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THE HONORABLE DONALD P. SMITH, JR.,
COLORADO COURT OF APPEALS*

JON J. WALKWITZ**

Judge Donald P. Smith, Jr. was appointed to the Colorado Court of Appeals in the fall of 1971 and sworn in January 1972. The contemporary court of appeals is Colorado's third and was created by statute pursuant to section 1 article VI of the state constitution in 1969.¹ The state's first intermediate appellate court was created in 1891 and consisted of three judges;² it was abolished in 1905.³ The second court, established in 1911, had a statutorily specified term of existence of only four years, and was thus dissolved in 1915.⁴ The present court began, pursuant to its enabling statute, on January 1, 1970, and was originally composed of six judges with statewide jurisdiction over only civil appeals.⁵ Judge Smith's appointment as Governor John A. Love's first merit appointee to an appellate court from the district court bench followed the resignation of Judge Phil Dufford and marked the beginning of twenty-one years of distinguished service as a respected, energetic and vigorous appellate jurist.

Judge Smith brought to the appellate bench a wealth of experience. His years in private trial practice included broad and diverse representation of clients in many areas of civil and criminal law and he developed particular expertise in the areas of real estate, municipal law and the law of eminent domain.

In 1964 Judge Smith was elected to the Arapahoe County District Court bench (Eighteenth Judicial District), presiding over civil, criminal and juvenile proceedings. Combining service as a trial and appellate judge with service to the bench and bar, he served as Secretary and Vice President of the Colorado District Judges Association and as its legislative chairman. He was also a founder and member of the Colorado Council of Juvenile Court Judges. Convinced of the value of continuing legal education, he was a faculty advisor at the National Judicial College located in Reno, Nevada in 1969 and while an appellate judge, he served on the faculty of that college from 1979 to 1982. He also lectured at the University of Denver and at various judicial conferences in other states.

* Judge Smith recently retired from the Colorado Court of Appeals.

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1. 1969 COLO. SESS. LAWS 106 §§ 37-21-1 to -265.

2. 1891 COLO. SESS. LAWS § 2.

3. COLO. CONST. art VI, § 8, as amended by 1903 COLO. SESS. LAWS 149.

4. COLO. REV. STAT. § 1439 - A (West 1911).

5. The court was increased to 10 judges in 1974, and to 16 effective July 1, 1988. The court's jurisdiction has been expanded to include criminal cases, agency review and workers' compensation claim review. COLO. REV. STAT. §§ 13-4-102 to -103 (1987).

During his service on the court of appeals, Judge Smith was named chairman of the Colorado Judicial Planning Council in 1979, a position he held for five years. Under his leadership, the council recommended, among other things, an in-state system for the training and education of the judiciary and proposed the creation of a judicial retention review and recommendation system. Both of these ideas were ultimately adopted. Further service to the judiciary included chairmanship of Colorado Supreme Court Committee on Judicial Retirement and in 1987-88, chairmanship of the Committee to Review and Redraft the Code of Judicial Conduct.

Judge Smith recognized early the value of technology and computerization to the efficient administration of courts. He strongly and ardently advocated computerization and served as the Chairman of the Colorado Bar Association Committee on Law and Technology in 1977-78. He was instrumental in initiating and directing the computerized printing of Colorado Supreme Court and Court of Appeals reports from 1975-1980 and instituted a computerized legal research system for the Colorado judiciary. He has lectured and consulted throughout the country on court-technology matters.

Although consistently devoted to assisting and serving the professional needs of the bench and bar, Judge Smith firmly believes that in order to win and maintain the public's respect for the legal system, judges must not divorce or seclude themselves from the problems and concerns of society. This conviction led him to assist in founding the "Inter-Faith Task Force" dedicated to the performance of charitable good works in Arapahoe County. Concerned with the needs of children and their welfare, Judge Smith, together with other district court judges, was instrumental in creating the Arapahoe County Juvenile Evaluation Center and Children in Need of Supervision ("Chins") home.

I. PROFESSIONAL BACKGROUND AND PRIVATE PRACTICE

Judge Smith attended public schools in Denver and upon graduation attended Colorado State University. He obtained his law degree from the University of Denver College of Law in 1956. After graduation, he opened a law firm in Englewood with classmates William Myrick and John Criswell (now also a judge on the Colorado Court of Appeals). The firm expanded to include Joseph Branney and the firm's practice emphasized plaintiff's personal injury claims, real estate and other civil matters. Judge Smith acquired a notable mastery of municipal law and he was retained by the cities of Sheridan as City Attorney and Englewood as an Assistant City Attorney.

In the late 1950's, the state began constructing the Colorado portions of Interstate Highways 25 and 70. At the request of Colorado Attorney General Duke Dunbar, Judge Smith took a two-year leave from private practice to conduct condemnation trials for the acquisition of the required highway rights of way throughout the state. After his return to the firm, he was appointed a special assistant attorney general for the purpose

of drafting a recodification of the State's motor vehicle laws for the legislature.

II. THE DISTRICT COURT

Judge Smith's election to the Arapahoe County District Court in 1964 brought him responsibility for a varied and extensive civil and criminal docket. His judicial demeanor and recognized administrative ability led to his selection in 1968 as Presiding Judge of the Eighteenth Judicial District. Having earned a reputation as one who has a particular concern for juvenile matters and solidly committed to the community welfare, he was retained in 1970 for another six year term by the vote of the people. He continued as a district court judge until his appointment to the appellate bench.

III. THE COLORADO COURT OF APPEALS

Donald P. Smith, Jr. was appointed as a judge to the Colorado Court of Appeals in 1971 by Governor John A. Love. He was retained in 1974, 1982 and 1990. He is, as of the date of this writing, after Judge Charles D. Pierce, the senior member of the court.

A. *Significant Opinions*

1. Real Property

Judge Smith's opinions in the field of real property reflect a firm knowledge of English common law and history as well as a command of how those sometimes seemingly arcane doctrines can be adapted to meet the needs of modern life, all without sacrificing the value of precedent or the import of long-accepted principles. His opinions recognize contemporary practice and problems but are written within the settled bounds of Colorado and Anglo-American law.

In *Brundage v. Perry*,⁶ Judge Smith addressed the effect of the "rule against perpetuities" as it related to a conditional option to repurchase certain realty. The seller attempted to repurchase the property and the buyer refused, arguing that the option was void as an impermissible restraint on alienation and additionally was violative of the rule against perpetuities.⁷ In reversing the trial court's judgment declaring the option void, Judge Smith noted that while options in gross to purchase realty are subject to the operation of the rule against perpetuities and must conform to the vesting requirements of that rule, exercise of the option at issue, despite the fact that it inured to successors and assigns, was specifically limited to a fixed six year period without reference to a measuring life in being at the creation of the interest.⁸ The "rule" was thus inapplicable since any interest created by the option must have vested, if at all, within a

6. 41 Colo. App. 526, 592 P.2d 6 (1978), *aff'd* 200 Colo. 229, 614 P.2d 362 (1980).

7. *Id.* at 528.

8. *Id.*

six year term in gross. The analysis contained in this opinion continues to provide guidance to the resolution of future "rule" cases.

In refusing to void the option on the grounds it impermissibly restrained alienation Judge Smith concluded that, in the commercial context involved, the option was supported by sufficient consideration and, consequently, did not operate as an impermissible contractual abdication of the buyer's power to alienate the property.⁹

2. Conflict of Laws

Few areas of the law are so esoteric yet so frequently determinative of a litigant's substantive rights and case procedure as the resolution of conflict of laws questions. In *Sabell v. Pacific Intermountain Express Co.*,¹⁰ the plaintiff, a Colorado resident, was injured in a motor vehicle accident in Iowa and brought suit in Colorado alleging negligence against the defendant, a corporation authorized to do business and also resident in Colorado.¹¹ Judge Smith determined that the specific choice of tort law principles of the *Restatement (Second) of Conflict of Laws* should be applied in ascertaining whether Iowa or Colorado traffic regulations should apply in determining the standard of care and whether Colorado's comparative negligence statute¹² or Iowa's contributory negligence doctrine was applicable. In evaluating and analyzing the "significant contacts" choice of law rule in a multi-state tort controversy, Judge Smith concluded that the *lex loci* of the jurisdiction where the injury and its causal conduct occurred should determine the standard of care, but that the comparative negligence law of Colorado should be applied to fix the liability between the two Colorado residents.¹³ The analysis of the principles of the *Restatement (Second) of Conflict of Laws* and the insightful discussion of policy considerations in *Sabell* remain fundamental to an understanding of this state's position in this difficult area of practice and stands as an excellent precedent-setting dissertation on the appropriate parameters to be employed in resolving choice of law problems.

3. Evidence

In *Coon v. Berger*,¹⁴ an action for professional malpractice was brought against an attorney. The first trial was reversed on appeal and remanded for a new trial,¹⁵ which resulted in a deadlocked jury. Prior to a third trial, the defendant attorney died and the administrator of the estate moved for summary judgment relying upon the testimonial preclusion of the "Dead Man's Statute."¹⁶

9. *Id.*

10. 36 Colo. App. 60, 536 P.2d 1160 (1975).

11. *Id.* at 63.

12. COLO. REV. STAT. § 13-21-111 (1973).

13. 36 Colo. App. 70-71, 536 P.2d 1166-67.

14. 41 Colo. App. 358, 588 P.2d 386 (1978), *aff'd* 199 Colo. 133, 606 P.2d 68 (1980).

15. *Coon v. Ginsberg*, 32 Colo. App. 206, 509 P.2d 1293 (1973).

16. COLO. REV. STAT. § 13-90-102 (1973).

Judge Smith, in a tight, well reasoned opinion, concluded relative to this issue of first impression, that equality of the parties was best served by allowing either party to introduce the decedent's prior transcribed testimony into evidence and then permitting plaintiffs to testify on their own behalf, provided such testimony was limited to relevant and competent matters raised by the decedent's recorded testimony.¹⁷ To do otherwise, Judge Smith concluded, would thwart the purpose of the statute, which seeks to prevent the living party from exercising unfair advantage over decedent's estate by putting both on an equal footing. Refusing the decedent's recorded testimony under the factual circumstances present would not, Judge Smith reasoned, advance justice or the equality the statute intended to promote.¹⁸

In its decision upon *certiorari*, the Colorado Supreme Court unanimously upheld this decision. In approving his reasoning, the supreme court noted that a contrary result, as reasoned by Judge Smith, "would place justice in imbalance rather than balance."¹⁹

4. Criminal Law

The court of appeals in *People v. McPherson*²⁰ ruled that an unloaded rifle is not a deadly weapon and that a defendant's use of an unloaded weapon could not sustain a conviction for felony menacing under the criminal law.²¹ Judge Smith, in his dissenting opinion, reasoned that it is immaterial whether the rifle was loaded or not, since the essential element of the offense is complete when the defendant commits an act or communicates a threat using a weapon in implementing his intent to cause fear in the victim.²² The dissenting opinion recognized that the culpable conduct rested in the intended provocation of the victim's fear and was not dependent upon the defendant's actual ability to consummate the threat.²³

The Colorado Supreme Court adopted this reasoning and reversed the court of appeals decision.²⁴ Echoing Judge Smith's rationale, the supreme court concluded that the specific intent of the defendant to cause fear is the gravamen of the offense. A weapon, unloaded or not, when used and accompanied by the intent to place another in fear of imminent serious bodily injury, is sufficient grounds for conviction.²⁵

CONCLUSION

Judge Smith has authored more than sixteen hundred opinions while an appellate judge. He has substantially contributed to Colorado jurispru-

17. *Berger*, 41 Colo. App. at 360-61, 598 P.2d at 388.

18. *Id.*

19. *Berger v. Coon*, 199 Colo. 133, 135, 588 P.2d 386, 387 (1980).

20. 43 Colo. App. 96, 601 P.2d 355 (1979), *rev'd*, 200 Colo. 429, 619 P.2d 38 (1980).

21. COLO. REV. STAT. § 18-3-206 (1973).

22. *McPherson*, 41 Colo. App. at 99-100, 601 P.2d at 357-58 (Smith, J. dissenting).

23. *Id.*

24. 200 Colo. 429, 619 P.2d 38 (1980).

25. *Id.*

dence and has actively promoted the professional competence and caliber of the bench and bar, while striving to maintain the public trust in the administration of justice. Although Judge Smith has announced his intention to retire from the bench effective January 31, 1993, he will continue to apply his reasoned judgment and administrative talent to the judicial process as a senior appellate judge serving by assignment of the Chief Justice.²⁶ The appellate court will continue to benefit from his years of experience as a lawyer, trial and appellate judge and from his unfailing devotion to the highest and best principles of public service.

26. See COLO. CONST. art. VI, § 5(3) and COLO. REV. STAT. § 24-51-1105 (1988).