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ONE YEAR REVIEW OF CIVIL PROCEDURE AND APPEALS

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In this article the authors have brought together decisions of the Colorado Supreme Court from January 1, 1958 to January 1, 1959. Only those cases involving procedure and appeals which suggest or clarify principles of significance are the subject of comment.

REQUISITE OF PROHIBITION—AN EXCESS OF JURISDICTION

Several cases came before the Colorado Supreme Court in 1958 as original proceedings in the nature of prohibition provided for in Rule 106 (a) (4).[1] In two instances, the supreme court discharged its rule to show cause, holding on each occasion that the circumstances did not warrant relief in the form of prohibition.

In *Prinster v. District Court*[2] the plaintiffs sought to restrain the lower court judge from hearing a case in which they had been named among the defendants. Several holders of decreed water priorities filed a complaint in the district court praying, in part, for an injunction against alleged usurpations of their water rights. The priorities were held under a 1948 adjudication. Some of the defendants in the district court appeared specially and moved to dismiss the complaint on the grounds that the 1948 adjudication decrees were null and void. The district court denied the motion to dismiss and ordered the defendants to answer the complaint. Thereupon some of the district court defendants sought prohibition. The district court plaintiffs appeared before the supreme court and answered on the merits.

The majority of the court, speaking through Mr. Justice Hall, reiterated the long standing requisite for relief in the form of prohibition: the supreme court will only prevent the exercise of lower court jurisdiction not granted by law.[3] The court further found that prohibition was not a proper remedy to restrain a trial court from committing error in deciding a question properly before it. Thus the court applied the cardinal rule that so long as the lower tribunal has jurisdiction over the parties and the subject matter, it is competent to proceed to a final legal determination, subject to an appellate power of review.[4]

The majority opinion noted that the mere fact that issues of great public importance are involved does not *per se* warrant the application of prohibition.[5] Similarly, the mere fact that a lower court trial will involve great expense and certain appeal does not warrant the application of prohibition. Thus the court shifted the emphasis of many former opinions by stressing the absolute necessity of a jurisdictional excess.[6]

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[1] Colo. R. Civ. P. 106 (a) (4).
[2] 325 P.2d 938 (Colo. 1958).
[3] See 73 C.J.S. *Prohibition* § 2 (b) (1951).
[4] *Id.* at *Prohibition* § 11.
[5] 325 P.2d at 940.
[6] *Ibid.* But *cf.* cases cited in the dissent by Mr. Justice Moore, 325 P.2d at 942.

In the final analysis the court refrained from deciding the water right issue through the use of prohibition as a matter of convenience to the parties[7] or as a technique for establishing principle and precedent.[8]

In *Leonhart v. District Court*[9] the plaintiff sought to restrain the district court from proceeding with a new trial. Plaintiff claimed the issues under consideration had been foreclosed by a determination of a foreign court through an application of the principle of res judicata. The supreme court again held that prohibition was a proper remedy only where the lower court was exceeding its jurisdiction. Prohibition would not lie to avoid mere errors in the determination of the law.

In particular the court found that a defense of res judicata does not divest the trial court of jurisdiction, nor establish a claim in the nature of prohibition; a conclusion well supported by case law in other jurisdictions.[10]

NECESSITY OF MOVING FOR NEW TRIAL WHEN LESS THAN ALL CLAIMS DISMISSED

One of last year's more important cases involving a procedural issue is *Graham v. District Court*,[11] where it was held that an order of dismissal under Rule 41 (b) (1)[12] is an adjudication on the merits whether it is directed to counterclaims, cross-claims, or third-party claims. This is true unless otherwise indicated by the court.

In the *Graham* case purchasers of realty sued their vendors and two brokers for fraud. The vendors and the second broker cross-claimed against the first broker, who, in turn, cross-claimed against the second broker. The trial court sustained motions to dismiss all cross-claims and granted the purchasers' motion for a directed verdict against the first broker. Thereafter, the first broker filed a motion for a new trial. The purchasers did not move for a new trial. Without notice to the vendors or the second broker, the trial court granted the first broker's motion for a new trial and made it effective as to *all* the parties. The supreme court applied Rule 41[13] and held that the trial court was without power to grant a new trial as to all the parties. The purchasers' failure to move for a new trial within the time permitted by Rule 59[14] was a fatal procedural error. The purchasers were obliged to make their motion, if at all, within ten days after the entry of the appropriate judgment.

This case is sound; Rule 41[15] is clearly and exactly applied. Rule 54,[16] relating to judgments on multiple claims, is held inapplicable. The *Graham* case says simply that unless a timely motion for a new trial is made by the proper party in interest, a dismissal as to one of a group of multiple claims operates as an adjudication on the merits as to that claim. This is true regardless of the disposition of other claims in the same action, notwithstanding the apparent conflict between Rule 41 and Rule 54.

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[7] See note 4, *supra*.
[8] See 73 C.J.S. *Prohibition* § 8 (1951).
[9] 329 P.2d 781 (Colo. 1958).
[10] See Annot., 159 A.L.R. 1283, 1293 (1945).
[11] 323 P.2d 781 (Colo. 1958).
[12] Colo. R. Civ. P. 41 (b) (1).
[13] *Ibid.*
[14] Colo. R. Civ. P. 59 (b).
[15] *Id.* 41 (b) (1).
[16] *Id.* 54 (a), (b).

The case illustrates a proper situation calling for the application of a claim in the nature of prohibition.

RETURN OF SERVICE AND THE NON-RESIDENT MOTORIST STATUTE

The underlying purpose and spirit of Colorado's non-resident motorist statute[17] was given full expression in *Nelson v. District Court.*[18] The facts were clear and undisputed. There was a proper service, but there was no statutory compliance to demonstrate return and proof of service[19]. The court determined that the failure of the plaintiff to comply with the statutory procedures following completion of service does not add or detract from the validity of process and service.

The court pointed out that there may be valid service and a defective return or invalid service and a return showing valid service.[20] A sound analysis of the purpose of the return of service was made by the court. That purpose is to enable the trial judge to make an intelligent finding that the court has in fact acquired jurisdiction, or has not acquired jurisdiction, because of some defect in the process or the service of process.

Jurisdiction of the Colorado court attaches when the service is completed. The return deals with proof and is vital only if the plaintiff appears in court and seeks to prove service entitling him to a default judgment.[21]

WRIT OF ERROR FILED — TRIAL COURT'S JURISDICTION ENDED

Davidson Chevrolet, Inc. v. Denver[22] illustrates a harsh application of a sound jurisdictional principle. Denver sued out a writ of error seeking to reverse an adverse trial court judgment. While this writ was pending in the supreme court, the trial judge vacated the lower court judgment. Denver then moved to dismiss its writ of error without prejudice; this motion was granted. Denver recovered a favorable judgment at the re-trial. Davidson then sued out its timely writ of error based on the ground that the trial court could not vacate a judgment rendered by it after the supreme court had acquired jurisdiction of the cause through proceedings on error. The supreme court sustained Davidson's contentions and vacated the judgment granted at the re-trial. The supreme court further ordered that the original trial judgment in favor of Davidson be restored to its full force and effect,[23] since Denver had withdrawn its original writ and had not then sought review within the proper time under Rule 111.[24]

The high court, however, permitted the trial court to ascertain the validity of the original judgment. The court noted that their reinstatement of this first judgment was not a determination as to whether or not that judgment was substantively valid, voidable, or void. The court's logic on this point is unassailable. If, in fact, the original judgment was void, as compared to voidable, a mere failure to seek review in time could not validate it. The trial court then vacated the original judgment, in effect, for the second time. On review, the supreme court found

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[17] Colo. Rev. Stat. § 13-8-2 (1953).
[18] 320 P.2d 959 (Colo. 1958).
[19] Colo. Rev. Stat. § 13-8-3 (1953).
[20] 320 P.2d at 963.
[21] *Ibid.*
[22] 328 P.2d 377 (Colo. 1958); and see 330 P.2d 1116 (Colo. 1958).
[23] 328 P.2d at 379.
[24] Colo. R. Civ. P. 111 (b).

the judgment to be voidable, not void, and therefore not subject to attack, since the time to review that original judgment had passed.[25]

One principle emerges with uncertain clarity: when the appellate court acquires jurisdiction of a cause, the lower court's powers are finally suspended pending further directions from the higher court.[26] Thus Denver lost its opportunity to seek appellate redress by an apparently unwarranted reliance on the extra-jurisdictional ruling of the lower court.

This comment does not extend itself to the issue of due process raised by Denver. The supreme court rather summarily dispensed with that argument which is not within the scope of this analysis.

VACATING JUDGMENTS "UPON SUCH TERMS AS ARE JUST"

In *Prather v. District Court*,[27] the plaintiff sought to restrain the lower court from imposing a bond requirement as a condition of vacating a cognovit note judgment against him. The trial judge had apparently acted within his determination of the scope of Rule 60 (b),[28] which provides that a court may relieve a party from a final judgment in certain enumerated circumstances "upon such terms as are just." The judge had fixed the bond in an amount equal to the demand and prayer of the lower court plaintiff. The supreme court found such a bond to be unwarranted and further noted that such action by the trial judge involved a degree of predetermination of the merits.

Perhaps, the supreme court could have been more incisive in its ruling by holding the imposition of a bond in such an amount to be an abuse of the trial court's discretion in the particular circumstances. Certainly, this holding cannot mean the trial court is without any power to impose reasonable conditions on its decision to grant relief from a judgment. The bond should not be objectionable only because the trial court had to concern itself with the probable outcome of the case before a full hearing on the merits: this, by analogy, is often a prime consideration in granting injunctive relief of a temporary nature.

STATUTE OF LIMITATIONS RAISED UNDER A GENERAL DENIAL

In *Denning v. A. D. Wilson & Co.*[29] the defendant counter-claimed seeking penalty recoveries under the 1913 Money Lenders Act.[30] Plaintiff replied by alleging " 'Said counter-claim is barred by the statute of limitations of this State in such case made and provided.' "[31] The supreme court held this reply to be a sufficient pleading within the scope and spirit of Rule 8 (c)[32] relating to the pleading of affirmative defenses.

The supreme court commented that even a general denial would have been sufficient to raise the issue of the statute of limitations with regard to a claim for a penalty recovery under the Money Lenders Act. It is generally held that a statute of limitations bars only a given remedy; it does not extinguish the right to a claim.[33] Thus, other remedies may be available or the right to a remedy may be revived by a proper ac-

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[25] 330 P.2d 1116 (Colo. 1958).
[26] 4A C.J.S. *Appeal and Error* § 617 (1957).
[27] 328 P.2d 111 (Colo. 1958).
[28] Colo. R. Civ P. 60 (b).
[29] 326 P.2d 77 (Colo. 1958).
[30] Colo. Rev. Stat. § 73-3-7 (1953).
[31] 326 P.2d at 790.
[32] Colo. R. Civ. P. 8 (c).
[33] 53 C.J.S. *Limitations of Actions* § 6 (b) (1948).

knowledgment of the obligation or claim. However, where the particular limitation is part and parcel of the very statute creating the right and liability, most courts determine that both the right and the remedy are extinguished forever.[34] The supreme court indicated that the requirement of affirmatively pleading a statute of limitations under Rule 8 (c) does not extend to this latter situation and this observation is well supported by other authorities.[35] The dictum of the *Denning* case has obvious application to other statutory claims.

HABEAS CORPUS CANNOT DIVEST A COURT OF ITS PROPER JURISDICTION.

Zimmerman v. Angele[36] held that habeas corpus may not be used in lieu of a writ of error. In the *Zimmerman* case the county court had entered an order committing the respondent therein to the state hospital for the insane until discharged according to law. Subsequently a petition was filed in the county court seeking an order of restoration to reason. While the petition was pending, habeas corpus was brought in the district court to secure the respondent's release. The supreme court held that an order by the district court discharging her was void since the district court lacked jurisdiction over the cause. If the commitment order was erroneous, a writ of error or a restoration petition was available. Habeas corpus was held to lie only where a court excercising jurisdiction has no power to exercise that jurisdiction. The case is well documented by supporting authority.

DISTRICT COURT HABEAS CORPUS NOT IN CONFLICT WITH JUVENILE COURT PROCEEDING

In contrast to the *Zimmerman* case, it was held in *Johnson v. Black*,[37] that the district court had jurisdiction in a habeas corpus proceeding brought by a mother to determine whether her child was being unlawfully detained by its grandparents. The district court had jurisdiction in spite of the fact that the grandparents were awaiting the determination of an adoption proceeding brought by them in the juvenile court. The supreme court found the jurisdiction of the district court and

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[34] *Ibid.*
[35] 54 C.J.S. *Limitations of Actions* § 357 (b) (1948).
[36] 321 P.2d 1105 (Colo. 1958).
[37] 322 P.2d 99 (Colo. 1958).

the juvenile court to be merely simultaneous, not concurrent. The high court further found the issues before the two courts to be of a different nature, so that the determination of one court would not affect the determination of the other court.

DEFECTIVE SERVICE DOES NOT WARRANT DISMISSAL

In *Fletcher v. District Court*,[38] the lower court plaintiffs had the defendants served with a copy of the summons stating the action was in one district court, while the copy of the complaint stated the action was in another district court. The original summons and complaint indicated the action to be in the court named on the copy of the complaint. The action was filed in the court named on the copy and original of the complaint.

Rule 4 (c) [39] requires that the name of the court be so stated on the summons. Rule 4 (e) [40] requires that personal service be accomplished by the delivery of a copy of process to the defendant. The supreme court found the summons to be void, so that no jurisdiction could attach over the lower court defendants. However, the supreme court found that the defective process did not warrant a dismissal. The lower court should have quashed the summons and required the plaintiff to re-serve the defendant, so that jurisdiction could properly attach over the person of the defendant.

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[38] 322 P.2d 96 (Colo. 1958).
[39] Colo. R. Civ. P. 4 (c).
[40] *Id.* 4 (e).