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value, in addition to the percentage, which attitude negatives the purpose of such leases.

4. The difficulty of the small merchant in estimating properly the amount of percentage he can reasonably pay.

It is quite likely that not only in Denver, but throughout the metropolitan area, percentage leases will come more and more into use, particularly with the expansion of chain stores. Both the real estate agent and lawyer will do well in giving study and attention to this type of leasing. It must be understood, however, that such leasing can apply successfully only with a limited class of tenants.

What has here been presented is not to be taken as a critical review of the present leasing methods, but rather as a means of implementing in our minds the vast changes in commercial life and the steady progress toward a business relationship built upon fairness and equity—a relationship not based on the doctrine of *caveat emptor* but seeking only mutual and common benefits.

Has The Doctrine of Stare Decisis Been Abandoned in Colorado?

By GEORGE T. EVANS
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In the British-American system of jurisprudence, precedent is important. History discloses that since the days of the Year Books (1290-1535) lawyers and judges have been assiduously engaged not only in making the law consistent within itself but even in developing the "mechanical" means requisite to insure and facilitate that consistency. Lord Coke, who died in 1634, said that "Out of the old fields must spring the new corn," [1] and it is a known fact that much of his writing was devoted to collecting, classifying and reconciling old cases from the Year Books and other sources, so that the bench and bar of his day could have at hand the ancient authorities in point in their own cases. By Blackstone's time (1728-1780) this adherence to precedent seems to have developed into the doctrine, modernly called *stare decisis,* for he is reported [2] to have said:

> "For it is an established rule to abide former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also the law in that case being solemnly declared and determined, what was before uncertain and perhaps indifferent is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine not according to his own private judgment but according to the known laws

1. Co. Rep. (Pref.)
2. Cooleys Blackstone, 4 Ed., Vol. 1, pp. 70-71.

and customs of the land; not delegated to pronounce new law but to expound the old * * *.

"The doctrine of the law is this: That precedents and rules must be followed unless flatly absurd or unjust; for though their reason be not obvious at first view, we owe such deference to former times as not to suppose that they acted wholly without consideration, * * *"

In more recent times a judge of the highest court in Connecticut showed the necessity for respecting precedent in deciding current cases in the following words:

"If the law, well established, may be annulled by an opinion, a foundation is laid for the most reckless instability * * * No system of inflexible adherence to established law can be as pernicious as such ceaseless and interminable fluctuations." [3]

These earlier views of the beneficent doctrine we now call *stare decisis* have persisted in high places. Mr. Justice White (later Mr. Chief Justice White) of the Supreme Court of the United States, said in a dissenting opinion:

"The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court, without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors and to determine them according to the mere opinion of those who temporarily fill its bench and our constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people." [4]

In 1913 the Supreme Court of Colorado had before it the question of whether or not article XX of the Constitution of Colorado (the home rule amendment) conferred upon the City of Denver exclusive power to regulate the sale of intoxicating liquors within its boundaries as against a state law then in force.[5]

In holding that article XX of the Constitution (the home rule amendment) did not give Denver any such power, the court said in part:

"The regulation of the liquor traffic is certainly a matter of concern and great importance to the people of the entire state, and there is nothing in the language of article XX to justify the assumption that they intended to relinquish the right to legislate concerning it in any portion of the state. This position is further strengthened by the fact that heretofore exclusive local regulation had been given to Denver and other cities, but thereafter these acts had been amended so that when article

3. Hosmer, C. J., in Palmers Admr. v. Mead (1828) 7 Conn. 149, 157, 158.
4. Pollock vs. Farmers L & T Co. (1895) 157 U. S., 427, 651, 652.
5. Walker vs. People (1913) 55 Colo. 402.

XX was adopted Denver's regulation of the liquor traffic was then subject to the existing laws of the state. Under such circumstances and in the absence of some language in article XX to indicate the contrary, we cannot believe that it was intended to divest the state of its entire jurisdiction in this territory upon this important subject." [6]

Thus Denver's assertion as a home rule city in 1913 that it had exclusive control of the regulation of the liquor traffic within its borders was overruled by the Supreme Court of Colorado.

Again in 1936 this conflict between a home rule city and the state came before the Supreme Court. There the question was whether the legislature by statute could direct the disposition of certain beer license fees collected by Colorado Springs (a home rule city under article XX). The court held that the power of the legislature was paramount over the regulation of the liquor traffic in all its phases and that this was especially true since the people of Colorado in 1932 adopted article XXII of the constitution. Mr. Justice Burke, for the court, said in part:

"These questions are disposed of by amended article XXII of the constitution * * *. By its provisions the regulation of the manufacture and sale of 'all intoxicating liquors' became 'exclusively' the subject of 'statutory laws' from July 1, 1933. If this chapter conflicts in any way with said section 6 of article XX or said section 11 of article II, those were, to that extent, amended by it. Thereby the regulation and sale of intoxicating liquor passed under the exclusive control of the legislature." [7]

Thus it was decided that, whatever the situation before presently subsisting article XXII became part of the Constitution of Colorado, thereafter the power of the legislature to regulate liquor throughout the length and breadth of Colorado was paramount, supreme and all-inclusive, and, indeed, in view of the wording of article XXII such a view seems unassailable. Article XXII, so far as material here, is as follows:

"* * * from and after July 1, 1933, the manufacture, sale and distribution of all intoxicating liquors wholly within the State of Colorado, shall, subject to the constitution and laws of the United States, be performed exclusively by or through such agencies and under such regulations as may hereafter be provided by statutory laws of the State of Colorado; * * *"

In 1939 the Colorado Supreme Court decided the case of *Denver vs. the People*,[8] involving practically the same question as that in the Colorado Springs case, *supra*, and arrived at the same conclusion as in the Colorado Springs case. In the course of its opinion the court said:

"No one would seriously contend that the granting of licenses for

6. Ibid., 406.
7. City of Colo. Springs vs. People (1936) 99 Colo. 525, 527.
8. Denver vs. People, 103 Colo. 565.

the manufacture and sale of intoxicating liquors is not an incident of the liquor traffic and controllable as such." [9]

The opinion was written by Mr. Justice Bakke.

On December 31, 1946, the Supreme Court handed down its decision in a case which involved a conflict between the right of Denver as a home rule city and the power of the legislature under article XXII of the constitution to designate the liquor licensing authority for Denver.[10] By section 9 of the Liquor Code of 1935, the legislature designated the city council as Denver's licensing instrumentality. It said:

> "Section 9. * * * Where the license fee is to be paid into the treasury of any * * * city and county the licenses in this act provided for shall be issued by the council in a city and county * * *".

There was no dispute as to the *intention* of the legislature, as expressed in section 9 of the Liquor Code, above noted. The argument for Denver was that the legislature was powerless, in view of the home rule provisions of article XX, to designate any particular instrumentality of the City and County of Denver as its liquor licensing authority. And the Supreme Court sustained that view in a four to three decision,[11] the opinion being written by Mr. Justice Hilliard. In part the court said:

> "* * * we conclude the general assembly properly has required the City and County of Denver to discharge the duty of receiving, considering, and acting upon applications submitted by those seeking licenses to dispense liquors within its territory, as contemplated in the Liquor Code of 1935; but, the * * * agency through which that public entity shall perform and discharge such assigned duty is within the City and County's keeping, that is to say, through appropriate charter enactment. It follows that since Denver, proceeding so, as we have seen, has created an office or agency called manager of safety and excise, to the occupant of which it has assigned all licensing authority, only that official, and not the city council, has authority to act upon applications of the nature of the one here under consideration, and issue, or refuse to grant, licenses for the sale of intoxicating liquors in the City and County of Denver.
>
> "Moreover, we are disposed to the view that perforce another provision of the constitution, although not cited or argued, the statutory section involved, in so far as it applies to the City and County of Denver, * * * is void."

The court then goes on to mention the fact that since Denver is the only city and county in the state and since the absolute requirement of section 9 that the city council in a city and county be the liquor licensing authority,

9. Ibid., 571.
10. Reed v. Blakley, et al, (Dec. 31, 1946; Rehearing denied Jan. 11, 1947), 115 Colo. 559.
11. Ibid., The majority: Justices Bakke, Burke, Hilliard, Luxford. (Dissenting: Justices Knous, Jackson, Stone)

such legislation was special as to Denver and therefore contrary to article V, section 25 of the Constitution of Colorado.

Article V was part of the original constitution adopted in 1876. Article XXII, authorizing the liquor traffic in Colorado and providing that the general assembly should regulate it, was adopted in 1932. Article XXII is not mentioned or referred to in the Reed decision. *Walker v. People* (1913), *supra,* holding that article XX gives Denver no right to control liquor within its borders; *City of Colorado Springs v. People* (1936), *supra,* and *Denver v. People,* (1939), *supra,* (the latter two decisions holding that article XXII gave the general assembly complete, plenary and all-inclusive power over liquor regulation in all of Colorado) were neither applied, distinguished, modified, overruled or commented on.

And so far as article V, section 25 is concerned, it has been construed by the Supreme Court in a number of cases beginning in 1884 [12] and continuing down to 1943,[13] in all of which it has been held that the question of whether a general or a special law can be made applicable to a given situation is for legislative determination and that courts can interfere only where there is a clear abuse of discretion by the legislature. No such abuse is found by the court in the Reed case, but that portion of section 9 of the Liquor Code was, nevertheless struck down.

Has the doctrine of *stare decisis* been abandoned in Colorado?

Additional Committee Appointment

A. THAD SMITH, 1011 University Bldg., Denver, has been appointed a member of the Committee on Legal Institutes of the Denver Bar Association by President Horace F. Phelps.

Personals

EDWARD A. WALSH has become a member of the firm of Miller and McKinley with change of name to Miller, McKinley and Walsh. Other members of the firm are David J. Miller and Richard McKinley. The firm will office in the Coronado Bldg., Greeley.

WILLIAM L. BRANCH has opened his office in the E. & C. Bldg., Denver. His practice is restricted to matters of taxation.

FRANKLIN A. THAYER, formerly Veterans Service Officer of Colorado and National Service Officer for the Disabled American Veterans has opened his office at 403-404 Symes Bldg., Denver.

LAWRENCE M. HENRY, member of the House of Representatives of the Colorado General Assembly, and former deputy clerk of the county court, Denver, has opened his office for the practice of law at 618 Symes Bldg., Denver.

12. Brown v. Denver (1884) 7 Colo. 305.
13. McClain v. People (1943) 111 Colo. 271.