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One Year Review of Civil Procedure

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This review is intended to cover decisions of the Supreme Court of Colorado from January 1, 1957, to January 1, 1958. Cases which apply principles already well established are omitted, it being the purpose of the reviewer to bring to the attention of the profession only those decisions which are novel in principle or which represent departures from accepted practices. The same arrangement will be followed as was used in the review for 1956.[1]

RULE 4

In *Jones v. Colescott*,[2] the matter of possible waiver of lack of jurisdiction over the person is presented in a novel fashion. Following default judgments based upon admittedly invalid substituted service of process a motion was made to set aside the defaults. The denial of the motion by the trial court was held to be error, the supreme court pointing out that although the motion by the defendants waived lack of jurisdiction over them, such appearance on their part would not serve to validate the void judgment and that the defendants should have been afforded the opportunity to present their defenses. Thus, although their motion was equivalent to a general appearance, it did not deprive defendants of their right to present their defenses going to the merits.

RULE 8 (c)

Davis v. Bonebrake[3] deals with the issues presented by an affirmative defense. The order of the trial court permitting the plaintiff to amend his complaint after presentation of his evidence was assigned as error. The defendant had interposed an answer setting up the statute of limitations as a defense and the amendment set up fraudulent concealment of the facts to meet this defense. The supreme court reversed the decision on other grounds but said, as to this point, that there was no error since the amendment injected no new issue into the case, no reply being required by the plaintiff, thus putting the defendants on notice that any matter in avoidance of the statute would be deemed to be in issue without a reply. The court pointed out that the amendment could not be prejudicial to the defendants since the matter set forth in avoidance was already before the court.

RULE 9 (c)

This rule relates to the pleading of performance or occurrence of conditions precedent and to the denial thereof, placing on the party alleging the performance or occurrence the duty to establish such facts. In *Sullivan v. McCarthy*,[4] an action to recover guaranteed profits under a contract of sale of a vending machine, the plaintiff alleged that he had "complied with the provisions of the contract."[5] This matter was put in issue by defendant's answer and the issues were resolved in plaintiff's favor. As to another condition the answer tendered no issue and the plaintiff offered no evidence to show its performance. The court said: "The plaintiff, while obligated to establish the performance of those

1 Dittman, One Year Review of Civil Procedure, 34 DICTA 69 (1957).
2 307 P.2d 464 (Colo. 1957).
3 313 P.2d 982 (Colo. 1957).
4 314 P.2d 901 (Colo. 1957).
5 Id. at 901.

conditions within the framed issues, is under no obligation to prove the performance of conditions other than those with reference to which defendant has specifically alleged failure to perform . . . ."[6] Thus, since the Rule requires a denial to "be made specifically and with particularity," a failure to deny admits the well pleaded allegations of the complaint.

RULE 14

The device of impleader presents many interesting questions, not the least of which arose in *Arms Roofing Co. v. Petrie.*[7] Here a holder in due course of a promissory note brought an action against the maker. The question concerned the propriety of a third party order secured by the defendant to bring in as a third party defendant the original payee, who had endorsed the note to the plaintiff. The third party complaint alleged duress in the execution of the note and demanded judgment against such payee for all sums which might be adjudged in favor of the holder against the maker. The court pointed out that the third party plaintiff's claim was independent of and apart from the plaintiff's claim and that the result of the trial between the maker and the payee could not affect the right of the holder to judgment against the maker or against the payee-endorser. The court approved a rule stated by a federal court that "the test to determine when a third party defendant may be impleaded under Rule 14 is whether he could have been joined originally as a defendant by the plaintiff . . ."[8] under Rule 20.

RULE 25

In *Film Enterprises, Inc. v. Selected Pictures, Inc.,*[9] one of the defendants died pending suit and a timely motion to substitute his executrix as a defendant was denied. At the trial the action was dismissed and a new trial was denied. On a motion to dismiss plaintiff's writ of error the motion was granted and the court pointed out that a substitution of parties could not be ordered by the supreme court because Rule 25 permits the trial court to order substitution in certain cases within two years but requires a dismissal as to the deceased party if such substitution is not made. Hence, at a time three years after the death of a party no substitution could be made, the Rule being mandatory as to dismissal and since it acts as a sort of statute of limitations the enlargement of time thereunder is forbidden under Rule 6 (b).

RULE 60 (b)

It appears that the trial court does not err in refusing to set aside a default judgment where the defendant alleges merely that he has a meritorious defense. In *Riss v. Air Rental, Inc.*[10] the court refused to disturb the order of the trial court under circumstances where the defendant was unable to show any excusable neglect on his part, even though there might have been a meritorious defense alleged.

RULE 69 (a)

In an original proceeding in the Supreme Court for a rule requiring respondents to show cause why the sheriff should not be permitted to proceed with a sale on execution of certain corporate stock, a debenture bond and a promissory note, the respondents argued that Rule

[6] Id. at 902.
[7] 314 P.2d 903 (Colo. 1957).
[8] Id. at 906, relying on United States v. Jollimore, 2 F.R.D. 148 (D. Mass. 1941).
[9] 306 P.2d 252 (Colo. 1957).
[10] 315 P.2d 820 (Colo. 1957).

69 (a) authorizes the trial court to prevent sale on execution. This proceeding had been commenced after the district court had denied an order directing the sheriff to levy upon and sell such items.[11] The court held that the sale should proceed, pointing out that although the pertinent statute[12] was not cited by counsel, it was, nevertheless, controlling, and this property not being within the class of assets exempt from execution under the statute, fell within the general provision providing for the sale of goods and chattels. The court also took occasion to say that the statute created a substantive right in a judgment creditor to enforce collection of his judgment against non-exempt property and that a rule of procedure cannot be so construed as to curtail substantive rights created by the legislature. This decision clarifies the question as to the right to reach choses in action on execution, a question heretofore shrouded in doubt.

RULE 106

In *Stull v. District Court*[13] there was involved an application in the nature of prohibition, in which it appeared that the district court had exceeded its jurisdiction by granting an injunction under circumstances where the requirements of Rule 65 were not complied with. In holding that the proceeding was proper the court, through Mr. Justice Sutton, said: "There is no plain, speedy or adequate remedy available to petitioners except that herein sought. . . . [W]e consider it a matter of 'great public importance' when an inferior court has issued injunctive orders without complying with the provisions of Rule 65."[14]

RULE 112 (f)

Once again the question of the sufficiency of the record on writ of error has been before the court, this time in the case of *Rechnitz v. Rechnitz*.[15] Here the transcript was presented to the trial judge at a time more than three months after the final order of the court. The judge refused to sign and certify it but plaintiff in error nevertheless filed the transcript in the Supreme Court. The court granted a motion to strike the transcript from the files and to dismiss the writ of error, stating that, without the transcript there was nothing to review, particularly since the order made by the trial court was discretionary and without a transcript there was no way to show that the court had abused its discretion or had acted arbitrarily or capriciously.

[11] See Jones v. District Court, 312 P.2d 503 (Colo. 1957).
[12] Colo. Rev. Stat. Ann. § 77-1-2 (1953).
[13] 308 P.2d 1006 (Colo. 1957).
[14] Id. at 1010.
[15] 309 P.2d 200 (Colo. 1957).