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The past year was marked by a number of opinions by the Supreme Court of Colorado on constitutional matters. The decisions dealt with important matters, for the most part. But of equal importance with the substance of what was decided is the manner of deciding cases. In its approach to the decision of cases, the Court appeared during the year to vacillate between caution and boldness in ruling on constitutional matters.

As for the substance, the Court held the Denver ordinance authorizing conditional suspensions of sentences for ordinance violations to be invalid in a difficult to follow opinion. A Littleton license tax upon curb cuts was found to violate constitutional mandates requiring uniformity in taxation. The Colorado statute providing for the effect to be given foreign judgments in divorce and support matters was struck down, without the citation of as much as a single authority from this or any other jurisdiction, and on a constitutional ground never raised or argued in either the trial court or in the Supreme Court. By way of contrast, the Court was cautious in refusing to give the Senate an advisory opinion on the constitutionality of the new severance tax, lest private rights be prejudiced in a non-adversary proceeding. Similarly, the Court cautiously employed a case by case approach in considering the validity of the statute governing the procedure of criminal trials in which insanity is pleaded by way of defense. The Court avoided this question altogether in one case, reversing a conviction on other grounds. And in another case, in which the conviction was reversed because of errors in the giving of instructions and admission of evidence, the Court ruled that the statutory procedure did not deprive the defendant of any of his constitutional rights since he had been accorded a fair trial and it therefore didn't matter what might be done to him under the statute, if it were followed.

If some of the remarks in an analyses of the opinions which follow seem sharply critical, it would be well to bear in mind what seem to the author to be factors which contribute substantially to decisions that are sometimes somewhat less than clear cut, sometimes wrong and totally unsupported by authority. A study of the briefs and argument of counsel in an oustanding instance or two indicates that counsel sometimes make constitutional arguments without citing either the constitutional language upon which counsel rely or any of the authorities which might support the argument. A busy court, unassisted by law clerks, can hardly be expected to research every point raised by counsel and to find the authorities to complete counsel's argument. It can be said that the

[1] The year intervening between the October, 1954, convention of the Colorado Bar Association and that of October, 1955.

better opinions are on those cases in which counsel has been most helpful to the Court. The Court, of course, must accept the responsibility for deciding cases on points never raised or argued by counsel.

POWER OF THE MUNICIPAL COURT TO IMPOSE CONDITIONAL SENTENCES

In *Holland v. McAuliffe* [2] the ordinance of the City and County of Denver was invalidated which authorized its Municipal Court to impose conditional sentences and suspend fines or imprisonment during observance by a defendant of the condition. The defendant in the Municipal Court of Denver was convicted on Sept. 11, 1953, of violations of the motor vehicle traffic ordinances. He was sentenced for a total of 90 days in the county jail and fines totalling $200. The Court, purporting to act under a 1950 ordinance, suspended the jail sentence and $100 of the fines on condition that defendant "refrain from driving any motor vehicle for one year from date." More than 4 months thereafter, and purporting to act under an amendment of the 1950 ordinance effective Nov. 21, 1953, the Municipal Court caused defendant to be arrested for non-compliance with the condition. Defendant had driven a motor vehicle in Adams County on January 7, 1954. The ordinance of 1950 had provided that sentences could be suspended conditionally by the Municipal Court but made no provisions for reinstatement of the penalties for violation of the conditions. Pursuant to the amendment, the Municipal Court vacated the suspension, reinstated the original penalties, and denied defendant's application to appeal because the appeal was not perfected within the 10 days after final judgment as required by the statute.

Defendant filed a complaint in the Superior Court, seeking an order prohibiting the Municipal Court from any further proceedings. Attack was made upon the order of the Municipal Court on the grounds, among others, that (1) the ordinance was repugnant to the Colorado Constitution and the city charter limiting the jurisdiction of the Justice and Municipal Courts to penalties of $300 fine or 90 days in the county jail; (2) the ordinance providing for reinstatement of penalties was retroactively applied—in what respect retroactivity is repugnant to the Constitution was not specified by counsel—; and (3) even if valid, the ordinance could not be applied as against this defendant because to do so would be to give extra-territorial effect to the orders of the Municipal Court since the violation of the conditional suspension took place in Adams County—and the Court was not advised by counsel of any constitutional reason why the Municipal Court could not look beyond the city limits.

Concerning the question whether the Municipal Court had exceeded its jurisdiction, the Court refers to Article VI, Section

[2] Colo. Bar Ass'n Adv. Sheets, Vol. 7, Number 13, p. 463; 286 P. 2d 1107.

28, of the State Constitution and to Article VIII, Section 156 and Article XIV, Section 219 of the city charter as authority for invalidating the ordinance. The pertinent part of the State Constitution requires that all laws relating to courts shall be general and of uniform operation. The charter provisions alluded to place original jurisdiction in the justice courts over all cases of violation of the charter or ordinances and provide that the council shall have power to enforce ordinances by ordaining fines not exceeding $300 or imprisonment not exceeding 90 days. The Court concluded, ". . . contrary to the terms of the ordinance this jurisdiction cannot extend beyond the limit of the ninety-day jurisdiction of the court. The ordinance attempting to provide such probationary jurisdiction or control of the defendant for a period of two years, is clearly beyond the limit of any jail sentence that could be imposed."

Very little attention and no authority was given to the proposition that the ordinance was retroactively applied and therefore invalid as to the defendant. The Court ventured the opinion that "While summary procedure in police court cases is countenanced from the standpoint of expedience, such recognition does not tolerate retroactive procedure such as above indicated." Why? The Court does not tell us, and counsel nowhere advised the Court that any provision in the State Constitution or charter prohibits the enactment of laws having retrospective operation.

Only bare mention was made by the Court concerning the contention that the Municipal Court was attempting to assume extra-territorial jurisdiction. Said the Supreme Court: "The condition upon which the suspension was entered, namely, 'refrain from driving any motor vehicle for one year from date,' if given the effect the police court seemed to invoke, the court's jurisdiction would apparently become worldwide regardless of the territorial limits, because the alleged violation of the suspension condition here was not within the territorial limits of the City and County of Denver." If the Supreme Court meant so to rule, it gives us no specific reason, constitutional or otherwise. And if the Court meant so to rule, does the rule not also invalidate the statutes [3] permitting peace officers of Colorado to pursue and take fugitives from Colorado from other states without interference and waiving legal requirements for extradition, and permitting Colorado parole and probation officers to go into another state to which parolees and probationers have been released and to arrest and return such parolees and probationers to Colorado for violation of the terms of their parole or probation in such other state? The Supreme Court of the United States, while not ruling on the specific question before us, has held that nothing in the Constitution

[3] 74-3-3 and 4 and 74-3-9, '53 C.R.S. The Colorado Rules of Civil Procedure —4(d) (2) and (3), and 4(f)—providing for service of Summons on residents of Colo. found outside the State, may also be in peril if the Court meant what it seems to have said.

of the United States prevents Wisconsin from conditioning the collection of an income tax, on income earned in Wisconsin, upon the payment of dividends out of that income in the State of New York.[4] And in *Milliken v. Meyer*,[5] a case with which our Court should be familiar, the Supreme Court of the United States held valid a judgment of a Wyoming court whose jurisdiction over the defendant was conditioned upon the service of summons in Denver.

As a practical matter, the Court could have avoided any reference to the questions of retroactivity and extra-territoriality since the ordinance under which the Municipal Court purported to act had been declared invalid as being in excess of the powers of the city council and jurisdiction of the Municipal Court. As a constitutional law case, the opinion must be considered as having value and as speaking with authority only to the effect that the imposition of conditional sentences for a period in excess of the 90 days which justice courts are empowered to impose in Denver is an attempt to exercise a power not given to the City and consequently invalid.

TAXATION OF PROPERTY RIGHT DISGUISED AS FEE FOR REGULATION

In a case involving the ordinances of the City of Littleton.[6] the defendant was charged with and convicted of violation of an ordinance providing "that for the purpose of regulating streets, . . . the use and manner of motor vehicles entering and leaving private property from and to the public streets and avenues; the use of vehicular parking space or spaces along the curb lines of streets and avenues;" the owner of any property having a curb cut, used for business purposes in a commercial zone, shall obtain a permit from the Building Inspector and pay an annual fee therefor. The defendant was assessed a fee for use of a concrete apron between the street and the sidewalk abutting on defendant's place of business. The apron, falling to the level of the street and not separated therefrom by a curb, ran all along the side of defendant's property for half a block. It had been installed years before enactment of the ordinance in question. While the apron abutted on defendant's property for a distance of 146 feet, the City assessed defendant only for that 44 feet which seemed, on examination of vehicle tracks, to be used by defendant in entering and leaving his property. Revenue from the curb cut fees was placed in the City's general fund.

Issues considered by the Court included the contention that if the fee imposed is not justified as a regulatory police measure it is invalid both as a purported property tax and as a license fee. The Court found the revenue raising character of the fee to be un-

[4] Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267 (1940).

[5] 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940).

[6] Heckendorf v. Littleton, Colorado Bar Ass'n Adv. Sheets, Vol. 7, Number 12; 286 P. 2d 615.

mistakable since the City spent no money for regulation of the use of the curb cut and engaged in no inspection other than to measure the cut and assess the fee. Nor could the Court find any special privilege enjoyed by the defendant aside from the privilege of entering and leaving his property, which privilege looked like a property right, and the taxation of which rendered the tax in violation of the uniformity required by Article X of the State Constitution in the levying of taxes.

The result seems to be consistent with *Walker v. Bedford*[7] in which it was held that a special additional registration fee on motor vehicles was an exaction for no special privilege in particular or for any regulatory purpose but rather for the sole purpose of raising revenue. The tax was laid according to the value of the motor vehicle. The statute involved was entitled "An Act to Provide Additional Emergency Relief Funds . . ." and its character as a revenue raising measure without any purported regulation was clear. Property, then, was the only ascertainable base upon which the exaction could fall; and the additional tax on only one kind of property destroyed the uniformity of the property tax.

The decision in the instant case should not discourage a city from taxing curb cuts if it desires to do so. There is ample authority in the Colorado cases to sustain a realistic license tax, as distinguished from a tax which seems to fall upon nothing if not upon property.[8] One who employs a curb cut to enter his property from the front or along the side, rather than at the rear, actually is enjoying a special right or privilege in the use of the street, inconsistent with the right of the general public to use that part of the street for proper purposes such as parking. In addition, one who enjoys a curb cut may be depriving the city of revenues derived from parking meters which might otherwise have been installed, and for that special privilege the user of the curb cut may be required to pay tribute. The problem seems to be one primarily of draftsmanship of ordinances, in which the tax must be made to appear as a license fee for regulatory purposes or as an excise tax upon a special privilege.

THE COURT REFUSES AN ADVISORY OPINION

The Senate, pursuant to Article VI, Section 3, of the State Constitution, requested an advisory opinion on seven questions propounded to the Court. The subject matter of the inquiry was the proposed severance tax act passed by the House and under consideration in the Senate. The questions propounded called for decisions on close and intricate issues involving the validity of the tax and the distribution of the proceeds under the Old Age Pension Amendment and Article X, Section 3, of the State Constitution,

[7] 93 Colo. 400, 26 P. 2d 1051. See also Moffit v. Pueblo, 55 Colo. 112, 133 P. 754.

[8] Denver City Railway Co. v. Denver, 21 Colo. 350, 41 P. 826, 52 Am. St. Rep. 239, 29 L.R.A. 608; Parsons v. People, 32 Colo. 221, 76 P. 666; Colo. Nat. Life Assur. Co. v. Clayton, 54 Colo. 256, 130 P. 330; Chicago, etc., R. Co. v. School District, 63 Colo. 159, 165 P. 260; Hollenbeck v. Denver, 97 Colo. 370, 49 P. 2d 435.

and the Fourteenth Amendment to the Constitution of the United States.

Said the Court,[9] in denying the request, and alluding to the intricacies of the questions involved. ". . . since the matter comes before our Court as an original proceeding, we are deprived of the aid and assistance of competent counsel generally prevailing in instances where we are called upon to review litigated causes." After pointing out the dangers and uncertainties of pronouncing judgment after only ex parte consideration, the Court said: "As a general proposition we seriously doubt the wisdom of prejudging involved legal problems and fundamental constitutional interpretations in ex parte proceedings of this nature, and it has been, and is, the policy of our Court to accommodate the legislature only in such cases as are clear and wherein no possible prejudice to anyone may later result."

In view of the complexity of the questions propounded and the very real danger of affecting private rights without adequate consideration in an ex parte proceeding, the reluctance of the Court to pass on the questions is understandable and quite consistent with the caution usually exercised by courts in deciding constitutional questions, even in adverse proceedings. The policy was as recently reaffirmed by the Court as in 1954 when the Court refused to pass on a question of constitutionality saying that the power of courts to declare legislative enactments invalid because of constitutional limitations involves a great responsibility, and is to be exercised with caution and reluctance.[10]

ENFORCEMENT OF FOREIGN DIVORCE AND PROPERTY SETTLEMENT DECREES

Caution and reluctance to decide constitutional issues were not the order of the day in the decision of *Minnear v. Minnear* [11] in which the Court held unconstitutional, as being repugnant to the Full Faith and Credit Clause of the Constitution of the United States, the Colorado statute providing for the manner of enforcement of foreign divorce, separate maintenance, annullment, or support decrees. The statute involved (Section 46-4-1, '53 C.R.S.) provides that the courts of this State "shall have power to enforce the decrees, judgments and orders of other states or jurisdictions made pursuant to statutes similar to this statute, or amend the same, or enter new orders, to the same extent and in the same manner as though such decrees, judgments and orders were entered in the courts of this state."

Plaintiff was divorced from his wife in 1950 in Florida. The decree ordered the plaintiff here to pay, as a property settlement, permanent alimony as long as his wife remained unmarried or as

[9] In Re Interrogatories Propounded by the Senate, Colo. Bar Ass'n. Adv. Sheets, Vol. 7, Number 10; Not Reported in P 2d.

[10] Higgins v. Sinnock, 129 Colo. 66, 266 P. 2d 1112 (1954).

[11] Colorado Bar Ass'n Adv. Sheets, Vol. 7, Number 9; 281 P. 2d 517.

long as plaintiff remained on duty in the Navy as a naval aviator. Plaintiff began an action in the District Court in Denver alleging that the property settlement was obtained by the defendant wife through trickery, fraud, deceit, undue influence and overreaching; and plaintiff prayed for an order setting aside the property settlement. Service was obtained upon the defendant in San Francisco. She appeared by attorney who filed a motion to dismiss for the reason "that this court does not have jurisdiction." The motion was sustained and the cause dismissed. Plaintiff sought review on writ of error from the Supreme Court.

The Court held that the appearance of the defendant was a general appearance and that the trial court should not have dismissed the complaint for want of jurisdiction, but that the error was not reversible because the statute providing that the courts of this State may vacate or modify foreign judgments was in violation of the Full Faith and Credit Clause (Article IV, Section 1) of the Constitution of the United States.

A better case could hardly be found to demonstrate the dangers of deciding questions without the benefit of adverse treatment by counsel. It is to be noted that the constitutional question of Full Faith and Credit was not raised, argued, or decided in the trial court. It was not raised or argued in the brief of the plaintiff in error in the Supreme Court, and the defendant in error did not appear in the Supreme Court. Contrary to the reluctance of the Court expressed in *In Re Interrogatories,* above to pass upon a constitutional issue on only ex parte consideration, here we find the Court boldly undertaking to strike down a statute without any brief or argument whatsoever. The opinion contains not a single citation of authority from any court from which we can determine the source of the Court's conclusion. We are simply told that "The power of the legislature to fix and determine the jurisdiction of our courts is subject to the restriction thus imposed by the federal Constitution. To abide this restriction our courts are open for the recognition and enforcement of valid foreign judgments, and not to declare a judgment of another state, in full force and effect for a number of years, totally void, as is here attempted." And further, "For the reasons herein indicated, we determine section 46-4-1, '53 C.R.S., to be unconstitutional as in violation of the full faith and credit clause of the federal constitution, and therefore this, or any other proceeding initiated thereunder for the purposes attempted in the instant case, cannot be effective and should be dismissed."

The Full Faith and Credit Clause has come under interpretation by the Supreme Court of the United States many times. The established rule is that "the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which

it is taken."[12] Under such a rule, Full Faith and Credit does not absolutely prohibit the courts of Colorado from modifying or vacating a Florida judgment incorporating a property settlement, as our Court flatly held in *Minnear v. Minnear,* but rather requires Colorado to give the Florida judgment the same faith and credit which the courts of Florida would give it. We must, then, inquire into the action which Florida courts may take with respect to a Florida judgment confirming a property settlement.

The case of *Cohn v. Mann*[13] seems to be the case nearest in point decided by the Supreme Court of Florida among the numerous times the question has arisen in that State.[14]

In *Cohn v. Mann,* the plaintiff petitioned for modification of a final divorce decree which contained the following: "Ordered, Adjudged and Decreed that the release and property settlement executed by the parties hereto be, and the same is hereby confirmed, and each of the parties is hereby directed to comply with all of the terms thereof, subject to a further order of this Court." Specifically, the defendant ex-spouse had by the agreement given up all her interest in certain property in return for petitioner's agreement to pay her $75 per week permanent alimony. Petitioner sought, in the subsequent action, a modification of the weekly payments on the ground that his financial status had "become so materially and substantially altered as to render the further payment of the weekly payments of $75 pursuant to the provisions of said agreement and decree wholly impossible." Petitioner set up Section 65.15, F.S., 1941, F.S.A. as authority for the court to modify the property settlement.

In reversing the trial courts' dismissal of the petition, the Supreme Court of Florida said in an unanimous opinion:

> The prior decisions construing the statutory provision are as follows:
>
> "We have authority, under Fla. Stat. 1941, Sec. 65.15, F.S.A., to modify alimony allowances, whether based on stipulation and decree or upon decree that rests solely on testimony." Fowler v. Fowler, 159 Fla. 100, 31 So. 2d 162.
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> "Where the parties have, by mutual agreement, settled their differences by compromise and the court has ratified the same in the final decree, a strong showing is required to modify the terms thereof." Webber v. Webber, 156 Fla. 396, 23 So. 2d 388.
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> "When a property settlement provides for an agreed sum or sums to be paid the wife in lieu of her right to participate in her husband's property, it will take a very

[12] Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454, 82 L. Ed. 649 (1938); Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943); Halvey v. Halvey, 330 U. S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947).

[13] .... Fla. ...., 38 So. 2d 465 (1949).

[14] See also Vance v. Vance, 143 Fla. 513, 197 So. 128; Haynes v. Haynes, 71 So. 2d 491 (1954); and other cases cited in the text.

strong case even in view of Chapter 16780 to modify it." Vance v. Vance, 143 Fla. 513, 197 So. 128.

We find that the Chancellor erred in dismissing the petition. It is not without equity.

It appears from the cases that the Supreme Court of Florida will order the modification or vacation of a property settlement agreement upon a showing that the agreement was the product of fraud or overreaching [15] or, as in *Cohn v. Mann,* that materially changed circumstances of the parties dictate modification as a matter of equity. It follows that if Colorado is to give the Florida judgment such faith and credit "as it has by law or usage in the state from which it is taken," the plaintiff in *Minnear v. Minnear* should have been given his opportunity to establish by proof his allegations that the property settlement was obtained by fraud, deceit and overreaching—the same opportunity which the courts of Florida would have afforded him.

To aid it in the construction of statutes in constitutional law cases, the Supreme Court ordinarily adheres to well-established rules of construction.

The first such rule is that courts are not at liberty to hold a statute unconstitutional unless it is clearly so. Often the rule as stated by the Court provides that an act of the legislature is presumed to be valid and will be held repugnant to the constitutions only if it appears to be so, clearly, plainly, palpably, and beyond a reasonable doubt.[16]

The second such rule is that if a statute is capable of two constructions, one of which would render it invalid and the other valid, the construction which will uphold the statute must be adopted.[17]

It must be conceded that the statute here involved is ambiguous. But ambiguity should not be an excuse for avoiding construc-

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[15] Haynes v. Haynes, ... Fla. ....., 71 So. 2d 491 (1954).

[16] Altitude Oil Co. People, 70 Colo. 452, 202 P. 180; Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108; People v. Morgan, 79 Colo. 504; People v. Rucker, 5 Colo. 455; Alexander v. People, 7 Colo. 155, 2 P. 894; Carpenter v. People, 8 Colo. 116, 5 P. 828; People v. Richmond, 16 Colo. 274, 26 P. 929; Denver v. Knowles, 17 Colo. 204, 30 P. 1041, 17 L.R.A. 135; Newman v. People, 23 Colo. 300, 47 P. 278; Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 P. 61; Union Pac. R. Co. v. DeBusk, 12 Colo. 294, 20 P. 752; Bd. of Commissioners v. Irr. Dist., 56 Colo. 515, 139 P. 546; Post Printing & Pub. Co. v. Denver, 68 Colo. 50, 189 P. 39; Mitchell v. People, 76 Colo. 346, 232 P. 685, 40 A.L.R. 566; Broadbent v. McFerson, 80 Colo. 264, 250 P. 852; U. S. Bldg. & Loan Ass'n. v. McClelland, 95 Colo. 292, 36 P. 2d 164; Rinn v. Bedford, 102 Colo. 475, 84 P. 2d 827; Amer. Fed. of Labor v. Reilly, 113 Colo. 90, 155 P. 2d 145, 160 A.L.R. 873; Champlin Ref. Co. v. Cruse, 115 Colo. 329, 173 P. 2d 213; Watrous v. Golden Chamber of Commerce, 121 Colo. 521, 218 P 2d 498; Ginsberg v. Centennial Turf Club, 126 Colo. 471, 251 P. 2d 926.

[17] C. B. & Q. R. Co. v. School Dist., 63 Colo. 159, 165 P. 260; Bushnell v. People, 92 Colo. 174, 19 P. 2d 197; Ludlow v. People, 92 Colo. 195, 19 P. 2d 210; Kimble v. People, 92 Colo. 197, 19 P. 2d 208; People ex rel. Park Res. Co. v. Hinderlider, 98 Colo. 505, 57 P. 2d 894; Robinson v. Aetna Cas. & Surety Co., 99 Colo. 150, 60 P. 2d 927.

tion of legislative intent. And in the search for legislative intent, the Colorado cases tell us that we must start with the presumption that the statute is consistent with the Constitution and must be so construed unless it is plainly, palpably and beyond a reasonable doubt repugnant to the Constitution.

Section 46-4-1, '53 C.R.S., in the first paragraph, can be read as conferring *jurisdiction* upon Colorado courts to enforce foreign judgments and to "amend, modify, set aside and make new orders as the court may find necessary and proper" to the same extent that Colorado courts have *jurisdiction* in other similar actions arising in Colorado. The language quoted above can, without doing violence to the context, be read to mean that the Colorado courts may, when "necessary and proper," in light of what the foreign law dictates, "amend, modify, set aside and make new orders." The second paragraph of the statute seems to be the principal basis for our Court's determination that Colorado courts have power, substantively, to disregard a foreign judgment. But the second paragraph, by its terms, gives our courts power to modify judgments of sister states only "where the action originated in this state" and consequently was not involved in *Minnear v. Minnear.*

Then, too, it must be remembered that it is a reciprocal law we are construing and the power of Florida courts under the Florida statutes is the same as the power of Colorado courts under Colorado law. That being so, a statute which authorizes Colorado courts to treat a foreign judgment the same way they would treat a Colorado judgment in effect authorizes the Colorado courts to treat a Florida judgment the same way the Florida courts would treat their own judgments.

The statute is susceptible of an interpretation which would render it constitutional. Despite its ambiguity, Section 46-4-1, '53 C. R. S. can hardly be said to be violative of the Constitution plainly, palpably, beyond a reasonable doubt.

Perhaps the result in *Minnear v. Minnear* would have been different had the Court waited to decide the case until the authorities for and against validity of the statute could have been argued by counsel.

In *Potter v. Potter,*[18] decided before *Minnear v. Minnear,* in an opinion by the Chief Justice which reflects careful study and research, the Court held that the Full Faith and Credit Clause does not require the courts of Colorado to enforce a judgment of the State of Texas which, by the law of Texas, is not final. The law is well settled that it is only final judgments which must be given full faith and credit, and that the faith and credit which one state must give the judgments of another state is the same credit which the state of origin would give its own judgment. The controlling authorities are adequately set out in the opinion on *Potter v. Potter* and in footnote 12, above. *Minnear v. Minnear* could readily

[18] Colo. Bar Ass'n. Adv. Sheets, Vol. 7, No. 6; 278 P. 2d 1020.

have been decided consistently with *Potter v. Potter*, leaving the parties to win or lose on their evidence, and avoiding the excision of 46-4-1, '53 C.R.S. from the statute books.

It should be noted in passing that the Court did adhere to its usual policy of restraint in *Bauman v. People*,[19] in which the conviction of the defendant was questioned. Being charged with rape, the defendant pleaded "Not guilty by reason of insanity at the time of the commission of the act and since." No other pleas were entered. Trial was had on the question of insanity and the defendant was found sane. Motion for a new trial was made on the ground that certain evidence was admitted which was hearsay. The motion was denied and the cause continued for the purpose of taking evidence prior to sentencing the defendant. At the sentencing hearing motions were filed for permission to withdraw the plea and to plead not guilty and not guilty by reason of insanity, and to vacate the verdict, which motions were supported by argument going to the constitutionality of the statutes governing the procedure for trial of criminal matters in which insanity is pleaded as a defense. Such motions were denied, evidence was taken, and the defendant was sentenced. On writ or error, the Supreme Court reviewed the matter and reversed the conviction because of the use of hearsay testimony prejudicial to the defendant. The majority of the Court considered the case disposed of on the evidence issue and never alluded to the constitutional questions. Just why, we are not told. Perhaps it was because the constitutional issues were not raised at the proper time, perhaps because courts ordinarily will not decide constitutional questions if a case can be disposed of on other grounds.[20] In either event, we find the Courts exercising a decree of caution here which was not employed in the cases of *Minnear v. Minnear* and *Holland v. McAuliffe*.

TRIAL PROCEDURE ON DEFENSE OF INSANITY HELD CONSTITUTIONAL

The Court was soon again confronted with the question of the validity of the statute providing for separate trials on the issues of guilt and insanity when a defendant pleads both not guilty and not guilty by reason of insanity. The statute, 39-8-2-3, and 4, provided, insofar as it applies in the present case, that a defendant who pleads both not guilty and joins therewith a plea of not guilty by reason of insanity shall be committed to a psychopathic hospital for observation, and shall be tried first on the issue raised by the plea of not guilty, in which trial "he shall be conclusively presumed to have been sane at the time the alleged offense was committed"; then, if found guilty, the defendant shall be tried on the issue of

[19] Colo. Bar Ass'n. Adv. Sheets, Vol. 7, Number 1; 274 P. 2d 591.

[20] DeVotie v. McGerr, 14 Colo. 577, 23 P. 980; Platte Land Co. v. Hubbard, 30 Colo. 40, 69 P. 514; Gale v. Statler, 47 Colo. 72, 105 P. 318; People v. Pirie, 78 Colo. 361, 242 P. 72; Mtn. St. Beet Growers' Mkt. Ass'n. v. Monroe, 84 Colo. 300, 269 P. 886; People v. Texas Co., 85 Colo. 289, 275 P. 896; People v. Dist. Ct., 87 Colo. 316, 287 P. 849; Flanders v. Pueblo, 114 Colo. 1, 160 P. 2d 980; Elliott v. People, 115 Colo. 382, 174 P. 2d 500; Lipset v. Davis, 119 Colo. 335, 203 P. 2d 730.

insanity, either before the same or a new jury, in the discretion of the court; and if found both guilty and sane the defendant shall be sentenced according to law.

In *Leick v. People*,[21] the defendant was tried first on the plea of not guilty and the jury returned the verdict of guilty. The jury was permitted to separate, was reassembled, and in the trial of the defendant on the insanity issue, returned a verdict finding the defendant legally sane. On writ of error, the defendant urged reversal on numerous grounds, three of which the Court considered: (1) that the statute is unconstitutional which fixes procedures for the trial of criminal cases in which a plea of not guilty by reason of insanity is entered by the defendant; (2) that error was committed in giving certain instructions; and (3) the admission of certain hearsay testimony. Counsel for defendant specifically urged that the procedure violated the due process clauses of both the State and Federal Constitutions because of the conclusive presumption of sanity prevailing in the trial of the guilt of the defendant, and because of the prejudice to the defendant resulting from the trial of guilt first and the trial of insanity later to the same jury which had previously heard the full details surrounding the offense charged.

The record in the case indicated that the jurors were not informed that any presumption, conclusive or otherwise, was to be indulged by them concerning the sanity of the defendant. Defense counsel offered testimony of expert and other witnesses on insanity of the defendant and all testimony was received. The record shows that no evidence offered by defendant bearing upon his mental condition, and consequently his capacity to premeditate and formulate the necessary intent, was rejected by the trial court. The trial court had obviously followed the rule earlier laid down by the Supreme Court [22] to the effect that application of the statute to prevent admission of any evidence which a defendant might have bearing on his ability to deliberate and form the intent to murder would be a denial of due process of law. The Court held that it was not the procedure designated by the statute but rather the procedure actually followed by the trial court which should determine if defendant's rights had been taken away without due process. And since the defendant was permitted to make his total defense, including the consideration of defendant's sanity, in the first trial, he was not deprived of his life or liberty without due process. The decision on this matter is well documented by the Court in its opinion, and many other United States Supreme Court opinions support the conclusion of the Court that "When considering the question as to whether procedures conducted under statutory authority were such as to deny due process of law to the accused in a criminal case, we are concerned only with the facts as

[21] Colo. Bar Ass'n. Adv. Sheets, Vol. 7, Number 9; 281 P. 2d 806.
[22] Ingles v. People, 92 Colo. 518, 22 P. 2d 1112.

they actually happened and not with speculations upon what conceivably might have taken place under the authority of the act."

The Court also adhered to its previous decisions [23] holding that statutory separation of the trials on the two issues involved—guilt and sanity—and trial of both issues to the same jury were not without due process of law.

As it happened, the Court did not need to decide the constitutional issues in this case, since the conviction was reversed for errors in the giving of instructions and in the admission of evidence. But the Court no doubt felt compelled to express its views concerning the statute because of the frequency and vigor of the attacks being made upon it, and because of the apparent need for guidance of counsel and the trial court on re-trial of the case. The Court considered the question of the validity of the statute important enough to order oral argument of the matter, allotting one hour each to the State and the defendant.

For the further guidance of counsel and courts the Supreme Court volunteered, by way of dicta, two further principles which merit consideration here. First, a refusal on the part of a trial court to admit defendant's evidence of mental derangement or insanity in the trial of the defendant's guilt "would be a denial of due process of law." And, second, referring to the statutory provision which reads "A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged," the Court said, "As indicated by the specially concurring opinion of Mr. Justice Holland in *Bauman v. People, supra,* we doubt the validity of this provision, . . ." The General Assembly, taking its cue from the decisions, has modified the statutes [24] to permit the taking of testimony going to the defendant's incapacity to formulate intent or deliberate in the trial of guilt, to eliminate the conclusive presumption of guilt in the trial of the insanity issue, and to require trial on the insanity issue prior to the trial on the issues raised by the plea of not guilty.

CRIMINAL LAW

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The cases which form the content of this review are those found in Volume 7 of the advance sheets published by the Colorado Bar Association, numbers 1 through 13.

Cases decided during this period dealing with the criminal law are not numerically great, and there is little that falls without the category of reaffirmation. The writer has attempted, with no great degree of success, to divide the cases into the two categories of procedure and substantive law. Some cases belong in

[23] Ingles v. People, supra; Wymer v. People, 114 Colo. 43, 160 P. 2d 987.
[24] Session Laws, 1955, Ch. 118.