

2001

# Mildred Rhoades v. James C. Wright aka James Clifford Wright and Clifford Wright, and Essie Wright : Brief of Petitioner

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MILDRED RHOADES individually and as  
Administratrix of the Estate of Claude  
Rhoades, deceased,

Plaintiff-Appellant,

-vs-

JAMES C. WRIGHT, also known as JAMES  
CLIFFORD WRIGHT, and CLIFFORD WRIGHT  
and ESSIE WRIGHT, his wife,

Defendants-Respondents.

PETITION FOR  
REHEARING

No. 14159

PETITIONER'S BRIEF

Appeal from the Seventh Judicial District  
Court of San Juan County, Utah, Honorable  
Edward Sheya, Judge

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Clerk, Supreme Court

MILDRED RHOADES individually and as  
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Rhoades, deceased,

- VS -

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MILDRED RHOADES, individually  
and as Administratrix of the  
Estate of Claude Rhoades,  
deceased,

Plaintiff and Appellant,

-vs-

JAMES C. WRIGHT, also known  
as JAMES CLIFFORD WRIGHT, and  
CLIFFORD WRIGHT and  
ESSIE WRIGHT, his wife,

Defendants and  
Respondents.

PETITION FOR REHEARING

No. 14159

--oooooOoooo--

PETITIONER'S BRIEF

NATURE OF THE CASE

This is an action to recover for the wrongful death of  
Claude Rhoades.

DISPOSITION IN THE LOWER COURT  
AND IN THE SUPREME COURT

Judge Edward Sheya dismissed plaintiff's complaint and  
quashed service of process holding that attachment is an im-  
proper method of conferring jurisdiction in a wrongful death case  
and vacated the plaintiff's writ of attachment. The Supreme Court  
of the State of Utah reversed this decision and remanded the case  
for reinstatement of the writ of attachment.

## RELIEF SOUGHT BY PETITION FOR REHEARING

Defendants seek to have the decision of the Utah Supreme Court reversed and affirm the decision of the lower Court.

## STATEMENT OF THE FACTS

This is a wrongful death action which arose in Colorado on April 19, 1970. Clifford and Essie Wright are the parents of James C. Wright and all are residents of Delores County, Colorado, which adjoins San Juan County, Utah. At all times material to this action, all defendants were residents of Colorado and the activities which gave rise to this cause of action occurred in Colorado. Similarly, during this time period, plaintiff Mildred Rhoades, wife of Claude Rhoades, deceased, resided with her husband on a ranch just inside the Utah border in San Juan County, Utah.

On April 19, 1970, Claude and Mildred Rhoades stopped the defendants on a roadway near the Wright home in Colorado ostensibly to discuss the conditions of windblown farm land. An argument ensued between Claude Rhoades and James C. Wright during which Mr. Wright shot and killed Rhoades after Rhoades made threatening remarks and movements indicating he was producing a gun. James C. Wright was prosecuted for first degree murder and found guilty. That conviction was reversed by the Colorado Supreme Court, a copy of that decision, People v. Wright, 511 P. 2d 460 (Colo. 1973), is attached. At a subsequent hearing Mr. Wright was found not guilty.



On September 19, 1970, Mildred Rhoades as Administratrix of her husband's Estate commenced a wrongful death action in the Federal District Court for Utah and approximately at the same time attached the real property of Clifford and Essie Wright in Utah which had been obtained by conveyance from their son. All defendants were served within Colorado.

The defendants appeared specially in that action and moved the Court for an order of dismissal on the basis that the Court lacked both personal and subject matter jurisdiction. The lower Court denied defendants' motion by memorandum decision which was reversed by the Tenth Circuit Court of Appeals on July 23, 1973.

On July 19, 1974, Mildred Rhoades, individually and as Administratrix of Claude Rhoades' Estate, commenced another action in the District Court in and for San Juan County, Utah, and caused summons to be issued and served on defendants again in Colorado. At approximately the same time an identical action was commenced in Delores County, Colorado, under which Mildred Rhoades sued the defendants individually and as the surviving widow of Claude Rhoades, deceased. Defendants again appeared specially in the Utah case by filing a motion to quash service of process arguing that the Court lacked both personal and in rem jurisdiction. On May 21, 1975 the District Court, Judge Edward Sheya presiding, granted defendants motion to quash service of process and vacated the writ of attachment. Plaintiffs

thereafter perfected this appeal in the Utah Supreme Court. The parties then filed briefs, argued the case orally to the Court, and on July 8, 1976 the Supreme Court filed its decision reversing the lower Court and reinstating the writ of attachment. Defendants now petition this Court for rehearing pursuant to Rule 76 (e), Utah Rules of Civil Procedure.

#### ISSUES

1. This Court erred in holding that the prior decision in the federal case is not res judicata.
2. This Court erred in ordering the original writ of attachment be reinstated.
3. This Court erred in not restricting the attachment to the present title owners of the property.

#### ARGUMENT

##### POINT I

THIS COURT ERRED IN HOLDING THAT THE PRIOR DECISION IN THE FEDERAL CASE IS NOT RES JUDICATA.

The action in the Federal District Court, the action in Colorado and the action in San Juan County all involve identical issues of fact and involve the same parties. In the federal action, plaintiff sought to obtain in rem jurisdiction by attaching defendants' property pursuant to 64 C (a) Utah Rules of Civil Procedure which read as follows:

The plaintiff, at any time after the filing of a complaint . . . in an action to recover

damages for any tort committed by a non-resident of this state against the person or property of a resident of this state, may have the property of the defendant, not exempt from execution, attached as security . . . .

On November 1, 1972 this rule was modified to its present form and reads as follows:

The plaintiff, at any time after filing of the complaint . . . in an action against a non-resident of this state . . . .

This modification was made after the decision in the Federal District Court but before briefs were filed on appeal with the Tenth Circuit Court of Appeals. Those briefs were not filed until January, 1973 and the matter was not argued before the Tenth Circuit Court until May, 1973. A decision was not rendered until July, 1973 and an order of dismissal was not entered in the lower Federal Court until September 19, 1973. Plaintiffs therefore had approximately ten months within which to bring this modification to the attention of the Federal Court. This they did not do.

This Court, through Justice Maughan, stated in the instant case as follows:

It is well settled that a change in a governing statute, or rule of court, deprives a judgment, based on a former statute or rule, of its conclusiveness. Consequently, the federal judgment is not res judicata as to the present attachment. It is also well established that a judgment dismissing an action for lack of jurisdiction is res judicata as to that which was the subject of the judgment, but is not res judicata as to the merits of the action.

Petitioners assert that this holding is inconsistent with prior cases from the United States Supreme Court and prior decisions from the Utah Supreme Court and hence constitutes error. The rule is firmly established in this jurisdiction and in others that res judicata applies to all issues which were raised in a prior proceeding and which could have been raised in that proceeding. This rule is firmly established in the case of Partmar Corp. v. Paramount Pictures Theater Corp., 347 U.S. 89 (1954) at pp. 90-91:

We have often held that under the doctrine of res judicata a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein.

See also 46 Am. Jur. 2d, Judgments, Sec. 417 (1969); Burns v. Kepler, 147 Colo. 153, 362 P.2d 1037 (1961).

The Utah Spureme Court has taken the same position. In Richards v. Hodson, 26 U.2d 113, 485 P.2d 1044, (1971), the Court stated:

Strictly speaking, the term "res judicata" applies to a judgment between the same parties who in a prior action litigated the identical questions which are present in the latter case. Not only are the parties bound by the ruling on matters actually litigated, but are also prevented from raising issues which should have been raised in the former action. The rule of law is wise in that it gives finality to judgments and also conserves the time of courts, in that courts should not be required to relitigate matters which have once been fully and finally litigated

See also Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974); Wheaton v. Pearson, 14 U.2d 45, 376 P.2d 946 (1962).

Under the facts of this case plaintiffs had over ten months to bring the change in the attachment statute to the attention of the Court. Under the decisions referred to above plaintiffs are now precluded under res judicata from raising the issue of the changed rule. In sustaining plaintiff's argument, this Court has gone contrary to prior decisions and in effect overruled them.

#### POINT II

THE COURT ERRED IN ORDERING THAT THE ORIGINAL WRIT OF ATTACHMENT BE REINSTATED.

In its decision this Court relied heavily on the United States Supreme Court decisions in Pennoyer v. Neff, 95 U.S. 714 (1877) and Ownbey v. Morgan, 256 U.S. 94 (1921). In both of those cases attachment was recognized as a valid means of acquiring in rem jurisdiction where the defendant was a non-resident. These cases are subject to the subsequent decisions made by the United States Supreme Court having to do with due process. In Fuentes v. Shevin, 407 U.S. 67 (1972), the United States Supreme Court invalidated the replevin statutes of Florida and Pennsylvania since they did not provide for a pre-seizure hearing. The Court said that such a hearing was mandated except in certain truly unusual circumstances where (1) seizure has been directly necessary to secure an important government or general

public interest, (2) where there has been a special need for very prompt action and (3) where the state has kept strict control over its monopoly of legitimate force. But in no case was a post-seizure hearing waived: In all instances the defendant must be afforded an opportunity short of trial to challenge the propriety of the attachment.

The Court in the instant case stated as follows with respect to the Utah attachment rule as it existed at the time defendant's property was seized:

It [the attachment statute] also provides for a hearing, at the instance of the defendant, at any time, upon such notice to the plaintiff as the Court may require. At which hearing the Court passes on the justification for the writ. In this, of course, would be prior to the deprivation of any significant property interest.

The Utah attachment statute prior to its modification in March, 1976, contained no provision for a hearing at the instance of the defendant or anyone other than to challenge the sureties. Neither a pre nor a post-seizure hearing was provided and in this respect the attachment statute is unquestionably unconstitutional. To remand this case now to the lower Court for further proceedings under the attachment writ as reinstated allows plaintiff to proceed under a procedure that is without constitutional justification. Such a procedure is error and is contrary to the procedural guidelines laid down in virtually every decision in the country either on the federal or state

level interpreting notice requirements under various attachment statutes. The following cases support this proposition: Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (D. N.Y. 1974); Roscoe v. Buller, 367 F. Supp. 575 (D. My. 1973); Day State Harness Horse Racing and Breeding Ass'n., Inc., v. PPG Industries, Inc., 365 F. Supp. 1299 (D. Mass. 1973); In re Northwest Homes, 363 F. Supp. 725 (D. Wash. 1973); Gunter v. Merchants Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973); Clement v. Four North State Street Corp., 360 F. Supp. 933 (D. N.H. 1973); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D. R.I. 1972).

### POINT III

THE COURT ERRED IN NOT RESTRICTING THE ATTACHMENT TO THE PRESENT TITLE OWNERS OF THE PROPERTY.

As noted in the Statement of Facts, the present title owners of the property in Utah are Mr. and Mrs. Clifford Wright. James C. Wright is not a title owner and conveyed his interest to his parents in 1970. Plaintiffs alleged this conveyance was without consideration and made with the intent to defraud creditors, namely plaintiff. As the record now stands, however, Mr. and Mrs. Clifford Wright are the sole title owners and the attachment can extend only to the interests they hold. James C. Wright has no interest in the property and is not a proper party in this proceeding. Justice Crockett notes in his concurring opinion that this case has dual aspects in view of the alleged

fraudulent conveyance. Defendants submit no evidence has been introduced in the record that the conveyance was fraudulent and that the mere allegation of fraud is insufficient in law to justify the reinstatement of the writ. The point of greater significance however is that James C. Wright remains a party defendant when he has no ownership interests in the property; this constitutes error.

#### CONCLUSION

The defendants invite the Court to review its decision previously filed in this matter. Defendants strongly believe the Court erred in the particulars raised in this petition and that the decision as it now stands is contrary to prior decisions of this jurisdiction with respect to res judicata, is contrary to decisions of the United States Supreme Court and the weight of authority in other jurisdictions with respect to notice requirements under the attachment statute, and, finally, contrary to the legal principle that attachment extends only to title owners of the property. James C. Wright should therefore be dismissed as a party defendant.

DATED this \_\_\_\_ day of July, 1976.

BRANDT, MILLER, NELSON &  
CHRISTOPHERSON

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CERTIFICATE OF MAILING

MAILED, postage prepaid, a copy of the foregoing

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Attorneys for Plaintiff-Appellant

DATED this \_\_\_\_ day of July, 1976.

---

Secretary

The PEOPLE of the State of Colorado,  
Plaintiff-Appellee,

v.

James Clifford WRIGHT, Defendant-  
Appellant.

No. 25082.

Supreme Court of Colorado,  
En Banc.

June 18, 1973.

Defendant was convicted in the District Court, Dolores County, Willard W. Rusk, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Day, J., held that district attorney's allusions at trial to fact that defendant had not presented his theory of self-defense during investigation and questioning were constitutionally impermissible inferences that defendant was guilty and that an honest answer would have incriminated him and such statements were violative of defendant's right to remain silent.

Judgment reversed and cause remanded with directions.

Pringle, C. J., and Erickson, J., did not participate.

#### 1. Criminal Law ⚖️393(1)

Not only does a defendant have right to remain silent, but it is improper for prosecution to allude to his exercise of that right as indicating a consciousness of guilt. Const. art. 2, § 18; U.S.C.A. Const. Amends. 5, 14.

#### 2. Criminal Law ⚖️393(1)

It is impermissible to penalize individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. Const. art. 2, § 18; U.S.C.A. Const. Amends. 5, 14.

#### 3. Criminal Law ⚖️407(1)

Prosecution may not use at trial fact that defendant stood mute or claimed his privilege in face of accusation.

#### 4. Criminal Law ⚖️393(1)

District attorney's allusions at trial to fact that defendant had not presented his theory of self-defense during investigation and questioning were constitutionally impermissible inferences that defendant was guilty and that an honest answer would have incriminated him and such statements were violative of defendant's right to remain silent. Const. art. 2, § 18; U.S.C.A. Const. Amends. 5, 14.

#### 5. Criminal Law ⚖️719(3)

District attorney's comments in closing argument upon his own honesty and integrity as an elected public official and on veracity and honesty of sheriff were improper.

#### 6. Criminal Law ⚖️719(3)

It is improper for a prosecutor to express his personal belief or opinion as to truth or falsity of any testimony or evidence or guilt of the defendant.

#### 7. Criminal Law ⚖️438(4)

Where photographs depicting a reconstruction of position of decedent's truck and defendant's automobile at scene of killing were only offered to lend support to defendant's testimonial contentions, exclusion of the stage photographs was not error.

#### 8. Criminal Law ⚖️437

Where an exhibit has been arranged simply to portray a scene and thereby supports testimonial contentions, and when other witnesses dispute accuracy or correctness of the reconstructed scene, trial court should not admit the evidence, but if parties agree the exhibit correctly portrays the scene, the reconstruction may be admitted.

Duke W. Dunbar, Atty. Gen., John P. Moore, Deputy Atty. Gen., David A. Sorenson, Asst. Atty. Gen., Denver, for plaintiff-appellee.

Walter L. Gerash, H. D. Reed, Denver, for defendant-appellant.

AY, Justice.

Defendant-appellant, James C. Wright, convicted by a jury of first-degree murder and sentenced to life imprisonment. will be referred to as defendant or ght.

On April 19, 1970, defendant and his parents, Clifford and Essie Wright, had relatives in Dove Creek. On their home, they observed the decedent, Rhoades, and his wife coming from opposite direction in their pickup truck. There was some difficulty encountered as cars passed on a narrow and somewhat rocky road. Rhoades turned his truck around and caught up with and overtook Wright vehicle. Wright claimed that he was run off the road, and that Rhoades pulled in front of his car and stopped the truck. Rhoades then started back towards Wright's car. Wright remained behind the wheel of his car, but as Rhoades approached, Wright removed a pistol from a pocket in the car and laid it on the seat next to him. According to Wright, Rhoades opened the encounter between the two by making accusations about Wright's meddling in Rhoades' affairs. Rhoades then allegedly made a movement with his right hand toward his right rear pocket. At that instant defendant raised his pistol and pulled the trigger. The shot killed Rhoades instantly.

Decedent's wife, who had been standing a few feet away, moved the truck to allow Wright car to get by. Wright drove to his home and immediately notified the appropriate authorities of the death. He also called his own attorney, who arrived about the same time as the sheriff and district attorney. Thus, during the investigation, defendant's attorney was present. Defendant and his parents—on advice of counsel—refused to answer questions, but were described as being cooperative in other ways with the sheriff and district attorney.

Defendant at the trial contended he acted in necessary self-defense. There was developed in the evidence a picture, first, of a reasonably friendly and neighborly re-

lationship between Wright and Rhoades, who was married to Wright's cousin, but subsequently a deteriorating relationship between the two. The hostility began in 1965 when Rhoades and Wright's cousin were divorced. It continued to 1970—the time of the homicide. It was fed by such incidents as defendant's mother's lending money to Rhoades' wife during the divorce proceeding plus contentions that defendant allegedly supplied information to his cousin—who had moved to California—as to Rhoades' farming operations so that her share of the profits might not suffer. Wright claimed that because of the friction of the divorce the decedent had made direct threats to him and had engaged in violent actions towards third persons related to the defendant. Wright also claimed he felt apprehensive and threatened because of decedent's numerous suspicious activities near Wright's residence. There was substantial other evidence of decedent's violent propensities and his continuing hostility toward the Wrights. This background, Wright claimed, prompted him to place the gun by his side when Rhoades approached him. His fears allegedly surfaced when Rhoades made the claimed movement towards his hip pocket. On the other hand, there was testimony from decedent's wife that the defendant waited for Rhoades to come back from his truck to the Wright car and then shot Rhoades without provocation.

Throughout the trial, in eliciting direct testimony from the sheriff and in questioning defendant's father and mother, as well as in cross-examination of defendant, the district attorney continuously, over objection, alluded to the fact that Wright had not presented his theory of self-defense during the investigation and questioning by the sheriff and district attorney. At numerous times during the trial, the district attorney made direct reference and sidebar arguments concerning defendant's remaining silent and his refusal to answer questions. It was brought out four times on direct examination of the sheriff. In

cross-examination of Wright, the district attorney said:

"Did you entertain a reason not to discuss this matter with the authorities that evening?" (Objection sustained)

"But in any event you elected to get your attorney out there as fast as possible; wouldn't that be a true statement?"

"You didn't relate that to us did you? That's what you wanted. You didn't say anything; you listened to your attorney and you kept your mouth shut; isn't that right?"

During closing argument, among numerous improper comments, the district attorney compounded the prejudice created by his questioning of the witnesses with the following remarks in his summation:

"Now, Ladies and Gentlemen, who's kidding who? You know this fella, James Wright. You know all about him. I don't know what was on Claude Rhoades' mind when he told him to mind his own business.

"I submit that this man comes in here and tells twelve men and women of this county that I shot in self-defense and makes them believe it, then he's going to beat you to the bank laughing about it.

"The thing that puzzles me, Ladies and Gentlemen, if he meant this self-defense, what was the big secret about telling Mr. Johnson and myself and Melvin Foley that night; this noble act of self-defense that Mr. Dilts is talking about, trying to make you buy. Johnson is a reasonable man. I try to be. No, he called his attorney. Not only wouldn't he talk, but Clifford and Essie wouldn't talk because they were afraid they would incriminate themselves."

#### I.

[1] The primary argument asserted by the defendant is based on his constitutional right against self-incrimination. U.S. Const. Amendments V and XIV; Colo. Const. art. II, § 18. Not only does defendant

have the right to remain silent, but it is improper for the prosecution to allude to his exercise of that right as indicating a consciousness of guilt.

[2, 3] We repeat once again the rule stated by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694:

"\* \* \* In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.  
\* \* \*

*See People v. Mingo*, Colo., 509 P.2d 800 (announced 5/14/73). *See also Meader v. People*, Colo., 497 P.2d 1010; *Hines v. People*, Colo., 497 P.2d 1258; *Montoya v. People*, 169 Colo. 428, 457 P.2d 397; *Martinez v. People*, 162 Colo. 195, 425 P.2d 299; American Bar Association Standards of Criminal Justice Relating to the Prosecution Function, § 5.8.

[4] We cannot condone the prosecutorial activities utilized by the district attorney in this case on any theory, including those based in "traditional methods of cross examination." The only inference to be drawn from such comments and arguments was that the defendant was guilty and that an honest answer would have incriminated him. The prejudice that results from such activities is of constitutional proportion.

#### II.

[5] Compounding the district attorney's improper comments on defendant's silence were his comments on his own honesty and integrity as an elected public official and on the veracity and honesty of the sheriff.

In the closing argument are to be found such statements by the prosecutor as:

"I don't have any doubts about it Ladies and Gentlemen: you know your Sheriff, Bob Johnson, your duly elected

Sheriff, and the rest of those men who were called upon to perform a job. They had no reason to lie about it. Eldon Laffel didn't lie about it. \* \* \* I want you to believe me. I want you to be the judge of my credibility. I'm an honest man. \* \* \* Now I'll vouch for their veracity and I know that they told you people the truth \* \* \*."

[6] As set out in the American Bar Association Standards of Criminal Justice Relating to the Prosecution Function § 5.8:

"(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."

We again caution district attorneys against overzealousness in their efforts to convict and who by improper comments impair the conduct of a fair trial. As we said in *People v. Walker*, Colo., 504 P.2d 1098, concerning the role of the district attorney:

"\* \* \* A prosecutor's duty is to seek justice, not merely to convict. American Bar Association Standards for Criminal Justice Relating to The Prosecution Function and The Defense Function, The Prosecution Function § 1.1. '[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)."

### III.

[7.8] To avoid uncertainty in the event of a retrial, we comment on the assertion of error in the trial in excluding certain staged photographs depicting a reconstruction of the position of decedent's truck and defendant's car. We hold the court's ruling was proper. The photographs were only offered to lend support to the defendant's testimonial contentions.

In these circumstances where an exhibit has been arranged simply to portray a scene and thereby support testimonial contentions, and when other witnesses dispute the accuracy or correctness of the reconstructed scene, trial court should not admit the evidence. See *State v. Ray*, 43 N.J. 19, 202 A.2d 425; *State v. Oldham*, 92 Idaho 124, 438 P.2d 275. Of course, if the parties agree the exhibit correctly portrays the scene, the reconstruction may be admitted.

The judgment is reversed, and the cause is remanded for a new trial.

PRINGLE, C. J., and ERICKSON, J., do not participate.



CURTIS, INC., a Delaware corporation,  
Petitioner,

v.

The DISTRICT COURT IN AND FOR the  
CITY AND COUNTY OF DENVER, State  
of Colorado, and the Honorable Robert E.  
McLean, one of the Judges thereof, Re-  
spondents.

No. 25972.

Supreme Court of Colorado,  
En Banc.

June 18, 1973.

Original proceeding in nature of prohibition or in the alternative for writ of mandamus. The Supreme Court, Kelley, J., held that in action involving disclosure of trade secrets and confidential information concerning plaintiff's record keeping and information systems, plaintiff was entitled to have the judge hear the evidence initially and not through a report from a referee, and hence trial court improperly appointed a master in such action.

Rule made absolute, and matter remanded with directions.