that the manager's deposition is the deposition of the corporation) resides

<sup>16</sup> 17 C.J.S. 194 (1952), Continuances, 36; See *Strom v. Toklas*, 78 Wash. 223, 138 Pac. 880 (1914), and *Zulauf v. Carton*, 30 Wn.2d 425, 192 P.2d 328 (1948).

<sup>17</sup> *Strom v. Toklas*, *supra* note 16.

<sup>18</sup> 145 Wash. Dec. 686, 277 P.2d 737 (1954).

<sup>19</sup> 34A Wn.2d 106.

<sup>20</sup> 34A Wn.2d 84.

<sup>21</sup> Rule 26 (a) provides in part that "the testimony of *any person, whether a party or not*, may be taken at the instance of *any party* by deposition," and in Rule 26 (d) (3) "the deposition of a witness, *whether or not a party*, may be used by *any party* . . . ." See 4 MOORE'S FEDERAL PRACTICE 1195, 1196 (2d ed. 1950).

in Connecticut, the only question is whether the corporation could be said to have procured its own absence. The court held that the term "absence" in the "unless" clause refers to absence from the county and more than 20 miles from the place of trial, and not absence from the trial.<sup>22</sup> Therefore, it cannot be said that one who resides out of a territory embraced within a radius of 20 miles from the place of trial has procured his own absence from such area.<sup>23</sup> This is probably so even if the party's absence is due merely to a preference to use his deposition rather than to testify orally at the trial.<sup>24</sup> The court indicates that the "unless" clause refers only to a situation where a party instigates a witness (including the party himself) to go outside the prescribed area.<sup>25</sup>

The defendant's primary contention is that the trial court erred when it refused to strike the plaintiff's pleadings and enter judgment for the defendant, as dictated by Rule 42 when a party refuses to attend and testify at the trial. The defendant relies on the first sentence of Rule 42: "A party to an action or proceeding shall not be *precluded* from examining the adverse party as a witness *at the trial*." It was argued that Rule 42 limits Rule 26, so that one can only take the deposition of an adverse party, and not his own deposition (for a party need not discover from himself).

The court said the above language suggests the inquiry of "precluded by what?" This sentence was taken from RCW 5.04.040,<sup>26</sup> which declared that a party, having filed interrogatories to be answered by the adverse party, shall not be precluded from examining the adverse party at the trial. The court stated that the transfer of this language into Rule 42, in abbreviated form, did not create a new situation; Rules 42 and 26 were promulgated at the same time, they are of equal force, and one must be interpreted so as not to invalidate the other. In effect, the court is holding that Rule 42 is not to be read literally, but as if it were the filing of interrogatories that does not preclude examination at the trial.

Rule 42 was amended (effective January 3, 1955) to eliminate the issue raised by the *Aircraft Radio Industries* case. The controverted

<sup>22</sup> 4 MOORE'S FEDERAL PRACTICE 1196 (2d ed. 1950).

<sup>23</sup> *Weis v. Weiner*, 10 F.R.D. 387 (1950), decided on Rule 26 (d) (3) 2, FED. R. CIV. P., which varies only in "that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States. . . ."

<sup>24</sup> 4 MOORE'S FEDERAL PRACTICE 1196 (2d ed. 1950).

<sup>25</sup> *Weis v. Weiner*, *supra* note 23; 4 MOORE'S FEDERAL PRACTICE 1196 (2d ed. 1950).

<sup>26</sup> Abrogated by RULE OF PLEADING, PRACTICE AND PROCEDURE 44, 145 Wash. Dec. No. 9 (1954 Amend.).

first sentence of the rule previous to the amendment is replaced with language even more explicit than that of RCW 5.04.040:

A party who has filed interrogatories to be answered by the adverse party or parties shall not be precluded for that reason from examining such adverse party or parties as a witness at the trial.<sup>27</sup>

It is now clear that Rule 42 does not guarantee a right to examine the adverse party, regardless of where he resides, at the trial.

STANLEY M. SAMUELS

**Appellate Practice—Violations of Rules on Appeal.** The importance of strict adherence to the Rules on Appeal<sup>28</sup> cannot be expounded too often, nor can the more common mistakes be pointed out too frequently, so that some unsuspecting and perhaps careless counsel may avoid having an appeal dismissed for noncompliance with the rules.<sup>29</sup> Appeals, in whole or in part, have continued to be dismissed in 1954 for failure to comply with requirements set forth in the Rules on Appeal.<sup>30</sup> While perhaps some of these dismissals might be excused because of an ambiguity or misunderstanding, the majority of them could very easily have been averted had appellate counsel taken the trouble to investigate and adhere to the applicable requirements.

**Changes in Rules on Appeal. Rule 16. Powers of Supreme Court.** The last sentence of this rule<sup>31</sup> is reworded to read as follows: "Without

<sup>27</sup> 145 Wash. Dec. No. 23 (1955 Amend.).

<sup>28</sup> 34A Wn.2d 3 *et seq.*

<sup>29</sup> See *Editor's Notes*, 28 WASH. L. REV. No. 1 (1953); Note, *Appellate Brief Assignments of Error—Changes in the Rules*, 29 WASH. L. REV. 150 (1954).

<sup>30</sup> Where there was no assignment of error directed to the findings of fact entered by the trial court they were conclusively presumed to be the facts of the case under RULE ON APPEAL 43, 34A Wn.2d (1953 Amend.). State *ex rel.* Welch v. Seattle School District, 145 Wash. Dec. 6, 272 P.2d 617 (1954). In Union Electric and Plumbing Supply Inc. v. United Ass'n., etc., 145 Wash. Dec. 15, 272 P.2d 144 (1954), the findings of facts made by the trial court were regarded as the established facts of the case where these facts were not set forth verbatim in the defendant's brief on appeal as required in RULE ON APPEAL 43, 34A Wn.2d (1953 Amend.) *cf.*, Vandermeer v. Belk, 145 Wash. Dec. 379, 275 P.2d 436 (1954). In State v. Hartwig, 145 Wash. Dec. 69, 273 P.2d 482 (1954), the court would not discuss any assignment of error which was not supported by argument as required in RULE ON APPEAL 42, 34A Wn.2d (1953 Amend.). A fifty-six page supplemental statement of facts was stricken where it was not filed within the ninety-day period prescribed by RULE ON APPEAL 34, 34A Wn.2d 36. Donald W. Lyle, Inc. v. Heidner and Company, 145 Wash. Dec. 753, 278 P.2d 650 (1954). In O'Brien v. Schultz, 145 Wash. Dec. 717, 278 P.2d 322 (1954), a cross appeal was dismissed for three reasons, each justifying a dismissal: (1) cross appellants filed no notice of cross-appeal as required by RULE ON APPEAL 33 (3), 34A Wn.2d 33; (2) the judgment or order appealed from was not in the record of the court [See State *ex rel.* Thomas v. Lawler, 23 Wn.2d 87, 159 P.2d 622 (1945)]; and (3) cross-appellants' brief contained no assignments of error as required by RULE ON APPEAL 43, 34A Wn.2d (1953 Amend.).

<sup>31</sup> RULE ON APPEAL 16, 34A Wn.2d 23.

the necessity of taking a cross-appeal the respondent may present and urge in the supreme court any claimed errors by the trial court in instructions given or refused and other rulings which, if repeated upon a new trial, would constitute error prejudicial to respondent."<sup>32</sup> The only changes are the adding of the phrase "Without the necessity of taking a cross-appeal," and the adding of the words "given or refused" after the word "instructions." Apparently these changes are to further clarify the requirements of the Supreme Court under Rule 16 regarding the presentment and urging of any claimed errors by the respondent.

*Rule 44. Transcript on Appeal.* A new subdivision designated as (4) was added as an amendment to Rule 44.<sup>33</sup> This provides that at the time the transcript is completed and certified the appellant shall mail to each of the prevailing parties in the trial court, or his counsel, a copy of the clerk's index to the transcript.<sup>34</sup>

*Rule 57. Other Original Writs.* An additional paragraph was added at the end of Rule 57.<sup>35</sup> This amendment makes it necessary for the relator to file a two hundred dollar bond, or two hundred dollars cash in lieu thereof, with the clerk of the supreme court at the time of filing his certiorari petition. This is conditioned that the relator will pay all costs assessed against him in the certiorari proceedings, or in the dismissal thereof, not to exceed two hundred dollars.<sup>36</sup>

*Rule 58. Certiorari, Mandamus and Prohibition.* Subdivision (5) of Rule 58<sup>37</sup> has been changed so as to exclude certiorari, as provided for in Rule 57, from the requirement of making the relator, if a private party, deposit twenty-six dollars with the clerk of the supreme court,<sup>38</sup> since this amount was raised to two hundred dollars by the amendment to Rule 57.

*Rule 65. Abrogation of RCW 4.88.180.* The addition of Rule 65<sup>39</sup> makes no real changes in the Rules on Appeal. Its effect is to eliminate RCW 4.88.180 and all other court rules relating to the subject matter of Rules 17<sup>40</sup> and 43<sup>41</sup> of Rules on Appeal, and Rule 11<sup>42</sup> of Rules of

<sup>32</sup> RULE ON APPEAL 16, 34A Wn.2d (1954 Amend.).

<sup>33</sup> RULE ON APPEAL 44, 34A Wn.2d 47.

<sup>34</sup> RULE ON APPEAL 44, 34A Wn.2d (1954 Amend.).

<sup>35</sup> RULE ON APPEAL 57, 34A Wn.2d (1953 Amend.).

<sup>36</sup> RULE ON APPEAL 57, 34A Wn.2d (1953 Amend.).

<sup>37</sup> RULE ON APPEAL 58, 34A Wn.2d 63.

<sup>38</sup> RULE ON APPEAL 58, 34A Wn.2d (1954 Amend.).

<sup>39</sup> RULE ON APPEAL 65, 34A Wn.2d (1954 Amend.).

<sup>40</sup> RULE ON APPEAL 17, 34A Wn.2d 24.

<sup>41</sup> RULE ON APPEAL 43, 34A Wn.2d (1953 Amend.).

<sup>42</sup> RULE OF PLEADING, PRACTICE AND PROCEDURE 11, 34A Wn.2d 75.

Pleading, Practice and Procedure. Rule 17 sets out what may be reviewed and the new rule does away with identical wording in the statute. Rule 43 gives the requirements for setting out the assignments of error in the appellant brief. The effect of this section of Rule 65 does not change the present procedure. However, the significance of this section of the new rule is apparent. A number of appeals were dismissed in 1954 for failure to comply with the requirements for setting out the assignments of error in the appellant brief. These requirements are very clearly set out in Rule 43 and these dismissals were due to carelessness of counsel rather than any ambiguity in the rules. The adoption of Rule 65 eliminates any possible misinterpretation by an attorney reading the abrogated statute or any court rules relating to this subject matter. This should further drive home the fact that Rule 43 must be strictly adhered to. Rule 11 of Rules of Pleading, Practice and Procedure makes exceptions to the findings of fact and conclusions of law unnecessary to obtain appellate review of causes tried without a jury. A conflicting rule set out in RCW 4.88.180 is taken off the books by the abrogation of that statute and though it was of no effect a possible ambiguity was eliminated. The overall effect of Rule 65 is to further clarify the rules by eliminating possible misinterpretations due to the abrogated statute or other rules relating to this subject matter.

WILLIAM G. VIERT

**Default Judgment—Appearance Is Not a Pleading Required to Be Filed to Avoid Default.** In *Tiffin v. Hendricks*, 44 Wn.2d 837, 271 P.2d 683 (1954), the court reversed a default judgment where neither notice nor a copy of the motion was first served upon the defendant. The defendant served written notice of his appearance in the action on the plaintiff's attorney, but it was not filed with the clerk of the court previous to the entry of the default judgment. Since written notice of appearance served on the plaintiff need not be filed in order to constitute an appearance, the defendant had appeared in the action before the plaintiff moved for an order of default. Consequently the court had no authority to grant the motion in the absence of service of a three-day notice to the defendants required by Superior Court Rule 3, 34A Wn.2d 110, and also the service of the motion for default upon him required by Superior Court Rule 4, 34A Wn.2d 111. As the court had no authority to enter the default judgment, it had no discretion to exercise as to the matter, and the defendant was entitled to have the default judgment set aside as a matter of right without alleging or proving a meritorious defense. The plaintiff unsuccessfully attempted to bring this case within Superior Court Rule 1 (2), 34A Wn.2d 110, which provides that pleadings must be filed on or before the time fixed by the notice of the adverse party for the hearing of any motion or demurrer addressed thereto, and that the party whose pleading is not filed within such time may be adjudged in default. It is significant that the court, for the first time, clearly defined the "pleadings" which Rule 1 (2) requires to be filed to avoid a default. They are defined as: "written allegations of claims or defenses to which an opposing party

may address some motion, demurrer or denial." Consequently notice of appearance cannot be a pleading within Rule 1 (2) as it asserts no claim or defense.

**Amendment to the General Rules of the Superior Courts—Rule 16—New Trial.** Superior Court Rule 16, 34A Wn.2d 131, was amended to delete the "denying" part of the paragraph following subdivision 9. [144 Wash. Dec. No. 23 (effective July 1, 1954).] As the rule now stands, the trial court must give definite reasons of law and fact when it grants a motion for a new trial. If the court denies a motion for a new trial, there is no longer the requirement of stating its reasons in the denying order. The desirability of deleting the "denying" part was pointed out in 29 WASH. L. REV. 145-147 (1954).

**Amendment to the Rules of Pleading, Practice and Procedure—Rule 44—Abrogation of Certain Statutes.** A new rule was adopted to the Rules of Pleading, Practice and Procedure. Rule 44, 145 Wash. Dec. No. 9 (effective September 1, 1954). Rules of Pleading, Practice and Procedure 26 through 37, 34A Wn.2d 84 *et seq.*, adopting the federal rules governing discovery, involved a major change from the statutory discovery procedures. Notwithstanding RCW 2.04.200, which declares all laws in conflict with rules of court are of no further effect, there has been some confusion by continuing to apply the statutory discovery procedures. See 29 WASH. L. REV. 143 (1954). Rule 44 clarifies precisely which sections of RCW are rendered ineffective by the discovery procedures in Rules 26 through 37.

## PROPERTY

**Real Property — Easements — Easement by Implied Reservation.** *Adams v. Cullen*<sup>1</sup> established for the first time the validity in Washington of easements by implied reservation. A driveway had been constructed to serve both a residence adjacent to the street and the residence behind. Both residences were upon the same tract of land, held by a single owner. The driveway had been used for both residences for many years. The quasi-servient tenement, adjacent to the street, was conveyed to the defendant prior to the plaintiff's acquisition of the rear property. Construction of another driveway for the plaintiff's premises would have entailed grading a 45 foot incline to the street below, a project of considerable expense. Plaintiff was held to possess an easement by implied reservation in the driveway across the defendant's land.

Following previous decisions on implied easements,<sup>2</sup> the court restated the three requirements: unity of title and subsequent separation; an apparent and continuous quasi-easement during unity of title; and a certain degree of necessity. The court then pointed out that "Unity of title and subsequent separation is an absolute requirement.

<sup>1</sup> 44 Wn.2d 502, 268 P.2d 451 (1954).

<sup>2</sup> *Bailey v. Hennessey*, 112 Wash. 45, 191 Pac. 863 (1920); *Wreggit v. Porterfield*, 36 Wn.2d 638, 219 P.2d 589 (1950); *Silver v. Strohm*, 39 Wn.2d 1, 234 P.2d 481 (1951).