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Civil Remedies and Civil Procedure

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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).

was not a "claimant" against the estate; therefore, the statute could not be invoked by the administrator, hence plaintiff was qualified to testify. The court stated:

> As a by-line and possible guide, we wish to add the comment that this case presents a quite unusual and rather unique situation, one which will doubtless infrequently arise. Great care, therefore, should be had that it be not applied other than under an identical factual situation as here presented.

In *Moreno v. Commercial Security Bank*,[4] it was held that a petition to intervene may be denied where the petitioner seeks to change the issues. The only appeal open to the petitioner who was denied the right to intervene is from the order denying intervention. Such petitioner cannot appeal from the main judgment. Also, concerning a motion to disqualify the judge, the Court held that a ruling of the judge in a previous similar case which had been affirmed on appeal is not evidence of prejudice sufficient for disqualification in a later action.

Rand v. Anderson:[5] At a pre-trial conference the defendant was required to furnish plaintiff with a list of expenditures. Thereafter the defendant remembered other items not included in the list. He attempted to prove such additional items, but was denied this right by the trial court. Held: This ruling was prejudicial. Rights of litigants are not to be denied by this kind of a rule of civil procedure. Pre-trial conferences are designed to expedite litigation and not to exclude proper and admissable evidence.

In *McMullen v. Denver*,[6] it was held that violation of a quiet title decree is not civil contempt under Rule 107 (a) unless the provisions violated are mandatory or prohibitive.

Hoff v. Armbruster,[7] was an action to impress a trust on assets of an estate located in Colorado. The administratrix was personally served. The heirs were served by publication of summons. Held: Under Rule 4 (g) (2) (h) service by publication could be made on the non-resident heirs as this was strictly a proceeding *in rem*.

In *Murrow v. Whiteley*,[8] the jury had found defendants liable in an automobile damage case but failed to follow instructions on the amount of damages. The trial Court denied plaintiff a new trial on the issue of damages alone. Held: Under Rule 59 C (a) where there is no need of another trial on other issues, a new trial should be granted on the question of damages only. The court stated that the application of this rule as here presented was one of first impression.

In *Pioneer Mutual Compensation Company v. Cosby*,[9] a damage

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[4] 240 P. 2d 118, 1951-2 C. B. A. Adv. Sh. (Jan. 14, 1952).
[5] 1951-2 C. B. A. Adv. Sh. (Jan. 28, 1952).
[6] 242 P. 2d 240, 1951-2 C. B. A. Adv. Sh. (March 3, 1952).
[7] 242 P. 2d 604, 1951-2 C. B. A. Adv. Sh. (March 24, 1952).
[8] 244 P. 2d 657, 1951-2 C. B. A. Adv. Sh. (April 21, 1952).
[9] 244 P. 2d 1089, 1951-2 C. B. A. Adv. Sh. (May 12, 1952).

suit, the insured defendant brought his insurer into the case by a third party complaint asking for judgment against the company for any sum he should be obligated to pay the plaintiff. The defendant recovered judgment against the company for the same amount as plaintiff's judgment. The Company contended that defendant had no right to make it a third party defendant because of a "no action" clause in the policy. Held: The purpose of Rule 14 (a) is to settle as many conflicting interests as possible in one proceeding. The "no action" clause is directly opposed to this rule and courts should not permit litigants to circumvent rules of court by contractural arrangements. The court also held, however, that the policy in this case was one of liability and not indemnity, and did not contain a true "no action" clause.

McCoy v. District Court:[10] At a pre-trial conference in an automobile damage case, the Court ordered the defendant to furnish plaintiffs with copies of statements made by plaintiffs and given to defendants after the accident and before suit was filed. The defendants brought original proceeding for writ of prohibition. Held: Under Rule 34, plaintiff does not have an unqualified right to examine a statement made by him and delivered to the defendant prior to the suit; he must show good cause. Rule 16, providing for pre-trial conference, does not confer authority on the trial court to compel production of documents or force the making of any admissions. The defendant had no adequate remedy here by writ of error.

In *Reserve Life Insurance Company v. District Court*,[11] it was held that where a party is notified to appear for a deposition, he is not entitled to *subpoena* nor to *per diem* allowance nor mileage under Rule 5 (b) (1).

CONSTITUTIONAL LAW, ELECTIONS, BANKS AND BANKING

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Eachus v. People:[1] Defendant was not a bonded butcher and sold some beef. He was convicted in District Court and appealed on constitutional grounds. Our Supreme Court upheld the bonded butcher statute as being within the police power. Our Court further quoted with approval the following from a United States Supreme Court case:

> We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.

This case is mentioned to show that the legislature is our first line

[10] 246 P. 2d 619, 1951-2 C. B. A. Adv. Sh. (June 23, 1952).
[11] 1951-2 C. B. A. Adv. Sh. 470 (Aug. 18, 1952).
[1] 238 P. 2d 885, 1951-2 C. B. A. Adv. Sh. (Nov. 19, 1951).