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Lawyers in the Public Service

Dicta Editorial Board

Let me sum up again by saying that, if you are opening the case, first of all present to the court a very brief picture of what the case is about, giving enough facts and enough logic to show what points are involved. This can usually be done in a few paragraphs and the court will then settle back and listen with more understanding of what you are presenting.

Rarely if ever should you quote the court's decisions for there is a very well fortified presumption that the justices know what they said in some previous case.

The lawyer must always be prepared to answer questions from the bench and these questions clarify the issues and give more point to the argument.

In questioning lawyers I especially want to refer to the manner of Justices Jackson and Rutledge. These two eminent justices are models for the manner and style of questioning lawyers from the bench. It is to be hoped that every other justice will follow the style of these two justices—never hostile, pugnacious, argumentative or seeming to seek disputation for its own sake, but asked with deference to the time and trend of thought of the lawyer who is arguing and asked for the obvious purpose of throwing more light on the case.

No citizen, whether he be a lawyer or not, can sit through a session of this great court, hear arguments and not be deeply impressed with the high character, fairness and ability of the great men who sit on that bench. He is certain to grasp more fully the truth of that motto which he read as he walked up the steps into the noble stone building where the court holds its sessions. Let me repeat that motto now—

"EQUAL JUSTICE UNDER LAW."

Lawyers in the Public Service

JUDGE FRANCIS J. KNAUSS is the presiding judge of the civil division of the Denver District Court this year. JUDGE JOSEPH E. COOK is the presiding judge of the criminal division. JUDGE JOSEPH J. WALSH has been transferred to the criminal division and JUDGE HENRY S. LINDSLEY to the civil division.

HAMLET J. BARRY, JR., DAVID V. DUNKLEE, WILLIAM V. HODGES, of Denver, VICTOR HUNGERFORD of Colorado Springs, and ROBERT L. STEARNS of Boulder, are members of the advisory committee of the Columbia Club of Colorado. JUSTIN W. BRIERLY, Denver, is president of the club.

WARWICK M. DOWNING, Denver, has been selected by the Publications Committee of the Mineral Law Section of the American Bar Association to participate in the writing of a volume on oil and gas conservation law. The volume is a cooperative work to be participated in by writers from each jurisdiction.

RALPH L. CARR, Denver, has been appointed by Governor Knous to the Children's Code Commission to study children's law and make recommendations to the legislature. The commission was created under an act passed by the general assembly in 1947, but passed in such a way that there is considerable doubt that the act was passed at all, or is in any way effective. However, the work of the commission is of considerable importance. The laws relating to children are like most other laws of the state—they need to be revised and brought to date.

H. ALLYN HICKS, JR., is second vice-president of the Denver Civic Symphony Society.

L. WARD BANNISTER AND RALPH L. CARR, Denver, directors of the United States Chamber of Commerce, have been appointed to committees of the chamber. Mr. Bannister is a member of the committees on international relations and labor relations, and Mr. Carr is a member of the committee on national resources.

HENRY TOLL, Denver, is deputy sheriff of the Westerners, an organization dedicated to the collection and preservation of Western lore and history.

JOHN C. YOUNG, Colorado Springs, former judge and chief justice of the Colorado Supreme Court is in Neurnberg trying former Wehrmacht officers for war crimes. Judge Young will be in Neurnberg for at least six months, with Mrs. Young. His sons, John Jr. and Rush will carry on the family law firm during their father's absence.

JACOB V. SCHAETZEL was recently elected president of the Legal Aid Society of Denver. JOHN E. GORSUCH is chairman of the board. EDWIN J. WITTELSHOFER and GORDON JOHNSTON are members of the board. PAUL IREY, general counsel, has been appointed to the executive board for the survey of legal aid, a part of the American Bar Association's survey of the American bar, and has been in New York City in connection with this work, for a short time.

New Members of Denver Bar Association

The following persons were admitted to membership in the Denver Bar Association at the January 5, 1948 meeting:

Betty Marie Asher
Thomas Campbell
George W. Currier
James C. Flanigan
Paul M. Hupp
J. Howard Miller
William V. Moore, Jr.
Byron M. Myers
George J. Stemmler
Comora MacGregor Nash
Joseph David Neff
William S. Powers
Arthur Thad Smith

Henrys Address Denver Bar in January and February

Municipal Judge Hubert D. Henry addressed the Denver Bar Association at the January 5, 1948 meeting. He discussed the legal problems involved in mixing gasoline with alcohol. He is a former chairman of the Junior Bar Section of the Colorado Bar Association, and practices alone in his spare moments from the Municipal Court. He is an instructor at Westminster Law School, where he had his legal education.

He is a graduate of Denver University, a member of Sigma Alpha Epsilon fraternity, and a former member of the Colorado General Assembly.

S. Arthur Henry addressed the Denver Bar Association at the February 2, 1948 meeting. His address was the fifth in a delightful series of humorous addresses with which he has been entertaining Denver and Colorado lawyers for several years. His subject was, "An Anthology of Little Known Legal Correspondence." It was very much enjoyed by all. Mr. Henry is a member of the longest named legal firm in the state, Lewis, Grant, Newton, Davis and Henry, which claims several partners whose names are not in the firm name, and two associates. He is a former president of the Denver Bar Association and a former member of the Board of Governors of the Colorado Bar Association. He is attorney for the Denver Public Schoools, and a member of the Board of Trustees of Denver University. He received his legal education at Harvard.

He is a graduate of Denver University, a member of Sigma Alpha Epsilon fraternity, and a former member of the Colorado General Assembly.

Personals

PAUL S. FRIES has removed his offices to 405 Mining Exchange Bldg., Colorado Springs.

LEWIS, GRANT, NEWTON, DAVIS AND HENRY has now officially announced its formation and office consolidation. The merged firm arising out of the firms of Lewis and Grant, and Newton, Davis and Henry, has moved into its new offices at 810 First National Bank Bldg., Denver. Members of the firm are: Mason A. Lewis, Mayor Quigg Newton (on leave of absence), Richard H. Davis, S. Arthur Henry, Irving Hale, Jr., Donald S. Graham, Donald S. Stubbs, and associates John N. Adams and Byron R. White.

JOHNSON AND ROBERTSON, consisting of Stanley H. Johnson, Donald B. Robertson, and its new associates Cecil M. Draper and James B. Young, has removed its offices to the Tramway Bldg., 1100 Fourteenth St., Denver.

EDWARD L. WOOD, BURTON CRAGER and WILLIAM K. RIS have associated under the name of Wood, Crager and Ris, with offices at 200 Equitable Bldg., Denver. Robert M. Johnson is associated.

PAUL A. JOHNSON has removed his offices to 305 Flatiron Bldg., Denver.

ERNEST B. FOWLER *and* CHARLES C. NICOLA have associated under the name of Fowler and Nicola, with offices at 803 Ernest and Cranmer Bldg., Denver.

CHARLES E. GROVER, formerly deputy district attorney in Denver, has resigned to enter private practice. He will maintain law offices with Forest C. Northcutt in the First National Bank Bldg., Denver.

Letters to the Editor

Re Worth Allen's quotation (December 1947 Dicta, page 274) from Justice Burke's condemnation of "and/or" I refer you to "Dictaphun", in July, 1937, Dicta where it is pointed out that "and/or" appears in the text of the opinion in an en banc decision by the Colorado Supreme Court to which no objection by Justice Burke was noted. The case is *Kolkman vs. People*, 89 C. 8, 21.

There are situations in which the use of "and/or" is proper. The fact that it may be frequently improperly used is no reason for wholesale condemnation.

Yours very truly,
CARLE WHITEHEAD.

Committee on Unlawful Practice Needs Information

The Unlawful Practice Committee of the Colorado Bar Association wishes to ascertain from the members of the association whether there are problems in this field that call for action and whether there are programs or policies that the various members of the bar might care to recommend.

Among the classifications of the American Bar Association having to do with unlawful practice are the following:

(a) Real estate brokers.
(b) Banks and trust companies.
(c) Insurance adjusters.
(d) Underwriters.
(e) Actors' agents.
(f) Notaries public.
(g) Persons practicing before administrative tribunals.
(h) Persons soliciting and preparing naturalization papers.
(i) Accountants and lay persons preparing instruments and giving advice generally in regard to tax matters.
(j) Members of the bars of other states or those licensed solely in the federal courts who maintain offices in a particular state and give advice and services of a legal nature but who are not members of the state bar.

All members of the Colorado bar are urged to write their suggestions to Charles A. Graham, Symes Bldg., Denver, chairman of the committee.

Denver Bar Considers Two Important Subjects

At the February meeting of the Denver Bar Association, two important matters were presented. Edwin J. Wittelshofer, chairman of the Real Estate Title Standards Committee, recommended the repeal or amendment of the Soldiers' and Sailors' Civil Relief on the grounds that the provisions which are now preventing unqualified opinions relating to titles have served their purpose and are no longer necessary. The association agreed with him and adopted a resolution recommending the repeal or amendment of the act.

A committee presented a recommendation relating to the justice of the peace courts in Denver. It was proposed that the municipal court be increased by two judges and that there be four justices of the peace in Denver. It was further proposed that the same four men who hold the office of municipal judge also be appointed justice of the peace, but waive their salaries as justice of the peace. Two of the municipal judges would continue to hear cases involving ordinance violations, and two of them would hear the usual justice of the peace cases. However, additional benefits would result to litigants by giving two more justices of the peace to which changes of venue could be taken if the first two changes of venue authorized by law were taken. At present, in such cases, the suit must be dismissed. The matter was referred to another committee for further study and report.

Upon Information and Belief

Attorneys' Fees Should Be Recoverable

The time has come for the bar to consider and take a firm stand on the subject of the recoverability of attorneys' fees. It has not been the custom in this country to permit attorneys' fees to be recovered, and apparently this philosophy has been adopted for the purpose of discouraging unwarranted litigation and for the purpose of encouraging settlement of disputed claims. This has apparently worked well for a large number of years, but it does not work well now in view of certain present conditions. Litigiousness has never been considered a virtue but the denial of attorneys' fees results in the denial of justice in connection with small liquidated claims.

The first case which comes to mind is the minor auto accident or street car accident. The damage done is $50 or less, and the amount of damage is easily ascertained—it is the repair bill for the car. The responsible party refuses to pay the claim, and the injured party wants to know what to do. Either the prospective defendant is insured, and the insurance carrier refuses to pay the claim, or the defendant refuses to pay, period. What is the prospective plaintiff to do? His only recourse is suit. How much will it cost? Well, he will have to advance court costs. In addition, the attorney must request at least $15 for an attorney's fee—and the attorney will lose money at that.

If the plaintiff decides to advance the costs and fee, the attorney starts suit—the plaintiff realizing, of course, that the attorney's fee will be totally

lost to him. A hearing is had in the justice court and the plaintiff wins. The plaintiff thinks he has not had such a bad deal, as he has only been out $15, and is not too much displeased. Then the plaintiff is made to realize the power in litigation of a wealthy defendant. He finds the case has been appealed to the county court. What does his attorney recommend?

Well, if the attorney is to represent him in the county court and make any kind of a charge the attorney's fee will be more than the difference between what he had already paid and the maximum amount recoverable. It's a complete loss for the plaintiff now—his damage of $50, plus his costs of $5, plus his attorney's fee of $15. He is thru. But by this time the attorney may see a public duty and tell plaintiff he will represent him without further charge. So the case is tried in the county court, and the plaintiff wins. An appeal is immediately taken to the Supreme Court. At this time both plaintiff and attorney throw in the towel.

But why has the defendant made such a vigorous defense in a claim which must surely result in victory for the plaintiff if carried to its final conclusion? Just this, poor innocent—if this plaintiff is allowed to get away with this suit other plaintiffs may try it, and that would wreck the defendant's policy of refusing to pay small claims.

Now let's take case number two. In this case plaintiff, with a very weak case, sues defendant because his attorney has taken the case on a contingent fee basis, and all the plaintiff is out is his court costs. The attorney in this case is giving his time, but he has plenty of it. The amount of posible recovery is $1000. Defendant consults an attorney. The attorney examines the claim and advises the defendant that the claim is baseless and recommends that it be defended against. The cost? Oh, yes, the cost. Well, that will take about three days of office work in preparing for trial. It will take at least two full days of trial. In addition we can expect several motions from the plaintiff, all of which will have to be argued, and possibly some other items requiring attorney's services, such as taking depositions, interviewing witnesses, etc. The attorney's fee could very easily run to $500. If you can settle the claim for $250, you are better off financially, even though the litigation is nothing more than legalized piracy.

Now let's examine these cases in the light of the recoverability of attorney's fees. Case number one. The claim is $50. The claim is not paid on demand. Suit is commenced. If the plaintiff is successful, the trial court awards an attorney's fee of $50. If an appeal is then taken, and won by the plaintiff, the county court awards an additional attorney's fee of $100. If an appeal is taken to the Supreme Court, an additional attorney's fee is awarded by that court, on affirmation of judgment, of $350. The plaintiff has been made whole, and his attorney has been reasonably compensated. The defendant has found an unworthy defense of a just claim expensive. On the other hand, the defendant has not been prejudiced because, had the defendant won the litigation, his attorney's fees would have been paid by the plaintiff, and he would not have suffered any loss in defending an unjust claim.

How about case number two? It isn't undertaken by the plaintiff because he does not want to have to pay the attorney for the defendant when he loses his case, but if he does undertake the litigation, he will have the attorney's fees of the defendant to pay, and he can not hope for any offer of settlement because the defendant knows he has a good defense, and that the plaintiff will have to pay his attorney if the defendant wins.

If we believe in justice and believe that an unjust demand cannot be made by others without having to pay the consequences, we should believe in the policy of allowing attorneys' fees to be recovered by the winning party. We sincerely hope that the Colorado bar, at the next session of the legislature, will sponsor legislation permitting attorneys' fees to be recovered by the winning party as a part of the costs. We do not object to reasonable safeguards, but we do feel that the bar will shirk its duty to the public if it does not sponsor such legislation, and as a result of its failure will permit the public to lose confidence in the bar as a whole, because a limited number of its members engaged in the practice of defending debtors who refuse to honor legitimate small claims or represent litigants who sue without just cause.

Admitted to a Higher Court

HARRY S. CLASS, Denver, died February 24 of a heart attack. He was 74. He was born in Norton, Kansas, and came to Denver at the age of 8. He returned to Norton, where he finished high school, at which time he returned to Denver. He was clerk of Adams County until his election as county judge in 1908. After serving one term he was elected district judge, serving in that capacity until 1918. In recent years he has been practicing in Denver.

Reese McCloskey

Requiem Address of James M. Noland

We of the profession of Reese McCloskey, we to whom came the privilege of close friendship, and of business and social association with him, have a distinct feeling that with the passing of this brother attorney has come the end of an era in Southwestern Colorado. The history of the development of this section of our state is so inextricably interwoven with the professional life of the dean of our bar that one cannot be related without the other. It is a period that had its beginning in 1886, when a fledgling lawyer, aged 25 years, a recent graduate of Lafayette University of Easton, Pennsylvania, drove his team and wagon up the Animas Valley, thru Hermosa Park, and into the new boom town of Rico, Colorado. There he unloaded his dog-eared Blackstone, his few personal belongings, and began to make legal history for the San Juan basin and Colorado. Hard rock miners were staking out their claims, digging, tunneling, drifting and finding themselves becoming increasingly enmeshed in disputes for which there was no help in legal precedent. The great body of mining law was then, in Rico and similar camps, being born. Reese McCloskey was there present at the birth and with his magnificent mind continued to nurture the infant to a full maturity which gave it top rank among

the mining states of the Union. Many times was the voice of this young attorney heard in the Supreme Court of Colorado and of the United States, and many times the law of mining rights which he argued became the final opinion of the judges.

The increasing activity among the mines of all the San Juan district necessitated the early removal of the new lawyer to Durango. Here he met and fell in love with Mabel Downs, to whom he was married in 1892, and thus began a devoted comradeship which ended only with Mrs. McCloskey's death 42 years later in 1934.

The increasing production of metals brought the need for transportation to the markets, and now youthful Reese McCloskey lent his mental and physical aid to the next momentous development of our section—the coming of the railroads. Thru all this virgin territory driving his team and wagon, sometimes camping for the night on the river bank, sometimes for the week in the snow drifts, Reese, as he came to be known, went gathering the right-of-way agreements that permitted the laying of the steel rail—which in turn brought the outside world to our doorstep, and took our gold and silver, our cattle and sheep, our hay and grain to the world.

Followed then the farmer, who found that here in our country his old accustomed plains methods of growing crops failed to produce. He must have water, and there it was in the mountain streams, but what about his rights to that water? He called Reese—his neighbors called him. And soon this lawyer and his pioneer colleagues were writing new doctrines for the law books. "First in time, first in right" became the basis of the hitherto unknown law of irrigation which was to become and remain the life of the arid western states. Throughout his lifetime, although never forsaking his first love of mining law and railroad transportation, Reese McCloskey devoted his talents and his labors to the equitable distribution of the life sustaining waters of the mountains, and became a recognized national authority in that branch of jurisprudence.

And so, the era of Reese McCloskey and his astute legal mind has come to an end! It would be folly to say that this great San Juan Empire could not have reached its present state of development had not this man lived amongst us. But we who came here as young lawyers when even then Reese McCloskey was growing grey—we who have listened to him in the court-room, and in his office, and on the street corner—we who have viewed his mental powers with a feeling akin to reverence—have cause to doubt that the paths of mining law, western railroading and irrigations would have been so clear cut and easily discernible had not this friend first broken the legal trail thru the forest.

To you, Reese, the pioneers of all the San Juan with whom you worked and fought along the way, the newer generation of miners and farmers whose burdens have lessened by your having lived, the lawyers, old and young, who have profited by sitting with you or against you at the counsel table—say "Hail and farewell!" and may you have the rest and peace to which you are entitled.