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Workmen's Compensation, Attorneys and Family Law

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EDITOR'S NOTE

The four articles contained in this issue of DICTA are papers which were delivered at the 55th Annual Convention of the Colorado Bar Association in Colorado Springs. The first two papers were presented as part of the One Year Review of Colorado Law on October 23, 1953. The following two papers were presented at a meeting of the Water Law Section of the Association on October 24, 1953. Another paper presented at this meeting of the Water Law Section will be published in the February, 1954 issue of DICTA.

WORKMEN'S COMPENSATION, ATTORNEYS AND FAMILY LAW

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WORKMEN'S COMPENSATION CASES

The several cases decided by our Supreme Court this past year covering workmen's compensation have fallen into various sub-topics, and it will be my purpose to subsume the decisions into these sub-topics in an effort to put them into sharper focus.

Four cases dealt with the kind of accident which might be covered in a workman's compensation situation. In the first of these, *Industrial Commission v. Corwin,*[1] the decision of the Supreme Court reversed the finding of the trial court which had previously set aside an Industrial Commission finding. The Industrial Commission had awarded compensation to a nurse who alleged she had contracted infantile paralysis while working in the polio ward of the defendant hospitial. It appeared from the facts that the claimant had been more or less isolated in the ward for some two months and had had very little outside contact. Furthermore, of the four nurses working in the ward, two, including herself, had become ill of this disease. The hospital sought to escape responsibility on the ground that the method of transmission of polio could not be established, therefore, they could not be held responsible. Our Court determined that this was a compensible accident arising out of, and in the course of employment. The phrase "accidently sustained" means simply that the harm is unexpected. It does not mean that the harm need be extraordinary. The Court also notes that the Workmen's Compensation Act is highly remedial and beneficial in purpose, and should be liberally construed.

The Court also defines the phrase "an accident arising out of employment" and states that this means "When there is apparent to the rational mind upon the consideration of all the circumstances a casual connection between the conditions under which the work is required to be performed and the resulting injury" an accident may be said to arise out of employment.

The Court, in a very interesting decision, *Billings Ditch Company v. Industrial Commission,*[2] ruled that an employee of a non-

[1] .... Colo. ...., 250 P. 2d 135, 1952-53 C.B.A. Adv. Sh. No. 3.
[2] .... Colo. ...., 253 P. 2d 1058, 1952-53 C.B.A. Adv. Sh. No. 12.

profit mutual ditch company was not covered under the Workmen's Compensation Act, but was, instead, exempt as an agricultural worker. This decision reversed both the Industrial Commission and the trial court's findings. The rationale of the case appears to be the theory that if the claimant had been working for an individual farmer and was injured while repairing a ditch there could be no question as to the exemption. Therefore, where farmers ban together to form a mutual company, the stock of which is owned by themselves so that the company is merely the agency of conveyance, employees of such company are not covered.

The question was also raised in this case as to whether the Supreme Court was not bound by the findings of fact made by the Industrial Commission and confirmed by the District Court. In overruling this contention, it was determined in accordance with the general rule that where, as here, the facts are undisputed, then the issue becomes one of law, and the Court would not be bound by the findings of fact.

An employee of a paint company who had been calling on the trade in the northern part of the State was also a hunter. During pheasant season he went hunting with two employees of one of his customers. While hunting he was shot in the eye, and sought to recover for the loss. The Industrial Commission and the trial court sustained the position of the claimant to the effect that he was entertaining customers and had, therefore, suffered an accident arising out of the course of his employment. The Supreme Court reversed on the ground that such an undertaking could not be classified as arising out of the course of employment, particularly so where it was shown that the claimant had not taken his customer's employees as guests, but they had all, more or less, gone out and shared expenses. The Court notes that the only evidence upholding claimant's position was his own statement. The Court in determining that such evidence was insufficient stated: "The preponderance of the evidence must show that the claimant was performing work connected with his job as hereinbefore outlined." The statement of the claimant being the only evidence in a case such as this is insufficient to establish a preponderance. Finally, the Court noted that the accident was simply a risk common to all hunters and could not be said to be a risk connected with the claimant's job. In a rather strong dissent, two of the Justices took the position "That the refusal of our court to be governed by findings of fact in this case is indicative of what appears to be a diminishing respect for the adjudication of facts by trial courts and other finding bodies. Thus the majority opinion does violence to the elemental rule in proceedings on error that findings of fact are to be accepted by appellate courts in the absence of a clear showing of error." *Aetna Casualty Company v. Industrial Commission.*[3]

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[3] .... Colo. ...., 255 P. 2d 961, 1952-53 C.B.A.-Adv. Sh. No. 13.

Lastly, in the cases decided this year, concerned with the kind of coverage under the Workmen's Compensation Act, we have a precedent making decision, mainly, the *University of Denver v. Nemeth.*[4] Here the claimant was a student at the University of Denver and was injured during spring football practice. The facts showed that he received $50.00 per month for taking care of tennis courts and various other things, but further showed that he would lose both this and his board and room as well if he failed to produce on the football team. The Supreme Court sustained on the following grounds the finding of the trial court that Nemeth had sustained an injury compensible under our Workmen's Compensation Act.

> (a) That the fact that the University of Denver is an educational institution does not prevent it from being within the scope and purview of the Workmen's Compensation Act. The Court notes that educational institutions today are big business.
>
> (b) The Court next determines that the claimant, although a part time employee, was still a regular, rather than a casual, employee and was thus within the terms of the act.
>
> (c) The controlling point in the case is whether or not "under all of the circumstances the injury arose from something which was incident to the claimant's employment." Here, says the Court, the claimant had to produce in football or lose his job. While not a direct part of his employment, it was at least incident thereto and therefore arose out of it. "In the instant case, Nemeth at the time of his injury was in the employ of the university, was upon his employer's premises, occupying himself consistently with his contract of hire in a manner pertaining to or incidental to his employment. * * * The obligation to compensate Nemeth arises solely because of the nature of the contract, its incidents and the responsibilities which Nemeth assumed in order to not only earn his remuneration, but to retain his job. He apparently had the physical ability and aptitude for football, and the university hired him to perform work on the campus, and as an incident of this work to have him engage in football."

Parenthetically, it is my opinion that the argument of the defendant based on public policy, namely, that it is against public policy to require an educational institution to come under workmen's compensation with respect to work scholarships for its students of whatever kind, should have been sustained as being sound. There is no doubt that this decision reflects the present condition existing in college athletics. However, it still seems novel to me, at least, to render our universities subject to claims of this sort.

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[4] .... Colo. ...., 257 P. 2d 423, 1952-53 C.B.A. Adv. Sh. No. 19.

Three cases cited by our Court were concerned with the problems of evidence. In the first of these, for the first time on appeal the claimant alleged that both the Industrial Commission and the District Court had erred when they ignored the undisputed testimony of an expert witness that the claimant had suffered a psychoneurotic injury. The Court reaffirmed the well known rule that a matter not raised before the Industrial Commission or the trial court could not be raised for the first time upon appeal. The Court also points out that in his opinion the evidence of the expert was not undisputed and that even if it were, it would not necessarily be conclusive on the fact finding body. *Bransall v. Industrial Commission.*[5]

The problem of a general finding in a workmen's compensation case came up in *United States Fidelity & Guaranty Co. v. Industrial Commission.*[6] Here the Commission found, so far as the accident was concerned ,"that the claimant sustained an accident arising out of and in the course of his employment on July 12, 1951, and that by reason of such accident he sustained a ruptured intervertebral disc. He left work July 26, 1951, and is temporarily and totally disabled. His permanent partial disability cannot be determined. His average weekly wages were $59.60." (P. 418). The Court, in determining that this is an insufficient finding, stated, in effect, that a general finding on conflicting evidence in a workmen's compensation case where the Court is bound by the findings of fact of the Commission which are supported by the evidence that the injury arose out of employment is insufficient to sustain an award. The proper finding should set out the evidentiary facts, such as what the claimant was doing, what happened to him, when the accident happened and the place of the happening. From these findings the ultimate fact that the accident arose out of and in the course of the claimant's employment should then be determined. The Court expressly overrules their earlier decisions which appear to be in conflict with its present ruling.

Next, in dealing with evidential questions, the Court considers a case which arose under the Occupational Disease Act, Chapter 163, Sessions Laws of 1945. It may be noted that this is only the second case which has reached our Supreme Court involving this act. Here the claimant alleged that he had contracted silicosis in the defendant's mine. The evidence indicated that the only place where claimant was exposed to silicon dioxide was the employer's mine. The employer sought to deny liability upon the ground that the act which required that the claimant "establish" the facts meant that he must prove the facts beyond doubt. The Court rules that in this, as in other workmen's compensation and civil cases, the employee must simply prove the facts by a preponderance of the evidence. The Court also notes, again, that

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[5] .... Colo. ...., 251 P. 2d 935, 1952-53 C.B.A. Adv. Sh. No. 9.
[6] .... Colo. ...., 259 P. 2d 869, 1952-53 C.B.A. Adv. Sh. No. 26

it is ordinarily bound by findings of fact upon disputed evidence. *Resurrection Mining Company v. Industrial Commission.*[7]

In a case considering the problem of jurisdiction under the Workmen's Compensation Act, the Court determined that the right to appeal from findings of the Commission to District Court are jurisdictional, cannot be waived and may be raised at any time. *Industrial Commission v. Plains Utility Company.*[8]

Finally, the Court, in *Pacific Employers v. Industrial Commission,*[9] ruled that the payment of wages is not *ipso facto* the payment of compensation so as to toll the statute of limitations on the bringing of claims before the Industrial Commission. In this case, the claimant was injured on May 15, 1951. On June 11, 1952, he filed a claim for compensation. His claim was sustained both by the Industrial Commission and the District Court upon the ground that the payment of wages had tolled the six-month statute. The evidence showed that the employer had made payments after the injury based on a 40-hour week, although the claimant often worked 48 or 56 hours. He testified that he thought he was receiving compensation of $21.75, and that his employer was paying the difference. As the Court points out, this entire evidence was based on hearsay and was, therefore, incompetent. The Court then rules "that in order that payment of wages during the absence of an employee may be held to be the payment of compensation under the Workmen's Compensation Act it must be established by competent evidence or reasonable inferences to be drawn therefrom that in making these payments the employer was doing so conscious of the fact that he was making the same as compensation and it must be received by the employee with the knowledge or reasonable grounds for assuming that the payments made to him were being made as compensation for his injuries." The evidence in the present case did not meet this test. The Court specifically overrules three prior cases which appeared to hold to the contrary. The Court, again, also states the rule that where the evidence is uncontradicted it is not bound by any finding of fact, and the question becomes one of law for it to determine.

The significant statutory changes under the Workmen's Compensation Act are found in Senate Bill 69, which increased the benefits payable in case of injury or death in the various categories from 50% to 66⅔% of the employee's average weekly wages, not to exceed maximum payments of $29.75 per week, and a minimum of $10.00 per week. The act has also been amended to include as an employee of an insured any working partner or individual employer actively engaged in the operation of the business, provided he takes certain steps to become covered. The Occupational Disease Act has also been amended to bring its benefits in line with the Workmen's Compensation Act.

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[7] .... Colo. ...., 259 P. 2d 275, 1952-53 C.B.A. Adv. Sh. No. 24.
[8] .... Colo. ...., 259 P. 2d 282, 1952-53 C.B.A. Adv. Sh. No. 22.
[9] .... Colo. ...., 257 P. 2d 404, 1952-53 C.B.A. Adv. Sh. No. 19.

Attorneys

Under this topic there have been several cases covering different problems in the field. A most significant case arose under the question of unauthorized practice, and I think we should congratulate our Association for their vigorous efforts along these lines.

The holding to which I just referred is commonly called the "pure trust" case, *People v. Schmidt.*[10] Here the defendant attempted to sell, through contacts and advertising, a legal panacea which he designated as a pure trust organization. The home office of this organization was Chicago. The pure trust was created, according to defendant's literature and statements, through the signing of a pure trust indenture contract under which the trustor conveyed his assets to the pure trust for a given period of time and received in return so-called professional certificates giving the holder the right to receive profits from the trust, if there should be any, and the corpus of the trust at the termination date of the contract creating same. Management was solely in the trustees, and the trustor has no rights other than those outlined. This scheme, according to its propaganda, would protect, for example, a partner from almost any kind of liability or would enable a person to avoid most estate problems, including tax questions, but would still permit the trustor, if he were setting up an estate plan, to control the property from beyond the grave. As a clincher, it was asserted that this organization was a "United States constitutional procedure," and as foolproof as any organization could be. Mr. Justice Burke, as referee to determine whether or not this gentleman and his organization were practicing law without a license in violation of Section 21, Chapter 14, Vol. 2, 1935 Colorado Statutes Annotated, pointed out that:

> The thing that stands out like a mountain peak in all this accumulated mass of evidence is that businessmen are not lured into disposing of all control of their property, of embarking into unheard of schemes to escape personal liability, taxes, court costs, attorney fees, etc., until they are assured by some reputed expert that the whole novel plan has been time tested and found legally water tight. It cannot be doubted that the inducement for the so-called purposes of this service was legal advice, nothing else, and it makes no difference whether the Chicago concern was legitimate or otherwise, or whether its representations were true or false. It was practicing law in Colorado without authority and defendant was re-enforcing its claims and making representations on his own behalf and his own authority was doing the same thing both in direct violation of our statutes and in defiance and contempt of this court.

[10] .... Colo. ...., 251 P. 2d 915, 1952-53 C.B.A. Adv. Sh. No. 9.

Our Court sustained the finding of the referee and fined the defendant $500.00, or, in lieu thereof, that he be incarcerated for 90 days in the County Jail of Denver.

The next case which considered the question of unauthorized practice concerned a public stenographer who advertised in the telephone directory *inter alia* "Legal Forms—Depositions, Conveyance Papers." She admitted that she had examined at least one title and had also prepared a Will. Her sole defense was that she had no intent to violate the law. The Supreme Court found her guilty of contempt and engaging in unauthorized practice and fined her $250.00 or 60 days in jail. *People v. Hanna.*[11]

Our Court had next had before it a problem which has been the bane of many an advocate, namely, how to conduct yourself in the rare case in which the opposition appears without benefit of counsel.

In the first of these, *Knapp v. Fleming, et al.,*[12] the plaintiff in error, Knapp, appeared *pro se* in the trial court. Judgment of dismissal was entered against him and he came by writ of error to our highest bench. There the Court noted that the writ must be dismissed for failure to comply with the rules. The Court stated that while a litigant is permitted to present his own case, still he should be restricted to the same rules of evidence and procedure as an attorney; otherwise, ignorance is unjustly rewarded.

Again, in *Viles v. Scofield,*[13] the Court enunciates the principle that "if a litigant for whatever reason sees fit to rely upon his own understanding of legal principles and the procedures involved in the courts, he must be prepared to accept the consequences of mistakes and errors. One who attempts a major operation without expert knowledge of the precautions essential to safety cannot be heard to complain if tragedy results."

Finally, there are three decisions directly involving the discipline of attorneys themselves. In the first of these, the Court points out that it is the duty of the lawyer as an officer of the court to be absolutely accurate in his statement of facts presented in his brief in order that the Supreme Court may rely upon them. *Clemann v. Bandimere.*[14]

Again, in *Spillane v. Wright,*[15] the Court denied a petition for rehearing, and severely rebuked the attorneys involved. The Court states: "Silence is sometimes the severest criticism. However, if we remained silent by simply entering an order denying the petition there would be no indication of our intolerance of a too prevalent tendency to file argumentative petitions and it would appear that we condone unfair and unethical practices. As

[11] .... Colo. ...., 258 P. 2d 492, 1952-53 C.B.A. Adv. Sh. No. 22.
[12] .... Colo. ...., 258 P. 2d 489, 1952-53 C.B.A. Adv. Sh. No. 20.
[13] .... Colo. ...., 261 P. 2d 148, 1952-53 C.B.A. Adv. Sh. No. 29.
[14] .... Colo. ...., 259 P. 2d 614, 1952-53 C.B.A. Adv. Sh. No. 26.
[15] .... Colo. ...., 259 P. 2d 1078, 1952-53 C.B.A. Adv. Sh. No. 27.

a further indication of unfamiliarity with or disregard for our rule this petition (for rehearing) seeks an oral argument which is specifically prohibited."

Lastly, a most recent case is that of *People v. Marshall.*[16] Here the respondent had been a practicing lawyer of many years standing in Alamosa. He was disbarred for conduct "highly reprehensible and grossly unprofessional and which has brought reproach upon the honored legal profession to which he belongs." It was noted by the Court that the respondent had previously been reprimanded for his conduct, but had appeared apparently to disregard the reprimands. Judge Steele served as referee, and his findings were adopted by the Court. The specific grounds which the Judge found to be cause for disbarment were:

(a) Accepting a retainer but failing to perfect a Supreme Court Appeal in a criminal case for which the retainer had been accepted.

(b) Respondent apparently had converted some thousand dollars of his client's money to his own use.

(c) That the respondent had failed to return papers or to institute suits on notes which a client had sought to have him do.

It should also be noted that our Courts in a most important step, adopted the Canons of Professional and Judicial Ethics with slight changes in the latter. These are published in September 1953 issue of *Dicta.*

Family Law

The last topic to which I have been assigned is that of family law. Again, there may be found under this broad heading several sub-heads, the cases under each of which will be briefly discussed.

In the first of these, under the general heading of dependency, we have *Everett v. Barry.*[17] Here a petition in dependency was filed on behalf of a maternal grandmother by an attorney who for filing such was severely rebuked in the following language: "A petition in dependency must be filed not in behalf of any individual but only in behalf of the state for the purpose of protecting a minor child. Such petition should not be filed by any petitioner, and particularly not by an attorney at law who is an officer of the court except singly for the protection of a child. It should be filed only upon credible information and belief that the child is so circumstanced that for its own protection and well being it should be taken from existing custody and become a ward of the state. One assuming to sign such a petition equally assumes the obligation to present evidence sustaining it and one should not verify any allegation of such petition as true of his own knowledge unless the facts set forth therein are within her personal knowl-

[16] .... Colo. ...., 261 P. 2d 719, 1952-53 C.B.A. Adv. Sh. No. 1.
[17] .... Colo. ...., 252 P. 2d 826, 1952-53 C.B.A. Adv. Sh. No. 11.

edge." (P. 152, 153). The facts showed that the father, a master sergeant, had always provided a good home for the children and had always supported them. The children had moved to Denver with their mother due to her mental condition. This removal had been instigated by the defendant husband in the hope that she would be cured. She did improve and her parents sought the custody of the children. In reversing the lower court which had refused to sustain a motion to dismiss, the Supreme Court set out the rules to govern the actions of Juvenile Courts in dependency and custody matters. These seven rules are as follows:

1. That the juvenile court is a statutory court with no jurisdiction beyond that expressly given by statute;
2. That the jurisdiction so given does not include jurisdiction of contests over custody of children in behalf of, or between, individuals, whether parents, or otherwise;
3. That such jurisdiction attaches only in proceedings brought, not in behalf of any person, but solely where children are found delinquent or have been so circumstanced, neglected or imposed upon as to require the state to take over their custody or act otherwise for their protection;
4. That in a dependency proceeding, such as that befor us, the question to be resolved is not the comparative rights of different claimants of custody, but solely that of whether or not the existing custody and surroundings of the child are such that it is the duty of the state, as *parens patriae,* to take over its custody and make it a ward of the state;
5. That a dispute between parents or between a parent and any other person as to right of custody is not such a controversy as to justify an adjudication of dependency;
6. That a parent, if a fit and suitable person, has the prior right of custody of his children over a grandparent or any other person or the state;
7. That a parent is presumed to be a fit and suitable person to have the custody of his children, and that such presumption can be overcome only by convincing evidence to the contrary.

The next case concerning dependency problems is found in *Avery v. The County Court.*[18] Here the Supreme Court sustained a writ of prohibition in a dependency hearing. The petitioner was a non-resident of Gilpin County. The defendant mother at the time the petition was filed raised the question of jurisdiction, but upon being overruled went to trial. She had been awarded custody of the child in a Boulder divorce. The Court sets out, again, the rule that the question of jurisdiction may be raised at any time. The defect here raised was that the action in dependency was not "filed by any officer of the State Board of Child

[18] .... Colo. ...., 250 P. 2d 122, 1952-53 C.B.A. Adv. Sh. No. 4.

and Animal Protection (an ingenious grouping) or the Juvenile Court or any person who is a resident of the county having knowledge that the children involved were dependent or neglected" (p. 58), as provided in Section 3, Chapter 33, 1935 Colorado Statutes Annotated. The Court rules that where "a statute makes the residence of a petitioner within a particular county a condition upon which the jurisdiction of a court can be invoked, a county court is wholly without power or authority to proceed in a statutory action unless the petitioner is a resident in a county in which an action is brought."

The Court overrules *Hudson v. Mattingley,* 69 Colo. 528, 195 Pac. 113 (1921), which had appeared to reach a contrary result on this question, and states: "Where a statute specifically identifies the officer or persons who may invoke the jurisdiction of a court in a proceeding which is purely statutory, it is necessary and essential that the persons thus named shall institute the proceedings. The identification by the statute of those authorized to invoke the courts' jurisdiction operates to exclude all persons not mentioned."

In the case of *Cederquist v. Archuleta,*[19] the Court rules that the Juvenile Court, whose correct title is Juvenile Court in and for the City and County of Denver and State of Colorado, may allow support money and medical expenses in a proper paternity or dependency case, provided that there is evidence as to the earning capacity of the father and as to the needs of the dependent child, but may not award attorney fees. The Court in reaching its result calls attention, specifically, to Section 5, Chapter 33, 1935 Colorado Statutes Annotated, which provides that at hearings such as these it is the duty of the county or district attorney, when requested by the Court or the petitioner to appear on her behalf and present her case. Therefore, if petitioner seeks other counsel she must pay for it. Also, in this case, the Court again affirms that Section 1, Chapter 33, 1935 Colorado Statutes Annotated, requiring a father to support an unborn child and its mother is constitutional.

In the case of *Campbell v. Gilliam,*[20] the trial court had granted a summary judgment in a dependency proceeding upon the ground, apparently, that the petitioner did not meet the requirements of the dependency statute with respect to residence. The facts showed that the petitioner, a neighbor of the defendant at Kalispell, Montana, had become enamored of him, and that they had had intercourse. Shortly thereafter, she discovered that she was pregnant, and came to Denver where defendant was located as a soldier at Lowry Field. He ignored her and she filed this petition. The trial court, in sustaining the motion for summary judgment, had also ruled that there was no showing that the child was dependent or neglected. Our Supreme Court,

[19] .... Colo. ...., 253 P. 2d 431, 1952-53 C.B.A. Adv. Sh. No. 11.
[20] .... Colo. ...., 257 P. 2d 965, 1952-53 C.B.A. Adv. Sh. No. 21.

in construing Section 13, Chapter 33, 1935 Colorado Statutes Annotated, states that the primary purpose of the entire statute is to provide for the welfare of the child, and that the residential requirements should be liberally construed so as not to defeat this purpose. The Court further states that the words of the statute "for the purpose of this section and other sections codified from the Act of 1907, the words dependent child or neglected child shall mean any child under the age of 18 years who is dependent upon the public for support or who is destitute, homeless or abandoned or who has not proper parental care or guardianship or who, in the opinion of the court, is entitled to support or care by its parent or parents where it appears that the parent or parents are failing or refusing to support or care for said child," indicate that the Court shall have jurisdiction where it appears that the parent or parents are failing to support the child, and that, therefore, the granting of the motion for summary judgment was error.

There has been but one case in the past year construing the sections of our statute concerned with annulments. This case is an exceedingly important one to the Colorado lawyer in its determination of the question of our Court's jurisdiction and the kind of action which an annulment is. *Owen v. Owen.*[21]

In this case, the plaintiff, as conservatrix, sought to have a marriage annulled which had been entered into by her ward in the State of Texas some three years prior to the present adjudication. Personal service was made on the defendant, a Texas resident, in Texas. Defendant, by what he termed a special appearance, moved to quash the service in substance on the ground that this was not an action in which personal service could be had on a non-resident. Further, the motion was coupled with a statement that without waiving it, the defendant moved to dismiss for the reason that the Court had no jurisdiction of the subject matter of the complaint. Both motions were denied in the County Court. From there the case was appealed to the District Court, which sustained the motions and from there the case came to the Supreme Court. Our Supreme Court determined two questions of prime significance in this State:

> That an annulment is not an action *in rem* but *in personam*. In the case of divorce the marriage status is the thing or res upon which the court may act. In an action for annulment on the ground the marriage ceremony was void, the very allegations of the petition preclude the existence of the thing or res.
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> We appreciate the difference between actions for divorce and annulment. The former being based on a valid marriage and a cause of divorce arising post nuptially while the latter presupposes and is based entirely upon

[21] .... Colo. ...., 257 P. 2d 581, 1952-53 C.B.A. Adv. Sh. No. 19.

> the assumption that by reason of some legal impediment the parties were incapable of contracting a valid marriage. In other words, in the latter case because of the legal impediment the attempted marriage is void *ab initio.*

The Court having disposed of the question as to the kind of action thereby sustaining, in effect, the motion to quash on that point, then rules that the courts of Colorado have jurisdiction to determine the validitiy of any marriage performed outside its borders so long as one of the parties is a domiciliary of Colorado, and states the well known rule that the validity of the marriage is a question to be determined according to the law of the State in which the marriage was performed. The Court specifically points out that it will not pass on the question as to whether defendant waived the validity of his motion to quash on that point, then rules that the Courts of Colorado have jurisdiction to determine the validity of any marriage performed outside its borders so long as one of the parties is a domiciliary of Colorado, and states the well known rule that the validity of the marriage is a question to be determined according to the law of the State in which the marriage was performed. Finally, the Court specifically points out that it will not pass on the question as to whether defendant waived the validity of his motion to quash and entered a general appearance when he filed a motion to dismiss along with it.

Next, we have had several cases concerning divorce. *Kleiger v. Kleiger* reaffirms the general proposition that the question of alimony and the propriety of a property settlement is generally within the discretion of the trial court, and that where the petitioning wife knew the facts, she could not later attempt to upset a property and alimony division. It is my thought that this decision illustrates that the rule in the Bartges case fortunately cannot be applied to every divorce settlement. *U. S. National Bank V. Bartges,* 120 Colo. 317, 220 P. 2d, 600; 122 Colo. 546, 224 P. 2nd, 658.

Perhaps the most significant single case decided in the field of divorce within the past year is that of *Burke v. Burke.*[22] In 1925 the plaintiff was awarded a divorce from the defendant and was given $30.00 per month for support of her minor child. The defendant, for a time, complied with the Court order as to support, but later moved to another state and failed to make any further payments. In 1951, the wife applied to the Court to reduce the child support arrearages to judgment. This was done without notice to the defendant, the Court entering judgment for the arrearage plus simple interest. The husband then entered his appearance and moved to vacate, which motion, after full hearing, was denied. In sustaining the position of the trial court, our

[22] .... Colo. ...., 255 P. 2d 740, 1952-53 C.B.A. Adv. Sh. No. 16.

Supreme Court holds that under Section 18, Chapter 56, 1935 Colorado Statutes Annotated, execution, property division or imprisonment are proper remedies to enforce child support payments. The Court also notes that these remedies are cumulative rather than mutally exclusive and states: "Each installment which matures under a decree which has not been modified becomes a judgment debt similar to any other judgment for money." (P. 249). Thus, the Court states that each amount as it becomes due is a separate judgment debt, and that a consolidated judgment for arrearage is proper as is the award of simple interest. The Court also rules that the fact that marriage is a civil contract does not bring this action within the statute of limitations respecting debts arising from contracts, and finally states that at least in this case it was in error to fail to give notice.

In another important decision, *People v. The District Court,*[23] the Court rules that an interlocutory decree, although containing a statement that plaintiff and defendant were bona fide residents of Colorado for more than one year last preceding the institution of the cause of action, as well as being bona fide residents of Rio Grande County for the same year, and although the complaint contained the same allegation, that these were insufficient to sustain an interlocutory decree of divorce entered where the undisputed testimony given subsequent to such entry showed that neither plaintiff nor defendant were residents of Rio Grande County but were, in fact, residents of Denver County, and that defendant had simply been served in transit to Denver. The Court states that all orders entered in this cause are void because, pursuant to Chapter 56, Section 6, 1935 Colorado Statutes Annotated, divorce actions can only be brought in the county where the plaintiff resides or where the defendant resides or where the defendant last resided, unless such can be shown the Court had no jurisdiction and can enter no orders. Under this ruling perhaps a court would not have jurisdiction to grant a change of venue in such a case. Counsel caught in this predicament should possibly seek prohibition.

Several miscellaneous cases have come up under the general topic of family law, and I am only briefly going to mention them, since they are not too important.

The first is *Thuet v. Thuet,*[24] which holds *inter alia* that a wife may convey her land without her husband's knowledge or consent and that such conveyance, if meeting the other requirements of conveyancing, are proper.

In *Franzen v. Zimmerman,*[25] the plaintiff, a widow, sought to recover for loss of consortium when her husband was injured in an auto accident from which injuries he subsequently died. The

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[23] .... Colo. ...., 255 P. 2d 743, 1952-53 C.B.A. Adv. Sh. No. 22.
[24] .... Colo. ...., 260 P. 2d 604, 1952-53 C.B.A. Adv. Sh. No. 26.
[25] .... Colo. ...., 256 P. 2d 897, 1952-53 C.B.A. Adv. Sh. No. 26.

Court states that at common law the wife could not maintain such action, but it is urged that married women statutes permit such. The Court indicates that this type action may be maintained where there is an interference with such rights resulting from intentional malicious or direct act by another, but that no such action can be maintained for indirect, remote or consequential loss.

Finally, the Court says that while the present case might present some difficulty, it is governed by *Giggey v. Gallagher Transportation Company,*[26] which denied the right to recover for loss of consortium based on the negligent actions of a third person.

In closing it may be noted that the statutory enactments covering family law do not appear to be important.

[26] 101 Colo. 258, 72 Pac. 2d 1100 (1937).

VAN CISE ON RULE ELEVEN

This Rule of Civil Procedure is the same both in United States and Colorado Courts. It is very frequently disobeyed by lawyers and the Courts should begin to enforce the penalties for such action. The pertinent portions are:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address and that of the party shall be stated. * * * The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. * * * For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

One of the most flagrant violations by attorneys is entering Counsel's appearance by a false Motion to Dismiss "for the reason that the Complaint fails to state a claim against the defendant upon which relief can be granted." This is most frequently filed against a good Complaint in Divorce and very often against good complaints in other cases. When so filed the attorney so doing knows that it is absolutely untrue.

When the attorneys are trying to work out a settlement of a case all that counsel should do is to enter his appearance for the Defendant, then no action can be taken without notice to them.

But to file an untruth is a grave reflection on the lawyer and should not be allowed by the Court.

PHILIP S. VAN CISE