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The Colorado Supreme Court ground out nearly seventy decisions during 1959 in which constitutional or administrative law issues were raised. Both space and time make it impossible to review all of the decisions. Omitted from this review are those cases considered unimportant, those which most likely will be reviewed elsewhere, and those which turn on minute points or raise issues without merit.

I. CONSTITUTIONAL LAW

Due Process of Law—Definiteness and Certainty

The Colorado Supreme Court had occasion, in two cases, to consider whether Colorado statutes were void for want of sufficient definiteness and certainty in the definitions and terms used to meet the requirements of due process of law. The judicial test established by the Supreme Court of the United States, in applying the due process clause of the fourteenth amendment, requires that the language of a state statute defining liability be plain enough that men of ordinary intelligence need not guess at its meaning.[1]

The state statute prohibiting sale or use of fireworks[2] was in question in *People v. Young*.[3] The sole question, thought the court, was whether the law was so vague and indefinite as to render it unconstitutional under Art. II, Sec. 25 of the Colorado Constitution and the fourteenth amendment. After defining the term "fireworks," the legislature attempted to exclude certain kinds of fireworks in the following language:

> The term 'fireworks' shall not include toy pistols, toy guns, sparklers or torches which do not contain explosive charges or other devices in which paper caps manufactured in accordance with United States interstate commerce commission regulations for packing and shipping of toy paper caps are used and toy pistol paper caps manufactured as provided in this article.[4]

The court sustained the statute as being sufficiently definite and unambiguous that "no ordinary person could be misled."

The Colorado statute[5] defining insanity as a defense in criminal prosecutions was attacked as being so uncertain, ambiguous and unintelligible as to constitute a deprivation of due process and equal protection in *Castro v. People*.[6] The defendant relied on *Durham v. United States*[7] which is said to hold that neither the right and wrong test nor the irresistible impulse test supply adequate criteria

1 Connally v. General Construction Co., 269 U.S. 385 (1926).
2 Colo. Rev. Stat. §§ 53-5-1, 53-5-2 (1953).
3 339 P.2d 672 (Colo. 1959).
4 Colo. Rev. Stat. § 53-5-1 (1953).
5 Colo. Rev. Stat. § 39-8-1(2)(1953).
6 346 P.2d 1020 (Colo. 1959).
7 214 F.2d 862 (D.C.Cir. 1954).

for determining criminal responsibility. It appears, on a careful reading of the *Castro* case, that the court did not actually decide the question raised, but held the matter to be one of policy and properly left for legislative consideration.

Due Process—Adequacy of Notice

In two cases the Colorado Supreme Court stood between persons and agencies of government to prevent impairments of property rights without adequate notice of the proceeding. But in another case it would appear that the court permitted—even ordered—impairment of private rights of persons not before the court.

The sufficiency of notice given by county commissioners of deliberations leading to a rezoning ordinance was questioned in *Holly Development Co. v. Board of County Comm'rs.*[8] The notice as published contained no reference to rezoning, erroneously described the zone classification of the property to be rezoned, said that the hearing would be at the "Court House" at a given day and hour. Despite the fact that Holly Development knew about this hearing, apparently understood its purpose, and actually appeared and participated in the hearing, the court said that the notice was insufficient, ambiguous and misleading, and unintelligible to the average citizen who might be affected thereby. The failure to give proper notice was thought to be dereliction in complying with mandatory conditions precedent to the exercise of power.

In a probate proceeding one of the heirs obtained letters, an order to publish notice, and, seemingly on the same day, a decree of final settlement which cut off another heir who claimed a one-half interest in the property of the estate. The aggrieved heir, learning of the situation some five and one-half years later, brought action to set aside the final decree. The Colorado Supreme Court[9] ruled that county courts sitting in probate matters have no more authority to conduct proceedings without notice in disregard of due process than do other courts or tribunals.

The court seems to have been caught napping in *Lucas v. District Court.*[10] In *Lucas,* action had been brought to recover damages resulting from the alleged negligence of the defendant in an auto accident. In pretrial discovery proceedings, plaintiff was taking the deposition of the defendant and asked whether defendant had casualty insurance and, if so, the policy limits. Defendant admitted having such insurance but refused to answer as to policy limits, obviously believing that the amount of insurance carried had little to do with either liability or damages. A hearing was had in the district court on the merits of the question whether defendant should answer concerning policy limits and the question was decided negatively in that court. The plaintiff sought mandamus in an original proceeding in the Colorado Supreme Court for an order directing the district court to order the defendant to answer as to policy limits. The defendant was never notified or required to appear to argue the question. One suspects that one of the insurance company counsel who appeared as amicus curiae represented the insuror of defendant, but the record is inconclusive. In any

8 342 P.2d 1032 (Colo. 1959).
9 Michels v. Clemens, 342 P.2d 693 (Colo. 1959).
10 345 P.2d 1064 (Colo. 1959).

event, the Colorado Supreme Court, never noticing except in dissent that the defendant was not represented in either brief or argument, decided that the defendant must disclose the limits of the casualty insurance carried. Without further documentation of its reasons for so deciding the numerous constitutional issues raised by the briefs and oral arguments, the court simply said (on rehearing):

> We have carefully examined the arguments and authorities set forth in the briefs and have considered the oral arguments of counsel which were offered at the hearing which was extended to all of counsel, including amicus curiae, and we are of the opinion that all of these contentions are without merit. It seems doubtful to us in the extreme that the Supreme Court of the United States would conclude that this Court's construction of its own rule[11] constituted a violation of the provisions of the Constitution of the United States. . . . [12]

The court assumes that its construction of its own rule can not possibly be unconstitutional in its application!

In this case many constitutional issues were raised by counsel. Some of them seemed to have merit. But Mr. Justice Hall noticed the most fatal defect in the whole proceeding when he pointed out that:

> Now this court redetermines this identical question 'on its merits' and without having before it two of the parties to the district court proceedings. Such determination in my humble opinion is in violation of both federal and state constitutional guaranties of due process and is therefore void for want of jurisdiction.[13]

Mr. Justice Hall's point is well taken. The persons whose resources were at stake in the case were the Moores. Their counsel may well have had some good legal reasons why the plaintiff should not have been permitted to inquire into the limits of their liability policy equally cogent as those which would deny the plaintiff from inquiring into how much property the Moores owned.

Arbitrary Interference With Property Rights

The Denver zoning ordinances of 1956 were struck down in important parts as being in violation of due process of law, as being abuses of police power, as being unreasonably discriminatory, or as being retrospective in operation as applied to one of the parties.[14]

The requirement that the owner of property in the B-6 district provide large areas of off-street parking[15] from which requirement property in the adjoining B-5 district was exempt was declared to be "unconstitutional when tested by the due process clause of the

11 Colo. R. Civ. P. 26(b) which provides, in pertinent part: " . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

12 345 P.2d 1064, 1074 (Colo. 1959).

13 *Id.* at 1080.

14 Denver v. Denver Buick, Inc., 347 P.2d 919 (Colo. 1959).

15 Denver, Colo., Rev. Municipal Ordinance, art. 614 (amend. 1959).

state and federal constitutions and by Article II, Section 15, of the State Constitution which provides, inter alia, that 'private property shall not be taken or damaged, for public or private use, without just compensation.' "[16] The court found that both B-5 and B-6 districts were general business areas and that there was not sufficient difference between them to warrant imposition of the burden of off-street parking on one and exempt the other. Further, the court could not find that requiring off-street parking had any relevancy to the public health, safety and welfare. The latter reason for striking down the ordinance would probably prevent the imposition of off-street parking requirements anywhere in the city.

Also declared to be invalid was the ordinance provision prohibiting the extension of certain kinds of building uses declared by the ordinance to be nonconforming.[17]

The court further deemed the discrimination,[18] between B-5 and B-6, as to the kinds of businesses permitted in each, size and use of buildings, number of employees permitted, and other discriminations, to be "unlawfully and unreasonably discriminatory." Having already determined that the two areas were very similar in nature, the court could see no reasonable basis for permitting the operation of pawn shops and music studios in one and prohibiting such uses in the other.

In *Denver v. Greenspoon,*[19] the city created a sewer district financed by special improvement assessments. The plaintiff owned property which was incapable of being served by the sewer inasmuch as the sewer line was high on a bluff at the rear of plaintiff's property. He brought action to have the assessment against his property set aside. The court granted the relief requested, saying that "To enforce a special assessment for a purpose which does not confer a special benefit upon the property on which it is levied would result in taking property without compensation, in violation of due process of law."[20]

Delegation of Legislative Power

The extent to which the legislature may lawfully delegate its authority was considered in four cases.

The Board of Regents of the University of Colorado is authorized to fix the charges for hospital services at Colorado General Hospital "at a rate based upon the actual per diem expenses."[21] Upholding the formula, the court said, "That such is not a delegation of legislative power, but rather the delegation of a power to the Board to determine some fact, or state of things, upon which the law as prescribed depends, appears beyond doubt."[22]

A Tri-County District Health Department was authorized by law[23] to make rules and regulations, violations of which were punishable as misdemeanors.[24] A prosecution resulting in a conviction for violation of one of the rules was reversed,[25] the court ruling with

16 Denver v. Denver Buick, Inc., 347 P.2d 919, 923 (Colo. 1959).
17 Denver, Colo., Rev. Municipal Ordinances, art. 617 (amend. 1959).
18 Denver, Colo., Rev. Municipal Ordinances, art. 612 §§ .9-1 and .10 (amend. 1959).
19 344 P.2d 679 (Colo. 1959).
20 *Id.* at 681.
21 Colo. Rev. Stat. § 124-4-6 (1953).
22 Bettcher v. Colorado, 344 P.2d 969 (Colo. 1959).
23 Colo. Rev. Stat. § 66-2-7(4)(1953).
24 Colo. Rev. Stat. § 66-2-14 (1953).
25 Casey v. People, 336 P.2d 308 (Colo. 1959).

very little discussion that the legislature had unlawfully delegated its power contrary to the Colorado Constitution, Art. III.

In another case,[26] the defendant was convicted of violating a land use ordinance adopted by the voters in a soil conservation district. The state statute[27] attempted to authorize the adoption of such ordinances by three-fourths of the voters voting in the district. Violations of the ordinances were misdemeanors. Because the statute left the determination of what acts would be punishable to the voters, the court declared the statute to be an unlawful delegation of power.

In an attempt to restore somewhat the pre-*Merris* status quo, the legislature enacted a statute[28] which would have given municipalities power to make and enforce ordinances imposing criminal penalties for conduct of both local and statewide import, even though the subject matter was covered by state law. Prosecution under a municipal ordinance would have barred a prosecution for the same offense under the state law, and vice versa. The Governor requested an advisory opinion from the Colorado Supreme Court which held[29] the law to be an unlawful delegation of legislative power to cities, and that the law would authorize the adoption of special and local laws in violation of the Colorado Constitution, Art. V, Sec. 25.

Municipal Ordinances v. State Statutes

In the wake of the *Merris* decision[30] have followed numerous cases in which the courts have had to wrestle with the distinction between matters of local concern and matters of state-wide concern in order to decide upon the enforceability of municipal ordinances. *Merris* held that drunken driving of a motor vehicle was of general state-wide concern and that a state statute punishing drunken driving precluded municipalities from prosecuting under local ordinances. The problem which is creating the greatest difficulty seems to be whether home-rule cities may by ordinance punish for conduct which is of general state-wide concern, but which is also somewhere between a little bit and a great deal of local concern.

It was noted above that the Colorado Supreme Court unanimously struck down Senate Bill 72, passed by the Forty-ninth General Assembly, which would have authorized cities to enact and enforce ordinances concerning matters which were at the same time of both local and state-wide interest. The reason given was that Art. V, Sec. 25 of the Colorado Constitution prohibits the legislature from enacting local or special laws when a general law will do. And otherwise, the legislature is prohibited from delegating its power to enact general laws. Three recent decisions handed down last year serve to illustrate the confusion brought about by *Merris*, and also seem to indicate that what the legislature was told it could not do in Senate Bill 72 without a constitutional amendment is, nevertheless, being permitted with the sanction of judicial legislation.

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26 Olinger v. People, 344 P.2d 689 (Colo. 1959).
27 Colo. Rev. Stat. §§ 128-1-9, 128-1-14 (1953).
28 Senate Bill 72, Forty-ninth General Assembly.
29 *In re* Senate Bill 72, 339 P.2d 501 (Colo. 1959).
30 Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958).

The three cases all arose in Denver and consequently involve the special authority given home-rule cities by Article XX of the Colorado Constitution to legislate upon any subject of local concern with the same power as might otherwise be exercised by the legislature.

Davis v. Denver[31] held that Denver could not enforce an ordinance prohibiting the operation of a motor vehicle by one whose driver's license is suspended or revoked. In its opinion, the Colorado Supreme Court said:[32]

> . . . Article XX of the Constitution does not grant to the City authority to regulate matters of general and state-wide concern and, as indicated above, this power can be exercised by municipalities *only* if the State consents to its exercise and provided that the matter, although predominantly general, is one in which the municipality has sufficient interest to warrant the delegation of power to it . . . .

A specially concurring opinion agrees with the result reached by the majority in this case but sees trouble ahead by virtue of the majority's finding power in the legislature to consent to local legislation on matters predominantly of state-wide concern.

Denver was also denied power to prohibit driving a motor vehicle while the driver's license was revoked, in *Denver v. Palmer*.[33] In its opinion, the court said that the offense of driving while the operator's license is suspended or revoked is a matter of general state-wide importance and concern and, therefore, any attempt by the city to legislate on this subject is ultra vires and void. Note the absence in this case of the use of the term "predominantly of state-wide concern."

In a third case,[34] Denver claimed authority to regulate speed on the Valley Highway, a limited access four- and six-lane non-stop arterial highway traversing the city, connecting at both ends with state highways, and carrying both local and through traffic. The court sustained Denver's power to regulate speed, although asserting that the predominant interest was that of the state. The opinion then asserts that the "right of the City to regulate speed had been in fact recognized by the State by allowing the City to post the highway and enforce its ordinances. The City, *acting with the consent and approval of the State*, had the requisite jurisdiction in the premises. . . ."[35] There is here an apparent and substantial conflict with *In Re Senate Bill 72*[36] concerning the validity of state permission to cities to regulate matters predominantly of state-wide concern.

Other Cases

The so-called severance tax enacted in 1953[37] imposing a graduated tax upon gross income derived from the production or extraction of crude oil and natural gas was contested by The California Company[38] as being unconstitutional for a number of reasons. The

31 342 P.2d 674 (Colo. 1959).
32 *Id.* at 677.
33 342 P.2d 687 (Colo. 1959).
34 Denver v. Pike, 342 P.2d 688 (Colo. 1959).
35 *Id.* at 687 (Emphasis supplied).
36 *In re* Senate Bill 72, 339 P.2d 501 (Colo. 1959).
37 Colo. Rev. Stat. § 138-1-7 (1953).
38 Calif. Co. v. Colorado, 348 P.2d 382 (Colo. 1959).

company contended that the tax was repugant to the due process and equal protection requirements of the state and federal constitutions; that the tax is not an income tax but rather a property tax and as such violates the state constitutional provisions requiring uniformity[39] and limiting the rate of the levy;[40] and that the tax unduly burdened interstate commerce and was therefore repugnant to the federal constitution. The Colorado Supreme Court held that the tax was an excise tax, and not a property tax. Laboring the point long, the court finally concluded that the progression in the tax rate in relation to gross income was not arbitrary and therefore did not transgress equal protection and due process. The court disposed of the objection on interstate commerce grounds by holding that the tax fell upon income from an intrastate operation, the extraction of oil and gas, before the oil and gas ever entered interstate commerce.

An important decision[41] in the field of labor-management relations considered the question whether the Colorado state courts could enjoin a labor union from picketing where the object was to coerce the employer to operate a closed shop, conduct which is defined as an unfair labor practice by the Colorado Labor Peace Act.[42] The same conduct is defined as an unfair labor practice in the Taft-Hartley Act of 1947.[43] Further, the federal act gives the National Labor Relations Board exclusive power to enforce Taft-Hartley and provides that the board may cede its power to an agency of the state.[44] It is elementary and needs no citation that federal power over labor management relations is predicated on the effect of such relations upon interstate commerce. Nowhere in the opinion of the Colorado Supreme Court is there an explanation why the controversy between the plaintiff and the defendant should be considered as affecting interstate commerce. The court's decision that the exclusive jurisdiction of the NLRB over the matter ousted the jurisdiction of the state court seems to be consistent with many cases cited in the opinion—assuming that interstate commerce was involved. But the United States Supreme Court has sustained many injunctions entered by state courts to restrain unfair labor practices in controversies not affecting interstate commerce.[45]

II. ADMINISTRATIVE LAW

Again, as in prior years, the administrative law cases reflect the propensity of certain of the administrative agencies to be arbitrary and capricious in the decision of cases before them and to fail in making a record and findings sufficient for judicial review.

Decisions Contrary to the Evidence

As a practical matter, there would be little point in holding hearings and taking evidence if decisions are not based upon evidence. As a matter of constitutional right, a person whose liberty or property is to be affected by a hearing is entitled to a finding and

39 Colo. Const. art. X § 3.
40 Colo. Const. art. X § 11, limiting the state property tax levy to 4 mills on each $1 of valuation.
41 Building Constr. Trades Council v. American Builders, Inc., 337 P.2d 953 (Colo. 1959).
42 Colo. Rev. Stat. § 80-5-6 (1953).
43 29 U.S.C. §§ 157-58 (1956).
44 29 U.S.C. § 160 (1956).
45 See, e.g., Local Union No. 10 v. Graham, 345 U.S. 585 (1953); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950).

decision in accordance with the evidence.[46] During 1959, the Colorado Supreme Court reversed the decisions of administrative agencies in at least four cases because the court deemed agency action to be arbitrary and capricious in that the decision in each case was clearly contrary to the evidence.[47]

Necessity for Record and Findings

In three cases the Supreme Court reversed and remanded agency actions because the agency had not made any record of the proceedings or evidence, making it impossible for the court to determine whether the decision was in accord with the evidence.[48]

Typical language to be found in the court's opinions reversing and remanding such cases is the following from *Colorado Banking Board v. Finnigan*,[49] in which the agency action was sent back "with directions to the trial court to remand the matter to the Board . . . for hearing in the plaintiff's application and the *taking and recording of all testimony*, exhibits, and other evidence in support of the application . . . *for the making of specific findings of fact as the basis of an order granting or denying the license applied for.*"[50]

Variance Between Charge and Findings

Just as the finding must be in accord with the evidence, so must the finding be consistent with the charge. In *State Civil Service Commission v. Conklin*,[51] the defendant, Commander of the Soldiers and Sailors Home, was charged, in a complaint to the Civil Service Commission, with negligent and wilful failure to control fiscal matters, use of heavy-handed methods, failure to keep a physical inventory, refusal to cooperate with the governing board, insubordination, lack of capacity to prepare and supervise a budget, lack of administrative ability, incompetent supervision of a boiler installation, and failure to make proper inspections and reports. The Civil Service Commission held a hearing on the complaint and entered its findings and order, reciting that it found a "complete breakdown and loss of confidence between the Board of Commissioners . . . and the present Commander . . . has irritated members of the Board of Commissioners . . . ."[52] The court held, therefore, that Conklin should be removed.

The Supreme Court, on review, said, "The Commission made no specific findings with reference to any of the seven charges preferred against Conklin . . . . it was improper to find him guilty of shortcomings of which he was not charged . . . ."[53] The removal order of the Civil Service Commission was vacated.

46 See Western & A. R.R. v. Henderson, 279 U.S. 639 (1929).
47 Colorado Transp. Co. v. P.U.C., 347 P.2d 505 (Colo. 1959); McNertney v. State Bd. of Examiners of Architects, 342 P.2d 633 (Colo. 1959); Board of County Comm'rs v. Skaff, 340 P.2d 866 (Colo. 1959); Buddy & Lloyd's Store No. 1, Inc. v. City of Aurora, 337 P.2d 389 (Colo. 1959).
48 Neverdahl v. Linder, 347 P.2d 512 (Colo. 1959); Buddy & Lloyd's, *supra* note 47; Colorado Banking Bd. v. Finnigan, 336 P.2d 98 (Colo. 1959).
49 336 P.2d 98 (Colo. 1959).
50 *Id.* at 100 (Emphasis supplied).
51 138 Colo. 528, 335 P.2d 537 (1959).
52 *Id.* at 531-32, 335 P.2d at 538-39.
53 *Id.* at 533, 335 P.2d at 539-40.