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Civil Procedure

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I. CIVIL PROCEDURE

A. Right To Jury Trial For Legal Counterclaim Against Equitable Claim

In *Miller v. District Court,*[1] the Colorado Supreme Court bucked the trend of federal and state court decisions regarding the right to a jury trial in civil suits. In this case, the plaintiff alleged that defendants had defaulted on a promissory note secured by a mortgage deed, and demanded foreclosure by sale of the mortgaged property. Defendants answered by alleging fraud in the procurement of the note and mortgage and filed a counterclaim for the alleged breach of contract involving the transaction in which the note and mortgage were executed. Defendants demanded trial by jury pursuant to Rule 38(b), Colorado Rules of Civil Procedure.[2] Ten days prior to the trial, the defendants were informed by the district court that it had granted the plaintiff's motion to strike the case from the jury calendar and had ordered that the action be tried by the court without a jury.

The defendants, petitioners in mandamus, contended that Rule 38(a)[3] established in them a right to trial by jury. The supreme court affirmed the lower court's action. Referring to Rule 38(a), the court, Moore, J., said:

> This rule, in all material parts, adopts without change the provisions of Rule 191 of the Code of Civil Procedure. This code provision has been construed on numerous occasions by this court prior to the adoption of Rule 38(a). The promulgation of the new rule, the pertinent parts of which are in the exact language of the pre-existing code, necessarily included the construction theretofore given the language of the code provisions. The new rule of civil procedure did not enlarge upon the right to the jury trial as those rights were fixed by the code provision and the judicial pronouncements thereunder. No other rule of civil procedure enlarges the category of cases in which the right to jury trial shall be had.[4]

The court cited several Colorado cases which interpreted the code to mean that the determination of whether or not an issue of fact must be tried by a jury was dependent upon the character of

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[1] Miller v. District Court, 388 P.2d 763 (Colo. 1964).

[2] Rule 38(b) provides: "Any party may demand a trial by jury of any issue triable by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

[3] Rule 38(a) provides: "Upon demand, in actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, an issue of fact must be tried by a jury, unless a jury trial is thereafter waived."

[4] Miller v. District Court, 388 P.2d 763, 765 (Colo. 1964).

the action in which the issue was joined.[5] Here the mortgage foreclosure, an equitable claim, was held to have invoked the equity aim of the court and the character of the action thereby determined.

The effect of the court's interpretation of the code, and thus of Rule 38(a), is disadvantageous to a defendant. If a defendant interposes a counterclaim in an equitable action, as determined by the plaintiff's claim, he waives any right to a jury trial he may otherwise have had (in a separate action) on issues presented by the counterclaim.[6] Generally, permissive counterclaims allowed by Rule 13(b) will not involve issues of fact raised by the basic claim, so a separate trial of these claims may not create any disadvantage other than the economics of litigation.[7] As the petitioners argue in their brief, to insure a right to a jury trial on the legal question a premium is placed on the race to the court house to file the claim, thereby permanently fixing the character of the action.

Compulsory counterclaims to an equitable claim present an entirely different problem.[8] Federal Rule 13(a) has been interpreted to mean that a defendant *must* assert those counterclaims arising from the same transaction or occurrence as the subject of the plaintiff's claim or relinquish them.[9] One authority goes so far as to say that a rule which attaches the consequences of a waiver to the interposition of a compulsory counterclaim would probably be unconstitutional.[10]

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[5] Tiger Placers Co. v. Fisher, 98 Colo. 221, 54 P.2d 891 (1936); Rosenbaum v. Buchhert, 73 Colo. 260, 215 Pac. 131 (1923); Plain Iron Works Co. v. Haggott, 72 Colo. 228, 210 Pac. 696 (1922); Neikirk v. Boulder National Bank, 53 Colo. 350. 127 Pac. 137 (1912); Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 Pac. 158 (1911); Cree v. Lewis, 49 Colo. 186, 112 Pac. 326 (1910); United Coal Co. v. [Canon City] Coal Co., 24 Colo. 116, 48 Pac. 1045 (1897); Danielson v. Gude, 11 Colo. 87, 17 Pac. 283 (1888).

[6] James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 684 (1963).

[7] McCoid, *Jury Trials in Federal Courts*, 45 IOWA L. REV. 726, 736 (1960).

[8] COLO. R. CIV. P. 13 — *Counterclaim and cross-claim*

(a) Compulsory Counterclaims. A pleading *shall* state as a counterclaim any claim at the time of filing the pleading the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim* and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. (Emphasis added.)

(b) Permissive Counterclaims. A pleading *may* state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of opposing party's claim. (Emphasis added.)

[9] Hancock Oil Co. v. Universal Oil Prod. Co., 115 F.2d 45 (9th Cir. 1940).

[10] *Supra* note 6. James refers to Bendix Aviation Corp. v. Glass, 81 F. Supp. 645, (E.D. Pa. 1948) where defendant filed a counterclaim for compensation against plaintiff's action for specific performance of a contract. The court there said, at 646:

> Under the old system of divided law and equity procedure a defendant in an equity suit who had a cause of action at law against the plaintiff waived his right to a jury trial if he pleaded it as a counterclaim against the plaintiff's bill. However, Rule 13(a) now makes it compulsory for him to do so if his claim arises out of the same transaction. Consequently there can be no question of this defendant's having waived jury trial by putting in his claim as a counterclaim to an equitable action.

In *Johnson v. Neel,* the Colorado Supreme Court had apparently left the door to the implications of compulsory counterclaims slightly ajar when it said:

> In basing the determination of this question on grounds of equitable estoppel, we are not unmindful of our opinion in Tiger Placers Co. v. Fisher, 98 Colo. 221, 54 P.2d 891, 892, in which we recognized the rule that the original complaint filed in an action fixes "the nature of the suit and by what arm of the court it should be tried," and whether either party is entitled to a jury trial even though the cross complaint of the defendant presented issues properly triable to a jury. That case, and others therein cited, was determined under the code of civil procedure. Whether or not the result would be the same under the Rules of Civil Procedure which contains a provision relating to compulsory counterclaims (Rule 13 [a]), we do not determine.[11]

Apparently, the door has now been slammed shut. The court disposes of any impact Rule 13(a) may have on previous decisions by holding that there are no material differences between the code and Rule 13(a) on the subject of compulsory counterclaims. At least not enough differences to justify abandonment of the rule on right to jury trial announced in *Neikirk v. Boulder National Bank.*[12]

The federal courts have consistently followed the United States Supreme Court's lead in *Beacon Theatres, Inc. v. Westover*[13] and hold that, since the promulgation of the provision for the merger of legal and equitable actions,[14] the filing of a counterclaim, or any legal defense against an equitable claim does not constitute a waiver of trial by jury on the legal questions.[15] They hold that there are no longer equity cases and legal cases. The legal issues, not the form of the cases, are determinative of the method of trial.[16]

Where before the promulgation of the Federal Rules of Civil Procedure the federal courts may have held that a court sitting in equity could retain jurisdiction even with regard to legal issues raised in an equitable action, the present courts would reject this principle. Relying upon Federal Rules 1, 2, and 18, the federal courts hold that the same court may try both legal and equitable causes in the same action.[17] Following *Beacon,* they hold that legal and equitable issues can be tried at the same time, with the jury (if demanded)

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[11] 123 Colo. 377, 388, 229 P.2d 939, 945 (1951).

[12] 53 Colo. 350, 127 Pac. 137 (1912).

[13] 359 U.S. 500 (1959).

[14] COLO. R. CIV. P. 1 and FED. R. CIV. P. 1.

[15] De Pinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963); Wirtz v. Robert E. Bob Adair, Inc., 224 F. Supp. 750 (W.D. Ark. 1963); Bendix Aviation Corp. v. Glass, 81 F. Supp. 645 (E.D. Pa. 1948).

[16] Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d 563 (2d Cir. 1942).

[17] De Pinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963).

rendering a verdict on the legal issues and the court rendering a decision on the equitable issues.[18] The right to a jury trial on legal issues, with a few exceptions not applicable here, will not be denied to a defendant in federal court on the mere ground that the case was originally presented to the court as an equitable action by the plaintiff.[19]

Many states have followed the trend of the federal courts by rejecting their previous holdings made under state codes prior to the adoption of rules similar to the Federal Rules of Civil Procedure.[20] The Colorado court was given an opportunity to follow the trend but refused.

The right to jury trial in civil actions has triggered considerable comment and many solutions have been proposed.[21] One common criticism of the procedure required by the Colorado court's decision in *Miller* — separate trials of the equitable claim and legal counterclaim if a jury trial is desired — is that a certain amount of evidence may have to be repeated, therefore defeating one objective of the merger provision of the rules: economy of litigation. In view of the federal cases interpreting the federal rules, from which the Colorado rules were promulgated, there appears to be no justifiable reason for requiring the additional litigation.

B. Original Jurisdiction Of Supreme Court: Prohibition

In *Colorado State Council of Carpenters v. District Court,*[22] the court exercised its original jurisdiction under unique circumstances. In an original proceeding by two labor unions and their presentatives, entitled *Original Proceedings Under Rule 106(4) and Rule 116 in Nature of Prohibition,* the court issued an absolute rule vacating a distrit court's order for a temporary injunction against picketing. Lack of jurisdiction in the district court was the basis for the rule.

Briefly, the proceeding arose from the following facts: Peti-

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[18] *Ibid.;* Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961).

[19] Thermostitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961).

[20] *E.g.* California in Hutchason v. Marks, 54 Cal. App.2d 113, 128 P.2d 573 (1942), and Minnesota, which had earlier case law to the effect that the decisive test whether an action is triable to the court or to a jury was determined by the complaint. In Landgraf v. Ellsworth, 126 N.W.2d 766 (Minn. 1964), the Minnesota court held that the nature and character of the action was determined from all the pleadings and the right to jury trial was also so determined. The court refused to follow the old doctrine, but stated that the more recent cases, which it followed, represented the correct view of the law.

[21] James, *supra* note 6; McCoid, *supra* note 7; Pike & Fischer, *Pleadings and Jury Rights in the New Federal Procedure,* 88 U. PA. L. REV. 645 (1940); 59 COLUM. L. REV. 938 (1959).

[22] 392 P.2d 601 (Colo. 1964).

tioners requested that the employer, a construction company building a water reservoir for the City of Fort Collins, sign a bargaining agreement. When the employer refused, the petitioners caused pickets to be placed near the entrance to the work project. The picketing caused complete work stoppage when union members honored the line and refused to cross. The employer sought an injunction against the picketing in district court. Petitioners filed no responsive pleadings to raise any issue of fact but merely appeared at a hearing on the injunction and orally suggested to the trial judge that there was grave doubt concerning the court's jurisdiction in view of the provisions of the National Labor Relations Act. The employer presented testimony to prove his allegations, whereas the petitioners offered no testimony whatsoever.

In briefs submitted by counsel to the supreme court, the petitioners alleged that the evidence showed the employer was arguably engaged in operations which affect commerce, thereby precluding the district court's jurisdiction, and that the preliminary injunction was a matter of great public importance because it deprived employees of their rights of self-organization, collective bargaining, and concerted action. The employer, in a brief by his counsel, contended that the employer's operation did not affect commerce and that the petitioner had another adequate remedy: writ of error.

The majority of the court, in vacating the district court's order for a temporary injunction, relied upon *Building Construction Trades Council v. American Builders, Inc.*,[23] in which it was held that the state courts have no jurisdiction to enjoin peaceful picketing in the absence of a showing that the National Labor Relations Board has declined to accept jurisdiction over the controversy. Two recent United States Supreme Court decisions[24] also were subscribed to as the basis for the court's decision.

The propriety of granting the extraordinary remedy of prohibition seems to be questionable in this case. The general rule regarding a writ of prohibition is that ordinarily it will not issue where there is another legally adequate remedy, or where the jurisdiction of the lower court is debatable, or depends on facts *de hors* the record.[25] Colorado generally subscribes to the concept that prohi-

[23] 139 Colo. 236, 337 P.2d 953 (1959).

[24] Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963); Local 438, Construction Union v. Curry, 371 U.S. 542 (1963).

[25] 42 AM. JUR. *Prohibition* § 5 (1942).

bition is primarily a preventive or restraining remedy and is not a corrective remedy which is the function of a writ of error.[26]

A showing that a court is proceeding without or in excess of jurisdiction is not sufficient basis for granting a writ of prohibition; either non-availability of any other adequate remedy, or irreparable damage, or "matters of great public importance" must also be shown before the writ is ordinarily granted.[27]

The court's decision here apparently was based solely upon the lack of jurisdiction. Because there is no mention of questions concerning the propriety for issuance of the rule, it is difficult to determine what factors other than lack of jurisdiction existed. Was the preliminary injunction a matter of great public importance? Was the ordinary remedy of writ of error inadequate in this situation? Or is the court saying that, as a matter of policy, prohibition will lie any time a state court exercises jurisdiction and issues an injunction against picketing of an operation which arguably affects commerce?

In an interesting and critical dissent, Hall, J. raises some interesting points regarding the propriety of the original proceeding and the court's review of the trial court proceeding. He candidly states that the supreme court exceeded its jurisdiction by entertaining the matter as an original proceeding. He argues that the

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[26] City of Aurora v. Congregation Beth Medrosh Hag., 140 Colo. 462, 345 P.2d 385 (1959); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958) where the court said:

> Corrective measures are not within the sweep and coverage of prohibition; correction of error is the function of a writ of error. A trial court has the power to render a right as well as a wrong decision. "Prohibition may never be used to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. Nor may it be used to restrain a trial court from committing error in deciding a question properly before it; it may not be used in lieu of a writ of error." (Citation omitted.) 138 Colo. at 6, 329 P.2d at 783.

See also People *ex rel.* Pratt v. District Court, 33 Colo. 306, 79 Pac. 1018 (1905); McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516 (1892).

[27] COLO. R. CIV. P. 116, "Relief in the nature of prohibition will not be granted except in matters of great public importance. The fact that a court has erroneously granted or denied change of venue, or is otherwise proceeding without or in excess of jurisdiction, will not be regarded as sufficient."; Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957) where it was stated:

> It appears that there are two requirements in construing the quoted last sentence of Rule 116, R.C.P., to-wit:
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> (1) That each case is determined by its own circumstances and conditions; and
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> (2) That coupled with the claim of lack of jurisdiction or proceedings in excess thereof, must be at least one other factor spelled out elsewhere in our rules and decisions, such as that it is a matter of great public importance, or that no plain, speedy or adequate remedy exists, or that relief by way of writ of error will be futile. 135 Colo. at 93, 308 P.2d at 1010.

Allen, *Mandamus, Quo Warranto, Prohibition, and Ne Exeat,* 1960 U. ILL. L.F. 102, 110.

majority completely ignored the court's earlier pronouncements concerning the issuance of prohibition.

As the dissenting judge points out, the majority does not mention the question as to whether the employer's operations affect commerce even though the employer's counsel urged that there was no proof that the building of the reservoir affected commerce. Since "affecting commerce" is essential to create jurisdiction in the National Labor Relations Board and thereby preempt jurisdiction of a state court, the supreme court side-stepped a very critical issue. The cases cited for support of the decision are in a different category. In all of them the operations involved either were stipulated as affecting commerce or were directly involved in interstate commerce. Because of this factual issue, there is some question whether the state district court lacked jurisdiction.

The supreme court apparently adopted a philosophy that a state court must keep its hands off any action which might involve the National Labor Relations Board. This might preclude future hand slapping by a federal court, but the use of prohibition seems to be stretching things a little too far. Prohibition is an extraordinary remedy which should be, as expressed by the court on many prior occasions, issued only upon sound and cautious discretion.[28] The exercise of discretion encompasses the existence or absence of other adequate relief.[29] A writ of error was available to the petitioners.

With no record to review, the court, in effect, gave the petitioners the benefit of a writ of supersedeas, without incurring the liability or expense of a bond, when it vacated the injunction.[30]

C. Extent Of Inquiry Into Judgment When Bankruptcy Raised As Defense To Execution Thereof

A case arose concerning the extent of permissible inquiry into a judgment subject to discharge in bankruptcy proceedings. Although

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[28] City of Aurora v. Congregation Beth Medrosh Hag., 140 Colo. 462, 345 P.2d 385 (1940); Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); People *ex rel.* Benbow v. District Court, 37 Colo. 440, 86 Pac. 322 (1906); McInerny v. City of Denver, 17 Colo. 302, 29 Pac. 516 (1892); Leonard v. Bartels, 4 Colo. 95 (1878).

[29] City of Aurora v. Congregation Beth Medrosh Hag., *supra* note 28.

[30] *Cf.* Local 1364 Retail Clerk's Union v. Superior Court, 52 Cal.2d 222, 339 P.2d 839, *cert. denied,* 361 U.S. 864 (1959) where a writ of prohibition was sought under similar circumstances. The court there said,

> We are not prepared to hold that the allegations of bare conclusions of law as to jurisdiction establish any facts as to the effect of any alleged labor practice upon interstate commerce; rather, we agree with the superior court that in the present state of the record there is an unresolved "factual question" (in addition to questions of law) upon which determination of its jurisdiction may eventually depend. At the present time the allegations as to jurisdiction show at most that upon further proceedings *in the basic action questions* of federal preemption *may* be presented; but they show also that no such issue is ripe for resolution in this proceeding. 339 P.2d at 841.

there is no specific rule of civil procedure directly involved, the case is apparently one of first impression in Colorado on the subject and is worthy of some comment in this review.

In *Miller v. Rush*,[31] a purchaser, plaintiff-in-error (hereafter referred to as plaintiff), and seller, defendant-in-error (hereafter referred to as defendant), entered into a written contract whereby the defendant agreed to construct a residence and convey the same to the plaintiff "free and clear" of all liens. In a foreclosure action by lien claimants against both parties, plaintiff put up cash to cover claims and obtained a cross-claim judgment against the defendant. Judgment was partially satisfied and plaintiff filed motion for supplementary proceedings under Rule 69, Colorado Rules of Civil Procedure, seeking to make discovery of defendant's assets that might be available for satisfaction of balance due. While proceeding was pending, defendant filed a debtor petition in bankruptcy. Plaintiff filed a proof of claim reciting that the liability was based upon defendant's obtaining money by false representation. Defendant received a general discharge in bankruptcy. When plaintiff resumed the supplementary proceedings, the trial court granted an indefinite stay upon defendant's motion asserting defense of bankruptcy. Plaintiff contended that the trial court should conduct a hearing concerning the true nature of his claim and find that the judgment was not dischargeable because the liability was based upon fraud. The record of judgment did not contain a single word concerning fraud or misrepresentation. The trial court refused to consider anything outside the record of judgment and found it was discharged. Plaintiff sought a writ of error overruling the trial court. The general rule is that where the origin of the indebtedness is not apparent from the judgment itself, ". . . it is proper to consider and review the whole record of the proceedings in which the judgment was rendered, including the pleadings, instructions to the jury, verdict, findings, special interrogatories, and the answers thereto, and the enrolled judgment order."[32] While the majority of courts retrict their inquiry to the record of proceedings,[33] there seems to be a growing minority which permits the introduction of testimony, not for the purpose of attacking or opening the judgment, but to prove that the defense of bankruptcy is not available to the debtor.[34]

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[31] 393 P.2d 565 (Colo. 1964).

[32] 6 AM. JUR. *Bankruptcy* § 815 (1938).

[33] National Finance Co. of Provo v. Daley, 14 Utah 2d 263, 382 P.2d 405 (1963); Lawrence v. Wischnowsky, 344 Ill. App. 346, 100 N.E.2d 816 (1951); Shawano Finance Corp. v. Haase, 252 Wis. 12, 30 N.W.2d 82 (1947).

[34] Levin v. Singer, 227 Md. 47, 175 A.2d 423 (1961); Fidelity and Cas. Co. v. Golombosky, 133 Conn. 317, 50 A.2d 817 (1946); Swig v. Tremont, 8 F.2d 943 (1st Cir. 1925); Gregory v. Williams, 106 Kan. 819, 189 Pac. 932 (1920).

Both the majority and minority views seem to agree that an inquiry into a judgment general in nature is proper to determine whether the defense of bankruptcy is available. The primary disagreement arises over the question of whether the inquiry is limited to the record[35] or if the creditor may show that the defense of bankruptcy is not available by testimony *de hors* the record.[36]

The court sets forth the three points of view on the subject as:

(1). The judgment is conclusive and the court may not go behind it to determine the facts on which predicated.

(2). Review of the whole record of the case may be had to determine the real nature of the claim which has been reduced to judgment.

(3). Not only review of the whole record may be had, but the court may go outside thereof to determine the nature of the claim (this is a decided minority view).

In refusing to accept the minority view, (3) above, as urged by the plaintiff, the court subscribed to a Utah decision, *National Finance Company of Provo v. Daley*[37] in which it was stated:

> In our judgment, it better comports with the orderly processes of justice to require the plaintiff to bear the responsibility of pleading, proving, and claiming the full benefit of whatever character of cause of action he possesses then to allow another trial upon the same cause of action raising issues which could have been dealt with in the original action.

The court pronounced that Colorado had in effect renounced the minority view in *Valdez v. Sams*.[38] In that case, the plaintiff alleged wilful negligence. The default judgment (entered when defendant failed to answer) contained no findings other than simple negligence and no exemplary damages were awarded. After judgment was entered, defendant received a general discharge in bankruptcy. Thereafter, when plaintiff began execution on the judgment and commenced garnishment proceedings, the defendant obtained a rule releasing the garnishee and prohibiting further writs of garnishment. The supreme court, in holding that a judgment not specifically setting forth findings making judgment non-dischargeable therefore is dischargeable, stated:

> Examination of the record in this action leads to the conclusion that the trial court entered judgment based on simple negligence. If plaintiffs desired to protect themselves against the possibility that defendant might seek a discharge in bankruptcy, it was incumbent

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[35] See cases cited *supra* note 33 .

[36] See cases cited *supra* note 34.

[37] 14 Utah 2d 263, 382 P.2d 405 (1963).

[38] 134 Colo. 488, 307 P.2d 189 (1957).

> on them to secure a specific finding in the trial court that the negligence of defendant was such that a discharge in bankruptcy it was incumbent on them to secure a specific finding in the trial court that the negligence of defendant was such that a discharge in bankruptcy would not operate to release the judgment. No such finding was made.[39]

The Colorado law still is not clear since the court did not specifically state which of the other two views it followed. The trial court expressly refused to go behind the judgment and examine "the depositions, exhibits, pleadings, or other papers in the principal action herein which preceded the judgment, because the same are merged by the judgment." In affirming the trial court's action, the court would appear to be adhering to view (1) above. However, in *Valdez,* the court considered allegations in the complaint so maybe view (2) above is followed. To preclude any problems, it appears that a plaintiff should definitely obtain a specific finding of non-dischargeable matters in the judgment.

D. Complaint — Necessity For Specific Allegation Of Place Where Tort Was Committed

In *Sprott v. Roberts,*[40] the court held that a complaint was insufficient for failure to adequately allege the place where an alleged tort was committed and a motion to dismiss on this basis was good. The action was brought against an anestheseologist for damages resulting from alleged malpractice. The complaint alleged that the plaintiff had been taken by his mother to a dentist's office for dental work and that the dentist engaged defendant to administer an anesthetic. Negligence of the two doctors in administering the anesthetic was the alleged cause of damages. The trial court granted defendant's motion to dismiss. The supreme court held that the motion to dismiss was good on the basis of failure to allege the place where the tort was committed, but reversed the trial court on the ground that the plaintiff should have been allowed to amend his complaint in accordance with Rule 15(a).

The important aspect of the case is the court-imposed requirement that the place of the alleged tort must be alleged in particular. This requirement seems to be contrary to the purpose of simplicity of pleadings set forth in Rule 8(e).[41] The federal courts have held that the new Federal Rules of Civil Procedure "restrict the pleadings to the task of general notice-giving."[42] Colorado has also held that

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[39] *Id.* at 491.

[40] 390 P.2d 465 (Colo. 1964).

[41] Colo. R. Civ. P. 8(e)(1), "Each averment of a pleading shall be simple, concise, and direct. . . . No technical forms of pleading or motions are required."

[42] Hickman v. Taylor, 329 U.S. 495 (1947).

the chief function of a complaint is to give notice, and the test of sufficiency is whether it gives fair notice to a defendant to enable him to answer and prepare for trial.[43] It seems like these requirements are met in *Sprott v. Roberts*,[44] but the court apparently ignored these pronouncements. What makes it more confusing is the fact that in *J & K Const. Co. v. Malton*,[45] which was decided a little over a week before *Sprott*, the court subscribed to the above test of sufficiency and added that "the rule now is that pleadings are to be construed in favor of the pleader."[46]

Certainly, the defendant was sufficiently notified of the alleged event and its location to enable him to answer and prepare for trial. As pointed out by the dissent, this decision seems to be a step backwards towards the supertechnical requirements of common law pleading.

E. SUMMARY JUDGMENT

In *O'Herron v. State Farm Mutual Automobile Ins. Co.*,[47] the court followed federal court decisions in reversing a summary judgment. An insurance company, third party defendant in a personal injury action, admitted the issuance of policies to defendants but denied coverage and by counterclaim for declaratory judgment alleged that the policies did not cover defendants, third party plaintiff, because of specific provisions in the policies. The insurance company took depositions from defendants and testimony contained therein was in agreement with no dispute of the facts. The defendants filed affidavits in opposition to the insurance company's motion for summary judgment. The affidavits made qualifying statements, in the form of conclusions, regarding the issue of whether the car involved in the accident was being used for business or personal purposes. The parties relied upon different provisions of the policies as grounds for their position. The trial court entered a summary judgment in favor of the insurance company on the basis of factual issue in the depositions.

The supreme court reversed the lower court, finding that even though there was no dispute in the depositional testimony, the parties' "discordant contentions bringing about dissimilar results, arise from divergent views of the testimony contained in the depositions." The court found that divergent inferences could be drawn

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[43] J & K Const. Co. v. Molton, 390 P.2d 68 (Colo. 1964); Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950).

[44] 390 P.2d 465 (Colo. 1964).

[45] 390 P.2d 68 (Colo. 1964).

[46] *Id.* at 71.

[47] 397 P.2d 277 (Colo. 1964).

from the facts, and these inferences would lead to variant results depending upon which were more reasonable.

In support of its position that there was an issue of fact arising from the inferences, the court, Frantz, J., cited federal court decisions[48] and stated:

> That pleadings, depositions, admissions or affidavits contained undisputed matter and can be taken as true is not decisive of the question of whether there is a genuine issue of any material fact. "An issue of fact may arise from countervailing inferences which are permissible from evidence accepted as true."[49]

Following the Colorado rule that the party moving for a summary judgment, in order to prevail, has the burden of showing the clear absence of any genuine issue of fact,[50] the court found that the inferences drawn from the depositions precluded such a showing and held that the motion for summary judgment should have been denied.

In view of the effect of a summary judgment upon a party against whom the motion is filed, this decision seems to be a just approach. A literal construction of the bare depositions would have precluded the third party plaintiff from a trial on an apparently genuine issue of fact. The more liberal rule, followed by the court here, allows litigation of a dispute even though the depositions did not expressly manifest the dispute.*

Glenn A. Buse

*[Editor's Note: The Colorado Supreme Court decided another significant case on civil procedure during 1964, Clemens v. District Court, 390 P.2d 83. A comment on this case will be contained in the next issue of the Denver Law Journal.]

[48] Empire Electronic Co. v. United States, 311 F.2d 175 (2d Cir. 1962); Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959).

[49] O'Herron v. State Farm Mut. Auto Ins. Co., 397 P.2d 227, 230-31 (1964).

[50] Koon v. Steffes, 124 Colo. 531, 239 P.2d 310 (1951).