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One Year Review of Property

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ONE YEAR REVIEW OF PROPERTY

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In 1959 the Colorado Supreme Court decided approximately 36 cases involving various phases of general property law. The most significant cases involved oil and gas and water law.

Oil and Gas

The Supreme Court denied rehearing in the case of *Corlett v. Cox*[1] in which the owner of the fee had conveyed by warranty deed containing the following reservation: "It is, however, further agreed and distinctly understood that Carl A. Holcomb hereby reserves 6¼% of all gas, oil and minerals that may be produced on any or all the above mentioned land, or in other words reserves ½ of the usual 1/8 royalty. . . ."[2] There was no oil and gas lease outstanding against the land at the time of the conveyance. The district court of Weld County held that the grantor had reserved a 1/16 interest in the mineral fee estate. Plaintiffs-in-error contended that the above words reserved a perpetual non-participating royalty interest of 6¼%. The Supreme Court affirmed the holding of the trial court. It directed attention to a 1954 oil and gas lease wherein both plaintiffs and defendants had joined as lessors and felt the parties had treated the interest reserved as a 1/16 mineral interest. The court also laid emphasis on the fact that here was no oil and gas lease in exisence at the time of the reservation. In quoting from an Oklahoma case[3] it said: "There was at the time of the conveyance . . . no oil and gas lease upon the property and in a strict sense there were no royalty rights to reserve or deal with in any manner."[4]

In the *Corlett* case the Supreme Court affirmed *Simpson v. Langholf*,[5] which was theretofore considered a questionable case, and in effect held that no perpetual non-participating royalty interest can be created where there is no existing oil and gas lease on the premises at the time of the attempted creation. Thus, the words of Lord Coke quoted in the *Simpson* case:

> If a man seized of land in fee by his deed granteth to others the profits of those lands to have and to hold to him and his heirs and maketh livery, sucundum, forman, chartae the whole land itself doeth pass. For what is the land but the profits thereof?[6]

seem to have application today notwithstanding modern-day property concepts applied and relied upon in the oil and gas industry.

A confusing case was *Radke v. Union Pac. R.R.*,[7] in which an action was brought by owners of certain Logan County land to re-

1 138 Colo. 325, 333 P.2d 619 (1959).
2 *Id.* at 327, 333 P.2d at 620.
3 Pease v. Dolezal, 206 Okla. 696, 246 P.2d 757 (1952).
4 138 Colo. at 332, 333 P.2d at 622.
5 133 Colo. 208, 293 P.2d 302 (1956).
6 *Id.* at 214, 293 P.2d at 306.
7 138 Colo. 189, 334 P.2d 1077 (1958).

move a cloud from their title alleged to exist by reason of the following reservation contained in a deed to plaintiffs' predecessors:

> Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land and to mine for and remove the same if found, and for this purpose it shall have right-of-way over and across said lands and space necessary for the conduct of said business thereon, without charge or liability for damage therefor.[8]

The court held that the quoted language created a mere license subject to revocation before its exercise by the railroad rather than a mineral reservation or exception from the grant. The court further held that because it was a mere license, and subject to revocation by the owner of the fee, revocation followed ipso facto by the conveyance of the land by the fee owner to a third party. It was further held that the license in the instant case was not an interest in property, such as an incorporeal hereditament, but that it was something separate and distinct from an interest in property, being merely a permit or privilege to do what otherwise would be unlawful. The court alluded to the fact that some types of licenses were irrevocable (those coupled with a grant in presentae and those coupled with an interest) but went on to hold that the license in the instant case was neither coupled with a grant nor coupled with an interest, and thus revocable prior to being exercised. The court stated that in order to create a severance of the mineral estate such as was recognized in *Mitchell v. Espinoza*,[9] the severance must be by clear and distinct wording in the conveyance. The *Radke* case cannot be considered as an important precedent because it must of necessity be limited to the language contained and used in the specific form of reservation in question. It does contain interesting language with respect to the nature and definition of licenses and to the necessity of precise draftmanship in creating or reserving mineral interests.

In *Farnik v. Board of County Comm'rs*,[10] the plaintiff had acquired property from the county, which in turn had acquired title by treasurer's deed. In its pre-1949 deed, the county had reserved minerals. Both the plaintiff and the county had executed oil and gas leases. Plaintiff sought to quiet title against the outstanding mineral interest of the county on the basis that the county had no authority to reserve minerals, in that its powers and duties in acquiring and disposing of real property for non-payment of taxes are defined by the revenue statutes[11] rather than the general laws defining powers of boards of county commissioners. Without ruling on the power of counties to reserve minerals before 1949, the court held that the 1949 Session Laws[12] validated and confirmed previous reservations of minerals and oil and gas leases issued by counties thereunder. The court held that the validating act applied to minerals acquired by counties by tax foreclosure, but went on to hold that county authority was only to purchase and hold real property

8 *Id.* at 195-96, 334 P.2d at 1081.
9 125 Colo. 267, 243 P.2d 412 (1952).
10 341 P.2d 467 (Colo. 1959).
11 Colo. Rev. Stat. ch. 36, art. 11 (1953).
12 Colo. Sess. Laws 1949, Ch. 140.

for county use and that no power was granted to hold reserved minerals for purposes of speculation. Thus counties have no power to retain reserved minerals where a county purpose or use no longer exists and reserved minerals must be sold and reinstated to the tax rolls as soon as possible after reservation.

In the case of *Clovis v. Pacific N.W. Pipeline Co.*,[13] plaintiff had executed an oil and gas lease involving 632 acres of land to defendant's predecessors. The lease contained no voluntary pooling or unitization clause. The defendant drilled a producing well in the north half of section seven in which the plaintiff owned fifty-two acres, but the well was not drilled on plaintiff's land. After commencement of the well, the Oil and Gas Conservation Commission ordered the north half of section seven pooled. Later the defendant drilled a producing well in the south half of section six. This well was drilled on plaintiff's land and the south half of section six was likewise pooled by order of the Commission. The defendant ceased paying delay rentals on leased lands not within the pooled units and plaintiff sought a declaratory judgment as to whether the producing wells within the two pooled units validated defendant's lease as to land outside the units. The court held that the drilling of a producing well within a unit validates the outside acreage contained within the same lease whether the well is on leased lands or not, and further that the lessor is protected as to non-unitized lands by the application of implied covenants for reasonable development and protection against drainage and that such covenants existed independent of the primary term.

Water Rights

In *Cresson Consolidated Gold Mining & Milling Co. v. Whitten*,[14] the owners of adjudicated water rights on a stream sought to enjoin two mining companies from impounding water, which the companies claimed to have developed by driving lateral tunnels. It was alleged by the plaintiffs that the water, if released, would flow through the main tunnel into the stream in which their rights had been adjudicated. The plaintiffs asserted that the water was tributary to the stream and the mining companies claimed that the water was developed water and thus not tributary. The trial court granted the injunction against the impounding of the water with-

13 345 P.2d 729 (Colo. 1959).
14 338 P.2d 278 (Colo. 1959).

out allowing the mining companies to adduce evidence that the water was in fact developed and not tributary. In so doing the trial court held that it would consider no evidence as to rights of ownership other than rights that had been adjudicated. The Supreme Court reversed, holding that the refusal by the trial court to consider evidence of ownership other than adjudicated priorities was error in that adjudication was not necessary to the acquisition of rights. The court stated that, "An adjudication only confirms that which has already been accomplished."[15] The court further stated that the mining companies were entitled to prove their rights even though not previously adjudicated and failure to allow proof was a denial of due process. The court went on to restate the rule that all waters are presumed tributary but held that the mining companies were entitled to adduce proof to overcome this presumption.

On June 22, 1959, the Supreme Court decided the much publicized *South Platte Water Conservancy District case.*[16] In this case originating petitions were filed under the Water Conservancy Act[17] with the District Court of Weld County for the creation of a water conservancy district of designated boundaries and for stated purposes. Protesting petitions and objections were filed but later dismissed by the trial court after hearing. At the hearing on the sufficiency of the originating petitions, before any evidence was taken, counsel for petitioners moved to amend the originating petitions to exclude lands of objectors from the district. The trial court granted the motion to amend, thereby excluding the lands of objectors and protestants from the proposed district. Subsequently, an original proceeding in the nature of quo warranto was instituted in the Supreme Court by the attorney general to test the legality of the formation of the district and the rights of its directors to hold office. The court held that it could review the entire record of the proceedings before the trial court in the quo warranto proceedings, and that the record to be searched included testimony and all matters considered by the trial court. Reviewing the record, the court held that the trial court erred in granting petitioners' motion to amend, as the statute gave the court power to allow amendments to correct "errors in the description of the territory"[18] only, and that petitioners motion was patently not for this purpose. The court held further that in allowing petitioners' motion to exclude the properties of objectors the trial court violated the rights of the original signatories to the petitions, in that after the exclusion the petitions no longer described the "territories to be included in the proposed district" as required by statute. The court stated that it could not be assumed that any one of the petitioners would have signed had he known that the district to be created would be substantially different from that represented to him by the instrument which he had signed. The court further held that the Water Conservancy Act did not give the trial court jurisdiction to determine what district is desirable or in the public interest but rather limited the trial court's function to supervising strict compliance with the statutory procedure.

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15 *Id.* at 283.
16 People *ex rel.* Dunbar v. South Platte Water Conservancy Dist., 343 P.2d 812 (Colo. 1959).
17 Colo. Rev. Stat. § 149-6-41 (1953).
18 343 P.2d at 818.

In the case of *Saunders v. Spina*,[19] plaintiffs and defendants were users of water from the same ditch. Plaintiffs brought an action to enjoin defendants from interfering with their asserted rights to use water in the ditch and for damages. Plaintiffs claimed one half interest in all the water allocated to the ditch by virtue of an 1890 ditch decree. The court reaffirmed the rule that a decree entered in a ditch adjudication is not determinative of ownership of various water priorities as between users, stating, "A ditch decree merely awards the ditch its proper number and adjudicates the amount of water to which it is entitled from water priorities which will use it."[20] The court further held that the burden was upon the plaintiffs to show either a better record title than defendants or that defendants had abandoned or waived prior rights to which defendants had proved title. The court held that such burden was not sustained and that abandonment is not to be presumed, stating, "Nor shall the owner of the right be held to have surrendered it or merged it except on reasonably clear and satisfactory evidence."[21]

In the case of *Nesbitt v. Jones*,[22] the plaintiff sued to quiet title to seventy-five inches of water allegedly conveyed to plaintiff's predecessors in 1879. In 1928 plaintiff's predecessor exchanged another 150-inch water right to the canal company for shares of stock in said company. The court held that the 75-inch right was lost to the canal company by adverse use, holding that the use of the seventy-five inches became adverse in 1928 when other rights were exchanged for shares in the company. The court stated, "The entire purpose of this transaction was to transform the previous relationship from one of priority so to speak . . . to a relationship of tenancy in common whereby the Post farm would share with the other canal company stockholders . . . "[23] The court held that the transaction served to notify plaintiff that the company recognized no other or further right and that such notification transformed a previous permissive use to an adverse use which had continued for the statutory period.

Mechanic's Liens

Hayutin v. Gibbons[24] was a case in which a materialman sued the owner of property (in which the materials were incorporated in improvements) for the value of materials furnished. The owner defended on the ground that he had entered into a statutory contract with the contractor and that the same had been recorded according to law. The court held that though the recording of the statutory contract may limit the extent to which the owner's property may be subject to liens it does not limit personal liability for goods furnished. The court stated that the Mechanic's Lien Act[25] does not extend an exclusive remedy to claimants but merely affords statutory lien rights and when, as here, the materialman was able to prove a personal promise on the part of the owner or his

19 344 P.2d 469 (Colo. 1959).
20 *Id.* at 473.
21 *Id.* at 474.
22 344 P.2d 949 (Colo. 1959).
23 *Id.* at 955.
24 338 P.2d 1032 (Colo. 1959).
25 Colo. Rev. Stat. § 86-3-1 (1953).

agent to pay for materials furnished he could recover the value thereof.

In the case of *Sontag v. Abbott*,[26] the holders of mechanic's liens for labor and material sought to foreclose their liens, naming as a party defendant a purchase money mortgagee. It appeared that the holder of an option to purchase the property ordered materials which were delivered to the premises the day prior to the delivery of the warranty deed to him. The trial court held that the mechanic's liens were superior to the purchase money deed of trust as they related back to the date of commencement of work (which was held in this case to be the date materials were first delivered to the premises), which was prior to the recording of the purchase money deed of trust. The Supreme Court affirmed the holding of the trial court that the optionee who caused delivery of the building materials to the premises, and whose rights later ripened into fee ownership, was an "owner" for purposes of the Mechanic's Lien Act with power to charge the property with a lien. The court further held that the delivery of materials was the "commencement of work" under the statute to which priority of liens related, (citing *International Trust Co. v. Clark Hardware Co.*[27]) and since the materials were delivered to the premises prior to recording of the deed of trust the mechanic's liens were superior. The court further held that the fact that the deed of trust secured a purchase money loan did not entitle it to any preference in that the statute provided that mechanic's liens "shall have priority over

26 344 P.2d 961 (Colo. 1959).
27 66 Colo. 210, 180 Pac. 579 (1919).

any and every lien or encumbrance subsequently intervening."[28] The court stated that had the legislature intended to make an exception of purchase money mortgages it would have so provided.

Mining Law

In *McNulty v. Kelly*[29] an action was brought challenging defendant's title to certain placer mining claims by the locators of overlapping claims. The defendant's claims were prior in time but plaintiff alleged that they were invalid because located as if on publicly surveyed land. The defendant's location certificates described the property located "by legal subdivisions of public land survey" when in fact the land had not been surveyed by the federal government. The court found the descriptions contained in defendant's location certificates sufficient where a reasonable man, by using the description and other evidence, could determine the location involved. The court held that the description need not assume the formality required to prove title for patent purposes and that location certificates may contain a description of the land by section numbers not based on an official United States Government survey. The court further held it to be a question of fact whether the location certificate adequately described the claim, and that the trial court in the instant case had before it sufficient evidence to prove that the claim could be located from the description set forth in the certificate.

Landlord and Tenant

The case of *Hix v. Roy*[30] added little to the law of landlord and tenant but is worthy of mention here if only to indicate that the statutory prerequisites to actions under the Forcible Entry and Detainer Statute[31] will be strictly applied. The landlord, one of two co-lessors, brought an FED action to evict the tenant. It appears that a notice was sent to the tenant stating that if certain conditions were not met and correction made the landlord would exercise the right to terminate the lease. The court held that such a notice was deficient and did not comply with the requirements of the statute in that it was conditional and did not unequivocally terminate the lease pursuant to the terms thereof. The court said, "A notice to terminate a lease generally to be effective must be unequivocal and unconditional and must be such as to be fully understood by the recipient."[32] The court further held that the failure of the co-lessor to join in the notice and attempted termination of the lease rendered the notice defective; that in the absence of agency (which is not presumed and must be established), one tenant in common cannot give notice for all without consent. Thus the notice on its face could only be effective, if at all, as to the tenant in common so acting.

GENERAL REAL PROPERTY

In the case of *Smith v. Town of Fowler*,[33] the town brought an action to quiet title to "Lot 1, north of the river in Section 16. . . . "

28 Colo. Rev. Stat. § 86-3-6 (1953).
29 346 P.2d 585 (Colo. 1959).
30 340 P.2d 438 (Colo. 1959).
31 Colo. Rev. Stat. § 58-1-1 (1953).
32 *Ibid.* at 440.
33 138 Colo. 359, 333 P.2d 1034 (1959).

The defendants, owners of adjoining land, answered and claimed title for themselves. It appeared that an 1870 government survey had established the meander line of the southerly bank of the Arkansas River and had platted lands to the south thereof. It further appeared that a subsequent government survey had platted lands north of the meander line established by the 1870 government survey. The patent to the lot in question described the land as "North of Arkansas River . . . according to the official plat of the survey of said lands returned to the General Land Office. . . ." The official survey showed the south boundary of Lot 1 as being the meander line as established. It appeared that Lot 1 was actually south of the Arkansas River and the defendants thus claimed title on two grounds, accretion and adverse possession. The defendants claimed that the north boundary of their property (the south boundary of Lot 1) was the thread line of the Arkansas River as the same existed and as the river had moved north Lot 1 had been absorbed by accretion and therefore belonged to defendants.

The court cited *Hanlon v. Hobson*[34] for the general rule, wherein the court stated, "[W]here, as here, in a deed conveying lands an unnavigable river itself is named as a monument, the grant extends to its center and the thread of the stream is its true boundary."[35] The court noted the further rule that the owner of lands bounded upon an unnavigable stream is benefited or his holdings impaired by changes in the course of the stream occurring gradually over a period of time. The court held, however, that an exception to the general rule existed where the parties to the conveyance intended otherwise, and held that the wording "according to the official plat thereof" in the United States patent to the lot in question referred to the official government survey of the meander line which was intended to be the south boundary of Lot 1. The court found sufficient evidence to sustain the trial court's finding that the meander line was intended to be used as a boundary and held that where the meander line is intended to be so used accretion cannot come into being. The court dismissed the adverse possession claim of defendants, holding that the mere pasturage of cattle on unfenced land cannot be regarded as hostile or adverse.

In the case of *Western Motor Rebuilders, Inc. v. Carlson*,[36] the plaintiffs conveyed lots to defendant "subject to the protective covenants as shown on the official plat thereof on file in the office

34 24 Colo. 284, 51 Pac. 433 (1897).
35 *Id.* at 288, 51 Pac. at 435.
36 138 Colo. 404, 335 P.2d 272 (1959).

of the Clerk and Recorder of Grand County, Colorado."[37] The plaintiffs claimed a violation of the protective covenants by defendant and asked the court for an injunction, damages and for a decree declaring forfeiture of title. The defendant asserted that it had purchased the property prior to the establishment of protective covenants, and that further the plaintiffs' action was barred by laches, estoppel and waiver. The Supreme Court reversed judgment of the trial court awarding the injunction, holding that where the defendant had paid the full purchase price for the lots and has been given possession thereof he had acquired the entire equitable title and thereafter the plaintiffs held only a bare, naked legal title in trust for the defendant. Thus, the plaintiffs could not impose restrictive covenants on the land without the defendant's consent. The court stated that the plaintiffs had actually, though unknowingly, performed "livery of seisin" in that the parties went upon the land to be conveyed and observed the boundaries thereof, and the defendant, having paid the full purchase price, was put in possession. The court held that from that time on the defendant was the full equitable owner of the property and not bound by protective covenants recorded thereafter without his consent.

The deed to defendant was dated November 6, 1951 and the protective covenants were not recorded until November 27, 1951. The court said, "The deed referred to the condition of the records as they existed on November 6, 1951 and that is all this grantee could be bound by."[38] The court also found the plaintiffs barred by laches and estoppel.

The case of *Friend v. Stancato*[39] involved a change in the point of diversion of water from a ditch. The petitioner asked for a decree allowing her a change in point of diversion of certain water rights. The protestant claimed ownership of the water rights involved and offered to prove his ownership thereof by offering a deed in evidence which was given to his grantor for purposes of correcting the omission of water rights from a prior deed. The corrective deed offered was not acknowledged or delivered to the grantee named therein, but was delivered to the attorney for the protestant. The protestant made an offer of proof but the court denied admission of the deed in evidence. The Supreme Court, in reversing judgment of the trial court, held that an unacknowledged deed may be effective as a conveyance if execution and delivery thereof are proven by competent evidence. Delivery of the corrective deed to the successor in interest of the grantee named therein was held sufficient delivery to validate the same where the grantor intended to convey title thereby. The after-acquired title doctrine applied to vest title in the successor of the grantee named in the deed.

The case of *Gaines v. City of Sterling*[40] was an action involving a boundary dispute between owners of two adjacent tracts of land registered under the Torrens Title Registration Act.[41] Plaintiff brought an action under rule 105[42] to obtain an adjudication of the location of the common boundary line. The court concluded rule 105

37 *Id.* at 407, 335 P.2d at 278.
38 *Ibid.*
39 342 P.2d 643 (Colo. 1959).
40 342 P.2d 651 (Colo. 1959).
41 Colo. Rev. Stat.
42 Colo. R. Civ. P. 105.

did not apply but held that the complaint stated a claim for relief under applicable statutory proceedings.[43] The plaintiff contended that under the Torrens Act a title once registered becomes "forever binding and conclusive upon all persons."[44] The court held that the Torrens Act can have no application to the settlement of a boundary dispute unless the dispute was adjudicated in the registration proceedings.

The trial court appointed a commissioner to determine the north-south center line (the line in dispute) of the section. The commissioner platted the line without reference to the section corners but by tying to points three miles distant and correlating his calculations with an old ditch filing, an abandoned road and other obscure monuments. The commissioner's platting of the north-south center line resulted in 2578 feet on one side of center, and 2740 feet on the other side of center, on the north line of the section. The Supreme Court held that the trial court erred in accepting the commissioner's findings, stating that the rule of single apportionment should have been applied by locating the section corners first and then locating the north quarter corner as equidistant between the section corners. Thus where section and quarter section corners have been obliterated and there is an interior boundary line dispute with no adequate evidence before the trial court of the correct possessory lines, the correct rule to determine an interior quarter section line as stated by the court "is first to relocate the exterior section corners and then proceed to locate the quarter section corners by applying the procedure set out in CRS 136-1-1. This statute applies the principle of the single apportionment rule."[45]

In *Scott v. Powers*,[46] plaintiff's land was bounded on the north by a state highway and on the east by a county road. Plaintiff conveyed a portion of his land to defendant's predecessors "subject, however, to the right-of-way for roads and ditches as now constructed, it being the intention hereof to exclude the county road from this conveyance."[47] The trial court found that no access road to plaintiff's land had ever existed as claimed so that none could be reserved under the wording "as now constructed." The plaintiff further claimed an easement by prescription. The court correctly held that while parcels of land are under a common ownership, no

43 Colo. Rev. Stat. § 118-11-1 (1953).
44 Colo. Rev. Stat. § 118-10-30 (1953).
45 342 P.2d at 656.
46 342 P.2d 664 (Colo. 1959).
47 *Id.* at 665.

rights by prescription can accrue against any future servient portion.

An interesting case is *American Lutheran Church v. Evangelical Lutheran St. Paul's Church.*[48] The American Church brought an action to have a deed to the Evangelical Church declared null and void. It appeared that plaintiff's congregation met and voted to disband. Three individuals were selected to execute the deed in question to defendant. Plaintiff's constitution vested the power to convey real property in the board of trustees. The Supreme Court held that the purported conveyance by the designated individuals under the attempted action and authority of the congregation was void and illegal as ultra vires. This case should serve as a lesson for those who contemplate the purchase of property from religious corporations to search the constitution and by-laws of the corporation for the appropriate method of conveying real estate.

In the case of *Clopine v. Kemper,*[49] the plaintiff sought to quiet title against defendant's rights, if any, arising by virtue of the filing of a *lis pendens* in a divorce action. The defendant had filed a *lis pendens* describing the real property involved which stated the names of the parties and the nature of the claim asserted in the action. Subsequently, plaintiff purchased the property and sought to quiet title against the *lis pendens.* Plaintiff asserted that the *lis pendens* was of no force and effect in that the complaint in the divorce action did not describe "any real property." The trial court's entry of judgment against plaintiff was affirmed by the Supreme Court. In its opinion the Supreme Court held that under rule 105(f)[50] it is no longer necessary to describe the real property involved in the complaint but such property need only be described in the recorded *lis pendens.* The court stated, "It is the notice of lis pendens and not the pleadings which give constructive notice of pending litigation affecting interests in realty."[51] The court held further that the divorce action was a proper subject of *lis pendens* where division of property was sought.

Plaintiff also urged for reversal that the *lis pendens* was void in that it was recorded three days before the complaint was filed in the civil action. The plaintiff cited rule 105(f) which provides, "After filing any pleading wherein affirmative relief is claimed . . . a party may file . . . a notice of lis pendens. . . ."[52] The court disposed of this argument by holding that the action had commenced upon the issuance of summons and that the *lis pendens* filed thereafter was valid. This would seem to be contrary to the wording of the rule, but as the court stated, it was immaterial whether notice of the *lis pendens* began running July 3 or July 6 as the plaintiff had purchased the property more than two years after the *lis pendens* was recorded and thus was in no position to rely upon a technical non-compliance with the rule.

48 343 P.2d 711 (Colo. 1959).
49 344 P.2d 451 (Colo. 1959).
50 Colo. R. Civ. P. 105 (f).
51 344 P.2d at 454.
52 Colo. R. Civ. P. 105 (f).