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One Year Review of Colorado Case Law

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ONE YEAR REVIEW OF COLORADO CASE LAW

The following is a summary of materials presented on October 10, 1952, at the 54th Annual Convention of the Colorado Bar Association. Subjects have been grouped arbitrarily to best suit the abilities of the attorneys who conducted the research. This is the third annual survey of Colorado law to be made by the Association and was prepared and presented under the direction of Charles J. Beise of Denver. Only cases which have changed or added to the law of this state have been considered by the researchers who have given so generously of their time in the preparation of this work. We hope that the material on the following pages will prove of assistance to Colorado lawyers.

CIVIL REMEDIES AND CIVIL PROCEDURE

CONRAD L. BALL

In *Neilson v. Bowles*,[1] an instruction with which the court was dealing, read:

> Such verdict should be on the one out of the four different theories and claims which a fair preponderance of the evidence indicates as the true, *or most probably* true one.

The Supreme Court held that it is the duty of the jury to determine as best they can which theory is supported by a preponderance of the evidence and not which is "probably true."

Kubat v. Kubat:[2] The District Court in a divorce action had stricken from the cross-complaint allegations attacking the validity of the County Court's adoption decree. Thereafter, in a County Court action directly attacking said adoption decree, the County Court sustained a motion to strike similar allegations on the ground that the matters alleged had been judicially determined in the District Court action. Held: (1) All matters relating to the validity of the adoption had been stricken in the District Court and therefore were not determined nor adjudicated therein. (2) The attempted defense of prior adjudication should be set up as a separate defense under Rule 8 and not by motion.

Risbry v. Swan[3] involved a suit for specific performance of an alleged contract to make a will and to impress a trust on the assets of the estate. Parties defendant were the administrator, the State of Colorado, the mother of deceased, and unknown persons. All defendants defaulted except the administrator and the state. On the administrator's objection plaintiff's testimony was stricken under the provision of sec. 2, ch. 177 '35 Colo. Stat. Ann., commonly referred to as "dead man's statute." Held: An administrator is not an adverse party within this statute where the action is to determine who is entitled to the assets of the estate since plaintiff

[1] 236 P. 2d 286, 1951-2 C. B. A. Adv. Sh. (Sept. 24, 1951).
[2] 238 P. 2d 897, 1951-2 C. B. A. Adv. Sh. (Nov. 26, 1951).
[3] 239 P. 2d 600, 1951-2 C. B. A. Adv. Sh. (Dec. 24, 1951).