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Case Comments

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CONSTITUTIONAL LAW—LICENSING AND REGULATING TAXICABS IS AN EXERCISE OF THE POLICE POWER AND MUST BEAR A REASONABLE RELATION TO THE PUBLIC HEALTH, SAFETY, MORALS OR WELFARE TO BE VALID. Thus in the recent owner-driver taxicab case of *City and County of Denver v. Thrailkill,*[1] both the individual and corporate plaintiffs had brought an action for declaratory judgment asking that the court define and determine the right, duties and status of all parties in the light of an amended ordinance claimed to be invalid and unconstitutional and further requesting an injunction to prevent the enforcement of the ordinance.

The owner-driver system of taxicab operations is one where the taxicabs are owned by private individuals rather than by a company, and the company obtains a master license and allows the individual to use the company name, advertising facilities and garage repairs in return for a flat fee. Prior to amendment the owner-driver system was recognized by city council [2] by passing a licensing and regulatory measure which covered this type of operation as well as company owned cabs and by the Colorado Supreme Court.[3] The original ordinance provided for the issuance of master licenses, licenses to drivers of taxicabs, revocation and renewal of licenses and certain reasonable and necessary restrictions upon the use of taxicabs within the city; all within the power of city council to subject the operation of taxicabs to reasonable regulation in the exercise of the police power. The power of municipalities, under state law, to regulate the use of public streets in the interests of all is conceded.[4]

In 1950 city council amended Section 4 of the 1947 ordinance by adopting ordinance 53 which prohibited the sale, transfer or assignment of any master license and vested in the manager of Safety and Excise the authority to renew licenses. In holding this portion of the amended act constitutional, although the trial court held *contra,* it was determined that the grant of a privilege to enter a business is a personal and not a property right in the constitutional sense.[5]

> There is a distinction between the delegation of power to make a law and conferring authority or discretion in its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid

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[1] ..... Colo. ....., 244 P. 2d 1074 (1952).

[2] Ordinance 165, Series of 1947.

[3] International Brotherhood v. Publix Cab Company, 119 Colo. 208, 202 P. 2d 154 (1949).

[4] '35 Colo. Stat. Ann., ch. 163, sec. 10, par. 7.

[5] Allen v. City of Kosciusko, 207 Miss. 343, 42 S. 2d 388 (1949).

objection can be made.[6]

> A statute that attempts to vest arbitrary discretion and unlimited power with respect to lawful business, without providing uniform rules and regulations, so that the officials as well as those affected thereby may govern themselves accordingly, is unconstitutional.[7]

By ordinance 109, Series of 1950, the city council purported to prohibit the owner-driver system by amending section 15 of the 1947 ordinance to provide that:

> No person shall drive or be permitted to drive a taxicab on the streets of the City and County of Denver for business purposes unless such person is a licensed driver who either is an operator or an employee of an operator who is paid a fixed definite wage and/or a fixed commission based on the gross amount of fares received from passengers. The Master License of any operator who shall violate this Section may in the discretion of the Manager be revoked or suspended in whole or in part as provided in Section 6 hereof.

Further changes in section 18 which tended to show the intent of the city council stated:

> No taxicab license shall be granted to any operator unless such operator is the bona fide, beneficial owner of the taxicab. . . . No taxicab license shall be issued to any operator where such taxicab is to be hired, leased, rented, or made the subject of a rental and purchase arrangement to or with any driver thereof.

The question before the court was whether the passage of an ordinance was within the authority of a municipality, in the exercise of the police power or otherwise, which abolished the owner-driver system of taxicab operation by prohibiting the issuance of a license to any applicant except the *bona fide* beneficial owner of the taxicab and required the payment of a fixed wage or commission based on the gross amount of fares received from passengers.

The defendant contended that the right of the city council to control the use of the streets of the city by private persons for private gain is plenary.[8] No prior Colorado law having existed on this point, the Court proceeded to set forth the rule for this jurisdiction to the effect that there is no authority in a municipality to prohibit the use of the city streets by any citizen or corporation in the carrying on of a legitimate business, harmless in itself and useful to the community, which is independent of the police power under which reasonable regulations may in the promotion of the

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[6] Locke's Appeal, 72 Pa. St. 491, 13 Ann. Rep. 716; Smith-Brooks Printing Co. v. Young, 103 Colo. 199, 85 P. 2d 39 (1938).

[7] People v. Stanley, 90 Colo. 315, 9 P. 2d 288 (1932); People v. Harris, 104 Colo. 386, 91 P. 2d 989 (1939); Trujillo v. Walsenburg, 108 Colo. 427, 118 P. 2d 108 (1942).

[8] Atlantic Veterans Transportation, Inc. v. Jenkins, 203 Ga. 457, 47 S. E. 2d 324 (1948).

public order, safety, health and welfare be proper.[9] The test, therefore, is whether such regulation is reasonable and a proper exercise of the police power. [10]

The Court having dispensed with the rather unusual argument of a city having plenary power, went on to consider whether Ordinance 109 was a valid exercise of the police power. As far back as 1910, in the decision of *City and County of Denver v. Curran*,[11] in which the city had passed an ordinance with regard to advertising billboards, the Court held that a municipal ordinance authorized by specific and definite legislative enactment, and not conflicting with any constitutional provision, will be sustained; but an ordinance which a municipality assumes to pass under a general grant of authority, or under incidental powers, must be reasonable, fair and impartial, and not arbitrary or oppressive. In arriving at such decision the Court stated:

> It appears that the ordinance here under consideration has no real or substantial relation to the protection of the public health, the public morals, or the public safety, and imposes an unnecessary and unreasonable restriction upon the use of private property; it commits, in some instances, the exercise of the municipality's legislative discretion to property owners and residents and in others, entrusts such power to the caprice of certain of its officers, and vests in them an absolute or despotic power to grant, refuse or revoke the right to carry on an ordinary, legitimate business.

As later stated in *Sapero v. State Board of Medical Examiners*:[12]

> To be valid, such legislation must bear a fair relation to the public health, safety, morals or welfare and tend to promote or protect the same.

The business of operating taxicabs is a property right and as such is entitled to protection against municipal action, the effect of which would be to deprive taxicab owners of their property without due process of law. The Supreme Court of North Carolina upheld a somewhat similar ordinance in *Victory Cab Co. v. Shaw*.[13] However, that case is distinguishable in that the taxicabs were owned by the company which obtained a franchise from the city and then "farmed" them out to individual drivers, where in the instant case the taxicabs were not owned by the companies to which master licenses were issued. The Colorado Supreme Court

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[9] 25 Amer. Juris., p. 544, sec. 253; 37 Amer. Juris., p. 533, sec. 19.

[10] Chenoweth v. State Board of Medical Examiners, 57 Colo. 74, 141 P. 132 (1914); Antlers Association v. Hartung, 85 Colo. 125, 274 P. 831 (1928); State Board of Dental Examiners v. Savelle, 90 Colo. 177, 8 P. 2d 693 (1932); Sapero v. State Board of Medical Examiners, 90 Colo. 568, 11 P. 2d 555 (1932); Lipset v. Davis, 119 Colo. 335, 203 P. 2d 730 (1949).

[11] 47 Colo. 221, 107 P. 261 (1910).

[12] *Supra.*

[13] 232 N. C. 138, 59 S. E. 2d 573 (1950).

rejected the argument used in that case choosing to follow instead the reasoning of the United States Supreme Court in *Liggett Co. v. Baldridge* [14] holding invalid an ordinance requiring that every pharmacy or drug store shall be owned only by a licensed pharmacist, because there was no relationship between mere ownership of a drug store and the public health. So too the mere ownership of a taxicab has no reasonable relation to the public health. Since the amended portions of the ordinance are inseparably related, and the main object of the ordinance—the destruction of the owner-driver system is invalid, the other amendments cannot be sustained.

In the opinion of this writer, the Colorado Supreme Court has once more indicated that regulations issued in pursuance of the police power must be reasonable and must bear a reasonable relationship to the public health, welfare, safety or morals of the community to be valid.

—GERALDINE R. KEYES.

EXPENSES OF MOVING IN EMINENT DOMAIN CASES

FRED CALHOUN*

If land is condemned for public use by eminent domain, the problem arises as to which party will bear the expense of moving a building to another location. This particular question has not been the cause of litigation in Colorado and has been settled in but a few cases in the United States.

There is one good reason why this is true. State constitutions [1] and statutes [2] establish a procedure to follow in condemnation proceedings. If these laws are faithfully followed, it is almost impossible to have "moving compensation" a question for the court to decide. The Colorado statute,[3] which sets out the facts that a jury or commissioners are to report, makes it mandatory to consider the values of a building for compensation purposes, whether the building is to be removed or left on the property condemned.

However, before an owner is entitled to remove a building from land that has been condemned, he must first reserve such right in the preliminary proceedings.[4] It is also true that the condemner can neither make the owner take the building [5] nor remove the building to other property of the owner and deduct the value of the building from the damages to be paid.[6]

[14] 278 U. S. 105, 49 S. Ct. 57 (1928).

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[1] Colorado Constitution, Art. II, sec. 15.

[2] '35 C.S.A., Ch. 61.

[3] *Ibid.*, sec. 18.

[4] Corpus Juris, Eminent Domain, sec. 249. Lineburg v. Sandven *et al*, 21 N.W. 2d 808 (1946).

[5] Cumbaa v. Town of Geneva, 235 Ala. 423, 179 So. 277 (1938).

[6] State v. Miller, 92 S.W. 2d 1073 (1936).

If, in spite of these precautions and obstacles, the question must be litigated, the status of the owner of the building will determine which one of two possible courses the owner should pursue to recover damages. The theory of a tenant recovering for removal is entirely different from the theory used to determine damages when the owner of the building is also the owner of the land.

In order for a tenant to receive damages, his rights as a tenant must include some right to the building in question. This right may arise from an agreement that the tenant may remove buildings at the end of his tenancy, from an agreement that the landowner will buy the buildings constructed by the tenant during the tenancy, or even be a right arising after eminent domain proceedings have started, where the owner does not want the building and the condemner does not have any use for it, but the lessee elects to remove the same.

If the latter is the case, indications seem to be that the amount of damages paid by the condemner should be lessened by the fair market value of the building as it stood on the land, such amount to be diminished by the cost of immediate removal because of necessity. This is a nice formula to determine the condemner's liability, but it leaves the owner of the building in the position of losing property without compensation. In actual practice, however, the building is probably worthless to the owner or the tenant has made arrangements with the owner so that the building will be paid for in one form or another.

If the tenant has such rights as may permit him to remove the building, three formulae have been developed to determine damages. First, the damages are awarded as the cost of immediate removal. Second, the cost of removal is determined to be no more than it would have been at the end of the tenancy for the reason that the tenant would have to remove at that time and is entitled to no compensation for moving now. Third, the tenant is entitled to damages equal to the cost of immediately moving the building, such amount to be lessened by the cost of removal at the end of the term. The last method appears to be more fair to both the tenant and the condemner and a majority of the courts use this measurement. The first and second methods have both been used but rarely.

Now, if the owner of the land wants to remove a building, and all preliminary steps have been taken, the courts will allow damages for removal. In this case two formulae have been developed. First, the amount will be the value of the land taken, including the building, less the fair market value of the building, such deduction to be lessened by the cost of moving. Second, the amount will be the value of the land taken, including the building, diminished by an amount equal to the difference in fair market value of the building as it stood on the old location and as it stands on the new location.

A close study of the two methods will show a discrepancy. There are advantages under either method, but there are also

disadvantages. The amount of recovery for moving one building may vary greatly according to the theory used, but there can be one situation where the recovery would be the same. To best illustrate this possibility, it may be well to turn to algebra. Letting D equal damages, V as value, c as cost of removal, x as fair market value on the condemned land, and y as fair market value in the new location, we derive the following equations:

1—D equals $V - (x - c)$

2—D equals $V - (x - y)$

If at any time the cost of removal in the first method is equal to the loss in fair market value in the second method, the recovery will be identical.

A perplexing problem involved in the first method, in which the cost of moving is allowed, is how far can the owner move the building and what methods can he employ? Surely a mover could not relocate the building two or three counties away and expect moving expenses to be paid, nor could the condemner reasonably expect the owner to move just across the property line unless there were other controlling factors. Reasonableness is the answer. The owner should be allowed to move the building to a new location, such location and cost of moving thereto to be within reason.

The second theory has a disadvantage, even if the building is moved only a reasonable distance. Suppose the building to be moved has qualities which make it peculiarly suitable for a certain use. By moving the building to another location where it can be used for the same purposes, it is entirely possible that the fair market value would be the same as before. Must the owner then pay the moving costs? We can carry this example further. Let us assume the new value far exceeds the old value. In this case the owner is better off in that he has theoretically been compensated for the cost of moving by the increase in valuation.

Another assumption, to bring out a point. Suppose the owner of this building moves it to a location where the value of the building, because of its restricted use, is nil. After settlement, is he to be allowed to move the building to the location where the value exceeds that of the original location? Can this not be termed double collection?

Here, again, it seems that reasonableness is a requisite, not only from the owner's point of view, but also from that of the condemner's. The basic theory behind this method is to allow the owner the cost of moving, and neither the owner nor the condemner should try to take too great an advantage lest the court lean towards the other method.

With this reasoning and comparison of both methods, one may draw the conclusion that there is no great difference in damages allowed in either case, especially when reasonableness is considered. With no reported case authority in Colorado, it may be predicted that our court will probably strike a method which will include one of the above, to be limited so that both the owner and the condemner will have a fair assessment of damages.

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