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9-1-1997

## The Volley of Canons

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### Recommended Citation

K.K. DuVivier, *The Volley of Canons*, 26 *Colo. Law.* 59 (Sept. 1997).

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## The Volley of Canons

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# The Scrivener: Modern Legal Writing



## The Volley of Canons

by K.K. DuVivier

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*Interpretation is the art of finding out . . .  
what [the drafter] intended to convey.*  
Francis Lieber

*I don't care what their intention was.  
I only want to know what the words mean.*  
Oliver Wendell Holmes

The “canons of construction” are a set of formalized rules or maxims for interpreting words. These canons are especially relevant for two categories of legal writers. First, brief writers can use the canons to argue a particular interpretation of the words of a statute. The statute’s words provide the best evidence of statutory intent, both under the “plain-meaning” rule and when legislative history is sparse. Second, attorneys who draft instruments should consider the impact of the canons when choosing specific language to insert in a contract,<sup>1</sup> lease, or other instrument.

An advantage of the canons of construction is that they provide some convenient and fairly uniform approaches for interpreting words. A disadvantage is that most canons are simply principles, not controlling rules. Furthermore, different canons may lead to contrasting results,<sup>2</sup> so the canons are applied inconsistently.

Because of this inconsistency, it is best to cite some authority for any canon you urge a court to follow. For rules of grammar, you can turn to a standard grammar book: the *Bluebook* references the *U.S. Government Printing Office Style Manual* (1986) and the *Chicago Manual of Style* (14th rev. ed. 1993) for grammar rules.<sup>3</sup> These sources do not, however, contain rules of construction.

### DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401 or through e-mail to: [duvivier@spot.colorado.edu](mailto:duvivier@spot.colorado.edu).

A few of the many canons of construction have been codified as controlling law in Title 2, Article 4 of the Colorado Revised Statutes. Part 1 of Article 4 (“Construction of Words and Phrases”) addresses discrete and basic issues, such as the computation of time.<sup>4</sup> Part 2 (“Construction of Statutes”) is more broad-brush. For example, CRS § 2-4-201 addresses the intent of a statute, but uses only general language such as the following:

In enacting a statute, it is presumed that . . . [a] just and reasonable result is intended; [a] result feasible of execution is intended. . . .<sup>5</sup>

Although CRS § 2-4-201 does not articulate the specific canons of construction, its annotations contain examples of many well-recognized canons and can be a good source for finding authorities to cite.<sup>6</sup> When the annotations to § 2-4-201 do not yield a case to cite as support for a particular canon of construction, look to the *Colorado Digest*. The majority of canons of construction are covered by the topic of “Statutes” and by the key numbers 174 through 278.<sup>7</sup>

While most traditional canons of construction are not specifically addressed in the Colorado statutes, one canon—the rule of the “last antecedent”—has been singled out for unique treatment by the Colorado legislature. The standard formulation of the last antecedent rule is as follows: “relative and qualifying words . . . are construed to refer solely to the last antecedent [word(s) immediately preceding or coming (“cedere”) before (“ante”)] with which they are closely connected. . . .”<sup>8</sup>

In *People v. McPherson*, an opinion authored by Justice Jean Dubofsky, the Colorado Supreme Court used the rule of last antecedent to overturn a Court of Appeals holding that an unloaded gun was not a “deadly weapon.”<sup>9</sup> Justice Dubofsky was working with the following wording:

“Deadly weapon” means any firearm, knife, bludgeon, or other weapon, device, instrument, material, or substance . . . which in the manner it is used . . . is capable of producing death or serious bodily injury.<sup>10</sup>

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The Colorado Court of Appeals had held that the italicized phrase modified all words in the list. Therefore, because the defendant's "firearm" was unloaded, and thus not "capable of producing death or serious bodily injury," it was not a deadly weapon under the statute. In contrast, Justice Dubofsky applied the rule of the last antecedent to find that the restriction applied only to the last antecedent, the word "substance." Thus, an unloaded gun was a "firearm" and consequently was a "deadly weapon" under the statute, regardless of whether it was "capable of producing death or serious bodily injury."

For some unexplained reason, the Colorado legislature enacted CRS § 2-4-214 in response to Justice Dubofsky's opinion in *McPherson*. This statute, perhaps the only Colorado statute that specifically references a case by name, states that the rule of last antecedent "has not been adopted by the general assembly and does not create any presumption of statutory intent."<sup>11</sup>

The result has been confusion. In April 1990, the Colorado Supreme Court used a footnote in *Danielson v. Castle Meadows, Inc.* to state that the rule of last antecedent "is no longer applicable in Colorado."<sup>12</sup> However, in June 1990, the Colorado Court of Appeals still was applying the rule of last antecedent in *People in the Interest of M.W.*<sup>13</sup> The *M.W.* case follows the majority rule concerning the last antecedent. In contrast, *Danielson* is consistent with a section of the criminal code: CRS § 18-1503(4) provides that if one element of an offense requires a "specified culpable mental state" (e.g., intent), then "that mental state is deemed to apply to every element of the offense . . ." (*emphasis added*).

Because CRS § 2-4-214 makes it unclear whether Colorado would follow the rule of last antecedent, it is wise to avoid it when you have control of language in drafting an instrument. For example, CRS § 18-1-901(3)(e) has been redrafted to avoid the uncertainty addressed in *McPherson*. The revised version, as follows, makes it clear that the modifying clause applies to all of the weapons listed.

"Deadly weapon" means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) A firearm, whether

loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance. . . (*Emphasis added.*)

The craft of writing requires an understanding of the controlling rules. Knowing the canons of construction can help us predict how the words we choose may be construed.

## NOTES

1. Canons for interpreting statutes have been applied in interpreting contracts. *Daly v. Concordia Fire Ins. Co.*, 65 P. 416 (Colo. 1901).

2. Some canons have been criticized because for every canon that provides a "thrust," there is another that provides a "parry." Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," 3 *Vand. L.Rev.* 395, 401-06 (April 1950).

3. See *The Bluebook: A Uniform System of Citation*, 16th ed. (Cambridge, MA: Harvard Law Review Assoc., 1996), Introduction, Rule 1.2 at 4.

4. E.g., "In computing a period of days, the first day is excluded and the last day is included." CRS § 2-4-108 (1980).

5. CRS § 2-4-201 (1980).

6. E.g., the canon of *in pari materia* ("on the same material," thus two statutes concerning the same subject matter should be read together) is supported by *People in Interest of M.K.A.*, 511 P.2d 477 (Colo. 1973). Caution, however, the annotations are not comprehensive. Some of the most recent cases on *in pari materia* are not listed in the Michie annotations supplement. CRS § 2-4-201 (Supp. 1996).

7. The *Colorado Digest* is the best source for finding specific Colorado cases. See *West's Colorado Digest 2d* §§ 174-278 (West Pub. Co., 1988). Other West digests are a source for cites to other jurisdictions, as is 73 *Am.Jur.2d Statutes* § 142-341 (1974).

8. *People v. McPherson*, 619 P.2d 38, 40 (Colo. 1980). See also 82 *C.J.S. Statutes* § 334 (1953), 73 *Am.Jur.2d Statutes* § 230 (1974).

9. *McPherson*, *supra*, note 8.

10. CRS § 18-1-901(3)(e) (1973). (*Emphasis added.*)

11. CRS § 2-4-214 (Supp. 1996).

12. *Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1113 n.6 (Colo. 1990).

13. *People in the Interest of M.W.*, 796 P.2d 66 (Colo.App. 1990), *cert. denied*.

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