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Administrative Law, Municipal Law, Zoning

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> rive at an honest conclusion that the testimony of the only evidence that would implicate defendant was unworthy of belief, then he certainly had the right to say, and it was his duty to say, that it was unbelievable and, in law, was not competent to support a verdict of guilt, then we must uphold the end of such courageous action by affirming his judgment.

The case is noteworthy because it modifies the rule which has obtained in criminal case that the jury is the judge of the credit to be given to a witness and of the weight to be given to his testimony. Heretofore, the rule has been that the testimony of an accomplice must be received with great caution if uncorroborated by other evidence, but that it can result in conviction if it establishes guilt beyond a reasonable doubt even though it is not corroborated.

ADMINISTRATIVE LAW, MUNICIPAL LAW, ZONING

By J. GLENN DONALDSON *of the Denver Bar*

ADMINISTRATIVE LAW

(1) *Colo. Contractors Ass'n., Inc. v. Public Utilities Comm.*, 128 Colo. 333, 262 P. 2d 266.

Action for declaratory judgment that the Commercial Carrier Act and the ton-mile tax imposed thereby are inapplicable to heavy construction contractors, who use their own large trucks for transportation of materials.

The Supreme Court held that they were so exempt—not because included in the exemption clause of the Act, which they were not, but simply because they were not within the intended scope of the Act.

The legislation under examination, The Commercial Carrier Act of 1935, since amended, is the last of the legislative classifications of carriers by motor vehicles. It was previously held in *Commission v. Manley*,[1] that the '35 Act is regulatory in character, not primarily for the raising of revenue, and goes no further than to regulate and license the use of the highways when used to transport freight in furtherance of any commercial enterprise. In short, Justice Clark pointed out here that the Commercial Carrier Act of 1935 under examination, applies to transportation of property sold or to be sold: that a heavy contractor, when purchasing needed materials and supplies, buys not for resale, but to incorporate them in the completion of a new integrated structure wherein they are useless for any other purposes: the procurement and haulage of required materials is but incidental to the over-all task of producing the finished product contemplated under the contract.

[1] 99 Colo. 153, 60 P. 2d 913.

Outside authorities were buttressed by Colorado decisions concerned with the sales and use tax law, particularly *Craftsmen, Painters and Decorators v. Carpenter.*[2]

(2) *People ex rel Dunbar, v. County Court of City and County of Denver*, 128 Colo. 374, 262 P. 2d 555.

This was an original proceeding filed by the Attorney General to prohibit the County Court from proceeding in contempt against state officials who had directed that a mentally defective child be refused admission to the State Home and Training School.

The Court held that where there was no available bed space in school, refusal of admission of child was not abuse of discretion. Hence we see that a commitment from the County Court is not always a mandatory order, particularly where directed to an institution concerned with education and training as distinguished from a custodial institution such as the State Hospital for the insane. The Court looked to legislative intent as expressed in the statutes for this distinction.

Probably of greater general interest was the conflict involved between the judicial and executive branches of the government caused by the Court's citation of three institutional officers for contempt in refusing the admission. The Court pointed out that these individuals were not officers of any judicial tribunals nor parties to this nor any other judicial proceedings, hence a state officer, under such circumstances, may not be required to answer in response to a contempt citation.

(3) *Bruce, Secretary of State v. Leo; Bruce, Secretary of State v. Holesworth,* Consolidated .... Colo. .... 267 P. 2d 1014.

Defendants, one a purveyor of liquor by the drink, the other by the package, were charged by information with the unlawful sale of alcoholic liquor to minors. Upon arraignment, both defendants entered separate pleas of *nolo contendere* to the charges and the Court thereupon assessed nominal fines, which were paid.

Based upon the foregoing, the Secretary of State took steps to cancel said licenses based upon the theory that they had been found guilty of a violation of the liquor law in a court of record. In this he was enjoined by the court below.

The Attorney General conceded that upon hearing, the State Licensing Authority could not utilize the plea of *nolo contendere* as evidence of such sales nor as conclusive admissions of their guilt thereof without running counter to *People v. Edison.*[3] He contended, however, that a plea of *nolo contendere,* followed by sentence results in conviction insofar as the application of statutory liabilities are concerned.

The Supreme Court granted that there was much authority elsewhere in support of the Attorney General's position, but pointed out that under its decision in the *Edison Case, supra* it was com-

[2] 111 Colo. 1, 137 P. 2d 414.
[3] 100 Colo. 574, 69 P. 2d 246.

mitted to the proposition that the plea of *nolo contendere,* while effective for sentence in the case where entered, is not otherwise or elsewhere conclusive. In short, anything growing out of such plea, such as a sentence, could not be used as a conviction if the plea itself is deprived of that classification.

(4) *People Ex rel Dunbar, Atty. Gen'l. v. District Court of the City and County of Denver,* .... Colo. .... 268 P. 2d 1098.

This, too, was an original proceeding seeking a writ in the nature of prohibition against the District Court to prohibit further proceedings in a class action instituted by the United Workers for the Blind in Colorado, Inc., and a taxpayer against the State Board for the Blind, its Executive Director, State Controller, State Treasurer, State Auditor and their sureties. The gist of the complaint was that the Board and its Director had negligently conducted the affairs of the Industries for the Blind; had misapplied and falsely reported funds and covered same by bribery of employees of Auditor's Office, etc. Damages in considerable monetary sums were demanded in what the Court termed a "Mother Hubbard Complaint." Injunctive relief was asked.

The Supreme Court held that one who seeks relief from the courts for an alleged breach of duty imposed on public officers by statute, must show that he had exhausted the means available to him through the executive officials of the state. For example, if appropriations are not wisely spent, the General Assembly can remedy the situation as a legislative matter. If the affairs of the Industries for the Blind are negligently conducted by the Board, the Director of Public Institutions and Governor are charged with the duty of remedying the situation. Further, this action was an attempt to control through judicial process, the power and discretion of officers and agents within the Executive Department in violation of Art. XII of the State Constitution.

A minor point made may save some attorney future embarrassment if noted. That is the observation that the plaintiff corporation, United Workers for the Blind in Colorado, Inc., organized in 1917 for the purpose of promoting in every feasible way the industrial, social, educational and economic welfare of the blind and partially blind people in the state, is not a taxpayer, but is a non-profit corporation organized for social and altruistic purposes. As such, the Court stated, it is not qualified in a taxpayer's action such as was here involved.

(5) *Colorado State Board of Nurse Examiners v. Hohu,* .... Colo. ...., 268 P. 2d 401.

This case involves court intervention with arbitrary and unlawful action of an administrative agency.

The registered nurse's license of Miss Hohu had been revoked for little more than the uncorroborated testimony of a doctor that she had referred to a patient as the "..... old fool." The Court observed:

"If it was held to be the rule that profanity is a ground for revoking a license, then here could be a serious depletion in the ranks of all professions."

The Court went on to find that the charges were not supported by the evidence and that one ground of revocation,—that she possessed habits rendering her unsafe or unfit to care for the sick, was not even specified in the charge against her.

One may wonder whether the Court was so incensed over the kangaroo court proceedings before it, that it made some rulings which it may later have to retract.

Both the Court below and the Supreme Court ruled, in effect:

(a) *That the one who hears, must decide.* In other words, in the case at hand, three of five Board members attended the hearing but the remaining two members based their decisions on a later reading of the transcript of the proceedings. This method was scorned as following a "correspondence school pattern" and the proceeding was held to be void and of no effect. The statement "that one who hears must decide" appeared in the first Morgan case, decided in 1936 by the U. S. Supreme Court. While in the same opinion the high court clearly indicated that it didn't mean what it said, the decision was believed by some to sound the death knell for administrative hearings as hearing officers in the first instance were a virtual necessity in the field of federal administrative pratice. The Morgan case, three decisions later, brought the law back to where it had started and today mere review of the records made is sufficient under the Federal Administrative Procedure Act and held to constitute due process by the federal courts. Review of the record made by the deciding authority, however, is not sufficient under Colorado practice.

(b) The Court also ruled:

Under the strict rule concerning certiorari, we are permitted To determine whether or not the Board abused its discretion. How, (the Court asks) can we make such determination without considering the testimony and the facts before the Board, together with the charges made? Unless we are free to make such determinations from the recorded testimony and facts, there would be no occasion for any review of any acts of a Board with statutory powers only.

Does this indicate a policy of free substitution of judgment by the Court? The generally accepted rule is that while the reviewing authority should, of course, carefully inspect administrative agency actions, it should be very cautious in the exercise of this power. It should not disturb the Board's action unless the evidence clearly indicates that the Board has acted arbitrarily, without sufficient evidence or just cause or in bad faith. It should not disturb the action of the Board merely because it thinks the action is not what it would have taken if it had heard the case originally.

(6) *Centennial Turf Club, Inc., v. Colo. Racing Comm.*, ... Colo. ...., 271 P. 2d 1046.

This was a declaratory judgment action brought by horse track licensees.

The Court drew a logical distinction between breaks ("odd pennies on payment to the wagerer up to ten cents") concerning which the statute is silent as to the beneficiary, and the excess of underpayments (to wagerers) and overpayments which expressly accrued to the State.

It held that the licensees, in absence of any express provision to the contrary, were entitled to retain breakage. The rule of law recognized was that: "The state can obtain revenue only by means of taxation and is not allowed to obtain revenue by implication."

(6) *Battaglia, et al v. Moore,* 128 Colo. 326, 261 P. 2d 1017.

Action in the nature of mandamus to compel the Board to issue a barber's license to the plaintiff, Moore.

The Barber's Act in its applicable section requires that an applicant for license shall have "practiced the trade in another state for a period of at least two (2) years and is possessed of requisite skill in said trade . . ."

Plaintiff, for approximately seven years, performed all the services customarily performed by barbers, but the situs of his work was on naval ships and not in "another state". The Board denied the application on the grounds that plaintiff's experience was in the wrong place—that is, not "in a geographical area with a defined civil government".

Both as to the geographical question and that of requisite skill, the Court observed:

> Any legislation purporting to restrict one's right to follow any lawful, useful calling, business or profession will be strictly considered in favor of the existence of the right and against the limitation.

The Court found that the purpose of the requirement was to assure a minimum of two years actual practical experience and that the legislature was not concerned with geographical boundaries. The Court noted that the Board had issue licenses to those whose only experience was acquired in foreign countries and concluded that experience under the American flag on board a warship was at least its equivalent.

The trial court had entered two separate orders prior to entry of judgment to which this writ of error was directed. It was contended that those prior orders were final judgments and upon the entry thereof the court lost jurisdiction to proceed further in the absence of a motion for new trial or other formality within the provisions of the Rules of Civil Procedure. While each of the orders which were entered prior to the judgment here in question, was inconsistent with the judgment finally entered, they contained a specific provision under which the trial court expressly retained jurisdiction for further proceedings.

The Court, relying on *Goodwin v. Eller*,[4] rejected the contention stating:

> The Court having retained jurisdiction had full power to reconsider any findings previously made and to reach different conclusions of fact or law as finally adjudicated.

MUNICIPAL LAW

(1) *Linke v. Board of County Commissioners of Grand County*, ... Colo. ...., 268 P. 2d 416.

In 1946 several school districts created and organized the "Middle Park Union High School District", conducted an election under the statutes and authorized the issuance of $125,000 in bonds to build the school building; $105,000 of these bonds were outstanding at time of suit.

In 1948, two other school districts in the County, by elections, were annexed to the Union High School District. The Board of County Commissioners failed and refused to levy a tax on the property in the newly annexed districts for purposes of paying its proportionate share of principal and interest on the bonds previously issued by the Union High school District.

Plaintiff sought by this action to compel the Board of County Commissioners to so act, that is, to levy a tax on the newly annexed area to assist in paying off the old bonded indebtedness.

The court below sustained defendants motions to dismiss.

The question raised before the Supreme Court was the constitutionality of a status which sought to make newly-annexed districts subject to assessment and levy to pay for such prior issued bonds. Plaintiff contended that the statute was unconstitutional being in violation of Art. XI, Sec. 7 of the Colorado Constitution, which provides in substance that no school district can create a debt for erection of school buildings unless the proposal be submitted to election and approval by majority vote.

This was a case of first impression in Colorado but after extended review of authority the Supreme Court held that there was no constitutional conflict. It pointed out the inequities in permitting the newly annexed districts to enjoy the benefits without contribution, hence it ruled the levy on the newly annexed districts to pay their proportionate share of the previously issued bonds proper and in order.

(2) *Finney et al v. Estes*, ... Colo. ...., 273 P. 2d 638.

This is a garbage case from Colorado Springs. The City Charter provides that no franchise shall be granted by the City except upon the vote of the taxpaying electors: that no exclusive franchise shall ever be granted. It also provides:

> The Council may grant a permit at any time in or upon any street, alley or public place, provided such per-

[4] 127 Colo. 529, 258 P. 2d 493.

mit may be revocable by the Council at any time, whether such right to revoke be expressly reserved in every permit or not.

An initiated ordinance was adopted which caused the City to suspend collection of garbage itself and let the collection out in bids.

Plaintiffs sought, through a declaratory judgment action, to set aside the contract granted upon the grounds that it constituted the granting of a franchise and was in violation of City Charter because no vote of the electorate was obtained.

The high Court held that a franchise is ordinarily accepted as being applicable to the well known services which are deemed public utilities. Garbage collection is non-such—it is simply the carrying out of a governmental function for the preservation of public health and safety.

The grant by City Council of non-exclusive rights to collect and dispose of garbage, revocable at any time without penalty, constitutes a revocable permit and is valid.

(3) *Cook et al v. City and County of Denver,* 128 Colo. 578. 265 P. 2d 700.

This was a suit by property holders for declaratory judgment and for injunction restraining the City and the Housing Authority from building storm sewers as authorized by an ordinance creating the Valverde Storm sewer District in Denver. The decision is one on the pleadings and not on the merits.

The complaint alleged that the action of the city in creating storm sewer district and authorizing construction was arbitrary, capricious, and illegal: that question of benefit to property holders was disregarded: that property holders were deprived of property without due process: that these property holders could not be benefited by the sewer. The complaint was sufficient to entitle property owners to injunction against construction of sewer the Supreme Court ruled, and the court below erred in sustaining motions to dismiss.

The Court followed *Ross v. City and County of Denver,*[5] where in a similar proceeding the complaint was held to be good as against a demurrer under the old code procedure. The rule being that on motions to dismiss, all of the allegations of the complaint are conclusively presumed to be true.

(4) *Chamley v. City and County of Denver,* .... Colo. ...., 266 P. 2d 1103.

Plaintiff, Chamley, a publisher of a sports magazine, and several agents solicited subscriptions on the streets. While the details are not recited in the opinion by Judge Bradfield—the sales pitch entailed the use of becoming females under the age of consent, who concentrated their efforts upon the male of the specie and particularly those in the armed services. For soliciting upon the

[5] 89 Colo. 317, 2 P. 2d 241.

streets without a license and because some of the solicitors were females under the age of 21, arrests were made under a city ordinance.

The plaintiff, while contending that the ordinance was unconstitutional, chose the remedy of injunction to restrain enforcement of the ordinance and try the issue.

The Supreme Court held that the trial court properly dismissed the action. The Court pointed out that in an action to restrain the enforcement of an ordinance, it is improper for the Court to pass upon the validity of the ordinance because the complainant has an adequate and complete remedy at law. Further, all questions of the constitutionality or other invalidity of the ordinance may be asserted and determined in the pending law action where plaintiff is on trial.

The Court recognized an exception to this rule, to the effect that injunction could be resorted to if a party had been previously tried under the ordinance and had prevailed—then it would be necessary to protect a party from oppressive and vexatious litigation. But while Chamley had been arrested and tried before, he had been the loser, hence the exception did not apply.

(5) *McDonald v. City of Glenwood Springs,* .... Colo. ...., 267 P. 2d 111.

This is a suit for injunction and declaratory judgment, but mere contemplation to construct a public improvement had matured into a contract to do so in this case. Agreement had been entered into between the City, the County of Garfield, and the State Highway Commission, whereunder the County was to pay one-quarter of the cost of replacing a bridge over the Colorado River *to be constructed wholly within the City.* The City had taken appropriate steps to constitute the city street and the bridge involved, a part of Highway 82. While several previous decisions had disapproved the use of county funds to build bridges within the limits of a town, the Supreme Court pointed out that at the time of those cases there was no statutory provision giving the Board of County Commissioners power to make agreements with a state highway authority for the construction of state highways. In 1921, the Legislature supplied this authority. Further, that while the power expressly conferred was not specifically re-enacted in the 1952 Department of Highways Act, there was no intent shown to divest the Department of that right. Hence, the Court found an implied right to so do. In 1953, the Court observed that the legislature apparently felt such authority to contract with one another was at least implied, as it expressly confirmed and ratified existing contracts between governmental units.

(6) *Champion v. City of Montrose,* 128 Colo. 474, 263 P. 2d 434.

Plaintiffs sought declaratory judgments against defendant, City of Montrose, under Rule 57(b) to have declared invalid certain ordinances, all relating to a local streeet improvement district,

and to restrain future contemplated actions thereunder of defendant city.

Since the creation of the district, seven years before, extensive work had been done through the proceeds of a bond issue of $140,000 —all but $1,000 of which had been repaid, and by property assessments.

It was held that the questions presented here are not within the purview of the Declaratory Judgment Act.

Besides holding that necessary parties to the action were wanting, the Court pointed out that the City had been engaged in activities under those ordinances for seven years and if plaintiffs had, during this period, considered the ordinances invalid, they could have invoked injunction proceedings to enjoin enforcement.

With showing of Colorado precedent, it also ruled that future contemplated acts of the city present no grounds for declaratory judgment action.

ZONING

(1) *DiSalle v. Giggal,* 128 Colo. 208, 261 P. 2d 499.

This was an action for injunction to restrain building operations in a zoned district.

The tract in question was zoned in 1941 by the County Commissioners of Arapahoe County. By such zoning the use of the tract was restricted to five family units. Without building permit, defendant in 1945 commenced construction of nine family units. When the buildings were approximately two-thirds completed the County Zoning authorities halted construction. The defendant thereupon applied for building permits for the work undertaken, promising to reduce the units to five when the war emergency housing situation was over. In 1949, the emergency being over, demand was made for conformance, but was refused.

The important contention advanced by defendant was that the restrictions in the zoning resolution limiting density of population are void. The Court held upon the authority of *Colby v. Board of Adjustment of Denver,*[6] that such limitations, when reasonably applied, are in the proper exercise of the police power. In the instant case, the Court ruled that the regulation of the number of families to a given lot area is of vital importance to the orderly development of a rapidly growing territory adjoining a city, particularly for reasons of sanitation thereof.

The further defenses of laches, estoppel and the one year statute of limitations were rejected under the circumstances present.

(2) *Bohn v. Board of Adjustment of the City and County of Denver,* .... Colo. ...., 271 P. 2d 1051.

Relator applied to the Chief Building Inspector for a permit to construct an addition to his existing motel on eight lots owned by

[6] 81 Colo. 344, 255 P. 443.

him since 1922. The lots were located on Wolff Street just off West Colfax Avenue in Denver. They were zoned Residence "B". Relator failed of permission before the Inspector, Board of Adjustment and District Court.

The sole question prosecuted to the Supreme Court was whether the evidence entitled relator to the relief demanded. No protests or objections to the petition had been made. The Court found nothing in the return of respondents which even remotely suggested that the contemplated use of relator's property would be injurious or detrimental to adjacent properties. It recognized the principle that any regulation or restriction upon the use of property which bears no relation to public safety, health, morals or general welfare, cannot be sustained as a proper exercise of the police power of the municipality. The Court found the surrounding area to be commercial in nature and concluded that the Board's action was arbitrary and directed issuance of the permit.

AGENCY, CONTRACTS, CORPORATIONS AND PARTNERSHIPS

By ERVIN T. LARSON *of the Ordway Bar*

AGENCY

(1) *Gray v. Blake,* 1953-54 C.B.A. Adv. Sh. No. 4.

Action by real estate broker Gray against the defendant Blake for commission in obtaining a purchaser for certain real estate. Trial by jury was in favor of defendant and plaintiff sued out writ of error. Blake and his wife were owners in joint tenancy of ranch property. Blake alone listed the property with Gray in 1949 and again in 1950. In March, 1951, Gray obtained a prospective buyer for the property upon terms which were approved by Blake. A down payment of $1,000 by the purchaser was made by check but the check was never cashed. Abstracts were furnished and examined, after which the purchaser tendered the balance of the purchase price in cash and demanded a deed signed by both Mr. and Mrs. Blake. Mrs. Blake refused to sign, the deal fell through and Gray sued for his commission.

Held: That if the broker Gray knew in advance that Mrs. Blake would not join in the conveyance the broker could not recover a commission. The opinion also indicates that if the broker knew of the existence of the joint tenancy at the time of the listing, it would be incumbent upon him to obtain the wife's consent to the listing as well as the husband's. The case was reversed for failure of the trial court to instruct properly and the cause was remanded for further proceedings.

(2) *Dumont v. Teets as Director of Employment Security,* 1953-54 C.B.A. Adv. Sh. No. 4.

Plaintiff, Dumont Sales Company, a partnership, brought action against Bernard E. Teets as Director of the State Depart-