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Notes on Proposed Amendments to Colorado Rules of Civil Procedure

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NOTES ON PROPOSED AMENDMENTS TO COLORADO RULES OF CIVIL PROCEDURE

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Out of the 466 members of the Denver Bar Association who voted for retention of the Rules of Civil Procedure in the postcard ballot conducted during the latter part of December, 384 also indicated that "so far as applicable to Colorado, the Colorado Rules should include the amendments adopted to the Federal Rules." [1] No statistics are available to indicate what the thinking of other local bar associations is on this question; but, since they were all overwhelmingly in favor of retention of the Rules, it is assumed that the majority of Colorado lawyers throughout the state likewise favor amendment of the state Rules in line with the Federal changes.

The Rules Committee [2] appointed by the Supreme Court of Colorado has recommended to the court, for such action as it may see fit to take, certain amendments to the Colorado Rules which embody many of these Federal amendments. These recommendations are set out in two reports, one dated September 1, 1948, and the other dated January 4, 1950. About 150 copies of the first report were printed, and these given only limited distribution. Since the second report is only a typewritten addendum with an even more restricted distribution, it is doubtful if many attorneys are aware of the specific purpose and effect of these recommended amendments, even though they favor conformity in Colorado and Federal civil procedure. To remedy this lack of information concerning the proposed changes, it was thought that a summary of the more importance changes and the committee notes thereon might prove interesting and useful to Colorado lawyers.

BACKGROUND OF THE RULES AND THEIR REVISION

Preliminary to a consideration of the proposed amendments, it is appropriate to consider their background. The Federal Rules of Civil Procedure were promulgated by the Supreme Court of the

[1] The results of the Denver bar poll were first reported to the Supreme Court on January 26, 1950 in a letter to Judge Mortimer Stone, chairman of the rules committee within the court. On that date 515 of the 770 ballots mailed had been returned with the following result: For retention of the Rules—462; for return to the Code—35; no opinion—18. Four additional ballots subsequently were received to raise the total favoring the Rules to 466. In addition to the 384 out of the first group who favored the Federal amendments, 69 expressed no opinion and 13 opposed further conformity to the Federal Rules. Of the 35 voting for a return to the Code, 13 indicated that if the Rules are retained the Federal amendments should be adopted, and three out of the 18 expressing no opinion on the primary question, nonetheless, voted for the amendments.

[2] As presently constituted: Jean S. Breitenstein, chairman; Joseph G. Hodges; Viggo H. Johnson; Thomas Keely; and Percy S. Morris.

United States pursuant to the authority conferred by the Act of June 19, 1934,[3] and became effective on September 16, 1938. The Colorado Bar Association, at its meeting in September, 1938, unanimously adopted a resolution to the effect that the Colorado Code of Civil Procedure be amended to conform to the new Federal Rules. In order to dispel any doubt which might exist as to the power of the court to prescribe general rules to govern the practice and procedure in civil actions, the General Assembly passed an appropriate statute in 1939.[4]

A Colorado Bar Association committee, under the able leadership of Philip S. Van Cise, submitted to the court a draft of proposed rules. On January 6, 1941, the Colorado Rules of Civil Procedure were adopted by the court which at that time made a statement recognizing, among other things, that:

> . . . in proceeding under these Rules, need for amendments or new rules may develop. The right to exercise necessary power to that end is reserved by the Court, but in its consideration it will have regard for well advised adherence to fixed standards.[5]

Since the adoption of the Colorado Rules, the court has found it necessary to amend the following rules: 4(f), 4(g), 4(h), 79(c), 98(c), 111(c), 115(h), 115(i), 117, 201, and 204.

In June, 1946, the Advisory Committee to the Supreme Court of the United States recommended 66 amendments to the Federal Rules of Civil Procedure and three amendments to the Appendix of Forms. These amendments were adopted by that court on January 3, 1947, and became effective March 19, 1948.

The Colorado Supreme Court on February 2, 1948, requested its Rules Committee to study the revisions in the Federal Rules and to recommend to the court "such changes in our rules as you may deem advisable in the light of the federal revision." This committee made its report on September 1, 1948, and stated therein:

> A study of the revisions of the Federal Rules discloses that all are not applicable or desirable in state procedure. Your Committee recommends that 37 amendments be made to the Colorado Rules in order to conform to the amendments to the Federal Rules and that 2 amendments to the Appendix of forms be made for the same purpose. In addition the Committee recommends 9 other amendments to the Colorado Rules.

Subsequently, the attention of the committee was directed to the need for revisions of Rule 4 covering Process, and Rule 120 covering Orders Authorizing Sales under Powers. On January 4, 1950, the committee submitted to the court a second report recommending certain changes in these two rules.

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[3] 48 Stat. 1064.
[4] Colo. Laws 1939, c. 80, p. 264.
[5] 107 Colo. ix (1941).

A number of amendments to the Federal Rules were not recommended by the committee for adoption in Colorado. The reasons therefore may be grouped into three categories: (1) The defect in the Federal rule had been foreseen and corrected in the Colorado rule, (2) The Federal rule relates to a purely Federal subject, and (3) The Federal rule, or amendment, while of general application, was deemed unsuited to local conditions. The committee filed with the court a statement as to its reasons for rejection of each Federal amendment which was not recommended for adoption in Colorado.

MAJOR CHANGES RECOMMENDED FOR COLORADO

Within the space allotted, it is impossible to present in detail all the proposed changes. Accordingly, those which are merely clarifying or conforming will be omitted. The amendments will be discussed in the numerical order of the rules affected. It should be understood that in each case the change is that recommended by the committee. The court may or may not agree with its committee.

Rule 4—Process

The suggested changes in Rule 4, involve two procedural matters: (1) service of process in a foreign country, and (2) the contents of the verified motion for an order for publication of summons. As to the first, the requirements of the existing rule are ineffective because United States consuls are now forbidden by the Department of State either to serve process issued by state courts or to designate any one to make such service. The amendment authorizes several classes of officials at the place of service to make the service. It follows closely the provisions in the Civil Code of New York. As to the second, the Real Estate Title Standards Committee of the Denver Bar Association has unanimously voted to request the Rules Committee to recommend to the court an amendment to Rule 4 (h) covering publication which will make more readily understood the requirements as to stating the address or last known address of the person to be served.

Rule 6—Time

The amendment to Rule 6 (b), relating to enlargement of time, further restricts the power of the court to extend the time for certain actions. It is based on the view that there should be a definite point where it can be said that a judgment is final. Under the rule as amended the court may not extend the time for substitution of parties under Rule 25, for a motion for judgment notwithstanding a verdict under Rule 50 (b), for motion to amend findings under Rule 52 (b), to amend a judgment under Rules 52 (b) or new 59 (e), or to relieve a party from a judgment under Rule 60 (b), except as stated in those particular rules.

Rule 6 (c) is changed to provide that the period of time allowed for taking any proceeding is not affected by the continued existence of a term of court. The purpose of the amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in the Rules.

Rule 12—Defenses and Objections

Some of the more important proposed changes concern Rule 12. The Federal amendment to 12 (b) added, as a defense which may be raised by motion, the failure to join an indispensable party. With this the committee concurred. In studying the rule, the committee came to the realization that in the adoption of the original Rule 12 (b) a mistake had been made in following too closely the Federal rule. One of the grounds of defense permitted by the Federal rule is that of improper venue. So far as the Colorado courts are concerned, improper venue is not a defense. It is merely the basis for change of venue. Hence, the committee recommended that improper venue be deleted as a defense.

Other changes in 12 (b) and 12 (g) make it clear that a party who resorts to a motion to raise any of the defenses and objections specified in Rule 12 must file with such motion all motions that are then available to him. Under the original rule defenses and objections were divided into two groups which could be the subjects of successive motions. The filing of all such motions at the same time does not constitute a waiver of any defense raised by any such motion.

Rules 12 (b) and 12 (c) are changed to provide that if, on a motion to dismiss for failure to state a claim or for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Under the original Federal Rules, there was a division in the Federal courts on the right to support or resist such motions by extraneous matter such as affidavits and depositions. Some Colorado trial courts permitted the use of such material. The committee was of the opinion that the trial court should have authority to permit the introduction of extraneous matter such as may be offered on a motion for summary judgment. If the court does not exclude such matter, the motion should be treated as a motion for summary judgment. Where extraneous matter is received, the tying of further proceedings to the summary judgment rule gives the courts a definite basis in the Rules for disposition of the motion.

Rule 13—Counter Claim and Cross Claim

Rule 13 (a) refers to compulsory counterclaims. The proposed change insures against an undesirable possibility under the

original rule whereby a party having a claim which would be the subject of a compulsory counterclaim, could avoid stating it as such by bringing an independent action in another court after the commencement of the action, but before filing his pleading thereto.

The amendment to Rule 13 (g) permits as a cross-claim any claim "relating to any property that is the subject matter of the original action." This takes care of such situations as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-claim against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of original Rule 13 (g).

Rule 14—Third Party Practice

The provisions of Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. The third sentence of 14 (a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action.

Rule 24—Intervention

Rule 24 (a) is modified to permit intervention of right when the applicant is so situated as to be adversely affected by the disposition of property subject to the control or disposition of the court or an officer thereof. This covers a situation wherein the property is not in the actual custody of a court or its officers, but the control or disposition of the property is lodged in the court wherein the action is pending.

The addition to Rule 24 (b), relating to Permissive Intervention, allows the intervention of governmental officers or agencies in proper cases and thus avoids the exclusionary construction of the original rule.

Rule 25—Substitution of Parties

Federal Rule 25 (a) requires substitution of parties because of death, within two years from the death. As originally adopted in Colorado, the two year limitation was omitted from this rule. A

majority of the committee thought that Federal and state practice should conform in this regard. Hence, an amendment to the state rule is recommended to bring about conformity.

Rule 26—Depositions Pending Action

Rule 26 (b) relates to the scope of examination on depositions. The amendment adds a sentence to the effect that inadmissibility of the testimony is not a ground for objection if the testimony sought is reasonable calculated to lead to the discovery of admissible evidence. This makes clear the broad scope of examination which may cover not only evidence for use at the trial, but also matters which themselves are inadmissible in evidence but which will lead to the discovery of admissible evidence. Thus, hearsay, while inadmissible itself, may suggest testimony which properly may be proved.

Rule 28—Persons Before Whom Depositions May Be Taken

Language is added to Rule 28 (a) to permit the court to appoint a person before whom a deposition may be taken. This is to take care of the occasional situation in which depositions must be taken at an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties.

Rule 30—Depositions Upon Oral Examination

Orders for protection of parties and deponents in connection with the discovery procedure are provided by Rule 30 (b). The criticism has been made that the discovery procedure can be used for harassment and delay. The amendment makes clear the intent of the rule that the protective provisions shall be liberally construed to prevent unnecessary inconvenience, expense, and delay:

Rule 33—Interrogatories To Parties

Rule 33 on interrogatories is amended in several respects. One addition insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed by the rule. Under the original wording, answers to all interrogatories might be withheld until objections are determined, even though objections were made to only a few of the interrogatories. Another proposed change makes the scope of examination as broad as that under Rule 26 (b) on depositions. There is no reason why interrogatories should be more limited than de-

positions, particularly when the former represent an inexpensive means of securing useful information. The protective provisions of Rule 30 (b) are made applicable to interrogatories. Further, the amended rule permits either interrogatories after a deposition or a deposition after interrogatories.

Rule 34—Discovery and Production of Documents

Changes in Rule 34 on the subject of discovery and production of documents correlate the scope of inquiry permitted thereunder with that provided in Rule 26 (b) on depositions and thus remove any ambiguities created by the former differences in language. The proposed amendment also makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30 (b).

Rule 36—Admission of Facts

Modifications of Rule 36 (a), referring to requests for admission, bring that rule in line with Rules 26 (a) and 33. There is no reason why these rules should not be treated alike.

Rule 41—Dismissal of Actions

The change in Rule 41 (a) (1), relating to voluntary dismissal, gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer.

The next proposed amendment is to Rule 41 (b) (1) on involuntary dismissal. In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under 41 (b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. The added sentence in this rule incorporates the view that on such a motion in a non-jury case, the judge may pass on conflicts of evidence and credibility. If he performs that function of evaluating the testimony and grants the motion on the merits, findings are required.

Rule 45—Subpoena

Rule 45 (d) covers the subject of subpoena for taking depositions. A sentence is added to subdivision (d) (1) to give the subpoena for documents or tangible things the same scope as provided in Rule 26 (b), thus promoting uniformity. The changes in subdivision (d) (2) give the court the same power in the case of

residents of the state as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

Rule 47—Jurors

Rule 47 (h) on peremptory challenges has caused confusion in cases involving third-party defendants or intervenors. The proposed amendment permits the court in its discretion to allow peremptory challenges to such parties.

Rule 52—Findings By The Court

The amended Rule 52 (a) makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated but carries into effect what has been considered its intent. Two sentences added at the end of the rule eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. The findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts.

Rule 54—Judgment; Costs

Rule 54 (b), judgment at various stages, was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the rule against piece-meal disposal of litigation. In practice, situations have arisen where a court has entered what the parties have thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. Hence, the question of the finality of a partial judgment has arisen. The amendment retains the rule against piece-meal disposal of litigation but gives discretionary power to afford a remedy in the infrequent harsh case.

Rule 56—Summary Judgment

The amendment to Rule 56 (a), relating to a motion by a claimant for a summary judgment, allows a claimant to move for a summary judgment at any time after the expiration of 20 days

from the commencement of the action or after service of a motion for summary judgment by the adverse party. The changes are in the interest of more expeditious litigation. The 20 day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself files a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

The amendment to Rule 56 (c), relating to procedure on motion for summary judgment, makes it clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Rule 58—Entry and Satisfaction of Judgment

Rule 58 (a) refers to the entry of judgment. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery," makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers such cases as where judgment is against the plaintiff in an action to quiet title, or in an action for a declaratory judgment, or in an action for the construction of a will, or in any other action where a judgment for money is not sought.

Rule 59—New Trials

Subdivision (e) has been added to Rule 59 to make clear that the trial court possesses the power to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50 (b).

Rule 60—Relief From Judgment or Order

The amendment to Rule 60 (a) permits the correction of clerical mistakes after the docketing of a case on appeal, provided leave of the appellate court is obtained. It eliminates any contention that upon the taking of a writ of error the trial court loses its power to act.

When originally promulgated, the rules contained a number of provisions, including those found in 60 (b), describing the practice by a motion to obtain relief from judgments. These rules, coupled with the reservation in 60 (b) of the right to entertain

a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force. the question has been raised whether the use of bills of review, *coram nobis,* or *audita querela,* to obtain relief from final judgments is still proper, and whether various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. The reconstruction of Rule 60 (b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the amended rules. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50 (b), and including the provisions of Rule 60 (b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6 (b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure.

Rule 65—Injunctions

Rule 65 (c) covers security in injunction actions. The amendment provides that a surety on an injunction bond submits himself to the jurisdiction of the court wherein the action is pending. Liability may be enforced on motion without the necessity of an independent action.

Rule 66—Receivers

The amendment to Rule 66 prohibits the dismissal of an action in which a receiver has been appointed without an order of court. A party should not be permitted to oust the court and its officer without the consent of the court.

Rule 68—Offer of Judgment

The proposed change in Rule 68 would permit more than one offer of judgment. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should encourage settlements and avoid protracted litigation.

Rule 98—Place of Trial

Rule 98 (e) is completely rewritten to cover motions for change of venue. The amendment to Rule 12 (b) eliminates improper venue as a ground for motion because in Colorado improper venue is not a defense. The manner of presenting the question of improper venue will be covered by 98 (e) if the proposed amendment is adopted.

Rule 111—Writ of Error

A suggested change in Rule 111 (f), specification of points, makes it clear that a defendant in error shall file cross-specifications if he desires to object to any action of the trial court. This clarifies the rule by bringing it in line with applicable decisions of the Colorado Supreme Court.

Rule 120—Orders Authorizing Sales Under Powers

Rule 120 (b) relates to orders authorizing sales of real estate under powers contained in a deed of trust. The amendment makes the language of the rule follow more closely the language of Sec. 64, Ch. 40, Colo. Stat. Ann. (1935). It is made clear that the clerk in proceeding under the rule shall mail notices to the same persons at the same addresses as shall the public trustee in proceeding under Sec. 64.

Deletion of the Prefix "C"

The committee further recommended that the prefix "C" be deleted wherever it appears in the rules. At the present the use of this prefix is not uniform or consistent and is confusing. The committee notes are sufficient to advise the practitioner in all cases where explanation is desirable as to source of rule or as to interdependence of rules. While the committee was divided on this proposal, it would seem that if the "C" designation is retained, some effort should be made to attain uniformity of usage.

CONCLUSION

It is hoped that this attempt to familiarize Colorado attorneys with the more important rule changes recommended by the Supreme Court's Rules Committee will point up the need for their adoption.

Besides their intrinsic value in improving the logic and justice of civil procedure, these amendments are necessary if Colorado is to achieve one of the basic goals for which the Rules were adopted in the first place—substantial uniformity in state and Federal practice. If no effort is made to accept and make effective worthwhile improvements in the system of civil procedure it inaugurated in 1941, Colorado will be neither a Rules nor a Code state, neither fish nor fowl.

While there has been some complaint as to the use and application of the Rules—or perhaps more accurately, their *non-use*—available evidence seems to indicate that the civil procedure provided in the Rules has met with satisfaction among the large majority of Colorado lawyers. Clearly, too, the Rules have increased the opportunity of the general public to obtain a closer approximation of real justice in our courts.

AVERAGE-SIZE ESTATE PROBLEMS SUBJECT OF MAY INSTITUTE

CHARLES H. HAINES, JR., AND COLLABORATORS
of the Denver Bar

Emphasizing the lawyer-like handling of the average estate, another Denver Bar Association Institute will be held on two successive Tuesday evenings, May 16 and May 23, in the Chamber of Commerce Dining Room (again without dinner), 1726 Champa Street, beginning promptly at 8:00 p.m.

Judge C. Edgar Kettering of Denver's County Court will act as chairman and moderator of both sessions.

Subjects and speakers have been announced as follows:

May 16: Will Drafting for Average-Sized Estates (or, Brother, Skip the Trust)—Hubert D. Henry.

Simple Devices for the Transfer of Assets Without Administration (or, How Far Can You Go With a Bond and Affidavit?)—Merrill A. Knight.

May 23: Practical Problems in the Administration of Average Estates (or, Taxes Aren't Your Only Worry)—Barkley L. Clanahan.

Estate Auditing (or, Why Can't Lawyers Add?)—John L. Griffith.

A clinic and refresher for your small estate problems! Come with your questions. Parking available across Champa Street.