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"THE OPINION OF THE COURT"

BY JUDGE MORTIMER STONE

Mortimer Stone received his A.B. degree from Colgate University in 1904 and his LL.B. degree in 1910 from New York Law School. In 1953 he was awarded the D.C.L. degree *honoris causa* by Colgate University. From 1945 to 1953 Judge Stone sat as Associate Justice, and from 1953 to 1957 as Chief Justice, of the Colorado Supreme Court. He is with the Denver firm of Yegge, Bates, Hall and Shulenberg, of counsel. A past president of the Colorado Bar Association, Judge Stone is now a member of the American, Colorado, and Denver Bar Associations.

For many years in the official publication of the decisions and opinions of the Colorado Supreme Court, it has been the set formula to have the initial opinion prefaced by the statement: "Mr. Justice Doe delivered the opinion of the court." The opinion following that preface, in most cases, has been concurred in by the requisite number of judges so as to become in fact the opinion as well as the judgment of the court; but such is not always the case. When the preface is not true the hurried attorney and sometimes the court itself is likely to be deceived.

The United States Supreme Court carefully distinguished between the frequently-used terms "opinion" and "decision" in *Rogers v. Hill.*[1] The Court, speaking through Mr. Justice Butler, said:

> "Here the mandate was to proceed not in accordance with the 'opinion' but with the 'decision'. These words, while often loosely used interchangeably, are not equivalents. The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests."

As said by the Missouri Supreme Court: "[U]ntil the opinion is adopted by the court it is not its product. When it is so adopted it becomes the decision of the court."[2]

In other words, there may be a decision of the court as to the judgment to be rendered without decision as to the reasons therefor.

A classic example of that situation is the case of *Yunker v. Nichols,*[3] where the three judges agreed that the judgment of the trial court should be reversed but each in a separate opinion based

1 289 U.S. 582, 587 (1933).
2 Edwards v. Bell, 343 Mo. 824, 123 S.W.2d 83, 85 (1938).
3 1 Colo. 551 (1872).

his conclusion on a different ground.

Where a majority of the court concurs merely in the result, the principles expressed in an opinion cannot be considered as controlling under the rule of stare decisis. Where two or more judges deliver opinions which arrive at the same result, but for different reasons, and other judges concur generally, the case cannot be considered as authority on any of the reasons urged.[4] For example, the court in *Scott v. Times-Mirror Co.*[5] said:

> [O]nly four Justices participated in the decision, and only three of these concurred on this point. . . . Since the concurrence of four members of the court is necessary to a decision in bank. . , it is plain that the language quoted . . . is not a decision of this court upon the point there considered."

Conversely, as our Colorado Court has held, where a majority of the court approves a rule stated in a concurring opinion, it becomes the opinion of the court.[6] Where the court divides equally, and judgment is affirmed by operation of law, it constitutes no precedent.[7] In a state which has asserted the controlling authority of stare decisis,[8] the status of an opinion becomes a matter of importance; and it is still a point to be argued even if we have sometimes changed to the "Rule of the Chancellor's Foot."[9]

In the Colorado Reports up to Volume 12, there is no statement as to the opinion of the court, and only the name of the judge who wrote the opinion is used. In these early volumes, however, care was taken to state when the opinion was not that of the court. In reporting the case of *Western Union Tel. Co. v. Eyser,*[10] the opinion by Mr. Justice Belford was followed by a statement by Mr. Justice Wells of the questions on which the opinion of Mr. Justice Belford was not concurred in by the other judges, and it was also said that: "Upon the other questions the opinion of Mr. Justice Belford is the opinion of the whole court."[11]

Even after the use of the "Opinion of the Court" prefix was begun in Volume 12 of the Colorado Reports, it was not uniformly followed for a time, and the court was still careful in their use of the word "opinion." In reporting *Raynolds v. Ray,*[12] it was stated before the first opinion that: "Mr. Justice Elliott delivered the opinion of the court concerning the validity of the attachment liens." Then, following his opinion, it was said: "Chief Justice Beck (dissenting upon the validity of the attachment liens) delivered the opinion of the court on other points." Such meticulous care, however, has long been disregarded.

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4 See 21 C.J.S. 305-06 (1940) and cases cited therein.

5 181 Cal. 345, 184 Pac. 672, 679 (1919).

6 London Guaranty Co. v. McCoy, 97 Colo. 13, 45 P.2d 900 (1935).

7 People *ex rel.* Walker v. Stapleton, 79 Colo. 629, 247 Pac. 1062 (1926).

8 Newton v. Mann, 111 Colo. 76, 137 P.2d 776 (1943); Murray v. Newmeyer, 66 Colo. 459, 182 Pac. 888 (1919).

9 "I can not agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot." Gee v. Pritchard, 2 Swans. 402, 414, 36 Eng. Rep. 670, 674 (Ch. 1818) (Lord Eldon, L.C.)

10 2 Colo. 141 (1873).

11 *Id.* at 169.

12 12 Colo. 108, 113, 116, 20 Pac. 4 (1888).

In so designating the opinions, our Colorado Court has followed the wording adopted by the United States Supreme Court, but that Court seems carefully to restrict the designation to those opinions which are majority opinions. As illustrations, in *Northwest Airlines v. Minnesota,*[13] where four of the nine justices joined in dissent and another concurred in the conclusion, it is reported that: "Mr. Justice Frankfurter announced the conclusion and judgment of the Court." A similar announcement was made in *Hartzell v. United States.* [14] In *Screws v. United States,*[15] it was reported that: "Mr. Justice Douglas announced the judgment of the court and delivered the following opinion in which the Chief Justice, Mr. Justice Black, and Mr. Justice Reed concur."

Our Colorado constitution provides that the Supreme Court may sit en banc or in two or more departments. No decisions of any department shall become the judgment of the court unless concurred in by at least three judges.[16]

A majority of the members constitute the court en banc and a majority as thus constituted may decide a case, if at least three judges concur.[17]

No attempt is made here to furnish a complete list of the "Opinions of the Court" which are plainly minority opinions, or those which are without three concurring judges; nor to analyze the opinions specially concurring as to the points of concurrence with the "majority" opinion. We have checked through only a few volumes of the reports for illustrations of the caution needed in search for precedents in prior reported opinions. This check, through Volumes 104 through 137 of the Colorado Reports, reveals at least twenty cases in which the "Opinion of the Court" appears in whole or part not to be a majority opinion.[18]

The case which seems best to point the moral and adorn the tale is *Denver v. Mountain States Tel. & Tel. Co.*[19] The opinion by Mr. Justice White was adopted with three judges dissenting just prior to the end of Mr. Justice White's term. Rehearing was later granted, and almost six months after Mr. Justice White left the court, his opinion was again brought up for adoption. Three of the members of the court dissented. Mr. Justice Teller wrote an opinion arriving at the same conclusion as previously reached but by

13 322 U.S. 292 (1944).
14 322 U.S. 680 (1944).
15 325 U.S. 91 (1944).
16 Colo. Const. art. VI, § 5.
17 Mountain States Tel. & Tel. Co. v. People ex *rel.* Wilson, 68 Colo. 487, 190 Pac. 513 (1920); Denver & R.G.R.R. v. Burchard, 35 Colo. 539, 86 Pac. 749 (1906).
18 The following are the cases turned up by our limited search: Cox v. Metropolitan State Bank, Inc., 336 P.2d 742 (Colo. 1959); Industrial Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Ace Flying Service, Inc. v. Colorado Dept. of Agriculture, 136 Colo. 19, 314 P.2d 278 (1957); Tate v. People, 125 Colo. 527, 247 P.2d 665 (1952); Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951); Chesney v. People, 121 Colo. 73, 212 P.2d 1011 (1949); Cover v. Denver, 120 Colo. 451, 211 P.2d 830 (1949); Page v. Lane, 120 Colo. 416, 211 P.2d 549 (1949); Ochsner v. Langendorf, 115 Colo. 453, 175 P.2d 392 (1946); Kidder v. People, 115 Colo. 72, 169 P.2d 181 (1946); McCutchen v. Jordan, 112 Colo. 499, 150 P.2d 859 (1944); Industrial Comm'n v. Parra, 111 Colo. 69, 137 P.2d 405 (1943); Aleman v. Annable, 110 Colo. 61, 129 P.2d 987 (1942); People ex *rel.* Lucke v. County Court, 109 Colo. 447, 126 P.2d 334 (1942); Denver v. Midwest Plumbing & Heating Co., 109 Colo. 395, 125 P.2d 960 (1942); Nebraska Bridge Supply & Lumber Co. v. Deakin, 109 Colo. 367, 125 P.2d 962 (1942); Cox v. Godec, 107 Colo. 69, 108 P.2d 876 (1940); Snyder v. Schmoyer, 106 Colo. 290, 104 P.2d 612 (1940); Hall v. Hall, 105 Colo. 227, 97 P.2d 415 (1939); North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939).
19 67 Colo. 225, 84 Pac. 604 (1919).

a different line of argument. Mr. Justice Burke, by a separate opinion, concurred in the conclusion reached in the "majority" opinion. Mr. Justice Dennison by another separate opinion said that he concurred in "the conclusion of the majority of the court as announced in the former opinion handed down in this case" and that "I am authorized to state that Mr. Justice Allen concurs in this opinion." This accounts for all seven judges of the court and not one of them concurred entirely in the opinion of Mr. Justice White, the former member. Yet the official report of the case states: "Mr. Justice White delivered the opinion of the court."

As indicative of the extent to which the court itself may become confused as a result of such indiscriminate labeling of opinions, it is interesting to note that *Kidder v. People*[20] was decided with one judge not participating and three judges concurring in the result "solely on the ground that defendant was not properly represented." The court being evenly divided as to other grounds stated in the opinion, patently that was the only point decided. Yet, in *Warren v. People*,[21] the court said: "One of the grounds for reversal by this court of a judgment of conviction . . . in the case of *Kidder v. People* . . . was that the one count upon which the jury returned a verdict of guilty was insufficient." Again, in *Cross v. People*,[22] the court said: "The statute here involved has been construed by us in the following cases: . . . *Kidder v. People*. . . ." And again, in *Hardy v. People*,[23] the court said: "In our opinion in the *Kidder* case . . . we held that the question of the sufficiency of an information to charge a crime could be raised in the supreme court for the first time. . . ."

Enos v. District Court[24] was decided with one judge dissenting and three judges concurring only in the result. Yet, in *Fiant v. Town of Naturita*,[25] a quote from the minority opinion is cited as the opinion of the court.

In *Tate v. People*[26] a judgment of conviction was reversed. The "Opinion of the Court" stated that one ground for the reversal was

20 115 Colo. 72, 169 P.2d 181 (1946).
21 121 Colo. 118, 121, 213 P.2d 381, 383 (1949).
22 122 Colo. 469, 471, 223 P.2d 202, 203 (1950).
23 133 Colo. 201, 206, 292 P.2d 973, 976 (1956).
24 124 Colo. 335, 238 P.2d 861 (1951).
25 127 Colo. 571, 574, 259 P.2d 278, 279 (1953).
26 125 Colo. 527, 247 P.2d 665 (1952).

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that prejudicial error had been committed by instructing on first degree murder when not sustained by the evidence, even though a verdict was returned of second degree. This holding specifically overruled *Ryan v. People.*[27] However, four judges joined in a memorandum opinion specifying the grounds on which in their opinion the trial court committed error, which did not include the ground of instruction on first degree murder. Yet, in *Eckhardt v. People,*[28] where a similar issue arose, the court, speaking through the same judge who wrote the "Opinion of the Court" in the *Tate* case, admitted that earlier cases had held to the contrary, but stated that "this situation existing in this jurisdiction was clarified by the latest pronouncement of this court on that question in the case of *Tate v. People* . . ." and quoted from his opinion on that issue, which had not been supported by the majority of the court, as authority for overruling prior decisions of the court.

Even the case of *Denver v. Mountain States Tel. & Tel Co.,*[29] discussed above, has frequently been cited by the court and has been quoted from as the voice of the court in *Berman v. Denver*[30] and *Bennett v. Mountain States Tel. & Tel Co.*[31]

The opinions in *Cox v. Metropolitan State Bank, Inc.,*[32] where two judges dissented and two others filed specially concurring opinions, illustrate the difficulty shared even by members of the court in determining on what points, if any, the concurring opinions concur in the so-called "majority" opinion, other than in the result.

The designation, in its instructions for publication, of the opinions and parts of opinions which are the expression of the opinion of the court, would put a further burden on an already overburdened court, but we think it would assist both the bar and the courts in their necessary research and perhaps make a challenge for clarity of expression in concurring opinions.

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27 50 Colo. 99, 114 Pac. 306 (1911).
28 126 Colo. 18, 22, 247 P.2d 673, 675 (1952).
29 67 Colo. 225, 84 Pac. 604 (1919).
30 120 Colo. 218, 230, 209 P.2d 754, 760 (1949).
31 121 Colo. 325, 333, 215 P.2d 714, 717 (1950).
32 336 P.2d 742 (Colo. 1959).

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