Denver Law Review

Volume 34 | Issue 2 Article 4

January 1957

One Year Review of Civil Procedure

Vance R. Dittman Jr.

ONE YEAR REVIEW OF CIVIL PROCEDURE

By Vance R. Dittman, Jr.
Professor of Law, College of Law, Denver University.

This review covers the decisions of the Supreme Court of Colorado from October 1, 1955 to January 1, 1957. It may, to some extent, overlap the latest review in this field, but it was deemed desirable to base the review upon the calendar year, rather than upon a year commencing with the annual convention of the Colorado Bar Association.

The cases will be analyzed as they interpret the Rules of Civil Procedure, in numerical order. They are not arranged chronologically. All references to the Rules are based on the Rules of Civil Procedure as they appear in volume one of Colorado Revised Statutes 1953. Where there is no citation of the official Colorado reports it is because of the fact that the case has not yet been reported officially in the reports.

Rule 7 (d)

In *Mesch v. Board of County Commissioners*[1] the Supreme Court found a failure to comply strictly with the requirements of Rule 7 (d), because of which there resulted a lack of jurisdiction in the trial court. The court, pursuant to Rule 106 (a) (4) and (b) dismissed the writ of error. It also remanded the case, with instructions to the trial court to set aside its decision and to dismiss the proceeding.

Rule 8

Weick v. Rickenbaugh Cadillac Company[2] is of interest to the profession for its discussion of the difference between a claim for relief under the Rules and the old cause of action. The court pointed out that in order to state a claim showing that the pleader is entitled to relief it is no longer necessary to elect a particular theory or "cause of action," but that it is sufficient to clearly identify the transactions which form the basis of the claim for relief and that if relief is warranted under any theory of law by the evidence offered, it should not be denied because of the selection of a wrong "cause of action." The court then reaffirmed the views it had expressed earlier in the case of *Bridges v. Ingram*[3]. The objection was also made that the complaint failed to allege ultimate facts, but the court held that under Rule 8 (e) (1) this objection was not well taken.

Since Rule 8 (c) specifically requires that in pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, the question may well arise whether a deficiency in the pleading in this respect may be cured by the introduction of evidence to show an accord and satisfaction, where no objection is made to such evidence. In *Metropolitan State Bank v. Cox*[4] the court held that under these circumstances the issue is properly

[1] 133 Colo. 223, 293 P.2d 300 (1956).
[2] 303 P.2d 685 (Colo. 1956).
[3] 122 Colo. 501, 223 P.2d 1051 (1955).
[4] 302 P.2d 188 (Colo. 1956).

before the court, just as though it had been raised in the pleadings. RULE 12.

The problem of general and special appearances seems to recur in various garbs. It had to be dealt with in the case of *Treadwell v. District Court*,[5] a proceeding in the nature of prohibition under Rule 106 (4). The court pointed out that a so-called general appearance filed after a motion to quash service of process for lack of jurisdiction over the person had no effect, because the Rules make no provision for general and special appearances. It was held that such motion having been made before answer, it properly raised the question of jurisdiction and preserved it until the motion had been disposed of. The case is also interesting because the court issued its writ against the action of the district court which required the defendant to answer, after holding that the general appearance waived the motion to quash. The court found it to be a matter of sufficient public interest to have the question of jurisdiction determined before a trial on the merits, to justify the issuance of the writ under Rule 106 (4).

RULE 18

In the case of *Gerbaz v. Hulsey*,[6] the plaintiffs joined two claims arising out of the same alleged breach of contract and the defendant moved that the plaintiffs be required to make an election of their remedies. The court determined that the claims were not inconsistent but that they were simply claims for damages arising out of one breach and were properly joined under Rule 18.

However, the requirements of Rule 10 (b) that the claims or defenses be set forth in separate paragraphs and counts are in no way abrogated by the liberal joinder provisions of Rule 18 and such claims must be separately stated and relief be expressly requested on each. *Colorado High School Activities Ass'n v. Uncompahgre Broadcasting Co.*[7]

RULE 19

In *Centennial Casualty Co. v. Lacey*,[8] an action by a car owner against an insurance carrier under the theft clause of an automobile policy, the court determined that the holder of a chattel mortgage on the car was not an indispensable party under Rule 19 (a).

RULE 20

Where a large number of parties join or are joined in an action it may be a difficult problem to determine whether the requirements of this rule regarding transactions or occurrences or series thereof and common questions of law or fact can be satisfied. In *Western Homes v. District Court*[9] some 232 plaintiffs joined in one action to recover damages for alleged fraudulent misrepresentations. The court ably discussed, at too great length to be set out here, the meaning of a series of transactions and what con-

[5] 133 Colo. 520, 297 P.2d 891 (1956).
[6] 132 Colo. 359, 288 P.2d 357 (1955).
[7] 300 P.2d 968 (Colo. 1956).
[8] 133 Colo. 357, 295 P.2d 690 (1956).
[9] 133 Colo. 304, 296 P.2d 460 (1956).

stitute common questions of law or fact. The court also discussed the requirements of Rule 9 (b) as to the sufficiency of allegations of fraud.

RULE 46

Rule 46 provides that there shall be no prejudice to a party who fails to object to a ruling of the court when he has no opportunity to object to the ruling at the time it is made. In *Brakhahn v. Hildebrand*[10] the plaintiff made no objection to an instruction on contributory negligence. There was no evidence of contributory negligence which could have been imputed to plaintiff and it was undisputed that the plaintiff was afforded no opportunity to register an objection. The court held that under Rule 46 it was at liberty to disregard the failure to make an objection under these circumstances.

RULE 50

Under the provisions of Rule 50 (b) a party who has moved for a directed verdict may, within ten days after the reception of the verdict, move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. The Rule also provides that a motion for a new trial may be *joined* with this motion or a new trial may be prayed for in the *alternative*.[11] It seems to be established

[10] 301 P.2d 347 (Colo. 1956).
[11] Italics added.

by numerous cases in the federal courts that the filing of a motion for a directed verdict is a condition precedent to the right to file a motion for judgment notwithstanding the verdict. In the case of *Ross v. Arrow Manufacturing Co.*,[12] the defendant had failed to move for a directed verdict at any time during the trial but nevertheless filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court did not rule on the alternative motion and after the case had reached the Supreme Court the defendant in the trial court filed a petition to remand to the trial court for a ruling on the alternative motion. This petition was denied and leave was granted to file briefs on the question of the propriety of the motion for judgment notwithstanding the verdict and the case is still pending on that question. The high court, however, said that under the Rule the defendant was not entitled to file a motion for judgment notwithstanding the verdict unless he had filed a motion for a directed verdict. If this turns out to be the holding of the court on this point it will be in accord with the view expressed many times by the federal courts.[13]

In the case of *Grange Mutual Fire Ins. Co. v. Golden Gas Co.*[14] the Supreme Court once more passed upon a question which would seem to be well settled both in Colorado and in the federal courts.[15] The defendant made a motion for judgment notwithstanding the verdict, joining with it the alternative motion for a new trial. The motion for judgment was granted but no ruling was made on the alternative motion. The court held, in line with its previous ruling, that the granting of the motion for judgment does not effect an automatic denial of the alternative motion for a new trial and that the trial court should have ruled on the defendant's motion for a new trial at the same time.

RULE 51

In *Stephens v. Lung*,[16] the record showed objections to the giving of certain instructions but showed no objection to an instruction on contributory negligence, which was claimed to be erroneous. Counsel insisted that the reference in the record to other instructions was inadvertent and that all arguments had been directed to the one on contributory negligence. The court held that it was error to give the instruction and that substantial justice required that the error be noticed in spite of the absence of a formal objection of record.

Again, in the case of *Warner v. Barnard*[17] the court noticed an error in the giving of an instruction where no objection was made to it at the trial, pointing out that Rule 51 is subject to the qualification that the court, on its own motion, may notice manifest error whether raised by counsel or not, if the same appears of record and

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[12] 133 Colo. 531, 299 P.2d 502 (1956).
[13] Barron v. Holtzoff, Federal Practice and Procedure § 1079. See, e.g., Guerrero v. American-Hawaiian S. S. Co., 222 F.2d 238 (9th Cir. 19).
[14] 133 Colo. 537, 298 P.2d 950 (1956).
[15] See Montgomery Ward v. Duncan, 311 U.S. 243 (1940); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).
[16] 133 Colo. 560, 298 P.2d 960 (1956).
[17] 304 P.2d 898 (Colo. 1956).

if justice will be served thereby, especially in view of the provisions of Rule 111 (f) which permit the court, in its discretion, to notice any error appearing of record.

RULE 54

Since Rule 54 (c) provides that every final judgment (except by default) shall grant the relief to which the party is entitled, even if such relief has not been demanded, the decision in *Reginnitter v. Fowler*[18] seems to be based upon sound principles. The court held that to determine whether the action of the trial court in sustaining a motion to dismiss is correct, the question is whether, in the allegations of the complaint, the plaintiff is entitled to any relief, and if, upon any theory of law relief should be granted, then the motion to dismiss cannot be sustained and appropriate relief should be granted.

RULE 57

In *People v. Baker*[19] the court was called upon to interpret Rule 57 (f) and held that the absence of persons whose presence was required because they had or claimed to have interests which might be affected prevented their being bound by the action of the court and that therefore the action should not be maintained because the judgment would not terminate the uncertainty nor determine the controversy, nor would it serve any useful purpose in clarifying and settling the legal relations in issue.

[18] 132 Colo. 489, 290 P.2d 223 (1955).
[19] 297 P.2d 273 (Colo. 1956).

RULE 59

Since Rule 111 permits a writ of error from the Supreme Court to a final judgment, the question has arisen with some frequency whether or not an order granting a new trial is a final judgment to which a writ of error will lie. In *Gonzales v. Trujillo,*[20] the most recent case to raise the point, the Supreme Court once again held that the granting of a motion for a new trial is not a final judgment and is therefore not reviewable on writ of error. The court dismissed the writ of error.

In *Deeds v. Proudfit*[21] the court re-affirmed what it called a long established rule that when the district court has had no opportunity to pass upon a question, it may not be urged in the Supreme Court.

In *Kopff v. Judd*[22] the court again determined that no writ of error lies to a final judgment (here, an order dissolving a writ of attachment, which is a final judgment under Rule 102 (aa) where no motion for a new trial was filed and the trial court made no order dispensing with such motion. The court held, also, that under Rule 102 (aa) compliance with Rule 59 (f) is essential to a right of review by writ of error.

RULE 60

In *Salter v. Board of County Commissioners*[23] an action was brought to vacate a judgment which had been entered nineteen months before the suit was brought and satisfied five months before the suit, the judgment debtor having voluntarily paid the judgment. The court dismissed the writ of error on the ground that the order of the trial court denying the vacation of the judgment was not a final judgment from (sic)[24] which a writ of error will lie. The court also stated that under Rule 60 (b) a motion to vacate a judgment must be filed within a reasonable time and further, that when the judgment debtor voluntarily has paid the judgment he is thereafter barred from questioning technicalities, either of pleading or form, incident to its entry.

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[20] 133 Colo. 64, 291 P.2d 1063 (1956).
[21] 133 Colo. 85, 293 P.2d 643 (1956).
[23] 133 Colo. 138, 292 P.2d 345 (1956).
[24] Obviously the word "from" should be "to."

In *Burr v. Allard*[25] there was filed what was apparently a timely motion to set aside a judgment, the defendant stating that he had a good and valid defense to the action. The motion was denied, since the grounds upon which it was based consisted of only legal conclusions, with no supporting facts to show a defense. The court held that, under these circumstances, there was no abuse of discretion in denying the motion, since, under earlier Colorado decisions the defendant had the burden to establish grounds for relief under Rule 60 and had failed to sustain that burden.

RULE 105

In *Meaker v. District Court*[26] the plaintiff had filed a lis pendens under Rule 105 (f). The district court ordered the plaintiff to release the interest claimed by him in the property and the plaintiff then filed in the Supreme Court a proceeding in the nature of prohibition to stay the proceedings in the district court in order to prevent it from enforcing its order by contempt or other means. The Supreme Court refused to entertain the proceedings on the ground that a writ of error to any judgment of contempt that might be entered was a speedy and adequate remedy.

RULE 106

In *Womack v. Grandbush*[27] the judgment creditor, proceeding under Rule 106 (a) (5), filed his petition to compel the wife of the judgment debtor to show cause why she should not be bound by the judgment, basing his petition on allegations that the wife was, in fact, the partner of the judgment debtor. The trial court dismissed the petition. The Supreme Court, in interpreting the rule, held that the judgment creditor was entitled to have recourse to the rule, under these circumstances.

RULE 111

There have been eight cases calling for an interpretation of Rule 111, during the period covered. Two of the cases involve formalities connected with the entry of the judgment.

In *Jones v. Galbasini*[28] the record showed the trial court's written ruling, the court's minute order to the clerk to enter a judgment

[25] 133 Colo. 270, 293 P.2d 969 (1956).
[26] 300 P.2d 805 (Colo. 1956).
[27] 298 P.2d 735 (Colo. 1956).
[28] 299 P.2d 503 (Colo. 1956).

of dismissal and the judgment so entered by the clerk. The question related to the timeliness of the writ of error and the court held that this record showed a final judgment to which a writ of error would lie.

In *Green v. Jones*[29] the court denied a motion to dismiss a writ of error based on the ground that it had not been sued out within ninety days of the date on which the motion for a new trial had been denied. This was true, but the application for the writ of error and the filing of the record on error had occured within ninety days of the date of entry of judgment, which included interest on the verdict. This the record showed. The court pointed out that the final judgment had actually been entered within ninety days of the writ of error and that therefore the writ of error was not subject to the motion to dismiss on the ground presented. This case is of interest in view of the decisions in this state that where the judgment is entered before the ruling on the motion for a new trial that until a motion for a new trial is determined a judgment is not final.[30]

Four of the cases concerned the problem of what constitutes a final judgment to which a writ of error properly lies. In the case of *Hizel v. Hizel*[31] the problem was one of a general nature, resolved in favor of expediency. In dismissing, as premature, a writ of error to review the action of the district court in refusing to make certain interlocutory orders concerning alimony, the court said:

> "In a sense, some of the orders involved, concerning alimony, have such finality that, strictly speaking, they are orders, and judgments thereon to which a writ of error may lie; however, it is more desirable that these matters await final disposition of the case on its merits."[32]

In *McMullin v. Denver*[33] no review of the final judgment was sought, but a motion was made to modify such final judgment or decree. The court said: "a writ of error will not lie from (sic) a ruling subsequently entered refusing to modify or change the final decree."[34]

In *Rigel v. Kaveny*[35] the writ of error was issued solely to review the propriety of an order appointing a receiver. There had been no trial on any issue of the case. The plaintiff in error sought a review of rulings of the trial court on motion to strike portions of the answer. The appellate court held that such rulings would not be considered, since such rulings did not end the action, prior to the entry of a final judgment in the case.

The latest case on this problem is *People v. District Court.*[36] Here the court said that where the district court had made an unauthorized order remanding a cause to the Public Utilities Commission with directions to hold a hearing in conjunction with certain findings, such order or "decision" was not a final judgment

[29] 304 P.2d 901 (Colo. 1956).
[30] See, e.g., Bankers Trust Co. v. Hall, 116 Colo. 566, 183 P.2d 986 (1947).
[31] 132 Colo. 379, 288 P.2d 354 (1955).
[32] *Id.* at 381, 288 P.2d at 355.
[33] 133 Colo. 297, 294 P.2d 918 (1956).
[34] *Id.* at 300, 294 P.2d at 918.
[35] 133 Colo. 556, 298 P.2d 396 (1956)
[36] 303 P.2d 692 (Colo. 1956).

to which a writ of error could be directed, since it did not put an end to the suit. In all of the above cases, the essential element of finality was lacking.

Two of the cases involving Rule 111 related to the actual form of the record in the Supreme Court and illustrate again the importance of a compliance with the requirements of the rule.

In the record in *Allison v. Heller*[37] the Summary of Argument which, under Rule 111 (f) is required to state "clearly and briefly the grounds upon which he relies," comprised three full typewritten pages and were, in essence, arguments. The court pointed out that the Summary of Argument supplants what were formerly designated Assignments of Error and, later, Specification of Points and that the Summary of Argument here did not comply with the rules. The court further held that to state that the verdict (in this case there was no verdict but findings by the court) was contrary to the law, to the evidence and to the law and the evidence was meaningless, and so general as to cover any possible question and, therefore, would not be noticed or considered. The court reached the same conclusion in the case of *Phipps v. Hurd.*[38]

RULE 112

The three cases which deal with this rule all relate to subdivision (f) of the rule, which concerns the reporter's transcript.

In *Bonham v. City of Aurora*[39] the entry of judgment for the defendant, based upon findings in its favor, contained no specification of time for tendering a reporter's transcript. The court held that under these circumstances the time fixed by Rule 112 (f) controlled, and since no extension of time for lodging the transcript had been allowed, a transcript filed after sixty days from the date of judgment could not be considered.

In *Brennan Construction Co. v. Colorado Springs Co.*,[40] after the issuance of the writ of error, the reporter's transcript, which had been lodged by the plaintiff in error, was stricken, on motion. A motion to dismiss the writ of error was then filed and in granting it the court held that where the only grounds for reversal would be found in such reporter's transcript there was nothing for the court to consider. The record of the clerk of the trial court disclosed no basis for a reversal.

In *Ratliff v. Davis*[41] the trial court had allowed sixty days within which to prepare and tender a reporter's transcript. No extension of time had been granted. The transcript, as filed in the Supreme Court, failed to show that it had been lodged in the trial court or that notice of lodging had ever been given to opposing counsel, although it did bear the signature of the trial judge affixed at a time which was later than sixty days after the order. Because the transcript had not been tendered within the time limited by the order of the trial court it was disregarded by the Supreme Court.

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[37] 132 Colo. 415, 289 P.2d 160 (1955).
[38] 133 Colo. 547, 297 P.2d 1048 (1956).
[39] 133 Colo. 276, 294 P.2d 267 (1956).
[40] 133 Colo. 301, 295 P.2d 686 (1956).
[41] 133 Colo. 315, 294 P.2d 1109 (1956).