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One Year Review of Constitutional and Administrative Law

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ONE YEAR REVIEW OF CONSTITUTIONAL AND ADMINISTRATIVE LAW

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Attorneys reviewing the decisions of the supreme court of the Centennial State, in the fields of constitutional law and administrative law during 1958, will be at once pleased, astonished and confused. Pleased with the court's insistence upon practical good sense in the conduct of proceedings by administrative agencies and courts. Astonished at the boldness with which the court takes a new course in waters thought well-charted and marked with the buoys of precedent. And confused by the diametrically opposite results arrived at in some of the cases.

I. CONSTITUTIONAL LAW

It is in the field of constitutional law that the most surprising decisions have come in the past year.

Is it Fish or Fowl?

In 1955 there appeared in the pages of DICTA[1] a rare gem of satirical legal literature written by the Honorable Mitchell B. Johns, Judge of the Superior Court of Denver, in which were dramatically examined the incongruities of the Colorado rule that a violation of a municipal ordinance imposing fine or imprisonment is tried as a civil action. The doctrine was established early in Colorado jurisprudence,[2] and has persisted despite the misgivings of judges who didn't like the rule[3] but who felt bound by precedent. Judge Johns held up for all to see a system in which a defendant in a civil action was denied a right to answer, but rather required to plead guilty or not guilty; a system in which, if the plea were not guilty, the defendant nevertheless might be fined or imprisoned on a mere preponderance of the evidence in a trial without a jury.

In one bold stroke, the Supreme Court of Colorado determined to abandon the pseudo logic of former decisions. In *Canon City v. Merris*[4] the court sustained a trial court rule that a person on trial for violation of a city ordinance[5] punishable by fine or imprisonment was entitled to all the constitutional guarantees traditionally surrounding criminal trials. Operation of a motor vehicle while under the influence of intoxicating liquor was a misdemeanor under a state statute[6] and punishable also under the city ordinance.[7]

In sustaining the dismissal of the case against Merris, the supreme court began with the premise that the Home Rule Amendment of the Colorado Constitution not only grants municipalities power to determine local destiny, but also provides that, "any act in violation of the provisions of such charter or of any ordinance thereunder shall be *criminal*

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[1] 32 DICTA 387 (1955).
[2] Dietz v. City of Central, 1 Colo. 323 (1871).
[3] McInerney v. Denver, 17 Colo. 302, 29 Pac. 516 (1892); Hughes v. People, 8 Colo. 536, 9 Pac. 50 (1885).
[4] 323 P.2d 614 (Colo. 1958).
[5] Driving a motor vehicle while under the influence of intoxicating liquor.
[6] The statute is not cited in the opinion, but the author confidently believes the statute alluded to may be found at Colo. Rev. Stat. § 13-4-30 (1953).
[7] The Canon City ordinance is not cited in the opinion.

and punishable as such when so provided by any statute now or hereinafter in force."[8]

The court added:

> "Even though an ordinance effectually covers a local and municipal matter, and it is a counterpart of a law of the state, its violation is triable and punishable as a crime where so designated by the statute.
>
> "Whether driving while under the influence of intoxicating liquor is a municipal matter or of state-wide concern makes little difference in the ultimate result of this case. Since there is a statute making such conduct a crime, its counterpart in the municipal laws of Canon City must be tried and punished as a crime. The violation having been prosecuted and determined as a proceeding civil in nature, the trial court was properly moved to dismissal."[9]

The court then declared that driving a motor vehicle while under the influence of intoxicating liquor is a matter of state-wide concern rather than local or municipal, leaving in no small doubt what the court might hold if a home rule city prosecutes as a civil action the violation of an ordinance imposing fine or imprisonment but going to strictly local and municipal matters.

Perhaps the special concurring opinion of Mr. Justice Moore may be taken as the law which will be applied in the future. From his concurring opinion we may set down the following propositions:

(1) A city has no power, by its legislative acts and its municipal courts, to punish, in any kind of action, an act which is a matter of state-wide concern.

(2) Where the city ordinance imposes punishment for an act of purely local concern, but a state statute also imposes punishment for an identical act if committed outside a home rule city, the state constitution commands that the trial in the municipal court be surrounded with the traditional safeguards of criminal proceedings.

Later in the year, in the second *Alaniz* case,[10] the court applied the *Merris* case to invalidate, as being unconstitutional, section 1, subsection 7 of a 1955 amendment to the Charter of Denver, providing that, "No party shall be entitled to a jury trial in the municipal court in any action arising under the ordinances and charter of the City and County of Denver." The judicial pronouncement is broad and seems to require criminal procedure in the trial of any ordinance violation for which imprisonment is imposed, without regard to state statutes or the locality of concern involved in the act punished. The court said:

> "The last sentence in said subsection . . . is invalid wherever the ordinance violated has a counterpart in the criminal statutes of the State (citing *Merris* and other cases) or the ordinance, although not a counterpart of a statute, provides for imprisonment for its violation (again citing *Merris*)."[11]

Whether fish or fowl, a criminal proceeding is now a criminal proceeding, be it for a violation of a city ordinance or state statute.

[8] Colo. Const. art. XX, § 6 (emphasis supplied).
[9] 323 P.2d at 620.
[10] Geer v. Alaniz, 331 P.2d 260 (Colo. 1958).
[11] *Id.* at 262.

Former Jeopardy

In a case of first impression in Colorado,[12] the supreme court held that a defendant was once in jeopardy who had been charged, had entered a plea of guilty on arraignment, and had been discharged by the trial court at the conclusion of the pre-sentence hearing. The matter came before the supreme court on a petition for a writ of prohibition filed by the defendant below when he was a second time charged with the same offense to which he had formerly pleaded guilty. Prohibition was made absolute on the ground that, the petitioner having once been arraigned and his plea of guilty accepted, a second trial for the same offense was prohibited by article II, section 18 of the Colorado Constitution.

The case will be most interesting to many Colorado lawyers for its dictum to the effect that a defendant is once in jeopardy when he has been charged under a valid indictment or information, before a court of competent jurisdiction, has been arraigned, has pleaded, and a jury has been impanelled and sworn.[13] The point at which former jeopardy begins has been in some doubt in Colorado as a result of a dictum in the *Herman* case:[14]

> ". . . The plea of former jeopardy is available only when a valid indictment or information has been found and presented; and a jury has been impanelled and sworn to try the case *and has returned a verdict.*"

If one dictum can have effect in cancelling or restricting another, the court has adopted for Colorado the usual rule by which former jeopardy is determined in those cases in which a defendant elects to stand trial on a plea of not guilty.

Notice of the Proceeding

In *Weber v. Williams,*[15] the plaintiffs in a previous proceeding knew the Chicago address of the equity owner defendant but never disclosed the address to counsel, who obtained service of notice by publication. In reversing and remanding the case, the supreme court said:

> "Due process under applicable rules requires notice, by actual or substituted service of process. Admittedly there was no actual service. The order authorizing the service by publication was obtained by a verified motion, which no doubt was made honestly and in good faith by plaintiff's attorney; however, it contained a statement that was known by the plaintiffs, the Williams, to be false."[16]

The court went on to hold that the failure by the plaintiffs to disclose their knowledge of the whereabouts of the defendant was fraud upon the court and that such failure to disclose voided the jurisdiction of the court in the absence of an appearance by the defendant.

It is not entirely clear from the opinion whether reversal was based upon failure to meet the standards of due process or on failure to comply

[12] Markiewicz v. Black, 330 P.2d 539 (Colo. 1958).
[13] Cited with obvious approval from 22 C.J.S. *Criminal Law* § 241 (1940).
[14] Herman v. People, 124 Colo. 46, 50, 233 P.2d 873, 876, (1951) (emphasis supplied).
[15] 324 P.2d 365 (Colo. 1958).
[16] *Id.* at 367

strictly with the rules of procedure regarding substituted service. However, the author would invite attention to such cases as *Mullane v. Central Hanover Bank and Trust Co.*[17] and *Walker v. City of Hutchinson.*[18] These cases hold that, to satisfy the requirements of due process, something more effective than notice by publication must be given when the whereabouts of a defendant can be ascertained with reasonable diligence, even in the absence of fraud. Indeed, the cited cases make it extremely hazardous to rely on service by publication without making a search for the address of the defendant and forwarding a written notice by first class or registered mail.

To Prohibit or Not to Prohibit

A curious, but highly important, confusion appears in the 1958 decisions dealing with petitions for judicial intervention in proceedings in other agencies or tribunals. In our Anglo-American system we have always, traditionally, looked to a court or a higher tribunal for relief from unauthorized or unlawful harrassment at the hands of a government agent—be it judicial, executive or legislative. It has always been deemed essential to the maintenance of liberty, and for the protection of property rights, that unlawful impairment of such rights be prohibited or enjoined by the judiciary at an early moment, lest the victory be Pyrrhic and a man's substance gone on the day he finally is adjudged to be in the right. We ask with good reason, what does it profit a man or society to compel a person to fight for a cause through the whole hierarchy of tribunals, if his cause can be judged to be just at the outset by a tribunal of higher authority. We spare the reader from citations of authority for the propositions that equity will restrain the infliction of injury for which there is no adequate remedy, and courts will prohibit the exercise of power by a tribunal that has no authority over the person or the cause.

Three cases reached the supreme court in 1958 in which the court was asked to intervene in or pass upon the lawfulness of legislative, administrative or lower judicial proceedings. In two of the cases the supreme court agreed to pass judgment and terminate oppressive and unlawful proceedings. But in the third case the court refused to intervene, subjecting its petitioner to months, perhaps years, of expensive litigation of his rights in lower tribunals, and effectively suspending the petitioner's means of livelihood.

In *Markiewicz v. Black,*[19] the supreme court terminated, by writ of prohibition, a second prosecution in the district court on the ground that to prosecute the petitioner twice for the same offense is prohibited by the state constitution.[20]

In *Denver v. Sweet,*[21] the court approved a district court injunction restraining the City and County of Denver from holding a special election to vote upon a charter amendment authorizing a city income tax.

The third case, *Board of Medical Examiners v. District Court,*[22] held that the district court of El Paso County did not have power to

[17] 339 U.S. 306 (1950).
[18] 352 U.S. 112 (1956).
[19] 330 P.2d 539 (Colo. 1958).
[20] Colo. Const. art II, § 18.
[21] 329 P.2d 441 (Colo. 1958).
[22] 331 P.2d 502 (Colo. 1958).

restrain or control the Board in advance of its taking final action, even though the statute under which the Board purported to act was allegedly unconstitutional. Here the Board had begun a proceeding against a doctor to determine if his license should be revoked. The doctor went to the district court asking that court to terminate the proceedings before the Board on the ground that the Board was acting without authority under a valid statute.

We note at once that *Board of Medical Examiners* presents a situation identical to that in *Denver v. Sweet*—a request by a person, alleging the threat of irreparable damage, that a court step in to decide the validity of the authority under which another branch of the government purported to be acting, and, if the authority be found not to exist because of constitutional infirmity, to restrain or prohibit the act. But despite the similarity, the supreme court permitted relief to one complainant and denied relief to the other.

In *Sweet*, the court said, "We deem it pertinent to this decision to say that in view of our holding hereinafter set forth, the action of the trial court in enjoining the plaintiffs in error (Denver) and the other defendants below was proper relief."[23] The "holding hereinafter set forth" was that under Art. X, Section 17, of the state constitution the state had exclusive power to lay an income tax. And, "Since the City has no power to levy the tax in question, it follows that the Council has no authority to call a special election of the City's electors to confer such forbidden power upon it."[24] In this case the supreme court examined the constitutionality of the city's authority to act, found that the city was acting without valid authority, and restrained the city and its election commission from holding the election.

The basis for the opposite result in *Board of Medical Examiners* was stated thus:

> ". . . (E) ven a claim, as urged in the complaint filed below, that the statute under which a department of the executive is proceeding is unconstitutional will not clothe the judiciary with power to interfere or control such department in advance of its taking final action in the premises. In other words, the question of constitutionality is a matter to be raised by writ of error after the executive has performed its function."[25]

It clearly appears in the opinion that the court assumed the validity of the statute under which the Board was acting, for the court said:

> ". . . (T) his court must intervene when formally requested where, as in the case at bar, the lower court is attempting to restrain *a duly authorized* administrative board from performing its duty pursuant to laws passed by the General Assembly."[26] (Emphasis supplied.)

But the court assumed too much, because the constitutionality of the authorization was among the questions of law raised by the complainant below. At no point in its opinion did the court consider the constitutional authority of the Board, but told the complainant that he must submit to the jurisdiction of the Board and raise the constitutional question on writ of error in protracted and expensive trial and appellate proceedings. We note that the supreme court did not require the tax-

[23] 329 P.2d at 444.
[24] *Id.* at 447.
[25] 331 P.2d at 506.
[26] *Id.* at 505.

payers of Denver in *Sweet* to submit to the election and raise the question of validity of a charter amendment, if adopted, by writ of error after a trial on the merits in a district court. We note, too, that the supreme court did not assume the validity of the second trial in *Markiewicz*, requiring the defendant to submit to the second trial, interpose former jeopardy as a special plea in bar, and then carry an adverse decision to the supreme court on writ of error.

In *Board of Medical Examiners* there is an attempt to justify the result by saying that, "Significantly, the respondent District Court did not find the only fact which would support its action, namely, that the board lacked jurisdiction."[27] Actually, the trial court had no opportunity to decide that question because the cause was removed to the supreme court after the district court ordered the Board to show cause (authority) for its proceeding, but before the issue was joined and argued in the district court.

To add to our confusion, the same supreme court said in *Markiewicz*:

> "We hold that petitioners have been in jeopardy and it appears from the record before us without contradiction, that respondent is about to place them in jeopardy a second time for the same offense. In such a case prohibition is a proper proceeding to protect petitioners in their constitutional right against twice being put in jeopardy for the same offense."[28]

There is no question but that the district court had jurisdiction. Further, former jeopardy is a matter that is ordinarily raised on a special plea in the trial court; and an adverse decision is ordinarily reviewed on writ of error from the supreme court. Yet the supreme court intervened in *Markiewicz* and refused to do so in the much stronger and more proper situation for doing so in *Board of Medical Examiners*. It seems clear that one or the other case is bad law.

The author has discussed these three cases at such length because he feels that a large reason for such seeming confusion and contradiction is the burden of work undertaken by the supreme court without adequate assistance—that here is clearly demonstrated a desperate need, in the interest of law and justice, for paid full time clerks for the justices.

II. ADMINISTRATIVE LAW

Only a few cases in the field of administrative law were decided by the supreme court during 1958, other than those such as *Board of Medical Examiners* discussed above. In none of the cases was there a wide departure from previously established rules.

Hearsay as the Basis for a Finding

Johnson v. Industrial Commission[29] re-affirmed the rule that an administrative agency may not base a finding upon hearsay uncorroborated by some "residuum of legal evidence," and denounced the practice of permitting an expert witness to review the evidence and state his conclusion as a finding or opinion of fact as to what happened.

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[27] 331 P.2d at 505.
[28] 330 P.2d at 543.
[29] 328 P.2d 384 (Colo. 1958), following Williams v. New Amsterdam Cas. Co., 136 Colo. 458, 319 P.2d 1078 (1957).

Findings Must Disclose Evidentiary Basis

The record made before administrative agencies and the finding of such agencies must set forth more than a finding of the ultimate facts upon which the agencies act. The agencies must include in their findings a statement of the evidentiary facts which support their findings, so that a reviewing court can evaluate the results of the proceedings and determine if the findings be in accordance with the evidence.[30]

Administrative Rule Cannot Modify Statute

In a case in which the validity of a voting list was in question, the supreme court held that, "When a statute clearly provides a method for accomplishing a desired result, it follows that an administrative commission cannot set up a regulation which is contrary thereto."[31]

What to Do—Remand or Decide

Illustrative of the variation in procedure from one administrative agency to another, and of the desirability of a statutory code of administrative procedure applicable to all agencies, are three cases decided during the past year dealing with the disposition of cases in which the supreme court found error in findings of agencies.

In *Johnson v. Industrial Commission,*[32] it appeared to the court that the finding was based on uncorroborated hearsay. The case was remanded to the commission to "make further determinations consonant with the views herein expressed."

In two other cases the supreme court sustained trial court orders directing administrative agencies to take action directly opposed to purported findings of such agencies. In one, *Lindner v. Copeland,*[33] the State Board of Examiners of Architects denied Copeland a license. The trial court, on review of such record as was made or compiled by the Board, ordered the Board to issue the desired license. In the second case, *Geer v. Smaldone,*[34] the supreme court reviewed the record made by a liquor licensing agency as if the matter had never been heard by the trial court, and affirmed the trial court order directing the agency to issue the license.

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[30] Lindner v. Copeland, 320 P.2d 972 (Colo. 1958).
[31] Graham Furniture Co. v. Industrial Commission, 331 P.2d 507 (Colo. 1958).
[32] 328 P.2d 384 (Colo. 1958).
[33] 320 P.2d 972 (Colo. 1958).
[34] 326 P.2d 978 (Colo. 1958), following Geer v. Stathopulos, 135 Colo. 146, 309 P.2d 606 (1957).