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# ONE YEAR REVIEW OF CIVIL PROCEDURE AND APPEALS

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This article contains a compilation of the decisions and opinions of the Supreme Court of Colorado that were handed down from January 1, 1959, to January 1, 1960, interpreting and construing the Colorado Rules of Civil Procedure. This review will endeavor to show the court's interpretation of the Rules of Civil Procedure in the numerical order of the rules. Only those cases involving procedure and appeals which, in the author's opinion, set forth, alter, or clarify the court's interpretation of the rules will be included in this article.

## RULE 4

In *Clark v. National Adjusters, Inc.*,[1] the defendant sought to attack the service of process under rule 4, claiming that she was identified in the summons without her middle initial and that the return of service contained an erroneous address. The court refused to set aside the service of process for a mere technical error, defect, or omission in either the summons or the return where the error, defect, or omission affects no substantial rights of the defendant. The court pointed out that the middle initial constitutes no part of one's name. The erroneous return did not detract from the validity of the service, in the court's opinion, and the failure to include the defendant's middle initial in the summons meant nothing, since the law recognizes but one Christian name.

## RULE 5

In *Zerobnick v. City and County of Denver*,[2] the Supreme Court refused to allow Denver to reinstate a suspended jail sentence in the superior court that had been imposed for the violation of municipal ordinances, because rules 5 and 7 (b) were not complied with, and said:

> Generally, 'the practice and procedure of superior courts shall be in accordance with the Colorado rules of civil procedure.' C.R.S. '53, 1957 Cum. Supp. 37-11-3. Treating the case as a civil proceeding, the Superior Court was obliged to follow the Rules of Civil Procedure. Did it do so?
>
> The motion to reinstate the jail sentence was a motion within Rules 5 and 7(b), R.C.P.Colo. By the terms of Rule 5, a party whose appearance is of record should be served personally or through his counsel. In this case, the withdrawal of counsel for Zerobnick in no way affected his appearance in the case, and it was incumbent on the city to serve him personally with a copy of the motion or a 'written notice of the hearing of the motion, or * * * a written notice of application to set the same for hearing.' Rule 7 (b) (1), R.C.P.Colo.[3]

1 348 P.2d 370 (Colo. 1959).
2 337 P.2d 11 (Colo. 1959).
3 *Id.* at 12-13.

The court found that Denver had not complied with either the requirements of a criminal proceeding or a civil proceeding and reversed the action of the superior court in reinstating the sentence.

The court concerned itself in *Thompson v. McCormick*[4] with an attempt to serve plaintiff's counsel after they were discharged. The court held that plaintiff's former attorneys could not bind him or act as his agents for service, and that service on them was ineffectual for any purpose. The trial court had dismissed the plaintiff's complaint for a partnership accounting, receivership and $20,000 damages, after the plaintiff failed to appear pursuant to a trial setting. No notice of the trial setting ever reached the plaintiff, despite the efforts of his former attorneys. The court found that the defendant had not complied with the default provisions of rule 55 or the involuntary dismissal provisions of rule 41, and ruled that there was no notice or service thereof on the plaintiff, as required by rule 5. The court accordingly reversed the case with direction for the trial court to sustain the plaintiff's motion to vacate the judgment of dismissal, and to proceed to trial on the merits. The court said:

> The judgment of dismissal having been entered without notice is void and is subject to direct or collateral attack. Laches does not preclude attack upon a void judgment. The court was in error in entering judgment; also in error in denying plaintiff's motion to vacate the judgment.[5]

In *Pearson v. Pearson*,[6] however, the court upheld service on a plaintiff's attorney in a divorce action involving plaintiff's custodial rights over her children. The service under rule 5(b)(1) was held good on the ground that the order determining custody in the interlocutory decree of divorce was not final, and was a matter still pending before the court. In this case, the plaintiff's counsel had been discharged and was unable to locate his client to provide notice of the proceeding to modify the custody award. The trial court, when the mother failed to appear, entered an order changing the custody of the children without any evidence that such a change would serve the best interest of the children. The Supreme Court reversed the custodial findings of the trial court, but affirmed the service on the discharged attorneys by stating that one could not

4 138 Colo. 434, 335 P.2d 265 (1959).
5 *Id.* at 441-42, 335 P.2d at 269-70. *But see* Davis v. Klaes, 346 P.2d 1018 (Colo. 1959); White, Green & Addison Associates v. Monarch Oil & Uranium Corp., 347 P.2d 135 (Colo. 1959).
6 347 P.2d 779 (Colo. 1959).

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avoid jurisdiction by discharging his attorney and moving out of the state.

Also in apparent contrast to *Thompson v. McCormick,*[7] the court, in *White, Green & Addison Associates v. Monarch Oil & Uranium Corp.,*[8] and in *Davis v. Klaes,*[9] upheld judgments that were taken in the trial court when the defendant failed to appear for trial after counsel had withdrawn. Both cases can be distinguished from *Thompson v. McCormick* on the facts and on the basis that actual notice had been received by the defendants. In *White, Green & Addison Associates v. Monarch Oil & Uranium Corp.* the defendant sought relief under rule 60, and the case is, therefore, set out under that rule. *Davis v. Klaes* raised an issue under rule 55 (b) and is reviewed under rule 55.

RULE 9

The court, in *O.K. Uranium Development Co. v. Miller,*[10] gave a liberal interpretation to rule 9. The defendants urged as grounds for dismissal that a complaint seeking rescission for fraud did not allege fraud with the particularity required by rule 9. The defendants had filed a motion to dismiss in the trial court, but the motion had not been ruled upon, and the defendants answered over the motion. Trial was had on the issues made by the complaint and the answer without the sufficiency of the complaint being challenged. The court found that the evidence was ample to sustain the judgment in favor of the plaintiffs on the issue of fraud and granted the requested rescission. By way of dictum the court suggested that if the matter of pleading had been raised in the trial court, an amendment to conform to the evidence would have been in order under rule 15(b).

RULE 12

The court dealt with the interpretation of the zoning ordinances of the City of Westminster and the injunctive power of the district court in *Erickson v. Groomer.*[11] The Board of Adjustment had granted a variance to Erickson to construct an apartment house in a class "A" residential district. Erickson obtained a building permit and commenced excavation in accordance with the ruling of the Board of Adjustment. Groomer, prior to the expiration of the twenty days following service on Erickson, caused his application for a preliminary injunction to be heard, and the trial court ruled that the variances and building permits were void, restrained further building, and directed that the part constructed by Erickson be torn down. Erickson prayed for relief from the order and pointed out that a newly enacted zoning ordinance authorized his intended use. The Supreme Court held that the action taken against Erickson was defective for two reasons: (1) The trial court was without lawful authority at the time it entered its final judgment providing for a permanent injunction, and the judgment was void because it was taken in violation of rule 12 (a) and before the twenty days set forth in the summons expired for Erickson to appear and defend.

7 138 Colo. 434, 335 P.2d 265 (1959).
8 347 P.2d 135 (Colo. 1959).
9 346 P.2d 1018 (Colo. 1959).
10 345 P.2d 382 (Colo. 1959).
11 336 P.2d 296 (Colo. 1959).

(2) The ordinance passed by Westminster rendered the question before the court moot.

In *Koch v. Whitten,*[12] the court reaffirmed its position on the granting of a judgment on the pleadings under rule 12(f). In order to grant judgment on the pleadings, the court held that the moving party must show that he is entitled to a judgment under the admitted facts without regard to what the findings might be on the facts with respect to which issue is joined. The court said that where a material issue of fact was present which could only be determined by the taking of testimony, a motion for judgment on the pleadings is improper. An issue of fact was found in the case by the court, and the judgment on the pleadings was, therefore, reversed. The *Koch* case also clarified rule 12(f) on motions to strike, with the following statement:

> A mass of evidence unnecessarily pleaded, legal conclusions argued at length, paragraphs seeking to retry a previous action, all obviously sham matter, may be stricken. Motions to strike alleged redundant, immaterial, impertinent, or scandalous matters are not favored. If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied. Even if the allegations are redundant or immaterial, they could not be stricken if their presence in the pleading cannot prejudice the adverse party.[13]

## RULE 16

In a case arising out of an auto-pedestrian accident the Supreme Court reversed a judgment favorable to the defendant.[14] An elderly woman was struck while walking across a highway, and the issue arose as to whether she was within a crosswalk. The instructions were that there was no crosswalk. The complaint alleged that she was within a crosswalk, and the Supreme Court held that the admission by the defendant at the pre-trial conference that the acts occurred at the time and place alleged in the complaint was tantamount to a stipulation of fact which dispensed with the necessity of proof. The trial court, therefore, was held to have committed reversible error in instructing the jury on a fact situation that was inconsistent with the stipulation at the pre-trial conference, and the action was reversed.

## RULE 24

In *Hercules Equipment Co. v. Smith,*[15] the court reversed the action of the trial court in allowing a stranger to the action to intervene and obtain a temporary and permanent restraining order against the Sheriff of the City and County of Denver. The facts were these: the plaintiff obtained a judgment against the defendant and caused an execution to be issued against an automobile. The defendant's wife filed a motion for a restraining order, claiming ownership of the automobile and attaching a copy of her title to the car. The trial judge granted the restraining order, restrained the

12 342 P.2d 1011 (Colo. 1959).
13 *Id.* at 1015, quoting 2 Moore, Federal Practice ¶ 12.21 (1)-(2) at 2314-18 (2d ed. 1948).
14 Allison v. Trustee, 344 P.2d 1077 (Colo. 1959).
15 138 Colo. 458, 335 P.2d 255 (1959).

sheriff from proceeding further in execution on the automobile and from retaining possession of the car. The plaintiff urged on writ of error that the wife's title was obtained in fraud of creditors and therefore was void. The record failed to support the plaintiff's position, and the court struck the fraud claim for failure of the plaintiff to comply with the affirmative pleading provisions of rule 8(c). However, the record disclosed that the wife had filed her motion without leave of court and had not obtained permission to intervene in accordance with rule 24(a) (3), and that she was a complete stranger to the case. The court found that the wife had an adequate remedy at law by way of replevin and that an injunction should not have been granted. The record disclosed that the sheriff had not received notice of the proceedings in which the injunction was obtained, and the court accordingly reversed the action and directed that the motion for restraining order be stricken and that all parties be permitted to take such steps as they deemed advisable in the trial court.[16]

RULE 26

The widely publicized decision in *Lucas v. District Court*,[17] came about when the plaintiff took a deposition in an automobile accident case and the defendants refused to disclose the amount of the policy limits of the liability insurance policies owned by them, although they admitted in the course of the deposition that such insurance policies existed. The plaintiff moved for an order requiring the defendants to disclose the policy limits of their liability insurance, and the motion was denied by the district court. In an original proceeding, the Supreme Court issued a writ of mandamus commanding the district court to expunge from the record the order denying the plaintiff the right to discover the insurance limits and requiring the defendants to supply the requested information.

The principal issue in the *Lucas* case, in the court's opinion, was whether discovery of the insurance policy limits was relevant to the subject matter involved in the pending action. The court held that the term "relevant" is not limited to matter which is admissible in evidence at the trial, but "includes all of those things which are relevant to the subject matter of the action." The court said, "In our view, the term 'relevant to the subject matter involved in the pending action' includes inquiries as to the existence of liability insurance and the policy limits of such insurance."[18]

The problem dealt with by the court in the *Lucas* case has been the subject of many decisions and articles.[19] The court reviewed the many decisions upholding discovery of the type before the court and those denying such discovery, and said, "The thread which runs through all of these decisions in that the term 'relevant' is not lim-

16 See Groendyke Transport Co. v. District Court, 343 P.2d 535 (Colo. 1959); Howard v. International Trust Co., 338 P.2d 689 (Colo. 1959).

17 345 P.2d 1064 (Colo. 1959), 31 Rocky Mt. L. Rev. 387.

18 *Id.* at 1068.

19 See, e.g., *accord*, Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (S.D. Tenn. 1951); Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948); Superior Ins. Co. v. Superior Court, 37 Cal. 2d 99, 73 P.2d 605 (1937); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 135 N.E.2d 588 (1957); Maddox v. Grauman, 265 S.W. 2d 939(Ky. 1954); Frank, *Discovery and Insurance Coverage*, 1959 Ins. L.J. 281; Levit, *Discovery of Liability Limits Before Trial*, 1959 Ins. L.J. 246; Roberts, *A Reappraisal of Discovery Procedure Permitting Disclosure of Liability Insurance Limits*, 6 Defense L.J. 238; Williams, *Discovery of Dollar Limits in Liability Policies in Automobile Tort Cases*, 10 Ala. L. Rev. 355 (1958); Wright, *Recent Trends in the Practical Use of Discovery*, 16 NACCA L.J. 409 (1955). *Contra*, Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Note, 68 Harv. L. Rev. 673 (1955).

ited to matter which is admissible in evidence at the trial or which will properly lead to admissible evidence, but includes all of those things which are relevant to the subject matter of the action."[20]

The court stated that the term "relevant" must be given a liberal interpretation and that the rules contemplate that a deponent shall answer all questions, except those to which he objects on the ground of privilege, and that objections based on admissibility are to be saved until the actual trial.

In concurring with the result, Mr. Justice Frantz emphasized the wording of the rule and particularly the portion relating to the claim or defense of any other party. Mr. Justice Sutton vigorously dissented, and Mr. Justice Moore, on rehearing, questioned not only the procedure, but the result.

The procedural problem involved in the *Lucas* case will be approached in the review of rule 106, since the court declared rule 106 to be inapplicable to original proceedings in the Supreme Court.

The *Lucas* case caused insurance counsel representing companies which issued more than fifty per cent of the liability insurance written in Colorado to rise to the defense and seek relief in the Supreme Court by way of a petition for rehearing. On rehearing, the insurance counsel who appeared as amici curiae, claimed that the pronouncement of the court violated a number of constitutional provisions, and the court summarized their claims as follows:

> . . . violation of due process, state and federal; equal protection of laws as guaranteed by the Fourteenth Amendment to the Federal Constitution; privileges and immunities in violation of the Fourteenth Amendment and of Article V, Sec. 25 of the Colorado Constitution; searches and seizures in violation of the Fourth Amendment of the Federal Constitution and Sec. 7, Article II of the Colorado Constitution. They (amici curiae) finally argue that the ruling constitutes invasion by the judiciary of the province of the Legislature.[21]

The court adhered to its former ruling with minor procedural and factual corrections, and the right of a plaintiff to know what insurance coverage the defendant has is now established in Colorado.

The court said as a conclusion to its original opinion:

> As a result of our study of the rules, the statute and the decisions of other jurisdictions, it is our opinion that the holding which allows questions to be propounded in pretrial depositions for the purpose of eliciting information as to the existence of liability insurance and the policy limits of such liability insurance is the better rule, and the one which is more in accord with the object, purpose and philosophy of the Rules of Civil Procedure. This object and purpose is served by holding that the scope of examination is broad. This will have a tendency to eliminate secrets, mysteries and surprises and should promote disposition of cases without trial and substantially just results in those cases which are tried.[22]

20 345 P.2d at 1070.
21 *Id.* at 1074.
22 *Id.* at 1070.

The Rules of Civil Procedure admittedly induce pre-trial settlements, and the *Lucas* case, in the author's opinion, will eliminate many of the last minute settlements that are made on the court house steps. The opinion of the court will enable the parties to evaluate a claim at arm's length and not within the hidden recesses of unknown insurance coverage. *Lucas* is a landmark decision that grants unto all litigants the wide latitude of discovery which the draftsmen of the rules intended, and which is eminently fair and in complete accord with rule 26(b).[23]

*Denver & R.G.W.R.R. v. District Court*[24] is in sharp contrast to the *Lucas* opinion. The railroad patterned an original proceeding in mandamus after the *Lucas* case, and the Supreme Court denied the application and indicated that the petition was not sanctioned by the Rules of Civil Procedure. The facts upon which the controversy centered were that interrogatories were propounded pursuant to rule 33 and within the scope of rule 26(b), and the plaintiff refused to answer the interrogatories. The railroad, the defendant in the trial court, moved to compel answers to the interrogatories, and the trial court denied the motion. The Supreme Court found that the answers were relevant in part, but held that the correctness of the trial judge's action on the interrogatories could be adequately reviewed by writ of error. A party, in the court's opinion, who appears on writ of error and who has refused to make discovery, does so at his peril, and such conduct may well be the basis for reversal of a favorable judgment that was obtained by the party who refused to make discovery. The court distinguished its pronouncement from the *Lucas* decision by saying that the information sought in that case could not be had by any other procedure. The court also indicated that the rules did not provide for the filing of a petition for a writ of mandamus for the relief requested and that the petition could have been stricken rather than denied.

### RULE 34

In *Michael v. John Hancock Mut. Ins. Co.*,[25] the suicide clause of a life insurance policy was urged as a defense to a claim made by the insured's beneficiary. Rule 34 was the pivotal issue in the case. The defendant insurance company obtained an order from the trial court requiring the plaintiff to produce a copy of the investigation report made by the United States Army for the purpose of determining the cause of death. The plaintiff claimed that the document was not in her possession or control and that the court could not order the plaintiff to take steps to make the report available to the defendant. The Supreme Court held that under rule 34, the plaintiff must produce, subject to the limitations of rule 26(b), all documents which are obtainable by the order or direction of the litigant, and said that actual possession of the documents or things is not necessary if the litigant has control of them.

23 See 2 Barron & Holtzoff, Federal Practice and Procedure § 646 (1950).
24 347 P.2d 495 (Colo. 1959).
25 138 Colo. 450, 334 P.2d 1090 (1959).

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RULE 38

A petition in contributory dependency brought *McBain v. Lopez*[26] before the court by writ of error. A referee of the juvenile court took evidence and found paternity existed and ordered that support be paid, but granted Lopez ten days to appeal the findings and recommendations to the judge of the juvenile court. Lopez filed a motion for a new trial and request for a jury in compliance with the referee's ruling, but did not serve McBain or her counsel with a copy of the motion. Nearly a year later, but before the motion was disposed of, McBain caused Lopez to be cited for contempt for failure to pay the support that was ordered by the referee and claimed that the failure of Lopez to properly serve the motion nullified the appeal. Lopez moved to dismiss the citation, and the court honored his motion and granted him a jury trial. At the subsequent trial, the issue of paternity was resolved by a jury in Lopez's favor. On appeal the Supreme Court recognized the failure to serve McBain with a motion but held that Lopez had complied with the referee's order. In examining the incomplete record and affirming the lower court, the court said that in the absence of a record showing otherwise, it must be assumed that a full-scale hearing was had and all issues submitted to the jury under proper instructions.

RULE 50

In *Mountain States Mixed Feed Co. v. Ford*,[27] the court upheld the trial court in granting a judgment notwithstanding the verdict. The plaintiff claimed damages for money had and received by the defendant for allegedly issuing false weight certificates in excess of the actual grain delivered to the plaintiff. At the close of the plaintiff's case, the defendant moved for a directed verdict, and the court reserved its ruling. The jury brought in a verdict against the defendant, and a motion for a new trial was filed, alleging as one ground therefor that the trial court had erred in failing to grant the defendant's motion for a directed verdict. The court overruled the motion for a new trial, but vacated the judgment, thus in effect granting judgment notwithstanding the verdict.

On appeal, the defendant urged that the plaintiff's motion was not in compliance with rule 50(b), but the Supreme Court upheld the trial court, stating that it would be manifestly unjust to give the technical interpretation to rule 50(b) that the defendant urged. The motion filed by the defendant, in the court's opinion, was sufficient to authorize the trial court to enter judgment in his favor, notwithstanding the verdict.[28]

In *Barth v. Burt Chevrolet, Inc.*,[29] the plaintiff sought to recover from the defendant on a chattel mortgage on a truck. The defendant asserted two counterclaims, one for the wrongful taking of the truck, and one for wrongful attachment that was levied upon his bank account by the plaintiff. Service of the writ of attachment and notice of levy was not effected upon the defendant. At the close of the defendant's opening statement, the trial court honored the plaintiff's motion to dismiss the defendant's counterclaim for conversion

26 138 Colo. 482, 334 P.2d 1097 (1959).
27 343 P.2d 828 (Colo. 1959).
28 See also Crouch v. Mountain States Mixed Feed Co., 343 P.2d 1052 (Colo. 1959).
29 342 P.2d 637 (Colo. 1959).

of the truck. At the conclusion of the trial, the plaintiff moved to dismiss the counterclaim for wrongful attachment, and that motion was granted, and a verdict was directed in favor of the plaintiff for the amount prayed for in the complaint. The Supreme Court held that there were factual issues that were clearly open for determination by the jury and that the errors of the trial court required reversal.

*Schweizer v. Amalgamated Butcher Workmen*[30] upheld the trial court's direction of a verdict in favor of the defendant. In the case before the court, the plaintiff claimed that she had been hired by the defendant and was unjustly discharged and sought damages under her employment contract. The court found that a review of the evidence in the light most favorable to the plaintiff did not present a question upon which the minds of reasonable men might differ; and since the plaintiff failed to establish the allegations of her complaint, the court affirmed the trial court's ruling directing a verdict for the defendant at the close of the plaintiff's evidence. In prosecuting her writ of error, the plaintiff attempted to introduce matters not included in her complaint, and the court refused to consider her new claim when it was raised for the first time on writ of error and was not before the trial court.

RULE 52

In *Mowry v. Jackson,*[31] a suit involving the right of a veteran to purchase a parcel of land under the Veterans Act from the Land Board, the trial court was found to be in error for failure to comply with the clear mandate of rule 52(a). The trial court had found against the plaintiff and made no definite findings of fact, stating that they were in the record. The court, in emphasizing the wording of rule 52 (a), said:

> It is the Rule itself which leaves the matter in the sound discretion of the trial court as to whether the findings shall be written or oral, but that discretion does not mean that no findings of fact need be made. The court has a duty to make one or the other and if made orally to see that his statement thereon is transcribed in full. In either event, such findings must be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which it reached its decision.[32]

The court pointed out that it is not necessary to request findings of fact for the purpose of review. On the basis of the court's decisions, it is anticipated that in the future where necessary findings of fact are lacking and review is sought, our court will not dismiss the writ, but will vacate the judgment and remand the case to the trial court for appropriate findings of fact; and if this procedure cannot be followed, the judgment will be reversed and remanded for a new trial.[33]

In its pronouncement, the court supplants its ruling in *Massachusetts Bonding & Investment Co. v. Central Finance Corp.,*[34]

30 347 P.2d 516 (Colo. 1959).
31 343 P.2d 833 (Colo. 1959).
32 *Id.* at 836.
33 See Irish v. United States, 225 F.2d 3 (9th Cir. 1955).
34 124 Colo. 379, 237 P.2d 1079 (1951).

where the court approved the action of the trial court in merely making an oral finding to the effect that the issues joined were in favor of the plaintiff.

RULE 53

In *Hutchinson v. Elder*,[35] the Supreme Court reversed the trial court for setting aside the findings and conclusions of the master. The issues framed by the pleadings on the interpretation of a contract were referred to a master for hearing. The trial court, after the master conducted a full hearing and made his report, found the contract to be unambiguous and set aside the findings and conclusions of the master. The court held that the trial court committed error in rejecting the master's report and said:

> Rule 53 (3) (2) R.C.P. Colo. provides:
>
> 'In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * *'
>
> That the rule binds the district court to accept the findings of a master just as effectively as rule 52 (a) binds this court to accept findings of a trial court is not a new principle and has long been recognized. . . .[36]

RULE 55

*Davis v. Klaes*[37] upheld the action of the trial court in taking a judgment over the defendant's objection that the three-day notice requirement set forth in rule 55 (b) (2) had not been complied with. The judgment was entered when the defendant failed to appear for trial at the time set by the court. He had made a general appearance, filed an answer, had personal knowledge of the day set for trial, and had contacted the court on the date that the case was set for trial. His counsel had withdrawn from the case a month before the trial. When he failed to appear for trial, evidence was taken and the trial proceeded to the conclusion of the plaintiff's case, at which time judgment was entered. After the judgment was entered, the defendant moved to set aside the judgment on the ground of inadvertence and excusable neglect. The court found that the defendant had notice and that the judgment taken was not a default judgment within the scope of rule 55 requiring a three-day notice. An examination of the case will disclose that the action taken by the trial court was not in fact a proceeding in which a default judgment was entered, but was a trial on the merits after issues were formulated and a trial date set with due notice to the defendant.[38]

RULE 56

*Rogerson v. Rudd*[39] again voiced the Supreme Court's unwillingness to grant a summary judgment when there is any unresolved issue of a material fact. Rudd sought to rescind a contract for the sale of cattle. At the close of the plaintiff's case, the defendant moved to dismiss, and the trial court sustained the defendant's mo-

35 344 P.2d 1090 (Colo. 1959).
36 *Id.* at 1092.
37 346 P.2d 1018 (Colo. 1959).
38 *Accord*, White, Green & Addison Associates v. Monarch Oil & Uranium Corp., 347 P.2d 135 (Colo. 1959). *But see* Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959).
39 345 P.2d 1083 (Colo. 1959).

tion and granted judgment on the defendant's counterclaim. The Supreme Court reversed and remanded that action.[40]

The trial court, when it reviewed the matter pursuant to the Supreme Court's remand, honored the plaintiff's motion for a summary judgment on the basis of the record and the opinion of the Supreme Court, dismissed the defendant's counterclaim and took testimony only on the question of the plaintiff's damage. In finding that there still remained genuine unresolved issues of material facts which had not been tried, the Supreme Court ruled that the defendant had been foreclosed in the first trial from presenting evidence in opposition to the plaintiff's claim because of the trial court's action in granting his motion at the end of the plaintiff's case and had been denied the privilege of introducing evidence in the second trial by reason of the court's ruling on the motion for summary judgment. The defendant had been denied his day in court, and that, in the court's opinion, was ground for reversal.

In *Farrell v. Bashor*,[41] one of the few cases in which a summary judgment has withstood appeal, the Supreme Court allowed a summary judgment against the plaintiff to stand on a complaint alleging damages for the overflow of a reservoir. The Supreme Court's action was predicated more upon the failure of the plaintiff to perfect his appeal in accordance with rules 111, 112 and 115, than it was upon the defendant's right to a summary judgment under rule 56.

RULE 59

In *Howard v. International Trust Co.*,[42] a motion for a new trial was filed on the basis of newly discovered evidence. The action sought an order compelling reconveyance of property conveyed to Howard by the plaintiff. The plaintiff, who had died after the commencement of the trial, was represented by the trust company. In affirming the judgment of the trial court in favor of the plaintiff, the court found that the newly discovered evidence that was asserted by the defendant as grounds for a new trial was merely cumulative and found that the trial court was within its discretion in not granting a new trial.

The court held in *Bushner v. Bushner*[43] that after a judgment of a trial court is reversed by the Supreme Court with directions for the trial court to enter a specific judgment, a motion may be filed for a new trial on the basis of newly discovered evidence by the party that was successful in the trial court and that the motion must be considered on its merits. The court said, "Reason and justice require that after a reversal by the Supreme Court, the party originally successful in the trial court (and only he) can file a motion for a new trial on the ground of newly discovered evidence, and only on that ground."[44]

The trial court had stricken the motion for a new trial as not being in compliance with the rules. The evidence presented by the defendant was not, as viewed by the Supreme Court, newly discovered evidence, and the trial court was held to be in error for striking the motion for not being in compliance with the rules. The

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40 Rudd v. Rogerson, 133 Colo. 506, 297 P.2d 533 (1956).
41 344 P.2d 692 (Colo. 1959).
42 338 P.2d 689 (Colo. 1959).
43 348 P.2d 153 (Colo. 1959).
44 *Id.* at 154.

court held that the proper procedure would have been for the trial court to consider the motion for a new trial and overrule it.

In *Devlin v. Huffman*,[45] a habeas corpus proceeding involving the custody of children, it was urged that the trial court committed error in dispensing with a motion for a new trial because the court's action precluded the plaintiffs from presenting newly discovered evidence which would show perjury on the part of the defendants. The Supreme Court, in upholding the trial court's ruling dispensing with a motion for a new trial, repeated the oft quoted law that the welfare and best interest of the children serve as the paramount consideration in a custody proceeding. The court refused to consider the newly discovered evidence which was included in affidavit form in the plaintiff's brief in the Supreme Court and which was not before the trial court and therefore not properly a part of the record before the Supreme Court.

## RULE 60

In holding again that applications to vacate default judgments are addressed to the sound discretion of the trial court and that the Supreme Court will only interfere when that discretion has been abused, the court affirmed the judgment in *White, Green & Addison Associates v. Monarch Oil & Uranium Corp.*[46]

In this case the plaintiffs prayed for possession of certain mining claims that they had leased to the defendant, alleging that the defendant had not complied with the terms of the leases. A hearing was held with the parties and their counsel present, and at that time the case was set for trial. On the trial date the court permitted counsel for the defendants to withdraw his appearance, and then proceeded to trial. The evidence offered was heard and judgment was entered in accordance with the complaint. Nearly a month later the defendant, appearing by new counsel, moved to vacate the judgment, alleging surprise, a meritorious defense, irregularities in the proceedings, and that the ends of justice demanded that the judgment be vacated. The defendant also claimed that it was denied a fair trial by the court's action in allowing defendant's counsel to withdraw without granting a continuance to the defendant to secure other counsel. The record disclosed that defense counsel and the court had notified the defendant of the firmness of the trial date. Witnesses had been brought from a distance by the plaintiff.

45 339 P.2d 1008 (Colo. 1959).
46 347 P.2d 135 (Colo. 1959).

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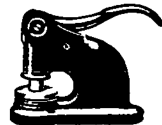

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In affirming the judgment of the trial court, the Supreme Court again reiterated that parties cannot be permitted to disregard the process of the court, and then, after judgment, come in at their convenience upon the mere allegation of the existence of a meritorious defense and vacate the judgment.[47]

In *Lohr v. Wills*,[48] the plaintiff sued to cancel a water lease that was executed with a deed of trust as security for a loan. The defendant asserted counterclaims against the plaintiff, and defenses of laches and the statute of limitations. It was admitted that the loans which were made at the time the lease and deed of trust were executed had been paid. The case was determined on the basis of the motions for summary judgment made by both the plaintiff and the defendant and supporting exhibits and stipulations of the parties. The trial court ruled that the water lease was terminated upon the payment of the loan. The defendant promptly filed a designation of record for appellate purposes. Immediately thereafter the plaintiff filed a motion under rule 60 to correct the judgment and findings of fact on the ground that the judgment should have been entered on the motions for summary judgment and the evidence embodied in the stipulation of the parties and the exhibits, and not in a form which would indicate that the issues were submitted and the case tried on the merits. The trial court entered corrected findings of fact and conclusions of law, again reviewed the facts as stipulated, and entered its corrected findings of fact and conclusions of law.

The defendant contended that the motion made by the plaintiff was a motion to alter or amend the judgment under rule 59 and should have been made within ten days after the entry of judgment, and not being timely made, should have been denied. The plaintiff contended that his motion was made under rule 60(a) for correction of a clerical mistake and under rule 60(b) for correction of a mistake or for inadvertence and that the rule granted him six months to make such a motion. In affirming the position taken by the plaintiff, the court found that if the mistake was a clerical error, the motion was filed before the case was docketed on error and was done within the required time; and that if it was a judicial mistake or inadvertence that the correction was made long before the six months expired. The court cited numerous authorities supporting the action taken by the trial court and classifying the correction as a clerical mistake.

A cognovit note came before the court in *Kean v. Brown*,[49] in an effort by the defendant to vacate a judgment and to enjoin enforcement of the judgment. Judgment had been entered pursuant to the provisions of the note. The defendant filed a motion to vacate the judgment, which motion was admittedly inadequate. He filed a second motion to vacate, and tendered his answer and a third-party complaint with the motion. The plaintiff moved to strike the second motion, and it was stricken by the court. The defendant urged that the plaintiff had perpetrated a fraud on the trial court in not setting out the defenses which the defendant asserted. On writ of error, the court held that the question for the trial court to

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47 *Accord*, Davis v. Klaes, 346 P.2d 1018 (Colo. 1959).
48 347 P.2d 518 (Colo. 1959).
49 346 P.2d 298 (Colo. 1959).

determine was whether a meritorious defense was tendered in the answer which was filed with the defendant's second motion to vacate. The court said that an attorney had no obligation to inform the court as to the possible defenses that were available or were claimed by the defendant, and that the court's finding that there was no fraud perpetrated upon it by the plaintiff in obtaining the judgment complained of was entitled to substantial weight. The court, however, reversed the trial court, with directions for the trial court to determine whether a meritorious defense was tendered in the answer presented to the court with the second motion to vacate.

### RULE 65

In *Renner v. Williams*,[50] the court reaffirmed its earlier jurisdictional pronouncement in *Erickson v. Groomer*[51] and reversed the trial court's decision for not complying with rule 65. The plaintiffs were officers and directors of a corporation that owned a tavern that was managed by the defendant. Pursuant to corporate resolution, the tavern was closed and the defendant manager and his wife were discharged. The defendant obtained an *ex parte* temporary restraining order granting him possession of the tavern and prohibiting the plaintiffs from interfering with him in his operation and management of the tavern. The plantiffs refused to comply with the court order and were cited for contempt. At the hearing on the citation, the plaintiffs attacked the validity of the restraining order on the ground that it was not issued in compliance with rule 65 and was, therefore, void. At the hearing on the citation, the trial court made the temporary injunction permanent. In declaring the temporary restraining order to be void, the Supreme Court held that rule 65 had not been complied with, and said:

> Having been issued without notice, it did not define the injury to the applicant or state why it was of such nature as to be irreparable; the reason for issuance without notice; the time or date of its expiration or the date of hearing for a preliminary injunction. More significant was the failure of the court to set or require any security to be given by the applicant. Any one of the deficiencies noted was sufficient to render the order a nullity. This court had occasion to consider directly the effect of failure to require the giving of security to protect the person enjoined in Stull v. District Court, 135 Colo. 86, 308 P. 2d 1006. We follow the holding in the Stull case that a restraining order issued without compliance with the requirement for giving security is without validity and of no force and effect.[52]

The invalidity of the restraining order was also held to be a valid defense to the contempt proceeding against the plaintiffs. The court held that the trial court issued its permanent injunction prior to the time fixed in the summons for the plaintiffs to appear and only had before it at the time of the hearing on the contempt citation the issue of whether or not the plaintiffs were in contempt of court.[53]

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50 344 P.2d 966 (Colo. 1959).
51 336 P.2d 296 (Colo. 1959).
52 344 P.2d at 967.
53 *Accord*, Erickson v. Groomer, 336 P.2d 296 (Colo. 1959).

The plaintiff brought an original proceeding in prohibition in *Dyonisio v. McWilliams*,[54] to stop proceedings in the district court that had been commenced against him by the Transit Equipment Company (a foreign corporation), the Denver National Bank, and others. The Transit Equipment Company sought to impose a constructive trust and an equitable lien on funds in the hands of the Denver National Bank, and on funds to be received in the future. In support of its prayer it obtained a temporary restraining order impounding the funds in the possession of the bank. Dyonisio was served by publication and a temporary injunction then issued. The Denver National Bank disclaimed any interest in the funds and agreed to abide by any lawful order of the court. The facts were that Dyonisio and the Transit Equipment Company had contracted to supply seventy-five used trollies to Sao Paulo, Brazil. Transit advanced moneys to Dyonisio, only to find that Dyonisio and his associate made the sale excluding the Transit Equipment Company. The court, in approving the action of the trial court, stated that there was a res within the State of Colorado upon which jurisdicion could attach. The court approved the service of summons by publication, approving its former holding in *Hoff v. Armbruster*,[55] since the action was in rem and not in personam, and said, "Essentially, the object of the action was to reach and dispose of the individual interest of each nonresident defendant in specific property located in Colorado, by enforcing what was alleged to be a valid contract respecting that identical property. . . ."[56]

The plaintiff in *Ambrosio v. Baker Metropolitan Water & Sanitation Dist.*[57] brought suit to enjoin the construction of a sewage disposal plant. The court found that a condemnation suit had been instituted by the district, an order for immediate possession had been entered, the land had been acquired and paid for and the sewage plant erected and placed in full operation, rendering the issues before the court moot. By way of dictum, the court announced that an injunction will not lie to prevent suits in eminent domain, because the respondent in an eminent domain action has an adequate remedy at law for damages for the property taken. The writ of error was, therefore, dismissed.

## RULE 81

Rule 81 (b) has been abrogated by the new statutes on divorce and separate maintenance, which provide that "The process, practice and proceedings shall be in accordance with the rules of civil procedure except as expressly modified or otherwise provided in this article."[58] And that "The process, practice and proceedings shall be in accordance with the rules of civil procedure."[59]

Rule 81 (c) came before the court on four occasions. *Andrews v. Lull*[60] and *McKelvey v. District Court*[61] both involved original proceedings in the Supreme Court in the nature of prohibition, and

54 338 P.2d 684 (Colo. 1959).
55 125 Colo. 324, 244 P.2d 1069 (1959).
56 338 P.2d at 687-88, quoting from Hoff v. Armbruster, *supra* note 55. See Aero Spray, Inc. v. Ace Flying Service, 338 P.2d 275 (Colo. 1959).
57 340 P.2d 872 (Colo. 1959).
58 Colo. Laws 2d Reg. Sess. 1958, ch. 37, § 3, at 222 (divorce).
59 Colo. Laws 2d Reg. Sess. 1958, ch. 38, § 1, at 225 (separate maintenance).
60 341 P.2d 475 (Colo. 1959).
61 345 P.2d 726 (Colo. 1959).

both cases held that an appeal from the county to the district court had been waived for failure to perfect an appeal within the ten-day period allowed by the statute.[62]

In *Andrews v. Lull,* the Supreme Court held that the ten-day period was not extended by the filing of a motion for a new trial and said, "If [appellant] desires to appeal to the district court for a trial *de novo* and wishes also to file a motion for a new trial, he must either have his motion acted upon within the statutory ten-day period or secure an extension of time to lodge his appeal . . . ."[63]

In *Erbaugh v. Jacobson,*[64] the court answered the argument that a motion for a new trial under rule 59 (f) was a condition precedent to the right to appeal to the district court from judgments of the county court, by holding that the only requisites for trial de novo in the district court are that there be a final judgment in the county court and an appeal lodged in the district court within the time and requirements of the applicable statutes.

The court refused to countenance an appeal in *Vigil v. Vigil,*[65] of a divorce action that was tried in the county court by the mere filing of a pleading entitled "Amended Complaint in Divorce Appeal," in the district court.

RULE 97

The Supreme Court reviewed *Geer v. Hall*[66] by writ of error. It was a certiorari proceeding in the district court that stemmed from a hearing before the Manager of Safety of the City of Denver on an application for a three-way liquor license. In reversing the judgment of the district court granting a three-way liquor license on the basis of the printed record, the court found that the motion and affidavit for disqualification of the trial judge under rule 97 for prejudice should have been granted.

RULE 102

Aero Spray, Inc. sued Ace Flying Service for goods sold and delivered. Both of the parties were foreign corporations. *Aero Spray, Inc. v. Ace Flying Service, Inc.*[67] The State of Colorado was indebted to the Ace Flying Service for approximately the amount claimed by the plaintiff. Aero Spray, Inc. caused a writ of attachment and a garnishee's summons in aid thereof to be served upon the state comptroller, who acknowledged the indebtedness to the defendant. Service was had upon the defendant by publication and mailing of notice of levy. The defendant filed a motion entitled "Special Appearance and Motion to Quash Return of Service and to Quash and Dissolve Writ of Attachment and Writ of Garnishment." The trial court, on the basis of the motion, dismissed the case. The Supreme Court held that it was error to dismiss the plaintiff's case, since the relief granted was more than that which was prayed for by the defendant. It was error to dismiss an action for failure to obtain proper service, because in the court's view the defects in service that were complained of could be corrected by proper serv-

62 Colo. Rev. Stat. § 37-6-11(1) (1953).
63 341 P.2d at 479.
64 343 P.2d 1026 (Colo. 1959).
65 338 P.2d 688 (Colo. 1959).
66 138 Colo. 384, 333 P.2d 1040 (1959).
67 338 P.2d 275 (Colo. 1959).

ice at any time. The court formulated the attachment issues and found the law to be as follows:

> First: *Can a foreign corporation plaintiff, not qualified to do business in Colorado, proceed in attachment and garnishment in this state and thereby subject personal property, in the form of a chose in action due from a resident to defendant, to payment of a debt which has a foreign origin and which is owing by the foreign corporate defendant to the said plaintiff?*
>
> This question is answered in the affirmative. Rule 102 (a) R.C.P. Colo. provides in pertinent part:
>
> "The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, * * * may have the property of the defendant, not exempt from execution, attached as security for any judgment that may be recovered in such action, in the manner prescribed in this rule, * * *."
>
> One of the grounds upon which the writ of attachment may issue is, 'That the defendant is a foreign corporation.' At no place in the various subsections of the rule governing attachment procedures is there any provision which excludes foreign corporations from the right to make use of the remedies of attachment and garnishment. The rule itself provides the answer . . . .[68]

### RULE 105

Rule 105 came into play in *Clopine v. Kemper*,[69] which was ancillary to the divorce action of *Kemper v. Kemper*.[70]

The Clopines brought an action under rule 105 to obtain an adjudication of the rights of all parties with respect to certain real estate which they had acquired from Hazel Kemper. Arthur Kemper filed a *lis pendens* and a homestead entry on property located in Sedgwick County, Colorado, before he filed his complaint in divorce in the Denver district court. The trial court struck the homestead entry, because the defendant had never resided on the real estate, but upheld the *lis pendens*, and both rulings were approved by the Supreme Court. The principal case held that the Clopines were chargeable with notice of the Denver divorce action and that

68 *Id.* at 277; see Dyonisio v. McWilliams, 338 P.2d 684 (Colo. 1959).
69 344 P.2d 451 (Colo. 1959).
70 344 P.2d 449 (Colo. 1959).

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any rights which they acquired were inferior and subject to Arthur Kemper's prior claim. In recognizing the early filing of the *lis pendens,* Mr. Justice Moore said:

> It is Hornbook law that the commencement of an action dates from the issuance of the summons and not the date of filing the complaint. As above noted, this action was commenced by the issuance of a summons on July 2, 1954, and whether notice of lis pendens began running July 3rd or July 6th is immaterial, for plaintiffs purchased the property more than two years after the action was started and the lis pendens was filed.[71]

Mr. Justice Moore's statement as to the commencement of an action would appear to be contrary to the clear wording of rule 3 (a) and (b), which cause an action to be commenced and jurisdiction to attach only after the time of filing of the complaint or the service of summons.

The Supreme Court also cast aside the Clopines' contentions that the *lis pendens* was invalid because the property upon which it was imposed was not described in the Denver divorce complaint and held that only the notice must contain a description of the property.

*Broadway Roofing & Supply, Inc. v. District Court*[72] was filed in the Supreme Court as an original proceeding. A rule was directed to the respondents to show cause why they should not be restrained from enforcing an order entered by the district court which purported to release a *lis pendens* recorded against real estate. The petitioner urged that the district court had abused its discretion and exceeded its jurisdiction. The petitioner, the plaintiff below, had performed labor and supplied material on real property owned by the Nelsons, who later sold to the Camerons. The petitioner filed its contract and claimed a lien and brought suit to foreclose the lien, naming both the Camerons and the Nelsons as defendants. The Camerons moved for summary judgment, and summary judgment was granted and the *lis pendens* purportedly released.

The Supreme Court found that there was but one claim for relief, and held that under rule 54(b) a final judgment could not be entered until the claims against all of the parties were finally determined by judgment. It was also held that even if a final judgment could be entered in favor of one defendant, it could only be entered upon an express determination that there was no just reason for delay. The court therefore held that no final judgment had been made. Since rule 105(f) states that a "lis pendens . . . shall remain in effect for thirty days from the time of entry of *final judgment* in the trial court" (emphasis added), the *lis pendens* had not been released. Accordingly, the rule was discharged by the court.

*Cawley v. Cawley*[73] was a divorce action in which the principal issue was property settlement. After the entry of the final decree, the wife filed a petition for property settlement and a *lis pendens.* At the hearing on the property settlement the husband offered a contract for the division of property that had been entered into by

71 *Id.* at 454.
72 342 P.2d 1022 (Colo. 1959).
73 340 P.2d 122 (Colo. 1959).

the parties prior to the commencement of the divorce action. The trial court denied the petition for property settlement and ordered the *lis pendens* released. The question of property settlement had not been reserved for future consideration in the interlocutory or final decrees of divorce, and the court, therefore, held that the trial court had no jurisdiction to make a property settlement and that the wife's rights must rest on her contract.

RULE 106

The remedial writs, whether relief was granted under rule 106, rule 116, or under article VI, section 3 of the Colorado Constitution, will be reviewed under this rule, except where the writs involved specific procedural questions which have been the subject of review in earlier parts of this article.

*Lucas v. District Court*[74] has been quoted more as authority for a broad interpretation of rule 26(b) than for a delineation of procedure in the Supreme Court on original proceedings. However, *Lucas* sounded the death knell to original proceedings under rule 106. The original jurisdiction of the Supreme Court is recognized by rule 116, as well as the Colorado Constitution, and the following cases recognize original jurisdiction, or the court's interpretation of the remedial writs.

The court held in the *Lucas* case, which was an original proceeding under rule 106 in the nature of mandamus, that rule 106 does not apply to original proceedings, and said:

> The Constitution of Colorado, Article VI, Section 3, declares in referring to this Court that 'It shall have power to issue writs of * * * mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same. * * *'
>
> In *Leonhart v. District Court,* 138 Colo. 1, 329 P.2d 781, we said:
>
> Our authority to entertain remedial writs is conferred by the Constitution, and 'is not dependent upon, or governed by the statute' or rules of civil procedure on the subject. . . . 'Those writs, however, are the common law writs * * *' . . . .
>
> We shall treat this complaint as if it were a petition seeking the issuance of a writ of mandamus or certiorari as the same existed at common law. . . .[75]

The court's ruling on the original proceedings in the *Lucas* case was the subject of a blistering dissent by Mr. Justice Hall,[76] after a rehearing was held by the Supreme Court, in which he said on the procedural question:

> The majority opinion, contrary to the expressed understanding of all counsel in the matter, states that this is not a proceeding under Rule 106 for the reason that:
>
> "This rule does not apply to original proceedings."
>
> Such statement runs contrary to dozens of decisions of this court wherein original proceedings brought in district

74 345 P.2d 1064 (Colo. 1959).
75 *Id.* at 1066.
76 *Id.* at 1075 (dissenting opinion).

courts and this court pursuant to this rule have been recognized, sanctioned and approved.[77]

In the opinion of Mr. Justice Hall, rule 106 precludes the granting of the relief that was requested in the *Lucas* case, because of the wording of rule 106, which states, "Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion."

In the opinion of Mr. Justice Hall, in an original proceeding in prohibition, mandamus and certiorari, the court may only determine questions of jurisdiction and must scrupulously avoid determination of the merits. Mr. Chief Justice Knauss and Mr. Justice Sutton joined him in his view.

The proceedings which occurred in 1959 involving prohibition, mandamus, habeas corpus, and quo warranto (and whether they were before the Supreme Court as original proceedings or by writ of error) will be set out under separate headings under this rule.

### *Habeas Corpus*

The writ of habeas corpus came into play under rule 106 and under article VI, section 3 of the constitution in the year 1959, but no petitioner saw fit to utilize the provisions of the Colorado habeas corpus statute,[78] which is ambiguous, to say the least.[79]

In *Lowe v. People*,[80] the petitioner sought a release by habeas corpus after he was returned to Colorado in an extradition proceeding. He pleaded guilty in the district court and was sentenced to the penitentiary. Thereafter, he claimed that he was illegally extradited and that his plea of guilty was extracted by coercion, intimidation, and threats and that the trial court acted irregularly and contrary to law in disposing of the habeas corpus proceedings. The petitioner appeared *pro se*, and the court again repeated that there must be a substantial compliance with the requirements by even a layman who assumes the burden of representing himself. The court said:

> Habeas corpus may be invoked to question the Court's jurisdiction of the person or its jurisdiction of the accusation made against him or where the question arises as to whether the judgment and sentence were within the prescribed statutory limits. A writ of habeas corpus, however, is not a corrective remedy, and it is never allowed to perform the function of a writ of error.[81]

The court said that jurisdiction is not impaired by the manner in which the accused is brought before it, and, therefore, no jurisdictional problem existed. The Supreme Court pointed out that a writ of error and not a writ of habeas corpus was the proper remedy to secure relief, if the facts were as the petitioner charged.

*Gallegos v. Tinsley*[82] was a joint petition for a writ of habeas corpus filed in the District Court of Fremont County by two of the defendants who had been convicted of rape in the District Court of Pueblo County and sentenced to the state penitentiary. They were

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77 *Id.* at 1077 (dissenting opinion).
78 Colo. Rev. Stat. § 65-1-3 (1953).
79 See Scott, *Post-Conviction Remedies in Colorado Criminal Cases*, 31 Rocky Mt. L. Rev. 249 (1959); Comment, *Habeas Corpus in Colorado for the Convicted Criminal*, 30 Rocky Mt. L. Rev. 145 (1958).
80 343 P.2d 631 (Colo. 1959).
81 *Id.* at 633.
82 337 P.2d 386 (Colo. 1959).

both fifteen years of age. They claimed that the statute[83] required that they be sentenced to the state reformatory and not to the penitentiary and that the sentence imposed was void. In sustaining the trial court, the Supreme Court held that he District Court of Fremont County had equal and coordinate jurisdiction with the District Court of Pueblo County, and that the District Court of Pueblo County had jurisdiction of the crime and of the person, and had the power to pronounce sentence. The court stated again that a district court, in a collateral proceeding, had no jurisdiction to pass upon the validity of the judgment of a court of equal jurisdiction.

*Marshall v. Geer*[84] stated the Supreme Court's views on the reconsideration of a writ of habeas corpus on the same questions which were reviewed by the Supreme Court on a previous occasion. The court refused to review a successive application based on the same grounds as those that were reviewed by it before. The court held that res judicata applies to habeas corpus proceedings and affirmed the trial court's decision discharging the writ.

*Mendez v. Tinsley*[85] came about after Mendez was tried and convicted on an information charging robbery and conspiracy to commit robbery and erroneously sentenced to the penitentiary for assault to commit robbery. Mendez was nineteen years old and petitioned for habeas corpus, alleging that he could not be sentenced to the penitentiary for the crime upon which sentence was pronounced and upon which mittimus issued. The trial court denied the petition for habeas corpus and set aside the robbery count of the information, resentenced the defendant for robbery to the penitentiary, and then caused a mittimus to issue on the newly imposed sentence. In reviewing the trial court's action, the court again said that the sole question in a habeas corpus proceeding is whether the court went beyond or exceeded its jurisdiction, and said that the writ of habeas corpus cannot be substituted for review by writ of error. The court held that since the information upon which sentence was pronounced was quashed by the trial court, there was nothing upon which the mittimus or warrant of commitment could stand, and the judgment of conviction became void, requiring that the prisoner be discharged.

*Quo Warranto*

In an original proceeding in the nature of a writ of quo warranto, the court examined the procedure for creating a water conservancy district. *People v. South Platte Water Conservancy Dist.*[86] The Supreme Court reviewed the findings and conclusions of the trial court, found that the decree creating the district was a nullity, and made the ruling to show cause absolute. When the court again reviewed the case on a petition for rehearing it found that the petition for rehearing was not in compliance with rule 118 and could be stricken because it contained argument and contained no citation of

83 Colo. Rev. Stat. § 39-10-1 (1953).
84 344 P.2d 440 (Colo. 1959).
85 336 P.2d 706 (Colo. 1959).
86 343 P.2d 812 (Colo. 1959).

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authority or reference to the record and briefs in relation to matters that the court had allegedly overlooked or misapprehended. However, because of the importance of the issues involved, the court did not strike the petition for rehearing, and again reviewed the matter. The court ruled that there was no provision for review of the trial court's proceeding by writ of error and that quo warranto was the only procedure which afforded adequate relief. The court, therefore, searched the entire record and did not limit the issue to fraud, lack of jurisdiction, or invalidity on the face of the decree. The court adhered to its original finding that the statutes for the formation of a water conservancy district had not been complied with.

*Prohibition*

In *City of Aurora v. Congregation Beth Medrosh Hagodol*[87] the court reviewed its earlier pronouncements in *Beth Medrosh Hagodol v. City of Aurora.*[88] On remand from the earlier case, the trial court upheld a plea of res judicata, which was raised when Aurora again sought to condemn a right-of-way through an allegedly public cemetery owned by Beth Medrosh Hagodol. When the Supreme Court first examined the rights of the litigants, the court had before it an original proceeding in the nature of prohibition, and in that instance the court made the rule absolute, with the same parties and the same condemnation issues before it. The court reviewed its earlier pronouncement and said that a writ of prohibition is preventive in that it restrains excessive or an improper assumption of jurisdiction by a tribunal possessing judicial or quasi-judicial powers, and that the sole inquiry is whether the inferior judicial tribunal is exercising a jurisdiction which it does not possess, or, having jurisdiction over the subject matter and the parties, has exceeded its legitimate powers. The court carefully pointed out that questions of jurisdiction do not encompass consideration of the merits of the cause. The court found that the allegation regarding the dedication of the property in question as a cemetery was disputed in the earlier case and that that issue required the presentation of evidence. No evidence was taken on the issue of dedication of the cemetery to a public use in the trial court, and the court held that the trial court's finding therefore prejudiced the City of Aurora. The case was remanded to the trial court to take evidence on all issues.

*Certiorari*

In *Marker v. City of Colorado Springs,*[89] the plaintiffs endeavored to review the action of the City of Colorado Springs in granting a use variance permit to erect a medical office building on property zoned as R-3 and located directly across from the Glockner-Penrose Hospital. The court, in affirming the judgment of the trial court, held that in a certiorari proceeding the scope of review is limited, and that the authority of the courts to interfere with the findings of tribunals vested with exclusive jurisdiction to determine particular issues, depends solely upon whether there is any competent evidence to support the findings that were made. The record contained ample evidence to sustain the findings of the bodies vest-

87 345 P.2d 385 (Colo. 1959).
88 126 Colo. 267, 248 P.2d 732 (1952).
89 138 Colo. 485, 336 P.2d 305 (1959).

ed under the ordinance with authority to determine the zoning issues and nothing appeared in the record to indicate that the proceedings or the conclusions reached were arbitrarily or capriciously arrived at, and the trial court was, therefore, affirmed.[90]

*City and County of Denver v. District Court,*[91] in an original proceeding in the nature of certiorari, challenged an order of the district court awarding the Glendale Water and Sanitation District, in an eminent domain proceeding, immediate possession of Cherry Creek. The purpose of the condemnation was to enable the sanitation district to discharge sewage into Cherry Creek, which was admittedly a dry bed throughout the greater part of the year. The court found this to be comparable to discharging sewage into gutters, streets, and barrow pits. In holding that public waters or beds or channels of public streams could not be condemned for sewage purposes, the court made the rule to show cause absolute.

RULE 116

A Public Utilities Commission ruling, granting lower rates to railroads than to truckers on intrastate hauls, was considered by the Supreme Court as an original proceeding under rule 116, in *Groendyke Transport Co. v. District Court.*[92] The court, however, would not allow the Supreme Court's original jurisdiction under rule 116 to be invoked to question the trial court's order allowing intervention under rule 24. The court held that a party seeking to invoke the original jurisdiction of the Supreme Court must be able to show prima facie, at least, circumstances justifying the exercise of such jurisdiction and that rule 116 may not be utilized to avoid the requirement of a final judgment.

The issue before the court was "[W]hether an order granting intervention is of such character and finality as to presumptively deny to other parties to the action any rights which could not be adequately reviewed . . . by writ of error."[93] It was the court's opinion that orders relating to intervention are interlocutory and that the issue framed by the court required a negative answer.

In *People v. Hively,*[94] an original proceeding, the Attorney General of Colorado caused a citation to be issued to the Assessor of Arapahoe County to show cause why he should not be adjudged in contempt of court for his failure to comply with the orders of the Supreme Court in a former original proceeding in mandamus and prohibition that bore the same name.

In the first proceeding[95] an order was obtained compelling the assessor to comply with the directions of the State Board of Equalization, which fixed the valuation of real and personal property in Arapahoe County, and prohibited the District Court of Arapahoe County from proceeding further in an action by the assessor and the residents of Arapahoe County to set aside the orders and directions of the Board of Equalization.

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90 *Accord,* Holly Development, Inc. v. Board of County Comm'rs, 342 P.2d 1032 (Colo. 1959) (also held that certiorari is proper remedy when public commission exceeds jurisdiction or abuses discretion); Civil Service Comm'n v. Conklin, 138 Colo. 528, 335 P.2d 265 (1959).
91 342 P.2d 648 (Colo. 1959).
92 343 P.2d 535 (Colo. 1959).
93 *Id.* at 537.
94 344 P.2d 443 (Colo. 1959).
95 People *ex rel.* State Board of Equalization v. Hively, 336 P.2d 721 (Colo. 1959).

The assessor, in defense of the contempt citation, urged that the court lacked jurisdiction, that the Attorney General had not complied with the requirements of rule 25 (d) in substituting the assessor for his predecessor, had not shown that he, as assessor, had continued or threatened to continue the actions of his predecessor, and that he had not had adequate notice. He also urged that he acted on the advice of counsel. The Supreme Court cut through the defenses and adjudged the assessor to be in contempt.