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One Year Review of Constitutional and Administrative Law

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1. CONSTITUTIONAL LAW

During the calendar year of 1957 the Supreme Court of the State of Colorado has considered and decided a number of cases controlled by the principles of the state and federal constitutions. A number of other cases were decided in which the reasons given for the decisions indicated that the court may have had constitutional principles in mind, but such principles were not specifically identified nor associated with the Constitution. Only those cases are reported here in which the court made it plain that its decision was dictated by one of our constitutions.

MOTOR VEHICLE DEALERS CLOSED ON SUNDAY

Prior to the reconstitution of the court subsequent to the last general election, the court held unconstitutional[1] the state law[2] prohibiting the sale by dealers of motor vehicles on Sunday. Under the statute, the definition of motor vehicles excluded vehicles not designed to operate on the highways and vehicles used in the production, care or harvesting of farm crops. On rehearing, a majority of four justices—three of whom were newly elected to the tribunal—held the Sunday closing law valid.[3] The law was contested as being in violation of the due process clauses of the state and federal constitutions, the equal protection clause of the federal Constitution, and the prohibition against special legislation contained in the state constitution.

Discriminatory legislation against a particular class or segment of people or activities does not violate the constitutional prohibitions if it can fairly be said that there is a real difference in law or in fact between those discriminated against and those privileged, which difference bears a reasonable relationship to the public health, welfare, safety or morals.[4] The majority of the court readily recognized a real difference between motor vehicle dealers and haberdasheries, and between automobile dealers and real estate salesmen. Automobile dealers were different from any other kind of dealers because they dealt in automobiles. The vice of the decision lies in the fact that it is not only a *difference* which the court must find, but a *difference which gives rise to some special necessity for legislating against automobile dealers* to promote the public welfare or safety—a necessity *created by such dealers which does not exist by virtue of Sunday operation of other kinds of business.*

The motor vehicle Sunday closing law involves two discriminations: (1) It prohibits the selling of motor vehicles *except* those not intended to be used on the highways, and those which are to be used for production, tending or harvesting farm crops; and (2) It prohibits selling of motor vehicles while permitting the selling of sporting goods, household

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[1] Mosko v. Dunbar, 8 Colo. Bar Ass'n Adv. Sh. 439 (1956).
[2] Colo. Rev. Stat. Ann. § 13-20-1 et seq. (Supp. 1955).
[3] Mosko v. Dunbar, 309 P.2d 581 (Colo. 1957).
[4] See e.g. Goesaert v. Cleary, 335 U.S. 464 (1948); Asbury Hospital v. Cass County, 326 U.S. 207 (1945); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Tigner v. Texas, 310 U.S. 141, 130 A.L.R. 1321 (1940); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

furniture, houses, groceries, clothing—in short, everything but motor vehicles.

The majority attempted to gloss over the first exception and lightly ridiculed the idea that there was any exception at all.[5] The white-wash is not convincing, and seems to be ably answered by Mr. Justice Knauss in dissent:

> "Under this exception dealer 'A' having a place of business directly across the street from dealer 'B' could remain open for business on the Sabbath day because he had for sale farm tractors, trucks, machines and tools used in the production, harvesting and care of farm products. At the same time dealer 'A' might have on his premises a dozen or a hundred motor vehicles as defined in the limited language of the 1955 Act. It will not do to say that dealer 'A' cannot sell one of his motor vehicles on Sunday, for he is permitted to remain open, attract customers by advertising and otherwise make contacts with the buying public, while dealer 'B' (directly across the street) who does not have a farm tractor or dump truck on his lot must remain closed. We would be naive indeed if we believed that trucks and motor vehicles, even under the limited definition of the Act, are not used in the 'harvesting and care of farm products.' "[6]

One asks: Is there any justification in terms of promoting the public health, welfare, safety and morals, in permitting the farmer to buy a pick-up truck on Sunday, while denying the cement contractor the same opportunity?

The majority didn't even see the problem of equal protection of the laws and of special legislation involved in drawing the line between motor vehicles and other commodities such as furniture, second-hand merchandise or what-have-you. The principal authority relied upon by the majority was an opinion of the Supreme Court of New Jersey,[7] written by the highly-respected Chief Justice Vanderbilt. But Chief Justice Vanderbilt didn't see the problem of equal protection either. He fell into the same error as did the Colorado majority. He understood that all motor vehicle dealers were to be closed on Sunday; thus, everyone was being treated alike and consequently there was no denial of equal protection. But, as indicated above, the question is not simply "Are all persons in the defined class treated equally?" but also "Is the class properly defined—are all persons whose activity presents the same kind or degree of dangers to the public health, welfare, safety and morals included in the class?"

That such a difference is necessary is clear even from the United States Supreme Court decision cited by the majority of our state court in support of its decision.

The principle is stated as follows in a leading case decided by the Supreme Court of the United States:

> "The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support

[5] 309 P.2d at 587.
[6] Id. at 596 (dissent).
[7] Gundaker Central Motors, Inc. v. Gassert, 23 N. J. 71, 127 A.2d 566 (1956).

> the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. . . . (Citing cases.) It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and *'if an evil is specially experienced in a particular branch of business'* it is not necessary that the prohibition 'should be couched in all-embracing terms.' "[8]

One asks: Is there any difference in the kind or degree of danger to the public health, welfare, safety and morals as between the motor vehicle dealer selling on Sunday on the one hand and the butcher, the baker, the candle-stick maker on the other? The majority of the court suggests none. Imagination supplies none.

RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD

The right to notice and hearing, as required by due process of law before liberty or property can be taken, was the issue in two cases decided during 1957.

The Denver ordinance popularly called the dog leash law,[9] prohibiting owners of dogs from permitting such animals to run loose, came under attack on the ground that property was being taken and destroyed without notice and hearing. The ordinance provides that dogs running loose shall be impounded; that notice of the impoundment be given to the owner, if known; that if ownership is not known, the description of the impounded dog must be posted at the pound; and that dogs not claimed after three days shall be disposed of. The court pronounced an unanimous decision[10]—one justice not participating—which was soundly reasoned and well-documented, holding that *if* notice and hearing were required by due process of law, the notice provided by the ordinance was adequate and reasonable under the circumstances.[11]

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[8] Radice v. New York, 264 U.S. 292, 29 (1924) (emphasis supplied).
[9] Councilman's Bill No. 32, Series 1955, Referred Ordinance No. 80, Series 1955.
[10] Thiele v. Denver, 312 P.2d 786 (Colo. 1957).
[11] The decision seems to be adequately supported also by such decisions of the Supreme Court of the United States as: Miller v. Schoene, 276 U.S. 272 (1928); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Lawton v. Steele, 152 U. S. 133 (1894).

In the second case raising the question,[12] an original action was begun in the supreme court, naming the councilmen and city clerk of Colorado Springs as defendants. The defendants had allegedly illegally rejected the majority of the signatures on a petition to submit a charter amendment to the electors in the April election. The complaint requested the court to declare the signatures legal and to require submission of the amendment to the voters. No service of process was made upon the defendants. On March 13, a brief was filed in support of the complaint and on March 14, the court considered the matter in conference. To serve the practical necessities of the plaintiffs, a decision from the court was needed by not later than March 18, because publication of the proposed charter amendment had to be made beginning on that day. In such cases, the court follows the practice of issuing an order to the defendants to show cause, allowing five days for the defendant to make an appearance. In this case the court was compelled to rule that to decide the legality of the signatures on the plaintiff's petition by March 18 would require the giving of notice so deficient in time as to deprive the defendants of their rights under the due process clause. "Accepting at face value the statement of counsel that final determination must be made prior to March 18, it is obvious to any fair-minded person that the issue could not conceivably be determined within that period of time."[13]

RIGHT TO CROSS-EXAMINATION

An error which trial courts seem prone to commit[14] is the admission into evidence of opinions of experts which are formulated in part from documents or consultations with others. The import of such documents or conferences is, of course, hearsay. For instance, a doctor who testifies that it is his opinion that a defendant is sane, because of information in the written reports of examining experts submitted to and reviewed by him in forming his opinion, is giving an opinion the whole basis for which is matter that is not before the court. Such testimony is not merely an opinion, but necessarily brings in secret evidence which is not subject to rebuttal or explanation.

In just such a case, our supreme court held that a defendant had been denied valuable constitutional rights when the trial court refused to permit cross-examination of the expert to determine if he was testifying to his observations and conclusions or to the facts included in various documents submitted to him by the prosecution.[15]

The court did not inform us as to the specific constitutional basis for its conclusion that valuable constitutional rights had been denied. The Colorado Constitution guarantees to the accused the right to "meet the witnesses against him face to face."[16] In addition, numerous decisions of the Supreme Court of the United States make it clear that the use of secret evidence, not known to the defendant and consequently not subject to rebuttal, renders a trial unfair and violates the due process clause of the fourteenth amendment.[17]

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[12] People ex rel. Bunker v. Blunt, 309 P.2d 201 (Colo. 1957).
[13] Id at 202.
[14] See Bauman v. People, 130 Colo. 248, 274 P.2d 591 (1954); Carter v. People, 119 Colo. 342, 204 P.2d 147 (1949); Graves v. People, 18 Colo. 170, 32 Pac. 63 (1893).
[15] Archina v. People, 307 P.2d 1083 (Colo. 1957).
[16] Colo. Const. art. II, § 16 (1876).
[17] Reilly v. Pinkus, 338 U.S. 269 (1949); Ohio Bell Telephone Co. v. Public Service Comm'n, 301 U.S. 292 (1937); United States v. Abilene and So. R.R. 265 U.S. 274 (1924); United States v. Baltimore and Ohio Southwestern R.R., 226 U.S. 14 (1912).

RIGHT TO REPRESENTATION BY COUNSEL

Two cases were decided by the court in which convicted men asked for relief because they had not been represented by counsel. The court sustained both convictions.

In the first case, *Freeman v. Tinsley*,[18] the opinion recites facts to indicate that the defendant, Freeman, was young and inexperienced, was speedily arraigned without counsel and without a reporter being present, that he had been told by the police that he was charged with larceny of an automobile and assault upon the owner, and that when the charge was read by the clerk it turned out to be kidnapping—an offense which is divided into several degrees involving technical distinctions. Freeman had previously sought reversal of his conviction on writ of error, unsuccessfully,[19] and in the instant case was again in the supreme court on writ of error to review the denial of his petition for *habeas corpus* by the District Court of Pueblo County. Freeman maintained that his conviction on a plea of guilty in such circumstances denied to him rights guaranteed by the due process clause of the fourteenth amendment.

A comparison of the reported circumstances of the *Freeman* case with those of the cases decided by the Supreme Court of the United States[20] suggests that Freeman's argument was well-conceived and that his conviction probably did violate the fourteenth amendment as construed by the nation's highest tribunal. Be that as it may, it appears that any pronouncement on that issue by our court was dictum because the court seems to have disposed of the case by applying a number of earlier state decisions[21] holding that the only matters which may be considered on a petition for *habeas corpus* are (1) whether the petitioner was convicted in a court having jurisdiction of his person and of the offense charged, and (2) whether the judgment and sentence were within the statutory limitations.

In the second case raising the question of the right to be represented by counsel, *Vigil v. People*,[22] in the court on writ of error to review the conviction below, it was held that none of Vigil's constitutional rights

[18] 308 P.2d 220 (Colo. 1957).
[19] Freeman v. People, 128 Colo. 99, 260 P.2d 603 (1953).
[20] All cases decided by the Supreme Court of the United States through 1955 involving right to counsel in state criminal proceedings are collected and analyzed in Hurst, The Right to Representation by Counsel Under the Fourteenth Amendment, 33 DICTA 39 (1956).
[21] Rivera v. People, 128 Colo. 549, 266 P.2d 226 (1953); People ex rel. Metzger v. District Court, 121 Colo. 141, 215 P.2d 327 (1949); Best v. People, 121 Colo. 100, 212 P.2d 1007 (1949).
[22] 310 P.2d 552 (Colo. 1957).

had been denied. The opinion meagerly sets forth the circumstances of the trial proceeding. Nothing appears in the opinion which would indicate that Vigil had been unfairly proceeded against or could not properly protect his rights without counsel. His conviction without counsel does not seem to run counter to the standards of due process.

FORMER JEOPARDY

The court applied the prohibition against twice putting a person in jeopardy for the same offense[23] to prevent a second prosecution of the defendant for embezzlement. The defendant was first charged and convicted on an indictment charging embezzlement "between the dates of May 24, 1953 and October 19, 1954." While the conviction was under review by the supreme court, the defendant was again brought to trial on a charge of embezzling from the same victim "on or about the second day of January, 1954." The court ordered the second indictment dismissed, holding that when the matter charged in the second indictment is admissible as evidence under the first, and could have supported a conviction, the person so charged is placed a second time in jeopardy for the same offense.[24]

JUDICIAL REVIEW OF GOVERNOR'S DISCRETION

In a proceeding in the nature of quo warranto,[25] the relator asked the trial court to declare the office of the defendant vacant because the defendant was not legally qualified to hold such office. The defendant had been appointed pursuant to statutory authority to appoint as members of the Board of Cosmetology persons who had had at least five years' practical experience in the majority of practices of cosmetology. The trial court sustained a motion to dismiss, and the supreme court affirmed, on the ground that for the judiciary to interfere with the exercise of his discretion by the chief executive "would be to impair or destroy the three well-defined and long recognized independent departments of government."[26] The court apparently had in mind, but did not allude to, the mandate in the Colorado Constitution that neither of the branches of the government shall exercise any of the powers of the other branches.[27] The result is consistent with prior decisions in Colorado.[28]

OTHER DECISIONS

Our court followed the Supreme Court of the United States in holding invalid racial restrictive convenants relating to real property.[29] The court also followed a recent federal decision in holding that the State must, as a matter of equal protection of the laws, provide at public expense the bill of exceptions from the trial court to support a writ of error. Where the writ of error is a matter of right, as in Colorado non-capital criminal cases, the writ must be made available without regard to the financial abilities of the defendant.[30]

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[23] Colo. Const. art. II, § 18 (1876).
[24] Bustamante v. People, 317 P.2d 885 (Colo. 1957). Accord, Dill v. People, 19 Colo. 409, 36 Pac. 229 (1894).
[25] People ex rel. Duncan v. Scott, 134 Colo. 525, 307 P.2d 191 (1957).
[26] Id. at 529, 307 P.2d at 193.
[27] Colo. Const. art III (1876).
[28] E.g., People ex rel. Beardsley v. Harl, 109 Colo. 223, 124 P.2d 233 (1932).
[29] Capitol Federal Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957), following Shelley v. Kraemer, 334 U.S. 1 3 A.L.R.2d 441 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953).
[30] Petition of Jack Carver Patterson, 317 P.2d 1041 (Colo. 1957), following Griffin v. Illinois, 351, U.S. 12 (1957).

In a case in which a fugitive from Alaska resisted extradition from Colorado, the court held that neither the state nor the federal constitution guarantees a right of asylum to a person who has committed a crime in a territory and fled to another jurisdiction.[31]

A lease arrangement between the City of Durango and a building association, under which the association was to issue bonds and build a recreational hall and the city was obligated to pay a yearly rental for thirty-one years, pledging its property tax, cigarette tax and parking meter revenues to pay the rent, with the association bondholders subrogated to the rights of the association to sue the city for interest and principal on the bonds, was held to be an indebtedness of the city and subject to the constitutional limits on municipal debt.[32]

II. ADMINISTRATIVE LAW

During 1957 the supreme court decided eight cases in which it laid down rules for taking evidence, preparing a record, and making findings in administrative hearings.

NECESSITY FOR A COMPLETE RECORD

The court made it plain that in Colorado an agency holding a judicial hearing must make a complete record of the proceeding.[33] In a hearing before the county commissioners in a liquor license application case, no record was made. The hearing was not completed but continued to a later date. When the hearing was resumed, a reporter was present and recorded the balance of the proceeding. The license application was denied. The district court ordered the issuance of the license and the supreme court reversed, saying, "(T)he trial court had no means of knowing, nor do we, whether the Board acted properly or arbitrarily and capriciously in denying the application for license."[34] The reversal was accompanied with a remand directing the Board to afford a new hearing and to keep a complete record.

PRESUMPTION NOT EVIDENCE

In a workmen's compensation case,[35] the claimant's proof included no evidence indicating an accident arising out of and in the course of

[31] Cutting v. Geer 313 P.2d 314. (Colo. 1957).
[32] Deti v. Durango, 316 P.2d 579 (Colo. 1957) Colo. Const. art. XI, § 8.
[33] County Comm'rs. of Fremont County v. Salardino, 318 P.2d 596 (Colo. 1957).
[34] Id. at 597.
[35] Industrial Comm'n v. London and Lancashire Indemnity Co., 311 P.2d 705 (Colo. 1957).

employment. The commission indulged, in its findings, a presumption against suicide and held the respondents to proof "by conclusive evidence" of suicide to overcome the presumption. Benefits were awarded. The supreme court reversed, ruling that the claimant must prove his claim. "The fact that there is a presumption against suicide does not take the place of proof of an accident arising out of and in the course of employment."[36] It should be noted here that claimant's proof showed only that deceased died on the employer's premises, on the ground below an open fourth story window. The court apparently did not consider such evidence to establish a prima facie case of accidental death occurring during the course of and arising out of the employment because the inference of suicide was equally as strong as the inference of accident.

HEARSAY, INCOMPETENT AND IRRELEVANT EVIDENCE

In another workmen's compensation case,[37] the claimant had twice before been married before she married the deceased. Her marriage to the deceased was evidenced by a marriage certificate. The defense offered and the referee admitted into evidence a letter allegedly signed by her second spouse which tended to establish that her second marriage had never been dissolved by divorce, which, if proven, would have negatived the claimant's dependency and resulted in the denial of benefits. There was no evidence whatever in the record, other than the letter, to indicate the invalidity of the claimant's marriage to the deceased. The supreme court, in reversing the district court in vacating the award, held the letter, as pure hearsay, to be incompetent and without probative effect. Since there was no other evidence concerning the invalidity of the claimant's marriage to the deceased, the inference of validity—or, as the court put it, the presumption of validity of the marriage—to the deceased was not met with any rebuttal evidence, and the claim of dependency was established.

The County Commissioners of Larimer County denied an application for a 3.2 beer license by Cloverleaf Kennel Club which was located at least five miles from the nearest town.[38] At the hearing, some 150 persons attended, the residence of none of them being established by the record. Introduced into evidence at the hearing were letters and petitions objecting to the issuance of the license, such letters, and petitions originating in towns from five to twenty-seven miles away from the establishment seeking a license. At the hearing, the commissioners called for a show of hands of those present who were for and against the issuance of the license and, without a count, recorded their impression that the majority of those present were opposed to the issuance. The license was denied. The supreme court reversed and directed the issuance of the license, saying:

> "To summarize we hold: That the applicant established a prima facie case entitling it to a liquor license; that the only evidence to the contrary consisted of petitions and letters which were incompetent and irrelevant and which the Board should not have considered. With those letters and petitions stricken from the record *as they should have been,* there remains before

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[36] Id. at 707.
[37] Williams v. New Amsterdam Casualty Co. 10 Colo. Bar Ass'n Adv. Sh. 95 (1957).
[38] Cloverleaf Kennel Club v. County Comm'rs. of Larimer Co., 10 Colo. Bar Ass'n Adv. Sh. 90.

> the Board only the prima facie evidence of the Club. On such evidence the Board should have granted the application."[39]

The decision was based on a holding that a "neighborhood" was the area adjacent to and homogeneous with the place sought to be licensed, and that licenses were to be issued so as to fulfill the reasonable needs of the neighborhood.[40] Since the letters and petitions were from people outside the neighborhood, they were incompetent and irrelevant—irrelevant is the better term for them under the circumstances. And since there was no evidence to show where the people attending the hearing resided, the show of hands for and against the license was incompetent—without probative value as to the issue whether the needs of the neighborhood were being reasonably served, because without connecting the people with the neighborhood their testimony, however given, proved nothing material to the case.

INADEQUATE STATEMENT OF FINDINGS

In two liquor license application cases arising in Denver, where the Manager of Safety is the licensing authority, the court held that denials of licenses must be reversed because the statement of the manager's findings was either confusing or not supported by evidence in the record of the proceeding.

In *Geer v. Stathopulos*[41] there were presented in evidence numerous petitions in favor of the license and little if any evidence that the needs of the neighborhood were adequately being served by existing licenses. In his statement of his findings, the Manager stated, as grounds for denial of the license, that "There are four (licenses) in this neighborhood which adequately serve the reasonable requirements of the residents thereof."[42] Such information did not appear anywhere in the record. In reversing the denial of the license, the court said:

> "Now, the Manager may have informaton, either from his records or from special knowledge, as to why four licenses are enough to meet all needs of the area in question. If so, the record and his findings and order fail to disclose such information. Lacking such information, we shall not speculate as to its existence and as to its quantum or weight in order to uphold the Manager."[43]

[39] Id. at 92 (emphasis supplied).
[40] Colo. Stat. Ann. § 75-2-7 (1953).
[41] 309 P.2d 606 (Colo. 1957).
[42] Id. at 608.
[43] Id. at 610.

The moral here seems to be that the manager, if he is going to use special knowledge within his possession, must spread such information on the record and give the applicant opportunity to explain away or rebut any inferences adverse to him which may arise from such information. Where such information appears for the first time in the manager's statement of findings, his findings cannot be said to be supported by evidence in the record.

In a similar case,[44] where the written statement of findings was so confusing that it could not be ascertained exactly what was found and why, the court said:

> "Administrative hearings should be decided according to the evidence and the law. Findings of fact should be sufficient in content to apprise the parties and the reviewing court of the factual basis of the action of the administrative agency, so that the parties and the reviewing tribunal may determine whether the decision has support in the evidence and in the law."[45]

These cases clearly require an administrative agency not only to formulate a written statement of what was found, but to include in such statement the evidentiary facts in the record which support the conclusion.

Official Knowledge—Evidence Not in the Record

The *Stathopulos* case discussed in the section above could well be included here, together with two cases in which the Industrial Commission used its specialized knowledge or expert opinions of doctors, not spread on the record and subject to rebuttal, in deciding to grant or deny claims for workmen's compensation.

In one of the cases[46] the evidence before the referee established that the deceased had overexerted himself on the job, was a short time later struck by a handcar, and died a few hours later of coronary thrombosis. The referee's finding, showing the benefit of the expertness acquired in his job, stated that he was of the opinion that the exertion (omitting

[44] Geer v. Presto, 313 P.2d 980 (Colo. 1957).
[45] Id. at 981.
[46] Industrial Comm'n v. Harvens, 314 P.2d 598 (Colo. 1957).

any reference to the blow and other testimony in the record) was not the proximate cause of death:

> "for the reason that overexertion is not ordinarily an element of coronary occlusion as demonstrated by the fact that more people that succumb to coronary occlusion do so while asleep or at rest than while performing any manner of exercise. . . .' The referee, therefore, concludes that overexertion was not a factor in the death of (the deceased) . . . . "[47]

No evidence to that effect came in at the hearing and the conclusion of the referee was, therefore, based entirely upon his own knowledge. The referee's denial of the claim was reversed. A less than unanimous court ruled that there was ample evidence to support a finding of causal relationship between the overexertion and the blow and the death, without expert medical testimony, and that the referee could not take "judicial notice" of the extraneous non-evidentiary and prejudicial information included in his finding and order.

Another workmen's compensation case[48] found the referee falling into the same error. The commission, on its own motion, had reopened a case to determine if there had been any change of condition in the disability of a claimant. Evidence was taken, all of which, in the form of testimony of three surgeons, indicated an increase of five percent in disability and that additional surgery probably would not effect any improvement. After the hearing was concluded, the employer's doctor made an examination and reported to the referee that in his opinion the increase in disability could be caused by growths not related to the accident, but that only exploratory surgery would reveal reliable information. The Commission sustained the referee's order dismissing the reopened case. Obviously, the *ex parte* statement of the employer's doctor had been received and considered in deciding to dismiss the case. Without mentioning the error of receiving and considering evidence which was not introduced at the hearing and therefore not subject to rebuttal or explanation, the court reversed the dismissal and directed that an award be made for an additional five percent disability. It was deemed error not to render a finding and order in accordance with the evidence taken at the hearing.

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[47] Id. at 700.
[48] Cain v. Industrial Comm. of Colo., 315 P.2d 823 (Colo. 1957).