Denver Law Review

Volume 39 | Issue 3 Article 1

January 1962

One Year Review of Civil Procedure and Appeals

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Justice is no longer delayed in the Supreme Court of Colorado. The court's departmental method of determining cases has made it possible for oral argument to be held within three months after issue is formed by the briefs in nearly every case. In 1961, 354 opinions were rendered by the court. Many of the controversies which existed in the interpretation of the Rules of Civil Procedure have now been resolved. This article will review the cases which altered or changed the court's interpretation of the Rules of Civil Procedure, but will necessarily be limited due to the number of cases which appeared before the court and involved the interpretation of the Rules of Civil Procedure.

RULE 4

The invalidity of a summons issued by an attorney pursuant to Rule 4(b), and not signed by him was the primary issue in *Brown v. Amen.*[1] A default judgment was taken against Brown, set aside on Brown's motion, and then reinstated when a rehearing was held. Brown and a witness called by him were found to be in contempt at the time the default was reinstated. The supreme court, in reviewing the validity of the default judgment and the contempt order, presumed that the copy of the summons served on Brown was not signed, because the original summons admittedly was not signed. Brown's appearance and motion to set aside the default judgment granted jurisdiction over the person, which supported the trial court's imposition of a sentence for contempt. However, it failed to have the retroactive force which would allow the reinstatement of the default and merely granted the court jurisdiction to set a time for Brown to plead or answer. The service of the void summons was held by the court to be ineffective to bring the defendants within the jurisdiction of the court, and the default judgment was therefore set aside.

RULE 9

Lamberson v. Thomas,[2] was a quiet title action where the defendant successfully proved title to mineral rights under a condemnation decree which awarded title to the defendant's predecessor in interest. Rule 9(e) came into play when a general denial formed the plaintiff's basis for questioning the validity of the condemnation decree upon which the defendant relied to prove superior title. After quoting Rule 9(e), the court said:

> If there were grounds upon which the condemnation decree could be assailed, the plaintiff was in no position to do it. Her "Reply to Amendment to Answer and Counterclaim" was only a general denial of the second, third and

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1 364 P.2d 735 (Colo. 1961).
2 362 P.2d 180 (Colo. 1961).

fourth defenses of defendants' amendment to answer. A general denial of the validity of the decree is not sufficient to assail it. Rule 9(e) provides:

> "In pleading a judgment or decision of a court * * * it is sufficient to aver [it] without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts."

The above manner of pleading is prescribed not only to simplify the pleadings relating to judgments, but also to apprise the pleader of a judgment or decision of a court that it is being challenged for jurisdictional reasons as well as the particular grounds of the attack upon it; and for the further purpose of preventing final judgments and decisions of courts from being overthrown unadvisedly.

> [I]f the plaintiff intended to attack the decree upon jurisdictional grounds she was required to give notice to the defendants by specifically denying jurisdiction and alleging with particularity the grounds showing lack of jurisdiction. Under the present system of pleading, the mandatory provisions of Rule 9(e) are not waived by the first pleader's having alleged jurisdictional facts in support of a judgment or decree. Contrary rulings by this court under the former code practice and procedure are no longer authority in Colorado.[3]

RULE 9(b)

The plaintiff in *Roblek v. Horst*,[4] was not permitted to retain possession of a Cadillac which he had obtained by a writ of replevin when he sought to defend his possession on the ground that he had been fraudulently induced to release his chattel mortgage on the Cadillac. In holding that the plaintiff failed to establish his defense of fraud, the court said:

> Fraud was neither pleaded nor proved in the manner and with the particularity required by Rule 9(b), Colo. R.C.P. and Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d 1080. The trial court under the present record was correct in directing a verdict for Frazer and against Roblek for possession of the Cadillac. There was no issue of fact to be resolved by the jury, but only an issue of law to be resolved by the court.[5]

RULE 9(e)

Rule 9(e) again found its way before the court in *Superior Distributing Corp. v. White*,[6] where full faith and credit was given to a judgment entered in Mississippi. The defendants had appeared specially in the Mississippi courts to quash the service and, after a hearing, were granted time to plead or answer when their motion was denied. When the Mississippi judgment was placed at issue in Colorado, the defendants alleged fraud in its procurement. The su-

3 *Id.* at 183.
4 362 P.2d 869 (Colo. 1961).
5 *Id.* at 873.
6 362 P.2d 196 (Colo. 1961).

preme court, in sustaining the judgment, held that the jurisdictional facts alleged as fraud were those litigated and decided by the Mississippi courts and were not subject to collateral attack. The defendants elected not to appear after the adverse determination on their motion to quash and were thereafter foreclosed from questioning the same facts in the Colorado court.

RULE 30

In *Appelhans v. Kirkwood*,[7] a $10,000 judgment was entered in favor of a fourteen-year-old plaintiff who was injured while occupying the defendant's automobile as a guest. In cross-examination of the plaintiff, defense counsel attempted to use a pre-trial discovery deposition in laying a foundation for impeachment. Objection was made to the form of the question. It was then discovered that the deposition had been corrected but not signed by the plaintiff and had not been returned to the reporter to be certified and filed as required by Rule 30(f). The court suppressed the deposition, even though the plaintiff had consented to its use. The supreme court held that the trial court violated Rule 32(d) in that any irregularity in the manner in which the deposition is "signed, certified, sealed . . . filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition, or some part of it, is made with reasonable promptness or with due diligence might have been ascertained." The court also found error in the trial court's denial of the right to refer to the deposition for the purpose of impeachment and said that the inadmissibility of the deposition was not put in issue until such time as the defendants proposed to impeach the witness by introducing the deposition into evidence. In strongly criticizing the trial court's action, the court reviewed the right to the use of a deposition and said:

> The court's subsequent action in suppressing the deposition, despite agreement by counsel for plaintiff that it be admitted for a limited purpose, was palpably erroneous. Defendants were entitled to refer to the deposition or any other document which would serve to bring to the attention of the witness any prior statement which she made looking to ultimate impeachment. The question of the inadmissibility of the deposition was not a valid issue until such time as the defendants proposed to impeach the witness by introducing the deposition. Until then it was not admissible in evidence. Our practice, unlike that under the Federal rules, does not permit its introduction as an admission.[8]

RULE 36

In *McGee v. Heim*,[9] the plaintiff sought to recover for damages suffered in a fire allegedly caused by the defendant's acts. The plaintiff filed Requests for Admissions which the defendant failed to answer. The trial judge allowed the defendant to rebut his admission as to the cause of the fire with testimony, which allowance was sustained by the supreme court:

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7 365 P.2d 233 (Colo. 1961).
8 *Id* at 238.
9 362 P.2d 193 (Colo. 1961).

In Beasley v. United States (D.C.E.D.S.C. 1948), 81 F. Supp. 518, 528, it was held in interpreting the equivalent federal rule on this point that "The admissions or denials stand in the same relation to the case that sworn evidence bears." This does not mean, however, that a technical admission of a certain fact will prevail over uncontradicted evidence to the contrary.

It would seem, then, that the proper effect of such an admission would be of a purely evidential nature. It may be contradicted or rebutted, its ultimate worth being left to the trier of fact.[10]

RULE 37(c)

In *Superior Distributing Corp. v. White*,[11] defendant refused to make certain admissions under Rule 36 and forced the plaintiff to take depositions, which the trial court refused to tax as costs against the defendant. On writ of error the trial court was sustained when the supreme court held that the awarding of costs under Rule 37(c) is a matter within the sound discretion of the trial court.

RULES 38 AND 39

In a unique personal injury action, *Butters v. Wann*,[12] Rule 38 was again placed before the court for interpretation when the defendants failed to make a timely demand for a jury trial. The court, despite the defendants' failure to comply with Rule 38 and Rule 39, ordered a jury trial. The defendants' demand for a jury was made more than a year after the issues were formed. The court, relying on *Jaynes v. Marrow*,[13] said that it was the trial court's right and power to order a jury trial, despite the fact that the formal requirements of Rule 38 were not complied with.

In *Rupp v. Cool*,[14] the court defined and clarified the right to a jury trial in the district court after trial to the court in the county court. The action was for the collection of attorney's fees and was tried to the court, where judgment was rendered for the plaintiff. On appeal to the district court, the defendant sought a jury, and the right was denied. In reversing, the supreme court said:

The trial in the district court being de novo it seems reasonable and just that the parties should not be bound in

10 *Id.* at 196.
11 *Supra* note 6.
12 363 P.2d 494 (Colo. 1961).
13 144 Colo. 138, 355 P.2d 529 (1960).
14 362 P.2d 396 (Colo. 1961).

the district court by their demanding or failing to demand a jury trial in the county court.

We hold that either party on appeal from the county court to the district court should be entitled to a jury trial in the district court in actions set forth in Rule 38. The rule does not specifically cover the time within which demand for jury trial should be made in cases appealed from the county court to the district court. Under these circumstances, if the demand for jury trial in such cases is made within a reasonable time prior to trial, and the trial court, under Rule 40, R.C.P. Colo., is afforded an oppportunity to arrange its trial calendar in an expeditious manner, the request for jury trial should be granted.[15]

The court, however, refused to place the trial of an annulment action within the confines of Rule 38(a) in *Young v. Colorado Nat'l Bank*,[16] and said that a cursory reading of the rule forces the conclusion that an annulment suit does not come within the meaning of the actions enumerated in Rule 38(a). The famous *Young* case was one where both parties consented to a jury trial, and the court elected to treat the jury as an "advisory jury." The supreme court determined that an annulment action was a statutory action in which the court is clothed with equity powers. In analyzing the right to trial by jury in an annulment action, the court looked to Rule 39(c) and said:

It is to be observed that the headnote and the body of the rule refer to two kinds of trials. 1. Cases not triable by a jury may, on motion or on the court's own initiative, be tried with an "advisory jury." 2. Non-jury cases including non-jury statutory actions (with an exception not pertinent here) may, by consent of court and the parties, be tried with a "jury." In the first, an "advisory jury" acts; in the second, a "jury" acts. If it had been intended that the "trial by consent" be submitted to an "advisory jury," the rule would have so stated.

This rule takes care of two differing situations. In the first, a party may request that a non-jury case be tried to a jury and the adversary party may resist. In such case, the court may grant the request but, since it has been resisted, may use the services of the jury in an advisory capacity only. In the second, parties and court consenting, the jury's verdict has the effect of a common law verdict.

As we construe Rule 39(c), the trial of a non-jury action to a jury, with the consent of both parties and the judge, is a jury trial in its regular sense.

Where the plaintiff demands a jury trial of a non-jury case and neither the defendant nor the court objects, consent to such trial is deemed to have been given, and the jury's verdict has "the same effect as if a jury trial had been a matter of right." *Kelly v. Shamrock Oil & Gas Corp.*, 171 F.2d 909, cert. den. 337 U.S. 917. The unilateral act of the trial court in changing the case from one of trial

15 *Id.* at 399.
16 365 P.2d 701 (Colo. 1961).

by consent to one in which an advisory verdict would be received was error; such change could only have been accomplished by agreement of the parties and the court.[17]

The *Young* case also caused the court to examine Rule 43(b) when the right to call Young's attorney as an adverse witness for cross-examination was before the court. The court said:

> The relationship of attorney and client does not entitle the opposing party to call the attorney under Rule 43(b), R.C.P. Colo., to propound leading questions to him as an adverse party or witness. *Bankers Trust Co. v. International Trust Co.*, 108 Colo. 15, 113 P.2d 656. Conduct of the attorney in extraneous matters, evincing an opinion on his part that his client is mentally competent, cannot, under the circumstances here present, be the subject of interrogation by calling the attorney as witness as tending to prove the competency of his client in a suit between the latter and another.[18]

RULE 41

A real estate broker brought a contract action against a purchaser of property to recover an amount overpaid or erroneously credited to the purchaser in the real estate closing sheet which he prepared, and his action was dismissed without prejudice for lack of privity. The broker instituted a second action in quasi contract and obtained judgment against the defendant. On writ of error the defendant urged that the trial court erred by not sustaining his defense of res judicata. The supreme court affirmed the trial court's decision and held that the dismissal by the trial court in the first instance was without prejudice and that Rule 41(b) did not foreclose the plaintiff from bringing his subsequent action in quasi contract.[19]

RULE 49

In the oft decided case of *O'Brien v. Wallace*,[20] the issues which had been joined and tried in a will contest were again presented to the court for review. Admission of the will to probate was opposed on the ground that the will was not properly executed and for the further reason that the testator did not have the requisite mental capacity at the time of execution. Proof of execution was offered and not contradicted, although abundant evidence was offered to show the mental incompetency of testator. Both issues were submitted to the jury, and a general verdict was returned invalidating the will. In reversing, the court held that error had been committed in not directing a verdict in favor of the proponents of the will on the issue of execution and said that the error had been compounded by having the jury return a general verdict. The court said:

> A general verdict upon distinct issues raised by several pleas cannot be sustained if one of the issues should not have been submitted to the jury. Here we have no way of knowing upon which of the issues submitted the jury reached its conclusion. It may have decided that Mary A.

17 *Id.* at 708.
18 *Id.* at 709.
19 Winstrand v. Leach Realty Co., 364 P.2d 396 (Colo. 1961).
20 359 P.2d 1029 (Colo. 1961).

Paige was competent but that the will was improperly executed, such verdict could not stand for there was no testimony to sustain a finding of improper execution.[21]

RULE 50

In *Nettrour v. J. C. Penney Co.*,[22] the supreme court reversed the trial court which had granted a directed verdict in favor of the defense. The directed verdict was granted in an action involving injuries sustained by a five-year-old boy while he was riding the escalator in the defendant's store. In analyzing the duties owed to a business invitee and the evidence presented, the court reversed and remanded and again said that a motion for a directed verdict could be granted only where the evidence compels the conclusion that the minds of reasonable men could not be in disagreement. The evidence must be viewed in the light most favorable to the plaintiff, and a motion for a directed verdict should be granted only when no evidence has been presented, and no inference could be drawn from

21 *Id.* at 1030.
22 360 P.2d 964 (Colo. 1961).

the evidence before the court, which would allow a jury verdict against the moving party to stand.

In a wrongful death action, *Sniezek v. Cimino*,[23] a verdict was directed against the plaintiff and affirmed by the supreme court, because the evidence posed no factual theory upon which the jury could have found negligence on the part of the defendants. The plaintiff had also urged that the trial court erred in not submitting an instruction which had been tendered and in allowing certain cross-examination. The supreme court affirmed the directed verdict with allusion to Rule 118 (f), which requires the court to "disregard any error or defect not affecting the substantial rights of the parties."

RULE 52

The findings made by the trial court pursuant to Rule 52 were questioned in *Anderson Randolph, Inc. v. Taylor*,[24] and *Crain v. Electrical Workers' Benefit Ass'n*.[25] The supreme court repeated the established law that findings of a trial court are binding and conclusive on review, unless the evidence is wholly insufficient to sustain them.

In an action to recover damages for failure to include an easement in a title insurance policy covering business property, the defendant insurer sought to set aside the trial court's findings on the basis that the judgment was based on the wrong ground. The supreme court answered the argument with the rule that "if a trial court announces the wrong grounds or incomplete grounds for its decision, nevertheless if proper grounds do exist therefor in the record that it will be affirmed on review."[26] However, a contract action, *Murray v. Rock*,[27] was reversed and remanded for new trial because of incomplete findings of fact and because the case could not be remanded for appropriate findings of fact after the trial judge had retired. In holding that the findings were insufficient to comply with Rule 52, the court repeated that findings may be either oral or written, but must be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable the appellate court to determine the ground on which it reached its decision.[28]

In *Dollison v. Cook*,[29] the trial court found for the plaintiff and awarded damages for breach of an oral construction contract, but failed to make a specific finding with regard to each objection made by the defendant. In affirming, the supreme court said there was no competent evidence to support the findings of the trial court and refused to reverse for failure to make specific findings.

RULE 54

In *Morrissey v. Achziger*,[30] the plaintiff instituted a quiet title action naming several defendants, and all defendants were personally served. Morrissey, who was a defendant, filed a cross-claim against the defendant Burns seeking reformation of his deed from

23 360 P.2d 813 (Colo. 1961).
24 361 P.2d 142 (Colo. 1961).
25 361 P.2d 442 (Colo. 1961).
26 Lawyers Title Ins. Corp. v. Trieder, 362 P.2d 555, 557 (Colo. 1961).
27 364 P.2d 393 (Colo. 1961).
28 See also *In re* Peterson's Estate, 365 P.2d 254 (Colo. 1961).
29 364 P.2d 207 (Colo. 1961).
30 364 P.2d 187 (Colo. 1961).

Burns, but never caused service of the cross-claim to be made on Burns. Burns defaulted and the supreme court upheld the plaintiff's judgment, but refused to countenance the entry of a default on Morrissey's cross-claim. The supreme court held that Burns had not received notice of Morrissey's cross-claim and that jurisdiction did not exist which would support a valid judgment for reformation under Rule 54.

RULE 55

A default judgment in a forcible entry and detainer action caused the supreme court to review not only Rule 55(b) but also Rule 80 and Rule 98(i), in *Orebaugh v. Doskocil.*[31] A forcible entry and detainer complaint was filed in the district court of Baca County, and a default judgment was entered by the court while sitting at Lamar, in Prowers County. The court, in entering the default judgment, took testimony which was not recorded by a court reporter and admitted five exhibits into evidence. The defendant filed an answer after the default was taken and subsequently filed a motion to set aside the default, alleging that the failure to answer within the proper time was the result of excusable neglect arising from mistake as to the time that service actually occurred. The trial court refused to set aside the judgment. The supreme court affirmed, holding that excusable neglect was not a sufficient basis for setting aside the default when not accompanied by a meritorious defense. The defendant's answer admitted the facts necessary to justify a judgment for forcible entry and detainer. The supreme court also pointed out that a trial court has wide discretion in a forcible entry and detainer action, where possession alone is in issue, as to whether a hearing is necessary before entering a default, and that Rule 80, which requires that evidence be taken stenographically, yielded and did not dictate a mandatory procedure in the taking of default judgments under Rule 55(b). The defendant's contention that error was committed by the entry of a judgment in Prowers, rather than Baca County, was also held to be without merit under Rule 98(i), because the action was filed in the county having proper venue and was held for the convenience of counsel in Prowers County only after the defendant had defaulted.

RULE 56

Res judicata was held to be a valid basis for a summary judgment under Rule 56 in *Kaminsky v. Kaminsky.*[32] The plaintiff sought to question a divorce decree which had been entered in her husband's favor while she was a mental incompetent and also requested an accounting of past and future support money, property held by the husband for her account, and for the creation of a trust relating to the property in issue. The husband's lawyer filed an affidavit which incorporated a copy of the Interlocutory and Final Decrees of Divorce in favor of the husband, in support of his motion for a summary judgment. He also moved to dismiss the wife's claim for an accounting on the ground that it failed to state a claim upon which relief could be granted. In affirming the summary judgment, the supreme court again held that res judicata can be raised in a

31 359 P.2d 671 (Colo. 1961).
32 359 P.2d 675 (Colo. 1961).

motion for summary judgment and upheld the attorney's affidavit which had certified copies of the judgment of the county court attached to it as being in full compliance with Rule 56(e). The court, however, reversed the trial court for dismissing the wife's suit for equitable relief, including an accounting.

A summary judgment under Rule 56 has seldom been sustained by the supreme court. *Norton v. Dartmouth Skis, Inc.*,[33] upheld a summary judgment which had been granted on the basis of the affirmative defense of the statute of limitations. The plaintiff's claim was for commissions, and the sole issue was whether the defendant corporation had absented itself from the State of Colorado so as to toll the statute of limitations. The supreme court, in upholding the trial judge's determination on the affidavits, said:

> By the affidavits filed in support of the motion for summary judgment as provided in Rule 56, Colorado R.C.P., the court had such facts before it as to enable it to determine whether the defendant was present in the state for the purposes of service. The affidavit complied with Rule 56(e) R.C.P. Colo., which provides in part that "* * * shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. * * *"[34]

A summary judgment was also upheld in *Broadway Roofing & Supply, Inc. v. Cameron*,[35] when the record disclosed that a construction contract did not bind the purchasers of property. The facts appearing before the court by way of affidavit established that there was no issue as to any material fact, and the defendant was entitled to judgment as a matter of law.

RULE 59

Rule 59 was construed in several cases during 1961. In *Boyd v. Adjustment Bureau, Inc.*,[36] the jury returned a verdict for the defendant and judgment of dismissal as to the defendant was entered. Thereafter, the plaintiff successfully urged a motion for a judgment notwithstanding the verdict when defense counsel failed to appear. The supreme court refused to consider, as a motion for new trial, the defendant's motion to reconsider the motion for judgment notwithstanding the verdict under Rule 50(b). The court dismissed the writ of error for failure to file a motion for a new trial in compliance with Rule 59(f).

The $175,681 wrongful death verdict in the ubiquitous falling telephone pole case was not reinstated by the supreme court after a new trial was awarded by the trial court.[37] The plaintiffs had attempted in the trial court to limit the issues on retrial to damages alone and had sought to have the verdict reinstated in the supreme court. In upholding the trial court, the supreme court held that an original proceeding was not proper when an adequate review was available by writ of error. The issues framed could not be determined in the supreme court without a record, and the matters be-

33 364 P.2d 866 (Colo. 1961).
34 *Ibid.*
35 362 P.2d 393 (Colo. 1961).
36 365 P.2d 813 (Colo. 1961).
37 Piper v. District Court, 364 P.2d 213 (Colo. 1961).

fore the supreme court forced the conclusion that the trial court was within its discretion in ordering a new trial.

Cortviendt v. Cortviendt[38] merely reiterated the truism that Rule 59 serves as a prerequisite to review by writ of error, and the court refused to honor the plaintiff's efforts to extend the period for review with a motion to vacate under Rule 60 and held that a valid judgment is not reviewable by writ of error. Of like effect is *Dry Cleaners & Laundry Workers v. Sunnyside Cleaners*,[39] where the court summarily refused to consider grounds for reversal not previously raised before the trial court and grounds not specified in the motion for a new trial.

RULE 81

In *Swingle v. Pollo's Estate*,[40] a beneficiary under a will appealed from the allowance of a claim against the estate from the county court to the district court. The appeal was dismissed for failure to file a bond in the district court within ten days and for the further reason that the bond was insufficient in amount. The bond in issue was filed late, but was approved by the judge of the county court within the ten-day period, and, admittedly, the county judge had the power to grant an extension of time for the filing and approval of the bond. In attacking the insufficiency of the bond and the timeliness of filing, no proof was offered to show the deficiency of the bond. The supreme court upheld the sufficiency of the bond and the timeliness of filing and declared that a beneficiary under a will who appeals from the allowance of a claim need make only a cost bond, and not a bond in twice the amount appealed from, and, therefore, reversed and remanded for trial on the merits, since no proof appeared in the record to show that the bond was deficient.

RULE 97

In *Kovacheff v. Langhart*,[41] a failure to honor a motion to disqualify, which was supported by affidavits charging that the trial judge disliked the plaintiff's attorney, was upheld by the supreme court on the ground that facts did not appear which would justify or compel disqualification of the trial judge.

RULE 101

The focal point of *Grant v. Gwyn*,[42] was the right to a body execution which was issued in a brutal assault case. The defendant moved to set aside the body execution, relying on *Canon City v. Merris*,[43] and claimed that the imposition of a sentence in the Municipal Court of Denver prohibited the imposition of execution against the body of the defendant. The trial court had submitted the proper interrogatory to the jury on the question of whether the defendant was guilty of a willful and wanton disregard of the rights and safety of the plaintiff and had properly instructed the jury on the issue of exemplary damages. After a verdict was rendered in favor of the plaintiff, the trial court ordered that a body execution be issued. The defendant's motion to set aside the body execution on the basis

38 361 P.2d 767 (Colo. 1961).
39 360 P.2d 446 (Colo. 1961).
40 360 P.2d 808 (Colo. 1961).
41 363 P.2d 702 (Colo. 1961).
42 365 P.2d 256 (Colo. 1961).
43 137 Colo. 169, 323 P.2d 614 (1958).

of her conviction for assault in the municipal court was made after the body execution was ordered, and the supreme court held that the motion was in time under Rule 101 (a) because body execution had not issued at the time the motion was filed.

RULE 103

In upholding a garnishment and the trial court's ruling on the garnishee's traverse, in *Field Family Constr. Co. v. Ryan,*[44] the supreme court said:

> [W]here one, for a valuable consideration, has assumed the obligation of another to plaintiff, he may be held liable as garnishee. . . . The assumption of the debts of another when in proper form is a right, credit or chose in action required to be reported in garnishment proceedings under Rule 103 (a), R.C.P. Colo.[45]

In *Loveland v. American Founders Life Ins. Co.,*[46] an attempt was made to collect on a judgment for American Founders obtained against Colorado Management Corporation, and execution was issued which was supported by a writ of garnishment. Pursuant to the writ, Loveland delivered stock certificates in her possession to the clerk and asserted a claim against the certificates and the Colorado Management Corporation. Error was asserted for failure to require the garnishee's claim to be honored before the certificates were released, and the supreme court dismissed the writ of error because no final judgment was present for review.

In *Rockey v. McCauley,*[47] error was predicated on the trial court's dismissal of a traverse in a garnishment proceeding. The right to set-off was in issue when Rockey attempted to enforce his judgment against Klepping by serving a garnishee summons on McCauley, who had suffered judgment in a suit instituted by Klepping against him. McCauley answered the garnishment by claiming that he also held judgments against Klepping and was entitled to set-off. Rockey traversed the answer, denying McCauley's ownership of the judgments at the time of the garnishment. Thereafter, McCauley moved to dismiss the traverse and to have his set-off approved in the action where Klepping had obtained his judgment, and both motions were honored. On writ of error, the trial court was reversed for failure to allow Rockey a hearing on his traverse and for granting a set-off in favor of McCauley to Rockey's detriment in an action where Rockey was not a party. The supreme court said that the rights became fixed and should have been determined on the issues raised by the answer and traverse on the date that the garnishee summons was served.

RULE 106

A. Certiorari and Mandamus

In *Ahern v. Baker,*[48] the retail package liquor dealers sought by declaratory judgment and mandamus to force the secretary of state to carry out certain mandatory provisions of the liquor code dealing with home delivery of package liquor and prayed that the con-

44 360 P.2d 110 (Colo. 1961).
45 *Ibid.*
46 361 P.2d 967 (Colo. 1961).
47 366 P.2d 138 (Colo. 1961).
48 366 P.2d 366 (Colo. 1961).

stitutionality of the liquor code be determined. The trial court dismissed the action, and the dismissal was upheld by the supreme court when it found that there was no controversy and all the parties before the court were not present. In reviewing the matter, the supreme court found that the complaint was insufficient to bring the action within Rule 106, whether the proceeding be considered as certiorari or mandamus. There were no proceedings before the secretary of state for the court to review, and no complaint was voiced which urged that the secretary had exceeded his jurisdiction, and since the secretary of state had not acted, he could not have abused his discretion. Mandamus also was not proper because no clear legal right to demand the performance of an act was shown or clear legal duty to act was established; therefore, the trial court's dismissal was affirmed.

Middle of the night justice, as the supreme court designated the action of a justice of the peace, was not in harmony with due process of law under the Fourteenth Amendment.[49] Strohl was taken before the justice court late at night, after having been involved in an automobile collision, and charged with driving on the wrong side of the road and under the influence of liquor. He pleaded guilty and paid the fine on the representation that he could then go on his way, but without disclosure of the fact that he faced the loss of his driver's license by reason of his plea. Thereafter, he sought relief in the district court under Rule 106(a)(4) in the nature of certiorari. The district court held the proceedings before the justice of the peace to be void, and on writ of error the supreme court upheld the propriety of the use of the extraordinary remedy and found that Strohl had no plain, speedy, and adequate remedy at law. In considering the propriety of taking evidence in the course of a hearing under writ of certiorari, the court recognized that although certiorari is a proceeding to review the proceedings in an inferior tribunal, testimony may be taken on the issue of jurisdiction provided that no disputed questions of fact were determined. Accordingly, the case was remanded for a proper hearing in the justice of the peace court.

A writ of mandamus did not take the place of a writ of error in *Mar-Lee Corp. v. Steele*.[50] The controversy before the court arose when restrictive covenants on residential property were construed

49 Toland v. Strohl, 364 P.2d 588 (Colo. 1961).
50 359 P.2d 364 (Colo. 1961).

to allow the construction of a church. The proceeding was commenced as a class action and service was not effected on all property owners in the area affected by the covenants. The trial court refused to recognize the proceeding as a class action within Rule 23 and ordered that all persons be served if the action was to continue. Thereafter, without a record, a petition for a writ of mandamus was filed in the supreme court. The supreme court held that the petitioners could have obtained a dismissal by standing on the record in the trial court and would thereby have made review possible by writ of error. The petition for a writ of mandamus was improper, because an adequate remedy was available by way of writ of error, once the case was dismissed in the trial court.

B. Prohibition

The court issued a writ of prohibition in *Lopez v. Smith*,[51] to restrain a county court from hearing and determining a writ of habeas corpus which was filed in aid of adoption proceedings. Smith had custody of the disputed child for fourteen years and obtained the child when the parents voluntarily relinquished the child to him. The parents then took the child, and Smith looked to adoption proceedings and a writ of habeas corpus in the county court to regain custody of the child. In upholding the parents' use of original proceedings and prohibition in the supreme court, the record recognized Smith's equities and said:

> Unquestionably habeas corpus is an available remedy to adjudicate custody of children under certain circumstances. . . . But a stranger lacks standing to maintain habeas corpus looking to an award of custody as against parents of the child who are presumed to be entitled to the custody. . . . One who seeks custody through habeas corpus must show a prima facie right to custody.[52]

The court concluded that the county court lacked jurisdiction, and the rule to show cause was made absolute.

Scheer v. District Court,[53] brought a writ of prohibition before the court when an attempt was made to prosecute a father under the Uniform Reciprocal Enforcement of Support Act after he had successfully divorced his wife in Colorado and had obtained a decree of divorce reserving the issue of child support and custody until his wife returned his children to Colorado. The wife had the children in Nevada and brought suit under the Act. The supreme court discharged the writ and held that the divorce decree did not prohibit the district court from proceeding under the Act, since the divorce decree did not exclude other remedies and the duties to support the minor children were absolute and could be enforced through the Uniform Reciprocal Enforcement of Support Act.

In *Rabinoff v. District Court*,[54] the supreme court reviewed the constitutionality of the Urban Renewal Act and upheld the jurisdiction of the district court when original proceedings were instituted for review by certiorari or, in the alternative, for prohibition, to challenge the jurisdiction of the district court to hear con-

51 360 P.2d 967 (Colo. 1961).
52 *Id.* at 969.
53 363 P.2d 1059 (Colo. 1961).
54 360 P.2d 114 (Colo. 1961).

demnation proceedings which were instituted in connection with the Urban Renewal Act. The constitutionality of the Act was upheld and the rule to show cause was discharged.

RULE 107

In *Wall v. District Court*,[55] the supreme court upheld a fine for contempt against an attorney, even though the record reflected no conduct which was worthy of punishment. The court held that the trial court's findings as to factual matters were conclusive and directed attention to the inanimate record which the court felt did not reflect demeanor, facial expressions, mannerisms, and other conduct of the party which would not take the form of the printed word.

RULE 111

Rule 111 furnished the basis for the dismissal of a writ of error in *Herzog v. Murad*,[56] after the plaintiff in a personal injury action had successfully argued that an additur should be granted to the jury verdict which had been returned in his favor. The trial court granted the request for an additur and ordered that, if the defendant elected not to pay the additional sum ordered by the court, a new trial would be held on the issue of damages alone. The defendant sought to review the ruling by writ of error but did not obtain a final judgment in accordance with the trial court's ruling, and the case was, therefore, dismissed without prejudice to the defendant and with the full right to review the proceeding in the trial court after final judgment was entered.

In *England v. Colorado Agency Co.*,[57] the supreme court was asked to review a temporary injunction and a sentence for contempt. No supersedeas was obtained from the supreme court, and in affirming the judgment of the trial court, the supreme court found the sentence for contempt to be supported by the record and held that the mere issuance of the writ of error did not stay proceedings in the trial court.

Failure to obtain a final judgment resulted in dismissal of a writ of error in *Weaver v. Bankers Life & Cas. Co.*[58] The defendant's unsuccessful argument to bring in third-party defendants in a mortgage foreclosure suit caused the matter to appear before the supreme court in the *Weaver* case. When the defendant's motion to bring in third parties was denied, the defendant petitioned for a writ of prohibition, and the writ was denied. Finally, the defendant sued out a writ of error which also resulted in dismissal because the supreme court ruled that the trial court's denial of the motion to bring in third parties was not a final order subject to review by writ of error.

A writ of error was also dismissed in *Mason v. Benson*,[59] when the supreme court found that the writ of error was not sought in apt time and that the parties who sought to review an adoption proceeding were not parties to the action and had no standing before the court.

55 360 P.2d 452 (Colo. 1961).
56 363 P.2d 645 (Colo. 1961).
57 359 P.2d 1 (Colo. 1961).
58 360 P.2d 807 (Colo. 1961).
59 361 P.2d 349 (Colo. 1961).

QUALIFICATION QUICKENER #4

— STATE TAX AND REPORT SAVINGS —

If it is practicable to delay qualification [or incorporation] of a client in an outside state until after certain dates a lawyer can — in many states, on many different dates — save his client the cost of a year's tax. Or he can save his client the bother of preparing and filing a state tax return. In some instances both the tax and the bother can be saved.

CT maintains such data by date and state. It is available to lawyers (only) without charge or obligation. Check on such possible savings before you proceed with qualification [or incorporation] of a client in any state, Canadian province, U. S. territory or possession.

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— all developed to make a lawyer's task of qualifying a client in an outside state easier, less time-consuming and less expensive to handle —

1. Information helpful to the lawyer in determining whether or not a client's out-of-state activities require qualification.

2. Information on a state's initial and annual costs, qualification requirements and penalties for failure to qualify.

3. Individual *Data Sheets* for each state, each Canadian province, each U. S. territory and possession. They contain summaries of all data needed by the lawyer to complete qualification forms for the jurisdiction in which qualification is to be effected.

5. Information from which the lawyer, by comparison, can determine advisability of incorporating a separate corporation rather than qualifying the existing corporation.

6. CT's continent-wide system of offices and representatives to expedite the filing of the lawyer's papers.

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